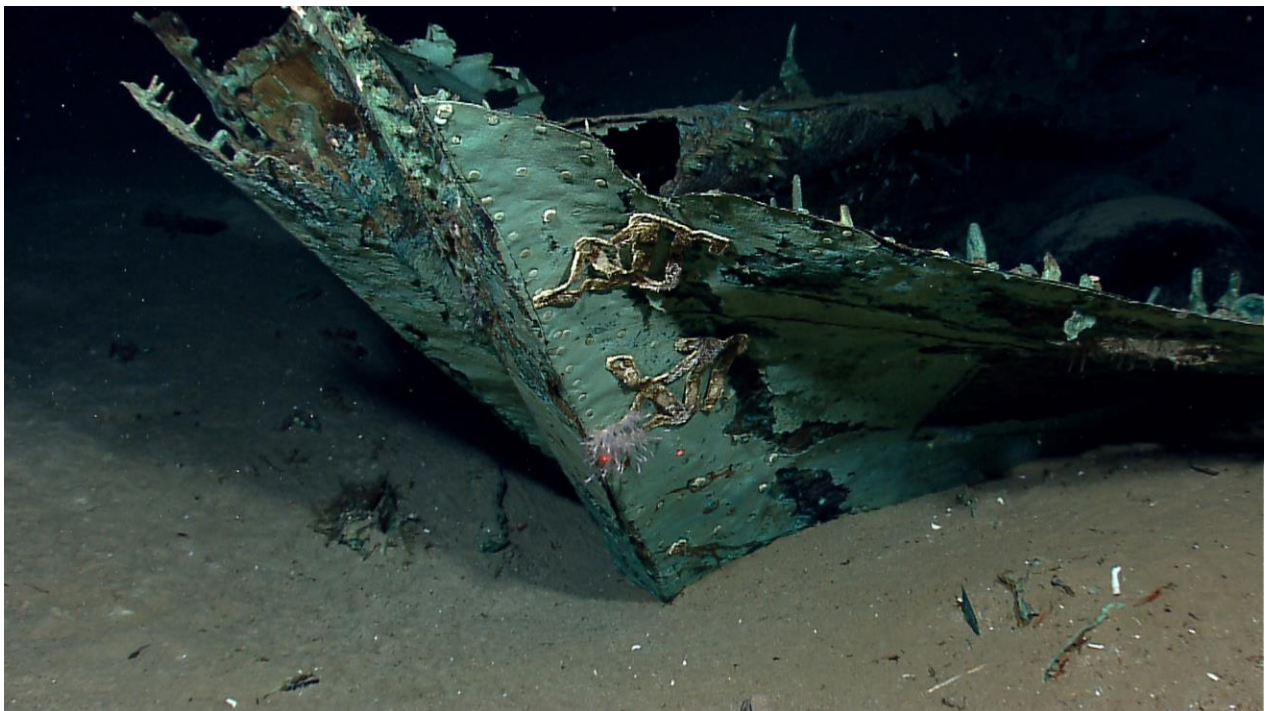


Underwater Cultural Heritage Law Study



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Underwater Cultural Heritage Law Study

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Headquarters, Herndon, VA
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DISCLAIMER

This study was prepared under an interagency agreement between the Department of the Interior (DOI) Bureau of Ocean Energy Management (BOEM) and the Department of Commerce (DOC) National Oceanic and Atmospheric Administration (NOAA). Approval does not signify that the contents necessarily reflect the views and policies of BOEM, nor does mention of trade names or commercial products constitute endorsements or recommendation for use. The final study is, however, exempt from review and compliance with BOEM editorial standards.

REPORT AVAILABILITY

The final report, will hereinafter be referred to as the study, and is available in compact disc format from the Bureau of Ocean Energy Management, Environmental Assessment Branch Attn: Tribal Liaison Officer, 381 Elden Street, MS HM 3107, Herndon, VA 20170-4817 at a charge of \$15.00 by referencing OCS Study BOEM 2014-005. The final report study is also available on the NOAA website at: [<http://csc.noaa.gov/beta/oceanlawsearch/#/search>] and at the BOEM [Environmental Studies Program Information System](#) website, where it is located by entering the Publication Number BOEM 2014-005.

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ABOUT THE COVER

The bow of an early 19th-Century copper clad vessel found in ultra-deep waters of the Gulf of Mexico during oil and gas surveys. At the request of BOEM, NOAA's Office of Ocean Exploration and Research subsequently investigated the site in 2012. While most of the ship's wood has long since disintegrated, copper that sheathed the hull beneath the waterline as a protection against marine-boring organisms remains, leaving a copper shell retaining the form of the ship. The copper has turned green due to oxidation and chemical processes over more than a century on the seafloor. Oxidized copper sheathing and possible draft marks are visible on the bow of the ship. (Photo Credit: NOAA Okeanos Explorer Program)

ABSTRACT

The protection and management of Underwater Cultural Heritage (UCH) is a challenging topic, as it involves the interplay of United States (U.S.) statutes, maritime law, international law, and often complex issues regarding what law applies when and against whom it may be enforced. At the same time, there is ongoing risk from activities that may directly or indirectly destroy UCH, such as unscientific salvage or looting, energy development, dredging, and bottom trawling. No single statute comprehensively protects UCH from all of these human activities.

This Underwater Cultural Heritage (UCH) Law Study is generated by the Department of the Interior, Bureau of Ocean Energy Management and the Department of Commerce, National Oceanic and Atmospheric Administration to provide an analysis of existing laws protecting UCH on the U.S. Outer Continental Shelf (OCS), identify gaps in protection and recommend legislative changes to address any gaps. The results of the analysis indicate a need for legislative changes to better protect UCH, including proposals to amend the Archaeological Resources Protection Act and/or the National Marine Sanctuaries Act. Study results can be accessed electronically at the website: <http://csc.noaa.gov/oceanlawsearch/#/search>. This site contains the final study, a summary of the statutes and key cases related to UCH, and links to the various bills, reports, and other documents describing the legislative history on this issue.

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Lydia Barbash-Riley (Legal Intern Summer 2013) Lead editor of first draft of the UCH Law Study; primary author of the Archaeological and Historic Preservation Act and National Fishing Enhancement Act/National Artificial Reef Plan sections; co-authored Rivers and Harbors Act and Historic Sites Act sections; contributed to database summaries of law for the United Nations Convention on the Law of the Sea, American Indian Religious Freedom Act, Archaeological Resources Protection Act, Abandoned Shipwreck Act, and National Environmental Policy Act.

Laura Gongaware (Legal Intern Summer of 2011 and Summer of 2012) Identified, researched, and synthesized Federal statutes, legislative histories, and case law pertaining to underwater cultural heritage within the United States. Assisted in developing the initial outline of the draft report as well as drafting a number of the statutes and cases, including the laws regarding trafficking of cultural heritage.

Brian Jordan This study and the corresponding website was his brainchild. He continued as a full partner in the development of both the study and website. Brian was a pleasure to work with and deserves acknowledgment as the patron saint for dealing with the sometimes difficult author.

Constance Murphy BOEM Office of Environmental Programs technical editor; reviewed document for clarity and performed editing for BOEM format.

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Margaret Riley (Legal Fellow Fall 2012 – Spring of 2013) Identified, researched, and synthesized Federal statutes, legislative histories, and case law pertaining to underwater cultural heritage within the United States. Assisted in drafting and editing the UCH Law Study, particularly the section on admiralty and maritime law.

Jackie Rolleri (Coastal Services Center) It is difficult for me to put in a few words Jackie Rolleri's contribution to this study and the project as a whole. Like the bright lighthouse on a dark stormy night, she has been my beacon in getting this project done. Jackie was the project manager for the UCH Law database and website that was developed by the Coastal Services

Center in cooperation with the DOC General Counsel Law Library and was the overall co-project manager for the development of the study. Jackie helped develop the statement of work, created schedules of assigned tasks, and helped manage the work of others (including a number of NOAA interns). In addition to her management of the work on this project, Jackie has done a lot of the research and writing on the summaries of laws and cases, and assisted in the editing of the draft to address comments from BOEM and others. In sum, over the past couple of years, Jackie has simultaneously played the roles of yeoman, first mate and Captain of this vessel – the UCH Law Study – to which I am forever grateful.

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ABBREVIATIONS AND ACRONYMS

AA	Antiquities Act
ACHP	Advisory Council on Historic Preservation
AHPA	Archaeological and Historic Preservation Act
AIRFA	American Indian Religious Freedom Act
ARPA	Archaeological Resources Protection Act
ASA	Abandoned Shipwreck Act
BOEM	Bureau of Ocean Energy Management
BSEE	Bureau of Safety and Environmental Enforcement
CEQ	Council on Environmental Quality
CWA	Clean Water Act
CZ	Contiguous Zone
CZMA	Coastal Zone Management Act
DOC	Department of Commerce
DOI	Department of the Interior
ECS	Extended Continental Shelf
EEZ	Exclusive Economic Zone
EO	Executive Order
EPA	Environmental Protection Agency
FAP	Federal Archeology Program
FCNT	Friendship, Commerce, and Navigation Treaty
HSA	Historic Sites Act
ICOMOS	International Council of Monuments and Sites
IMO	International Maritime Organization
LOS	Law of the Sea
LOSC	Law of the Sea Convention
MPRSA	Marine Protection, Research, and Sanctuaries Act

NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NHL	National Historic Landmark
NHPA	National Historic Preservation Act
nm	nautical mile
NMS	National Marine Sanctuary
NMSA	National Marine Sanctuaries Act
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NPS	National Park Service
NRHP	National Register of Historic Places
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
PVA	Public Vessels Act
RHA	Rivers and Harbors Act
R.M.S.	Royal Mail Ship
RSA	Reservoir Salvage Act
SCUBA	Self-Contained Breathing Apparatus
SOI	Secretary of the Interior
SIAA	Suits in Admiralty Act
SLA	Submerged Lands Act
SMCA	Sunken Military Craft Act
TS	Territorial Seas
UCH	Underwater Cultural Heritage
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
U.S.	United States

USACE United States Army Corps of Engineers

USG United States Government

WHC World Heritage Convention

1. OVERVIEW OF UNDERWATER CULTURAL HERITAGE

1.1. INTRODUCTION

The protection and management of Underwater Cultural Heritage (UCH)¹ is a challenging topic, as it involves the interplay of United States (U.S.) statutes, maritime law, international law, and often complex issues regarding what law applies when and against whom it may be enforced. Under a number of statutes, including the [Outer Continental Shelf Lands Act](#) (OCSLA), the Secretary of the Department of the Interior (DOI) has delegated to the Bureau of Ocean Energy Management (BOEM) the authority, responsibility, and jurisdiction over various activities on the Outer Continental Shelf (OCS) that may have the potential to impact UCH. To promote compliance with OCSLA and several other statutes, BOEM has developed regulations and guidance documents directing energy lease and permit holders to avoid impacting any archaeological resources found during the survey or development of their leases. With the passage of the Energy Policy Act of 2005, BOEM has jurisdiction for renewable energy development on the OCS.²

The majority of the legal guidance regarding BOEM responsibilities for the survey and protection of archaeological resources was developed by DOI in the early 1980s with periodic revisions in the 1990s. The existing guidance is dated and does not take into account revisions to the [National Historic Preservation Act](#) (NHPA) and its regulations, or BOEM's expanded responsibilities for renewable energy development on the OCS. Consequently, it has been difficult for BOEM to reliably apply the existing statutes and regulations with which they rely to protect and enforce UCH management law.

1.2. PURPOSE

The purpose of this study is to provide assistance to BOEM in fulfilling its responsibility to protect UCH discovered in the management under OCSLA and other applicable laws, particularly from treasure hunting activities which are not subject to OCSLA. The scope of DOI's jurisdiction is generally limited to the activities of those contractually obligated under the lease issued by DOI/BOEM for exploration and development of oil, gas, minerals and, more recently, renewable energy resources. In order to clarify the scope of BOEM's responsibilities under existing law and outline possibilities for improving overall protection of UCH on the OCS, this study will:

- Identify domestic and international laws that directly protect UCH through regulation of looting, salvage, research, and other activities directed at UCH.
- Identify laws that may inadvertently protect UCH by requiring consideration of effects from activities that are not directed at UCH but may incidentally impact them.
- Complete a “gap analysis” using the [2001 United Nations Educational, Scientific, and Cultural Organization \(UNESCO\) Convention](#) as the benchmark for protection of UCH.
- Outline the recommended measures for filling the identified gaps in UCH protection in order to meet the obligations under the 2001 UNESCO Convention.

1.3. SCOPE AND DEFINITIONS

All humans are connected by the sea, and on the seabed are sites containing stories of humankind throughout the ages. Similarly, as the sea level rises and falls over time, sites once occupied by pre-contact Native Americans become submerged and are preserved *in situ*, enabling archaeologists to piece together Native American history. Shipwrecks located on the seafloor serve as time capsules of resources and information about when the ship was wrecked due to human error or natural disaster. This treasure trove of information from our past is important for understanding the heritage of humankind. The Law of the Sea (Article 149) imposes a duty on coastal states to preserve historic or archaeological items or to dispose of them for the benefit of mankind. However, much of this UCH is at risk of destruction from activities such as unscientific salvage or looting. Commercial exploitation of UCH is often done by those in pursuit of gold, silver, and other commodities of high monetary value that may be thought to be found inside these time capsules. Other activities such as oil and gas or renewable energy development, dredging, and bottom trawling that involve the exploration for and exploitation of natural resources of the seabed may incidentally harm UCH. No single statute comprehensively protects UCH from all of these human activities. Nonetheless, many laws and policies already in place demonstrate public concern about the resources that we have inherited from our ancestors.

1.4. STRUCTURE AND ORGANIZATION OF STUDY

In order to do the gap analysis and recommendations, the study first discusses (in Sections 1 through 4) the development of law that pertains to UCH including threats from treasure hunting under maritime law and the 2001 UNESCO Convention that was negotiated to address this and other threats. The discussion of U.S. statutes is divided into two categories that track the two primary ways that the 2001 UNESCO Convention protects UCH, which are through control of: 1) activities directed at UCH (e.g., looting, unwanted salvage and archaeological research; Table 1); and 2) other activities that may incidentally affect UCH (exploitation of natural resources like energy development; Table 2).

The discussion of these two types of laws in Sections 5 and 6 include subheadings to organize the analysis: Background and Overview of the statute to touch on its legislative history and how the law came about, including concerns the statute was intended to address; Purpose of the statute and its geographic Scope, particularly in regard to the OCS; Authorizations such as permits, leases or licenses through which the law controls the activities; Sanctions that may apply for a violation and finally there is the analysis of the Gaps the statutes fill or leave in regard to protecting UCH on the OCS in regard to the 2001 UNESCO Convention used as the point of reference for comprehensive protection of UCH. The study then suggests ways to amend three of the primary statutes that control activities directed at UCH that could fill the gaps in the law protecting UCH on the OCS.

Table 1: U.S. Federal Statutes Controlling Activities Directed at UCH

U.S. Federal Statutes (water column above seabed)	Internal waters (<0 nm)	Territorial Sea prior to 1988 (0-3 nm)	Territorial Sea since 1988 Proclamation (0-12 nm)	Contiguous Zone 1999 Proclamation (12-24 nm)	Exclusive Economic Zone (EEZ) 1983 Proclamation (-200 nm)	High Seas (Outside EEZs of nations) (>200 nm)	High Seas (Outside EEZs of nations) (>200 nm)
U.S. Federal Statutes (seabed)	State Lands under Bays, Sounds, and navigable rivers	State Lands (e.g., 0-3 nm) 9 nm off TX, FL Gulf Coast & Puerto Rico	Outer Continental Shelf (3-12 nm)	Outer Continental Shelf (12-24 nm)	Outer Continental Shelf (24-200 nm)	Extended Continental Shelf (ECS) (>200 nm)	Area (beneath high seas + beyond ECS- EEZ)
Antiquities Act of 1906	Applies to activities in monuments and other protected areas on lands “owned or controlled” by U.S.	Applies to activities in monuments and other protected areas on lands “owned or controlled” by U.S. (e.g., per agreement with State)	Applies to activities on OCS/Territorial Seas (TS) as it is “controlled” by U.S. (UCH law may be enforced vs. foreign-flagged vessels & nationals)	Applies to activities on OCS/Contiguous Zone (CZ) because one “controlled” by U.S. (UCH law may be enforced against foreign-flagged vessels and nationals)	Applies on OCS-EEZ b/c “controlled” by U.S. (enforcement of UCH law may be limited vs. foreign flagged-vessel without consent of foreign state)	Applies on ECS as they are lands “controlled” by U.S., (enforcement of UCH law generally limited to U.S.-flagged vessels and nationals)	N/A (because there are no lands owned or controlled by U.S.)
National Marine Sanctuaries Act (NMSA) of 1972	Applies only to resources within a Sanctuary	Applies only to resources within a Sanctuary	Applies only to resources within a Sanctuary	Applies only to resources within a Sanctuary	Applies only to resources within a Sanctuary	Applies only to resources in Sanctuary (Note: While there is no sanctuary on the ECS, <i>Monitor</i> is precedent for sanctuary on OCS in high seas in 1974)	N/A (NMSA could be amended to implement international UCH agreement such as <i>Titanic</i> Agreement)
Archaeological Resources Protection Act (ARPA) of 1979	Applies only to U.S. public lands and Indian lands	Applies only to public (Federal) lands and Indian lands	N/A on OCS, because the OCS is expressly excluded from definition of public lands	N/A on OCS, because the OCS is expressly excluded from definition of public lands	N/A on OCS, because the OCS it is expressly excluded from definition of public lands	N/A (Note: ARPA could be amended to expressly include OCS)	N/A
Abandoned Shipwreck Act (ASA) of 1987	Applies to abandoned wrecks as defined in the ASA	Applies to abandoned wrecks as defined in the ASA	Applies to abandoned wrecks in Texas, Puerto Rico, and the Gulf coast of FL (0-9 nm)	N/A	N/A	N/A	N/A
R.M.S. Titanic Maritime Memorial Act of 1986	N/A, except enforcement activities	N/A, except enforcement activities	N/A, except enforcement activities	N/A, except enforcement activities	N/A		Applies only to activities directed at <i>Titanic</i>
Sunken Military Craft Act (SMCA) of 2004	Applies to sunken military craft as defined in the SMCA, includes foreign craft	Applies to sunken military craft as defined in the SMCA, includes foreign craft	Applies to sunken military craft as defined in the SMCA, includes foreign craft	Applies to sunken military craft as defined in the SMCA, includes foreign craft	Applies only to U.S. sunken military craft	Applies only to U.S. sunken military craft	Applies only to U.S. sunken military craft wherever located enforcement consistent with Law of the Sea Convention (LOSC)

Table 2: U.S. Federal Statutes Controlling Activities that may Inadvertently Affect UCH

U.S. Federal Statutes (water column above seabed)	Internal waters (<0 nm)	Territorial Sea prior to 1988 (0-3 nm)	Territorial Sea since 1988 Proclamation (0-12 nm)	Contiguous Zone 1999 Proclamation (12-24 nm)	Exclusive Economic Zone 1983 Proclamation (-200 nm)	High Seas (Outside EEZs of nations) (>200 nm)	High Seas (Outside EEZs of nations) (>200 nm)
U.S. Federal Statutes (seabed)	State Lands under Bays, Sounds, navigable rivers	State Lands (e.g., 0-3 nm) 9 nm off TX, FL Gulf Coast & Puerto Rico	Outer Continental Shelf (3-12 nm)	Outer Continental Shelf (12-24 nm)	Outer Continental Shelf (24-200 nm)	Extended Continental Shelf (>200 nm)	Area (beneath high seas + beyond ECS + EEZ)
1969 National Environmental Policy Act (NEPA) & 1979 Executive Order (EO) 12114 (NEPA Abroad)	Applies in + on state territory + internal waters to Federal activities	Applies in + on State territory + territorial sea to Federal activities	Applies in + on territorial sea/OCS to Federal activities	Applies in + on CZ/OCS to Federal activities	Applies in + on EEZ/OCS to Federal activities	Applies in + on OCS to Federal activities on ECS	Applies in high seas per EO NEPA abroad policy to Major Federal Actions
1966 National Historic Preservation Act (NHPA) (Sections 106 & 110)	Applies in + on state territory + internal waters to Federal undertakings on State lands and internal waters	Applies in + on State territory + territorial sea to Federal undertakings on State lands and territorial sea	Applies to Federal undertakings on State lands and territorial sea	Applies to Federal undertakings	Applies to Federal undertakings	Applies to Federal undertakings	Applies to Federal undertakings
1980 Amendment to the National Historic Preservation Act (NHPA) (Section 402)	Applies in + on foreign territory + internal waters. to undertakings in sites on list of World Heritage or equivalent of U.S. National Register	Applies in + on foreign territory + territorial sea to undertakings in sites on list of World Heritage or equivalent of U.S. National Register	Applies in + on foreign land + territorial sea to undertakings in sites on list of World Heritage or equivalent of U.S. National Register	Applies in + on foreign and CZ/CS for sites inscribed on World Heritage List or sites on the equivalent of U.S. National Register			N/A as World Heritage Convention does not apply in high seas - Area
Rivers and Harbors Act 1899 Sec. 10	Applies to any and all potential obstructions to navigation in + on navigable waters + submerged lands	Applies to any and all potential obstructions to navigation in + on territorial sea + submerged lands	Applies to any and all potential obstructions to navigation in + on territorial sea and OCS	Applies to potential obstructions to navigation occasioned by the placement of “installations and other devices permanently or temporarily attached to the seabed in + on CZ/OCS per OCSLA (43 USC 1333(a))	Applies to potential obstructions to navigation occasioned by the placement of “installations and other devices permanently or temporarily attached to the seabed in + on EEZ/OCS per OCSLA (43 USC 1333(a))	Applies to potential obstructions to navigation occasioned by the placement of “installations and other devices permanently or temporarily attached to the seabed on OCS per OCSLA (43 USC1333(a))	N/A
Clean Water Act 1972 Section 404	Applies in + on internal waters + submerged lands to dredge and fill activities (including, in some courts, “sidecasting” activities)	Applies in + on territorial sea + submerged lands to dredge and fill activities (including, in some courts, “sidecasting” activities)	N/A	N/A	N/A	N/A	N/A

2. MARITIME LAW OF SALVAGE, THE COMMON LAW OF FINDS AND ADMIRALTY JURISDICTION

2.1. INTRODUCTION

Maritime law is the substantive law applied by courts exercising admiralty jurisdiction.³ Article III of the Constitution of the United States vests the judicial power of the United States in the U.S. Supreme Court and in lower Federal courts as Congress may from time to time ordain and establish.⁴ Maritime cases and admiralty jurisdiction were specifically addressed and assigned to federal courts in the Constitution because of the need for uniformity of the law pertaining to shipping. To have subjected a ship sailing from Europe to the United States to different laws depending on where the ship docked would have created as much uncertainty in the early days of the nation or state⁵ as it would today.

Maritime law developed over the ages, originating when commerce via ships became commonplace and the need grew for rules governing navigation and international trade. While many of the traditional concepts of maritime law have remained,⁶ courts have held that substantive maritime law as well as admiralty law can be modified and supplemented. In *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) the Supreme Court recognized Congress' authority to alter, qualify or supplement the substantive maritime law applied in federal courts sitting in admiralty jurisdiction.⁷ In [*Lathrop v. Unidentified, Wrecked and Abandoned Vessel*](#), 817 F. Supp. 953 (M.D. Fla. 1993), the Federal district court recognized that Congress may constitutionally alter, qualify, or supplement the maritime law of salvage which may be supplemented by historic preservation laws passed by Congress.⁸

2.2. THE HISTORY OF MARITIME COMMERCE AND SALVAGE LAW

Maritime law dates back centuries to the time of ancient Egyptian, Phoenician, and Greek ports. The first codification of maritime law remaining in existence today is the ancient Code of Hammurabi, dating to around 1780 BCE. The Code included the amount that sailors and shipbuilders should be paid for their services, as well as provided a limited discussion of salvage protocol.⁹

In ancient Athens, commercial maritime courts were created to adjudicate complaints between parties, regardless of their country of origin or residence. Athens was eventually eclipsed as a maritime economic power by the island of Rhodes, located midway between the Greek Aegean Sea and ports of Egypt, Cyprus, and Syria. An independent city-state at the time, Rhodes was recognized as one of the best-governed city-states, its people renowned for their naval power and discipline. Due to the vast amount of maritime trade in the port of Rhodes, many international maritime disputes were settled by Rhodian magistrates. In order to facilitate this trade, the people of Rhodes developed, codified, and promulgated a system of maritime laws.

The Rhodian collection first codified the principle of offering a reward for the saving of imperiled maritime property. Under this code, one-fifth of anything saved from an imperiled vessel was awarded to the salvor. If the vessel was already lost to the sea floor, either one-third or one-half was awarded to the salvor, depending on the danger taken to retrieve the items.¹⁰

Further, Rhodian law punished those who took anything from a wreck using violence by requiring the looter to return the property fourfold. Rhodian sea law, including the laws of salvage, became recognized as the law of nations between Mediterranean trading partners.¹¹

Eventually, the island's status declined and Rhodes was incorporated into the Roman Empire. The Roman-Byzantine Code and the Digest of Justinian, compiled around 500 CE, contain many edicts and opinions, which reflected different maritime law practices around the Mediterranean. Included in Roman law was the doctrine of the salvor's right to be rewarded for his voluntary services, even if the services were rendered without the owner's request or knowledge.¹² This doctrine was known as *negotiorum gestio* and was based on the theory of preventing unjust enrichment of one at the expense of another.¹³

Roman salvage law principles remained in use even after the decline of the Empire. In 1063 CE rules regarding salvage law were published in the Italian City of Trani and became known as the Marine Ordinances of Trani.¹⁴ The ordinances decreed that a finder of goods at sea could legally take possession of the goods but must deliver the goods and a written inventory to the court within three days of the find. If the owner came forward to claim the goods, the salvor was entitled to half. If the owner did not appear within 30 days, the salvor was entitled to all of the goods.

About two hundred years later the Rules of Oleron (or Rolls d'Oleron) entered the English legal system. The Rules of Oleron, a small island located on the west coast of France, are thought to be the origin of modern English maritime law.¹⁵ At the time, Oleron was a prosperous port city situated between the ports of La Rochelle and Bordeaux. The Rules contain numerous provisions relating to both salvage and finds. For example, included is a provision that allows for rewarding seamen who save cargo or parts of the shipwrecked vessel as well as a provision requiring the restoration of any gold or silver that happened to be found along the coasts while fishing, although the finder may deduct for his own efforts.¹⁶

The Rules of Oleron are strikingly similar to another set of codified maritime rules from around the same time, the Consolato del Mare, or Consulate of the Sea, from Genoa, Marseilles, and Valencia. The Consulate of the Sea is probably best known in the United States for Justice Story's 1815 citation to it in *Delovio v. Boit*, a seminal case regarding admiralty jurisdiction.¹⁷ Many of the Rules of Oleron were adopted into the Rules of Visby, originating from an island off the coast of Sweden and published in 1505.¹⁸

The Laws of the Hanse Towns, also known as the Hanseatic League, was a code of maritime laws published in 1597 that also borrowed from the Rules of Oleron.¹⁹ The code included provisions relating to salvage, obliging mariners to save as many goods as they could, and be rewarded for it by the master.²⁰

Throughout history, salvage law has maintained its independence from common law. In salvage law, the salvor is given a lien on goods saved through voluntary effort. For example, a person may have a claim for a reward after they rescue a vessel from sinking.²¹ However, in common law, there has never existed a reward for running into a burning building to save a life or property. This was confirmed in the United States by an 1804 Supreme Court case, *Mason v. The Blaireau*, in which Chief Justice Marshall noted the difference between the maritime law concept of salvage and the common law stating that although no reward is given for an act on

land, if “precisely the same service, at precisely the same hazard, be rendered at sea, [then] a very ample reward will be bestowed in the courts of justice.”²² The reasons underlying the difference between granting an award for doing an act at sea and for withholding one for the same act done upon land was founded in public policy to promote trade. In *Falcke v. Scottish Imperial Insurance Co.*, an English judge distinguished the reason for the different public policy on land as opposed to on water:

The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mention it because the word “salvage” has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea.²³

The public policy differences between rewarding for salvage at sea versus on land still persist today. Three main concepts of salvage law survived over the centuries: 1) the property right in the wrecked vessel may *escheat* (revert) to the state; 2) a wrecked vessel may be claimed by whoever first locates and obtains possession of it; and 3) the title of the wrecked vessel remains with the owner, but the owner may be required to pay a salvage award to whoever saves the property and returns it to the owner.²⁴ One of the oldest noted cases of salvage law that involved a moiety (an award for half the monetary value of property saved at sea) dates back to 1333.²⁵ Many of the principles developed at the beginning of the maritime law of salvage can be found in modern salvage law which has been substantially amended to address the relatively more recent issue of salvage of wrecks that have been underwater for so long that they are now UCH.

2.3. MODERN SALVAGE LAW

Modern salvage law is only somewhat different from its historical origins. Salvage law is divided into two types: pure salvage and contract salvage.²⁶ Pure salvage most closely resembles the historical origins of salvage law. In pure salvage, a voluntary service is rendered to imperiled property on waters that are navigable by commercial ships with compensation dependent upon success and without prior agreement or arrangement having been made regarding the salvor’s compensation. In contract salvage, the reward is agreed upon before assistance is given to the distressed vessel.²⁷

2.3.1. Contract Salvage

In contract salvage, the service for salvage is entered into either by oral or written agreement and the amount of compensation is fixed. If the salvage service is rendered pursuant to contract salvage, the salvor has no right to additional compensation or a salvage lien.²⁸ However, an agreed upon amount in a contract salvage award will be set aside if the contract can be shown to have been entered into because of impending marine perils.²⁹

2.3.2. Pure Salvage

Pure salvage was best characterized in the 1879 case, *The Sabine*. In *The Sabine*, the Court stated “[s]alvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture.”³⁰ The factors in *The Sabine* are included today in our modern requirements for a pure salvage award to be granted. These include: 1) a marine peril; 2) service voluntarily rendered when not required as an existing duty or from a special contract; and 3) success, in whole or in part.

