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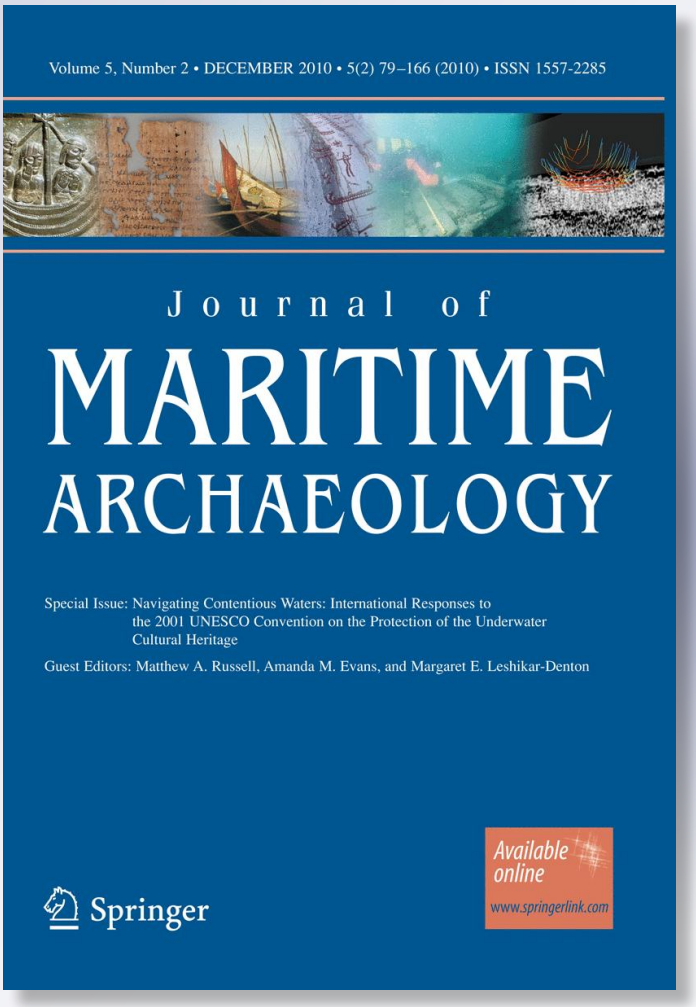

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ORIGINAL PAPER

United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

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Abstract While the US is not a signatory to the 2001 UNESCO Convention, much progress has been made by US agencies to implement its Rules and principles. The US signed an Agreement on *Titanic* with Rules that are nearly identical to the UNESCO Convention. US agencies have also expressed support for the Rules and their implementation into their programs. This paper identifies these positive actions as well as the two primary concerns that have prevented the US from signing the Convention to date: (1) "creeping coastal State jurisdiction" and (2) treatment of sunken state vessels.

Keywords Underwater cultural heritage · Salvage · 2001 UNESCO convention · Law of the Sea

The views expressed here are those of the authors in their individual capacity and do not necessarily reflect the view of NOAA, the Department of Commerce or the United States Government.

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Introduction

We are all connected by the sea and within it are time capsules that contain stories of humankind throughout the ages. These time capsules are a treasure of information important for understanding the heritage of humankind. Some of these time capsules may also contain gold, silver, and other treasures that are a lure for looting and unwanted salvage. Just as humans have over exploited much of the natural heritage off of their coasts, and now threaten the natural heritage in deep seas, we are also seeing the exploitation of our cultural heritage move into the deepest parts of the sea.

In the negotiation of the Law of the Sea Convention (LOSC) (1982), some nations flagged this threat and suggested that nations with coastlines (coastal states) should be recognized as having exclusive authority and jurisdiction to control activities directed at cultural heritage on their continental shelf and Exclusive Economic Zone (EEZ) similar to the control that was being sought to be recognized over activities directed at the natural heritage off their coast, e.g., protection and exploitation of fisheries, oil, gas and minerals. Maritime nations were concerned about restrictions on their rights under customary international law, particularly the right of navigation. These nations argued that the flag State (nation under which a ship registers and thus subject to its jurisdiction) should continue to control these activities in the High Seas and even in the newly created EEZ. A compromise was negotiated such that coastal State jurisdiction over cultural heritage would extend beyond the territorial sea out to the limit of the 24 nm contiguous zone under the LOSC and contemplated that more specific provisions would be addressed in some future agreement. Salvage of *Titanic* and other deep water wreck sites reinvigorated international efforts to protect our underwater cultural heritage (UCH) from the threat of exploitation.

