

## Chapter 13

### UNITED STATES OF AMERICA

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#### 1. Introduction

The sea and its bed have provided a natural barrier to salvage of the underwater cultural heritage (UCH), which has been accumulating since the dawn of humankind. While much of the UCH is stable and preserved by the marine environment, it remains vulnerable to its greatest risk, unregulated salvage. Until the advent of SCUBA technology in World War II, access to these irreplaceable resources was limited to those who could hold their breath long enough to dive and return with goods from the wreck. In the 1960s, a cottage industry of treasure hunting and salvage evolved in Florida, particularly in Key West, where salvage of recent marine casualties had previously been part of the local industry and custom. Armed with SCUBA, remote-sensing devices and equipment able to blow away vast amounts of the seabed habitat, treasure hunters began to salvage gold, silver and jewels that had been lost for generations.

Archaeologists, historians and others decried the loss and destruction of the UCH and have suggested that various governments protect the public's interest in these resources. The United States (US) and the underlying coastal State governments have been entrusted with the protection and preservation of the UCH. These entities are therefore faced with the awesome task of protecting and managing the UCH for use by present and future generations.

Protection of our UCH is becoming increasingly difficult due to advances in deep water exploration and exploitation technology. Submersible vehicles now provide access to the deepest parts of the ocean. Even the *Titanic*, which is under 12,500 feet of water, is subject to potential loss or destruction by salvors. There is no US program or statute providing *comprehensive* protection of the UCH. The location, ownership and control of the UCH primarily determine which national or state preservation laws apply. For the most part, the national government has delegated to the individual states responsibility for the protection and management of the UCH on state submerged lands. Outside three nautical miles, the UCH is protected if it is in a National Marine Sanctuary. In addition, any UCH that is likely to be affected by activities of the national government, including the issuing of permits, is subject to environmental and historic preservation law considerations. However, these US preservation laws are limited in scope, and leave much of the UCH vulnerable to loss or destruction from private activities, such as salvage.

#### 2. Overview of Issues Concerning Protection and Salvage of UCH

In order to create legal rights to their finds, treasure salvors file *in rem* actions against the vessels and their cargo (hereinafter 'shipwrecks') in US federal district admiralty courts. Generally, they assert that – under the law of finds – title to an abandoned shipwreck is vested in the person

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\* The views expressed in this chapter are the personal opinions of the authors and do not represent the official positions of the US government, the National Oceanic and Atmospheric Administration (NOAA), or the Department of Justice.

who finds it and reduces it to his or her possession.<sup>1</sup> Alternatively, they argue that, because the shipwrecks are in 'marine peril', the public interest would be best served by salvaging the shipwreck and returning it into the stream of commerce.<sup>2</sup> If successful, they obtain a salvage award for services rendered, which often amounts to the vast majority of the recovered treasure.<sup>3</sup>

The national and underlying state governments have countered the salvors' claims with various arguments, including their own claims of ownership of the UCH. The US government's initial position was that it owned abandoned shipwrecks on its outer continental shelf. In the landmark case, *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel* ("the Atocha"),<sup>4</sup> however, the court determined that, while the US had ample authority to exercise its sovereign prerogative to claim ownership of abandoned shipwrecks, it had not done so under the Outer Continental Shelf Lands Act, the Antiquities Act, or the Abandoned Property Act.<sup>5</sup> The court explained that US control over the outer continental shelf was limited to exploration and exploitation of natural resources. The US had not asserted its sovereign prerogative over historic resources on the outer continental shelf under the Outer Continental Shelf Lands Act, or otherwise.<sup>6</sup> In support of its opinion that the Outer Continental Shelf Lands Act was limited to natural resources and did not include the UCH the court noted that the 1945 Truman Proclamation and the 1958 Convention on the Continental Shelf were both limited to natural resources.<sup>7</sup> The fallout from the *Treasure Salvors* case is significant and has affected US legislation on the UCH, including the Abandoned Shipwreck Act and the Archaeological Resources Protection Act, which are discussed below.

### 3. US Statutes Protecting Certain Underwater Cultural Heritage

#### 3.1 Abandoned Shipwreck Act of 1987

For decades, US state governments have asserted ownership rights to the UCH pursuant to the Submerged Lands Act and state historic preservation laws. In some cases, states have successfully argued that the Eleventh Amendment to the US Constitution, which recognizes states' sovereign immunity from suit, barred federal admiralty courts from determining the states' interests in shipwrecks on state submerged lands. In other cases, states waived their immunity and prevailed in convincing federal admiralty courts that they owned the shipwrecks in their sovereign state submerged lands. However, in a majority of the federal admiralty cases, salvors prevailed in getting ownership rights to the UCH under the law of finds.

