

## Chapter 16

# UNITED STATES OF AMERICA

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### 1. Introduction

We are all connected by the sea. In its bed lies our cultural heritage which has been gathering there since humans began to use the sea for food and transportation.<sup>1</sup> Wherever ships travel, some inevitably sink because of natural disasters or human error. As ships became used for commerce, practices and laws developed to provide a more predictable business environment, including incentives or awards for those who saved or salvaged the ships and cargo that were in marine peril and returned them to the stream of commerce.<sup>2</sup>

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\* The views expressed in this chapter are the personal opinions of the author and do not necessarily represent the official positions of the US government, the National Oceanic and Atmospheric Administration (NOAA), or the Department of Commerce. Special thanks to Jeanne Philbin.

<sup>1</sup> See generally, J. Delgado (ed.) *Encyclopedia of Underwater and Maritime Archaeology* (British Museum Press, London, 1997) and G. Bass *Ships and Shipwrecks of the Americas* (Thames and Hudson, London, 1988).

<sup>2</sup> The ancient principles of salvage law date back to at least 900 B.C. in the Code of Rhodes: 3A *Benedict on Admiralty* s. 5 at 1–8. For a discussion about how international law and the world

As shipwrecks became objects of antiquity, the lure of fortune and fame resulted in the hunting and plundering of many treasure laden vessels. Many of these treasure hunters argued that they owned the treasure under the common property law of finds or should be awarded the artifacts under the law of salvage. They argued that these artifacts should be treated as commodities and that it was in the public interest to return them to the stream of commerce, ignoring that the law of salvage and finds was never intended to address the management of these time capsules of our cultural heritage.

Archaeologists and others have vehemently disagreed that this 'salvage' is in the public interest. To the contrary, they have decried the destruction of the UCH by profit-driven unscientific salvage. They have argued that the public's interest is much better served by an *in situ* preservation policy where the UCH is preserved in the location that it was discovered. Under this policy, proper recovery should only be considered after there has been a full scientific assessment and a recording of the site pursuant to archaeological standards. To this end, they have called on governments to protect UCH from looting, unscientific salvage and the treatment of UCH as a commodity. As a result, laws have been developed to protect UCH. Governments, as the owners or entities in control of the UCH, have also successfully used salvage law in court to prevent the unwanted salvage, or to ensure that it is done in a proper manner. The recognition by federal admiralty courts of government ownership or control usually involves the recognition of government statutes concerning UCH.

This essay will provide an overview of the applicable US federal law relevant to the UCH. This includes statutes that expressly address certain UCH. It also includes laws that were developed for heritage resources located on terrestrial land but that have been applied to UCH in the marine environment. It will then analyze these laws in the context of some of the more important provisions of the UNESCO Convention on the Protection of the Underwater Cultural Heritage. There will also be a discussion of the provisions of the Convention that are objected to by the US and other States who were concerned that the Convention was consistent with by the UN Law of the Sea Convention (LOSC). The essay will conclude by suggesting a way to move forward in a manner that addresses those concerns, i.e. is consistent with the LOSC.

## 2. Overview of National Laws, Policy and Practice Governing the Protection of UCH

There are a number of US laws, policies and programs protecting objects of antiquity, archaeological resources, and historic properties, including UCH. These laws codify a professional and scientific method for the long-term preservation of these public resources. In general, these laws protect heritage resources that are owned or controlled by the US, as opposed to privately owned cultural property. In the US there is a high regard for private property rights that is reflected in the US Constitution, statutes, case

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economy are arguably connected to advances in ship and navigation technologies, see generally C. Picker 'A View From 40,000 Feet: International Law and the Invisible Hand of Technology' (2001) 23 *Cardozo Law Review* 149 at 160.

law and administrative policies and practice. "Although most foreign nations regulate and protect archaeological resources found on private (as well as public) land, the legal regime in the United States differs markedly when applied to private land."<sup>3</sup> The Fifth Amendment of the US Constitution prohibits the taking of private property without just compensation. The government may, however, regulate the private owner's use of the property, provided the owner could still continue to make productive use of the property.<sup>4</sup> As a result, the laws, policies and cases involving UCH often turn on whether it is publicly owned or controlled. In addition to issues about the ownership of the UCH, there is also the old but interesting issue regarding the application of the maritime law of salvage and federal admiralty jurisdiction.

The maritime law of salvage provides rights and possible rewards to the salvor of vessels and their cargo (hereinafter 'shipwrecks'). Under Article III of the US Constitution admiralty and maritime cases jurisdiction is conferred on federal district courts.<sup>5</sup> The jurisdiction of the admiralty court is accomplished through the filing of an *in rem* action against the shipwreck in the US district sitting in admiralty.<sup>6</sup> Generally, salvors have asserted that – under the law of finds – title to an abandoned shipwreck is vested in the person who finds it and reduces it to his or her possession.<sup>7</sup> Alternatively, they have argued that, because the shipwrecks are in 'marine peril', the public interest would be

<sup>3</sup> P. Gerstenblith 'Protection of Cultural Heritage on Private Land' in D. Craib (ed.) *Topics in Cultural Resource Law* (Society for American Archaeology, 2000) p. 12. In order to protect a pre-Columbian aboriginal structure called the 'Miami Circle' from destruction by a privately funded project on private land, the government had to exercise its authority under *Eminent Domain* to purchase the property: *ibid.*

<sup>4</sup> *Ibid.* at pp. 12–14 citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 100 (1978). If the owner is deprived of all economically viable use of the property then it may be an unconstitutional taking pursuant to the holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If, however, "it can be shown that all the owner's bundle of rights never included the right to use the land in the way the regulation forbids" then there is no regulatory taking and the state does not have to pay compensation: *Hunziker v. Iowa*, 519 N.W.2d 367 (IA. 1994) (landowner required to leave undeveloped portion of land that had Indian burial mound).

<sup>5</sup> W. Casto 'The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates' (1993) 37 *American Journal of Legal History* 117, 154; the admiralty clause was placed in the Constitution and federal admiralty courts were subsequently created to ensure complete federal jurisdiction over three specific categories of litigation: 1) prize cases for privateers, 2) criminal prosecution, and 3) federal revenue or customs duties.

<sup>6</sup> *Ibid.* at p. 154: modern federal admiralty jurisdiction is dedicated to the resolution of private disputes that arise in the maritime context. *Cf.* the International Salvage Convention 1989 which was developed for recent marine casualties and corresponding resolution of private disputes (private international law) – parties have express authority to exclude its application to sovereign vessels and expressly exclude application to UCH.

<sup>7</sup> *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel (the 'Atocha')* 569 F.2d 330, 337 (5th Cir. 1978): in this landmark case for treasure hunters the court held the wreck was abandoned and held the finder owned it under the law of finds. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1983): long-lost shipwreck presumed abandoned.

### 3.1.1 US asserting ownership over abandoned shipwrecks

Under the ASA, the US Congress expressly exercised its sovereign prerogative and asserted title over abandoned shipwrecks.<sup>18</sup> Abandoned shipwrecks are those shipwrecks that are embedded in state submerged lands or those located on state submerged lands that are of historical significance.<sup>19</sup> Under section 6(c), the US federal title to these abandoned shipwrecks is transferred to the states.<sup>20</sup> In codifying the court cases, the architects of the ASA focused on ownership of and title to UCH. That is why the scope of the ASA was limited to abandoned shipwrecks. While it may have been reasonable to expect that the passage of the ASA would be successful in preventing any further treasure salvage of historic shipwrecks in or on state submerged lands, subsequent litigation has shown otherwise. Some salvors cleverly shifted the strategy from that established by *Treasure Salvors* (arguing that the shipwrecks were ‘abandoned’ for an award under the law of finds) and instead argued that the shipwrecks were not abandoned and just requested an award under the law of salvage. In order to trigger the ASA, the states had the burden of proving that the shipwrecks were abandoned. Under the ASA, the states were not afforded the presumption that the shipwrecks were abandoned, as they were under the *Treasure Salvors* case. Thus, federal admiralty courts were again the entity deciding the disposition of UCH because ‘abandonment’ was now something that the states had to prove rather than something that the courts could presume.

### 3.1.2 The issue of abandonment

The ASA protects “any abandoned shipwreck” that is “(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.”<sup>21</sup> Unfortunately, the term ‘abandoned’ is not expressly defined by the ASA.<sup>22</sup> Instead of defining the term, Congress relied on the maritime admiralty law, in particular the *Treasure Salvors* case and its progeny.<sup>23</sup> Federal admiralty courts had generally presumed the abandonment of long-lost ship-

<sup>18</sup> 43 U.S.C. s. 2103.

<sup>19</sup> 43 U.S.C. s. 2105 (a). The UCH is of historical significance if it is determined to be eligible for listing on the National Register of Historic Places under the National Historic Preservation Act.

<sup>20</sup> 43 U.S.C. s. 2105 (c).

<sup>21</sup> 43 U.S.C. s. 2105 (a).

<sup>22</sup> ‘Shipwreck’ is defined to mean “a vessel or wreck, its cargo, and other contents”: 43 U.S.C. s. 2102 (d). It should be further noted that shipwrecks entitled to sovereign immunity, such as warships or other sovereign non-commercial vessels, are generally not considered to be abandoned by the flag nation, regardless of their location. US Navy vessels are not abandoned: ASA Guidelines Vol. 55 Fed. Reg. 50120 (4 December 1990). See Section 3.3 below for additional laws and policies on sunken warships and other State vessels.

<sup>23</sup> *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel (the ‘Atocha’)*, 569 F.2d 330, 337 (5th Cir. 1978): in this landmark case for treasure hunters the court held the wreck was abandoned and held the finder owned it under the law of finds. *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1983): long-lost shipwreck presumed abandoned.

wrecks by the passage of time and the absence of a claim therein.<sup>24</sup> The drafters of the ASA failed to codify this presumption. So, when presented with the issue of abandonment, the federal admiralty courts were more inclined to presume that there is an owner and require states to prove abandonment as an element of their case. Thus states had the burden of proving that the shipwreck was either embedded in or on the state submerged land, or that it had been determined to be historically significant and eligible for listing on the National Register of Historic Places. States often took the most prudent approach by arguing that the ASA applied under both alternatives, i.e. because the shipwreck was embedded and because it had been determined eligible for listing on the National Register and was therefore historically significant. If the state prevailed under either approach, then the ASA applied and there was no award of salvage. Courts often note how this is consistent with an exception to the law of finds and is also consistent with the law of salvage where one who owns or controls the shipwreck has the authority to deny salvage.