Since negotiation of the LOSC, the US government has made substantial progress in the development of laws, practices and policies to address this threat. However, salvors from the US continue to work in the high seas and even off the coasts of other nations to commercially salvage UCH without any permit or authorization from the coastal State or the Flag State. The 2001 UNESCO Convention is viewed by many nations and individuals as being the next best step to addressing this problem. This has resulted in many questions as to what the US position is and why it has not yet signed the Convention to address these issues.

United States Position on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

The United States (US) Has Stated its Support for the Preamble, the Annex Rules and Most of the General Principles of Historic Preservation in the 2001 UNESCO Convention

The US actively participated as an Observer delegation in the negotiation process convened by the United Nations Educational, Scientific and Cultural Organization (UNESCO), where it expressly supported the development of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention) (O'Keefe 2002). The US had one of the largest delegations and perhaps the most controversial, as in addition to representatives of various government agencies, museums, archaeological institutions and recreational dive organizations, it also included representatives of the salvage industry. The 2001 UNESCO Convention, ratified by thirty-six States as of the date

of this publication, is a multilateral instrument that was established for the protection of underwater cultural heritage (UCH). Early in the negotiation process, progress was made on the important scoping provisions of the 2001 UNESCO Convention, particularly in limiting the Annex Rules and many other provisions to "activities directed at underwater cultural heritage," so it was clear that the general scope of the 2001 UNESCO Convention was directed at looting, salvage and research and did not directly cover pipeline and cable laying, fishing and military activities (O'Keefe 2002). In statements by the US delegation heads, it was noted that the US believed that the Preamble, Annex Rules, and general principles of historic preservation of the 2001 UNESCO Convention reflected substantial progress in the protection of UCH (Blumberg 2001; Wanner 2001).

The US supported UCH protection and management consistent with customary international law, as reflected in LOSC. The delegation's principal concerns with the 2001 UNESCO Convention were: (1) the provisions that they perceived create new rights for coastal States over the activities of foreign nationals and vessels on the Continental Shelf/Exclusive Economic Zone (EEZ), and (2) the treatment of sunken warships in the Territorial Sea (O'Keefe 2002). Other major maritime powers, including Russia and the UK, also expressed concern with the 2001 UNESCO Convention for reasons similar to those of the US (Aznar-Gómez 2010; Williams 2006). On behalf of the US, the US Department of State has signed bilateral and multilateral agreements with other States to protect UCH in a manner consistent with its views about jurisdiction and the treatment of sunken sovereign immune vessels. Examples of UCH that have been protected by such international agreements include RMS *Titanic*, *La Belle,* CSS *Alabama* and Japanese Type-A *Kohyoteki* midget submarines offshore Pearl Harbor.

The US Two Primary Concerns with the 2001 UNESCO Convention

The US delegation noted two separate issues of concern during the Convention negotiations; the potential for "creeping jurisdication" of coastal States, and the treatment of sunken warships. The LOSC says that all States—including both coastal States and flag States—have a duty to protect "objects of an archaeological or historical nature found at sea and shall cooperate for that purpose" [art. 303(1)]. The seaward limit of coastal State jurisdiction over such UCH is 24 nautical miles from the baseline from which the Territorial Sea is measured, which corresponds with the seaward limit of the Contiguous Zone [art. 303(2)]. One of the US delegation's primary concerns was that certain provisions of the 2001 UNESCO Convention that apply to the Continental Shelf (CS) and the Exclusive Economic Zone (EEZ) upset the delicate balance of jurisdiction and authority under the LOSC between coastal States and flag States, with preference given to coastal States (Blumberg 2001). This perceived increase in jurisdiction or authority is often referred to as "creeping jurisdiction" of the coastal State.

Concern over "Creeping Coastal State Jurisdiction" over Underwater Cultural Heritage on the CS/EEZ Seaward of the Contiguous Zone

The head of the US delegation expressed concern over the 2001 UNESCO Convention, particularly the reporting scheme in article 9 and the protection scheme in article 10. As Blumberg noted, "[i]n some cases, these provisions are unsatisfactory because they create new rights for coastal States in a manner that could alter the delicate balance of rights and interests set up under [the LOSC]" (Blumberg 2001). For example, article 9(1) (b)(i) of the 2001 UNESCO Convention requires direct prior notification to a coastal State of any

activity to be directed at UCH in its EEZ or on its CS. Thus, the US concern is that such a broad notice requirement may upset the balance of rights and jurisdiction between flag States and coastal States found in the LOSC. For example, there is concern that vessels conducting military surveys would arguably be required to provide direct prior notification and thus undermine the national security interests.