- 1 *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel (the 'Atocha')*, 569 F.2d 330, 337 (5th Cir. 1978): the court preferred law of finds over salvage as did the treasure hunter who got ownership of the shipwreck rather than an award of money or percentage of the salvaged objects.
- 2 The salvor obtains an award and a lien on the salvaged property for services rendered if three conditions are met: the shipwreck is in 'marine peril'; the salvor's services are voluntarily rendered; and the salvor achieves success in whole or in part in recovering shipwrecked property: see *The Sabine*, 101 U.S. [11 Otto] 384 (1879).
- 3 See *Columbus-America Discovery Group v. Atlantic Mut. Ins.*, 974 F.2d 450, 459 (4th Cir. 1992): the court preferred the law of salvage over finds; 90 percent of treasure was awarded to the salvors.
- 4 569 F.2d 330 (5th Cir. 1978).
- 5 Outer Continental Shelf Lands Act 43 U.S.C. s. 1331; Antiquities Act 16 U.S.C. s. 470; Abandoned Property Act 40 U.S.C. s. 310.
- 6 The rule in the US, largely established by this landmark case, is that the sovereign must expressly exercise its authority over the UCH.
- 7 *Treasure Salvors*, 569 F.2d at 338-40.

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In response to the need to protect certain UCH and address this confusion over ownership, the role of admiralty law and other public interests, Congress passed the Abandoned Shipwreck Act (ASA).<sup>8</sup> Congressional findings support the view that the states already had the authority to manage the UCH pursuant to the Submerged Lands Act and that the ASA merely codified this minority view of admiralty cases.<sup>9</sup> However, confusion as to the scope of the ASA continues to cloud the governments' ability to protect and manage the UCH.

### 3.1.1 US asserting ownership over abandoned shipwrecks

In passing the ASA, the US Congress exercised its sovereign prerogative to protect certain UCH by asserting title to abandoned shipwrecks embedded in state submerged lands and to those located on state submerged lands and determined to be of historic significance.<sup>10</sup> Under section 6(c), title to these shipwrecks is then simultaneously transferred to the states.<sup>11</sup> Title to abandoned shipwrecks on certain federal public lands, such as national parks and Indian lands is reserved to the US from transfer to the states.<sup>12</sup> Many presumed that the ASA protected all historic shipwrecks in or on state submerged lands. However, subsequent litigation has shown the vulnerability of the ASA. In some cases, salvors shifted their strategy by arguing that the shipwrecks are not abandoned and, therefore, not covered by the ASA. In turn, they demanded liberal salvage awards or divided up the recovered goods pursuant to salvage contracts with owners/insurers. These cases revive the old dispute between salvors and sovereigns as to whether the law of salvage or historic preservation laws apply. The debate involves questions of what the states must demonstrate to prove that a shipwreck is 'abandoned' and, conversely, what a salvor must show to prove that the law of salvage applies. The results are mixed but clearly bring into question the scope of protection afforded by the ASA.

### 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>13</sup> Unfortunately, the term "abandoned" is not expressly defined by the ASA.<sup>14</sup> This is because Congress relied on the *Treasure Salvors* case and its progeny where federal admiralty courts traditionally inferred the abandonment of long-lost shipwrecks by the passage of time and the absence of a claim therein.<sup>15</sup> Under admiralty law, the process for determining

8 43 U.S.C. ss. 2101-2106 (effective 28 April 1988).

9 43 U.S.C. s. 2101.

10 43 U.S.C. s. 2105 (a). The UCH is "historic" if it is eligible for listing on the National Register of Historic Places.

11 43 U.S.C. s. 2105(c).

12 43 U.S.C. ss. 2101, 2105. The ASA assertion of title and the transfer of that title to states with reservations for public lands is very similar to the transfer and reservations of title to submerged lands under the Submerged Lands Act.

13 43 U.S.C. s. 2105(a).

14 "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 Dec. 1990). See further, J. Ashley Roach "Sunken warships and military aircraft" (1996) 20 *Marine Policy* 351-354.

15 "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 2. See also *Moyer v. Wrecked & 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.

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abandonment is by express renunciation or by inference based on the totality of the circumstances.<sup>16</sup> With regard to long-lost historic shipwrecks, the inference of abandonment by the courts became tantamount to a presumption that such wrecks were abandoned by the mere passage of time.<sup>17</sup> However, by not codifying this meaning of "abandonment", Congress left the determination of its definition to the National Park Service, the entity charged with developing the ASA's implementing guidelines,<sup>18</sup> the individual states and ultimately federal admiralty courts. This has proved to be a perilous path as conflicting case law has subsequently developed which directly threatens the underlying historic preservation purpose of the ASA.

These shortcomings of the ASA came to a head in the Ninth Circuit case *Deep Sea Research (DSR), Inc. v. The Brother Jonathan and California*.<sup>19</sup> The *Brother Jonathan* is a double side-wheeled paddle steamer that sank off the coast of California in 1865. Shortly after it sank, five San Francisco insurance companies paid claims on approximately one-third of the cargo. The remaining two-thirds of the cargo and the vessel itself were uninsured.

The Ninth Circuit held that California did not prove by a preponderance of the evidence that "the vessel is abandoned and embedded in the subsurface or coralline formations of the territorial waters of the State" or, in the alternative, that the vessel "is abandoned" and "eligible for listing in the National Register". Even though there was no effort to salvage the vessel for well over 100 years, the court held that this long-lost historic shipwreck was not abandoned, was not subject to the ASA, and, therefore, could be salvaged under admiralty law. The court reasoned that technological advances and the payment of insurance on a third of the cargo made salvage possible. In effect, it presumed the law of salvage applied, instead of following the traditional admiralty cases where abandonment was presumed by the passage of time and absence of an ownership claim.