### 3.1.3 Law of finds and salvage

A primary purpose of the ASA was to ban the application of the law of salvage and finds to certain UCH.<sup>25</sup> Congress sought to codify the minority of cases where the government prevailed against salvors and treasure hunters so that states would protect and manage this important UCH.<sup>26</sup> Salvors challenged this provision of the ASA by questioning its constitutionality. They argued that the ASA's attempt to prevent the application of the law of salvage violates Article III of the US Constitution which provides that federal courts have exclusive jurisdiction over all maritime admiralty cases.<sup>27</sup> This argument confuses the substantive body of past common law salvage cases with a procedural requirement for exclusive federal court jurisdiction that is required under Article III. Congress has the authority to change or even override this federal common law. It just

<sup>24</sup> "The Committee notes that . . . abandonment . . . may be implied . . . by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." H.R. Rep. No. 100-514(I) at p. 2. See also *Moyer v. Wrecked and Abandoned Vessel, Known as the Andrea Doria*, 836 F.Supp. 1099, 1105 (D.N.J. 1993): an insurance company's failure to attempt salvage from 1956 to 1993 constituted abandonment. The definition of abandoned shipwreck in the ASA guidelines follows the admiralty cases that presume abandonment by the passage of time and the absence of a claim therein. In addition, the definition adds that a shipwreck may be considered abandoned if an owner fails either to mark and subsequently remove the wrecked vessel and its cargo, or to provide legal notice of abandonment to the US Coast Guard and US Army Corps of Engineers. Rivers and Harbors Act (33 U.S.C. s. 409). Under this law such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from the sinking.

<sup>25</sup> 43 U.S.C. s. 2106.

<sup>26</sup> "The purpose of [the ASA] is to give states title to certain abandoned shipwrecks that are buried in state lands or have historical significance and are on state lands, and to clarify the regulatory and management authority of states for these abandoned shipwrecks": HR Report 98-887, 98th Cong. 2d Sess. p. 2 (7 June 1984).

<sup>27</sup> "[T]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction": US Const. Art. III, s. 2, cl. 1.

needs to take care to do so consistent with Article III. The argument about the ASA ban on the law of salvage and finds being unconstitutional has not held much water in federal admiralty courts.

In *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be The 'Seabird'*,<sup>28</sup> the federal admiralty court held that Congress has the authority to define and even limit admiralty court jurisdiction. Specifically, the ASA does not interfere with Article III's purpose of ensuring national control over navigation, as well as inter-state and foreign commerce in federal admiralty courts. The court also noted that the result in this case was consistent with the result in maritime admiralty cases. "In fact, in a remarkable twist, this provision of the ASA [section 2106(a)] has no effect on the law of salvage because the law of salvage does not apply to abandoned shipwrecks."<sup>29</sup> Article III federal admiralty courts used to determine whether the law of salvage or the law of finds applied; now, at least in state waters, the Article III federal admiralty courts will determine whether the law of salvage or the ASA applies. The ASA codified the exception to the law of finds whereby the sovereign has constructive possession of abandoned property embedded in its submerged lands. So the abandoned shipwreck is the property of the state and not of the finder. In the *Brother Jonathan* case, the US Supreme Court appears to have addressed this constitutional question by requiring that an Article III court make the threshold determination of whether the ASA applies; if it does, the Eleventh Amendment applies and the federal admiralty court no longer has jurisdiction over the state-owned UCH.

### 3.1.4 Protection and management of abandoned shipwrecks

The ASA directs states to protect abandoned shipwrecks and defers to the states to determine how they should be managed consistent with some broad provisions. States are to offer recreational and educational opportunities to interested groups, including divers and researchers.<sup>30</sup> Unlike other Federal Archaeological Program (FAP) statutes, the ASA establishes a multiple use management regime for the protection of shipwrecks that also incorporates the protection of natural resources.<sup>31</sup> These provisions are consistent with integrated coastal management<sup>32</sup> and the multiple use management approach under the

<sup>28</sup> 746 F.Supp. 1334 (N.D. Ill. 1990), rev'd, 941 F.2d 525 (7th Cir. 1991), on remand, 811 F.Supp. 1300 (N.D. Ill.) 1992) aff'd, 19 F.3d 1136 (7th Cir. 1994) cert. denied 513 U.S. 961 (1994).

<sup>29</sup> *Ibid.* at 1141 citing *Chance v. Certain Artifacts Found and Salvaged*, 606 F.Supp. 801, 804 (S.D. Ga. 1984) (pre-ASA case) and *Columbus-America Discovery Group v. Atlantic Mut. Ins.* 974 F.2d 450, 459 (4th Cir. 1992) cert denied, 123 L.Ed. 183, S.Ct. 1625 (1993) (post-ASA case).

<sup>30</sup> 43 U.S.C. s. 2103.

<sup>31</sup> 43 U.S.C. s. 2103.

<sup>32</sup> The ASA guidelines urge states to integrate their UCH management into their state Coastal Zone Management Act (CZMA) plans to allow the use of s. 307(c) consistency to protect historic wrecks and the use of CZMA grant money to fund research and management: 16 U.S.C. ss. 1451, 1456(c). (Section 307(c) requires that national government actions be "consistent" with approved CZMA programs.) Thus, the CZMA presents another national procedural protection for national actions to comply with state UCH management programs.

National Marine Sanctuaries Act which is discussed below.<sup>33</sup> The ASA also encourages states to develop underwater parks to provide additional protection to the UCH and to apply for grants made available for such purposes.<sup>34</sup> To assist states and national managers of submerged lands, the ASA directs the National Park Service to develop guidelines for implementation of the ASA.<sup>35</sup>

The ASA guidelines<sup>36</sup> encourage states to assign their authority over abandoned shipwrecks to an appropriate and adequately staffed state agency. It is advised that states utilize advisory boards to consider the recommendations and advice of those who use or have an interest in the UCH. The long-term management of the UCH should reflect the broad, diverse and often conflicting interests in the UCH. Consistent with the ASA, provisions are made for the recovery of shipwrecks for the public by the private sector, subject to the control of the appropriate state UCH management program. However, it is also advised that the unscientific use of treasure hunter technology should be banned because it destroys natural resources as well as valuable archaeological information. Of particular import is the suggestion that states create and manage underwater parks or preserves to provide additional protection to historic shipwrecks.

The ASA guidelines have similar provisions for federal agency managers to consider in the protection and management of UCH under their jurisdiction and control. These guidelines supplement the other national historic preservation laws comprising the Federal Archaeological Program (FAP). The laws of the FAP include the National Historic Preservation Act (NHPA),<sup>38</sup> the Archaeological Resources Protection Act (ARPA)<sup>39</sup> and the Antiquities Act (AA),<sup>40</sup> all land-based historic preservation laws that have been applied to UCH (as discussed below). The FAP also included the ASA. The NHPA, ARPA and the ASA and implementing guidelines have been incorporated by reference into regulations implementing the National Marine Sanctuaries Act. As the ASA guidelines are more tailored to UCH, they have been particularly instrumental in the development of management plans for UCH in the National Marine Sanctuaries Program.

### 3.2 National Marine Sanctuaries Act

The National Marine Sanctuaries Act (NMSA)<sup>41</sup> authorizes the Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), to set aside discrete marine areas of special national – and sometimes international

<sup>33</sup> See Section 3.2.

<sup>34</sup> 43 U.S.C. s. 2103(b).

<sup>35</sup> 43 U.S.C. s. 2104.

<sup>36</sup> The guidelines are advisory and therefore non-binding upon the states and federal agencies. 55 Fed. Reg. 50116 (1990).

<sup>37</sup> 55 Fed. Reg. 50132 (1990).

<sup>38</sup> 16 U.S.C. ss. 470 *et seq.*

<sup>39</sup> 16 U.S.C. para. 470 *et seq.*

<sup>40</sup> 16 U.S.C. s. 431 *et seq.*

<sup>41</sup> Also known as Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. s. 1431 *et seq.*

### 3.2.1 Protection of UCH and management of public access

The *Monitor* was designated as a national marine sanctuary to protect this nationally significant resource from looting and salvage. For over fifteen years it was managed as an archaeological site; direct physical access was permitted only as part of proposed archaeological research on the *Monitor*. In the 1990s, NOAA denied requests for permission to dive in the sanctuary and photograph the *Monitor*. While NOAA's decisions withstood legal challenge,<sup>61</sup> the underlying policy restricting public access at this site came under the scrutiny of the US Congress, the dive community and others. Restricting non-harmful public access to UCH continues to be roundly criticized by the diving community.

As a result, NOAA amended its practice and policy at the *Monitor*. NOAA began issuing 'special use' permits for non-intrusive diving in the sanctuary without requiring that scientific research be conducted on the *Monitor*. This permit practice reflects the change in the public's interest in how the *Monitor* should be managed, particularly in regards to public access. Research was done by both NOAA and some private permittees. Over time it became clear that the *Monitor* was deteriorating at a much more rapid rate than indicated by prior research.<sup>62</sup> Accordingly, NOAA revised its management plan and has conducted research and recovery of the turret and other important artefacts. Thus, the *Monitor* is an example of how *in situ* preservation policy was the first option and recovery did not occur until after scientific research was conducted to show that recovery was in the public interest for long-term preservation.

The Thunder Bay National Marine Sanctuary, like all of the other sanctuaries, does not require a permit for non-intrusive public access to UCH. To the contrary, the UCH management program involves the installation of mooring buoys to facilitate public access in a manner that avoids the risk of harm to UCH that is associated with dive boats anchoring near the UCH or even tying up to the UCH. Like all of the other sanctuaries, the recovery or even moving of UCH is prohibited without a permit. Thus, there are regulations in place to prevent looting and unwanted salvage. NOAA's authority under the NMSA to protect historic sanctuary resources from looting and unwanted salvage has withstood every legal challenge to date by US treasure salvors. The courts have consistently ruled that admiralty law provides no legal haven for the removal of, or injury to, the historic sanctuary resources and, accordingly, have uniformly ordered salvors to strictly adhere to sanctuary regulations and NOAA's permitting regime. To date, however, there have been no cases testing the enforcement of sanctuary regulations against a foreign salvor on a foreign flagged vessel under international law for salvage activities on UCH located seaward of the 24 nm contiguous zone.