Similarly, the protection scheme set out in article 10 of the 2001 UNESCO Convention creates a right for the coastal State, acting as the "coordinating State," to take unspecified and unlimited protective measures to prevent immediate danger to UCH located in its EEZ or on its CS. Of particular concern was that the coastal State may take such protective measures prior to consultations with other States on whose behalf the coastal State is intended to be coordinating. There is a duty under the Law of the Sea Article 303(1) to cooperate with other nations for such protection and consent for certain activities if the UCH is also a sunken warship. Protective measures were here expressly not limited to dangers caused by "activities directed at UCH," which was such an important scoping provision for the 2001 UNESCO Convention on which consensus had previously been reached. The definition of "activities directed at UCH" that was originally negotiated made it clear that the scope of the 2001 UNESCO Convention was intended to be generally limited to protecting UCH against looting and unwanted salvage. Thus, the 2001 UNESCO Convention would not be directly applicable to pipeline and cable laying, fishing and other activities not specifically directed at UCH that would likely make reaching a consensus much more difficult. However, instead of limiting the scope of article 10 to make the provision consistent with the application of the Annex Rules and other provisions of the 2001 UNESCO Convention, the provision was extended to any danger "whether arising from human activities or any other cause."

The US delegation was somewhat frustrated at the negotiation meetings because it believed that its proposals to protect UCH on the CS/EEZ, based on how it had implemented the US National Marine Sanctuaries Act (NMSA) consistent with the LOSC, were sufficient to address the primary concerns of looting and unwanted salvage (see discussion below for how US protects UCH under the NMSA). The proposals of the US based on the NMSA approach were supported by other States and ultimately resulted in the creation of article 10(2) of the 2001 UNESCO Convention (Dromgoole 2006). Article 10(2) says that "[a] State Party in whose Exclusive Economic Zone or on whose Continental Shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea." Dromgoole (2010) provides a detailed analysis interpreting LOSC Marine Scientific Research (MSR) in relation to UCH. She suggests that applying MSR to seabed (Continental Shelf and Area) research and surveys for the exploration and exploitation of UCH would address the threat to UCH that exists under the current LOSC regime; the current regime applies solely to scientific research of the seabed for natural resources and not for UCH (Dromgoole 2010).

The US has shown that it is willing to address the protection of UCH in a manner that does not upset the balance of coastal State and flag State jurisdiction and authority under the LOSC. A prime example of this cooperative spirit is the quadripartite international Agreement Concerning the Shipwrecked Vessel RMS *Titanic* (*Titanic* Agreement), which the US negotiated with the UK, France and Canada; the US is currently waiting for Congress to pass enacting legislation in order for the agreement to come into force.

Concern Over the Treatment of Sunken Warships and Other State Vessels Subject to Sovereign Immunity

During Convention negotiations, the US expressed concerns about provisions set forth in articles 7 and 10 of the 2001 UNESCO Convention, which address sovereign state vessels. These provisions encourage cooperation between the coastal State and flag State, but protective measures, including recovery, are permitted to proceed without the formal cooperation of the flag State in the urgent event of immediate danger to UCH. As stated by Blumberg, these provisions of the 2001 UNESCO Convention affecting State vessels and aircraft were inadequate because they fail to "provide a regime under which the flag State must consent before its vessels can be the subject of recovery" (Blumberg 2001).

International Agreements with the US that Protect Sunken Warships In the same cooperative spirit as the *Titanic* Agreement, the US has demonstrated its willingness and ability to manage and protect sunken warships. The US has agreements with France on CSS *Alabama* and *La Belle*, and with Japan on the *Kohyoteki* midget submarines, which demonstrate US recognition of coastal State jurisdiction over sunken warships, in a manner that respects the need for the flag State's consent prior to disturbance of UCH in its Territorial Sea (CSS *Alabama* Agreement 1995; *La Belle* Agreement 2003; Midget Submarine Agreement 2004). Specifically, the agreements with France and Japan recognize the ownership and sovereign immunity of sunken warships but also recognize the jurisdiction and authority of coastal States over foreign sunken warships located within their territorial seas.