The Ninth Circuit's analysis of why it found that the *Brother Jonathan*<sup>20</sup> was not abandoned further reveals how other UCH is vulnerable. The court found no inference of abandonment from the fact that no action had been taken to recover the wreck or its cargo since 1865. The recent technological developments that enabled the discovery and recovery of the UCH negated the inference of abandonment that existed under traditional admiralty law. In other words, due to technological advances and corresponding interests in recovery by a salvor-subrogee of an insurer of part of the cargo, a shipwreck that was clearly abandoned and protected by the ASA in 1988 has subsequently been determined to be no longer abandoned and thus subject to the law of salvage. Citing the ASA guidelines, the court also stated that, if the full value of insurance is paid, the shipwreck should not be considered abandoned.

16 *Russell v. Forty Bales of Cotton*, 21 F. Cas. 42, 46 (S.D. Fla. 1872): abandonment was inferred by "the absence of a claimant or the neglect to claim"; *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988): "[S]ince the Wydah has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned"; T. Schoenbaum, *Admiralty and Maritime Law* s. 16-7, at 240 (2nd ed. 1994): "In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage is appropriate because '[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths'" (quoting *Treasure Salvors*, 569 F.2d 330, 332(5th Cir. 1978)).

17 *Ibid.*; *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.

18 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 to either 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). Such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from the sinking.

19 102 F.3d 379 (9th Cir. 1996).

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In determining whether the owners and insurers had abandoned the vessel that sank in 1865, the court considered recent statements of the insurers, in their assignment of title to DSR, which assured DSR that they had title to one-third of the cargo. The court acknowledged that the remaining two-thirds of cargo were uninsured and therefore abandoned. However, the court ruled that, for purposes of judicial economy, the ship and cargo should be treated as a unified *res* and, therefore, allowed salvage of the entire shipwreck, including the two-thirds that the court indicated were abandoned. It reasoned that the application of the ASA to the abandoned portion and salvage law to the non-abandoned portion of the shipwreck would lead to separate legal proceedings in state and federal courts. While the court said that it was unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA, the Ninth Circuit ruled that the law of salvage should apply, instead of the ASA.

In practice, the Ninth Circuit followed the *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company* case by relying on a new factor, technological advance, to reject the presumption of abandonment.<sup>21</sup> The court reasoned that the development of deep water technology made locating and recovering the shipwreck possible, and thus there should no longer be an inference of abandonment. In place of the inference of abandonment, the court held that there was a presumption that the law of salvage should apply. The Sixth Circuit has similarly departed from the traditional admiralty approach to determining abandonment and followed the *Brother Jonathan* and *Columbus-America* cases.<sup>22</sup> In contrast, the traditional admiralty analysis of abandonment is the one that was followed by most of the other circuits prior to 1988 and the one Congress relied on when it enacted the ASA. It is also the approach to abandonment followed by the Seventh and Third Circuits in analyzing whether a shipwreck is abandoned under the ASA.<sup>23</sup>

Perhaps because of this confusion in the circuit courts, the US Supreme Court granted *certiorari* in the *Brother Jonathan* case on all three issues in the *writ*: 1) whether the Eleventh Amendment bars a federal court from deciding *in rem* admiralty action where a state asserts title to the shipwreck under the ASA; 2) whether the lower court erred in ruling that the ASA pre-empts<sup>24</sup> state laws which regulate shipwrecks which are not abandoned; and 3) whether the lower court erred in finding that a long-lost historic shipwreck is not protected by the ASA because an insurance company may have paid a claim on a portion of the ship's cargo.

With regard to the issue of abandonment, the US, California and others took issue with the Ninth Circuit's holding and analysis before the US Supreme Court. The US argued that the Ninth Circuit erred in its approach to determine whether a shipwreck is abandoned within the meaning of the ASA. Consistent with traditional admiralty case law and other ASA cases, the US argued that the Ninth Circuit erred in rejecting the inference of abandonment when a long period of time had passed and the owner of the vessel had not attempted to salvage the vessel or establish a

<sup>21</sup> 974 F.2d 450 (4th Cir. 1992).

<sup>22</sup> *Fairport Int'l Exploration Inc. v. The Shipwrecked Vessel Known as The Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997); see also 913 F.Supp. 552, 558 (W.D. Mich. 1995): Michigan showed that the previous owner was a salvor; he made no effort to recover the vessel: he declined US Coast Guard offers of salvage assistance; he stated the uninsured wreck was a total loss, the damage assessment was greater or equal to the value of the vessel \$200; and finally, that technology was available to salvage the wreck at the time of the casualty.

<sup>23</sup> See *Zych v. Unidentified, Wrecked and Abandoned Vessel (Seabird)*, 941 F.2d 525 (7th Cir. 1991); *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F.Supp. 1129 (D. St. Croix 1994). See also *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) and *Treasure Salvors* (5th Cir. 1978).

