

Perspective from Across the Atlantic

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1. Introduction

We are all connected by the sea. In its bed lies our cultural heritage which has been gathering there since humans began to use the sea for food and transportation. Where ever ships travel, some inevitably sink because of natural disasters or human error. As ships became vehicles for trade, laws developed to provide a more predictable business environment, including awards for those who salvaged ships that were in marine peril and returned the cargo to the stream of commerce. As shipwrecks became objects of antiquity, the lure of fortune and fame resulted in the hunting and plundering of many treasure laden shipwrecks. In the absence of any international agreements or legislation regarding this underwater cultural heritage (UCH), many treasure hunters were successful in obtaining title to abandoned property under the common law of finds or as an award under the law of salvage. As a result, laws developed to protect UCH. Governments, as the owners or entities in control of the UCH, have also successfully used salvage law in court to prevent the unwanted salvage or to ensure that it is done in a proper manner. The recognition of government ownership or control by federal admiralty courts usually involves the recognition of government statutes concerning UCH.

This paper provides a brief overview of the United States (US) laws, policies and practices relevant to the protection and management of UCH in the context of some of the more important provisions of the United Nations Education Scientific Cultural Organization (UNESCO) Convention for the Protection of the Underwater Cultural Heritage (hereinafter “ UCH

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

Convention”).¹ At the UNESCO Meeting, the US, United Kingdom (UK) and other nations with significant maritime interests supported the primary purpose of the Convention to prevent looting and unwanted salvage as well as most of its archaeological and historic preservation provisions, including the Annexed Rules. There were, however, two major obstacles that prevented the US, UK and some other nations from supporting the Convention as a whole. First, there was the concern about the so-called “creeping coastal State jurisdiction” over UCH on the continental shelf (CS) and Exclusive Economic Zone (EEZ) seaward of the 24 nm limit of the contiguous zone. The other matter of concern to the US, UK and other nations was the treatment of foreign sunken warships and other sunken State craft landward of the 12 nm limit of the territorial sea. In particular, they were concerned about the diluting the principle of sovereign immunity as it applies to all sovereign vessels and equipment. This paper will summarize how US law protects and manages UCH in all of the maritime zones in a manner consistent with the Law of the Sea Convention (LOSC) and the UNESCO UCH Convention, including in these two areas of concern. For example, it will summarize how the US treats foreign sunken State craft and protects UCH in the EEZ/CS in a manner consistent with international law. As such, the author suggests that this US approach to preventing looting and unwanted salvage suggests a way for other nations to move forward in protecting UCH from activities subject to their control and jurisdiction in manner consistent with the LOSC and the UNESCO UCH Convention without changing the international law regarding the principle of sovereign immunity or extending coastal State jurisdiction over UCH.

2. Overview of United States Law, Policy and Practice Governing the Protection of UCH

In the US a few laws specifically protect certain UCH. There are also a few laws that were enacted to protect terrestrial land-based heritage but also apply to certain heritage located in the marine environment. The US has not yet passed legislation providing comprehensive protection

¹ A more detailed account will appear in S. Dromgoole (ed.) *Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff, forthcoming 2006).

to all UCH that may be subject to its control and jurisdiction. However, it had done more than most, if not all other nations, to protect certain UCH in the 12 nm territorial sea, 24 nm contiguous zone, 200 nm EEZ and in the high seas. Perhaps even more importantly, these laws do so a manner consistent with international law as reflected by the LOSC. They also protect UCH in a manner consistent with the archaeological and historic preservation principles in the UNESCO UCH Convention, particularly the Annexed Rules.

Under the UCH Convention, heritage that has been underwater for 100 years is to be protected and managed in accordance with historic preservation and archaeological standards and requirements. The US Archaeological Resource Protection Act (ARPA) has the same 100 year threshold for protecting such resources located on US public lands. US laws also protect UCH that are deemed historically significant. Under the US National Historic Preservation Act (NHPA), a 50 year rule of thumb has developed as a matter of practice and policy for determining historical significance. Accordingly, the US suggested that UNESCO adopt a 50 year rule for determining historical significance for the UCH that should be subject to the Annexed Rules and other provisions. However, the US subsequently agreed with the 100 year blanket approach preferred by most of the UNESCO representatives as it was consistent with the 100 year rule under ARPA. It has also been noted that nearly shipwreck or heritage that has been underwater for 100 years would likely be considered historically significant under the NHPA and related laws. Thus, the scope of the UNESCO UCH Convention as well as most of its provisions implementing historic preservation and archaeological principals are consistent with current US law and practice, particularly those associated with the US programs associated with National Marine Sanctuaries, Parks and the US Navy.