United States Law and Policies Protecting Sunken Warships In 2001, President William J. Clinton issued a Statement on the United States Policy for the Protection of Sunken Warships (Statement) (Clinton 2001). In sum, the Statement provides notice that the US maintains ownership of its sunken State craft wherever located unless expressly abandoned, in a manner directed by Congress; the law of finds shall not apply and no salvage is authorized without the government's express permission. In 2004, the US Congress passed the Sunken Military Craft Act (SMCA) that codified this policy thereby protecting US sunken military craft wherever located and foreign vessels located within the US 24-nautical-mile Contiguous Zone (SMCA 2004).

The SMCA clarifies that sunken military vessels and aircraft—both US and foreign—located in US waters, which 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 (SMCA, sect. 1401). The SMCA facilitates the uniform application of long-standing US policy, international law and federal admiralty court cases within the jurisdiction of the US In particular, the SMCA encourages reciprocal treatment by foreign sovereigns and supports elimination of the application of the law of finds to any such vessels (SMCA, sects. 1403(d), 1406(c)). Except perhaps pursuant to a contract entered into with the flag State owner, the SMCA should also help eliminate any award for the (unwanted?) salvage of such craft (SMCA, sect. 1406(d)). A review of the federal admiralty court cases, laws and US policy leading up to this most recent domestic law to protect sunken State craft will be helpful in understanding its context and application.

The need for the SMCA is supported by case law. In *Hatteras, Inc. v. The USS Hatteras*, the salvors argued that a shipwreck was abandoned by the US government because it had been underwater for more than 100 years (*Hatteras* 1984). The court, however, disagreed

and 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 another case, US *v. Steinmetz*, the US successfully recovered the bell from CSS *Alabama*, which sank off the French coast in 1864 from Richard Steinmetz, an antique dealer who had purchased the salvaged bell (*Steinmetz* 1993). The US Navy became aware of the bell through a notice that it was to be auctioned. After Mr. Steinmetz refused to return the bell to the Navy, the US government filed an action against him. The court determined that the US was the sovereign successor to the Confederacy and as such, had acquired all right and title to the property of the Confederate States of America including *Alabama* and the bell, which had not been abandoned.

In a landmark case that demonstrates how foreign sovereign vessels are protected in US waters, *Sea Hunt v. Unidentified Shipwrecked Vessel,* the court recognized the ownership interests of a foreign sovereign, the Kingdom of Spain, to two frigates of war that sank within the US Territorial Sea (Aznar-Gómez 2010; *Sea Hunt* 2001). Two ships, *Juno* and *La Galga de Andalucía*, were lost off the Virginia coast in 1750 and 1802, respectively. They were reportedly found by Sea Hunt, Inc., in the late 1990s. Sea Hunt had authorization from the state of Virginia to salvage the wrecks, which Sea Hunt presumed to be abandoned and subject to the Abandoned Shipwreck Act of 1987. The salvors claimed a salvage award against the wrecks and, 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 were sunken sovereign vessels. The court also held that the vessels 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. Because Spain was the owner and it had expressly rejected salvage, the court held that Sea Hunt was not entitled to a salvage award.

Finally, in *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked, and Abandoned Aircraft*, the US successfully halted the unwanted salvage of a World War II aircraft off the Florida coast (*International Aircraft* 2001). The federal admiralty court held that the US had not abandoned the wreck. As it was still the owner, the US had 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 The court subsequently determined that a salvage award was not warranted because the US had objected to salvage of the aircraft.

Several lessons can be gleaned from the cases 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. Second, 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. Third, it is in the US interest to help protect foreign State UCH in US waters in order to foster their reciprocal treatment of US UCH in foreign waters. Fourth, such notice of policy and practice would provide a better administrative record in admiralty court cases. It was as a result of these cases, that the US issued a policy regarding sunken warships and other craft in a statement by President Clinton (Clinton 2001). These cases were also the catalyst for a bill that ultimately became the SMCA.

Consistent with these 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 Sates; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank" (SMCA, sect. 1401). The SMCA prohibits "any activity directed at a sunken military craft that disturbs, removes, or injures" the craft except as authorized by a permit (SMCA, sect. 1402).