<sup>24</sup> California also argued that its historic preservation statute precluded the application of salvage law to California's UCH. The Ninth Circuit rejected the argument with little analysis holding that the California statute was pre-empted by the ASA to the extent it protected shipwrecks that were not abandoned within the meaning of the ASA.

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Regardless, the *Brother Jonathan* case is now before the US District Court in California where there will be a new trial on whether the *Brother Jonathan* is an abandoned shipwreck subject to the ASA, or not abandoned and subject to the law of salvage. If the lower court also follows the suggestions in the briefs filed by the US, it should find the shipwreck is abandoned and that the ASA applies instead of the law of salvage.

In addition to asserting and transferring title to abandoned shipwrecks, Congress in the ASA expressly stated that the “law of salvage and finds shall not apply to abandoned shipwrecks...”<sup>25</sup> In enacting the ASA, Congress sought to end the management of the UCH by

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federal admiralty court, and instead rely on state and national agencies to protect and manage this important cultural heritage.<sup>26</sup> Salvors have attempted to elevate their activities above the province of Congress by arguing, albeit unsuccessfully, that this effort to prevent the application of the law of salvage to the UCH violates Article III<sup>27</sup> of the US Constitution because all cases of admiralty and maritime jurisdiction must be before federal admiralty courts, not state courts.

In *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be The "Seabird"*,<sup>28</sup> the court held that Congress has the authority to define and even limit admiralty court jurisdiction. It specifically held that the ASA does not interfere with Article III's purpose of ensuring national control over navigation, as well as interstate 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 maritime law of salvage or the common 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.

The *Zych* court held that, since the wreck was abandoned and owned by the state under the ASA, the Eleventh Amendment precluded a federal admiralty court from hearing litigation concerning a state-owned shipwreck.<sup>30</sup> The court acknowledged that the intent of the ASA is to have states, not admiralty courts, protect and manage abandoned shipwrecks, and rejected the salvors' arguments that admiralty courts should determine whether the ASA applies.

Since 1982, it was generally accepted that, because of the state's sovereign immunity under the Eleventh Amendment<sup>31</sup> of the US Constitution, a federal "court did not have the power . . . to adjudicate the State's interest in the property without the State's consent."<sup>32</sup> However, the Supreme Court has subsequently ruled in the *Brother Jonathan* case that the Eleventh Amendment does not bar federal courts from deciding whether the law of salvage or the ASA applies, unless the state is in "actual possession" of the shipwreck.<sup>33</sup> Citing decisions from the 1800s, the Court noted that the US and foreign sovereigns are not immune from an *in rem* admiralty case unless the sovereign is in "actual possession" of the vessel.<sup>34</sup> It then reasoned that the sovereign immunity of the several states under the Eleventh Amendment should be the same as the standard for US and foreign sovereigns.<sup>35</sup> As a result, Justice Stevens admitted that he had made an error in his

- 26 "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 Rpt 98-887, 98th Cong. 2d Sess., page 2 (7/6/84).
- 27 "[T]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction": U.S. Const. art. III, @ 2, cl. 1.
- 28 746 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).
- 29 *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* (post-ASA case).
- 30 *Zych v. Seabird*, 19 F.3d at 1136 (7th Cir. 1994); see also *Zych v. Unidentified, Wrecked & Abandoned Vessel ("Lady Elgin")*, 755 F. Supp. 213 (N.D. Ill. 1991), rev'd, 960 F.2d 665 (7th Cir. 1992); both citing *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).
- 31 The Eleventh Amendment bars suits in federal court against states. States argue that disputes over their interests should be heard in the sovereign state courts and not in federal court.
- 32 *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982).
- 33 *California v. Deep Sea Research, Inc. (the 'Brother Jonathan')*, 118 S.Ct. 1464 (1998).
- 34 118 S.Ct. at 1470-1473.
- 35 118 S.Ct. at 1470-1473.

plurality decision in the 1982 Supreme Court *Treasure Salvors* case and agreed that California may be bound by a federal court's *in rem* adjudication of rights to the *Brother Jonathan* and its cargo.<sup>36</sup>

The meaning of "actual possession" in the context of shipwrecks in and on state submerged lands is likely to be litigated in the years to come. To trigger the Eleventh Amendment, states may now have to make a reasonable showing that they have control or custody of the shipwreck, or that they immediately occupy the shipwreck site. States are likely to argue that they are in "actual possession" of shipwrecks embedded in their state submerged lands which are controlled by state statutes and regulations concerning state natural and cultural resources. To the extent that such laws and management programs exercise control sufficient to exclude the unauthorized use of the UCH sites by others, such arguments may be successful.

Alternatively, states will need to provide reasonable evidence that the ASA applies. This would involve the state presenting circumstantial evidence that the shipwreck is abandoned and embedded in state lands. The sovereigns will argue that historic shipwrecks should be presumed to be abandoned if the owner did not attempt to salvage, or otherwise claim the shipwreck for a specified period of time, i.e., 60 years or more. If a state can show that the shipwreck is embedded in state submerged lands, the federal admiralty court should find that the shipwreck is abandoned and that the ASA applies. The state should also provide evidence of the historical significance of the shipwreck. If the shipwreck is not embedded, the state will need to show that the shipwreck has been determined eligible for inclusion in the National Register.