2.3.3. Marine Peril

In the context of a recent marine casualty, the danger of the sinking of the ship does not need to be imminent or absolute to be considered a marine peril. After such a ship sinks, they are generally considered to be in marine peril and subject to salvage. The shipwreck immediately begins a natural process of change through which it adapts to its new underwater environment. The rate of deterioration of a shipwreck depends on a variety of factors, including the ship’s composition, the surrounding sea life, the amount of oxygen in the water, and the presence or absence of certain chemicals. However, over time the shipwreck becomes part of the marine environment and is often covered by or embedded in the seabed. At this point, the rate of deterioration slows dramatically due to the lack of oxygen able to access and affect the shipwreck. The shipwrecks have not only reached stasis with the environment, they have become part of the environment.³¹ Such a shipwreck is a cultural resource that is not in marine peril and the law of salvage does not apply.³² The consideration of this scientific evidence presented by the National Park Service (NPS) was an important factor to the admiralty court’s determination that the H.M.S. *Fowey* was a park resource that was not abandoned and was not in marine peril . . .³³ The judge also noted that since the wreck was being protected and preserved *in situ* by the NPS, the treasure hunter’s excavation of the shipwreck was not saving the wreck but rather putting it in more danger because the excavation exposed the site to the water column and oxygen, threatening the stasis or stability of the site.³⁴ The [Klein](#) was a landmark admiralty case that amended the maritime law of salvage by incorporating the science of how shipwrecks at some point become part of the environment, are being preserved *in situ*, and are no longer in marine peril.

2.3.4. Salvage Award

If a wreck is determined to be in marine peril, the service is rendered voluntarily, and if the salvage is a success (in whole or in part), then the salvor may be entitled to a reward. The amount of the salvage award is no longer as easily calculable as it had been over a thousand

years ago. In 1869, the court listed factors to be considered in the salvage award, today known as “The Blackwall Factors.” The factors include:

1. The labor expended by the salvors in rendering the salvage service;
2. The promptitude, skill and energy displayed in rendering the service and saving the property;
3. The value of the property employed by the salvors in rendering the service and the danger to which the property was exposed;
4. The risk incurred by the salvors in securing the property from impending peril;
5. The value of the property saved; and,
6. The degree of danger from which the property was rescued.³⁵

A claim for a salvage award may proceed in person against the property owner or *in rem* against the salvaged property. However, in *in rem*³⁶ proceedings, the *res*³⁷ must be present in the territory of the district when the suit is filed or during the pendency of the action. The *res* requirement is typically satisfied for historic shipwrecks by bringing an object from the wreck into court.³⁸ Types of service for which pure salvage award may be granted include towage, stranding, fire, recovery of cargo, life salvage, supplying crew or stores, standing by or securing aid, giving advice, pilotage, preventing collision, recapture from enemies, pirates and privateers, or raising sunken craft and property.³⁹ Whether the recovery of a derelict vessel deserves an award for salvage is unresolved. Courts have defined a “derelict vessel” as a vessel on navigable waters that is abandoned and deserted by the owner, whether by accident, necessity or voluntarily, without hope or intention of recovery (*sine spe recuperandi*) or the intention of returning (*sine animo revertendi*) to it by the owner.⁴⁰ Both the vessel and cargo can be derelict.⁴¹

2.3.5. Commercial Treasure Salvage and Historic Preservation

As indicated above, the long history of salvage law was developed in the context of recent marine casualties in order to protect the interests of owners of ships and cargo in marine peril to prevent looting, and provide salvors a reward for returning the goods to the stream of commerce.⁴² With the advent of SCUBA, came recreational and commercial treasure hunting and salvage. Commercial treasure salvage has been defined as the “recovery of treasure and artifacts from ancient shipwrecks,” which may have considerable monetary and archaeological significance.⁴³ The landmark case for treasure hunters is [*Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Vessel*](#), in which the court held in favor of the infamous Mel Fisher in granting title to artifacts salvaged from the Spanish vessel *Nuestra Senora de Atocha*.⁴⁴ The *Atocha* sank off the coast of Florida in 1622 and was found by the plaintiffs a mile (1.6 km) beyond Florida’s submerged lands on the outer continental shelf.⁴⁵

The United States Government (USG) intervened as a defendant but the court rejected the USG’s counterclaim for title under various statutes and legal theories including OCSLA and the [*Antiquities Act*](#) (AA). The court noted that the AA applies to “lands owned or controlled by the Government of the United States” but rejected the USG argument of title to the *Atocha* because

the USG did not own it under the Abandoned Property Act or own the OCS in which it was embedded. The court noted that the OCSLA and the Convention on the Continental Shelf only applied to the exploitation of natural resources found within the continental shelf and did not assert ownership or control over historic shipwrecks. As shipwrecks are not natural resources of the OCS, the Federal government could not claim ownership of *Atocha* through OSCLA or the Antiquities Act. Finally, the court rejected the Federal government's proposition that it had adopted the English common law rule granting the Crown title to abandoned property found at sea. The court noted that one state court had applied that doctrine early in U.S. history, but that it had since been abandoned by the courts. The court agreed that the U.S. Congress has the sovereign prerogative to enact legislation to control activities directed at shipwrecks but noted that this had not been written into any statute.⁴⁶ In this early case, the court discussed how salvage of a historic shipwreck was in the public interest because it was in marine peril and would now be returned to the stream of commerce. In a more recent post-[Abandoned Shipwreck Act](#) (ASA) treasure salvage case, [Columbus-America](#), the court recognized the public interest in historic preservation of shipwrecks and added a factor to the Blackwall factors to reward the salvors' efforts to preserve the historical and archaeological value of the wreck including the cargo.⁴⁷

The *Columbus-America* case involved the discovery of the *S.S. Central America* that sank in September 1857 well over 200 kilometers (108 nm) off the coast of the Carolinas.⁴⁸ Captain Herndon went down with the ship that resulted in the loss of four hundred and twenty-five lives.⁴⁹ Tommy Thompson led the *Columbus-America* Discovery Group that discovered the wreck on the Blake Plateau of the U.S. OCS well outside the territorial sea and contiguous zone. They asserted ownership under the law of finds or an award under the law of salvage. Underwriters and other insurers intervened and asserted rights of ownership. The court noted that the law of salvage is preferred over the law of finds as it is more protective of property rights of the true owner. The court held that while the law of finds was not applicable, the salvors were entitled to a liberal salvage award (92%).⁵⁰ The case is noteworthy for adding the consideration of the salvors' efforts to address the archaeological value and of historic preservation interest to the Blackwell list.⁵¹ It is also a precedent for control or constructive possession of the wreck through "telepresence" involving the use of remote sensing equipment to research and monitor the site.⁵² The *Columbus-America* case re-emphasizes the preference for the application of the law of salvage over the common law of finds.

2.4. THE COMMON LAW OF FINDS

The common law of finds has sometimes been applied in lieu of salvage law, particularly in cases pre-dating the Abandoned Shipwreck Act of 1987.⁵³ The law of finds originated from common law with the principle of "*sine amino revertendi*," the owner has no intention of returning, which was developed to address finds of property on terrestrial land.⁵⁴ The law of finds treats property that is abandoned as having returned to the state of nature and thus the equivalent to property with no owner. For private property to be "abandoned," the owner must voluntarily give up title to the shipwreck "with the intent of never claiming a right or interest in the future and without vesting ownership in any other person."⁵⁵ Under maritime case law, abandonment may be either express (a clear, affirmative announcement of the intention to abandon a shipwreck and renounce title) or implied when the owner's actions or failure to act demonstrate such intention.⁵⁶

The law of finds generally assigns ownership of or title to the abandoned property or *res* over which it has *in rem* jurisdiction.⁵⁷ Two exceptions to this rule are recognized: 1) if the abandoned property is *embedded* in the submerged lands, the owner of the submerged lands also owns the abandoned property; and 2) if the owner of the submerged lands on which the property is found (whether located on or embedded in the seabed) has *constructive possession*⁵⁸ of the property such that it cannot be deemed to be “lost,” the owner of the submerged lands also owns the property embedded in the land.⁵⁹

The issue of whether shipwrecks are abandoned has been the subject of much litigation. Some courts have inferred abandonment by the mere passage of time and the failure of the owner to assert an ownership claim.⁶⁰ It should be noted that the United States and other nations take the position that their sovereign shipwrecked vessels, no matter where in the world they are located, are *not* abandoned, absent an express renunciation of ownership by the proper authority.⁶¹

2.5. JURISDICTION UNDER INTERNATIONAL LAW AND UCH

The “jurisdiction” of a State describes the scope of the legal competence of the State to make, apply, and enforce rules of conduct on persons or to regulate the consequences of events.⁶² Under international law, it is generally recognized that a State has sovereignty and jurisdiction over its territory including its territorial sea.⁶³ A State also has jurisdiction over its nationals as well as vessels registered to fly its flag, i.e., flag State jurisdiction.⁶⁴ A State’s jurisdiction over its nationals and flagged vessels extends beyond its territory to include the activities of the nationals and vessels in the high seas and in some cases wherever the nationals and vessels may be located.⁶⁵ There are a couple of types of jurisdiction a coastal State may exercise over shipping activities, ships, and shipwrecks that are important to keep in mind in the international context where enforcement may be against a foreign flagged vessel or national: the jurisdiction to prescribe rules of law and the jurisdiction to enforce and/or adjudicate those rules of law.

“Jurisdiction to prescribe” refers to the authority of the state or nation to make its law applicable to particular persons or circumstances, usually by adopting legislation, although it may also do so through courts which develop the law. “Jurisdiction to enforce” refers to the state or nation’s authority to induce or compel compliance or to punish noncompliance with its laws, whether through its courts or by use of executive, administrative or police action.⁶⁶ For example, under the [National Marine Sanctuaries Act](#) (NMSA), National Oceanic and Atmospheric Administration (NOAA) has the authority to prescribe regulations to protect and manage sanctuary resources on the OCS and Exclusive Economic Zone (EEZ). However, the NMSA expressly provides that any enforcement against foreign flagged vessels must be consistent with international law. NOAA may prescribe sanctuary regulations for the removal of UCH and enforce them against any U.S. vessel and national on the OCS and within the EEZ; however, the enforcement of regulation regarding removal of UCH against a foreign flagged vessel or national for any sanctuary UCH located beyond the 24 nautical mile (nm) (44 km) contiguous zone may be questioned unless it is also done with the consent of the foreign nation per an international agreement or in a specific case. That is because coastal State jurisdiction over UCH is limited to the 24 nm (44 km) contiguous zone under Article 303 (2) of the [Law of the Sea Convention](#) (LOSC). On the other hand, since the LOSC recognizes coastal State jurisdiction over natural heritage, if the looting or unauthorized salvage of UCH also involves excavation of the OCS or otherwise violates regulations to protect natural heritage or resources, then those regulations may

be enforced against foreign flagged vessels and nationals. Other activities that the USG may regulate and enforce against U.S. and foreign flagged vessels and nationals on the OCS/EEZ include the placement of structures on the seabed, including artificial reefs. It therefore follows that the harm, injury or removal of an artificial reef would also be a regulation that may be enforced on the OCS/EEZ even if that artificial reef also happens to be UCH.⁶⁷

In the domestic context of U.S. admiralty courts, treasure salvors have typically sought legal rights to the shipwrecks that they salvage by means of filing *in rem* actions against the subject shipwrecked vessel and its cargo.⁶⁸ Jurisdiction over shipwrecks is created through a legal fiction by bringing an object from the wreck, including its cargo, into the territorial jurisdiction of the admiralty court so that the “arrest”⁶⁹ of the object results in an *in rem* proceeding for the salvage activities being conducted at the wreck site outside of the territorial jurisdiction of the court. This jurisdiction is also referred to as constructive jurisdiction or jurisdiction by necessity.⁷⁰ While this fiction may be argued to become more and more tenuous the further off shore the wreck lies, the court loathes a vacuum and has filled that vacuum or gap in the law with case law through admiralty jurisdiction.⁷¹ *In personam* jurisdiction plays a prominent role in such actions as it gives court’s jurisdiction over the salvors and thus their salvage activities as they seek authorization for their salvage activities. Although constructive jurisdiction may be exercised over the shipwreck and her cargo for purposes of authorizing the salvage activities and granting rights to the salvor, it is the court’s exercise of *in personam* jurisdiction over the plaintiff, or any claimant who may intervene in the action, that is essential for the enforcement of any of the orders in the case.⁷²

2.5.1. Sovereign Immunity and United States Public Vessels

2.5.1.1. Overview and Background

Vessels owned and operated by the U.S. Government or foreign governments are subject to sovereign immunity. Under domestic law, the doctrine of sovereign immunity can be traced back to early English common law where the sovereign was immune from suits by his or her subjects unless the sovereign consented to the suit. There is also a principle in public international law that the government of one State or nation is generally immune from arrest and enforcement of the laws of another State without its consent. This immunity of the sovereign extends to the property of the respective sovereign governments, including sovereign or public vessels. The U.S. Supreme Court upheld this doctrine in the landmark case *Schooner Exchange v. McFaddon*.⁷³

The *Schooner Exchange* case involved a vessel, owned by a U.S. citizen, which had been seized by Napoleon's government for conversion into a French warship. When the French warship entered the U.S. port of Philadelphia, the original owner sought to regain title and possession of the vessel. The Supreme Court ruled that the confiscation of the ship had been carried out in waters subject to French law and jurisdiction and that the confiscation had been undertaken in accordance with French law. As such, the vessel was subject to sovereign immunity and the original owner could only regain title in a French court applying French law.

2.5.1.2. Scope of sovereign immunity includes sunken public vessels

This respect for foreign ownership and immunity of vessels from arrest and enforcement of civil or criminal law has been extended to sunken State vessels. For example, France respected

the United States' claim of ownership and immunity over the C.S.S. *Alabama*, a Confederate warship that sank off the coast of France during the U.S. Civil War. France and the United States had signed an agreement in regard to how the *Alabama* was to be treated. In that agreement, the United States recognized the authority of the French government to regulate activities directed at the sunken U.S. warships in France's territorial waters because those waters are clearly subject to French jurisdiction and control. In turn, France acknowledged that the *Alabama* is still owned by the United States; therefore, France obtained the consent of the United States before conducting intrusive studies of the vessel and recovered artifacts in a manner agreed upon by the United States. The agreement also recognized that France had the authority to take urgent action for purposes of conservation and that the United States must be subsequently notified of those actions.

2.5.1.3. Authorization or consent of flag State of sunken public vessel

Under international law, there is recognition that the State or nation under which the vessel is flagged in the State which has jurisdiction over the vessel, its crew and passengers and their activities at sea, including the high seas outside national or coastal State jurisdiction. If a foreign flagged vessel is in the port, territorial sea or EEZ of another nation then it is subject to the laws of that nation and the coastal State jurisdiction for certain purpose; however, there are a number of actions that the coastal State may not take against the foreign flagged vessel without the consent of the foreign flagged state. The LOSC is largely about the balance of interests of coastal State jurisdiction and the freedom of navigation in the high seas that exists in the EEZ and the right of innocent passage of a foreign flagged vessel that exists in the territorial sea in another nation. Under maritime law, a salvor may seek the arrest of a private vessel that is sinking or has sunken for purposes of an *in rem* action for salvage rights and reward; however, public vessels are subject to sovereign immunity and are therefore immune from arrest unless there is an express waiver of sovereign immunity such as in legislation. Therefore, the consent of the government is generally required before any arrest of a public vessel and certainly before its salvage, recovery, or intrusive activities are conducted. U.S. sovereign vessels are not subject to arrest or enforcement under U.S. law unless there is consent or a waiver of sovereign immunity under that law. The same is true for foreign sunken vessels.

2.5.2. Suits in Admiralty Act of 1920

2.5.2.1. Overview and Background

In 1916, Congress created one such waiver when it enacted the Shipping Act. Under the Shipping Act, a private ship-owner was allowed to recover damages from the United States for damage caused to that private ship-owner's vessel by a U.S. owned vessel that, at the time the damage occurred, was employed as a merchant vessel. It was unclear in the Shipping Act whether the waiver of sovereign immunity allowed a private ship-owner to seize or arrest a U.S. owned vessel in an admiralty proceeding. When the U.S. Supreme Court ruled in *Lake Monroe*⁷⁴ that this waiver did allow the seizure or arrest of a U.S. owned vessel, Congress passed the Suits in Admiralty Act (SIAA) in 1920 in order to avoid the embarrassment and expense of having a U.S. owned vessel seized or arrested.⁷⁵

2.5.2.2. Purpose

The Suits in Admiralty Act provides an express waiver of this sovereign immunity in certain cases. According to the statute, “[i]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding may be brought against the United States.”⁷⁶

2.5.2.3. Scope

The statute applies to maritime cases subject to admiralty jurisdiction of U.S. Federal courts. It does not set forth any limit to the geographic scope of application.

2.5.2.4. Authorization, consent or waiver of immunity for cases vs. U.S. Public Vessels

Suits under the SIAA must be brought within two years after the cause of action arises, as opposed to the three-year limitation typically applied to most maritime personal injury/death actions. The claims can only be brought in Federal court and may not be commenced *in rem*. It should be noted that if the SIAA applies, claims under the Federal Tort Claims Act of 1946 are excluded.⁷⁷ Because the government is waiving immunity under the SIAA, procedural obligations require that the Federal Tort Claims Act cause of action be taken at a different time. The two-year statute of limitation under the SIAA then presents an issue.⁷⁸

Under the SIAA, “a civil action in admiralty *in personam* may be brought against the United States or a federally-owned corporation.” However, that waiver of sovereign immunity extended only to actions that would have existed had the vessel been privately owned or operated. Additionally, Congress did not extend that waiver of sovereign immunity to enforcement by foreign nations: “This [Act] does not affect the right of the United States to claim immunity of a vessel or cargo from foreign jurisdiction.”

Because the government did not want this waiver to extend to the seizure or arrest of U.S. owned or operated vessels, the SIAA exempted from arrest or seizure any “vessel owned by, possessed by, or operated by or for the United States or a [f]ederally-owned corporation.” However, claimants could pursue actions related to other *in rem* liabilities so long as those actions would have been available had a private party caused the damage. Because sovereign immunity was waived for actions already existing in admiralty law, the SIAA entitled the United States “to the exemptions from and limitations of liability provided by law to an owner, charterer, operator, or agency of a vessel” that also already existed in admiralty law.

At the time of its passage, the SIAA applied only to government owned or controlled merchant vessels. Those vessels did not have to be actively employed as a merchant vessel in order for an action to be filed under the SIAA; all that was required was that “the vessel belong[ed] to th[e merchant] class as distinguished from one employed in government service.” Therefore, the SIAA provided for an action against the United States for damages caused by active government owned or controlled merchant vessels and damage caused by the wrecks of former merchant vessels. Although Congress had contemplated extending the waiver of sovereign immunity to public vessels in addition to merchant vessels, there was some fear that the inclusion of public vessels would delay passage of the Act.

2.5.3. Public Vessels Act

2.5.3.1. Overview and Background

In 1925, Congress enacted the Public Vessels Act (PVA) thus extending the waiver of sovereign immunity to public vessels.⁷⁹

2.5.3.2. Purpose

Under the PVA, the United States waived sovereign immunity to allow for the filing of a “civil action *in personam* in admiralty . . . against the United States for . . . damages caused by a public vessel of the United States.” Like the SIAA, the PVA retained the United States’ sovereign immunity from arrest and seizure, but provided for a waiver of sovereign immunity from actions based on other *in rem* principles. Similarly, the purpose of the PVA was to impose the same kind of liability on the U.S. that admiralty law imposed on private ship-owners; therefore, the Act did not create new rights of action against the United States but instead waived the United States’ immunity from those actions existing under admiralty law. This waiver of liability was also extended to foreign nationals but only if “it appears to the satisfaction of the court in which the action is brought that the government of that country, in similar circumstances, allows nationals of the U.S. to sue in its courts.” Waiver from suit was not restricted to cases in which the “public vessel was the ‘physical instrument’ by which the ‘physical damage’ was done.” For example, the United States would be liable for damage caused by the negligence of a public vessel crewmember in the same manner in which the principles of admiralty law impose liability had private actors been involved. Like the SIAA, under the PVA, “the United States is entitled to the exemptions from and limitations of liability provided by law to an owner, charterer, operator, or agency of a vessel.”

Although the PVA does not define “public vessels,” Congress intended the PVA to be the public counterpart to the SIAA; therefore, any vessels owned or operated by the United States that did not belong to the merchant class were public vessels. Under the PVA, courts have found that government ownership of a vessel and government use of that vessel for a public purpose is enough to establish the vessel as a public vessel. Government owned vessels that are operated by private individuals for a public purpose have also been considered public vessels.

2.5.3.4. Scope

The statute applies to maritime cases subject to admiralty jurisdiction of U.S. Federal courts. It does not set forth any limit to the geographic scope of application.

2.5.3.5. Authorization, consent or waiver of immunity for cases vs. U.S. Public Vessels

The PVA⁸⁰ waives sovereign immunity for certain suits against the U.S. In cases involving foreign vessels, there is a requirement for reciprocity in that the U.S. vessels may only be sued when the foreign national’s home nation also has a waiver of sovereign immunity for U.S. citizens who sue in the foreign nation’s court.⁸¹ Suits under the PVA must be commenced within two years of when the cause of action arises and must be brought in Federal court.⁸² The venue is the district in which any of the plaintiffs reside, have their principle place of business, or in which the vessel or cargo charged with liability is found. As with the SIAA, suits under the PVA may not be commenced *in rem* against the vessel.

2.5.4. Plunder Statute of 1909 – Potential Sanctions for Looting and Unauthorized Salvage

2.5.4.1. Overview and Background

The “[Plunder of Distressed Vessel](#),” also known as the “Plunder Statute” originated in the Crimes Act of 1790, crafted by the First Congress of the United States. It has undergone minor revisions over the years. While the law of salvage provided an award for proper salvage under that process, the Plunder Statute was enacted to make it an offense for unauthorized salvage.

2.5.4.2. Purpose

Its purpose was to make it illegal to plunder, steal, or destroy goods of any value from and/or belonging to a wrecked vessel within U.S. admiralty or maritime jurisdiction and with the intent to appropriate, convert, or destroy the items by a use other than restoring them to their rightful owner.

2.5.4.3. Scope

The Plunder Statute applies in any place within U.S. admiralty or maritime jurisdiction, including ships that have run aground on a U.S. or foreign shore, “[f]rom the moment of the wreck ... until restored to their rightful owner,”⁸³ regardless of the property’s location and even in situations where the vessel itself has gone to pieces. Although U.S. flagged vessels are under constructive U.S. jurisdiction while outside of actual U.S. jurisdiction, such jurisdiction ceases for purposes of this statute once a vessel is destroyed to the point that “not a vestige of the vessel remain[s].”⁸⁴

2.5.4.4. Sanctions

The “Plunder Statute” provides for a civil and/or criminal penalty for the looting or destruction of a vessel that is lost, wrecked or in distress at sea.⁸⁵ The statute states:

(a) Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined under this title or imprisoned not more than ten years, or both.

(b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or

Whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger or distress or shipwreck—Shall be imprisoned not less than ten years and may be imprisoned for life.⁸⁶

2.6 GAP ANALYSIS: USE OF MARITIME LAW AND ADMIRALTY JURISDICTION TO PROTECT UCH

As indicated previously, the courts loathe a vacuum in the law. As a result, U.S. admiralty courts have been applying maritime law developed for recent marine casualties to apply to historic shipwrecks in the absence of statutes from Congress. In some cases, there has been an unscientific hurried salvage to keep expenses down and commercial profits up resulting in the loss of UCH, including important information that would have been recovered with strict adherence to archaeological standards. While the *Treasure Salvors* case may have been a landmark case for treasure hunters that wanted to exploit UCH as a commercial commodity, from the start there was recognition of the public interest in preservation of at least some artifacts if not the contextual record. The cases that failed to recognize this public interest often resulted in authorization of unscientific salvage and the loss or destruction of the contextual record and artifacts that perhaps were less appealing for sale or display in museums. The trend over the past couple of decades has been moving more and more to treat historic shipwrecks more as a public resource that is not necessarily in marine peril and may be preserved at the bottom of the sea *in situ* and should only be salvaged or recovered in accordance with professional archaeological standards.

The recognition of Federal laws and policies reflecting public interest in historic shipwrecks started in cases where the shipwrecks were located in federal marine protected areas, such as in the cases of *Klein* (Biscayne National Park), *Lathrop* (Cape Canaveral National Seashore), [*United States v. Craft*](#) (Channel Islands National Marine Sanctuary) and *United States v. Fisher* (Florida Keys National Marine Sanctuary). The recognition of public interest in federal statutes and programs has continued to historic shipwrecks that are located outside of federal marine protected areas and even outside the United States. For example, in the case of *Titanic*, the salvors agreed to be bound by archaeological standards for research, salvage, conservation, and curation. Those standards are now part of the court orders and covenants and conditions for the award of the *Titanic* collection under the maritime law of salvage.

Another more recent example is an order issued on January 4, 2013 by the Chief Judge, Susan Oki Mollway, for the U.S. admiralty court for the District of Hawaii. While Mollway granted exclusive rights to salvage a wreck off the coast of Hawaii, she ordered that “prior to any physical contact with the vessel, Plaintiff is responsible for obtaining any necessary permits and authorizations from local, state or Federal authorities, including but not limited to authorities whose areas of expertise and enforcement are the ocean, environment, endangered or threatened species, historic preservation, and/or cultural protection or preservation. Plaintiff shall also comply with all applicable local, state or Federal statutes or regulations.”⁸⁷ If this approach to conditioning rights to salvage upon compliance with applicable permits becomes the norm in subsequent U.S. admiralty courts, it would do much to fill the gaps in protection of UCH through maritime law and statutes protecting natural and cultural heritage. For example, the need obtain a Rivers and Harbors Act (RHA) Section 10 permit for excavation of the seabed in this case is likely to result in the triggering of Section 106 of the NHPA as well as NEPA and perhaps the consultation requirement under the Endangered Species Act and/or the Marine Mammal Protection Act. If a permit is ultimately issued, it will be conditioned in a manner that addresses the concerns for natural and cultural heritage. The RHA Section 10 applies on the OCS and would similarly control salvage activities to ensure that they are carried out in an

environmentally sound manner. Finally, if the courts and the Executive Branch agree that the AA permit provision is applicable in the EEZ/OCS in the same manner that the monument provision has been applied in the EEZ/OCS, then compliance with that permit required by admiralty courts would clearly fill a large gap in protection of UCH on the OCS.

3. INTERNATIONAL LAW AND UNDERWATER CULTURAL HERITAGE

3.1. OVERVIEW OF INTERNATIONAL LAW AND THE LAW OF THE SEA

In general, international law is the law of nations, or rules of law nations have agreed to be bound by through a treaty or the customary practice of nations.⁸⁸ This branch of law has its roots in boundary agreements between the rulers of early city- and nation-states. As these entities began increasing their international trade, norms of conduct were codified due to the need for a stable framework for what was largely maritime commerce. Rules for international combat also developed at this time as nations began using their military to control maritime commerce, such as Denmark requiring a toll for ships to pass through a narrow sound in the Baltic Sea.

The Dutch jurist, Hugo Grotius, is widely considered to be the father of international law.⁸⁹ The Dutch were at war with Spain and Portugal when a captain working for the Dutch East India Company captured a Portuguese vessel off the coast of Singapore and sought a prize in court. Grotius was called upon to defend the capture and his work ultimately led to his 1625 treatise, *De jure belli ac pacis* (On the Law of War and Peace), his earliest compilation of the laws of nations and thus the starting point for modern international law. However, it was his 1609 pamphlet entitled *Mare Liberum* (Free Seas) that posited the new principle that the sea was open and free for use by all for shipping. This was disputed by other legal scholars, including English jurist, John Selden, who published *Mare Clausum* (Closed Sea) in 1635 arguing that the sea was, in practice, capable of being as protected and controlled as terrestrial territory.⁹⁰ This need for balance between free use of the sea by ships and a coastal State being able to control the sea off its coast as part of its territory became the foundation for the practice of nations that became part of the customary Law of the Sea (LOS).

The legacy of early naval warfare survives in the contemporary Law of the Sea Convention. For example, the recognition of a 3 nm (5.6 km) territorial sea arose in part because that was the distance a cannon shot could reach at the time (also known as the “cannon shot rule”). A customs or contiguous zone also gained recognition as an area adjacent to the territorial sea in which foreign ships could be seized by the coastal state to protect its territory and enforce customs law. In the United States, the creation of a territorial sea and contiguous zone dates back to the late 1700s in response to issues of national security and law enforcement at coastal areas, including a 1793 diplomatic note sent from Thomas Jefferson and legislation passed by Congress in 1799 to allow the boarding of foreign flag vessels within 12 nm (22 km) from the coast. This zone was known as “customs waters” and was later called the “Contiguous Zone.”

3.2. SOURCES OF INTERNATIONAL LAW - CUSTOMARY INTERNATIONAL LAW AND TREATIES

There are two primary sources of international law.⁹¹ Customary international law is the general custom or consistent practice of nations that have been recognized or accepted by the

majority of the international community of nations or states. A generally accepted international practice such as the “cannon shot” rule for a coastal State’s territorial sea is an example of customary international law. Treaties, conventions, and other written international agreements constitute the other primary source of international law.

The Statute of the International Court of Justice addresses sources of international law in Article 38(1). The article lists four mechanisms for establishing international law: international conventions (including treaties); generally recognized principles of law; judicial decisions and teachings by qualified publicists (a subsidiary means); and customary international law.⁹² The fourth mechanism, customary international law, is derived from State Practice and *Opinio Juris*. State Practice is generally defined as an act, omission, inaction, statement, exchange, or any sort of official communication made by governments to address an international issue that adheres to a consistent principle or doctrine. *Opinio Juris* is the short form of *opinio juris sive necessitates* (a conviction that the rule is obligatory) – in other words, a legal obligation accepted by nations with few declining to follow it.