<sup>61</sup> *Gentile v. NOAA*, 6 O.R.W. a, 1990 NOAA LEXIS 50 (4 January 1990): research required for permit; facilitating multiple use does not entitle public to physical access; *Hess v. NOAA*, 6 O.R.W. 720a, 1992 NOAA LEXIS 53 (26 March 1992): denial of permit held reasonable because the application for 'research' was inadequate and did not even propose elements of the scientific approach and methodology to be used.

<sup>62</sup> Congress directed NOAA to develop a plan for the stabilization, preservation and recovery of artifacts and materials from the *Monitor*.



### 3.2.2 *Enforcement of sanctuary regulations protecting and managing UCH*

NOAA regulates activities, issues permits, assesses civil penalties and conducts other enforcement to protect sanctuary resources. The two prohibited activities that directly or indirectly protect UCH are: 1) the removal<sup>63</sup> of, or injury to, historic sanctuary resources and 2) any alteration of the seabed. NOAA has the jurisdiction to apply the first measure to US nationals and vessels in the US EEZ. Any exercise of jurisdiction against foreign flagged vessels and nationals must be done in a manner consistent with international law.

The enforcement of the first measure against foreign flagged vessels and nationals pursuant to coastal State jurisdiction is limited to UCH landward of the 24 nm limit. However, if the foreign salvage activities involve altering the seabed, placing structures on the seabed or some other activity that is regulated to protect natural resources, then they are subject to US/NOAA jurisdiction under international law. This approach is consistent with articles 60 and 80 of the LOSC, which provide coastal State authority for the regulation of structures and installations in the EEZ and on the continental shelf. Article 81 of the LOSC also provides for the regulation of drilling on the continental shelf *for any purpose*. Since any salvage of UCH is likely to involve drilling or digging on the seabed, NOAA regulations protecting natural resources would be enforceable against foreign salvors to directly protect such natural resources and thereby indirectly protect any associated heritage resource in the EEZ or on the continental shelf.

These two sanctuary regulations have been implemented in all sanctuaries. Both of these regulations were applied in the administrative enforcement proceedings against the divers caught excavating the seabed and looting historic sanctuary resources in the *Craft* case. An administrative law judge assessed civil penalties in the amount of \$132,000 for violating these two regulations. The judge assessed the maximum fine, \$50,000 per regulatory violation for a total \$100,000, against the dive master for establishing a system to warn divers of any approaching enforcement patrols.<sup>64</sup> The penalty was challenged as being unreasonably high. The district court found that the dive master's announcements about sanctuary rules against taking the UCH were made in a "mocking derision" of the law. In addition, the use of a bell to warn if any enforcement patrols were spotted was found particularly egregious. The Ninth Circuit agreed, stating that:

... there can be no doubt that appellants were aware that their activities were prohibited ... appellants' claims that they lacked fair warning that their actions were prohibited ring hollow.

<sup>63</sup> Removal of any UCH in a national marine sanctuary requires a research and recovery permit which complies with professional archaeological standards and requirements as set forth in the FAP.

<sup>64</sup> To date, this is the highest US assessment of civil penalties for taking of any heritage resources, UCH or terrestrial. The cap on civil penalties has been raised from \$50,000 per violation to \$120,000 for each violation. Another important aspect of the NMSA's enforcement mechanisms is the authority under s. 307 to seek the forfeiture of vessels: s. 1437(d). Forfeiture is a rare occurrence; bonds are usually posted for vessels to ensure the recovery of civil penalties or damages. However, in some circumstances, particularly when the operator abandons the vessels, the authority is a potentially helpful management tool.

The court ruled that the fine was reasonably based on the heinous acts of the dive master.

In *Craft*, the treasure hunters also challenged the application of the regulation prohibiting alteration of the seabed to their removal of the UCH. *Craft* argued that the seabed regulation was intended to control oil, gas and mineral exploration and development, not the recovery of the UCH. As such, there was no notice to the public that this regulation would apply to the salvaging of the UCH from the seabed. Therefore, *Craft* argued that enforcement of this seabed regulation against salvaging the UCH was a violation of their rights to due process under the US Constitution. The court held that the language contained in the seabed regulation was sufficiently clear, especially as applied to the salvage activities.<sup>65</sup> The court read the prohibition broadly to include the excavation of the UCH by the treasure hunters and rejected the argument that the alteration of the seabed was *de minimus*. The court stated that, unless the activity falls within the two exceptions set forth in the regulation: anchoring and bottom trawling, any alteration of the seabed would clearly be prohibited. As a result, the regulation could technically be applied to activities such as handfanning without a permit. The sanctuary regulation of UCH was upheld and found to be consistent with the NMSA purposes to protect and preserve sanctuary resources as well as to promote research, education, recreation, and the aesthetic value of the area. In *Craft*, the salvors/looters argued that the regulations conflicted with the principles of admiralty law.

### 3.2.3 Sanctuary control over UCH and the law of salvage and finds

The salvors argued that since they had regularly visited the shipwreck over the years they therefore had a fundamental right to salvage under the principles of admiralty law that pre-dated the sanctuary designation. The court rejected these arguments. "The Court does not have to reach defendants' argument that plaintiffs' prior use does not create a right as defined in s.304(c)(1), because it finds that even if defendants have a right under the statute, [NOAA] acted within its authority to regulate that right in the instant case."<sup>66</sup> In response to the arguments about the rights under admiralty law, the court noted that "[e]xceptions to the law exist where the abandoned property is embedded in the soil, or when the owner of the land where the property is found has 'constructive possession' of the property such that the property is not lost", citing *Klein*:

In *Klein* [758 F.2d 1511 (11th Cir. 1985)], the Eleventh Circuit found that when the federal government creates a national park in navigable waters, possession of resources beneath those waters vests in the United States. *Klein*, 758 F.2d at 1514. Although that case involved

<sup>65</sup> On appeal, plaintiffs only argued the constitutionality of the regulation. The Ninth Circuit ruled that the regulation of the alteration of the seabed was neither over-broad nor unconstitutionally vague as applied to the appellants' conduct, and upheld the district court. The court noted that the degree of vagueness tolerated by the Constitution is greater for a statute providing for civil sanctions than for one involving criminal penalties, because the consequences of imprecision are less severe. Additionally, the court noted that a scienter requirement may mitigate vagueness. Finally, the Court found that the most important factor to consider is whether the law threatens to inhibit the exercise of constitutionally protected rights, in which case a more stringent vagueness test applies: *Craft*, 34 F.3d 918, 922 (1994).

<sup>66</sup> *Craft v. National Park Service*, CV 92 1769, p. 4 (1992).

a designation as a national park, the analysis is the same. In passing the [NMSA] Congress asserted its possession in the [sanctuary]. As the Ninth Circuit has explained, under admiralty law principles, someone in possession may refuse services of would be salvors like the plaintiffs. *Tidewater Salvage Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304, 1306–7 (9th Cir. 1980). Through the comprehensive preservation and conservation scheme set out in the [NMSA] and its regulations, the owner of the [sanctuary] has refused these services.<sup>67</sup>

In *US v. Fisher*, the salvors argued that they were not liable for any damages because, they claimed, their exploration and salvage activities were authorized by federal admiralty law and any injury caused was negligible. Under the NMSA section 312, a person is not liable if it can be shown that the injury to sanctuary resources was caused by an activity authorized by federal or state law or was negligible.<sup>68</sup> These arguments were rejected. The court held that neither general admiralty law nor particular admiralty court orders provide a defense for liability because they are not “federal law” within the meaning of the NMSA.<sup>69</sup> Rather, “federal law” was interpreted narrowly so as only to include licenses, permits, and other authorizations pursuant to federal statutes, and does not include authorizations developed under federal common law and its corresponding cases. The court further stated that the NMSA precludes the application of the maritime law of finds and salvage in the Florida Keys National Marine Sanctuary.<sup>70</sup>

Another argument made by the salvors and rejected by the *Fisher* court was that their rights to explore and salvage were authorized under admiralty law and the *MDM Salvage*<sup>71</sup> case, which preceded sanctuary designation and, therefore, could not be terminated pursuant to the NMSA. In support of their assertion, they cited section 304(c), which provides that any rights of access or subsistence use may not be terminated by sanctuary designation, but may be regulated.<sup>72</sup> The *Fisher* court’s rejection of their argument is consistent with the holding of a Ninth Circuit sanctuary case in which harm to, and loss of, the UCH was at stake.

It is unlawful to conduct an activity prohibited<sup>73</sup> by sanctuary regulations, unless it is conducted pursuant to a permit or other written authorization issued by NOAA under the sanctuary regulations. In all sanctuaries, activities that are intrusive to the UCH are permitted only if conducted pursuant to an archaeological research permit. In the first twenty years of the program, private recovery of the UCH was rare and permitted only when the UCH was threatened and could no longer be preserved *in situ*. The UCH would be removed pursuant to professional archaeological research and recovery requirements, and would then be conserved and curated in an institution of public access, presumably in perpetuity. Unlike the ASA, the NMSA has no provision asserting title or ownership. NOAA is a trustee of sanctuary resources, even those resources

<sup>67</sup> *Craft v. National Park Service*, CV 92 1769, pp. 5–6 (1992). See also *Craft*, 34 F.3d 918, 921 n. 2 (9th Cir. 1994).

<sup>68</sup> 16 U.S.C. s. 1443(a)(3).

<sup>69</sup> *US v. Fisher*, 22 F.3d at 270; *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997).

<sup>70</sup> *US v. Salvors Inc.*, No. 92–10027 (S.D. Fla. 30 April 1997) p. 10 f.n. 4.

<sup>71</sup> *MDM Salvage*, 631 F.Supp. 308, 314 (S.D. Fla. 1988).

<sup>72</sup> 16 U.S.C. s. 1434(c).

<sup>73</sup> If an activity falls within a narrowly construed exception, it is not prohibited. Rather, it is an activity that is allowed to be conducted in the sanctuary without a permit from NOAA.

that may be owned by others. Thus, while the final disposition of UCH will be consistent with professional archaeological standards, it must also be done with the co-operation of the owner or co-trustee of the UCH, such as a state, the Navy, a foreign sovereign, or a private owner.