The ASA is alive and well. However, by not defining abandonment the *Brother Jonathan* Supreme Court decision ensures that historic shipwrecks will continue to be subject to challenge by the salvage industry in federal admiralty court. The ASA should ultimately prevail in protecting shipwrecks embedded in state submerged lands and perhaps other historic shipwrecks, but it may take years of litigation before this is fully realized. In the interim, the Supreme Court's decision also raises questions over the protection and management of historic shipwrecks by the sovereigns.

#### 3.1.4 Protection and management of abandoned shipwrecks

The ASA directs states to protect abandoned shipwrecks and defers to the states the determination of 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>37</sup> Unlike US land-based cultural heritage statutes, the ASA establishes a multiple use management regime for the protection of shipwrecks that also incorporates the protection of natural resources.<sup>38</sup> These provisions are consistent with integrated coastal management<sup>39</sup> and the multiple use management approach under the National Marine Sanctuaries Act which is discussed below. 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>40</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>41</sup>

36 118 S.Ct. at 1474.

37 43 U.S.C. s. 2103.

38 43 U.S.C. s. 2103.

39 The ASA guidelines urge states to integrate their UCH management into their state Coastal Zone Management Act (CZMA) plans to allow the use of section 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.

40 43 U.S.C. s. 2103(b).

41 43 U.S.C. s. 2104.

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The ASA guidelines<sup>42</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.<sup>43</sup> 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. These guidelines supplement the other US cultural heritage laws comprising the Federal Archaeological Program (FAP). The FAP and particularly the ASA guidelines have been instrumental in the development of the National Marine Sanctuary UCH management program as discussed below.

### 3.2 National Marine Sanctuaries Act

The National Marine Sanctuaries Act (NMSA)<sup>44</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 – significance.<sup>45</sup> NOAA protects and manages these “areas of the marine environment possess[ing] conservation, recreational, ecological, *historical*, research, education, or aesthetic qualities which give them special national significance.”<sup>46</sup>

The NMSA shows much promise in protecting historical sanctuary resources<sup>47</sup> because it is a far-reaching statute. Sanctuaries may be established out to 200 nautical miles offshore, the outer limits of the exclusive economic zone. To date, there are twelve national marine sanctuaries protecting significant natural resources and the UCH.<sup>48</sup> 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 of the UCH is located in coastal waters, including shipwrecks and submerged sites of early humans.<sup>49</sup> However, the only national marine sanctuary designated solely to protect an historic shipwreck is located some sixteen miles off the coast of North Carolina. Thus, in 1975, the ironclad Civil War vessel, *USS Monitor*, became the first national marine sanctuary and the cornerstone for the national marine sanctuary UCH management program.<sup>50</sup>

42 The guidelines are advisory and therefore non-binding upon the states and federal agencies: 55 Fed. Reg. 50116 (1990).

43 55 Fed. Reg. 50132 (1990).

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

45 16 U.S.C. s. 1433 sets out the standards and factors to consider in the designation process set out in s. 1434.

46 16 U.S.C. s. 1431(a)(2) (emphasis added).

47 “Historical” means 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).

48 15 C.F.R. Pt. 922 sets forth each sanctuary’s regulations.

49 B. Terrell, *Fathoming Our Past: Historical Contexts Of The National Marine Sanctuaries* (NOAA Publication 1994).

50 The Sanctuary Program was established in 1972 to protect natural resources. After the *Monitor* was found in 1973, it was designated as a sanctuary in 1975 as part of a strategy to prevent its salvage. The NMSA was subsequently amended in 1984 to expressly include the existence of the UCH as a factor for sanctuary designation: 16 U.S.C. s. 1433.

### 3.2.1 Protection and multiple use management

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>51</sup> the underlying policy restricting public access at this site came under the scrutiny of Congress and others. The restrictive access policy continues to be roundly criticized by the diving community which fears that there will be restrictions on diving in other sanctuaries.

Moreover, recent evidence has revealed that the *Monitor* was deteriorating much more rapidly than indicated by prior research.<sup>52</sup> As a result, 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. The current permit practice is consistent with the ASA requirement that divers and others be permitted access to our UCH. It also further facilitates the multiple use mandate of sanctuaries under the NMSA.

Generally, sanctuary management is required:

to facilitate to the extent compatible<sup>53</sup> 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>54</sup>

In every sanctuary, the public is allowed to dive and enjoy viewing the UCH: no permit is required.<sup>55</sup> While such non-intrusive public access is clearly a compatible use of the sanctuary, any unauthorized removal of, or injury to, the UCH has been determined to be incompatible with the primary objective: resource protection.<sup>56</sup>

NOAA has very broad and comprehensive enforcement authority to protect and manage sanctuary resources<sup>57</sup> and uses under the NMSA. Injunctive relief is available to prevent the destruction of sanctuary resources.<sup>58</sup> For example, in *US v. Fisher*, treasure salvors were enjoined from using propeller wash deflection devices in the Florida Keys National Marine Sanctuary.<sup>59</sup>

51 *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 does not propose elements of the scientific approach and methodology to be used.