3.3. TREATIES AND CONVENTIONS REGARDING HERITAGE IN GENERAL

As discussed below, there are several conventions regarding the protection of heritage that, although primarily developed to protect heritage on terrestrial land, may apply in the marine environment, or at least provide some policy guidance.

3.3.1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

The Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”) was adopted at The Hague in the Netherlands in 1954 in the wake of massive destruction of cultural heritage during the Second World War. The 1954 Hague Convention is the first international treaty with a worldwide vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict.⁹³ The 1954 Hague Convention covers immovable and movable cultural heritage, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical, or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership.

States that are party to the 1954 Hague Convention benefit from the mutual commitment of more than 115 States with a view to sparing cultural heritage from consequences of possible armed conflicts through the implementation of the following measures:

- The adoption of peacetime safeguarding measures such as the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property;
- The respect for cultural property situated within their own territory as well as within the territory of other State Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its

protection for purposes likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property;

- The registration of a limited number of refuges, monumental centers and other immovable cultural property of very great importance in the International Register of Cultural Property under Special Protection⁹⁴ in order to obtain special protection for such property, including:
 1. Consideration of the possibility of marking of certain important buildings and monuments with a distinctive emblem of the Convention;
 2. Establishment of special units within the military forces to be responsible for the protection of cultural property;
 3. Sanctions for breaches of the Convention; and,
 4. Wide promotion of the Convention within the general public and target groups such as cultural heritage professionals, the military or law-enforcement agencies.⁹⁵

3.3.2. 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Sixteen years after the adoption of the 1954 Hague Convention, the international community agreed to extend this protection of heritage by adopting the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“[1970 UNESCO Convention](#)”) to curb the increasing illicit international trafficking of cultural property.⁹⁶ Under the provisions of this pioneering international treaty, States cooperate to protect the “cultural property”⁹⁷ on their territory and fight its illicit import, export and transfer. This international legal instrument addresses a rapidly evolving issue that is attracting significant political, media, diplomatic, and legal attention.

3.3.3. World Heritage Convention of 1972

In 1972, during the Nixon Administration, the United States proposed the World Heritage Convention (WHC) to UNESCO, and was the first nation to ratify that convention.⁹⁸ The WHC promotes local and international cooperation for the preservation of natural and cultural heritage. Significantly, it is the most widely accepted international conservation treaty in the world, which has resulted in the American concept of national parks being implemented worldwide.

The WHC identifies and helps protect international sites of such exceptional ecological, scientific, or cultural importance that their preservation is considered a global responsibility.⁹⁹ Under the WHC, which entered into force in 1975, participating countries nominate sites to be included on the World Heritage List and the List of World Heritage in Danger (“Danger List”). Currently, the World Heritage List is composed of 936 natural and cultural sites in 153 countries, and the Danger List includes 35 sites from 28 countries. One hundred and ninety countries, including the United States, are party to the WHC.¹⁰⁰

Only countries that have signed the WHC, pledging to protect their natural and cultural heritage, can submit nomination proposals for properties within their territory to be considered for inclusion in UNESCO’s World Heritage List.¹⁰¹ Proposals are considered based on a series

of nomination steps, criteria, and other evaluative processes. These constitute the key elements of the road map for proceeding from a decision to nominate a site for inclusion to attaining approval for the site to be inscribed on the World Heritage List.

The U.S. World Heritage Program is administered by the National Park Service (within the U.S. Department of the Interior), which processes U.S. nominations and handles other daily program operations. It administers sites with funds appropriated by Congress, except for several sites that are owned by states, private foundations, the Commonwealth of Puerto Rico, or Native American tribes. Twenty-one sites in the United States are currently included on the World Heritage List, including the Statue of Liberty and Yellowstone National Park. The Papahānaumokuākea Marine National Monument in Hawaii is the latest U.S. site to be added to the list, the first Marine World Heritage site in the United States, and is the nation's first site designated for its outstanding natural and cultural heritage qualities.¹⁰²

Since the U.S. Senate ratification of the WHC in 1973, Congress has generally supported the program implementing the Convention.¹⁰³ While some concerns have been raised that designating U.S. lands and monuments as World Heritage Sites would infringe on national sovereignty, these are unfounded. Ultimately, U.S. participation in the WHC does not give UNESCO or the United Nations (UN) authority over U.S. World Heritage sites or related land-management decisions.¹⁰⁴ In addition, under current law, Congress is involved in the nomination of U.S. sites to the extent that the Assistant Secretary for the U.S. Fish and Wildlife and the National Park Service is required to notify the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources regarding which sites he or she plans to nominate for inclusion on the World Heritage List.¹⁰⁵

3.4. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The 1982 Law of the Sea sets forth a comprehensive legal framework for the sea, the seabed and its subsoil, and the protection of the marine environment and its natural and cultural resources.¹⁰⁶ The LOS recognizes the limits of a coastal nation's maritime zones and boundaries, balancing the rights of coastal States with those of flag states in each of the maritime zones. While it is not yet a party, the U.S. nevertheless observes the LOS as reflective of customary international law and practice.¹⁰⁷ The LOS designates several maritime zones, each of which delineates the jurisdiction, authority, and rights that a coastal State may assert.

3.4.1. Maritime Zones

3.4.1.1. Internal Waters

The internal waters are those waters on the landward side of the baseline from which the breadth of the territorial sea is measured, following the definition in Article 5 of the 1958 Territorial Sea Convention.¹⁰⁸ In general, "internal waters" refers to freshwater and estuarine waters. The "normal baseline" is the low water mark along the coast.¹⁰⁹

3.4.1.2. Territorial Sea

The territorial sea is the belt of ocean measured from the baseline of the coastal State, not to exceed 12 nm (22 km), comprising the seabed, subsoil, water, and corresponding airspace.¹¹⁰ A coastal State may assert full sovereign authority in the 12-nm (22 km) territorial sea. Thus, a

coastal State's domestic laws affecting UCH apply even to foreign flag vessels in its territorial sea, and therefore do not conflict with international law, except to the extent that the domestic laws do not prohibit or unduly interfere with the right of "innocent passage."¹¹¹ Innocent¹¹² passage¹¹³ is the continuous or expeditious navigation of vessels that is not prejudicial¹¹⁴ to the peace, order, and security of a nation. Since 1988, the U.S. has claimed a 12-nm (22 km) territorial sea pursuant to Presidential Proclamation 5928.¹¹⁵

3.4.1.3. Contiguous Zone

The contiguous zone is the belt of ocean adjacent to, or contiguous with, the territorial sea and extending 24 nm (44 km) from the baseline, wherein the coastal State may exercise control necessary to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.¹¹⁶ Like the territorial sea, the contiguous zone developed from the practice of nations in part to control customs and trafficking¹¹⁷. It was codified for the first time in the 1958 Convention on the territorial sea and contiguous zone and more recently in Article 33 of the Law of the Sea Convention.¹¹⁸ It also is an area wherein it is recognized that a coastal State has jurisdiction and authority over foreign flagged vessels and nationals to protect and manage the UCH located within this zone.¹¹⁹ In 1972, the U.S. proclaimed a contiguous zone extending from 3 to 12 miles (5 to 19 km) offshore that was consistent with the 1958 United Nations Convention on the Territorial Sea and Contiguous Zone.¹²⁰ In 1999, eleven years after President Reagan extended the U.S. territorial sea to 12 miles (19 km), President Clinton proclaimed a contiguous zone extending from 12 to 24 nm (22 km to 44 km) offshore consistent with Article 33 of the LOSC.¹²¹

3.4.1.4. Exclusive Economic Zone

The Exclusive Economic Zone is a belt of ocean extending 200 nm (370 km) from the baseline excluding the territorial sea and contiguous zone.¹²² The EEZ regime represents a balancing of the rights of coastal States to protect and develop resources lying off their coasts (e.g., fisheries and offshore oil and gas) with the rights and freedoms of all other nations on the high seas (e.g., navigation, overflight, laying and maintenance of pipelines and submarine cables), as well as related uses compatible with the coastal State's and other international laws. A coastal State does not have sovereignty in the EEZ but, under Article 56, it may exercise sovereignty for the purpose of exploring and exploiting, conserving, and managing the natural resources of the EEZ. The U.S. declared its 200-nm (370 km) EEZ in 1983 with Presidential Proclamation 5030, and Congress incorporated this EEZ into the Magnuson-Stevens Fishery Conservation and Management Act and National Marine Sanctuaries Act.¹²³ Beyond the EEZ lies the "High Seas," defined as the open ocean waters beyond the EEZ and above the seabed "Area" described below.¹²⁴ This zone does not include the EEZ, territorial sea, contiguous zone, archipelagic, or internal waters.

3.4.1.5. Continental Shelf

The continental shelf consists of the seabed and subsoil of the submarine areas beyond the territorial sea, throughout the natural prolongation of a coastal State's land territory, and extending either to the outer edge of the continental margin or, if the continental margin stops short of 200 nm (370 km), to a distance of 200 nm (370 km) from the baseline.¹²⁵ The coastal State alone exercises sovereign rights over the continental shelf, but only for purposes of

exploring it and exploiting its natural resources. Natural resources include oil, gas, minerals, and other non-living natural resources, as well as living organisms belonging to sedentary species.¹²⁶

3.4.1.6. The Area

The Area is the seabed and subsoil beyond national jurisdiction. Exploration and development of mineral resources on or beneath the seabed of the Area must be undertaken pursuant to the international regime established by the LOS, on the premise that these resources are the “common heritage of mankind.”¹²⁷ The Area is open to use by all nations for the exercise of high seas freedoms, defense, scientific research, telecommunications, and other purposes. Article 149 sets forth the duties and responsibilities of states with regard to submerged heritage resources located in the Area.

3.4.2. Provisions Specifically Addressing Underwater Heritage Resources

As mentioned above, Article 149 (addressing “the Area”) and Article 303 (addressing “the Sea”) set out some of the coastal States’ duties and responsibilities to protect UCH. However, the scope and extent of these duties is unclear. Furthermore, the LOSC does not address the duties of coastal States on the continental shelf between the outer limit of the contiguous zone and the outer limit of the EEZ (24-200 nm or 44-370 km from the baseline).

Article 149 expressly imposes a duty on coastal States with regard to the preservation or disposition of submerged heritage resources, and delineates stakeholders whose preferential rights must be considered in carrying out that duty. Specifically, it requires that all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. However, the article does not specify the standard governing that duty, nor does it explain the process for executing it. Also, the text does not define “preferential rights of the State or country of origin,” “State of cultural origin,” or the “State of historical or archaeological origin,” and it neglects to provide any information on how to rank the preferential rights it lists. While Article 149 attempts to address the global community’s interest in submerged heritage resources, by failing to provide standards to measure compliance with the duties governing preservation and disposition, it leaves the development of those standards up to the nations working in the Area, their domestic laws, customary international law, and other provisions of the LOS.

Article 303 (1) recognizes a duty on coastal States to protect underwater heritage resources at sea and to cooperate with other nations for that purpose. Article 303(2) provides that “[i]n order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.” This provision and the practice of nations have resulted in recognition of the authority of a coastal State to prescribe and enforce UCH regulations against foreign flagged vessels and nationals out to the 24 nm (44 km) limit of the contiguous zone.¹²⁸ Notably, Section 3 of Article 303 contains the caveat that “nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.” University of Nottingham professor of Maritime Law Sarah Dromgoole has

expressed concern that Article 303(3) signifies “that the protective provisions in the first two paragraphs of Article 303, and in Article 149, do not in themselves interfere with the application of the law of salvage and other rules of admiralty; in other words, there can be no presumption that these laws do not apply to objects of an archaeological and historical nature.”¹²⁹ However, this “savings clause” does not necessarily prevent parties from placing UCH outside the purview of the law of salvage through their national legal systems.

Outside the 24 nm (44 km) limit of the contiguous zone, coastal State regulation of shipwreck recovery is generally limited to vessels flying its flag and its nationals although enforcement of domestic law against foreign flag vessels based on port State jurisdiction would be consistent with international law. In addition, coastal States have jurisdiction and control over activities that affect their continental shelf or the natural resources within their EEZ, and they may use this authority to exert indirect control over submerged heritage resources there. A coastal State can regulate intrusive research on, or recovery of, submerged heritage resources in the EEZ if the activity conflicts with the State’s rights concerning authority over natural resources.¹³⁰ At the international level, the LOS provides the legal framework for all human activities conducted in the various maritime zones. In addition to providing the balance of jurisdiction between coastal States and vessel flag States, Articles 149 and 303 provide some framework for the legal protection of UCH.

Despite the fact that the duty to protect UCH found at sea in Article 303(1) covers all the maritime zones, a number of nations and authors perceive a gap in protection under the LOS.¹³¹ This arises because Article 149 of the LOS applies only to UCH in the deep seabed Area beyond the seaward limit of the continental shelf, and Article 303(2) established a limit to coastal State jurisdiction over UCH to the 24 nm (44 km) limit of the contiguous zone. As a result, it has been asserted that there is a legal vacuum or gap in protection of UCH under the LOS for that portion of the continental shelf beyond 24 nm (44 km).¹³² Also, as indicated above, the application of the law of salvage and finds to UCH poses a direct threat to UCH unless the salvage is carried out in a manner consistent with international archaeological standards as reflected in the 2001 UNESCO Convention. Therefore, concern has been expressed about Article 303(3) which provides that “[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.” While some have viewed this provision as an invitation to salvage, it appears to be just clarifying that the duty to protect and cooperate does not affect property rights or the application of the law of salvage.¹³³ However, Article 303(4) is evidence that those negotiating the LOSC contemplated the negotiation of a more specific agreement to more fully address the duty to protect UCH and cooperate for that purpose.¹³⁴

In response to the continued threats to UCH from looting and unwanted salvage, and the perceived gap in the protection of UCH on the continental shelf extending beyond the 24 nm (44 km) contiguous zone, nations came together to develop an international convention to provide protection to UCH in a manner consistent with the LOS. The resulting 2001 UNESCO Convention is now considered by many nations, archaeologists, and legal experts to provide the minimum standards and requirements for protection of UCH to specifically address the threats to UCH in a manner consistent with the legal framework of the LOS.

3.5. 1989 INTERNATIONAL CONVENTION ON SALVAGE

In 1989, under the auspices of the International Maritime Organization¹³⁵ (IMO), the government parties interested in uniformity in the maritime law of salvage adopted the International Convention on Salvage, also known as the London Salvage Convention. It replaced the earlier convention on salvage law adopted in Brussels in 1910¹³⁶ and the “no cure, no pay” principle under which a salvor was only rewarded for services if the operation was successful.¹³⁷ The new Convention added provisions for an enhanced salvage award, taking into account the skill and efforts of the salvors in preventing or minimizing damage to the environment.

The London Salvage Convention sets out the duties, rights, rules, conditions, and procedures for salvage, including salvage rewards. “Salvage operations” are any act or activity undertaken to assist a vessel or any other property in danger in navigable waters.¹³⁸ “Vessel” denotes any ship or craft, or any structure capable of navigation, and “property” for the purposes of this convention means any property not permanently and intentionally attached to the shore line, including freight at risk.¹³⁹

The London Salvage Convention applies to recent casualties (per the definition of “vessel”), and therefore not to submerged heritage resources incapable of navigation for decades or centuries.¹⁴⁰ Nevertheless, in order to accommodate the (ultimately rejected) French proposal for an explicit provision addressing the UCH issue, Article 30 (1)(d) of the Convention states that “[a]ny State may, at the time of signature, ratification, acceptance, approval, or accession, reserve the right not to apply the provisions of this Convention . . . (d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.” Several nations have made reservations pursuant to this provision, including the United Kingdom, Norway, Sweden, China, Canada, Iran, Ireland, Mexico, Spain, and Saudi Arabia.

The IMO observer at the 1998 Paris, France meeting on the draft UNESCO Convention for the Protection of the Underwater Cultural Heritage reiterated the inapplicability of the London Salvage Convention to historic shipwrecks, explaining:

[T]he Salvage Convention is a private law Convention and its objectives are very different from those of [the 2001 UNESCO Convention] draft, which deals with international public law. The Salvage Convention should not, therefore, apply to historic wrecks. At the time of drafting of the Salvage Convention, some States required, for constitutional reasons, a provision expressly allowing for reservation in respect of historic shipwrecks. So far, eleven of the twenty-five States Parties have made this reservation. The majority of States also declared that any State, whether or not it made a reservation, would be entitled not to apply the Salvage Convention to historic wrecks.¹⁴¹

The London Salvage Convention does not apply to warships or other noncommercial vessels owned or operated by a State that are entitled to sovereign immunity, unless a State party notifies the IMO and specifies the terms and conditions of applicability.¹⁴² Article 25 provides additional protection for sovereign immune vessels and certain types of cargo, stating that “no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process

of, nor any proceeding *in rem* against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity.” In addition, the Convention disclaims any effect on “any provision of national law or any international convention relating to salvage operations by or under the control of public authorities.”¹⁴³

In 2002, the International Maritime Committee¹⁴⁴ introduced the opinion that State Parties to the London Salvage Convention that had not incorporated an Article 30 (1)(d) reservation would have to denounce and then re-ratify the Salvage Convention with the reservation prior to adopting the 2001 UNESCO Convention.¹⁴⁵ However, as of June 30, 2013 no nation has done so, including seven State Parties to the 2001 UNESCO Convention.¹⁴⁶ Clearly, this provision has not prevented non-compliant nation from nonetheless protecting UCH from salvage. For example, the United States did not claim an Article 30 (1)(d) reservation when it ratified the Salvage Convention despite the fact that there was a ban on the application of the law of salvage under the ASA of 1987. That may have been, at least in part, because of the trend in U.S. admiralty courts to integrate the interests of historic preservation into salvage law in tacit accord with Article 30 (1)(d).¹⁴⁷ There are several U.S. cases where the government has successfully won the right to preserve UCH as its owner under salvage law, or as the entity in control of the UCH.¹⁴⁸ In two of these cases, the courts focused on the fact that the salvors’ actions did more to create marine peril than to prevent it, thereby failing to meet one of the requirements for a salvage award.¹⁴⁹ The U.S. Government did have constructive possession over these particular wrecks due to their location in otherwise protected areas or the wreck’s sovereign immune status. Nevertheless, nothing in the original London Salvage Convention, nor its interpretation of the 2001 UNESCO Convention, necessarily poses a treaty obligation that prevents the U.S. Government from protecting non-sovereign UCH.

3.6. U.S. TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

Friendship, Commerce, and Navigation Treaties (FCNTs) are an early variety of Bilateral Investment Treaty. Bilateral Investment Treaties are international agreements between countries establishing the terms for the treatment of businesses, private corporations and investments in the other country.¹⁵⁰ The treaty requires the host nation to treat foreign investments and their appurtenances as favorably as the host nation would treat its own investments.¹⁵¹ FCNTs also established the terms of trade and shipping between the contracting countries and the rights of foreigners to conduct business and own property in the host nation.¹⁵²

Of the twenty-five FCNTs the United States is party to, twelve contain articles that address the treatment of damaged, grounded, stranded, and/or wrecked vessels, as well as their cargo and other property. The terms of these treaties vary, but most generally establish that should a vessel of either country meet some sort of peril resulting in damage or destruction, the vessel and its equipment, cargo, documents, and any other goods or property will receive the same assistance, protection, and immunities from the host country as it would a vessel under its own flag in similar circumstances.¹⁵³ These articles often establish conditions for salvage and exemptions from customs duties unless the cargo passes into internal consumption.¹⁵⁴ Treaty articles are generally mutually applicable; however, there are certain treaties that only account for U.S. flagged vessels.¹⁵⁵ Other treaties only address the treatment of foreign vessels.¹⁵⁶ Some of the treaties are very simple, requiring only that no higher duties or charges be imposed on salvage of damaged or shipwrecked vessels.¹⁵⁷ Some treaties permit necessary measures to be taken if a wrecked or damaged vessel constitutes a navigation hazard in territorial waters.¹⁵⁸ Lastly, some

treaties regulate conduct within the coastal or territorial seas of the State parties while others leave the geographic scope open ended.¹⁵⁹ The 1902 Treaty of Friendship and General Relations between the United States and Spain is an example of the latter type of treaty, which proved integral to the Spanish government's ability to reclaim a treasure frigate salvaged by an American company.

The case of [*Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*](#), 675 F. Supp. 2d 1126 (M.D. Fla. 2009) (better known as the "Black Swan" or *Mercedes* case), concerned an American shipwreck exploration company that filed *in rem* complaint in admiralty against the 1804 wreck of the Spanish frigate *Nuestra Senora de las Mercedes* (code named the "Black Swan"). Odyssey discovered *Mercedes* on the continental shelf¹⁶⁰ of Portugal approximately 100 miles (161 km) west of the Straits of Gibraltar.¹⁶¹ The company demanded possessory rights and ownership over the items it recovered and that remained at the salvage site under the law of finds. In the alternative, Odyssey demanded a "liberal salvage award" for its services. The Kingdom of Spain, the Republic of Peru, and 25 alleged descendants of those aboard the vessel filed claims against the property or *res*. Spain moved to dismiss and vacate the arrest warrant for lack of subject matter jurisdiction of a U.S. admiralty court over artifacts that were salvaged from a sovereign immune Spanish warship without its authorization. The U.S. District Court for the Middle District of Florida granted Spain's motion.¹⁶²

Odyssey appealed the decision in the U.S. Court of Appeals for the Eleventh Circuit; however, the Court upheld the ruling on Spain's motion to dismiss. The court found that the evidence record supported the earlier factual determination that the *res* was indeed the wreck of *Mercedes* and, for purposes of sovereign immunity, was immune from arrest pursuant to the Foreign Sovereign Immunities Act. Therefore, the district court lacked subject matter jurisdiction over the company's claim.¹⁶³

The Eleventh Circuit also determined that the cargo aboard the *Mercedes*, even if it was privately owned, was still part of the wreck and subject to the sovereign immunity of the Spanish warship. It also affirmed the district court's order to release the *res* (silver, gold and other artifacts) to the custody of Spain. Under the 1902 Treaty with Spain, the United States must treat cases involving Spanish warships as it would a U.S. warship. Under U.S. law and policy, the cargo and even private property effects of the crew and passengers would be subject to sovereign immunity of the shipwreck and should be immune from arrest under the law of salvage.¹⁶⁴ The promotion of reciprocal relations with Spain's interest also compelled the court to treat the cargo and the vessel as a whole for sovereign immunity purposes. According to the Treaty of Friendship and General Relations between the United States of America and Spain, the United States must afford Spanish military vessels, including those shipwrecked in the 19th century, the same protection as it would have given a shipwrecked United States military vessel. The United States considers the cargo and private property of the passengers and crew of a shipwrecked U.S. military vessel part of the shipwreck and, therefore, grants it the same immunities as the shipwreck itself such as in the case of the U.S.S. *Monitor* and the U.S.S. *Arizona*.¹⁶⁵

4. THE 2001 UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

4.1. OVERVIEW AND BACKGROUND

Under the LOS Article 303(1) there is a duty to protect UCH and a duty to cooperate for that purpose.¹⁶⁶ Article 303(2) recognizes a coastal State's jurisdiction to protect and manage UCH out to 24 nm (44 km) limit of the contiguous zone. However, as indicated above, many perceived that there was a gap in protection for UCH on the continental shelf/EEZ beyond the 24 nm (44 km) limit to the Area under the high seas, which is subject to the regime under Article 149 of the LOS. In addition, some saw the savings clause for the law of salvage in Article 303(3) as an invitation to the salvage of UCH without regard to archaeological standards and requirements. As reflected in Article 303(4), the parties to the LOS contemplated subsequent international agreements to provide more details on how states should fulfill their duty to protect UCH and cooperate for that purpose. The display of artifacts salvaged from the *Titanic* wreck site and the removal of amphora from the continental shelf of Italy provided much of the catalyst for the convening of a "Meeting of Experts" by UNESCO for the development of a Convention to protect UCH. Meetings were held by UNESCO, which culminated in the 2001 UNESCO Convention. It entered into force on January 2, 2009, three months after the twentieth instrument of acceptance.¹⁶⁷ As of July 7, 2013, there are 44 parties to the Convention including France, which is the first "major maritime power" to ratify and become a party to the Convention.¹⁶⁸

4.2. PURPOSE AND SCOPE

Adopted in 2001 by the UNESCO General Conference, the 2001 UNESCO Convention represents an international response to the concern of looting and destruction of UCH by treasure hunters and others.¹⁶⁹ The 2001 UNESCO Convention is based on four main principles and should be understood as the bar from which the gap in U.S. UCH protection should be measured:

1. The obligation to preserve underwater cultural heritage;
2. *In situ* preservation policy and scientific rules for research & recovery;
3. No commercial exploitation of this heritage; and
4. Cooperation among States to protect this heritage, particularly for training, education and outreach.

The primary goal of the 2001 UNESCO Convention is to protect UCH, defined as:

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as . . . vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.¹⁷⁰

The 2001 UNESCO Convention seeks to accomplish this protection through control of activities that may directly or incidentally harm UCH, and by authorizing (permitting) activities directed at UCH only when done in accordance with professional archaeological standards and practices set forth in the Annex Rules.¹⁷¹ The geographic scope of the 2001 UNESCO

Convention includes UCH located in all maritime zones, as well as the continental shelf and seabed Area beyond national jurisdiction.¹⁷²

4.3. AGREEMENT ON HOW TO COOPERATE TO PROTECT UCH ON CONTINENTAL SHELF/EEZ

A primary purpose of the 2001 UNESCO Convention is to protect UCH on the OCS beyond the 24 nm (44 km) limit. Instead of extending coastal State jurisdiction, it was agreed that efforts to protect and cooperate would be led by a Coordinating State. The coastal State would serve as the Coordinating State unless and until the flag State was determined and took over the role as the Coordinating State. The 2001 UNESCO Convention also recognizes that a coastal State may control activities directed at UCH on its continental shelf that involve its sovereign rights to protect and manage its natural resources. Article 10(2) states:

A State Party in whose Exclusive Economic Zone or on whose Continental Shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

4.4. SOVEREIGN IMMUNITY AND TREATMENT OF SOVEREIGN UCH

The 2001 UNESCO Convention incorporated the principle of sovereign immunity in regard to sovereign UCH as well as the sovereign craft operating in the sea. The objectives and general principles in Article 2(8) state:

Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.

Under Article 13 (sovereign immunity):

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention.

The consent regime for sovereign UCH is set forth throughout the Convention. The United States and other states expressed concern for the treatment of foreign sovereign UCH discovered in the territorial sea of a coastal State as it has exclusive jurisdiction. The jurisdiction of coastal States in the territorial sea in this Article is consistent with the LOS. While Article 7(3) provides that the coastal State "should"¹⁷³ notify the foreign flag State instead of the mandatory consent required of the flag State in all of the other maritime zones this does not conflict with any provision regarding sovereign immunity in the LOS, nor has there been any problems in regard to the treatment sovereign UCH by the parties.¹⁷⁴ The fact that France has become a party is

evidence that they are no longer concerned about the treatment of sovereign UCH in the territorial sea or otherwise or share the concerns about “creeping jurisdiction” on the continental shelf/EEZ.

4.5. 2001 UNESCO CONVENTION IS THE POINT OF REFERENCE FOR THE GAP ANALYSIS

This study uses the 2001 UNESCO Convention as the point of reference for discussion of how the patchwork of existing Federal statutes meets many of the 2001 UNESCO Convention’s minimum requirements. In accordance with the primary purpose of the 2001 UNESCO Convention, the focus of the gap analysis will be addressing the obligations of parties to protect UCH in all of the maritime zones but with particular attention to protecting UCH on the continental shelf/EEZ. The study will first address the obligations on parties to protect UCH from activities directed at UCH within the territorial sea, contiguous zone, and continental shelf/EEZ set for in Articles 7-10.¹⁷⁵ It will then address the relatively soft obligation under Article 5 for parties to use the “best practicable means to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.”¹⁷⁶ It will then make recommendations for filling those gaps on the OCS as well as implementing the 2001 UNESCO Convention should the U.S. decide to consider becoming a party.

5. STATUTES CONTROLLING ACTIVITIES DIRECTED AT UCH IN VARIOUS MARITIME ZONES¹⁷⁷

5.1. ANTIQUITIES ACT OF 1906

5.1.1. Background and Overview

The Antiquities Act of 1906, officially “An Act for the preservation of American antiquities,” was the first U.S. statute enacted to protect cultural heritage.¹⁷⁸ The AA was passed by Congress and signed by President Theodore Roosevelt on June 8, 1906, providing the President of the United States the authority to, by Executive Order, set aside federally owned or controlled lands as national monuments in order to protect landmarks, structures, or objects of historic or scientific interest.¹⁷⁹

5.1.2. Purpose

The AA was developed in response to concerns about pot hunting and other looting of Native American heritage located on public lands in the southwestern part of the country. The movement for the protection of American antiquities gained momentum as educators, archaeologists, societies, and institutions convinced the Federal government that it should enact legislation to prevent such looting, culminating in the passage of this statute.