In addition, the SMCA protects foreign State craft in US waters, provides for the respectful treatment of the "remains and personal affects" of military personnel, and requires protection of sensitive archaeological artifacts and historical information (SMCA, sects. 1403(a), 1408). The SMCA 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 (SMCA, sects. 1403–1404). Violators may also be liable for damage resulting from the disturbance of sunken military craft and subject to otherwise applicable criminal law sanctions. Activities otherwise prohibited by the SMCA may be carried on only as provided by a permit issued by the Secretary of the Navy, the Secretary of the Air Force or other appropriate military unit.

Furthermore, 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" (SMCA, sect. 1406(c)). 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" (SMCA, 1406(d)). 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. The SMCA 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 (SMCA, sect. 1407).

Because US craft are owned by the US, the policies and legal restrictions of the SMCA do not raise all of the issues associated with having similar restrictions on privately owned property. In addition, since the craft are subject to US flag State jurisdiction, the regulation of such UCH by the US is consistent with the balance of interests under the LOSC. If the US were a party to the 2001 UNESCO Convention, it could cite the SMCA as authority to implement its obligations to protect UCH that is also sunken military craft in a manner that is consistent with current State practice and international law as reflected in the Sea Hunt case of the *Juno* and *La Galga* Spanish warships in the US territorial sea (see Anzar-Gomez 2010 for an excellent argument and analysis on how this consent regime appears to already be required for sunken warships in all maritime zones including the territorial sea under the 2001 UNESCO Convention and LOSC).

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 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*.

International Agreement on *Titanic* Negotiated with the United Kingdom, France and Canada: Example on how to Protect Underwater Cultural Heritage on the Extended Continental Shelf/High Seas Consistent with the LOSC

Since it sank on April 15, 1912, taking the lives of passengers and crew, RMS *Titanic* has captivated the interest of people worldwide. The *Titanic* story has been told through numerous articles, books, movies and other media. *Titanic* has reached iconic status and has become the most readily recognized shipwreck in history. This maritime casualty resulted in governmental investigations in the US and the UK, and was the catalyst for the establishment of the International Convention for the Safety of Life at Sea and the International Maritime Organization (House Report 1985). Furthermore, the 1985 discovery of the site by a US/French expedition initiated the US statute, RMS *Titanic* Maritime Memorial Act 1986 (*Titanic* Act) (*Titanic* Act 1986).

The *Titanic* Act suggested that the wreck site be treated as a maritime memorial. Canada is the closest coastal State to the wreck site, which lies more than 325 nautical miles off the coast of Newfoundland and even further from any US territory (*Titanic* Agreement). The US Congress recognized that while it had a significant interest in protecting *Titanic*, it needed the co-operation of other interested nations. Consequently, the US Congress called for the US Department of State to negotiate an international agreement with the U.K., Canada, France and any other interested nations to designate the wreck as a maritime memorial and protect it from looting and unwanted salvage (*Titanic* Act 1986). The *Titanic* Act also directed the National Oceanic and Atmospheric Administration (NOAA) to consult with these same nations in the subsequent development of international guidelines (NOAA Guidelines) for the exploration, research and, if determined appropriate, the possible salvage of artifacts. The NOAA Guidelines are based on Rules annexed to the *Titanic* Agreement, as well as the International Council on Monuments and Sites (ICOMOS) Charter on the Protection and Management of Underwater Cultural Heritage (1996) and the 2001 UNESCO Convention Annex Rules (NOAA Guidelines 2001). The UK signed the Titanic Agreement in 2003, and has exisiting legislation to implement the agreement. The US signed the *Titanic* Agreement on June 18, 2004, although implementing legislation is still necessary for the *Titanic* Agreement to come into effect in the US Although this Agreement is not yet in force and the NOAA Guidelines are advisory, the NOAA Guidelines and *Titanic* Agreement have been cited by the court (RMS *Titanic* 2004).

While US courts will respect treaties, conventions and other international agreements to which the US is a party, when salvors approached the court in the early 1990s requesting *Titanic* salvage there was no such agreement. In the absence of any international agreement, the court asserted "quasi *in rem* jurisdiction" over the wreck site, which ripened into an assertion of "constructive jurisdiction," or jurisdiction out of necessity. This is recognized as a legal fiction. The court clearly has *in personam* jurisdiction over the salvors, RMS *Titanic* Incorporated (RMST). Thus, the Judge is in a position to protect and manage the wreck site and salvage in a manner that the *Titanic* Act 1986 did not provide for the Executive Branch. The Judge 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 (Niemeyer 2005).