52 Congress directed NOAA to develop a plan for its stabilization, preservation and recovery of artifacts and materials from the *Monitor*.

53 For an analysis of uses of natural sanctuary resources see O. Varmer and A. Santin, *Ocean Management under the Marine Protection, Research and Sanctuaries Act: Sanctuaries, Dumping and Development* (Coastal Zone 1993 published papers): compatible uses include: research, education, recreation, and commercial fishing. Oil, gas, and mineral development, as well as ocean dumping, are generally considered to be incompatible uses.

54 16 U.S.C. s. 1431(b)(5).

55 With the exception of the aforementioned permits required to dive in the *Monitor* NMS.

56 The two regulations protecting the UCH are discussed in the text associated with the *Craft* case and footnotes 74-77.

57 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; it was added in 1988 along with the liability provision for injury of sanctuary resources.

58 16 U.S.C. s. 1437(i).

59 Prop-wash deflectors (or 'mailboxes') can punch a hole in the seabed 30 feet across and several feet deep in hard packed sediment in fifteen seconds. In this case, the salvors uncovered and removed around 200 artifacts from the nearly 600 holes they made.

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Within destroys, cause 312,<sup>63</sup> those r damages.<sup>66</sup> As recovery of the *Inc.*, the court \$211,130 in da assessment and NMSA to show that the defend establish that th costs.<sup>69</sup> The N

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The preliminary injunction was primarily based on the irreparable harm caused by treasure hunting devices to natural sanctuary resources, particularly seagrass beds.<sup>60</sup> 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.<sup>61</sup>

Within national marine sanctuaries, it is expressly prohibited to engage in any activity that destroys, causes the loss of, or injures sanctuary resources, including the UCH.<sup>62</sup> Under section 312,<sup>63</sup> those responsible for such injury<sup>64</sup> are held strictly liable for any response costs<sup>65</sup> and damages.<sup>66</sup> As litigation in these matters can continue for years, the NMSA also provides for the recovery of the accrued interest on the amount of damages and response costs.<sup>67</sup> In *US v. Salvors Inc.*, the court awarded \$351,648 based on NOAA's estimate for its seagrass restoration project, \$211,130 in damage assessment and response costs, and \$26,533 in interest accrued on NOAA's assessment and response costs for a total of \$590,311.<sup>68</sup> Because there is no requirement under the NMSA to show any negligence, intent or culpability of defendants, NOAA needed only to show that the defendants caused the destruction, loss of, or injury to, sanctuary resources, in order to establish that the defendants were strictly liable for all of the resulting damages, including response costs.<sup>69</sup> The NMSA does, however, provide defenses for such claims.

A person is not liable under section 312 if it can be shown that the injury to sanctuary resources: (1) was caused solely by an act of God, an act of war, or a third party, and the person acted with due care; (2) was caused by an activity authorized by federal or state law; or (3) was negligible.<sup>70</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. 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>71</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 laws of finds and salvage in the Florida Keys National Marine Sanctuary.<sup>72</sup>

60 22 F.3d 262 (11th Cir. 1994): US evidence that salvors used prop-wash deflectors to make 100 craters in the sanctuary seabed held to show a substantial likelihood of success on the merits sufficient for issuance of a preliminary injunction.

61 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 prop-wash deflectors without a NOAA sanctuary permit: *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997).

62 16 U.S.C. s. 1436 (NMSA section 306).

63 16 U.S.C. s. 1443.

64 "Injure" means to change adversely, . . . [and] includes . . . to cause the loss of or destroy: 15 C.F.R. 922.3.

65 "Response costs" means the costs of actions taken by the US to minimize further loss, destruction or injury: s. 1432(7).

66 "Damages" includes: compensation for the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource, or the assessed value of the resource; and the cost for assessing the damage and monitoring the injured, restored or replaced resources: 16 U.S.C. s. 1432(6).

67 16 U.S.C. 1443(a): liability and interest.

68 NOAA sought damages for the injury to the UCH including the loss of contextual information and a proposed UCH restoration project. The court held that the loss of contextual information was negligible since the defendants recorded the location of the artifacts it removed. NOAA did not challenge the defendants' conservation methods which appeared to meet FAP standards.

69 *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997).

70 16 U.S.C. s. 1443(a)(3).

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

72 *US v. Salvors Inc.*, No. 92-10027 (S.D. Fla. 30 April 1997) p. 10 f.n. 4.

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>73</sup> case, which preceded sanctuary designation and, therefore, could not be terminated by 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>74</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.

In *Craft v. US*, the National Park Service became aware of routine looting of the UCH by scuba divers and set up a 'sting' operation in the Channel Islands National Park and adjacent National Marine Sanctuary. They caught the divers excavating the sanctuary seabed and removing the UCH and seized their hammers, chisels and other excavation tools.<sup>75</sup> The *Craft* 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] apply for a permit to ensure that recovery is done in an environmentally and archaeologically sound manner. . . .<sup>76</sup>

NOAA's authority under the NMSA to protect historic sanctuary resources from 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, the historic sanctuary resources and, accordingly, have uniformly ordered salvors to strictly adhere to sanctuary regulations and NOAA's permitting regime.