The AA has two major components: 1) a permitting provision that authorizes the “examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity” with the grant of a permit; and 2) a criminal enforcement component, providing 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 government of the United States . . .”¹⁸⁰

5.1.3. Scope

The AA applies to “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States . . .”¹⁸¹ Lands “owned or controlled” by the U.S. Government are not limited to Federal terrestrial lands but include federally owned or controlled submerged lands, such as those within marine national monuments.¹⁸²

The AA was successfully used to protect UCH located in the Cape Canaveral National Seashore in *Lathrop*.¹⁸³ The AA has also been recognized to apply to UCH on the OCS and EEZ located within the boundaries of the Florida Keys National Marine Sanctuary, despite a contrary earlier Federal court ruling.¹⁸⁴ In a September 15, 2000 Opinion, the Department of Justice Office of Legal Counsel also determined that the AA applies in the U.S. territorial sea and EEZ.¹⁸⁵ Since 2000, the Act has been applied at least four times to create marine national monuments, all of which extend beyond the outer limit of the 12 nm (22 km) territorial sea. The four monuments — the Papahānaumokuākea Marine National Monument, the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument — encompass almost 214,777,000 acres (869,171 km²) of marine environment, a land area greater than that of Texas and Florida combined.¹⁸⁶ The Marianas Trench Marine National Monument covers only submerged lands around the trench itself and approximately twenty-one undersea volcanoes. The Monument also covers the waters and submerged lands around the three northernmost Marianas Islands.¹⁸⁷

5.1.4. Authorization

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulation as they may prescribe: “Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.”¹⁸⁸

5.1.5. Sanctions

Section 1 of the AA provides that:

any person who shall 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 Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

5.1.6. Gap Analysis

As indicated above, the AA has been successfully applied on the OCS in national marine monuments and other Federal marine protected areas; however, there are two issues that must be addressed in order to apply AA to protect UCH on the OCS outside of these federally-designated areas: 1) whether the public has reasonable notice that the UCH is an antiquity subject to the criminal enforcement provisions of the AA; and 2) whether the permit requirements of the AA may be applied on the OCS outside of national marine monuments or other Federal marine protected areas.

Issue 1: Reasonable public notice that UCH is an antiquity subject to the protection of the AA

In *U.S. v. Diaz*, the Ninth Circuit held that the AA was unconstitutionally vague because it did not define terms such as “object of antiquity,” which may have different meanings to different people.¹⁸⁹ The statute did not provide reasonable notice that the law would apply to the object at issue in this case (which was only three to four years old), nor that such conduct would render a person liable to the Act’s criminal penalties.¹⁹⁰

To remedy this gap in coverage under the AA, the Department of the Interior or the Department of Commerce could promulgate regulations implementing the AA to define “ruin” or “antiquity” as explicitly including shipwrecks and other cultural heritage that have been underwater for at least 100 years. This definition would be consistent with the definition of UCH under the 2001 UNESCO Convention, as well the definition of archaeological resources under the Archaeological Resources Protection Act, which was enacted in response to the constitutional issue of vagueness raised in the *Diaz* case.¹⁹¹

Issue 2: Applying AA permit on the OCS outside monuments and sanctuaries

In the landmark 1978 case involving treasure hunter Mel Fisher and his Treasure Salvors company, *Treasure Salvors v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, the Court held that the law of finds instead of a number of Federal statutes – including the Antiquities Act – applied to *Atocha* because it was located on the OCS and not land “owned or controlled by the United States” as argued by the U.S. Government.¹⁹² In support of its argument, the government cited the OCSLA as providing the U.S. with jurisdiction and control over the OCS.¹⁹³ The Fifth Circuit was not persuaded. Instead, the Court agreed with the treasure salvors’ argument that since OCSLA only explicitly granted Federal control over the OCS for the purposes of exploration and exploitation of oil, gas and minerals, it was insufficient to grant governmental jurisdiction over the salvage of a historic shipwreck under the AA. The Court was particularly persuaded by the salvors’ argument that OCSLA tracked its corresponding international treaty, the 1958 Convention on the Continental Shelf, which was limited in scope to natural rather than cultural resources of the OCS.¹⁹⁴

There are several issues with the arguments of the treasure salvors, and ultimately the Court’s decision that result in several points where *Treasure Salvors* must be distinguished. First, the treasure salvors, and ultimately the Court, confused the purpose and scope of international law and how it relates to the domestic law of the United States. The U.S. Government does not derive its authority from international law, but rather the Constitution and statutes promulgated by Congress. The international law in this case, the 1958 Convention on the Continental Shelf,

sets forth the agreement or understanding among signatories recognizing that the respective parties have jurisdiction and control over the exploration and exploitation of natural resources of the continental shelf.¹⁹⁵ *The absence of reference to cultural resources in this 1958 Convention does not result in some unwritten international law prohibiting coastal States from protecting and managing historic shipwrecks on the continental shelf.* To refer to the 1953 OCSLA as an implementation of the 1958 Continental Shelf Convention is further evidence of the confusion, if not mistake, of the salvors and the Court in this case.¹⁹⁶

Second, the AA is triggered when there is an object of antiquity on land owned or controlled by the U.S. Government. The statute does not require that the land be owned or controlled for the specific purpose of protecting cultural resources.¹⁹⁷ In addition, the statute was passed in 1906, long before other statutes that covered cultural protection. Had the AA required that another statute with the purpose of cultural protection be in place in order to apply, the AA would have effectively been meaningless. Thus, the AA does not only apply in or on lands over which the United States has express authority to regulate activities affecting heritage resources. The purpose of the OCSLA – to control natural resources – does not affect the protections afforded by the Act, even on the OCS.

In a subsequent case involving the same treasure hunter, Mel Fisher, and a historic shipwreck on the OCS off the Florida Keys, a Federal court agreed that the U.S. Government did have jurisdiction and control over the historic shipwreck sufficient for application of the AA.¹⁹⁸ Furthermore, in September 2000, the Department of Justice Office of Legal Counsel issued a Memorandum Opinion distinguishing *Treasure Salvors* and determining that the AA can be applied within the EEZ for the purpose of establishing a national monument to protect marine resources on the basis of customary international law, the 1983 Presidential Proclamation, and the Law of the Sea Convention.¹⁹⁹ The Opinion was written in response to questions relating to the President’s authority to establish a national monument within the EEZ to protect coral reef resources; however, the subsequent Presidential Proclamation 8031 establishing the Papahānaumokuākea Marine National Monument in June 2006 included protection for historic as well as natural and scientific resources.²⁰⁰ Moreover, the Monument is on the World Heritage List of “mixed” natural and cultural heritage and includes a substantial portion of the OCS, extending out 50 miles (80 km) from the coastline.²⁰¹

To remedy the gap in coverage on the OCS under the AA, the Department of the Interior and the Department of Commerce/NOAA may want to consider issuing a notice, if not rulemaking, to clarify that the AA applies on the OCS, including those outside of existing national marine sanctuaries and marine national monuments. Such notice should define the antiquities as those that have been underwater for at least 100 years as that would address any arguments of vagueness as well as use the definition of UCH under the 2001 UNESCO Convention.

5.2. NATIONAL MARINE SANCTUARIES ACT OF 1972

5.2.1. Background and Overview

The National Marine Sanctuaries Act authorizes the Secretary of Commerce to designate and protect areas of the marine environment with special national or international significance due to their conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or aesthetic qualities as national marine sanctuaries.²⁰² Sanctuaries are then

comprehensively managed for present and future generations with the policy to facilitate, to the extent compatible with resource protection, all lawful public and private use of sanctuary resources. The NMSA also provides civil sanctions for violations of the Act or its implementing regulations.

Congress enacted the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) in the wake of the environmental movement of the 1960s and 1970s. As reflected in the legislative history, the MPRSA arose out of public concern for ocean dumping, exploitation of the seabed for oil, gas, and minerals, and a desire to set aside special areas for protection, research, education, recreation, fishing, and other uses determined compatible with the primary conservation objective. The MPRSA detailed a plan for use of the marine environment by regulating the dumping of only certain waste in specified areas (Title I, or the “Ocean Dumping Act”), scientific research of the ocean in general but of ocean dumping sites in particular (Title II), and setting aside the more special or significant areas of the marine environment for conservation as national marine sanctuaries (Title III, or the “National Marine Sanctuaries Act”).

5.2.2. Purpose

While the NMSA was primarily enacted to conserve our natural heritage, the first national marine sanctuary to be designated under the Act in 1975 sought to conserve an underwater cultural resource, the Civil War ironclad U.S.S. *Monitor*. At the time of the *Monitor* National Marine Sanctuary designation, Title III of the MPRSA did not expressly refer to historical, archaeological, or cultural resources within its stated scope. As originally enacted, Title III provided the Secretary of Commerce with the authority to designate sanctuaries as “necessary for the purpose of preserving *or restoring* such areas for their conservation, recreational, ecological, or esthetic values.”²⁰³ In 1992, on the twentieth anniversary of Title III, the most substantial changes to the NMSA occurred to date, amending it to expressly include the protection and management of historic and cultural resources.

5.2.3. Scope

The current NMSA recognizes that “certain areas of the marine environment possess conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance.”²⁰⁴ The Act defines “marine environment” to include the EEZ and specifically provides that it applies throughout the EEZ.²⁰⁵ NMSA also specifies that it is to be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the U.S. is a party.²⁰⁶

Of the 13 current National Marine Sanctuaries, nine are located in whole or in part beyond the U.S. 12 nm (22 km) territorial sea. These nine national marine sanctuaries are the Cordell Bank National Marine Sanctuary (NMS), the Florida Keys NMS, the Flower Garden Banks NMS, the Gray’s Reef NMS, the Hawaiian Islands Humpback Whale NMS, the Monitor NMS, the Monterey Bay NMS, the Olympic Coast NMS, and the Stellwagen Bank NMS. Only the Channel Islands NMS, the Fagatele Bay NMS, and the Gulf of the Farallones NMS are entirely within the U.S. territorial sea. Thunder Bay NMS is located entirely within U.S. internal waters (Lake Huron).²⁰⁷

5.2.4. Authorization

The NMSA authorizes the Secretary of Commerce, through NOAA, to set aside certain areas of the marine environment having special national or international significance as national marine sanctuaries. The “marine environment” is defined to include “those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law.”²⁰⁸

Marine sanctuaries generally lie close to the shore because that is where significant natural and cultural resources exist, and where human activities affecting these resources, such as fishing, boating, and diving take place. To the extent compatible with the primary objective of resource protection, sanctuary management includes facilitating the public and private use of resources not otherwise prohibited by law through regulations and permitting. Under the NMSA, it is unlawful for any person or entity to destroy, cause the loss of, or injure any sanctuary resource; be involved in the possession or sale of a sanctuary resource taken unlawfully; violate a sanctuary regulation or permit; and interfere with the enforcement of the NMSA.²⁰⁹

5.2.5. Sanctions

With regards to enforcement, the Secretary of Commerce “shall conduct such enforcement activities as are necessary and reasonable to carry out this chapter.”²¹⁰ The NMSA enforcement provisions collectively provide perhaps the broadest and most comprehensive enforcement authority of any heritage resource management statute. Offenders are strictly liable for violations; accordingly, no proof of negligence is required. NOAA must only demonstrate that an offender caused the destruction of, or injury to, sanctuary resources.

While the major heritage resource statutes provide for criminal enforcement mechanisms, the NMSA uses civil remedies and authorizes civil penalties for violations in marine sanctuaries. Since Federal and state criminal laws may also apply to these activities, the civil penalty enforcement tool provides resource managers and agency counsel with supplemental enforcement authority. In one enforcement case, [*Craft v. National Park Service*](#), criminal penalties were pursued by the State of California against the offenders at the same time that Federal authorities pursued civil penalties under the NMSA.²¹¹ This dual-track enforcement authority is nearly non-existent in other state and Federal resource management regimes.²¹²

5.2.6. Gap Analysis

The NMSA provides the most comprehensive protection of natural and cultural heritage in all of the maritime zones except the high seas and seabed Area beyond national jurisdiction. While the NMSA provides the authority to establish sanctuaries that would protect all UCH on the OCS, it has not been done to date, and there are no such proposals being considered. However, Section 8 of this study proposes an amendment to the NMSA that would provide minimum protection to UCH on the OCS currently outside of sanctuaries and monuments without the need for additional facilities and personnel to handle the permit system or its enforcement.

5.3. ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

5.3.1. Background and Overview

The [Archaeological Resources Protection Act of 1979](#) (ARPA) protects archaeological resources on public and Native American lands while fostering increased cooperation and exchange of information between relevant stakeholders.²¹³ ARPA was enacted to address looting of archaeological sites located on Federal lands. Looters were emboldened by the 9th Circuit Court of appeals overturning of the previous conviction of Ben Diaz for stealing a number of recently crafted religious objects from a cave in the San Carlos Indian Reservation.²¹⁴ The Court stated that the phrase “object of antiquity, ruins, and monuments” contained in the AA was unconstitutionally vague and could not be applied to the items in this case, which were created in 1969.²¹⁵ The AA was thus weakened as an enforcement tool in the 9th Circuit, and the decision caused government prosecutors in other circuits to be cautious about using the AA to go after looters. To remedy the situation, Congress passed the ARPA.²¹⁶

5.3.2. Purpose

As stated above, the purpose of ARPA “is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals . . .”²¹⁷

5.3.3. Scope

“Archaeological resource” is defined to include “any material remains of past human life or activities which are of archaeological interest,” as determined by ARPA’s implementing regulations.²¹⁸ ARPA sets forth items that must be included in the regulations, and provides the stipulation that any item treated as an archaeological resource must be at least 100 years of age.

ARPA applies to government agencies, individuals, and other private entities, as well as Indian tribes. In order to excavate or remove an archaeological resource located on public or Indian lands, and to carry out associated activities, the applicant must apply for and receive a permit from the Federal land manager.²¹⁹

Application is generally limited to archaeological resources on “public lands” (owned and administered by the United States) and Native American lands.²²⁰ However, ARPA’s definition of “public lands” expressly excludes the OCS.²²¹ Thus, with regards to the marine environment, the permit system established under ARPA only applies within Federal marine protected areas and submerged lands to which the United States retained title and which were not transferred under the [Submerged Lands Act](#) (SLA) or other laws.

5.3.4. Authorization

ARPA requires a permit for activities directed at UCH located on public lands.²²² Such permits of authorization are not granted unless the proposed activities are determined to be consistent with the standards of the Federal Archeology Program (FAP)²²³. The standards of the FAP are consistent with the Annex Rules of the 2001 UNESCO Convention.²²⁴

5.3.5. Sanctions

Sanctions for commercial looting include civil and criminal sanctions as well as forfeiture provisions.²²⁵ The ARPA Section 6(c) trafficking provision serves as a catch-all to reinforce state and local laws protecting archaeological resources wherever they are located.²²⁶ It prohibits the sale, purchase, exchange, transport, receipt, or offer to do so, in interstate or foreign commerce, of any unlawfully taken archaeological resource. So while the permit system does not apply on the OCS, the ARPA Section 6(c) trafficking provision is enforceable within the United States and seaward out to the U.S. 24 nm (44 km) contiguous zone boundary consistent with Article 33 of the LOSC.²²⁷ ARPA Section 6(c) has also been used for U.S. enforcement of trafficking of archaeological resources looted from outside public lands and even outside of the United States.²²⁸

5.3.6. Gap Analysis

As indicated above, ARPA permit requirements and other provisions do not apply on the OCS because it is expressly excluded from the Act's definition of public lands. To fill this gap in coverage, ARPA's definition could be amended to include the OCS, which is controlled by the U.S. Government under OCSLA and other laws. While it has not been tested in a UCH case yet, the ARPA Section 6(c) trafficking provision has been applied to archaeological resources looted from sites outside of U.S. public lands and resources abroad found to be in violation of state law in the United States.²²⁹ Therefore, the ARPA trafficking provision may be applied within the territory of the United States as well as in its territorial sea and contiguous zone to UCH stolen from a UCH site on the OCS, in the seabed Area under the high seas, and from the maritime zones of foreign nations.

5.4. R.M.S. TITANIC MARITIME MEMORIAL ACT OF 1986 AND AGREEMENT CONCERNING THE SHIPWRECKED VESSEL R.M.S. *TITANIC*

5.4.1. Background and Overview

The [R.M.S. Titanic Maritime Memorial Act](#) (1986 Titanic Act) regulates research, exploration, and salvage activities at the *Titanic* wreck site 350 nm (648 km) off the coast of Newfoundland, Canada. The 1986 Titanic Act directs the U.S. Secretary of State to: 1) negotiate an international agreement with interested countries to designate *Titanic* as an international maritime memorial; and 2) to encourage in those negotiations the development of international guidelines for conducting research, exploration, and salvage of the wreck site.²³⁰

The related international agreement, the "Agreement Concerning the Shipwrecked Vessel R.M.S. *Titanic*" (*Titanic Agreement*), was subsequently negotiated between the United States, United Kingdom, France, and Canada. The negotiations concluded in January 2000. The Department of Commerce, through NOAA, developed the "Guidelines for Exploration, Research and Salvage of *Titanic*" (NOAA Guidelines) based on the Annex Rules to the *Titanic Agreement*.²³¹ While the United Kingdom ratified the Agreement in 2003, at least one other country must ratify it before it can come into force. In 2004, the United States signed the *Titanic Agreement* subject to the enactment of implementing legislation.²³²

The R.M.S. *Titanic* is perhaps the most famous shipwreck in our current popular culture. The reportedly "unsinkable" British-registered ship was of the White Star Line that was owned

by a U.S. company in which John Pierpont “JP” Morgan was a major stockholder. R.M.S. *Titanic* was built in Belfast, Northern Ireland by Harland & Wolff for transatlantic passage between Southampton, England and New York City. *Titanic* was launched on May 31, 1911, and set sail on its maiden voyage from Southampton on April 10, 1912 with 2,240 passengers and crew on board. On April 15, 1912, after striking an iceberg, *Titanic* broke apart and sank to the bottom of the ocean, taking with it the lives of more than 1,500 passengers and crew. While there has been some salvage outside of the major hull portions, the vast majority of the shipwreck remains in its final resting place, some 12,600 feet (3.84 km) below sea level off the coast of Canada.

5.4.2. Purpose

Shortly after *Titanic* was discovered in 1985, U.S. Congress enacted the R.M.S. *Titanic* Maritime Memorial Act of 1986 to recognize the R.M.S. *Titanic* wreck site as an international maritime memorial and to protect it through international guidelines for research, exploration, and appropriate salvage activities directed at the site. The 1986 *Titanic* Act recognized the United States’ interest in the site, its cultural, historical and educational significance, and the risk of misguided salvage. Congress directed the U.S. Secretary of State, in consultation with the Administrator of NOAA, to negotiate an international agreement with the United Kingdom, Canada, France, and other interested countries to designate *Titanic* as an international maritime memorial to those who lost their lives when she sank in 1912.²³³ Additionally, the 1986 *Titanic* Act called for NOAA to develop international guidelines, negotiated with the same nations, to regulate exploration, research, and, if determined appropriate, salvage of certain portions of the site consistent with scientific criteria for proper research and recovery in the public interest.²³⁴ President Reagan signed the Act on October 21, 1986.²³⁵

5.4.3. Scope

The 1986 *Titanic* Act recommended that the agreement and guidelines control activities directed at the shipwrecked vessel, R.M.S. *Titanic*, including the exploration, research, or, if determined appropriate, salvage of *Titanic*. Of course, U.S. oversight would generally be limited to those persons and vessels subject to U.S. jurisdiction in a manner consistent with international law, such as U.S. nationals and U.S. flagged vessels. The Act expressly states that it is not an exercise of extraterritorial jurisdiction.²³⁶

5.4.4. Authorization

5.4.4.1. Authorization under NOAA *Titanic* Guidelines implementing the Agreement

As proposed by the 1986 Act, NOAA developed Guidelines in 2000 for Exploration, Research and Salvage of *Titanic* (NOAA Guidelines), in consultation with the United Kingdom, France, Canada, and other interested countries.²³⁷ The NOAA Guidelines set standards for activities directed at the wreck site and are based on the most widely accepted principles in archaeology, including the International Council of Monuments and Sites (ICOMOS) International Charter on the Protection and Management of Underwater Cultural Heritage, as well as the U.S. Department of the Interior’s Standards and Guidelines for Archaeology and Historic Preservation. The NOAA Guidelines and Annex to the Agreement are similar to the Rules annexed to 2001 UNESCO Convention.²³⁸

5.4.4.2. Authorization under Proposed Legislation implementing the Agreement

In 2009, the U.S. Department of State transmitted to Congress proposed legislation to protect R.M.S. *Titanic* from looting and unscientific salvage and ensure adherence to the scientific rules for research, recovery or salvage that will help preserve R.M.S. *Titanic* for present and future generations.²³⁹ In March 2012, Sen. John Kerry (D-Mass.) introduced legislation co-sponsored by Sen. Johnny Isakson (R-Georgia) that would amend the 1986 Titanic Act to protect *Titanic* and its wreck site and ensure that planning and the conduct of activities directed at the wreck are consistent with applicable law. According to Sen. Kerry, the “R.M.S. Titanic Maritime Memorial Preservation Act of 2012 (S. 2279)” would: 1) amend the 1986 Titanic Act by providing the U.S. Department of Commerce with the authority to protect the *Titanic* wreck site from salvage and intrusive research; 2) provide authority to monitor and enforce specific scientific rules to protect the public’s interest in the wreck site and collection; and 3) propose the establishment of a *Titanic* Advisory Council, modeled on advisory councils previously established under the NMSA.²⁴⁰ The proposed legislation maximized the jurisdiction and authority that the United States may assert over party and non-party foreign persons to the extent recognized under current international law, including port State jurisdiction, flag State jurisdiction, and persons over which the United States may exercise jurisdiction consistent with international law.

On March 29, 2012, the bill was referred to the Senate Committee on Commerce, Science, and Transportation. Also in March 2012, representatives from NOAA, the U.S. Department of State, and the U.S. Coast Guard met with staff from the House Committee on Transportation and Infrastructure to provide answers to questions and technical drafting assistance on a draft bill to implement the International Agreement. The Senate Committee on Commerce, Science, and Transportation reported the bill favorably, without amendment on July 31, 2012.²⁴¹ Unfortunately, this session of Congress concluded without the bill being voted on by the full Senate much less the House of Representatives. As of December 2103, there has been no resubmission of this bill or any other on *Titanic*.

5.4.4.3. Authorization per Court Orders under Maritime Law of Salvage

U.S. courts sitting in admiralty jurisdiction have recognized the public’s interest in preserving the two large hull portions of *Titanic in situ* through orders authorizing salvage of *Titanic* artifacts conducted in adherence to the scientific rules and guidelines called for in the 1986 Titanic Act, international agreement, NOAA Guidelines, and proposed legislation.²⁴² Titanic Ventures, Inc., a U.S. company, with assistance from the French Research Institute for the Exploitation of the Sea (co-discoverer of the wreck), salvaged approximately 1,800 artifacts in 1987 and obtained title to them, subject to certain conditions, in a salvage award from a French Administrative Tribunal.²⁴³ The conditions included a requirement that the artifacts not be sold individually but rather be kept together as a single collection for the public benefit. In June 1994, Titanic Ventures obtained exclusive salvage rights to *Titanic* from the U.S. District Court for the Eastern District of Virginia. The Court has since held that Titanic Ventures, now known as R.M.S. Titanic, Inc. (“RMST”), continues to have the right to salvage the wreck but does not own the wreck at the site or any artifacts recovered from the wreck site.²⁴⁴ The Court also prohibited, without its authorization, any piercing or penetration of the wreck’s hull.

On August 15, 2011, the Chief Judge of the U.S. District Court for the Eastern District of Virginia signed an Order granting RMST title to the artifacts recovered in the 1993, 1994, 1996, 1998, 2000, and 2004 salvage expeditions subject to certain specified conditions.²⁴⁵ The covenants and conditions were initially proposed by RMST, negotiated with NOAA and the U.S. Department of State through the U.S. Department of Justice, and then finalized by the Court.²⁴⁶ The covenants and conditions ensure that the collection of artifacts recovered from *Titanic* will be conserved and curated consistent with current international and U.S. historic preservation standards. Under the Order, NOAA represents the public interest in *Titanic* and has authority to enforce the covenants and conditions through the U.S. Department of Justice in court proceedings.²⁴⁷

5.4.4.4. International Cooperation in Protection of Titanic

The “Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic” (International Titanic Agreement) stems from the recommendation made by the U.S. Congress in the 1986 Titanic Act to address activities in and around R.M.S. *Titanic* in order to increase protection of the wreck site.²⁴⁸ The International Titanic Agreement’s objectives are to preserve the unique historical significance and symbolic value of the R.M.S. *Titanic* site. It calls for keeping intact as a single collection any subsequently retrieved artifacts and the regulation of dives and visits to the site to avoid further damage to it. In particular, the R.M.S. *Titanic* legislation specifies that *in situ* preservation is the preferred mode of preserving the site.²⁴⁹

As mentioned above, for the International *Titanic* Agreement to take effect, at least two countries must ratify it. The United Kingdom ratified the Agreement on November 6, 2003, implementing it through Order 2003 No. 2496, which comes into force with regards to the United Kingdom on the date the International Agreement enters into force.²⁵⁰ The United States signed the Agreement on June 18, 2004, subject to acceptance following the enactment of implementing legislation.

The 100th anniversary of the sinking of the R.M.S. *Titanic* on April 15, 2012, triggered significant interest in the wreck site. On January 31, 2012, in response to a request from NOAA, the U.S. National Park Service, the U.S. Coast Guard, and the International Maritime Organization issued a circular on *Titanic*.²⁵¹ The circular advised all vessels to refrain from discharging any garbage, waste or effluent in a zone approximately 10 nm² (34 km²) above the wreck. It also requested that submersibles avoid landing on the *Titanic*’s deck and concentrate the release of any dropweights on ascent in specific areas away from hull portions of the wreck. The circular requested that visitors refrain from placing plaques or other permanent memorials on the wreck, however well-intentioned.

On April 15, 2012, the R.M.S. *Titanic* came under the 2001 UNESCO Convention, which only applies to remains that are submerged for at least 100 years.²⁵² The 41 State Parties to the Convention now have the authority to seize any illicitly recovered artifacts, close their ports to all vessels undertaking exploration not conducted in accordance with the principles of the Convention, and outlaw the destruction, pillage, sale, and dispersion of objects found at the wreck site. As explained in Section 4, the Convention was adopted in 2001 by the General Conference of UNESCO to ensure better protection of underwater cultural heritage and entered into force on January 2, 2009.

5.4.5. Gap Analysis

The law and policy regarding *Titanic* do not necessarily apply to UCH within the U.S. EEZ/continental shelf; however, they are examples of how to protect UCH on a continental shelf outside of the 24 nm (22 km) limit of the contiguous zone in a manner consistent with international law.²⁵³ In regard to protecting *Titanic* itself, the preferred alternative for protecting *Titanic* from activities directed at the shipwreck and surrounding wreck site would be for Congress to enact legislation implementing the international agreement called for in the 1986 *Titanic* Act. However, U.S. court orders have essentially filled gaps in *Titanic* protection consistent with the 2001 UNESCO Convention by incorporating provisions of the 1986 *Titanic* Act, the International *Titanic* Agreement, and NOAA *Titanic* Guidelines with regards to R.M.S. *Titanic*, Inc., the exclusive salvor-in-possession. In addition, as of May 31, 2011, the trafficking of artifacts in the United States that were looted from the *Titanic* wreck site may be subject to state and Federal laws such as ARPA Section (6)(c).

5.5. ABANDONED SHIPWRECK ACT OF 1987

5.5.1. Background and Overview

The Abandoned Shipwreck Act asserted title to abandoned shipwrecks on the submerged lands of states and then transferred it to the states.²⁵⁴ There are three categories of abandoned shipwrecks in or on the submerged lands of a state. The ASA also directed the development of Federal guidelines to assist states and Federal agencies in managing the shipwrecks in accordance with their responsibilities under the Act.

Since the passage of the Antiquities Act in 1906, abandoned shipwrecks located on public lands have generally been treated as Federal property and managed accordingly. Congress passed the ASA in response to the need to protect certain submerged cultural heritage and to address the confusion over ownership, the role of admiralty law, and other public interests in regards to such resources. In passing the ASA, Congress exercised the sovereign prerogative of the United States to assert title to certain abandoned shipwrecks and their cargo within the waters of states and U.S. territories.²⁵⁵

5.5.2. Purpose

The U.S. Congress passed the ASA in response to the need to protect UCH and address the destruction resulting from treasure hunting and the law of salvage and finds. 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.²⁵⁶ The ASA's legislative history states that the laws of salvage and finds are "obviously inappropriate for underwater archaeological sites as [they] would be for ancient ruins on land."²⁵⁷

5.5.3. Scope

The ASA first asserts title to three categories of abandoned shipwrecks: 1) those embedded in the submerged lands of a state; 2) shipwrecks embedded in coralline formations protected by a state on its submerged lands; and 3) those on a state's submerged lands and eligible for (if not already on) the National Register of Historic Places (NRHP). The ASA then authorizes the Federal government to transfer title of those shipwrecks to the respective states to manage. The

transfer of title allows states to manage the submerged cultural resources as part of their duty to manage living and non-living resources in state waters and submerged lands. The ASA also asserts U.S. Government title to (and retains management responsibility for) abandoned shipwrecks located in or on Federal land and reasserts Indian tribe title for those abandoned shipwrecks in or on Native American land.

5.5.4. Authorization

The ASA provides authority for states to protect and manage such UCH through state law. Implementation of state law therefore determines the actual scope of the Act's application. However, the ASA may be assumed to apply to those conducting activities directed at UCH including looting and unwanted salvage.

Section 5 of the ASA directs the Secretary of the Interior, through the U.S. National Park Service, to prepare and publish guidelines in the Federal Register to assist the states and Federal agencies in developing legislation and regulations to fulfill their responsibilities under the ASA.²⁵⁸ The ASA Guidelines are intended to aid states in maximizing the enhancement of cultural resources, fostering partnerships among interested stakeholders, and facilitating recreational access, in addition to recognizing the interests of wreck discoverers and salvors consistent with the protection of the site's historical values and environmental integrity. However, the ASA Guidelines are only advisory.

5.5.6. Sanctions

Sanctions for looting or unauthorized salvage would be promulgated and enforced by the laws of the states implementing the ASA; however, U.S. admiralty courts may also implement sanctions for any violations of their court orders.