On 1 July 1997, the Florida Keys National Marine Sanctuary regulations became effective. NOAA is a co-trustee with Florida for the UCH located on state lands within the sanctuary. Florida owns the abandoned shipwrecks and other UCH pursuant to the ASA, the Submerged Lands Act and state historic preservation laws. Sixty-five per cent of the Florida Keys National Marine Sanctuary is located within state lands and waters. At a minimum, all recovery must be supervised by a professional archaeologist and meet the other rigid FAP standards and requirements as to methodology and conservation. No UCH is permitted to be removed until it is determined to be in the public's interest: *in situ* preservation is preferred. Any UCH that is permitted to be recovered must be kept together in a collection and made available for future research and other public access. Only after the archaeological research and recovery is completed and the UCH has been properly conserved and curated, may permittees apply for a 'special use' permit to transfer certain objects to their custody. Such transfer will be granted if NOAA and Florida archaeologists determine that the objects are no longer of archaeological significance.<sup>74</sup> This permit system is the result of a compromise reached with Florida on how the UCH should be managed in the Florida Keys National Marine Sanctuary. It has been determined to be consistent with the NMSA and is primarily based upon the ASA mandate for the inclusion of private recovery of shipwrecks as a multiple use for such UCH. NOAA, Florida and the Advisory Council for Historic Preservation entered into a Programmatic Agreement pursuant to section 106 of the NHPA, which evidences that the Florida Keys National Marine Sanctuary permit system is in compliance with national historic preservation law and policies. It is very important, however, that the permittees conducting such activities strictly adhere to the permit conditions, regulations and Programmatic Agreement in order to protect and conserve the UCH for present and future generations. If the permit application involves UCH that is also a sunken warship or other State vessel, then NOAA will consult with the owner or interested agency in accordance with US and international laws and policies.

### 3.3 Sunken Military Craft Act (treatment of warships and other sunken State craft)

The Sunken Military Craft Act (SMCA)<sup>75</sup> is a codification of long-standing US policy, international law<sup>76</sup> and federal admiralty court cases. This codification in the SMCA

<sup>74</sup> 16 U.S.C. para. 1441. Such 'special use' permits are also referred to as 'deaccession/transfer permits'. Objects eligible for transfer under this permit include duplicative gold and silver bullion, unworked precious stones, and coins.

<sup>75</sup> Public Law Number 108-375 passed into law on 8 October 2004 and presented to the President on 21 October 2004.

<sup>76</sup> But see S. Dromgoole and N. Gaskell 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) *International Journal of Marine and Coastal Law* 171 at p. 184. While noting the firm position of the US and other nations that sunken warships retain sovereign immunity, they conclude that "the weight of academic opinion seems to disagree with this view". For references to the academic debate, see J. Ashley Roach 'Sunken warships and military aircraft' (1996) 20 *Marine Policy* 351, note 10.

should help ensure the uniform application of these laws and policies within the jurisdiction of the US. It should also encourage reciprocal treatment by foreign sovereigns. In particular, the SMCA clarifies that sunken military vessels and aircraft – both US and foreign – located in US waters that would have been entitled to sovereign immunity at the time they sank remain the property of their flag States unless expressly abandoned: title is not lost through the passage of time. This should help eliminate the application of the law of finds to any such vessels. Except perhaps pursuant to a contract entered into with the flag State owner, it should also help eliminate any award for the unwanted<sup>77</sup> salvage of such craft. A review of the federal admiralty court cases, laws and US policy leading up to this most recent law to protect sunken State craft will be helpful in understanding its context and application.

In *Hatteras*,<sup>78</sup> the salvors argued that a shipwreck was abandoned by the US government since it had been underwater for over 100 years. The court stated: “[I]t is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake or unauthorized actions by subordinate officials[,]” explaining further that US government property may only be disposed of in the manner prescribed by Congress. In this case, the Secretary of the Navy had expressly abandoned the shipwreck. Nevertheless, the court held that the shipwreck had not been properly abandoned pursuant to US property statutes enacted by the US Congress. Thus, the US prevailed against the salvors even though the salvors had documentary evidence of express abandonment.

In *US v. Steinmetz*,<sup>79</sup> the US successfully recovered the bell from the CSS *Alabama*. Richard Steinmetz, an antique dealer, had purchased the bell salvaged from the CSS *Alabama* which had been wrecked off the coast of France in 1864. The Navy became aware of the bell through a notice that it was to be auctioned. After Mr. Steinmetz

<sup>77</sup> The US Navy is opposed to the application of the law of finds as well as the application of the law of salvage without its consent. However, the US Navy, like the UK and perhaps other nations, is of the view that the application of salvage law to the recovery of its sovereign immune vessels may be appropriate in some circumstances pursuant to contracts or other permission provided by the US Navy, provided it is consistent with archaeological and historic preservation laws, requirements and standards. Thus, this essay uses the term unwanted salvage to be any salvage that is conducted without the consent or permission of the owner and/or the agency that is authorized to protect and manage the UCH.

<sup>78</sup> *Hatteras, Inc. v. The USS Hatteras* 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd*, 698 F.2d 1215 (5th Cir. 1982).

<sup>79</sup> *US v. Steinmetz*, 763 F. Supp. 1293 (D.N.J. 1991), *aff'd*, 973 F.2d 212 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993). In *US v. Steinmetz*, the so-called *Alabama*-bell case, the purchaser in due course of the bell was deprived of possession by the superior right in title of the US. By his account Richard Steinmetz, an antique dealer, acquired the bell at a London gun show in 1979; it had reportedly been recovered from the 1864 wreck of CSS *Alabama* in 1936 by a diver who placed it in a bar in trade for drinking privileges. The bell came to the attention of Navy officials in 1990 when Mr. Steinmetz put it up for auction. After Mr. Steinmetz refused to turn the bell over to the Navy, the government filed an action against him for its return. The court determined that the US was the successor sovereign to the Confederacy and had acquired all right and title to the property of the Confederate States of America including the *Alabama* and the bell, finding that it had not been abandoned.

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In the landmark case relating to the *Juno* and *La Galga*<sup>80</sup> the federal admiralty court recognized the ownership interests of a foreign sovereign, Spain, to galleons that sank within the US territorial sea. The two ships were lost off the coast of Virginia in 1750 and 1802 respectively. They were reportedly found by Sea Hunt, Inc., in the late 1990s. Sea Hunt had authorization from Virginia to salvage the galleons which they presumed to be abandoned and subject to the ASA. The salvors claimed a salvage award against them or, in the alternative, asked the US District Court for the Eastern District of Virginia to award title under the law of finds. Assuming the identity of the ships to be that claimed by Sea Hunt, the court ruled that both vessels were sovereign vessels. It also held that the galleons had not been abandoned. The Kingdom of Spain had intervened to assert ownership and there was no evidence that it had expressly abandoned the vessels. Since Spain was the owner and it had expressly rejected salvage, the federal admiralty court held that Sea Hunt was not entitled to a salvage award.

The case of the *Juno* and *La Galga* is an important precedent. From a procedural standpoint, the court barred the US from representing Spain's interest in the wrecks. The US could intervene to represent its own interests, but Spain would have to intervene and argue its interest. This was the first time Spain had asserted title to any wreck lost during the Spanish colonial period. Previously the government of Spain had been reluctant to subject itself to the jurisdiction of a foreign district court sitting in admiralty. In addition, there may also have been some concern or sensitivity about the circumstances surrounding the treasure that Spain was carrying on the galleons. The fact that the US informed Spain about the case and inquired about its potential interest likely played a role in Spain's ultimate decision to intervene in the case.

In *Int'l Aircraft Recovery*,<sup>81</sup> the US successfully halted the unwanted salvage of a World War II aircraft off the coast of Florida. The federal admiralty court held that the US had not abandoned the wreck. As it was still the owner, it had the authority to deny salvage. There was a question about whether the US should have to pay for the salvage services provided before the court ruled for the US. It was subsequently determined that a salvage award was not warranted because the US had objected to salvage of the aircraft.

The US learned several lessons from this case and the ones discussed above. First, additional notice to the salvors and the public in general would probably improve voluntary compliance with the US policy on sunken State craft. Secondly, admiralty courts are not inclined to presume abandonment or grant salvage awards against the US and other sovereigns when they assert their ownership in UCH. Thirdly, it was in the US interest to help protect foreign State UCH in order to foster their reciprocal treatment

<sup>80</sup> *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000), cert. denied, 121 S. Ct. 1079 (2001).

<sup>81</sup> *Int'l Aircraft Recovery, L.L.C. v. Unidentified, Wrecked, and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000), cert. denied, 121 S. Ct. 1079 (2001).

of US UCH in foreign waters. Fourthly, such notice of policy and practice would provide a better administrative record in admiralty court cases. As a result of these cases, the US issued a policy regarding sunken warships and other craft in a statement by the US President.<sup>82</sup> They were also the catalyst for a bill that ultimately became the Sunken Military Craft Act (SMCA).

The SMCA protects sunken US military ships and other craft<sup>83</sup> wherever located. Consistent with the cases, the SMCA provides that “[r]ight, title, and interest of the United States in and to any United States sunken military craft – (1) shall not be extinguished except by an express divestiture of title by the United States; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.”<sup>84</sup> It prohibits any activity directed at a sunken military craft that disturbs, removes, or injures the craft except as authorized by a permit. It also protects foreign State craft that are subject to US jurisdiction. It provides for the respectful treatment of the graves of lost military personnel. It also requires the protection of sensitive archaeological artifacts and historical information. It provides for permitting and civil enforcement to prevent unauthorized disturbance. Violators of the SMCA are subject to civil penalties of up to \$100,000 per day of violation.<sup>85</sup> They may also be liable for damage resulting from disturbance of sunken military craft.<sup>86</sup> Violators may also be subject to otherwise applicable criminal law sanctions.<sup>87</sup> Activities otherwise prohibited may be carried on only as provided by a permit issued by the Secretary of the Navy, Air Force or other appropriate military unit.<sup>88</sup>

The SMCA provides that: “[t]he law of finds shall not apply to – (1) any United States sunken military craft, wherever located; or (2) any foreign sunken military craft located in United States waters.” It further states that: “[n]o salvage rights or awards shall be granted with respect to – (1) any United States sunken military craft without the express permission of the United States; or (2) any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.” The provisions extend the jurisdiction of the US to the maximum degree possible, consistent with the notion that sovereign vessels carry their sovereign status with them and that a coastal state can regulate activities within its waters. Note however that the exercise of jurisdiction in the latter case is without prejudice to sovereign ownership rights in foreign vessels. It does not impact on commercial fishing, the laying of submarine cables,

<sup>82</sup> 69 Fed. Reg. 5647–5648 (5 February 2004). Several European States have notified the US State Department of their laws and policies, which are substantively the same as the US policy position. See also, J. Ashley Roach ‘Sunken warships and military aircraft’ (1996) 20 *Marine Policy* 351–354.