There are two regulations implemented in all sanctuaries that provide broad protection of the UCH by prohibiting: 1) the removal of,<sup>77</sup> or injury to, historic sanctuary resources and 2) any alteration of the seabed. 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>78</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 of the presence of enforcement patrols 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." The court ruled that the fine was reasonably based on the heinous acts of the dive master.

73 *MDM Salvage*, 631 F. Supp. 308, 314 (S.D. Fla. 1988).

74 16 U.S.C. s. 1434(c).

75 6 O.R.W. 150 (NOAA 1990), 1990 NOAA LEXIS 29.

76 *Craft*, No. 92-1769 (C.D. Cal. 1992); 22 October 1992, Order of Judge Stephen Wilson, p. 4.

77 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 FPA.

78 To date, this is the highest US assessment of civil penalties for the removal of any heritage resources, UCH or terrestrial. The cap on civil penalties has been raised from \$50,000 per violation to \$110,000 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.

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In *Craft*, the appellants 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 plaintiffs' activities.<sup>79</sup> The court read the prohibition broadly to include the defendants' excavation of the UCH 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.

The court decisions in *US v. Salvors Inc.* and *Craft v. US* provide a very strong legal basis for the protection of the UCH in national marine sanctuaries. Consistent with article 303 of the United Nations Convention on the Law of the Sea 1982, 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 that 24 miles, the enforcement of regulations prohibiting the removal of sanctuary UCH against foreign flagged treasure salvors may be deemed by some to be suspect. However, enforcement of the regulation protecting the seabed and other natural resources against foreign flagged vessels appears consistent with international law, including the 1982 Convention. Since treasure salvage operations generally involve disturbance of the marine environment, marine environmental regulations may provide indirect protection of the UCH from unwanted treasure salvage.

As mentioned earlier, and illustrated through the discussion of the sanctuary cases, it is unlawful to conduct an activity prohibited<sup>80</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 then be conserved and curated in an institution of public access, presumably in perpetuity.

79 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 overbroad 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).

80 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.

On 1st July 1997, the Florida Keys National Marine Sanctuary regulations became effective, including the permitting regime allowing the privatization of certain public resources.<sup>81</sup> 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 be 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, 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>82</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. NOAA has determined it is consistent with the NMSA and is primarily based upon the ASA directive for the inclusion of private recovery of shipwrecks as a multiple use for such UCH. NOAA, Florida<sup>83</sup> and the Advisory Council for Historic Preservation entered into a Programmatic Agreement pursuant to section 106 of the National Historic Preservation Act, which demonstrates 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. Time and experience will tell whether this compromise permit program furthers the public's interest in the UCH.

#### 4. US Land Based Cultural Heritage Statutes Applicable to Certain Underwater Cultural Heritage 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 the 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 Antiquities Act of 1906<sup>84</sup> 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

81 It should be noted that the NMSA does not assert ownership over the UCH or other sanctuary resources. NOAA is a trustee of sanctuary resources. 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 percent of the Florida Keys National Marine Sanctuary is located within state lands and waters.

82 16 U.S.C. § 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.

83 Most of the sanctuary is within Florida submerged lands and waters. Under the ASA, Florida owns the abandoned shipwrecks in the state submerged lands. Under the NMSA, NOAA is a trustee for the public's interest in sanctuary resources. There is no assertion of ownership of sanctuary resources in the NMSA. NOAA is a co-trustee with Florida for the UCH in and on Florida submerged lands.

84 16 U.S.C. s. 431, *et seq.*



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 Antiquities Act was unsuccessfully asserted to apply to the outer continental shelf in the matter of *Treasure Salvors*<sup>85</sup> but was subsequently determined to apply in a national seashore. The *Lathrop*<sup>86</sup> case turned on the Act's permitting provision, and did not concern the ownership of the UCH or seabed. The 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 Lathrop's 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>87</sup>

The Antiquities Act permitting provision can, therefore, be used as a protection tool in waters over which the US has ownership or control, such as marine protected areas.

The Antiquities Act is still in effect, and its permitting provision remains a potentially useful tool for protecting the UCH. However, its enforcement was subject to a constitutional attack in two cases. In *US v. Diaz*,<sup>88</sup> the Ninth Circuit held that the Antiquities Act 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 held that the Act was unconstitutionally vague and therefore a violation of due process. However, the Tenth Circuit subsequently upheld the constitutionality of the Antiquities Act in *US v. Smyer*.<sup>89</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 artefacts that were 800-900 years old and taken from ancient sites. The court found that, as it 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>90</sup> These challenges to the Antiquities Act ultimately resulted in the enactment of the Archaeological Resources Protection Act in 1979.<sup>91</sup>

## 4.2 Archaeological Resources Protection Act

The Archaeological Resources Protection Act<sup>92</sup> also 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>93</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. The

85 *Treasure Salvors*, 569 F.2d 330 (5th Cir. 1978) ruled that the US did not own or control the outer continental shelf for purposes of protecting the UCH. This ruling not only precluded the application of the Antiquities Act to the *Atocha*, but it also influenced subsequent legislation of the Archaeological Resources Protection Act and the ASA restricting their application beyond three miles from the shoreline.