5.5.7. Gap Analysis

One gap in UCH protection under the ASA is the lack of a definition of "abandoned" in the Act. The term 'abandoned' was not expressly defined by the ASA because Congress instead relied on related case law, including the *Treasure Salvors* case and its progeny, where the courts inferred abandonment of long lost shipwrecks based on the passage of time and the absence of a claim to the ship.²⁵⁹ As a result, some salvors attempt to argue that a shipwreck is not abandoned and therefore not covered by the ASA, and subsequently demand a salvage award despite the ban on the application of the law of salvage. This tactic has had mixed success, although it brings into question the scope of protection afforded by the ASA.²⁶⁰ This gap could be filled with an amendment that defined the term "abandoned." However, any such amendment should be limited to privately owned vessels as the [Sunken Military Craft Act](#) (SMCA) and U.S. Government property law already applies to sunken U.S. Government vessels and foreign military craft located on State submerged lands.

5.6. SUNKEN MILITARY CRAFT ACT OF 2004

5.6.1. Background and Overview

On October 28, 2004, President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2005. Title XIV of the Act, generally referred to as the Sunken Military

Craft Act, preserves the right, title, and interest of the United States in and to any sunken U.S. military craft by codifying its protected sovereign status and permanent U.S. ownership, regardless of the passage of time.²⁶¹ The Act prohibits any activity directed at a sunken military craft that disturbs, removes, or injures the craft except as permitted under the SMCA, authorized by SMCA regulations, or otherwise authorized by law. The possession of any sunken military craft is also prohibited under the SMCA. The Act encourages reciprocal agreements with foreign countries regarding sunken military craft in U.S. waters consistent with this title.²⁶²

Thousands of U.S. Government warships and military aircraft lie in waters around the world. Recent advances in technology have made these wrecks accessible to looters, treasure hunters, and others who may damage the sites. This issue is a growing concern both nationally and internationally because, in addition to war graves, many sunken warships and aircraft contain objects of a sensitive archaeological or historical nature. By providing legal protection for sunken military craft, the SMCA helps reduce the potential for irreversible harm to important historical resources.

5.6.2. Purpose

The purpose of the SMCA is to protect sunken military vessels and aircraft and the remains of their crews from unauthorized disturbance. The Act accomplishes this goal through preserving government ownership and sovereign immunity of sunken U.S. military craft and the remains and personal effects of crews except in the case of express and authorized divestiture.²⁶³ This primary function of the SMCA originates in the doctrine of perpetual sovereign title enunciated by case law extending from the U.S. Constitution's Property Clause.²⁶⁴ The principle is founded on the view that the sovereign should not be deprived of its property through application of subordinate law other than as prescribed. Prior application had refined the rule to mean that only Congress might act to give authority to abandon or dispose of the vessels and aircraft of the United States.²⁶⁵

The statute defines “sunken military craft” as all or any portion of “any sunken warship, naval auxiliary, or other vessel [including spacecraft] that was owned or operated by a government on military non-commercial service when it sank[,]”²⁶⁶ in addition to the craft’s associated contents, such as equipment, cargo, and all contents within its debris field, and the remains and personal effects of the crew and passengers within the debris field.²⁶⁷ The history of case law surrounding salvage of sunken military craft strongly supports the critical necessity of the SMCA.²⁶⁸

5.6.3. Scope

The SMCA protects U.S. military craft wherever it is located, in all maritime zones around the world, including the seabed Area under the high seas and the maritime zones off the coast of foreign nations. It also authorizes the protection of sunken foreign craft in U.S. waters, defined to include internal waters, territorial sea, and contiguous zone. The landmark *Sea Hunt* case demonstrates how foreign sovereign vessels are protected in U.S. waters. The Fourth Circuit Court of Appeals recognized the ownership interests of a foreign sovereign, the Kingdom of Spain, to two frigates of war that sank within the U.S. territorial sea.²⁶⁹ Two ships, *Juno* and *La Galga de Andalucía*, were lost off the Virginia coast in 1750 and 1802 respectively. Sea Hunt, Inc. reportedly found the vessels in the late 1990s. The salvors obtained authorization from the

state of Virginia to salvage the wrecks, which Sea Hunt presumed to be abandoned and thus subject to the ASA. The salvors claimed a salvage award against the wrecks and, in the alternative, asked the U.S. District Court for the Eastern District of Virginia to award title under the law of finds. Assuming the identity of the ships to be that claimed by Sea Hunt, the court ruled that both were sunken sovereign vessels that had not been abandoned. The Kingdom of Spain had intervened to assert ownership, and there was no evidence that it had expressly abandoned the vessels. Because Spain was the owner and it had expressly rejected salvage, the court held that Sea Hunt was not entitled to a salvage award.

5.6.4. Authorization

Permits are required for any activity directed at a sunken military craft and may be issued by the “Secretary concerned” for archaeological, historical, or educational purposes. The SMCA expressly prohibits the application of both the law of finds and the law of salvage to any U.S. sunken military craft, wherever located, or any foreign sunken military craft located in U.S. waters.²⁷⁰ No salvage rights or award will be authorized for any U.S. sunken military craft without the express permission of the United States or any foreign sunken military craft in U.S. waters without the foreign State’s express permission. The Secretary of the Navy may carry out permitting at the request of and on behalf of a foreign state.²⁷¹

The SMCA applies to any person conducting activities directed at sunken military craft, with the exception of those actions taken by, or at the direction of, the United States. The Act does not apply to any person who is not a citizen, national, or resident alien of the United States unless in accordance with generally recognized principles of international law, an agreement between the United States and the foreign country of which the person is a citizen, or, where the person is on a foreign vessel, an agreement between the United States and the flag State of the foreign vessel.

5.6.5. Sanctions

Any person who violates the SMCA or any regulation or permit may be subject to enforcement, including penalties up to \$100,000 per day for each violation, as well as costs and damages resulting from the disturbance, removal, or injury to protected craft and cargo. Damages may include the reasonable costs of storage, restoration, care, maintenance, conservation, and curation of the craft, as well as the cost of retrieving any information of an archaeological, historical, or cultural nature from the site.²⁷² Violators may also be subject to otherwise applicable criminal law sanctions.²⁷³

5.6.6. Gap Analysis

The SMCA filled most of the gaps in U.S. law protecting U.S. public vessels in all of the maritime zones. While the SMCA may not cover some non-military public vessels, like those used by NOAA for scientific research, those wrecks are protected by U.S. property law and are not yet UCH as they have not been underwater for at least 100 years. Those non-military public vessels that have been underwater for 100 or more years may be protected from activities directed at them over which the United States has jurisdiction through the NHPA and perhaps the Antiquities Act. It should be noted that the SMCA protects a number of wrecks that are not UCH. However, as 2014 is the 100th anniversary of WWI, many of those wrecks will soon become UCH. If the United States were a party to the 2001 UNESCO Convention, it could cite

the SMCA as authority to implement its obligations to protect UCH that is also sunken military craft in a manner that is consistent with current State practice and international law as reflected in the *Sea Hunt* case of the *Juno* and *La Galga* Spanish warships in the U.S. territorial sea.²⁷⁴

5.7. LAWS & POLICIES RELATING TO NATIVE AMERICAN HERITAGE

People have fished, boated, and established temporary and permanent settlements along coastlines, including the coasts of the United States, for thousands of years. During the most recent Ice Age (10,000-20,000 years before present), the sea level was approximately 300-400 feet (90-120 m) lower than it is today. Some of these terrestrial sites subsequently became submerged as a result of glacial melting and subsequent sea-level rise. Scientists believe that evidence of past human existence may lie as far as the OCS.²⁷⁵ In fact, heritage resources have been found in Grey's Reef National Marine Sanctuary, 17.5 nm (33 km) off the present-day coast of Sapelo Island, Georgia. Items culturally identified with the Chumash Indians have been recovered from the seabed in Channel Islands National Marine Sanctuary off the California coast, and the skeletal remains of a mastodon were reportedly recovered from the seabed of Stellwagen Bank on the OCS beyond the submerged lands of Massachusetts.²⁷⁶

It was not until the second half of the 20th century that Federal legislation was enacted in the United States to protect Native American cultural heritage and religious freedoms. The [American Indian Religious Freedom Act](#) (AIRFA), a Federal law and joint-resolution, was enacted in 1978, followed by the [Native American Graves Protection and Repatriation Act](#) (NAGPRA) in 1990. Prior to the passage of AIRFA in 1978, traditional Native American ceremonies had been severely intruded upon or, in some instances, banned outright.²⁷⁷

5.7.1. American Indian Religious Freedom Act of 1978

AIRFA protects the rights of Native Americans to exercise their traditional religions by ensuring access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.²⁷⁸ AIRFA is primarily a policy statement, with approximately half of the brief statute devoted to Congressional findings. Following the Congressional findings, the act makes a general policy statement regarding American Indian religious freedom:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.²⁷⁹

“Indian,” for the purposes of AIRFA, means any member of an Indian tribe, defined as any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.²⁸⁰ AIRFA requires Federal land managers to include consultation with traditional Native American religious leaders in their management plans.²⁸¹

5.7.1.1. Purpose & Scope

The intent of AIRFA has been interpreted as ensuring that Native Americans obtain First Amendment protection, as opposed to granting Native Americans rights in excess of the First Amendment. As religious sites may be eligible for inclusion in the National Register, any effects that may occur as a result of granting access to them may trigger Section 106 review under the NHPA. As a related law, the NHPA greatly strengthens the requirements for Federal agencies to ensure that tribal values are taken into account. Tribes are given greater control over patrimonial objects, and are allowed to establish their own culturally-specific criteria of significance.²⁸²

5.7.1.2. Authorization

There is no authorization or permitting system under AIRFA. However, the National Park Service's Heritage Preservation Services has a major role in fulfilling AIRFA Federal policy through its programs, which provide: financial and technical assistance to tribes; leadership in the preservation of the prehistoric and historic resources of the United States; leadership in the administration of the national preservation program in partnership with states, Indian tribes, Native Hawaiians, and local governments; and assistance to state and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

5.7.1.3. Sanctions

While there are no sanctions, consideration of the purpose and underlying provisions of AIRFA may also be helpful in guiding policy for UCH in certain cases.

5.7.1.4. Gap analysis

AIRFA, while well-intentioned, has not effectively protected Native American's freedom to practice their religious and cultural ways of life. In *Lyng v. Northwest Indian Cemetery Protective Association*, the U.S. Supreme Court considered whether to allow the U.S. Forest Service to build a road through the Chimney Rock area of Six Rivers National Forest, a sacred region for some Native Americans.²⁸³ The challengers, including an Indian organization, individual Indians, nature organizations, and the State of California objected on free exercise grounds and AIRFA. The Court found that the AIRFA did not create any cause of action under which to sue, nor did it contain any judicially enforceable rights, as it was simply a joint resolution of Congress.²⁸⁴ Furthermore, the court cited the legislative history of AIRFA in which the sponsor of the bill, Representative Udall, confirmed that it would "not change any existing State or Federal law" and essentially "had no [legal] teeth."²⁸⁵

5.7.2. Native American Graves Protection and Repatriation Act of 1990

5.7.2.1. Overview and Background

The Native American Graves Protection and Repatriation Act was enacted to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony.²⁸⁶ While the AA and ARPA were enacted to address looting of Federal public lands, this statute provides additional protection to those remains and objects, and addresses the repatriation of remains that were looted or recovered under prior authorization.

NAGPRA also seeks to balance the interests of Native Americans in the repatriation of the human remains and objects associated with their heritage with the interest of the scientific community in research.²⁸⁷ NAGPRA authorizes Federal grants to Indian tribes, Native Hawaiian organizations, and museums to assist with the documentation and repatriation of Native American cultural items, and establishes the Native American Graves Protection and Repatriation Review Committee to monitor the NAGPRA process and facilitate the resolution of disputes that may arise concerning repatriation under NAGPRA.

5.7.2.2. Purpose

The primary purpose of NAGPRA is the protection and repatriation of the remains of Native Americans. It sets up a process for determining “the ownership or control of Native American cultural items which are excavated or discovered on Federal tribal lands after November 16, 1990” and to facilitate the repatriation or disposition of these items to their rightful owner.²⁸⁸ Under this process, museums and Federal agencies return certain Native American materials—human remains, funerary objects, sacred objects, or objects of cultural patrimony—to Indian tribes, Native Hawaiian organizations, and lineal descendants.²⁸⁹

5.7.2.3. Scope

NAGPRA applies on tribal and Federal lands.²⁹⁰ NAGPRA defines “Federal lands” as any land other than tribal lands that are *controlled or owned* by the United States government.²⁹¹ The implementing regulations define “control” as referring to “those lands not owned by the U.S. Government but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person.”²⁹² NAGPRA’s definition of Federal lands owned or controlled appears to be consistent with the terms land owned and controlled by the United States that are used in the AA. As the Department of Justice has interpreted the scope of the AA lands controlled by the United States to apply in the marine context of the EEZ and OCS, it appears reasonable to NAGPRA’s use of Federal lands controlled by the United States to include the OCS. This interpretation is bolstered by a comparison of how Congress defined “public lands” under ARPA. Congress expressly excluded the OCS from the definition of “public lands” under ARPA. In NAGPRA there is no such express exclusion of the Outer Continental Shelf despite the fact that Congress excluded it under ARPA and was careful to exclude certain US territorial lands under NAGPRA. It may be argued that the Federal government has sufficient control over exploration and exploitation activities on the OCS to fulfill the purposes of NAGPRA for activities directed at Native American remains and objects on the OCS, as well as their inadvertent discovery. In further exploring the concept of control as applied under NAGPRA, the preamble to the 1995 final NAGPRA rule provides guidance. In the preamble, the Department of the Interior wrote: “Generally, however, a Federal agency will only have sufficient legal interest to ‘control’ lands it does not own when it has some other form of property interest in the land such as a lease or easement”.²⁹³

As explained in Section 5, the OCSLA provides that the subsoil and seabed of the OCS appertaining to the United States are subject to U.S. jurisdiction, control and power of disposition.²⁹⁴ Under OCSLA, the Secretary of the Interior is given the responsibility of granting leases for oil and gas exploration on the OCS.²⁹⁵ While the United States does not have title to or own the OCS, its authority, jurisdiction, control, and power over it and the activities directed

at it have been interpreted to result in a form of property interest sufficient to trigger the application of NAGPRA on the OCS.²⁹⁶ This definition of control of Federal land would therefore appear to include the OCS²⁹⁷ on which international law recognizes a coastal nation has sovereign rights to control exploration and exploitation of the continental shelf and its natural resources.²⁹⁸

NAGPRA applies to intentional excavation or inadvertent discovery of Native American human remains and cultural items on Federal or tribal lands after November 16, 1990. The implementing regulations define “intentional excavation” as “the planned archeological removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3(c) of the Act.”²⁹⁹ The regulations also define “inadvertent discovery” as “the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3(d) of the Act.”³⁰⁰ NAGPRA applies to all Federal agencies, as well as public and private museums³⁰¹ that have received Federal funds. NAGPRA also applies to any person who knows or has reason to know that they have discovered Native American cultural items.³⁰²

NAGPRA recognizes claims by lineal descendants, Indian tribes, and Native Hawaiian organizations. An Indian tribe is defined as any tribe, band, nation, or other organized group or community of Indians that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Department of the Interior has interpreted the definition of “Indian tribe” as applying to approximately 770 Indian tribes and Alaska Native villages that are recognized by the Bureau of Indian Affairs. A Native Hawaiian organization includes any organization that: 1) serves and represents the interests of Native Hawaiians; 2) has as a primary and stated purpose for the provision of services to Native Hawaiians; and 3) has expertise in Native Hawaiian Affairs, and includes the Office of Hawaiian Affairs and Hui Malama I Na Kupuna `O Hawai`i Nei. The Department of the Interior includes the Hawaiian island burial councils and various hanas (extended families) within this definition.³⁰³

5.7.2.4. Authorization

Section 3 of NAGPRA states that the “intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if such items are excavated or removed pursuant to a permit issued under Section 4 of the Archaeological Resource Protection Act of 1979 . . .”³⁰⁴ ARPA permits under NAGPRA mandate consultation with, or in the case of tribal lands, “the consent of the appropriate Indian tribe or Native Hawaiian organization[.]”³⁰⁵ This authorization may also be argued to apply to the conduct of these activities directed at cultural items found on the OCS for a couple of reasons. First, there is no express exclusion of the OCS as there is in ARPA. The fact that Congress incorporated the ARPA permit system without incorporating the corresponding ARPA definition of public land and other scoping provisions indicates intent for broader application. Disposition of the found cultural artifacts is done in accordance with NAGPRA regulations.³⁰⁶ ARPA also includes special notification requirements regarding Indian tribal religious or cultural sites.³⁰⁷ For example, if ARPA determined that a permitted activity may result in harm to, or destruction of, any Indian or tribal or religious site on public lands, then it must notify a designated official with the tribe at least thirty days prior to issuing a permit,

meet with the official during that thirty day period, and discuss ways to avoid or mitigate potential harm or destruction of the cultural site.³⁰⁸

In the cases involving inadvertent discovery of Native American human remains or defined cultural items during the conduct of legal activities occurring on Federal or tribal lands, NAGPRA requires that the person must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the cultural items.³⁰⁹ NAGPRA requires any person who knows, or has reason to know that he or she has inadvertently discovered Native American cultural objects, must provide immediate notice by telephone to the responsible Federal agency. To the extent the Federal government has sufficient authority and jurisdiction to exercise control over activities on the OCS under OCSLA and other laws such as the Rivers & Harbors Act, the provisions of NAGPRA may apply to address activities directed at Native American UCH as well as other activities directed at the OCS that result in the inadvertent discovery of such UCH.

5.7.2.5. Sanctions

Section 9 of NAGPRA authorizes the Secretary of the Interior to assess a civil penalty against any museum that fails to comply with the requirements of the Act.³¹⁰ NAGPRA also includes provisions for unclaimed and culturally unidentifiable Native American cultural items, penalties for noncompliance and illegal trafficking, and provisions regarding intentional or inadvertent discovery of Native American cultural items on Federal and tribal lands.³¹¹

5.7.2.6. Gap analysis

To date, there exist no cases or permits issued under NAGPRA in regard to remains or objects on the OCS. This is the direct result of the current lack of evidence of Native American archaeological sites on the OCS, though present work may swiftly alter this situation. Regardless, it is reasonable to interpret NAGPRA and particularly its definition of Federal lands that are controlled by the U.S. Government to include the OCS in a manner consistent with how the Department of Justice, Department of the Interior, and NOAA have interpreted similar terms regarding lands owned or controlled by the United States under the Antiquities Act. Under this interpretation, NAGPRA would provide the authority to protect the UCH on the OCS that are the remains of the first settlers of this continent. In conjunction with the AA and other laws that protect UCH on the OCS, NAGPRA could play a significant role in addressing the obligations under the 2001 UNESCO Convention to regulate activities directed at UCH on the OCS through the authorization system as well as activities that may incidentally affect UCH through the procedures for inadvertent discoveries.

6. STATUTES CONTROLLING ACTIVITIES THAT MAY INCIDENTALLY AFFECT UCH³¹²

6.1. RIVERS AND HARBORS ACT OF 1899

6.1.1. Background and Overview

The Rivers and Harbors Act of 1899 is the initial authority for the U.S. Army Corps of Engineers (USACE) regulatory permit program designed to protect navigable waters in the development of harbors and other construction and excavation.³¹³

6.1.2. Purpose

The RHA was enacted to further safe navigation by providing authority for the USACE to address shipwrecks and other unauthorized obstructions or alterations of the navigable waters of the United States. The law applies to any dredging or disposal of dredged materials; excavation, filling, re-channelization, or any other modification of a navigable water of the United States; and to all structures, from the smallest floating dock to the largest commercial undertaking.

6.1.3. Scope

The geographic jurisdiction of the RHA includes all navigable waters of the United States, which are defined as “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.”³¹⁴ The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, as well as to the seaward limit of the outer continental shelf, by Section 4(f) of the amended Outer Continental Shelf Lands Act of 1953.³¹⁵ Moreover, while the RHA program is generally focused on safe navigation in ports, harbors and navigation near shore, the application of the RHA to control excavation and construction activities on the OCS has been upheld in court.³¹⁶

The RHA applies to the person³¹⁷ conducting the aforementioned activities that are unlawful if conducted without a permit. Anyone excavating, dredging, disposing of dredged material, filling, or making other modifications to the seabed associated with “navigable waters” of the United States must obtain authorization to conduct those activities.

6.1.4. Authorization

Section 10 of the RHA prohibits the unauthorized obstruction or alteration of any navigable water of the United States.³¹⁸ This section provides that the construction of any structure in or over any navigable water of the United States, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The Secretary’s approval authority has since been delegated to the Chief of Engineers. Activities requiring Section 10 permits include the placement of structures (e.g., piers, wharfs, breakwaters, bulkheads, jetties, weirs, transmission lines) and work such as dredging or disposal of dredged material, or excavation, filling, or other modifications to the navigable waters of the United States.

6.1.5. Sanctions

Section 12 of the RHA provides sanctions for the violation of any of the provisions of Sections 9, 10, and 11 of the RHA, including a fine not exceeding U.S. \$2,500 nor less than \$500, or imprisonment not exceeding one year, or by both such punishments, at the discretion of the court. Further, the removal of any structures or parts of structures erected in violation of the provisions of these sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.³¹⁹

6.1.6. Gap Analysis

The activities that may incidentally affect UCH would include the excavation, dredging, filling and the placement of structures or other construction activities that are regulated under the RHA. The RHA would arguably apply to most of the significant excavation and construction projects in all of the maritime zones subject to U.S. jurisdiction. For example, NOAA consulted with the USACE in regard to treasure hunting that harmed coral on Bright Bank on the OCS in the Gulf of Mexico. NOAA had some information that a treasure hunter had conducted this excavation on the seabed in area of coral outcropping in their search for a sunken Spanish Galleon. NOAA surveyed the site and discovered a small drilling rig and evidence of excavation into the seabed and coral. The USACE agreed with NOAA that a permit would be required for the undertaking of this type of activity on the OCS. The USACE had no records of an application much less a permit, and agreed that an enforcement action along the lines of [*U.S. v. Ray*](#)³²⁰ would be appropriate. However, it was difficult to obtain evidence of the person actually conducting the unauthorized excavation and construction activity. While such evidence has yet to be collected, the matter is a good example of the potential use of the RHA to protect UCH on the OCS from construction and excavation activities regardless of whether the activities are directed at UCH. Such activities triggering the RHA Section 10 permit requirements would also necessitate compliance with NEPA and Section 106 of the NHPA, thereby addressing the potential affect to UCH from most if not all of the excavation and construction activities on the OCS within United States jurisdiction.

6.2. SUBMERGED LANDS ACT OF 1953

6.2.1. Background and Overview

Since the formation of the nation, coastal states have managed the resources off their coast as part of the state's territory.³²¹ In general, this was limited to the territorial sea that was considered to be some 3 nm (5.6 km) under the cannon shot rule.³²² The interest in coastal states exploiting the sea and its riches gradually extended seaward with development of better ships, equipment and technology for fishing, and particularly for exploitation of oil and gas. This in turn resulted in the need for some legal authority and control for the predictable operation of these business enterprises.

In 1945 President Truman proclaimed that the natural resources of the subsoil and seabed of the U.S. continental shelf beneath the high seas, but contiguous to U.S. coasts, are subject to national jurisdiction and control.³²³ While some states already regulated off-coast oil and gas development with no objections from the Federal government, some businesses were applying to the Department of the Interior for legal rights to explore and exploit oil and gas off the coast. The Federal government decided to assert authority and control over offshore development. In *United States v. California*, 332 U.S. 19 (1947), the United States successfully argued that the submerged lands off the coast of California belonged to the Federal government. The Supreme Court agreed finding that the Federal government's responsibility for the defense of the marginal seas and the conduction of foreign relations outweighed the interests of the individual states.³²⁴ In passing the Submerged Lands Act, Congress returned the title to submerged lands to the states, promoting the exploration and development of petroleum deposits in coastal state lands and waters.³²⁵

6.2.2. Purpose

Under the SLA, Congress asserted and subsequently granted to the states and other titleholders under state law title to the submerged lands and waters as well as the associated natural resources located within “the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time [the s]tate became a member of the Union,”³²⁶ or as subsequently approved by Congress. For most states, the limit of this boundary is three nautical or geographical miles³²⁷ (5.6 km) from the coastline; however, former Spanish colonies including Texas, the Gulf Coast of Florida, and Puerto Rico have a seaward limit of nine nm (17 km) boundary line measured from the coastline. The seaward limit of the boundaries of the submerged lands of the states in the Great Lakes extends to the international boundary with Canada.³²⁸ Certain Federal public lands were withheld from the SLA, such as national parks and monuments.³²⁹

For purposes of the SLA, the term “natural resources” includes “oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life,” yet expressly excludes “water power, or the use of water for the production of power.”³³⁰ Title II addresses the rights and claims by the states to the lands and resources beneath navigable waters within their historic boundaries and provides for their development by the states. Title III preserves the control of the seabed and resources therein of the outer continental shelf beyond state boundaries and to the Federal government and authorizes leasing by the Secretary of the Interior in accordance with certain specified terms and conditions. The legality of the SLA was affirmed in 1954 by the Supreme Court case *Alabama v. Texas*, in which the Court emphasized that Congress could relinquish to the states the Federal government's property rights over the submerged lands without interfering with U.S. national sovereign interests.³³¹

6.2.3. Scope

The SLA grants most coastal states rights to the natural resources located within 3 nm (5.6 km) from their coastline, and 9 nm (17 km) from the coastline for Texas, the Gulf coast of Florida, and Puerto Rico. SLA boundaries between coastal states and the United States are not fixed unless done so by a deliberate action of the U.S. Supreme Court (i.e., by a decree “fixing” the boundary by coordinates).³³² The SLA Boundary (aka the State Seaward Boundary or Fed-State Boundary) defines the seaward limit of a state's submerged lands and the landward boundary of federally-managed OCS lands.

6.2.4. Authorization

Coastal state agencies have laws and programs requiring authorization for activities directed at their submerged lands.

6.2.5. Sanctions

Sanctions are established under state law.

6.2.6. Gap Analysis

While the SLA is not applicable on the OCS, it is part of this study because its development is so closely tied to the development of OCSLA.

6.3. OUTER CONTINENTAL SHELF LANDS ACT OF 1953

6.3.1. Background, Overview, and Scope

The Outer Continental Shelf Lands Act defines the United States Outer Continental Shelf as all submerged lands lying seaward and outside of the area of lands beneath navigable waters (defined in the SLA as three miles from (5.6 km) the state shoreline),³³³ and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.³³⁴ Under OCSLA, the Secretary of the Interior is responsible for the administration of mineral exploration and the development of the OCS.³³⁵

6.3.2. Authorization

OCSLA empowers the Secretary of the Interior to authorize mineral exploration and development leases on the OCS to the highest qualified responsible bidder on the basis of sealed competitive bids and to formulate regulations as necessary to carry out the provisions of the Act.³³⁶ The Energy Policy Act of 2005 amended OCSLA Section 8 to give jurisdiction of alternate energy-related uses (including renewable energy projects) on the OCS to the DOI.

6.3.3. Sanctions

Criminal violations are covered under Section 24(c) of OCSLA³³⁷ and are authorized for those violations that are knowing and willful and may include: violation of any provision of the OCSLA, any lease term, license, or permit pursuant to the Act, or any regulation or order issued under the Act designed to protect health, safety, or the environment or to conserve natural resources; any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under the Act; falsifying, tampering with, or rendering inaccurate any monitoring device or method of record required to be maintained under the Act; and a disclosure of any data or information required to be kept confidential by the Act. The Office of the Inspector General is authorized to investigate violations of OCSLA under Section 2 of the Inspector General Act.³³⁸

Civil penalties are authorized for violations that are not corrected within the period of time granted by the Bureau of Safety and Environmental Enforcement (BSEE) and for actions the BSEE determines may constitute or constituted a threat of serious, irreparable, or immediate harm or damage to life, property, or the environment; and violations that cause serious, irreparable, or immediate harm or damage to life, property, or the environment.³³⁹

6.3.4. Gap Analysis

OCSLA asserts sufficient jurisdiction and control over exploration and exploitation in order to trigger other laws such as NHPA, NEPA, and the AA in order to protect UCH from these activities. In light of the legislative history of OCSLA and the SLA, and the relatively easier fix to ARPA, the author is not recommending amending OCSLA to address the gap in protection of UCH on the OCS.

6.4. NATIONAL HISTORIC PRESERVATION ACT OF 1966

6.4.1. Purpose

The National Historic Preservation Act of 1966 emerged in response to the destruction of older buildings and neighborhoods in the immediate post-World War II years.³⁴⁰ The NHPA signals the U.S. Government's commitment to preserving national heritage through ensuring the consideration of the value of heritage properties or resources of Federal, state, local, and international significance.

Section 110 mandates that Federal agencies assume responsibility for the preservation of historic properties or resources owned or controlled by such agency³⁴¹ or may be affected by activities subject to the control or jurisdiction of the agency.³⁴² Additionally, Federal agencies must carry out their programs and projects in accordance with the purposes of the NHPA.³⁴³ Congress amended the Act to add the provision that directs Federal agencies to withhold grants, licenses, approvals, or other assistance to applicants who intentionally, significantly, and adversely affect historic properties.³⁴⁴ This provision is designed to prevent applicants from destroying historic properties prior to seeking Federal assistance in an effort to avoid the Section 106 review process.