<sup>83</sup> The statute defines ‘sunken military craft’ as all or any portion of “any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank[.]” along with sunken military aircraft and spacecraft, and their associated contents: s. 1408(3).

<sup>84</sup> s. 1401.

<sup>85</sup> s. 1404.

<sup>86</sup> s. 1405.

<sup>87</sup> s. 1406(i).

<sup>88</sup> s. 1403.

or commercial salvage of private vessels. It also encourages the US Secretary of State, in consultation with the Secretary of Defense, to enter into bilateral and multilateral agreements with foreign countries for the protection of sunken military craft.

As the US craft are owned by the US, the policies and legal restrictions do not raise all of the issues associated with having similar restrictions on privately owned property. In addition, since they are US flagged vessels, the regulation of such UCH by the US is consistent with flag State jurisdiction under international law. Protecting and managing private foreign flagged UCH beyond the reach of national jurisdiction is probably the greatest challenge under international law. Perhaps the most famous example of this challenge is RMS *Titanic*. The SMCA does not expressly codify the US policy on respectful treatment of the wrecks as gravesites. The only US UCH law that does expressly recognize the need for the treatment of certain UCH as gravesites is the 1986 Act regarding RMS *Titanic*.

### 3.4 RMS Titanic Maritime Memorial Act of 1986

Since its collision with an iceberg on 14 April 1912, and the associated loss of life, RMS *Titanic* has captivated the interest of people around the world. There was some immediate salvage of the flotsam and jetsam of the wreck. This maritime casualty also resulted in governmental investigations in the US as well as the UK. It was the catalyst for the Safety of Life at Sea Convention (SOLAS), as well as for the establishment of the International Maritime Organization (IMO).<sup>89</sup> The 1985 discovery of the site where *Titanic* came to rest by a US/French expedition was the catalyst for the US statute, RMS *Titanic* Maritime Memorial Act of 1986.<sup>90</sup>

This Act suggested that the wreck site be treated as a maritime memorial.<sup>91</sup> Canada is the coastal State that is the closest to the wreck site. However, it is still more than 350 nm off the coast of Newfoundland and even further from any US territory. The US Congress recognized that while it had a significant interest in protecting *Titanic*, it needed the co-operation of other interested nations. Thus the US Congress directed the US Department of State to negotiate an international agreement with Canada, France, the UK and any other interested nations to designate the wreck as a maritime memorial and protect it from looting and unwanted salvage.<sup>92</sup> The *Titanic* Act also directed NOAA to consult with these same nations in the development of international guidelines for the exploration, research and, if determined appropriate, the possible salvage of artifacts.<sup>93</sup> NOAA's guidelines are based on the Rules annexed to the *Titanic* Agreement.<sup>94</sup> They are also based on the ICOMOS Charter and the Rules annexed to the UNESCO Convention 2001.<sup>95</sup> The US State Department signed the Agreement on *Titanic* on 18 June 2004. The Bush Administration's Ocean Policy Action Plan expressly provides that it

<sup>89</sup> HR Report on HR 99–393, 99th Cong. 1st Sess., pp. 4–8 (21 November 1985).

<sup>90</sup> Public Law No. 99–513, Oct. 21, 1986, 100 Stat. 2082, 16 U.S.C. s. 450rr–450rr–6 (2005).

<sup>91</sup> 16 U.S.C. s. 450rr(b).

<sup>92</sup> s. 450rr–4.

<sup>93</sup> s. 450rr–3.

<sup>94</sup> 66 Fed. Reg. 18905–18907 (12 April 2001).

<sup>95</sup> *Ibid.* See also preamble of the draft guidelines at 65 Fed. Reg. 35326 (2 June 2000).



will submit recommended legislation along with the Agreement to the US Congress for its consideration.<sup>96</sup> Implementing legislation is necessary for the Agreement to come into effect in the US. Although this Agreement and the guidelines are not enforceable by NOAA or other federal agencies under the current Titanic Act of 1986, the guidelines and agreement have been cited by the admiralty court.<sup>97</sup>

Federal admiralty courts will respect treaties, conventions and other international agreements to which the US is a party. However, when salvors approached the admiralty court in the early 1990s there was no such agreement. In the absence of any international agreement, the federal admiralty court asserted 'quasi *in rem* jurisdiction' over the wreck site. This ripened into an assertion of 'constructive jurisdiction' or jurisdiction out of necessity. The courts recognize that this is a legal fiction. It has been done, at least in part, because the courts loathe a vacuum in the law. It has also been done because the salvors requested the court to exercise their jurisdiction over maritime and admiralty cases. The court clearly has *in personam* jurisdiction over the salvors, RMS Titanic Incorporated (RMST). Thus, the court is in a position to protect and manage the wreck site and salvage in a manner that the Titanic Act did not provide for the Executive Branch. The court will likely continue to protect and manage the salvors and the wreck site under the federal common law of salvage unless and until the international agreement becomes effective for the US through legislation enacted by Congress.<sup>98</sup>

The federal admiralty court rejected RMST's arguments that it owned *Titanic* under the law of finds.<sup>99</sup> While the court has granted RMST exclusive rights for the salvage of artifacts in the debris field, it has denied RMST's requests to pierce the hull so that it can enter and salvage artifacts that are inside the hull.<sup>100</sup> In the absence of an international agreement or guidelines, this order precluding salvage of the hull was the court's balance of the interests set forth in the Titanic Act and other applicable law. The court is currently considering requests by RMST to be awarded the artifacts under the law of salvage. While *Titanic* and the maritime law of salvage are very far and distant from the preservation of archaeological resources on US public lands, the US FAP provides helpful instruction for how to protect and manage *Titanic* and other UCH.

<sup>96</sup> <http://ocean.ceq/actionplan.pdf> p. 24. It also provides a plan for protecting sunken military craft and interpreting the maritime heritage in the Great Lakes.

<sup>97</sup> *RMS Titanic Inc. v. Wrecked, and Abandoned Vessel*, 323 F.Supp. 724 (E.D. Va. 2004).

<sup>98</sup> P. Niemeyer 'Applying Jus Gentium to the Salvage of the RMS Titanic in International Waters' Nicholas J. Healey Lecture on Admiralty Law, New York University (5 May 2005) (US Court Judge 4th Circuit rebuttal to an argument put forward by Professor Nafziger (see J. Nafziger 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (2003) 44 *Harvard International Law Journal* 251 at 260) that salvage law in regard to recent marine casualties is not part of *jus gentium*, but noting that the remainder of Professor Nafziger's criticism may be fair insofar as he states that modern treasure salvage is "so recent that there simply is no applicable custom, let alone a *jus gentium*").

<sup>99</sup> *RMS Titanic Inc. v. Wrecked, and Abandoned Vessel*, 323 F.Supp. 724, 737 (E.D. Va. 2004).

<sup>100</sup> *RMS Titanic Inc. v. Wrecked, and Abandoned Vessel*, Civ. No. 2:93cv902 (E.D. Va. July 28, 2000) (order enjoining RMST from penetrating or cutting into the *Titanic* or selling any artifacts).

#### 4. US Land Based Cultural Heritage Laws Applicable to Certain UCH Sites

There are three historic preservation statutes that were primarily developed for the protection of terrestrial sites but which also apply to the protection of UCH in certain circumstances. They are the Antiquities Act, the Archaeological Resources Protection Act, and the National Historic Preservation Act.

##### 4.1 Antiquities Act

The public interest in the protection of American antiquities on federal lands, particularly those of prehistoric American Indians, led to the development of the Antiquities Act of 1906 (AA).<sup>101</sup> The AA has two main components: (1) a criminal enforcement component, which provides for the prosecution of persons who appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the US; and (2) a component that authorizes examination of ruins, the excavation of archaeological sites and the gathering of objects of antiquity on lands owned or controlled by the US through the granting of a permit.

The AA is still in effect and its permitting provision remains a potentially useful tool for protecting the UCH. However, the enforcement of its criminal provision has been the subject of a constitutional attack in two cases. In *US v. Diaz*,<sup>102</sup> the Ninth Circuit held that the AA definitions of “object” could also include objects made recently and, as a result, provided insufficient notice to the public of the applicability of the Act’s penalty provisions. The court also held that the Act was unconstitutionally vague and therefore a violation of due process. However, the Tenth Circuit subsequently upheld the constitutionality of the AA in *US v. Smyer*.<sup>103</sup> The court distinguished the *Diaz* case which involved face masks made only a few years before from the objects appropriated in the *Smyer* case, which involved artifacts that were 800–900 years old and taken from ancient sites. The court found that, as applied to the case before it, the Act suffered “no constitutional infirmity” and must be considered “in the light of the conduct with which the defendant is charged.”<sup>104</sup> These challenges to the AA ultimately resulted in the enactment of the Archaeological Resources Protection Act in 1979.<sup>105</sup>

<sup>101</sup> 16 U.S.C. s. 431, *et seq.* For a detailed analysis of the long 25-year process it took to enact this law, see generally ‘A Special Issue: The Antiquities Act of 1906’ (2000) 42 *Journal of the Southwest* 199–269.

<sup>102</sup> 499 F.2d 113 (9th Cir. 1974).

<sup>103</sup> 596 F.2d 939 (10th Cir. 1979).

<sup>104</sup> *Id.*

<sup>105</sup> It should be noted, however, that the cases addressed enforcement of the criminal provisions of the AA, and not the permitting provision, which has never been subject to such a constitutional attack. It should also be noted that these challenges reveal the problems with not taking a bright-line approach to defining UCH.