86 *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).

87 *Lathrop*, 817 F. Supp. at 962 (emphasis in original).

88 499 F.2d 113 (9th Cir. 1974).

89 596 F.2d 939 (10th Cir. 1979).

90 *Ibid.*

91 It should be noted, however, that these cases addressed enforcement of the Antiquities Act, and not the permitting provision, which has never been subject to such a constitutional attack.

92 16 U.S.C. § 470ee *et seq.*

93 CRIM DOC. Nos. P169925, P169927, and P169928 (S.D. Fla. 1986).

## LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

Archaeological Resources Protection Act does not typically apply in the marine environment unless the US owns the seabed of the marine protected area. However, as the Act's prohibition against trafficking archaeological resources has been applied to such resources taken from private land, it may also be used to prohibit the trafficking of the UCH.<sup>94</sup>

### 4.3 National Historic Preservation Act

The National Historic Preservation Act of 1966 was enacted to recognize that the nation is "founded upon and reflected in its historic heritage."<sup>95</sup>

[T]he 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>96</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>97</sup>

Section 106 of the National Historic Preservation Act 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>98</sup> that is included in, or eligible for inclusion in, the National Register of Historic Places.<sup>99</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>100</sup> The agency must complete the section 106 process prior to issuing any license or permit, or going forward with any other undertaking.<sup>101</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>102</sup> As long as the 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 needs for federal undertakings in the public interest.<sup>103</sup>

The other main provision of the National Historic Preservation Act is section 110(a)(2) which requires national government agencies to manage heritage resources under their jurisdiction

94 See *US v. Gerber* 999 F.2d 1112 (7th Cir. 1993).

95 16 U.S.C. ss. 470 *et seq.*, 470(b)(1).

96 16 U.S.C. s. 470(b)(4).

97 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: 42 U.S.C. s. 4321 *et seq.* Like the National Historic Preservation Act, the National Environmental Policy Act is procedural in nature and does not contain any enforcement mechanism to prevent harm to heritage resources committed by third parties.

98 "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>97</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. 800.3 (c).

99 16 U.S.C. s. 470f.

100 36 C.F.R. s. 800.1(a).

101 36 C.F.R. s. 800.3(c).

102 36 C.F.R. s. 800.13(a).

103 36 C.F.R. s. 800.1(b).

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and control. Such management includes the obligation to survey, inventory, and determine the eligibility of historic properties for nomination to the National Register.<sup>104</sup> Section 110(a)(2) also requires that each agency exercise caution to assure that properties that may be eligible for inclusion are not "inadvertently" transferred or sold.<sup>105</sup>

## 5. Conclusions

As discussed throughout this chapter, the US has certain statutes that offer some protection to the UCH located within US waters, albeit they are limited in scope. For example, the ASA, while protective of certain categories of UCH, has proven to be vulnerable to legal attacks by treasure salvors. The NMSA, in contrast, has proven to be a strong legal tool, however, it only protects the UCH within national marine sanctuaries. Likewise, the application of the Antiquities Act is, arguably, limited to marine protected areas, such as national seashores, where the US has either ownership of, or expressly asserted control over, the UCH. The Archaeological Resources Protection Act is even more limited in scope. It only protects the UCH that is located in or on submerged lands owned by the US, and expressly exempts the outer continental shelf.

Furthermore, the reach of one of the most important pieces of federal historic preservation legislation, the National Historic Preservation Act, is also limited in its protection of the UCH. It merely requires national agencies to comply with the procedural requirements of that statute to ensure that federal agencies preserve and protect the UCH under their jurisdiction and consider the effects of their federal undertakings on the UCH. Accordingly, the UCH located in the vast majority of US waters is left unprotected and vulnerable to unregulated salvage.

Comprehensive legislation to protect the UCH is greatly needed. Such legislation should protect the UCH located in waters from the shoreline out to the 200 mile exclusive economic zone, and should include several important components: (1) a US assertion of its historic preservation interest in all UCH under its jurisdiction or control (including sunken US flagged vessels regardless of their location), without terminating any property rights of others including those of foreign sovereigns;<sup>106</sup> (2) a permitting regime to regulate research and recovery of the UCH in an environmentally and archaeologically sound manner; (3) a US assertion of title to abandoned<sup>107</sup> UCH located in the twelve mile territorial sea and a contiguous zone out to 24 miles consistent with international law; (4) an enforcement provision to prohibit unauthorized activities affecting the UCH and/or the marine environment; and (5) a provision stating that the maritime law of salvage and common law of finds shall be inapplicable to all UCH.

104 16 U.S.C. s. 470h-2(a)(2).

105 National agency compliance with the s. 106 process prior to any property transfer or sale would meet this requirement.

106 Another component could also include a provision authorizing the US Department of Justice to enter federal courts to represent foreign sovereign nations, at their request, in protecting UCH in which they have an interest located in US waters. One additional aspect of this proposed legislation is that it would favor a national policy of *in situ* preservation.

107 UCH which has been left on the seabed for over 50 years should be presumed abandoned.