6.4.2. Scope

In general, the NHPA applies to activities or undertakings of Federal agencies on the OCS for UCH that is located within an area potentially affected by the proposed undertaking. This would include UCH that has been underwater for 100 years but may also apply to a historic property³⁴⁵ including a shipwreck that is at least 50 years old, as it may be considered eligible for listing on National Register of Historic Places.³⁴⁶

Section 106 requires Federal agencies to consider the effects of their proposed Federal and federally-funded undertakings under their jurisdiction on historic properties in any state, including the state's submerged lands and waters as determined by the terms of the SLA.³⁴⁷ This section also applies to Federal agencies with the statutory authority to license, approve, or permit an undertaking, both domestically and internationally, including the OCS and the EEZ.³⁴⁸ Thus, NHPA 106 may apply within the EEZ/OCS because the geographic scope the statute authorizing the undertaking applies within the EEZ/OCS. In other words, if an agency's jurisdiction and control over activities applies within the EEZ/OCS and those activities may affect historic properties the NHPA Section 106 applies even if the underlying statute does not provide the agency with express jurisdiction and control over the UCH itself.³⁴⁹ The Advisory Council on Historic Preservation (ACHP) has issued regulations that set forth the Section 106 process, which explains how Federal agencies must take into account the effects of their actions on historic properties and how the ACHP will comment on those actions.³⁵⁰

Section 402 requires Federal undertakings outside of the United States to take into account potential adverse effects on sites inscribed on the World Heritage List or on the foreign nation's equivalent of the National Register in order to avoid or mitigate adverse effects.³⁵¹

6.4.3. Authorization

The NHPA established the Advisory Council on Historic Preservation, now an independent Federal agency.³⁵² The ACHP is directed to advise the President and Congress on historic preservation matters, review the policies and programs of Federal agencies to improve their consistency with the purposes of the NHPA, conduct training and educational programs, and encourage public interest in preservation.³⁵³ Most importantly, the Act places the ACHP in the central role of administering and participating in the preservation review process established by Section 106. The center of Federal agency responsibilities under the NHPA can be found in Sections 106 and 110 of the Act.

The NHPA authorizes the Secretary of the Interior (SOI) to establish and promulgate regulations for the NRHP, which is composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.³⁵⁴ In addition, the SOI is also authorized to set forth National Historic Landmark designation criteria and promulgate regulations for nominating historic properties for inclusion in the World Heritage List, in accordance with the terms of the Convention concerning the Protection of the World Cultural and Natural Heritage.³⁵⁵ No property is to be nominated for inclusion in the World Heritage List until the SOI determines that such property is of international significance.³⁵⁶

6.4.4. Sanctions

Section 110 requires Federal agencies, among other things, to withhold grants, licenses, approvals, or other assistance to applicants who intentionally, significantly, and adversely affect historic properties to prevent the destruction of historic properties in order to avoid the Section 106 process.³⁵⁷ However, the NHPA is only implicated when there is a Federal undertaking; therefore, only UCH affected by a proposed Federal undertaking can be protected under the NHPA.³⁵⁸

6.4.5. Gap Analysis

The NHPA applies within the EEZ/OCS to the Federal undertakings that may affect UCH that is on the National Register or is eligible for listing. DOI and NOAA have been applying the NHPA to their undertakings within the EEZ/OCS. However, clarification of the application of the NHPA in the marine environment through regulation or perhaps an Executive Order would be helpful. However, the NHPA does not apply to the activities of private persons outside of the control of some Federal agency permit system.

6.5. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

6.5.1. Background and Overview

Two primary purposes of the [National Environmental Policy Act](#) (NEPA) are “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment. . . .”³⁵⁹ The Federal government is to use “all practicable means, consistent with. . . national policy, to improve and coordinate Federal plans, functions, programs and resources” to fulfill responsibilities under this policy.³⁶⁰ Congress directed that all Federal agencies “shall . . . recognize the worldwide and long-range character of environmental problems and, where

consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment . . .”³⁶¹

Signed into law by President Richard Nixon on January 1, 1970, NEPA was the first major environmental law in the United States and established national environmental policies for the country.³⁶² NEPA mandates Federal agencies to consider the impacts of their activities—including the issuance of Federal permits, Federal funding, and other Federal agency actions—on the environment, and to ensure that information about these environmental impacts is available to the public before final decisions are made.³⁶³

NEPA also established the Council on Environmental Quality (CEQ) in the Executive Office of the President to formulate and recommend national policies, which ensure that the programs of the Federal government promote improvement of the quality of the environment. The CEQ set forth regulations to assist federal agencies in implementing NEPA during the planning phases of any Federal action.³⁶⁴ These regulations, together with specific Federal agency NEPA implementation procedures, help to ensure that the environmental impacts of any proposed decisions are fully considered and that appropriate steps are taken to mitigate potential environmental impacts.

6.5.2. Purpose

As stated above, NEPA is intended to address the potential impacts of Federal actions on the “human environment.” The NEPA process begins when an agency starts planning to take an action that might impact the environment. This includes proposed regulations; management plans, permits, leases, licenses, research, and other activities that may have an impact on the environment. Once the proposal is conceptualized and any reasonable alternatives have been developed, the agency must determine if the action has the potential to affect the quality of the human environment. Cultural resources are part of the “human environment” and are specifically addressed under Section 101(b)(4), which gives the Federal government responsibility to “preserve important historic, cultural and natural aspects of our national heritage, and to maintain, wherever possible, an environment which supports diversity and variety of individual choice.”

6.5.3. Scope

NEPA is a procedural statute that applies to the decision making process of all Federal agencies for planned activities that may affect the environment.³⁶⁵ NEPA does not define the term “environment” much less indicate what part of the environment to which it applies. Like the NHPA, also a procedural statute that applies to Federal agency decision making, the statute authorizing the Federal agency action will likely determine whether NEPA applies. For example, OCSLA authorizes DOI to control the exploration and exploitation of energy development on the OCS. Therefore, in implementing OCLSA, DOI applies NEPA for activities it carries out on the OCS. NOAA similarly applies NEPA to its fisheries management activities within the EEZ. NOAA has even applied NEPA to its management of the activities of U.S. vessels and nationals being conducted in the high seas and Area beyond the national jurisdiction of the United States under the Deep Seabed Hard Minerals Act.

The application of NEPA beyond U.S. territory has often been litigated in the Federal courts. The key issue in such cases is whether there are substantial environmental effects within U.S. territory. Where the effects are primarily found to be within the territory of a foreign country or would not affect existing U.S. treaty rights, courts generally have held that NEPA does not apply. A factor considered by some courts is whether the decision that led to the environmental effects was made within the territory of the United States. Notably, the Circuit Court of Appeals for the D.C. Circuit in holding that NEPA applied concluded that:

Applying the presumption against extraterritoriality here would result in a federal agency being allowed to undertake actions significantly affecting the human environment in Antarctica, an area over which the United States has substantial interest and authority, without ever being held accountable . . . , if it was enforced, would result in no conflict with foreign law or threat to foreign policy.³⁶⁶

NOAA's policy on the extraterritorial application of NEPA is to apply NEPA both within and beyond the U.S. EEZ.³⁶⁷

6.5.4. Gap Analysis

NEPA applies within the EEZ/OCS to the Federal activities that may affect the human environment, which includes UCH. DOI and NOAA have been applying it to their activities and programs within the EEZ/OCS. However, NEPA does not apply to the activities of private persons outside of the control of some Federal agency permit system.

6.6. COASTAL ZONE MANAGEMENT ACT OF 1972

6.6.1. Background and Overview

The [Coastal Zone Management Act](#) (CZMA), enacted in 1972, encourages coastal states to develop and implement coastal zone management plans, with the aim of preserving, protecting, developing, and restoring the coastal zones and coastal resources.³⁶⁸ All coastal states, with the exception of Alaska, currently have a federally approved coastal zone management plan.

6.6.2. Purpose

The purpose of the CZMA is to encourage states to preserve, protect, develop and, where possible, restore and enhance valuable natural coastal resources. Participation by states is voluntary. To encourage states to participate, the Federal government, through the Secretary of Commerce, may provide grants to states that are willing to develop and implement a comprehensive coastal zone management program. The Secretary of Commerce has delegated many of the responsibilities under the CZMA to NOAA.

6.6.3. Scope

The term "coastal zone," as applied to coastal states, includes the coastal waters, the lands found in and under the coastal waters, and the adjacent shorelands.³⁶⁹ Coastal states determine the geographic scope of their respective coastal zones pursuant to the approval process. While the seaward limit of coastal zones may not exceed the seaward limit of the state under the SLA, "Federal Consistency" applies on the OCS/EEZ.

In the Great Lakes, the coastal zone extends to the international boundary between the United States and Canada and, in other areas, it extends to the outer limit of state title and ownership under the Submerged Lands Act,³⁷⁰ the Act of March 2, 1917,³⁷¹ the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976,³⁷² or Section 1 of the Act of November 20, 1963.³⁷³ However, a state's coastal zones specifically exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal government, its officers or agents."³⁷⁴

U.S. jurisdiction over waters off its coasts extends to the seaward limit of its 200 nm (370 km) EEZ, and to the outer limit of its continental shelf.³⁷⁵ The CZMA contains a "Federal consistency provision," that requires Federal agency activities that have reasonably foreseeable effects on state coastal zones to be consistent to the maximum extent practicable with the enforceable policies of a coastal state's federally approved coastal management program.³⁷⁶

6.6.4. Authorization/Federal Consistency

Approval of a state's coastal management program by NOAA results in the application of the CZMA Federal Consistency provision with respect to the state's coastal resources and uses. Thereafter, Federal agency activities having reasonably foreseeable coastal effects must be consistent to the maximum extent practicable with the federally-approved enforceable policies of the state's management program. In addition, activities of non-Federal entities having reasonably foreseeable coastal effects must be fully consistent with the coastal management program's enforceable policies if the activity requires a Federal permit or license or seeks Federal funding. States with approved coastal management plans may object to proposed Federal activities or federally-licensed or permitted activities. In the case of Federal activities, the CZMA provides for a process by which the Federal agency and the state may negotiate a resolution of the parties' differences. However, the proposed Federal activity can proceed if the Federal agency concludes that the activity is consistent to the maximum extent practicable, and that existing law prohibits full consistency; or if the Federal agency concludes that the activity is in fact fully consistent. In the case of federally licensed or permitted activities by non-Federal applicants, the CZMA provides a process whereby the Secretary of Commerce can sustain the state's objection or override a state's objection to an applicant's certification. If the Secretary sustains the state's objection then the activity does not go forward, if the Secretary finds that the Federal license or permit activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security (Section 307(c)) then the activity may proceed accordingly.

6.6.5. Gap Analysis

While the Federal consistency provision applies within the EEZ/OCS, it has not been used to protect UCH to date and is not expected to be used to fill the gaps in protection in the future. However, it is worth reiterating that the CZMA is cited as a potential source of funds for the management of historic shipwrecks in the Department of the Interior's National Park Service Abandoned Shipwreck Act Guidelines.³⁷⁷

6.7. CLEAN WATER ACT OF 1972

6.7.1. Background and Overview

Enacted in the midst of a national concern about untreated sewage, industrial and toxic discharges, destruction of wetlands, and contaminated runoff, the Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into U.S. waters and regulating quality standards for surface waters.³⁷⁸ The basis of the CWA was enacted in 1948 as the Federal Water Pollution Control Act. In 1972, the Act was significantly reorganized and expanded to include Section 404, which established a program to regulate the discharge of dredged or fill material into waters of the United States. “Clean Water Act” became the Act’s common name through amendments in 1977.

The Rivers and Harbors Act of 1899 defined navigable waters of the United States as “those waters that are subject to the ebb and flow of the tides and/or are presently used, or have been used in the past, or maybe susceptible to use to transport interstate or foreign commerce.” The CWA built on this definition and defined waters of the United States to include tributaries to navigable waters, interstate wetlands, wetlands which could affect interstate or foreign commerce, and wetlands adjacent to other waters of the United States.

6.7.2. Purpose

The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The Act regulates both the direct and indirect discharge of pollutants into the nation’s waters. Section 301 of the Act prohibits the discharge into navigable waters of any pollutant by any person from a point source unless it is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit.³⁷⁹ The Act defines discharge of a pollutant to include the addition of pollutants to navigable waters from point sources and the addition of pollutants to waters of the contiguous zone or the ocean from any point source (aside from vessels and floating crafts).³⁸⁰ Section 404 of the Act authorizes the USACE to issue permits for the disposal of dredged material into navigable waters.³⁸¹ Generally, projects that move material in or out of waters or wetlands require Section 404 permits.

6.7.3. Scope

The CWA defines “navigable waters” as “waters of the United States, including territorial seas,” which are in turn defined in the statute to extend 3 nm (5.6 km) seaward.³⁸² Since the power to enforce the CWA only extends to the territorial sea, courts have held that only the Federal government through the United States Environmental Protection Agency (EPA) may issue permits for discharges beyond the territorial sea, which includes “all ocean waters.”³⁸³

The “ocean” is broadly defined by the Act as “any portion of the high seas beyond the contiguous zone.”³⁸⁴ While the jurisdiction implied by that statement seems to include the contiguous zone, high seas, and all waters beyond, the reach of the NPDES discharge permit issuance is effectively limited to the U.S. EEZ.³⁸⁵

6.7.4. Authorization

The USACE and the EPA jointly administer the CWA program. The USACE is responsible for the day-to-day administration and permit review, and EPA provides program oversight. The

fundamental rationale of the program is that no discharge of dredged or fill material should be permitted if there is a practicable alternative that would be less damaging to our aquatic resources or if significant degradation would occur to the nation's waters. Permit review and issuance follows a sequence process that encourages avoidance of impacts, followed by minimizing impacts and, finally, requiring mitigation for unavoidable impacts to the aquatic environment. This sequence is described in the guidelines at Section 404(b) (1) of the CWA.³⁸⁶

6.7.5. Gap Analysis

The CWA permit, like the Rivers and Harbors Act permit, provides additional authority to address activities that may incidentally affect UCH, particularly through NHPA/NEPA provisions.

6.8. HISTORIC SITES ACT OF 1935

6.8.1. Background and Overview

The Historic Sites Act (HSA) was enacted on August 21, 1935. The Act declared “that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.”³⁸⁷ The HSA built upon the foundation of a Federal archaeological program started by the AA. The responsibility to survey and identify significant sites resulted in the National Landmark Program. In 1966, the NHPA greatly expanded the Federal government's role in historic preservation. The NHPA established the NRHP, which included properties of state and local significance, as well as National Historic Landmarks (NHLs) and historic units of the National Park System under the HSA. Congress provided explicit recognition of the NHLs in the 1980 amendments to the NHPA. In 1983, the National Park Service published regulations defining the NHL's criteria and the procedures for considering new properties for inclusion as NHLs.³⁸⁸

6.8.2. Purpose

The HSA authorizes the National Park Service to collect data, inventory both publicly and privately held sites, erect and maintain commemorative tablets, and operate and maintain suitable properties for the benefit of the public.³⁸⁹ This led to establishment of the National Historic Landmarks Program in 1960. The goal of the NHLs program is to focus attention on properties of exceptional value to the nation as a whole rather than to a particular state or locality.³⁹⁰ A property which is designated a NHL is also added to the NRHP.

6.8.3. Authorization

While there is no permit system, per se, for activities that may be directed at NHLs, or that may inadvertently affect them, NHL status is granted only by the Secretary of the Interior. Before the status is granted, a NHL study is conducted that analyzes specific criteria in order to determine whether NHL designation should be granted. NHL designation may be granted to districts, sites, buildings, structures or objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archaeology, engineering and culture and that possess a high degree of integrity of location, design, materials, workmanship, feeling and association, and:

- a. That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or
- b. That are associated importantly with the lives of persons nationally significant in the history of the United States; or
- c. That represent some great idea or ideal of the American people; or
- d. That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
- e. That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or
- f. That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.³⁹¹

6.8.4. Scope

The vast majority of NHL listings are terrestrial sites; however there are several UCH sites. These UCH sites on the NHL include: Truk Lagoon Underwater Fleet (Truk Atoll, Micronesia, listed 1985); U.S.S. *Monitor* shipwreck; (Outer Continental Shelf, listed 1986); U.S.S. *Arizona* shipwreck (Hawaii, listed 1989); U.S.S. *Utah* shipwreck (Hawaii, listed 1989); *Maple Leaf* shipwreck (Florida, listed 1994); the *Antonio Lopez* shipwreck (Puerto Rico, listed 1997); and *Land Tortoise* radeau shipwreck (New York, listed 1998). Two of these monuments are located outside the 12 nm (22 km) territorial sea limit: *Monitor* lies 16 nm (30 km) from shore, on the OCS and in the High Seas at the time of listing but is now located within the contiguous zone since the zone's expansion to 24 nm (44 km) limit; the Truk Lagoon Underwater Fleet is located in the territorial waters of the Federated States of Micronesia, outside of U.S. territorial jurisdiction.

6.8.5. Sanctions

There are no sanctions for non-compliance.

6.8.6. Gap analysis

The Historic Sites Act applies within the EEZ/OCS and is part of the FAP that helps Federal agencies fulfill the public interest in historic preservation. However, as it only applies to the activities of Federal agencies it does little if anything to help fill the gap in protection of UCH from private activities that are not subject to some Federal permit system.

6.9. ARCHEOLOGICAL AND HISTORIC PRESERVATION ACT OF 1974 (MOSS – BENNETT ACT)

6.9.1. Background and Overview

The [Archeological and Historic Preservation Act](#) (AHPA) is also known as the Archaeological Recovery Act or the Moss-Bennett Act or bill. Moss and Bennet were the bill's primary sponsors in the Senate and House of Representatives. It was enacted in response to the destruction of archaeological sites associated with Federal projects, particularly sites in the Mississippi Alluvial Valley associated with Native Americans.³⁹² It also amended and expanded the Reservoir Salvage Act (RSA) of 1960 to require that Federal agencies provide for “the preservation of historical and archeological data . . . which might otherwise be irreparably lost or destroyed as the result of . . . any alteration of the terrain caused [by] any Federal construction project or federally licensed activity or program.”³⁹³ This language greatly increased the number and range of Federal agencies that had to take archaeological resources into account when executing, funding, or licensing projects albeit in the tradition of “salvage archaeology.”³⁹⁴ Prior to the AHPA, Federal agencies only had to take archaeological resources into account when constructing or licensing the construction of dams and related structures.³⁹⁵ Archaeologists Carl Chapman of the University of Missouri and Charles R. McGimsey of the Arkansas Archeological Survey promoted the amendment to the RSA to address this gap in legislative protection by ensuring that all agencies of the Federal government would undertake archaeology before allowing their actions to result in the destruction of an archaeological site.³⁹⁶

6.9.2. Purpose

Enacted with the stated purpose to further the policy set forth in Sections 461-467 [the Historic Sites Act of 1935 and the Reservoir Salvage Act of 1960], the AHPA required that Federal agencies provide for “. . . the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of . . . any alteration of the terrain caused as a result of any Federal construction project of federally licensed activity or program.”³⁹⁷ It provides three avenues for the protection of cultural and scientific resources: a notification requirement, preservation requirements, and funding provisions.³⁹⁸

6.9.3. Scope

The AHPA applies to any Federal construction project or federally licensed activity or program, including terrain alterations and flooding due to dam building activities that carry over from the original RSA. As the AHPA has no geographic limits within the statute, it should apply to these Federal activities on the Outer Continental Shelf. However, Section 3(b) prescribes different regulations for private persons, associations, and public entities. When these parties receive Federal financial assistance (by loan, grant, or otherwise), and the Secretary of the Interior determines archaeological or other scientific data “might be irrevocably lost or destroyed,”³⁹⁹ the Secretary must obtain the consent of the “all persons, associations, or public entities having a legal interest in the property involved”⁴⁰⁰ before undertaking data recovery actions (including survey, recovery, protection, and preservation).

6.9.4. Authorization

The Secretary of the Interior has the primary responsibility for coordinating preservation efforts for the affected cultural and scientific resources. Section 3(a) directs Federal agencies that find “or [are] notified, in writing, by an appropriate historical or archeological authority . . .”⁴⁰¹ that their construction project or activities they have licensed “may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data . . .”⁴⁰² to notify the Secretary of the Interior in writing of the discovery. The Secretary must then survey, investigate, and preserve (including by analysis and interpretation) the data “. . . which, in his opinion, are not being, but should be, recovered and preserved in the public interest.”⁴⁰³ These survey or recovery efforts must begin within sixty days of notification or within a time agreed upon with the head of the agency responsible for funding or licensing the activity threatening the cultural or scientific resource.⁴⁰⁴ The Secretary must also consult with interested Federal and state agencies and institutions, organizations and qualified individuals “with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered as a result of any work performed.”⁴⁰⁵ This consultation requirement is particularly important, as it is the statutory basis for the government-wide regulations for the curation and care of Federal archaeological collections and associated records.⁴⁰⁶

Another of the AHPA’s significant contributions to archaeological preservation is “that it made clear that all Federal agencies were authorized to fund archeological investigations, reports, and other kinds of activities to mitigate the impact of their projects on important archeological sites.”⁴⁰⁷ Section 3(a) authorizes Federal agencies to request that the Secretary undertake preservation activities or conduct the activities with funds appropriated for the project themselves. Section 6 permits the Secretary to contract with qualified agencies, institutions, and individuals in the administration of this Act, hire experts in accordance with 5 U.S.C. § 3109 rules for temporary employment of experts and consultants, and to accept and use private or Federal funding for salvage archaeology.⁴⁰⁸ The Federal agency responsible for the project affecting the resource may transfer up to one percent (1%) of the total amount authorized for the project to the Secretary under Section 7, which remain available until expended.⁴⁰⁹ In 1980, Section 208 of Public Law 96-51 amended the AHPA to provide a means by which agencies could obtain a waiver of the one percent limit with the concurrence of the Secretary and notification of Congress.⁴¹⁰

6.9.5. Sanctions

There are no penalties or sanctions under the AHPA.

6.9.6. Gap Analysis

The AHPA applies to Federal activities including construction and authorizations and would therefore appear to apply to such activities on the OCS. In conjunction with the HSA, the NHPA and other statutes, the AHPA in fact strengthens the application of the Federal archaeological program to protect and manage UCH on the OCS in a manner consistent with the 2001 UNESCO Convention by requiring that data be “salvaged,” the resources preserved in consultation with interested and qualified parties, and that funds be made available for that purpose.

7. RECOMMENDATIONS FOR FILLING GAPS IN PROTECTION OF UNDERWATER CULTURAL HERITAGE ON THE OUTER CONTINENTAL SHELF

There are a number of recommendations that could be made to address the gaps in the law protecting UCH on the OCS. Below are the top three alternatives recommended by the author.

7.1. PREFERRED ALTERNATIVE: AMEND NATIONAL MARINE SANCTUARIES ACT TO PREVENT LOOTING AND UNWANTED SALVAGE OF UCH ON THE OCS

As explained above, the NMSA provides the most comprehensive protection of UCH on the OCS and EEZ, including the strongest civil penalties to withstand testing in U.S. admiralty court.⁴¹¹ However, the NMSA only applies to UCH within National Marine Sanctuaries. The following proposed amendment to the NMSA would fill the gap in protection of UCH on the OCS by relying on the existing authorization system and sanctions that would become applicable outside of National Marine Sanctuaries without the associated management regimes that will continue to be limited to these areas. The amendment would also provide a safety net for protection of UCH on state submerged lands and waters for historic shipwrecks not currently protected under the ASA or the NMSA.

A bill to amend the National Marine Sanctuaries Act

SEC. xxx. CONGRESSIONAL FINDINGS, PURPOSE, AND SCOPE.

(a) FINDINGS.—The Congress finds that—

- (1) this nation has a vast number of cultural heritage resources below the surface of the oceans and Great Lakes that possess archaeological, historical, and cultural significance which should be identified, inventoried, and protected;
- (2) many of these cultural heritage resource sites may contain human remains as well as munitions, fuel and other hazardous material currently unprotected by any Federal law and therefore vulnerable to looting and inadvertent destruction through human activities;
- (3) the public has the right to enjoy the educational and recreational benefits of responsible non-intrusive access to *in situ* underwater cultural heritage, and the value of public education to contribute to awareness, appreciation and protection of that heritage.

(b) PURPOSE AND SCOPE.—

- (1) The purpose is to provide authority to identify, inventory and protect cultural heritage resources that are not currently protected by Federal or state law, and enhance public awareness and understanding of wrecks that present a threat to the marine environment.
- (2) The scope of this title includes cultural heritage resources and shipwrecks that have been identified by the Coast Guard as being a significant threat to the marine environment from unauthorized salvage or looting, hereinafter referred to as a potentially polluting wreck. For the purposes of this title— The term “[cultural] heritage resource” means any shipwreck or other site or object that has been underwater for at least 100 years and is of archaeological, historical, or cultural significance found in, on or under the seabed, including foreign sunken military craft on state submerged lands and the outer continental shelf.

SEC. xxx. PROTECTION OF CULTURAL HERITAGE RESOURCES.

No person may disturb, remove, possess or injure, or attempt to disturb, remove, possess or injure, any cultural heritage resource, potentially polluting wreck or the associated seabed without permission.

SEC xxx. ISSUANCE OF REGULATIONS, PERMITS AND PROMOTION OF PUBLIC ACCESS.

(a) ISSUANCE OF REGULATIONS AND PERMITS.—The National Oceanic and Atmospheric Administration may promulgate regulations and issue permits to any person or vessel proposing to engage in activities that are prohibited by this title or any regulation issued pursuant to this title.

(b) PROMOTION OF PUBLIC ACCESS.—Responsible non-intrusive access to observe or document *in situ* cultural heritage resources shall be encouraged to create public awareness, appreciation, and protection of the resources, except where such access is incompatible with the protection and management of a particular site.

SEC. xxx. ENFORCEMENT AND LIABILITY.

Persons may be subject to enforcement and liability under this Title consistent with Sections 307 (Enforcement) and 312 (Liability) of the National Marine Sanctuaries Act, incorporated here by reference.

SEC. xxx. RELATIONSHIP TO OTHER LAWS.

(a) The common law of finds shall not apply to any cultural heritage resource or potentially polluting wreck subject to United States jurisdiction.

(b) The admiralty maritime law of salvage shall not apply to any cultural heritage resource or potentially polluting wreck subject to United States jurisdiction. Nothing in this Act precludes the application of the admiralty law of salvage to any contract between a valid owner and a salvor, provided such contract is in accordance with this Act and its implementing regulations, including any required permits.

(c) This section and any implementing regulations shall be applied in accordance with applicable law, and in accordance with the treaties, conventions, and other agreements to which the United States is a party.

(d) Nothing in this section shall invalidate any prior delegation, authorization or related regulations consistent with this section.

(e) This title does not apply to abandoned shipwrecks located in, on, or under the submerged lands of a state, as defined in Section 3(f) of the Abandoned Shipwreck Act of 1987, except to the extent the Governor of an affected state specifically requests protection of an abandoned shipwreck under this title. NOAA and the appropriate state agency may enter into an agreement for cooperative management under the National Historic Preservation Act and the National Marine Sanctuaries Act.

(f) This title does not apply to cultural heritage resources that are already protected and managed by other Federal agencies under other laws, except that the head of such agency specifically requests protection under this Title. NOAA and other agencies may enter into an agreement for cooperative management under the National Marine Sanctuaries Act, the National Historic Preservation Act or the Economy Act including, but not limited to, agreements between NOAA and DOI/BOEM and BSEE to ensure that historically significant wrecks are taken into

consideration during activities authorized under the OCSLA as the agencies share stewardship responsibilities between the agencies recognizing the significant expertise and staff from both agencies.

(g) This title does not apply to U.S. sunken military craft that are already protected under the Sunken Military Craft Act (Public Law 108-375, 10 U.S.C. § 113 Note and 118 Stat. 2094-2098), except to the extent the Secretary of the Department of Defense specifically requests protection and/or cooperative management of a sunken military craft under this title. It does apply to foreign sunken military craft on that portion of the continental shelf seaward of the 24 nm (44 km) contiguous zone as well as such craft landward of that 24 nm (44 km) limit that are not subject to an agreement for protection under the Sunken Military Craft Act. This title does apply to foreign sunken military craft that are not abandoned and are not subject to an agreement for protection under the Sunken Military Craft Act.

7.2. ALTERNATIVE 2: AMEND THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT TO EXPRESSLY INCLUDE THE OUTER CONTINENTAL SHELF

As indicated above, treasure hunters and their counsel were successful in persuading Congress to expressly exclude the OCS from the definition of public lands under ARPA. Therefore, a minor amendment to the definition of public lands to specifically include the OCS in place of the current exclusion of the OCS would result in a major filling of the gap in protection of UCH on the OCS. The following is proposed language for an amendment:

A bill to amend the Archaeological Resources Protection Act

Under Section 3 (16 U.S.C. 470bb) (Definitions) Subsection (3) strike Subsection (B) and insert the new Subsection (B) so it would read as follows with **emphasis added in bold to highlight the new text**:

- (3) The term “public lands” means—
 - (A) lands which are owned and administered by the United States as part of—
 - (i) the national park system,
 - (ii) the national wildlife refuge system, or
 - (iii) the national forest system; and
 - (B) all other lands owned or controlled by the United States, including the Outer Continental Shelf.**

Note: This amendment does not retain the exclusion for lands under the jurisdiction of the Smithsonian Institution. However, if there is a legitimate reason why the resources on such land should not be protected by ARPA, the exclusion could be reinserted.

7.3. ALTERNATIVE 3: AMEND THE ANTIQUITIES ACT OR ITS IMPLEMENTING REGULATIONS TO CLARIFY APPLICATION ON OCS OUTSIDE OF MONUMENTS

The AA could be amended to make its civil penalties consistent with NMSA sanctions. If so, language could also be added to expressly clarify that the AA applies on the OCS. However, in

terms of amendments to existing laws, the amendments to the NMSA or ARPA would appear more reasonable and avoid the controversy associated with the establishment of monuments under the AA. As the AA has been applied on the OCS under existing law, it would appear the development of regulations to implement the application of the permit regime on the OCS outside of monuments would be the preferred approach to filling the gaps on the OCS under the AA.

8. CONCLUSIONS

There are a number of U.S. statutes that provide authority to protect and manage UCH on the OCS and otherwise. There are also a number of gaps in the law that provide direct protection of UCH particularly on the OCS and in areas beyond U.S. national jurisdiction for UCH that is not subject to the SMCA. Along the coast and within state submerged lands that generally extend out 3 nm (5.6 km), the ASA and other laws provide direct protection for much of the UCH, although the law of salvage is periodically used to challenge state authority under the ASA, as well as the Federal government in Federal marine protected areas such as parks and sanctuaries. Beyond state submerged lands on the OCS, unless the UCH is covered by the NMSA, the AA, or NAGPRA, the only protection may be indirectly under the NHPA and NEPA through the authorization process required for activities that may incidentally affect UCH, such as through a broader application of the RHA. In the Area beyond national jurisdiction under the high seas, and the submerged lands and waters of foreign nations, the only protection for UCH subject to U.S. jurisdiction would be under the SMCA and international agreements such as the one for *Titanic*, which, somewhat ironically, is actually being afforded protection under Federal admiralty court orders as we still don't have legislation implementing the international agreement.