2.1 Marine Protection Research and Sanctuaries Act of 1972 - National Marine Sanctuaries Act

In my opinion, the best US law specifically protecting UCH is Title III of the Marine Protection Research and Sanctuaries Act of 1972 now more commonly know as the National Marine

Sanctuaries Act (NMSA).² The 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.³ 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."⁴ While most of the sanctuaries focus on protecting ecosystems and natural resources, the first sanctuary established in 1973 was to protect the USS Monitor from looting and unwanted salvage. The most recent designation in 2003 was to solely protect UCH in Thunder Bay off the coast of Michigan. The NMSA shows much promise in protecting historical sanctuary resources⁵ because sanctuaries may be established in the 200 nm EEZ consistent with international law.

In order to protect sanctuary resources, NOAA regulates activities, issues permits, assesses civil penalties and conducts other enforcement. The two activities that are regulated in sanctuaries to directly or indirectly protect UCH are the prohibitions against: 1) the removal of,⁶ or injury to, historic sanctuary resources and 2) any alteration of the seabed. There is no question that NOAA has the jurisdiction to apply the first measure to US nationals and vessels in the US EEZ. Of

² Also known as Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. s. 1431, *et seq.*

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

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

⁵ "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).

⁶ 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 Federal Archaeological Program.

course, any exercise of jurisdiction against foreign flagged vessels and nationals must be done in a manner consistent with international law.

Under international law, the coastal State jurisdiction for the enforcement of the first measure against foreign flagged vessels and nationals is limited to UCH landward of the 24 nm limit of the contiguous zone. However, if a foreign flagged vessel or national is conducting salvage activities that involve altering the seabed, placing structures on the seabed or conducting some other activity that triggers the sovereign rights and jurisdiction that a coastal State has over activities in the EEZ/continental shelf, then they would be subject to US/NOAA jurisdiction. This approach to controlling treasure salvage is consistent with LOSC Article 81 which provides the coastal State with the authority to regulate drilling on the continental shelf *for any purpose*. As treasure salvage activities may also involve the installation of structures and installations on the seabed regulation of those activities is consistent with the coastal State authority under LOSC Article 80. Accordingly, NOAA regulations regulating activities to protect natural resources in the EEZ/CS would be enforceable against foreign salvors and thereby indirectly protect any associated UCH in the EEZ/continental shelf. The US efforts to protect UCH have gone beyond its EEZ/CS into UCH located under the High Seas. The international agreement on *Titanic* seeks to protect this historically significant shipwreck that is located over 300 nm off the coast of Canada relying on jurisdictional approaches that are consistent with international law, e.g., jurisdiction over flagged vessels and nationals and use of port state jurisdiction and jurisdiction in territorial sea and customs waters over foreign flagged vessels and nationals.

2.2 RMS Titanic Maritime Memorial Act

The 1985 discovery of *Titanic* raised concerns about how to protect it from looting and unwanted salvage and resulted in the enactment of the RMS Titanic Maritime Memorial Act of 1986.⁷ As

⁷ PL No. 99-513, Oct. 21, 1986, 100 Stat. 2082, 16 U.S.C. s.450rr – 450rr-6 (2005).

there are no legal bars to such salvage and no nation may exert sovereignty or sovereign rights over this or any other shipwreck in the high seas, the US Congress recognized that coordination with other nations was necessary to fully protect *Titanic*. The Act suggested that the wreck site be treated as a maritime memorial, encouraged the negotiation of an international agreement⁸ and international guidelines for the exploration, research and, if determined appropriate, the possible salvage of artifacts. NOAA's published guidelines based on the Rules Annexed to the *Titanic* Agreement that were developed in consultation with representatives from the UK, France and Canada.⁹ These guidelines and rules are also based on the ICHMOS Charter and the Rules Annexed to the UNESCO UCH Convention.¹⁰ The US signed the Agreement on *Titanic* on June 18, 2004.