## 4.2 Archaeological Resources Protection Act

The Archaeological Resources Protection Act (ARPA)<sup>106</sup> applies to “archaeological resources” of at least 100 years of age located in national parks, national wildlife refuges and other specific areas on national public lands. The Act requires a permit for any excavation, removal, or alteration of archaeological resources. The enforcement provision provides for the imposition of both civil and criminal penalties against violators of the Act. The criminal enforcement provision was successfully used in *US v. Hampton*.<sup>107</sup> In that case, a salvor was prosecuted for salvaging the UCH in Florida’s Key Biscayne National Park. The matter resulted in a plea bargain.

## 4.3 National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA) was enacted to recognize that the nation is “founded upon and reflected in its historic heritage.”<sup>108</sup> The Act requires that national government agencies survey, inventory and assess the historical significance of heritage resources including the UCH, prior to undertaking any action such as issuing permits, expending funds, developing projects, and taking other government actions.<sup>109</sup>

Section 106 of the NHPA requires that national government agencies take into account the effect of any proposed federal, federally assisted, or federally licensed “undertaking” on any historic property<sup>110</sup> that is included in, or eligible for inclusion in, the National Register of Historic Places.<sup>111</sup> In addition, such agencies must afford the Advisory Council on Historic Preservation and the State Historic Preservation Office a reasonable opportunity to comment on the proposed undertaking.<sup>112</sup> The agency must complete the section 106 process prior to issuing any license or permit, or going forward with any other undertaking.<sup>113</sup> Section 106 does not prevent the undertaking from occurring, but it does require that the adverse effects to heritage resources be minimized. To fulfil the section 106 requirements for a class of undertakings that would require numerous individual requests for comments, the national agency may enter into a Programmatic Agreement with the Advisory Council and the state.<sup>114</sup> As long as the

<sup>106</sup> 16 U.S.C. para. 470ee *et seq.*

<sup>107</sup> Crim. Doc. Nos. P169925, P169927, and P169928 (S.D. Fla. 1986).

<sup>108</sup> 16 U.S.C. ss. 470 *et seq.*, 470(b)(1).

<sup>109</sup> Another statute that requires national agencies to consider the effects of their activities on the environment, including heritage resources, is the National Environmental Policy Act (NEPA): 42 U.S.C. s. 4321 *et seq.* Like the NHPA, the NEPA is procedural in nature and does not contain any enforcement mechanism to prevent harm to heritage resources committed by third parties.

<sup>110</sup> ‘Historic property’ means any prehistoric or historic district, site, building, structure, remains or object eligible for inclusion on the National Register, i.e. meets the National Register listing criteria: 36 C.F.R. s. 800.2 (e).

<sup>111</sup> 16 U.S.C. s. 470f.

<sup>112</sup> 36 C.F.R. s. 800.1(a).

<sup>113</sup> 36 C.F.R. s. 800.3 (c).

<sup>114</sup> 36 C.F.R. s. 800.13(a).

activities are conducted in accordance with the Programmatic Agreement, no further consultations are required for compliance with section 106. The purpose of the section 106 process is to identify potential conflicts between historic preservation concerns and the need for federal undertakings in the public interest.<sup>115</sup>

The other main provision of the NHPA is section 110(a)(2) which requires national government agencies to manage heritage resources under their jurisdiction and control. Such management includes the obligation to survey, inventory, and determine the eligibility of historic properties for nomination to the National Register.<sup>116</sup> Section 110(a)(2) also requires that each agency exercise caution to ensure that properties that may be eligible for inclusion are not “inadvertently” transferred or sold.<sup>117</sup>

As explained below, even though the NHPA, ARPA and the AA were developed to protect resources on dry terrestrial lands, they are consistent with the UNESCO Convention 2001, as are the US UCH laws, i.e. the ASA, NMSA, SMCA and Titanic Act.

## 5. UNESCO Convention 2001 and US UCH Law

### 5.1 Definitions of UCH and scope of Convention (article 1)

The scope of the UNESCO Convention 2001 is largely determined by the definitions of “[u]nderwater cultural heritage” and “[a]ctivities directed at underwater cultural heritage” set out in article 1(1) and (6). Each of the US laws applicable to UCH use different terms or definitions (e.g. “archaeological resources”, “historic properties”, etc.). However, these definitions and terms are similar to and compatible with the definition of UCH under article 1 of the Convention. The 100-year threshold and use of the term “character” in the Convention is very similar to the ARPA’s 100-year threshold and use of the term “interest”. The ARPA defines “archaeological resources” as:

any material remains of past human life or activities which are of archaeological interest. No item shall be treated as an archaeological resource . . . unless such item is at least 100 years of age.<sup>118</sup>

The NHPA uses the term “historic properties” in its establishment of the listing of historic places on the National Register.<sup>119</sup> Eligibility for listing on the National Register

<sup>115</sup> 36 C.F.R. s. 800.1(b).

<sup>116</sup> 16 U.S.C. s. 470h-2(a)(2).

<sup>117</sup> National agency compliance with the s. 106 process prior to any property transfer or sale would meet this requirement.

<sup>118</sup> 16 U.S.C. para. 470bb. The ARPA regulations define ‘archaeological resources’ to mean “any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest”: 43 C.F.R. 7.3. It should be noted that the ARPA was enacted in part due to problems with the AA and the term ‘antiquity’ being held to be unconstitutionally vague. Thus, there are potential problems when using a broad term like antiquity which is not defined and potential benefits from the use of a bright-line approach, such as a 100-year rule.

<sup>119</sup> ‘Historic property’ means any prehistoric or historic district, site, building, structure, remains or object eligible for inclusion on the National Register, i.e. meets the National Register listing criteria: 36 C.F.R. s. 800.2(e).

involves a determination that the property is of historical significance. There is no bright-line threshold of years of age in the NHPA for properties to qualify as historic. However, a 50-year rule of thumb for consideration of significance has developed as a matter of practice. The NHPA criterion of historical "significance" affects the application of the ASA and the NMSA.

Whether an abandoned shipwreck<sup>120</sup> is covered by the ASA may rely on a determination of whether it is eligible for listing on the National Register (i.e. is historically significant).<sup>121</sup> Under the NMSA, historic sanctuary resources are defined in a sufficiently broad manner so as to include those objects covered by the NHPA, as well as the Convention.<sup>122</sup> The NHPA 50-year rule of thumb is followed in the National Marine Sanctuary Program and has been expressly incorporated into the Programmatic Agreement for Historical Resource Management in the Florida Keys National Marine Sanctuary.<sup>123</sup> *Titanic* is another example of the protection of a historic shipwreck that is less than the 100-year threshold of the Convention. The SMCA protects all such craft

<sup>120</sup> 'Shipwreck' is defined to mean "a vessel or wreck, its cargo, and other contents": 43 U.S.C. s. 2102(d). It should be further noted that shipwrecks entitled to sovereign immunity, such as warships or other sovereign non-commercial vessels, are generally not considered to be abandoned by the flag nation, regardless of their location. US Navy vessels are not abandoned: ASA Guidelines Vol. 55 Fed. Reg. 50120 (4 December 1990). See further, J. Ashley Roach 'Sunken warships and military aircraft' (1996) 20 *Marine Policy* 351–354.

<sup>121</sup> There are other means of determining the scope of coverage under the ASA. For example, if an abandoned shipwreck is determined to be embedded in the submerged lands of the state, then it is subject to the ASA regardless of whether it is significant enough to be determined eligible for listing on the National Register: 43 U.S.C. 2105(a)(1)–(2) (provisions based on property law regardless of historical significance which, under (3), is another way to protect abandoned shipwrecks).

<sup>122</sup> 'Sanctuary resources' are defined to mean "any living or non-living resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, *historical*, research, educational, or aesthetic value of the sanctuary": 16 U.S.C. s. 1432(8) (emphasis added). The 1972 Act did not define sanctuary resource; the definition was added in 1988 along with the liability provision for injury to sanctuary resources. 'Historical' is further defined to mean a resource possessing historical, cultural, archaeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events": 15 C.F.R. s. 922.2(c).

<sup>123</sup> See s. H. 2.(b): artifacts which are 50 years or older are presumed to be historic sanctuary resources that are of historical significance and thus not available for deaccession or transfer to the private sector, unless NOAA and state archaeologists jointly determine that an artifact is no longer of historical interest pursuant to the criteria set forth in paras. 11–13. Paras. 11–13 set forth the criteria for determining historical significance. The criteria were based on the criteria set forth in the regulations and guidelines implementing the NHPA and the ASA. This Programmatic Agreement is between NOAA, the State of Florida and the Advisory Council on Historic Preservation. It was developed to ensure that the management of historical sanctuary resources in this sanctuary is done in accordance with s. 106 of the NHPA, as well as with the regulations and policies of the NMSA. It is available on the Web at [http://www.fknms.nos.noaa.gov/sanctuary\\_resources/scr\\_programmatic\\_agremnt.html](http://www.fknms.nos.noaa.gov/sanctuary_resources/scr_programmatic_agremnt.html).

and does not have any age threshold.<sup>124</sup> While the ARPA is very similar to the Convention, the other US UCH laws are consistent with the Convention even though they lack a bright line and protect UCH that has been underwater for less than 100 years and is determined to be historically significant.

During the UNESCO negotiations, the US suggested a definition of UCH consistent with the NHPA, i.e. determination of significance and the codification of the 50-year rule of thumb. The UK supported this approach as it was also consistent with its historic preservation laws.<sup>125</sup> However, many other nations preferred to avoid the administrative burden and process involved in the determination of significance and instead favoured more of a blanket approach.<sup>126</sup> In discussing the lack of consensus on the use of 50 years, the Chairman of the UNESCO Meeting of Experts, Carsten Lund, noted that salvage for wrecks underwater more than 50 years may be appropriate without compliance with the Convention. Consensus was reached on using a 100-year rule as a bright line for the scope and definition of UCH. This does not preclude individual nations, like the US and the UK, from protecting historic shipwrecks that may be underwater less than 100 years, such as *Titanic* or wrecks from WWII.<sup>127</sup> The term “significance” was deleted and “character” was used instead. The US supported this approach for several reasons. The use of 100 years as a threshold is consistent with the definition of archaeological resources in the ARPA. In addition, use of the modifying term “character” under the UNESCO Convention is similar to and consistent with the ARPA’s use of the term “archaeological interest”. The use of 100 years also does not conflict with other US historic preservation statutes or the NMSA.