There remains a need to fill the gaps in protection of UCH, particularly on the OCS and in the Area beyond the national jurisdiction of the United States. The unauthorized salvage of the *Nuestra Señora de las Mercedes*, a Spanish colonial shipwreck on the continental shelf of Portugal beyond its coastal State jurisdictional authority over UCH, illustrates the need for legislation similar to the SMCA to control the unauthorized salvage or looting of historic shipwrecks outside of U.S. territorial waters by U.S. nationals and vessels. On the bright side, there have been a number of decisions over the past decade or so in United States courts sitting in admiralty jurisdiction that have recognized the public interest in preserving UCH *in situ* as well as incorporating archaeological standards for conservation and curation of intact collections such as in the case of *Titanic*. In the case of the *Mercedes*, the court did not authorize the salvage of this vessel and instead ordered the salvor to return the salvaged cargo to Spain as the owner of the shipwreck. As we wait for Congress to act to fill the gaps, we must realize that the Federal courts sitting in admiralty may somewhat ironically be the best interim gap filler in protection as we try to get cases like *Titanic*, *Mercedes*, and the landmark *Klein* case to become the rule rather than the exception.

As indicated above, there may be a number of ways to fill the gaps in protection of UCH on the OCS through a broader implementation of current U.S. statutes such as the AA, and the RHA. Finally, the study provides a draft bill that would fill these gaps and afford authority for protection of all UCH from looting and unwanted salvage with minimal need for management.

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- ¹ “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. Article 1.1.(a) of the 2001 UNESCO Convention.
- ² *See generally* Energy Policy Act of 2005, 42 U.S.C. § 15801 (2011)(Energy development includes, but is not limited to: offshore wind energy, wave energy, ocean current energy, offshore solar energy, and hydrogen generation.
- ³ W. Casto ‘The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates’ (1993) 37 *American Journal of Legal History* 117, 154: the admiralty clause was placed in the Constitution and federal admiralty courts were subsequently created to ensure complete federal jurisdiction over three specific categories of litigation: 1) prize cases for privateers, 2) criminal prosecution, and 3) federal revenue or customs duties.
- ⁴ U.S. CONST. art. III.
- ⁵ In this study the term state may be used instead of or in addition to the term nation, particularly in discussing international law of the sea which uses the term coastal State.
- ⁶ *See Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 468 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993) (listing the Supreme Court’s six elements for fixing a salvage award from *THE BLACKWALL* 77 U.S. (10 Wall) 1, 13-14, 19 L.Ed. 870 (1869) and adding a seventh; “the degree to which the salvors have worked to protect the historical and arch[ae]ological value of the wreck and items salvaged”).
- ⁷ *Panama R.R .Co. v. Johnson*, 264 U.S. 375, 386 (1924)
- ⁸ *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 962 [quoting *Panama R.R .Co. v. Johnson*, 264 U.S. 375, 386 (1924)].
- ⁹ *See generally* Steven Snell, *Courts of Admiralty and the Common Law, Origins of the American Experiment in Concurrent Jurisdiction*, 2007.
- ¹⁰ Vol 3 *Benedict on Admiralty* Doc. 1, 7 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 2007)
- ¹¹ Snell, *supra* note 30 (citing Richard Zouch[e], *THE JURISDICTION OF THE ADMIRALTY ASSERTED, AGAINST SIR EDWARD COKE’S ARTICULI ADMIRALITATIS, IN XXXI* (London, 1663)).
- ¹² Snell, *supra* note 30.

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- ¹³ Raymond Heilman, *The Rights of the Voluntary Agent Against His Principal in Roman Law and in Anglo-American Law*, 4 TENN. L. REV. 34, 34 (1925).
- ¹⁴ *Maritime Ordinances of Trani*, ADMIRALTYLAWGUIDE.COM, www.admiraltylawguide.com/documents/trani.html (last visited June 17, 2013), source of text T. Twiss IV THE BLACK BOOK OF ADMIRALTY, 524-543.
- ¹⁵ Gordon Paulsen, Historical Overview of the Development of Uniformity in International Maritime Law, 57 TUL. L. REV. 1065, 1070 (1982).
- ¹⁶ The Rules of Oleron, available at ADMIRALTYLAWGUIDE.COM, www.admiraltylawguide.com/documents/oleron.html (last visited June 17, 2013).
- ¹⁷ *Delovio v. Boit*, 2 Gall. 398, 419 (C.C.D. Mass., 1815).
- ¹⁸ See Gordon Paulsen, An Historical Overview of the Development of Uniformity in International Maritime Law, 57 Tul. L. Rev. 1065, 1072 (1982-1983)
- ¹⁹ *Id.* at 1072.
- ²⁰ The Laws of the Hanse Towns, ADMIRALTYLAWGUIDE.COM, available at <http://www.admiraltylawguide.com/documents/hanse.html> (last visited June 17, 2013).
- ²¹ See THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW, 502 (1987).
- ²² *Mason v. The Ship Blaireau*, 6 U.S. 240, 266 (1804).
- ²³ *The English Case*, 34 Ch 234 (1886).
- ²⁴ Snell, *supra* note xx, page 51.
- ²⁵ Snell, *supra* note xx, p. 73, note 80.
- ²⁶ See Schoenbaum, *supra* note 41 at 502.
- ²⁷ See generally *id.* at 500-511.
- ²⁸ See *id.* at 511.
- ²⁹ See *The Elfrida*, 172 U.S. 186 (1898)(contract may be set aside under certain circumstances such as fraudulent representations, mistakes, suppression of important facts, other circumstances amounting to compulsion, or when its enforcement would be contrary to equity or good conscience).

³⁰ *The Sabine*, 101 U.S. 384, 384 (1879).

³¹ See Indiana University Underwater Archaeology Techniques Training Booklet: Methodology for Investigating Submerged Cultural Resources and Associated Biodiversity 21, Wrecking Process Diagram; It should also be note that under NEPA human (Charles D. Beeker & Frederick H. Hanselmann, eds.) (Illustrating how shipwrecks stabilize in the marine environment over time and become substrate for coral) insert pdf cite; It should also be noted that under NEPA, the human environment included natural resources and cultural resources.

³² See *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F.Supp. 1562 (S.D. Fla. 1983): admiralty court held that the US is the owner of the shipwreck under an exception to the law of finds on two alternative grounds: 1) because it is embedded in land and 2) because the National Park Service had “constructive possession” such that the property is not considered legally lost; the admiralty court also rejected the request for a salvage award because the shipwreck was not in marine peril and in fact was better off being preserved in situ than it was being salvaged.

³³ *Klein*, 568 F.Supp. at 1567-68.

³⁴ *Klein*, 568 F.Supp. at 1567-68: unscientific salvage creates more of a marine peril than if left preserved in situ.

³⁵ *The Blackwall*, 77 U.S. 1 (1869)

³⁶ *In Rem* [Latin, In the thing itself.] A lawsuit against an item of property as opposed to one against a person (in personam).

³⁷ *Res* [Latin, A thing.] An object, a subject matter, or a status against which legal proceedings have been instituted.

³⁸ *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 952 (4th Cir. 1999) (the physical presence of a wine decanter in the Eastern District of Virginia salvaged from the wreck of the Titanic lying on the slope of the continental shelf of Canada was sufficient for *in rem* jurisdiction over the entire wreck).

³⁹ See generally William Mark McKinney, ET AL., *Ruling Case Law: As Developed and Established by the Decisions and Annotations, Salvage*, 520, at 523 – 529 (vol. 24, 1919) (explaining types of service for pure salvage and then the difference with what constitutes contract salvage); see also Robert Force ET AL., *Admiralty and Maritime Law*, 154 & 160 (2004) (explaining the differences between pure and contract salvage).

⁴⁰ See Schoenbaum, *supra* at 512.

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- ⁴¹ The policies regarding derelict property or vessels have changed much throughout history. In early medieval English law, portions of a wreck or its cargo adrift on the high seas were *res nullius*, property of whomever first found and retrieved them, however, if a derelict vessel or cargo washed ashore the property would escheat (revert) to the Crown. Towards the end of the 13th century, the policy in England changed. If any person had escaped the wreck alive, the original owners would have one year and a day to claim their property or it would escheat to the local lord upon whose land it was found (this became known as the Year-and-a-Day Rule).
- ⁴² *Great Lakes Exploration Group LLC v. Unidentified Wrecked and (For Salvage-Right Purposes), Abandoned Sailing Vessel*, citing 3A Martin J. Norris, *Benedict on Admiralty* 232 at 19-3 (Salvage law is intended to foster recovery and return of goods into the stream of commerce); see also S. HUTT, C.M. BLANCO, O. VARMER, *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT* 424-447 (1999) (Discussion of Maritime Law of Salvage).
- ⁴³ See Schoenbaum, *supra* at 513; Florida Keys National Marine Sanctuary Management Plan at 131, available at <http://floridakeys.noaa.gov/mgmtplans/2007.html> (distinguishing commercial treasure salvage from treasure hunting which is exploration and exploitation with little or no regard to the policy preference of *in situ* preservation and the importance of adherence to conservation and curation standards in any intrusive research and recovery).
- ⁴⁴ *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel (the 'Atocha')*, 569 F.2d 330, 337 (5th Cir. 1978) (Note that Spain did not intervene to assert ownership over this Spanish Galleon as it did in subsequent cases such as the *Juno* and *LaGalga* where the court held that Spain had not abandoned these Spanish Galleons).
- ⁴⁵ *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 569 F.2d 330 (5th Cir. 1978), modifying 408 F. Supp. 907 (S.D. Fla. 1976). Plaintiffs were initially under contract with the state of Florida to retrieve the wreck, with Florida entitled to 25% of the finds, but the contract was determined to be void because the wreck was on the OCS outside Florida's territorial waters.
- ⁴⁶ See *Treasure Salvors*, 569 F.2d at 341-343 (discussion of sovereign prerogative and how the King of England has prerogative right to treasure and shipwrecks, whereas in the United States the Court ruled that Congress has not exercised that sovereign prerogative. Note courts have subsequently recognized that Congress has exercised that sovereign prerogative under the National Marine Sanctuaries Act. See *U.S. v. Fisher*, 977 F.Supp. 1193 (S.D. Fla. 1997)
- ⁴⁷ *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 56 F.3d 556, 573-74 (4th Cir. 1995); see also S. HUTT, C.M. BLANCO, O. VARMER, *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL*

ENVIRONMENT 424-447 (1999)(Detailed discussion of Maritime Law and *Columbus-America* case).

- ⁴⁸ *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 455 (4th Cir. 1992), F.Supp. at 1330. It started sinking on September 11 and sank on September 12, 1857 *America's Lost Treasure: The Wreck of the SS Central America* see <http://www.sscentralamerica.com/history.html>
- ⁴⁹ G. Kinder, *Ship of Gold in the Deep Blue Sea* (Atlantic Monthly Press, 1998); The cargo of tons of gold from California was being shipped to banks in New York to help address the requirement that bank notes be backed by gold and silver. In the United States the loss of the gold in this marine casualty was a contributing factor to the first worldwide economic crisis - the Panic of 1857. *America's Lost Treasure: The Wreck of the SS Central America* see <http://www.sscentralamerica.com/history.html>
- ⁵⁰ The long legal battle over the gold appears to continue as investors have sued Tommy Thompson claiming that they are still owed millions of dollars. "Treasure hunter who found 'Ship of Gold' now sought by US Marshals" Fox News published August 27, 2012. <http://www.foxnews.com/us/2012/08/23/engineer-who-found-hip-gold-now-sought-by-us-marshals/> See also Bob Evans comments on such reports and summary of disposition of collection of salvaged artifacts. http://www.coinbooks.org/esylum_v16n16a32.html
- ⁵¹ *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 56 F.3d 556 (4th Cir. 1995)
- ⁵² J. S. Stern, *Smart Salvage: Extending Traditional Maritime Law To Include Intellectual Property Rights in Historic Shipwrecks*, 68 *Fordham L. R.* 2489 (2000) <http://ir.lawnet.fordham.edu/flr/vol68/iss6/12> See *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, S.S. Central America*, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989). The court defined telepossession as "(1) locating the object searched; (2) real time imaging of the object; (3) placement or capability to place teleoperated or robotic manipulators on or near the object, capable of manipulating it as directed by human beings exercising control from the surface; and (4) present intent to control ... the location of the object." *Id.* at 1958.
- ⁵³ *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel (the 'Atocha')*, 569 F.2d 330, 337 (5th Cir. 1978): in this landmark case for treasure hunters the court held the wreck was abandoned and held the finder owned it under the law of finds. See also *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) and *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1983) (long-lost shipwreck presumed abandoned).
- ⁵⁴ J. S. DuClos, *A Conceptual Wreck: Salvaging the Law of Finds*, 38 *J. Mar. Law & Comm.* 25, (2007) citing *Armory v. Delamire*, 93 Eng. Rep. 664 (K.B. 1722); Leeanna Izuel, *Property*

Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659, 1702 (1991) (tracing the history of the common law doctrine of finds); *Eads v. Brazelton* appears to be the first U.S. maritime case in which the law of finds was applied to a sunken shipwreck See Craig N. McLean, Law of Salvage Reclaimed: Columbus-America Discovery v. Atlantic Mutual, 13 BRIDGEPORT L. REV. 477, 499 (1993).

⁵⁵ ASA Final Guidelines; the U.S. Supreme Court stated that “the meaning of ‘abandoned’ under the ASA conforms with its meaning under admiralty law.” *California v. Deep Sea Research, Inc.* 523 U.S. 491, 508 (1998).

⁵⁶ *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 287-88 (9th Cir. 1996)

⁵⁷ See *R.M.S Titanic v. Haver*, *supra* note 51.

⁵⁸ Constructive possession is a legal theory used to extend possession or control over property to situations where a person has no hands-on custody of an object. Most courts say that constructive possession, also sometimes called "possession in law," exists where a person has knowledge of an object plus the ability to control the object, even if the person has no physical contact with it (*United States v. Derose*, 74 F.3d 1177 [11th Cir. 1996])

⁵⁹ See *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985).

⁶⁰ See *Treasure Salvors*, 569 F.2d at 337.

⁶¹ See, e.g., *United States v. Steinmetz*, 973 F.2d 212, 222 (3rd Cir. 1992) (interpreting Article IV, Section 3, Clause 2 of the Constitution to mean that “the United States cannot abandon its own property except by explicit acts.”).

⁶² Restatement (Third) Foreign Relations Law of the United States (hereafter Restatement) § 401 (1987)

⁶³ For a good discussion of jurisdiction of States under international law in the context of UCH see S. Dromgoole, Book, Chapter 7 pp. 241-275 (Rights, jurisdiction and duties under general international law) and Chapter 8, pp. 276-305 (UNESCO Convention 2001: jurisdictional mechanisms) (2013).

⁶⁴ Id at pp xxx 2.2 Nationality principle including flag State jurisdiction

⁶⁵ Id

⁶⁶ Id. “jurisdiction to adjudicate” which refers to the state or nation’s ability to subject persons or things to the process of its courts or administrative tribunals. There is some difference of

opinion as to whether this adjudicative jurisdiction is really a distinct third category, or whether it is, in essence, a form of either “prescriptive” jurisdiction or of “enforcement” jurisdiction. The latter view is most strongly held with respect to application of criminal law. When a state or nation’s court applies its domestic law to conduct that has occurred outside its territory, it is exercising prescription. It is acting on the view that its law is applicable to the conduct in question. At the same time, when a domestic court tries and perhaps convicts an individual for that conduct, its action is as much the means of enforcing its law as is the action of those entities within the area or territory of the court’s jurisdiction.

⁶⁷ 2001 UNESCO Convention Article 10(2) (A State Party has the right to prohibit or authorize any activity directed at UCH to prevent interference with its sovereign rights or jurisdiction as provided for by UNCLOS).

⁶⁸ 28 U.S.C. § 1333 An *in rem* case is a lawsuit against a thing such as an item of property, like the wreck and/or cargo as opposed to a lawsuit against a person (*in personam* jurisdiction).

⁶⁹ The arrest is seizure of the property by the court that is designed to bring the owner into court to address dispute over the property. See W. Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 *Tulane L. R.* 1895, 1905-07 (1999).

⁷⁰ See *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va. 1996) (district court exercised jurisdiction over the salvage activities directed at the *Titanic* wreck site located well outside USUSUSUSUSU.S. territory in the high seas some 340 nm off the coast of Newfoundland on the slope of Canada's continental shelf).

⁷¹ In *Treasure Salvors* the wreck of the *Atocha* was a few miles off the coast of Florida; in the *Columbus-America* case the wreck was over 100 nm off the coast of North Carolina and in the case of *Titanic* the wreck was in the high seas off the coast of Canada.

⁷² *Id.* at 1103.

⁷³ *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

⁷⁴ In *The Lake Monroe*, 250 U.S. 246 (1919), the Supreme Court held that the Shipping Act had subjected all Shipping Board merchant vessels to proceedings in rem in admiralty, including arrest and seizure. Congress, concerned that the arrest and seizure of Shipping Board merchant vessels would occasion unnecessary delay and expense, promptly responded to the *Lake Monroe* decision by enacting the Suits in Admiralty Act. The Act prohibited the arrest or seizure of any vessel owned by, possessed by, or operated by or for the United States. 46 U.S.C. 741. In the place of an [425 U.S. 164, 171] in rem proceeding, the Act authorized a libel in personam in cases involving such vessels, if such a proceeding could have been maintained had the vessel been a private vessel, and "provided that such vessel is employed as a merchant vessel." 41 Stat. 525, 46 U.S.C. 742 (1958 ed.).

⁷⁵ 46 U.S.C. § 309.

⁷⁶ Suits in Admiralty Act, 46 U.S.C.A § 30903 (2012). Prior to the SIAA, a person could only file a cause of action for injuries or damages caused by a U.S. vessel by seeking special authorization from the legislature. 46 U.S.C.A §§ 30901-30918

⁷⁷ Federal Tort Claims Act, 28 U.S.C. § 2680(d) (2006).

⁷⁸ *Kelly v. United States*, 531 F.2d 1144

⁷⁹ 46 U.S.C. §§ 31101–31113.

⁸⁰ Public Vessels Act, 46 U.S.C. §§ 31101 -31113

⁸¹ 46 U.S.C. § 31111

⁸² *Taghadomi v. Extreme Sports Maui*, 257 F. Supp. 2d 1262, 1271–73 (D. Haw. 2002) (“Section 745 of the [Suits in Admiralty Act] provides that any claim must be brought “within two years after the cause of action arises....” The SIAA's 2–year limitations period applies to the PVA.” (citing *Aliott v. U.S.*, 221 F.2d at 600 (9th Cir. 1955)) citing *Aliott v. U.S.*, 221 F.2d at 600 (9th Cir. 1955))).

⁸³ *United States v. Stone*, 8 F. 232, 238 (C.C.W.D. Tenn. 1881).

⁸⁴ *United States v. Smiley*, 6 Sawy. 640 (C.C.N.D. Cal. 1864).

⁸⁵ 18 U.S.C. § 1658 (2010). Enacted as section 16 of the “Act of April 30th, 1790, An Act for the Punishment of Certain Crimes Against the United States.”

⁸⁶ 18 U.S.C. § 1658(a)-(b)

⁸⁷ Order dated January 4, 2013 in CIVIL NO. 12-00552 SOM-RLP U.S. D. Ct. Hawaii.

⁸⁸ ROBERT CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 5 (1987) (positing that international law evolved with the emergence of independent States, instead of imperial relations through the Roman Empire).

⁸⁹ *Id.*

⁹⁰ *Id.* at 6.

⁹¹ CHURCHILL, *supra* note 82 at 5-6.

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- ⁹² Charter of the United Nations and Statute of the International Court of Justice, Art. 38(1), June 26, 1945, 59 Stat. 1031, 1055.
- ⁹³ Convention for the Protection of Cultural Property in the Event of Armed Conflict (The 1954 Hague Convention), May 14, 1954, 249 U.N.T.S. 240.
- ⁹⁴ Available at: <http://unesdoc.unesco.org/images/0015/001585/158587EB.pdf>
- ⁹⁵ Full convention text available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=35744&URL_DO=DO_TOPIC&URL_SECTION=201.html
- ⁹⁵ http://portal.unesco.org/culture/en/ev.php-URL_ID=35744&URL_DO=DO_TOPIC&URL_SECTION=201.html
- ⁹⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.
- ⁹⁷ Article 1 defines “cultural property” which does not have a 250 year old threshold and instead appears to focus on archaeological or historical significance, however, there is a 100 year old threshold for antiquities and furniture.
- ⁹⁸ See UNESCO, The World Heritage Convention, <http://whc.unesco.org/en/convention/> (last visited July 1, 2013).
- ⁹⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.
- ¹⁰⁰ States Parties – UNESCO World Heritage Center, available at <http://whc.unesco.org/en/statesparties/>.
- ¹⁰¹ See Operational Guidelines for the Implementation of the World Heritage Convention, available at <http://whc.unesco.org/archive/opguide12-en.pdf>.
- ¹⁰² For information about this see http://www.gc.noaa.gov/gcil_papahanaumokuakea.htm#whs
- ¹⁰³ The UNESCO World Heritage Convention: Congressional Issues Congressional Research Service, p. 3 (July, 2011)(“The United States generally supports the World Heritage Convention.”) and Fn 12 (“The United States, for instance, remained active in the Convention and Committee during its withdrawal from UNESCO between 1994 and 2003. The United States withdrew from UNESCO because, in its view, the agency was highly politicized, exhibited hostility toward the basic institutions of a free society—especially a free market and a free press—and demonstrated unrestrained budgetary expansion and poor management.”)

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- ¹⁰⁴ *Id.* CRS report at Summary page (“Ultimately, however, U.S. participation in the Convention does not give the United Nations authority over U.S. World Heritage sites or related land-management decisions.”); See also generally the provisions of the Convention. It is almost entirely about the process and criteria in which member states have the discretionary authority to nominate sites in their respective nations for the international recognition of other parties through a World Heritage Committee. There are no provisions providing the UN or UNESCO any authority over the sites. The authority under the Convention of the Committee is limited to enscribing sites on the list based on the significance of the site and the nation’s authority and plans for protection and management, potentially providing assistance in certain cases, and perhaps delisting sites which are no longer of outstanding universal value or perhaps not being protected and managed as the nominating nation has promised. It is analogous to the US domestic program under the National Historic Preservation Act for the listing of properties on the National Register. That does not result in any NPS authority over the property, but it may make it available for assistance and triggers the NHPA 106 process to protect the property from Federal activities.
- ¹⁰⁵ *Id.* CRS report p. 10 under discussion of the Role of the Legislative Branch in Selecting U.S. World Heritage Sites.
- ¹⁰⁶ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994); *see also* 1994 Letters of Transmittal and Submittal and Commentary, 1982 Law of the Sea Convention (U.S. Department of State, Dispatch Magazine, Vol. 6, Supp. 1, Feb. 1995).
- ¹⁰⁶ For example, see UNCLOS PART XII PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT and Articles 140 and 303.
- ¹⁰⁷ See 1994 Letters of Transmittal and Submittal and Commentary, 1982 Law of the Sea Convention (U.S. Department of State, Dispatch Magazine, Vol. 6, Supp. 1, Feb. 1995). Senate advice and consent to accession is necessary before the U.S. can become a party.
- ¹⁰⁸ art. 8(1).
- ¹⁰⁹ *Id.* art. 5. As coastlines have various geographical features, the LOS Articles 5-11, 13, and 14 detail rules for drawing straight baselines.
- ¹¹⁰ *Id.* art 2-3.
- ¹¹¹ All ships enjoy right of innocent passage Art. 17. Prejudicial activities include: the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State; any act of willful and serious pollution contrary to this Convention; carrying out research or survey activities; and any other activity not having a direct bearing on passage. Art. 19(2). Exploratory surveys in

search of UCH and the salvage of those resources are neither "passage" nor an inherently "innocent" activity under the terms of Article 19(2)(j).

¹¹² Passage is "innocent" as long as it is not prejudicial to the peace, good order, or security of the coastal State. art. 19.

¹¹³ Passage may include stopping and anchoring, but only for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. art. 18

¹¹⁴ Prejudicial activities include: the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State; any act of willful and serious pollution contrary to this Convention; carrying out research or survey activities; and any other activity not having a direct bearing on passage. art. 19(2). Exploratory surveys in search of UCH and the salvage of those resources are neither "passage" nor an inherently "innocent" activity under the terms of article 19(2)(j); 21 (Laws and regulations of the coastal State relating to innocent passage).

¹¹⁵ 54 Fed. Reg. 777 (1988), reprinted in 43 U.S.C. § 1331 note (1994)]See also Pub. L. No. 104-132, §901, II 0 Stat. 1214, 1317 (1996), §90 I (a), reprinted in 18 U.S.C. § 7 note, and § 901 (b). codified at 18 U.S.C. § 13 (1998) (the territorial sea as defined by Presidential Proclamation 5928 is part of the United States Code for purposes of Federal criminal jurisdiction, and is within the special maritime and territorial jurisdiction of the United States for purposes of Title 18 of the United States Code). It should be noted, however, that the United States has recognized a 12 nm (22 km) territorial sea elsewhere in its domestic legislation. See, e.g., the National Marine Sanctuaries Act.

¹¹⁶ art. 33.

¹¹⁷ C.E. Remy U.S. Terr Sea Extension- 16 Fordham Int'l L. J. En 1208, 1221 (1992); see also N. Esters, IMPACTS OF LANGUAGE: Creeping Jurisdiction and its Challenges to the Equal Implementation of the Law of the Sea Convention at <http://www.gmat.unsw.edu.au/ablos/ablos08folder/session5-paper1-esters.pdf>

¹¹⁸ See M. Aznar, The Contiguous Zone as an Archaeological Maritime Zone, 29 Int'l J. of Marine and Coastal Law --, [--third page] (2014).

¹¹⁹ Article 303(2) provides that "[i]n order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article. For a good analysis of the evolution of a coastal States authority in the protection of UCH in the contiguous zone see M. Aznar, The Contiguous Zone as an Archaeological Maritime Zone, 29 Int'l J. of Marine and Coastal Law (2014)(discussing of the emerging recognition of a coastal State's authority to prescribe and enforce it UCH regulations against foreign flagged vessels and nationals

beyond that of just controlling removal of UCH as part of the coastal States authority over customs and trafficking).

¹²⁰ Department of State Public Notice 358, 37 Fed. Reg. 11906 (June 15, 1972)

¹²¹ Presidential Proclamation No. 7219, August 2, 1999. Note: between the 1988 proclamation of a 12 nm territorial sea and the 1999 proclamation of a 24 nm contiguous zone, the 12 nm contiguous zone was coterminous with the 12 nm territorial sea. See also International Section of NOAA Office of General Counsel website of Maritime Zones and Boundaries, http://www.gc.noaa.gov/gcil_maritime.html (last visited xxxx).

¹²² art. 55.

¹²³ Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 & 1811 (1994); National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 & 1437(j) (1994).

¹²⁴ UNCLOS art. 86.

¹²⁵ *Id.* art. 76.

¹²⁶ *Id.* art. 77.

¹²⁷ *Id.* art. 136. Part XI of the LOSC sets forth the articles specifically pertaining to the regime in the Area.

¹²⁸ Article 303(2) provides that “[i]n order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article. For a good analysis of the evolution of a coastal States authority in the protection of UCH in the contiguous zone see M. Aznar, *The Contiguous Zone as an Archaeological Maritime Zone*, 29 *Int’l J. of Marine and Coastal Law* (2014)(discussing of the emerging recognition of a coastal State’s authority to prescribe and enforce its UCH regulations against foreign flagged vessels and nationals beyond that of just controlling removal of UCH as part of the coastal States authority over customs and trafficking). See also art. 33(2) contiguous zone.

¹²⁹ S Dromgoole, p. 176 (Cambridge, 2013)

¹³⁰ art. 55-58.

¹³¹ See Garabello and Scovazzi, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE (Before and after the 2001 UNESCO Convention) 1 A Contradictory and Counterproductive Regime D) a legal vacuum* p7 (Martinus Nijhoff, 2003) (“While two LOSC provisions apply to the space within the 12 or 24 nm and to the Area, there is no

clarification in the LOSC about the regime relating to the archaeological and historical objects found on the continental shelf or in the exclusive economic zone.”)

¹³² *Id.*

¹³³ *Id.* at 1.(E) An Invitation to Looting pp 8-9 (Discussing the danger of the legal vacuum being aggravated by the reservation clause for the law of salvage in Article 303 (3) which was interpreted to be an invitation to looting).

¹³⁴ *Id.* at 1.F) *Prospects for a Better Regime* p 9 fn 22 (statement by the Netherlands on the ratification of the LOSC “Jurisdiction over objects of an archaeological and historical nature found at sea is limited to Articles 149 and 303 of the Convention. The Kingdom of the Netherlands does however consider that there may be a need to develop the international cooperation, the international law on the protection of underwater cultural heritage.”) and p. 10 (“The UNCLOS itself seems to encourage the filling of gaps and the solutions of the contradictions that it has generated.”)

¹³⁵ The International Maritime Organization (IMO) is a specialized agency with the United Nations organization with competence and responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

¹³⁶ 37 Stat. 1658, T.I.A.S. No. 576.

¹³⁷ International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S.165 (entered into force July, 14, 1996).

¹³⁸ *Id.* art. 1.

¹³⁹ *Id.*

¹⁴⁰ See Dromgoole, *supra* note 62 at 9-10 for a history of the debates during the formation of the London Salvage Convention on whether sunken property could be salvaged and the rights of treaty nations to define “danger” restrictively in order to exclude UCH from the Convention’s scope.