The Judge rejected RMST's arguments that it owned *Titanic* under the law of finds (*RMS Titanic* 2004). Although the court has granted RMST exclusive rights for the salvage of artifacts in the debris field, it has denied RMST's requests to penetrate the hull, thereby

preventing RMST from entering and salvaging artifacts that are inside the hull (RMS *Titanic* 2000). 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 has granted RMST's request for an award of approximately $110,000,000 for its salvage services. The court decided to wait until August of 2011 to see if some acceptable entity is willing to purchase the collection so that the proceeds may be used to satisfy the award or whether to grant RMST's request to award the Collection of artifacts along with the Covenants and Conditions in the absence of any other means to satisfy the award (see http://www.gc.noaa.gov/gcil_titanic-salvage.html for copies of the decision as well as the C&Cs which incorporate many of the provisions in the international Agreement on *Titanic* and standards of the Federal Archaeological Program).

Though *Titanic* and the maritime law of salvage are very far and distant from the preservation of archaeological resources on US public lands, the US Federal Archaeological Program (FAP) provides helpful instruction for how to protect and manage *Titanic* and other UCH.

NOAA's Protection and Management of UCH in a Manner Consistent with the 2001 UNESCO Convention and the LOSC

The National Marine Sanctuaries Act (NMSA) 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, significance (NMSA). NOAA protects and manages these "areas of the marine environment possess[ing] conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, or aesthetic qualities which give them special national, and in some cases international, significance" (NMSA, sect. 1431(a)(2)). In 2006, the Director of the Office of National Marine Sanctuaries (ONMS), Daniel J. Basta, stated his support for incorporating the 2001 UNESCO Convention Annex Rules into the ONMS activities (Basta, 2006). NOAA has broad and comprehensive authority to protect and manage sanctuary resources and activities under the NMSA. This includes the authority to prohibit and otherwise regulate activities, issue permits, assess civil penalties and conduct other enforcement (NMSA, sects. 1436-1437). Injunctive relief is also available in order to prevent the destruction of sanctuary resources.

For example, in *US v. Fisher*, treasure salvors were enjoined from using propeller wash deflection devices in the Florida Keys National Marine Sanctuary (*Fisher* 1994). The preliminary injunction was based primarily on the irreparable harm caused by destructive use of deflector devices to natural sanctuary resources, particularly seagrass beds. The court initially deferred making a decision on whether the salvage of historic sanctuary resources would continue under admiralty law. However, the court subsequently issued a permanent injunction against any salvage or removal of the UCH, unless expressly authorized by NOAA pursuant to a sanctuary permit.

The NMSA shows much promise in protecting historical sanctuary resources because it is a far-reaching statute. Sanctuaries may be established to the outer limit of the US sovereign rights and jurisdiction, i.e., the 200 nautical miles Exclusive Economic Zone (EEZ) (NMSA, sect 1437(k)). To date, there are thirteen US national marine sanctuaries protecting over 150,000 square miles of significant natural resources and UCH (*Monitor* 2008). Most sanctuaries are in coastal waters where some of the most significant natural

features are located and where most human uses occur. It is because of this human use that most UCH is located in coastal waters, including shipwrecks and inundated sites of early humans. There are now two national marine sanctuaries designated solely to the protection of historic shipwrecks. The first protects the ironclad Civil War vessel, USS *Monitor*, which is located 16 miles off the coast of the North Carolina Outer Banks (*Monitor* 2008). The *Monitor* National Marine Sanctuary, designated in 1975, was the first national marine sanctuary, serving as the cornerstone for the national marine sanctuary UCH management program. The second national marine sanctuary that protects UCH is the Thunder Bay National Marine Sanctuary located off the eastern coast of Michigan in Lake Huron; this sanctuary was designated in 2000 (Thunder Bay 2009).

Monitor National Marine Sanctuary

The wreck of the USS *Monitor* was designated as a national marine sanctuary to protect this nationally significant UCH resource from looting and salvage. As it is located approximately 16 miles off of the North Carolina Outer Banks, this first US marine sanctuary was actually located in, what was at the time, the High Seas beyond the 3 nautical miles (nm) Territorial Sea and 12 nm Contiguous Zone (*Monitor* 2008). Of course, enforcement of its regulations was limited to US flagged vessels and nationals in order to be consistent with international law at that time. The 1999 proclamation of a US Contiguous Zone to the 24 nm limit, consistent with the LOSC, provides that the *Monitor* regulations may now be enforced against even foreign flagged vessels and nationals. For more than fifteen years the sanctuary was managed as an archaeological site; direct physical access was permitted only as part of proposed archaeological research on *Monitor*. In the 1990s, NOAA denied public requests for permission to dive in the sanctuary and photograph the site, limiting access to private divers for research purposes only. While NOAA's decisions withstood legal challenge, the underlying policy restricting public access at this site came under scrutiny of the US Congress, the dive community and others (*Gentile* 1990).