## 5.2 Objectives and general principles of the UNESCO Convention and the question of salvage (articles 2 and 4)

### 5.2.1 Protection of UCH – in situ preservation – research and recovery – salvage

A primary purpose of the UNESCO Convention is to protect UCH from unscientific commercial salvage. The first option is *in situ* preservation, but recovery is authorized if consistent with the annexed Rules. The annexed Rules codify current professional scientific and archaeological principles. The US statutes and federal policies are consistent with these objectives and principles. The primary purpose of the NMSA is resource protection.<sup>128</sup> The ARPA provides that: “[t]he purpose of this Act is to secure, for the preservation and future benefit of the American people, the protection of archaeological

<sup>124</sup> The definition of ‘sunken military craft’ is consistent with the definition of such craft under the LOSC and art. 1(8) of the UNESCO Convention.

<sup>125</sup> See further, Sarah Dromgoole ‘United Kingdom’, Chapter 15 above.

<sup>126</sup> For wrecks underwater less than 100 years, these nations agreed to allow a coastal State to designate them as UCH under art. 1(1)(b); however, the language as drafted does not clearly state that such designated UCH is subject to the Convention: P. O’Keefe *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Leicester, 2002) pp. 41–42.

<sup>127</sup> *Ibid.* at pp. 41–42.

<sup>128</sup> 16 U.S.C. s. 1431(b)(5).

resources and sites which are on public lands. . . .”<sup>129</sup> The NHPA provides that: “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations. . . .”<sup>130</sup> Although the AA and the ASA do not have such express provisions, both implicitly protect heritage resources. All these US statutes set up a permit system which has followed archaeological standards and the scientific approach as a matter of practice and policy, if not as a matter of law. The decision whether to pursue the first option of *in situ* preservation or whether to allow research and recovery of UCH is determined case by case.

These US statutes do not expressly address *in situ* preservation. However, the *in situ* preservation policy is discussed in federal guidelines, such as NOAA’s Guidelines for the Exploration, Research, Recovery or Salvage of *Titanic*.<sup>131</sup> In the US, *in situ* preservation is a scientific management approach as opposed to a legal requirement. As a matter of practice, the application of this approach has resulted in leaving UCH on the seabed until there is scientific evidence that indicates that recovery is in the public interest. This involves a balancing of the potential public benefits from recovery, the risks inherent in recovery, as well as the potential loss due to deterioration or due to some federal project. Non-intrusive access is encouraged under the NMSA<sup>132</sup> and the ASA.<sup>133</sup> This appears consistent with the UNESCO Convention.

With regard to recovery, the ARPA requires that archaeological resources remain the property of the US and that “such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or scientific or educational institution. . . .”<sup>134</sup> While none of the other statutes expressly address this requirement, it has been incorporated by reference into sanctuary regulations. Thus it applies in all federal marine protected areas.<sup>135</sup> As indicated below, there are even some admiralty law cases that have resulted in UCH being protected or preserved *in situ*.

### 5.2.2 *The law of salvage and finds – commercial exploitation of UCH*

The prohibitions on commercial exploitation and the use of the law of salvage and finds set out in article 2(7) and article 4 of the UNESCO Convention further explain the primary objectives of protection of UCH. The general rule is that the law of salvage and finds shall not apply to UCH. However, if a nation decides to implement the Convention through amendment of its law of salvage, there is an exception for such an

<sup>129</sup> 16 U.S.C. para. 470aa(b).

<sup>130</sup> 16 U.S.C. s. 470(b)(4).

<sup>131</sup> NOAA Guidelines for Research, Exploration and Salvage of *RMS Titanic*, 66 Fed. Reg. 18905, 18908–09 (April 12, 2001).

<sup>132</sup> 16 U.S.C. s. 1431(b)(5): NMSA management is to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.

<sup>133</sup> 43 U.S.C. s. 2103(a)(2) (access to UCH is to be provided to the public for research, recreation and education).

<sup>134</sup> 16 U.S.C. s. 470cc(b)(3).

<sup>135</sup> 15 C.F.R. 922.2(c)(4)(2005) (sanctuary regulation that incorporates by reference the FAP laws and policies).

approach. However, such an approach could only be taken if the amendments to the law of salvage are made so that it is in full conformity with the Convention. This would require authorizations by the competent authorities to ensure that recovery of UCH achieves its maximum protection and is not subject to commercial exploitation.

Of the US statutes, only the ASA and the SMCA expressly prohibit the application of the law of salvage and finds.<sup>136</sup> Unfortunately, the ASA has been only partially successful in protecting UCH from unwanted salvage. The SMCA has not been tested in court yet; however, it is actually a codification of admiralty court cases where the US, as the owner of UCH, is recognized as having the authority to deny salvage. There are also cases where the admiralty court agreed that government management and control of UCH was sufficient to prevent the award of salvage or application of the law of finds. For example, in *US v. Fisher*, treasure salvors were permanently enjoined from any salvage or removal of UCH in the sanctuary, unless expressly authorized by NOAA pursuant to a sanctuary permit.<sup>137</sup>

The statutes for national marine sanctuaries, parks and other marine protected areas do not have an express prohibition against the law of salvage and finds. However, courts have consistently recognized that Congress, through the NMSA, has exercised its sovereign prerogative and control over UCH in sanctuaries.<sup>138</sup>

In *US v. Fisher*, the admiralty court rejected the argument that the salvor had a right to salvage under the *MDM Salvage* case<sup>139</sup> and admiralty law in general; the admiralty court held that neither the law of salvage nor particular admiralty court orders provide a defense for liability because they are not “federal law” within the meaning of the NMSA.<sup>140</sup> Rather, “federal law” was interpreted to be licenses, permits, and other authorizations pursuant to federal statutes. The court further stated that the NMSA precludes the application of the maritime law of finds and salvage in the Florida Keys National Marine Sanctuary.<sup>141</sup>

In *Craft v. US*,<sup>142</sup> the court ruled against the plaintiffs’ argument that admiralty law provided a right to recover historic shipwrecks from “marine peril” under section 304(c) or otherwise. In particular the court held that:

even if defendants have a right under the statute [NMSA section 304(c)], the Secretary acted within its authority to regulate that right. . . . [A]nyone holding a pre-existing right [must]

<sup>136</sup> 43 U.S.C. ss. 2101–2106 (effective 28 April 1988).

<sup>137</sup> The court found that allowing the Fishers to continue to use mailboxes and remove artifacts was likely to cause further, irreparable, harm to the UCH. The court noted that this activity is now regulated by NOAA through the issuance of permits and, accordingly, the defendants were permanently enjoined from removing sanctuary resources or using a prop-wash deflector without a NOAA sanctuary permit: *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997).

<sup>138</sup> T. Schoenbaum, Vol. 2 *Admiralty and Maritime Law* s. 16–7, at p. 186 (4th edn., 2004).

<sup>139</sup> *MDM Salvage*, 631 F.Supp. 308, 314 (S.D. Fla. 1988).

<sup>140</sup> *US v. Fisher*, 22 F.3d at 270; *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997).

<sup>141</sup> *US v. Salvors Inc.*, No. 92–10027 (S.D. Fla. 30 April 1997) p. 10 fn. 4.

<sup>142</sup> *Craft*, No. 92–1769 (C.D. Cal. 1992); 22 October 1992, Order of Judge Stephen Wilson, Appeal of Administrative case at 6 O.R.W. 150 (NOAA 1990), 1990 NOAA Lexis 29. *Craft v. US*, 34 F.3d 918 (9th Cir. 1994).



apply for a permit to ensure that recovery is done in an environmentally and archaeologically sound manner. . . .<sup>143</sup>

In the *Lathrop* case,<sup>144</sup> the admiralty court ruled against the salvors who argued that requiring permits for dredging the seabed and salvaging the UCH within the boundaries of the national seashore interfered with their rights under the admiralty law of salvage and the common law of finds. The court stated that:

Congressional enactments restricting the *manner* in which a potential salvor excavates property located on federally owned or managed lands does not offend these sound constitutional limitations [to maritime law and admiralty jurisdiction].<sup>145</sup>

Thus, there are a number of examples where admiralty courts have recognized that US management and control of UCH is sufficient to prevent unwanted salvage and awards under the law of salvage and finds.

The requirement that the collection of recovered or salvaged artefacts be kept together has also been incorporated into the federal admiralty court orders regarding *Titanic*.<sup>146</sup> A federal admiralty court order was also used to prevent the salvage of a Japanese 'mini-sub' so that it could be preserved *in situ*.<sup>147</sup> Thus, while the laws of salvage and finds have presented the greatest threat to the preservation of UCH, there are some cases where UCH has been preserved by the government as the owner of the UCH under salvage law, or as the entity in control of UCH under an exception to the law of finds.<sup>148</sup>

<sup>143</sup> *Craft*, No. 92–1769 (C.D. Cal. 1992); 22 October 1992, Order of Judge Stephen Wilson, p. 4.

<sup>144</sup> *Lathrop v. The Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953 (M.D. Fla. 1993).

<sup>145</sup> *Lathrop*, 817 F.Supp. at 962 (emphasis in original) (citing *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) as authority for Congressional power to alter, qualify or supplement the substantive admiralty law without offending the jurisdiction of federal admiralty courts under the US Constitution).

<sup>146</sup> *RMS Titanic Inc. v. Wrecked, and Abandoned Vessel*, Civ. No. 2:93cv902 (E.D. Va. June 7, 1994) (order granting exclusive salvage rights on a number of conditions including keeping the collection together for the public benefit).

<sup>147</sup> *Institute of Aeronautical Archaeological Research, Inc. v. Wreck of Type A "Midget" Japanese Submarine*, Civ. No. 92–0052–BMK (D. Hawaii July 1, 1993) (Consent Judgment and Permanent Injunction that the US is the owner and enjoining the salvage, moving or disturbing of the site without the permission of the US).

<sup>148</sup> *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (Biscayne National Park); *Craft*, 34 F.3d 918, 922 (1994) (Channel Islands National Marine Sanctuary and Park); *Lathrop v. The Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953 (M.D. Fla. 1993) (Cape Canaveral National Seashore); *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997) (Florida Keys National Marine Sanctuary); T. Schoenbaum, Vol. 2 *Admiralty and Maritime Law* s. 16–7, at p. 186 (4th edn., 2004) ("At least within designated national parks and monuments the U.S. has both the power and the interest to exercise dominion and control that amounts to constructive possession of ancient shipwrecks. The federal government may also, at its option, declare the area of an historic shipwreck to be a federal marine sanctuary. . . .")