The Bush Administration's Ocean Policy Action Plan expressly provides that it will submit recommended legislation along with the agreement to the US Congress for its consideration. Implementing legislation is necessary for the agreement to come into effect in the US. Although this agreement and the guidelines are not enforceable by NOAA or other federal agencies under the current *Titanic* Act of 1986, the guidelines and agreement have been cited by the admiralty court asserting jurisdiction over salvage activities of *Titanic*.¹¹ The US and UK plan to protect this UCH in the high seas in a manner consistent with UNCLOS and the UCH Convention through flag state jurisdiction, port state jurisdiction and jurisdiction over their respective nationals. Back in 1986 when the US Congress enacted the statute regarding *Titanic* it was also considering legislation to protect and manage abandoned shipwrecks along the coast of the US.

⁸ s.450rr – 4.

⁹ 66 Fed. Reg. 18905-18907 (April 12, 2001).

¹⁰ Ibid. See also Preamble of the draft guidelines at 65 Fed. Reg. 35326 (June 2, 2000).

¹¹ *RMS Titanic Inc. v. Wrecked, and Abandoned Vessel*, 323 F.Supp. 724 (E.D. Va. 2004).

2.2 Abandoned Shipwreck Act

Since the dawn of treasure hunting, US state governments have asserted ownership rights to the UCH pursuant to the Submerged Lands Act¹² and control under their historic preservation laws. They were successful in some cases. However, in a majority of cases, salvors prevailed in obtaining ownership under the law of finds or salvage. In response, the US Congress passed the Abandoned Shipwreck Act (ASA).¹³ Unfortunately, the ASA has been only partially successful in protecting the UCH from unwanted salvage.

The ASA directs states to protect abandoned shipwrecks and defers to the states to determine how they should be managed consistent with some broad provisions. The ASA establishes a multiple use management regime for the protection of shipwrecks that also incorporates the protection of natural resources. Since the implementation of the ASA is left to the states it may not necessarily be consistent with the US Federal Archaeological Program or the UNESCO UCH Convention. However, to the extent there are sunken military craft in state waters those wrecks are generally not abandoned and thus protected by the most recent addition to US laws protecting UCH - the Sunken Military Craft Act.

2.4 Sunken Military Craft Act (Treatment of Warships and other Sunken State Craft)

¹² The Submerged Lands Act establishes that title to and ownership of the lands beneath navigable waters, and the natural resources within such lands and waters within the boundaries of the respective States, is vested in the States. 41 U.S.C. s. 1311.

¹³ 43 U.S.C. ss. 2101-2106; for a more detailed analysis of this and other US UCH laws see [insert cite for article in 1999 publication].

The Sunken Military Craft Act (SMCA)¹⁴ is a codification of US practice, international agreements and federal admiralty court cases. It clarifies that sunken military craft –both US and foreign – remain the property of their flag States unless expressly abandoned. It prohibits the application of the law of finds to any such craft. It also eliminates any award for the unwanted salvage of such craft.

Its scope is broad in protecting sunken US craft¹⁵ wherever located as well as foreign craft in US waters defined to include the internal waters, territorial sea and contiguous zone.¹⁶ Violators are subject to civil sanction¹⁷ as well as applicable criminal law sanctions.¹⁸ Activities otherwise prohibited may be carried on only as provided by a permit issued by the Secretary of the Navy, Air force or other appropriate military unit.¹⁹ The SMCA requires the consent of the foreign sovereign before permitting salvage of foreign craft in US waters.²⁰

3. US Land Based Cultural Heritage Laws Applicable to certain UCH Sites

¹⁴ Public Law Number 108-375 passed into law on October 8, 2004, and presented to the President on October 21, 2004.

¹⁵ The statute defines "sunken military craft" as all or any portion of "any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank[.]" along with sunken military aircraft and spacecraft, and their associated contents, and reaches them across debris fields. s. 1408(3).

¹⁶ s.1403(d) and s.1408(7).

¹⁷ s.1405

¹⁸ s.1406(i)

¹⁹ s.1403

²⁰ s.1406(d)(2).

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

3.1 Antiquities Act

The public interest in the protection of American antiquities on federal lands, particularly those associated with prehistoric American Indians, led to the development of the Antiquities Act of 1906 (AA).²¹ The AA has two main components: (1) a criminal enforcement component, which provides for the prosecution of persons who appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the US; and (2) a component that authorizes examination of ruins, the excavation of archaeological sites and the gathering of objects of antiquity on lands owned or controlled by the US through the granting of a permit. The criminal enforcement of the AA in cases where there is a question of whether an object is an antiquity, however, it is still good law and its permitting provision remains a potentially useful tool for protecting the UCH. These challenges to the Antiquities Act ultimately resulted in the enactment of the Archaeological Resources Protection Act in 1979.²²

3.2 Archaeological Resources Protection Act

²¹ 16 U.S.C. s. 431, *et seq.* For a detailed analysis of the long twenty-five year process it took to enact this law see generally *"A Special Issue: The Antiquities Act of 1906"*, 42 J. Southwest 199-269 (2000).