As a result, NOAA amended its practice and policy in the *Monitor* National Marine Sanctuary by issuing new "special use" permits for non-intrusive diving in the sanctuary without requiring that scientific research be conducted (*Monitor* 2008). This permit practice reflects the change in the public's interest in how *Monitor* should be managed, particularly regarding public access. NOAA and some private permittee research clearly added to NOAA's data revealing that over time *Monitor* was deteriorating more rapidly than indicated by earlier research. Accordingly, NOAA revised its management plan and has since conducted research, recovery, and conservation of the turret and other important artifacts from the shipwreck. Thus, *Monitor* is an example of when in situ preservation policy was the first option exercised; recovery did not occur until after scientific research was conducted that indicated recovery was in the public interest for long-term preservation.

Thunder Bay National Marine Sanctuary

The Thunder Bay National Marine Sanctuary (TBNMS), like all of the other sanctuaries except *Monitor*, does not require a permit for non-intrusive public access to UCH. To the contrary, Thunder Bay maintains an active mooring buoy program to facilitate safe public access while eliminating the risk of harm to UCH that is associated with anchoring near or into the UCH or even tying boats directly to the UCH (Thunder Bay 2009). Like all of the other sanctuaries, recovery, or even moving of UCH, is prohibited without a permit.

Accordingly, there are regulations in place to prevent looting and unwanted salvage in the sanctuary.

The TBNMS Final Management Plan is consistent with the NMSA and implementing regulations that incorporate the standards, requirements and policies of the FAP developed by the National Park Service (Thunder Bay 2009). Additionally, the ONMS has incorporated the 2001 UNESCO Convention Rules into office practices and policies, including the TBNMS Final Management Plan, which is also consistent with the FAP. NOAA's authority under the NMSA to protect historic sanctuary resources from looting and unwanted salvage has withstood every legal challenge to date. The courts have consistently ruled that admiralty law provides no legal haven for the removal of, or injury to, historic sanctuary resources. The courts have uniformly ordered salvors to adhere strictly to sanctuary regulations and NOAA's permitting regime in the national marine sanctuaries.

Regulations that Generally Apply in all Sanctuaries that Protect UCH

There are two sanctuary regulations implemented in all sanctuaries that provide broad protection of UCH by prohibiting: (1) the removal of, or injury to, historic sanctuary resources and (2) any alteration of the seabed. Both these regulations were applied in the administrative enforcement proceedings against divers caught excavating the seabed and looting historic sanctuary resources in *Craft v. NPS and NOAA* (*Craft* 1994). This case was a "sting operation" by the National Park Service regarding looting and unwanted salvage of UCH located in the Channel Islands National Marine Sanctuary and National Park. 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. 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 an underwater bell to warn if any enforcement patrols were spotted was found to be 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" [*Craft*, 34 F.3d 918, 922 (1994)]. The court ruled that the fine was reasonably based on the heinous acts of the dive master.

In *Craft*, the looters also challenged the application of the regulation prohibiting alteration of the seabed to their removal of the UCH (*Craft*, 1994). 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 salvaging UCH from the seabed. Therefore, Craft argued that enforcement of this seabed regulation against salvaging 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. 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's 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 unsuccessfully argued that the regulations conflicted with the principles of admiralty law.

Conclusion

While the US supports the Preamble, Annex Rules and most of the general principles, it has not signed the 2001 UNESCO Convention because of concerns about the regime on the continental shelf and EEZ applying to activities that are not directed at UCH in a manner that would upset the balance of interests of flag States and coastal States under the LOSC, and an inconsistent application of the flag State consent regime that applies to sunken warships in all of the maritime zones except the territorial sea. Nonetheless, the US has taken steps to protect UCH in a manner consistent with the framework of the LOSC and the 2001 UNESCO Convention Annex. As such, the international agreements on *Titanic* and sunken warships, the SMCA and NOAA's implementation of the NMSA demonstrate an interest and willingness to cooperate with other nations to protect UCH from looting and unwanted salvage consistent with the LOSC and the 2001 UNESCO Convention.

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