The US statutes and even certain admiralty court cases are consistent with the general objectives prohibiting the commercial exploitation of UCH under the law of salvage and finds.

These court decisions provide a very strong legal basis for the protection of the UCH in any national marine sanctuary, park or other area where the government exercises control and jurisdiction over UCH. Consistent with article 303 of the LOSC, these decisions should apply to the enforcement of sanctuary regulations against foreign salvage operations conducted in sanctuaries within 24 miles from the baseline used for measuring the territorial sea. Beyond those 24 miles, the enforcement of regulations prohibiting the removal of sanctuary UCH against foreign flagged salvors is consistent with international law where it interferes with the sovereign rights or jurisdiction over natural resources and uses of the continental shelf and EEZ. Salvage operations generally involve digging in the seabed, placement of structures on the seabed, and damage to or injury of natural resources. Therefore, regulations protecting the natural resources will generally provide the sovereign rights and jurisdiction to protect UCH at the site from looting and unwanted salvage.

### 5.2.3 *Activities incidentally affecting UCH (article 5)*

The NHPA<sup>149</sup> and the National Environmental Policy Act (NEPA)<sup>150</sup> are the US laws that primarily address activities incidentally affecting UCH. Prior to any “undertaking” (e.g. issuing permits, expending funds, developing projects, etc.), the NHPA requires that national government agencies take into account the effect it may have on any historic property.<sup>151</sup> In addition, such agencies must afford the Advisory Council on Historic Preservation and the State Historic Preservation Office a reasonable opportunity to comment on the proposed undertaking.<sup>152</sup> The agency must complete the section 106 process prior to issuing any license or permit, or going forward with any other undertaking.<sup>153</sup> The NHPA does not prevent the undertaking from occurring or expressly require the government or permittees to use the best practicable means at their disposal. However, it does require that the adverse effects on heritage resources be taken into account prior to the permit or other federal agency action. In this process, professional and FAP standards are used to guide the process. As such, the NHPA policies and practices of the State Historic Preservation Offices and federal agencies would appear consistent with the requirement of article 5 of the UNESCO Convention for the use of the best practical means at their disposal.

Another statute that requires national agencies to consider the effects of their activities on the environment, including UCH, is the NEPA. Like the NHPA, the NEPA is procedural in nature. It does not contain any enforcement mechanism to prevent harm to

<sup>149</sup> 16 U.S.C. ss. 470 *et seq.*, 470(b)(1).

<sup>150</sup> 42 U.S.C. s. 4321 *et seq.*

<sup>151</sup> 16 U.S.C. s. 470f. As indicated above ‘historic property’ means any prehistoric or historic district, site, building, structure, remains or object eligible for inclusion on the National Register, i.e. meets the National Register listing criteria: 36 C.F.R. s. 800.2(e).

<sup>152</sup> 36 C.F.R. s. 800.1(a).

<sup>153</sup> s. 800.3(c).

heritage resources committed by third parties. The NMSA would also provide authority for addressing the indirect effects from activities conducted in sanctuaries.

#### 5.2.4 *Internal waters and territorial sea (article 7)*

The scope of the US laws discussed above would include UCH in all, or portions of, the territorial sea and internal waters. The NHPA and NEPA would apply to federal undertakings or major federal actions in internal waters. NOAA and the Department of the Interior (DOI) apply these laws in the 12 nm territorial sea and EEZ as a matter of policy, if not law. Other agencies have interpreted the legal requirements under the NHPA and NEPA to be limited to the seaward limit of states or the territorial sea. UCH subject to the SMCA is protected in all of the US maritime zones.

While the US laws protecting UCH in these zones are consistent with the Rules annexed to the Convention, the US delegation at the UNESCO negotiations suggested that within the territorial sea and internal waters the Rules should be guidelines as opposed to requirements, out of respect for nations' sovereignty. Under current international law, nations already have the authority to protect and manage UCH in these zones. The application of rules in these zones is a laudable goal from the perspective of historic preservation. However, it may well be considered as an inappropriate intrusion into the State's sovereignty, thus making it more difficult for such nations to join the Convention even if they support the underlying preservation principles. The US Department of Justice raised one or two issues with regard to this provision, including the problems with federal regulation of state sovereign property and the federal-state relationship (federalism) under the US Constitution.

Under the ASA, title to abandoned shipwrecks has been transferred to the several states of the US. If the US entered into an agreement mandating the application of the Rules to state-owned UCH, it would then raise questions about federalism and may well be unconstitutional. Therefore, even though US law is consistent with this provision, the US would have to exercise authority under article 29 of the Convention so that the Rules did not have mandatory application in these zones under international law. At the negotiations, the US also expressed objections to the Convention's treatment of sovereign immune UCH in the territorial sea and internal waters (see further below).

#### 5.2.5 *Treatment of sunken warships and other State craft that are UCH (articles 7(3), 1(8), 10(7), 12(7))*

The treatment of sunken warships and other State craft is one of the two major issues that prevented the US from supporting the final text of the Convention.<sup>154</sup> US law and policy have codified the international law principle that the flag State continues to own its sunken warships and other State craft unless and until it expressly abandons the craft. This is reflected in the agreements between the US and other nations regarding the protection and management of UCH.<sup>155</sup> The US law protects such craft wherever they are

<sup>154</sup> For the second reason, see Section 5.2.7 below.

<sup>155</sup> The US and France have entered into two agreements of a reciprocal nature. The French recognized US ownership of the CSS *Alabama* in the French territorial sea. France is protecting and regulating access consistent with US interests. The US similarly has recognized French

within the EEZ or on the continental shelf. Admiralty jurisdiction under maritime law has also been used in the US over UCH within the EEZ, such as in the case of the *Central America*, and beyond that in the case of *Titanic*.<sup>158</sup> However, the orders of those courts could only be enforced against persons over whom the court has *in personam* jurisdiction. As indicated in the *Titanic* Agreement, the use of port state jurisdiction to protect and manage UCH in the Area as well as in the EEZ would be consistent with international law. The use of port state jurisdiction is a long-standing basis of jurisdiction under international law whereby the flag State is consenting to the jurisdiction as a condition of port entry. Such jurisdiction is distinguished from any coastal State jurisdiction over the UCH because it is located on its continental shelf or is within its EEZ.

#### 5.2.8 *Annexed Rules for activities directed at UCH*

The US laws and policies regarding activities directed at UCH are consistent with the Rules annexed to the UNESCO Convention. The Rules annexed to the *Titanic* Agreement and the NOAA Guidelines for Exploration, Research, Recovery and Salvage of *Titanic* are nearly identical to the Rules annexed to the Convention.

The annexed Rules set forth general principles and establish scientific rules and standards that are consistent with US statutes and regulations governing federally owned or controlled UCH and with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation.<sup>159</sup> NOAA has incorporated these standards and guidelines into regulations implementing the NMSA. Therefore, DOI and NOAA have regulations and policies regarding activities directed at UCH that are consistent with the Convention, including the annexed Rules.

As indicated above, these US laws and practice are consistent with Rule 1. For example, *in situ* preservation is considered as the first option for management as a matter of practice and policy. Permits are required for recovery of cultural resources. Such permits must be conducted consistent with professional archaeological standards. Only recovery which makes a significant contribution to protection, knowledge or enhancement of UCH is permitted.

The FAP, particularly the ARPA, is consistent with Rule 2's requirement that UCH shall not be traded, sold, bought or bartered as commercial goods. In response to concerns raised by the US delegation and others, however, two important clarifications to Rule 2 were added: one change ensures that the general rule does not prevent the provision of professional archaeological services or necessary services incidental thereto (e.g. commercial salvage services), subject to the authorization of the competent authorities. The other change clarifies that the general rule does not prevent the disposition of UCH recovered in the course of research projects in accordance with the Convention,

<sup>158</sup> *Columbus-America Discovery Group v. Atlantic Mut. Ins.* 974 F.2d 450, 459 (4th Cir. 1992) *cert denied*, 123 L.Ed. 183, S. Ct. 1625 (1993); Ricardo Elia 'Titanic in the Courts' *Archaeology* Vol. 54 (January/February 2001) (summary of court actions regarding *Titanic*, including over a decade of admiralty court cases in the Eastern District of Virginia asserting jurisdiction over the salvage of *Titanic*).

<sup>159</sup> See DOI/NPS website for links to historic preservation laws, regulations, standards and guidelines of the FAP: <http://www.cr.nps.gov/linklaws.htm>.

so long as it does not prejudice its scientific integrity or result in its irretrievable dispersal. The disposition must also be in accordance with Rule 34 (which deals with curation), and again is subject to the authorization of the competent authorities. These provisions are really a codification of professional archaeological standards that are already part of the law, policy and practice of DOI, NOAA, Department of Defense (DOD) and other federal agencies responsible for protecting and managing UCH in the US.

Rules 9–13 describe necessary actions for development of project design for UCH investigations. The requirements for preliminary investigations, methods, and techniques are described in Rules 14–16. Funding requirements, project scheduling, and the qualifications of principal investigators are described in Rules 17–23. Rules 24–36 mainly describe the requirements following fieldwork: conservation of recoveries, site management, documentation, reporting, curation, and dissemination of information for professional research, resource management, and public interpretation. All of these parts of the investigation, management, and protection of UCH are consistent with US domestic laws, policies and practices followed by US agencies.

US laws, policies and practices are also consistent with Rules 34 and 35 that deal with the project archive. All artifacts and supporting documentation must be kept together and intact as a collection to the maximum extent possible, and managed according to international professional standards, subject to the authorization of the competent authorities.

### Conclusion: The Way Forward

The US laws and policies are consistent with the Rules annexed to the UNESCO Convention 2001 and its general historic preservation principles, including the ban against the law of salvage and finds under article 4. However, the Convention's failure to require the consent of the flag State for sunken State craft within the territorial sea, and the extension of coastal States' rights in the EEZ and on the continental shelf continue to raise objection from the US and other nations because these provisions are not consistent with the LOSC. Thus, one way forward would be to have bilateral or multilateral agreements with the US protecting UCH in a manner consistent with the LOSC. The Titanic Agreement may be a model for such agreements, as would major portions of the UNESCO Convention.