²² It should be noted, however, that the cases addressed enforcement of the criminal provisions of the AA, and not the permitting provision, which has never been subject to such a constitutional attack. It should also be noted that these challenges reveal the problems with not taking a bright-line approach to defining UCH.

The Archaeological Resources Protection Act²³ also applies to "archaeological resources" of at least 100 years of age located in national parks, national wildlife refuges and other 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.

3.3 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."²⁴ The Act requires that national government agencies survey, inventory²⁵ 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.²⁶

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 property²⁷ that is included in, or eligible for inclusion in, the

²³ 16 U.S.C. § 470ee *et seq.*

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

²⁵ 16 U.S.C. s. 470h-2(a)(2).

²⁶ 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.

²⁷ "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).

National Register of Historic Places.²⁸ 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.²⁹ Even though the NHPA, ARPA and the AA were developed to protect resources on dry terrestrial lands, they are consistent with the UNESCO Underwater Cultural Heritage Convention as are the US UCH laws, i.e. the ASA, NMSA, SMCA and Titanic Act.

Conclusion - A Way Forward

The US laws and polices are consistent with the UNESCO UCH Convention Annexed Rules and other provisions codifying the general principles of historic preservation including the general ban against the application of the law of salvage and finds to UCH. However, the US, UK and other nations have not supported the Convention as a whole because its treatment of foreign state owned UCH within territorial sea appears to dilute the important principle of sovereign immunity and the regime for UCH located in the EEZ/continental shelf appears to extend coastal State jurisdiction and sovereign rights beyond that authorized under the LOSC. Thus, one way forward would be to have bi-lateral or multilateral agreements protecting UCH in a manner that is consistent with US UCH law, the *Titanic* agreement, and US international agreements protecting sunken State craft and the Annexed Rules and Article 4 of the UNESCO UCH Convention.

The following points should be considered:

- Maximize control over activities in all the maritime zones consistent with LOSC
 - Proclaim a contiguous zone and implement legislation asserting coastal State jurisdiction and control over all activities directed at UCH in internal waters, territorial sea and contiguous zone, including those of foreign flagged vessels &

²⁸ 16 U.S.C. s. 470f.

²⁹ 36 C.F.R. s. 800.1(b).

nationals in manner consistent with LOSC Art 303(2) and UNESCO UCH Convention Art -8?

- Control all activities directed at UCH by UK flagged vessels and nationals regardless of location of UCH – this control is consistent with LOSC
 - On continental shelf assert control over activities consistent with the LOSC. For example, regulate the placement and use of all installations, structures and devices on the continental shelf by foreign vessels and nationals consistent with LOSC Art 60 including the use of such objects in the salvage or recovery of UCH – this will indirectly help protect UCH in manner consistent with LOSC
 - On continental shelf regulate “drilling” for any purpose and expressly include excavation associated with salvage or recovery of UCH – this would be consistent with LOSC Art 81
 - This and other regulation of activities to protect the marine environment will also indirectly help preserve UCH in and on the continental shelf
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- Along the lines of *Titanic*, consider other agreements and implementing legislation to protect other UCH seaward of 24 nm and in the high seas

 - Along the lines of *LaBelle* consider agreement to protect sunken military and other state craft in the territorial sea and internal waters of other States such as the United States
 - Title to State craft, wherever located, must remain vested in the original flag State unless abandoned
 - No salvage or recovery permitted wherever located (including in the territorial sea and contiguous zone) without consent of the flag State.
 - Coastal State would determine whether any recovery in the TS and CZ takes place and the manner of any recovery.
 - Recovery that is permitted by the flag and coastal States would have to be consistent with the UNESCO UCH Convention’s Annexed Rules.

- These agreements regarding UCH should incorporate the Annexed Rules of UNESCO UCH Convention, Article 4 Relationship of Salvage and perhaps other general archaeological and historic preservation that are consistent with the LOSC