¹⁴¹ Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage, Final Report CLT-98/CONF.202/7 (June 29 – July 2, 1998).

¹⁴² *Id.* art. 5.

¹⁴³ *Id.* art 5.

¹⁴⁴ The Comité Maritime International (“CMI”) is a not-for-profit international organization established in Antwerp in 1897. It is the oldest organization in the world, the object of which

is to contribute by all appropriate means and activities to the unification of maritime law. In 1897, there existed a partnership between the Belgian Government and the CMI that resulted in the famous series of “Brussels Diplomatic Conferences on Maritime Law”. These intergovernmental conferences considered and ultimately adopted the conventions and protocols drafted by the CMI over the decades prior to the creation of IMO’s Legal Committee, and were held between February, 1905 (Collision and Salvage) and December, 1979 (Hague/Visby Rules and SDRs). The CMI has an Executive Council comprising officers and councillors from around the world. Its members are 56 National Maritime Law Associations, with memberships ranging from 10 to 3,600. In all, the CMI is composed of approximately 11,000 individuals worldwide concerned in one way or another with maritime law. They include lawyers, commercial men and women in the shipping and cargo industries, insurers and brokers, and bankers, amongst others. The co-operation of the CMI with IMO started immediately after the stranding of the TORREY CANYON on the Seven Stones reef between the Scilly Isles and Lands End in Southwestern England on March 18, 1967. Another international convention that resulted from the co-operation of the CMI with the newly named IMO has been the Salvage Convention 1989, almost entirely based on a CMI draft. <http://www.comitemaritime.org/Relationship-with-UN-organisations/0,27114,111432,00.html> (last checked on December 29, 2013)

¹⁴⁵ See Dromgoole (unpublished) at 29 (citing “Consideration of the UNESCO Convention on the Protection of Underwater Cultural Heritage: Report of the CMI Working Group” [2002] CMI Yearbook 156).

¹⁴⁶ International Maritime Organization, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Secretary-General Performs Depository or Other Functions 452-62 (June 2013), available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>; List of Signatories to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, November 2, 2001 available at <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (parties to both the Salvage and the 2001 Conventions who did not include an Article 30(1)(d) reservation include: Albania; Italy; Jordan; Montenegro; Nigeria; Romania; and Slovenia.

¹⁴⁷ See Dromgoole (unpublished) at 20 for assertion that U.S. Federal admiralty courts have made almost no reference to the Salvage Convention.

¹⁴⁸ See *Institute of Aeronautical Archaeological Research, Inc. v. Wreck of Type A "Midget" Japanese Submarine*, Civ. No. 92-0052-BMK (D. Hawaii, 1993) (Consent Judgment and Permanent Injunction that the US is the owner and enjoining the salvage, moving or disturbing of the site without the permission of the US); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (Biscayne National Park); *Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801 (D. Geo. 1985); *Craft*, 34 F.3d 918, 922 (1994) (Channel Islands National Marine Sanctuary and Park); *Lathrop v. The Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953

(M.D. Fla. 1993) (Cape Canaveral National Seashore); *US v. Salvors Inc.*, 977 F.Supp. 1193 (S.D. Fla. 1997) (Florida Keys National Marine Sanctuary); T. Schoenbaum, Vol. 2 *Admiralty and Maritime Laws*. 16-7, at p. 186 (4th edn., 2004) ("At least within designated national parks and monuments the U.S. has both the power and the interest to exercise dominion and control that amounts to constructive possession of ancient shipwrecks. The Federal Government may also, at its option, declare the area of an historic shipwreck to be a Federal marine sanctuary.").

¹⁴⁹ See *Klein*, 758 F.2d 1511; *Chance* 606 F.Supp. 801.

¹⁵⁰ Legal Information Institute: Bilateral Investment Treaty, http://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited July, 1, 2013).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Treaty of Friendship, Reciprocal Establishment, Commerce, and Extradition Convention, U.S.-Switzerland, art. 12, Nov. 25, 1850, 11 Stat. 587.

¹⁵⁴ Treaty of Friendship, establishment and Navigation Treaty, U.S.-Belgium, art. 14, Feb. 21, 1961; Treaty of Friendship, commerce and Navigation Treaty, U.S.-Costa Rica, art. 5, July 10, 1851, 10 Stat. 916; Treaty of Friendship, commerce, and Consular Rights Treaty, U.S.-Finland, art. 28, Feb. 13, 1934, 49 Stat. 2659; Treaty of Friendship commerce, and Navigation, U.S.-Germany, art. 21, Oct. 29, 1954, 49 Stat. 3258; Treaty of Friendship Commerce and Navigation Treaty, U.S.-Japan, art. 19(5), Apr. 9, 1953, 4 U.S.T. 2063; Treaty of Friendship, commerce, and Navigation Treaty, U.S.-Netherlands, art. 19(5), Mar. 27, 1956, 8 Stat. 32; Treaty of Friendship, commerce and Consular Rights, U.S.-Norway, art. 27, June 5, 1928, 47 Stat. 2135.

¹⁵⁵ Treaty of Peace, Friendship, Commerce and Navigation, U.S.-Brunei, art. 8, June 23, 1850, 10 Stat. 909.

¹⁵⁶ See Treaty of Friendship, U.S.-Switzerland, 11 Stat. 587.

¹⁵⁷ See Treaty of Friendship, Commerce and Navigation Treaty, U.S.-Paraguay, Feb. 4, 1859, 12 Stat. 1091.

¹⁵⁸ Treaty of Friendship, Commerce, and Navigation, U.S.-Greece, art. 22(2)-(3), Aug. 3, 1951, TIAS 3057.

¹⁵⁹ See Treaty of Friendship, Commerce, and Consular Rights, U.S.-Finland, art. 28, Feb. 13, 1934, 49 Stat. 2659 ("[. . .] wrecked upon the coasts of the other"); See also Treaty of Friendship Commerce and Navigation Treaty, U.S.-Japan, art. 19(5), April 9, 1953, 4 U.S.T.

2063 (“[. . .] waters of the other Party”). But see, e.g., Treaty of Friendship and General Relations, U.S.-Spain, art. 10, July 3, 1902, 33 Stat. 2105 (“[. . .] damages at sea”).

- ¹⁶⁰ J. Ashley Roach, Robert W. Smith, *Excessive Maritime Claims: Third Edition* p 553 (Martinus Nijhoff, 2012)
- ¹⁶¹ *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1130 (M.D. Fla. 2009)
- ¹⁶² *See, generally, Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 2009) *aff’d*, 657 F.3d 1159 (11th Cir. 2011).
- ¹⁶³ *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) *cert. denied*, 132 S. Ct. 2379, 182 L. Ed. 2d 1051 (2012) and *cert. denied*, 132 S. Ct. 2380 (2012) and *cert. denied*, 132 S. Ct. 2380, 182 L. Ed. 2d 1051 (2012); Foreign Sovereign Immunities Act 28 U.S.C.A. §§ 1602–1611 (1976).
- ¹⁶⁴ Foreign Sovereign Immunities Act, 28 U.S.C. § 1611 (2006). Under the Friendship Treaty with Spain the United States should provide reciprocal treatment and look to how United States law and policy would apply to its sunken military craft. In this case that would include the Sunken Military Craft Act and the National Marine Sanctuaries Act.
- ¹⁶⁵ *See Odyssey Marine Exploration, Inc.*, 657 F.3d at 1182; Treaty of Friendship and General Relations, U.S.-Spain, art. 10, July 3, 1902, 33 Stat. 2105 (“In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.”); See also, Supplementary Admiralty and Maritime Claim Rule, §§ 1402(b), 1408, 118 Stat. 2094.
- ¹⁶⁶ Article 303(1) should be interpreted broadly to mean the duty includes: i) reporting the discovery of archaeological sites to the competent authorities of the flag State to initiate cooperation on its protection; (ii) take reasonable measures to protect the UCH from looting and unwanted salvage as well as adverse effects from inadvertent activities; (iii) consider it being preserved in situ as the first option; and (iv) do not authorize intrusive research, recovery or salvage unless it is done in accordance with international archaeological standards as reflected in the Annex Rules in the 2001 UNESCO Convention. For further discussion of this interpretation of Article 303(1), see Anastasia Strati, "The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea" 124 (Publications on Ocean Development Vol. 23, 1995).
- ¹⁶⁷ Text of the 2001 UNESCO Convention, Entry Into Force, *available at* <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/#EntryIntoForce> (last visited July 1, 2013).

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- ¹⁶⁸ The Convention on the Protection of the Underwater Cultural Heritage, United Nations Treaty Collection
<http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (last visited June 30, 2013).
- ¹⁶⁹ UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 [hereinafter 2001 UNESCO Convention].
- ¹⁷⁰ *Id.* art. 1(a).
- ¹⁷¹ The Annex rules are derived from the International Charter on the Protection and Management of Underwater Cultural Heritage, a non-binding predecessor charter to the 2001 UNESCO agreement adopted by the International Council on Monuments and Sites in 1996. (*The ICOMOS International Committee on the Underwater Cultural Heritage (ICUCH)*, ICHUCH.ICOMOS.ORG, <http://icuch.icomos.org/the-icomos-international-committee-on-the-underwater-cultural-heritage/> (last visited July 2, 2013)).
- ¹⁷² *Id.* art 29.
- ¹⁷³ *Id.* art. 7.
- ¹⁷⁴ See Aznar-Gómez, M. J. 2010. Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. *The International Journal of Marine and Coastal Law* 25: 209--236. For an excellent argument and analysis on how this consent regime appears to already be required for sunken warships in all maritime zones including the territorial sea under the 2001 UNESCO Convention and UNCLOS.
- ¹⁷⁵ There will be no analysis of articles that do not have obligations such as Article 6 that encourages bi-lateral and multilateral agreements.
- ¹⁷⁶ Article 5 2001 UNESCO Convention.
- ¹⁷⁷ Chapter 6 specifically addresses Articles 6 – 10 of the 2001 UNESCO Convention (Art. 7: Underwater cultural heritage in internal waters, archipelagic waters and territorial sea; Art. 8: Underwater cultural heritage in the contiguous zone; Art. 9: Reporting and notification in the exclusive economic zone and on the continental shelf; Art. 10: Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf).
- ¹⁷⁸ Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2011) (*available at* http://www.cr.nps.gov/local-law/fhp1_antiact.pdf).
- ¹⁷⁹ An Act for the Preservation of American Antiquities, Pub. L. No. 59-209, 34 Stat. 225 (1906).

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- ¹⁸⁰ *Id.* at § 432-33.
- ¹⁸¹ *Id.* at § 431.
- ¹⁸² See DOJ Office of Legal Counsel (OLC) Opinion (September 15, 2000) (Antiquities Act authority used to establish monument in the marine environment off the coast of Hawaii on the continental shelf).
- ¹⁸³ *Lathrop v. The Unidentified, Wrecked and Abandoned Vessel*, 817 F.Supp. 953 (M.D. Fla. 1993). See also Hutt, *supra* note 20 at 129.
- ¹⁸⁴ See also Pleadings of the U.S. Government in *U.S. v. Fisher* (Unreported Fisher Summary Judgment Order at 12, *United States v. Fisher*, 977 F. Supp. 1193 (S.D. Fla. 1997) (No. 92-10027)) (holding that “[c]ommon law principles do not automatically bar Congress from exercising its legislative prerogative to protect Federal lands from potentially damaging activity” and therefore the Antiquities Act could apply in the Florida Keys National Marine Sanctuary); *but see* *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 408 F. Supp. 907, 910 (5th Cir. 1976) (modified by *Treasure Salvors*, 569 F.2d 330 (S.D. Fla. 1978)) (holding that Antiquities Act did not apply to the shipwreck of the Nuestra Señora de Atocha, which lay on the outer continental shelf of the United States) [note OLC decision states that AA applies on the OCS. The *Treasure Salvors* decision is incorrect in this regard].
- ¹⁸⁵ Administration of Coral Reef Resources in the Northwest Hawaiian Islands, from a Memorandum Opinion for the Solicitor, Dep’t of the Interior, the Office of General Counsel, NOAA, and the General Counsel, Council of Environmental Quality, available at <http://www.justice.gov/olc/coralreef.htm>.
- ¹⁸⁶ See *About Sanctuaries*, NOAA.GOV, <http://sanctuaries.noaa.gov/about/welcome.html> (last visited June 17, 2013).
- ¹⁸⁷ See *U.S. Fish & Wildlife Service Marianas Trench Marine National Monument*, FWS.GOV, <http://www.fws.gov/marianastrenchmarinemonument/> (last visited June 17, 2013).
- ¹⁸⁸ 16 U.S.C. § 432
- ¹⁸⁹ *Diaz*, 499 F.2d at 114.
- ¹⁹⁰ *Id.* at 115.
- ¹⁹¹ *Id.*
- ¹⁹² *Treasure Salvors*, 569 F.2d at 340.

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- ¹⁹³ *Treasure Salvors*, 569 F.2d at at 338.
- ¹⁹⁴ *Id.* at 339 (“Interpretations of the Convention and the Act by legal scholars have, with remarkable accord, reached the same conclusion regarding the nature of control of the United States over the continental shelf. The most compelling explication of the Convention regarding national control over non-resource-related material in the shelf area is contained in the comments of the International Law Commission: ‘It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.’” (quoting 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956)).
- ¹⁹⁵ See generally U.N. Convention on the Continental Shelf, 499 U.N.T.S. 311 (April 29, 1958).
- ¹⁹⁶ The 1945 Truman Proclamation and 1953 OCSLA are more likely catalysts for the 1953 convention, at which the international community ended up recognizing the US assertion of rights to exploration and exploitation of the U.S. Continental Shelf.
- ¹⁹⁷ 16 U.S.C. § 431.
- ¹⁹⁸ *Fisher* Summary Judgment Order at 11-12 (*citing* *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 at 962 to support constitutionality of Congressional enactments restricting salvage activities on federally owned or managed lands, including application of the Antiquities Act in this particular case) Note that the shipwreck in question in the *Fisher* case was located 4 nm off shore on the OCS).
- ¹⁹⁹ *Supra* note 83.check
- ²⁰⁰ Proclamation No. 8031, 71 Fed. Reg. 122 (June 26, 2006).
- ²⁰¹ *World Heritage List – Mixed Sites*, UNESCO, http://whc.unesco.org/en/list/?search=&search_by_country=&type=Mixed&media=®ion=&order=&criteria_restriction=(last visited June 17, 2013).
- ²⁰² National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.* (2000) as amended by Public Law 106-513, November 2000) [hereinafter NMSA]. The authority to implement the NMSA has been delegated to NOAA (Title III of the Marine Protection, Research and Sanctuaries Act of 1972. Within NOAA, this authority has been delegated to the office of National Marine Sanctuaries (Department Organizational Order.....).
- ²⁰³ Authorization for Title III of the Marine Protection, Research, and Sanctuaries Act for Fiscal Years 1980 and 1981 (to accompany S. 1140), S. Rep. No. 96-148 (1979).
- ²⁰⁴ 15 C.F.R. Ch. IX § 922.2

²⁰⁵ 16 U.S.C. § 1432(3) and § 1437(k).

²⁰⁶ 16 U.S.C. § 1435(a) and § 1437(k).

²⁰⁷ For more information on sanctuaries see <http://sanctuaries.noaa.gov/> last visited on December 23, 2013.

²⁰⁸ *Id.* at § 922.3

²⁰⁹ 16 U.S.C. § 1443 (2000).

²¹⁰ 16 U.S.C. § 1437 (2000).

²¹¹ *See generally* Craft v. National Park Service, 34 F.3d 918 (9th Cir. 1994), *aff'd* No. 92-1769 (C.D. Cal. 1992), *aff'd* 6 O.R.W. 684 and 687 (NOAA App. 1992)

²¹² SHERRY HUTT, CAROLINE BLANCO, OLE VARMER, HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT 486 (1999).

²¹³ Archaeological Resources Protection Act of 1979, 16 U.S.C. § § 470aa *et seq.* (enacted October 31, 1979).

²¹⁴ *Diaz*, 499 F.2d 113

²¹⁵ *Id.*

²¹⁶ ARPA – *Legislative History*, NPS.GOV, <http://www.nps.gov/archeology/tools/permits/legislative.htm> (last visited June 18, 2013).

²¹⁷ 16 U.S.C. § 470aa

²¹⁸ 16 U.S.C. § 470bb(1)

²¹⁹ 16 U.S.C. § 470bb(2)

²²⁰ 16 U.S.C. § 470bb(3)

²²¹ 16 U.S.C. § 470bb(3)(B)

²²² 16 U.S.C. § 470cc(a)

²²³ The Federal Archeology Program (FAP) is a general term used to encompass archaeological activities on public land, as well as archaeological activities for federally financed, permitted, or licensed activities on nonfederal land. Included under this term are archaeological

interpretation programs, collections care, scientific investigations, activities related to the protection of archaeological resources, and archaeological public education and outreach efforts. See <http://www.nps.gov/archeology/sites/fedarch.htm> (last checked on Dec. 21, 2013)

²²⁴ Annex to the Draft Summary Record of the first session of the Meeting of States Parties to the Convention on the Protection of Underwater Cultural Heritage (26/27 March 2009, Paris), Observer Statements, 1st Observer Statement by the United States of America (“A number of United States Federal and state agencies currently use the Annexed Rules as a guide in the protection and management of underwater cultural heritage located in national marine sanctuaries, national parks, and national monuments, including in the national marine monument in the Northwestern Hawaiian Islands, the Papahānaumokuākea National Monument.”).

²²⁵ 16 U.S.C. § 470ff(a)(a) (civil penalties); 16 U.S.C. § 470ee(d) (criminal penalties).

²²⁶ See Hutt, *supra* note 220 at 129.

²²⁷ See U.S. v. Hampton, Nos. P169925, P169927, and P169928 (S.D. Fla. 1986) (ARPA case ending in plea bargain brought against treasure hunter in Key Biscayne National Park, which includes submerged lands).

²²⁸ See, e.g. United States v. Melnikas, 929 F. Supp. 276 (S.D. Ohio 1996) (defendant caught attempting to sell several manuscript pages stolen from the Vatican and two cathedrals in Spain in violation of APRA § 6(c) because the pages were over 100 years old and defendant had violated Ohio state law § 2913.04(A) (2011) (“[n]o person shall knowingly use or operate the property of another without the consent of the owner or person authorized to give consent”).

²²⁹ U.S. v. An Archaic Etruscan Pottery Ceremonial Vase c. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware, c. 8th-7th Century B.C., Located at Antiquarium, Ltd., 948 Madison Avenue, New York, New York, 10021, 96 Civ. 9437 (1996) (U.S. Attorney’s office applied ARPA §6(c) using defendant’s violation of New York Penal Code section 165.45 prohibiting knowingly holding stolen property in successful forfeiture complaint against antiques company in possession of artifacts that the company knew had been looted from an archaeological site in Southern Italy and had purchased the goods in foreign commerce).

²³⁰ (16 U.S.C. §§ 450rr et seq.) (Enacted as “R.M.S. Titanic Maritime Memorial Act of 1986”, on October 21, 1986)

²³¹ NOAA Guidelines for Research, Exploration and Salvage of R.M.S. Titanic. 66 Fed. Reg. 18905 (April 12, 2001) (available at http://www.gc.noaa.gov/documents/recovery_guidelines.pdf).

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- ²³² Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic (2000) (*available at* <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>).
- ²³³ International Agreement, <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>
- ²³⁴ *See* Guidelines for Research, Exploration and Salvage of R.M.S. Titanic, 65 Fed. Reg. 35,326, 35,327 (June 2, 2000) (proposed guidelines are based on, among other sources, “widely accepted international and domestic professional archaeological standards, including the [1996] ICOMOS International Charter on the Protection and Management of Underwater Cultural Heritage”).
- ²³⁵ Reagan signing, http://library.doc.gov/client/index.assetbox.assetactionicon_0.view/10401.
- ²³⁶ R.M.S Titanic Memorial Act of 1986. **16 U.S.C. § 450rr, et seq.**
- ²³⁶ *Id.*
- ²³⁷ Guidelines, <http://www.gc.noaa.gov/documents/recoveryguidelines.pdf>.
- ²³⁸ UNESCO, <http://unesdoc.unesco.org/images/0012/001260/126065e.pdf>.
- ²³⁹ Proposed legislation, http://www.gc.noaa.gov/documents/gcil_prop_titanic_leg_062409.pdf.
- ²⁴⁰ S. 2279, <http://www.gpo.gov/fdsys/pkg/BILLS-112s2279is/pdf/BILLS-112s2279is.pdf>.
- ²⁴¹ *See* S. 2279, R.M.S. Titanic Maritime Memorial Preservation Act of 2012, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on July 31, 2012 (*available at* <http://www.cbo.gov/publication/43689>).
- ²⁴² *See* R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel etc. 286 F. 3d 194 (2002); August 15, 2011 Court Order Award of Titanic Collection (*available at* http://www.gc.noaa.gov/documents/gcil_titanic_order_081511.pdf); Covenants and Conditions to Award of Titanic Collection (*available at* http://www.gc.noaa.gov/documents/gcil_titanic_opinion_081210_ex_A.pdf). *See also* Sarah Dromgoole, *UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: Implications for Commercial Treasure Salvors*, LLOYD’S MARITIME AND COMMERCIAL LAW QUARTERLY 326 (August 2003); Ole Varmer and Mariano J. Aznar, *The Centenary of Titanic and the Treaty Giving Legal Protection* at fn 3, UNESCO Scientific Colloquium on Factors Impacting the Underwater Cultural Heritage (2011). Cite order and covenants and conditions
- ²⁴³ Salvage Award, http://www.gc.noaa.gov/documents/092293-french_award.pdf.

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- ²⁴⁴ R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, F. Supp. 2d 784, 790 (E.D. Va. 2010) (citing R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 286 F. 3d 194, 210 (4th Cir. 2002)) (“[RMST] has a lien on the artifacts and is entitled to a reward enforceable against those artifacts”); note that this court is hearing R.M.S. Titanic, Inc. on remand from the Fourth Circuit to “provide RMST with ‘an appropriate reward’” (F. Supp. 2d at 791 quoting RMS Titanic Inc. v. Wrecked and Abandoned Vessel, 435 F. 3d 521, 535 (4th Cr. 2006)). *See also* R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 924 F. Supp. 714, 722-724 (E.D. Va. 1996) for discussion of how RMST has not lost rights to salvage for lack of due diligence.
- ²⁴⁵ Order, http://www.gc.noaa.gov/documents/gcil_titanic_order_081511.pdf.
- ²⁴⁶ Covenants and Conditions, http://www.gc.noaa.gov/documents/gcil_titanic_opinion_081210_ex_A.pdf.
- ²⁴⁷ *Id.*
- ²⁴⁸ Agreement, <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>.
- ²⁴⁹ Titanic Legislation, http://www.gc.noaa.gov/gcil_titanic-legislation.html.
- ²⁵⁰ Order 2003 No. 2496, <http://www.legislation.gov.uk/uksi/2003/2496/contents/made>.
- ²⁵¹ MEPC.1/Circ.779, http://www.gc.noaa.gov/documents/2012/013112_gcil_mepc1-circ779.pdf
- ²⁵² UNESCO 2001 Convention Art. I(a)
- ²⁵³ See generally M. Aznar & O. Varmer, [The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection](#), Vol 44 Ocean Development & International Law 96-112 (2013)(Discussing the legal implications of 100th Anniversary of the sinking of Titanic and it becoming UCH under the 2001 UNESCO Convention).
- ²⁵⁴ Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.*
- ²⁵⁵ *See also* OLE VARMER AND CAROLINE BLANCO, LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL AND INTERNATIONAL PERSPECTIVES 205-206 (Dromgoole ed., 2000).
- ²⁵⁶ *See* 43 U.S.C. § 2101 (effective 28 April 1988); *Protection of Historic Shipwrecks, and the National Maritime Museum: Hearing Before the Senate Committee on Energy and Natural Resources*, 98th Cong. 44 (1983); OLE VARMER, *The United States of America*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVE IN LIGHT OF THE UNESCO CONVENTION 2001 351-385 (Dromgoole ed., 2006).

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- ²⁵⁷ Statement of Sen. Bill Bradley (D-N.J.), 133 Cong. Rec. 36,578 (1987). *See also* Ole Varmer, THE CASE AGAINST THE “SALVAGE” OF THE CULTURAL HERITAGE, 30 J. Mar. L. & Com. 279, 283 (1999).
- ²⁵⁸ 43 U.S.C. § 2104; Guidelines, 55 Fed. Reg 50,116 (1990), *corrected* 56 Fed. Reg. 7875 (1991).
- ²⁵⁹ *Treasure Salvors, Inc.*, 569 F.2d at 333-34.
- ²⁶⁰ *See* Varmer, *supra* note 146 at 207.
- ²⁶¹ Sunken Military Craft Act of 2005, Pub. L. No. 108-375, Stat. 2094-2098 (codified at 10 U.S.C. §§ 113 (2011)).
- ²⁶² 10 U.S.C. § 113, sections 1403(d), 1406(c)
- ²⁶³ 10 U.S.C. § 113, section 1401 ("Right, title, and interest of the United States in and to any United States sunken military craft--- (1) shall not be extinguished except by an express divestiture of title by the United States; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.”).
- ²⁶⁴ U.S. Const. art. 4, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).
- ²⁶⁵ *See Hatteras, Inc. v. U.S.S. Hatteras*, 1984 AMC 1094 (1981) *aff’d* without opinion 698 F.2d 1215 (5th Cir. 1983).
- ²⁶⁶ 10 U.S.C. § 113, sections 1408.
- ²⁶⁷ *Id.*
- ²⁶⁸ *See, e.g. Hatteras*, 1984 AMC 1094 (1981) (holding that salvors did not have rights to an over 100-year old shipwreck expressly abandoned by the Secretary of the Navy because the shipwreck had not been properly abandoned pursuant to U.S. property statutes); *U.S. v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992), *aff’g* 763 F. Supp. 1293 (D.N.J. 1991) (U.S. Government permitted to recover the bell from the CSS *Alabama*, which sank off the French coast in 1864, from an antique dealer because the court determined that the United States was the sovereign successor to the Confederacy and as such, had acquired all right and title to the property of the CSA including *Alabama* and the bell); *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) (holding that the United States could halt the unwanted

salvage of a World War II aircraft off the Florida coast because the United States had not abandoned the wreck and therefore had the authority to deny salvage).

²⁶⁹ *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), *aff'g in part & rev'g in part* 47 F. Supp. 2d 678 (E.D. Va. 1999).

²⁷⁰ 10 U.S.C. § 113, Section 1406 ("[t]he law of finds shall not apply to --- (1) any United States sunken military craft, wherever located; or (2) any foreign sunken military craft located in United States waters....[n]o salvage rights or awards shall be granted with respect to --- (1) any United States sunken military craft without the express permission of the United States; or (2) any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.").

²⁷¹ 10 U.S.C. § 113, Section 1403 (d).

²⁷² 10 U.S.C. § 113, Sections 1403-1404.

²⁷³ *Id.* § 1406

²⁷⁴ O. Varmer, J. Grey and D. Alberg, *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage* J Mari Arch (2010) at 135 citing Aznar-Gómez, M. J. 2010. *Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*. *The International Journal of Marine and Coastal Law* 25: 209--236.

²⁷⁵ See *Generally Submerged Prehistory* (Oxbox Books, 2011) and specifically Chapter 12, Michael K. Faught and Amy E. Gusick, *Submerged Prehistory in the Americas*. http://academia.edu/1281599/Submerged_Prehistory_in_the_Americas

²⁷⁶ See B. Terrell, *Fathoming Our Past: Historical Contexts of the National Marine Sanctuaries* (National Oceanic and Atmospheric Administration, 1994).

²⁷⁷ American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996...).

²⁷⁸ 42 U.S.C. § 1996 *et seq.*

²⁷⁹ 42 U.S.C. § 1996 (2011).

²⁸⁰ 42 U.S.C. § 1996(a)

²⁸¹ See Hutt, *supra* note 107 at 362.

²⁸² 16 U.S.C. § 470(a)

²⁸³ 485 U.S. 439 (1998).

²⁸⁴ *Id.* at 455.

²⁸⁵ 124 Cong. Rec. 21444 (1998).

²⁸⁶ Native American Graves Repatriation Act, 25 U.S.C. § 3001 et seq. (1994).

²⁸⁷ M. Birkhold, Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provisions. 37 WM. MITCHELL L. REV. 2046-2096 (September 2011) http://academia.edu/1083878/Tipping_NAGPRAs_Balancing_Act_The_Inequitable_Disposition_of_Culturally_Unidentified_Human_Remains_Under_NAGPRAs_New_Provision

²⁸⁷ *Id.*

²⁸⁸ 25 U.S.C. § 3002(a)

²⁸⁹ *Id.* See also 43 C.F.R. § 10.

²⁹⁰ 25 U.S.C. 3001(D)(5). NAGPRA applies to Hawaii, Alaska, and the continental United States, but does not apply to United States territories. 43 CFR 10.1 (a).

²⁹¹ *Id.* including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act (emphasis added).

²⁹² 43 C.F.R. § 10.2(f)(1).

²⁹³ 60 Fed. Reg. 62134, 62139 (Dec. 4, 1995)

²⁹⁴ 43 U.S.C. § 1331 *et seq.*

²⁹⁵ Outer Continental Shelf Lands Act of 1953 as amended through P.L. 106-580 *available at* www.epw.senate.gov/ocsla.pdf

²⁹⁶ *See* United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969), *aff'd* in part, *rev'd* in part, 423 F.2d 16 (5th Cir. 1970) (construing U.S. authority under the Outer Continental Shelf Lands Act and identifying U.S. rights and interests in the outer continental shelf). *See also* Vol 17 U.S. Attorneys Bulletin, No. 8. Pp 185- Feb. 21, 1969 (for discussion of U.S. v Ray case and conclusion that while the Division did not consider the proprietary interest in the OCS and coral reef to be sufficient for maintaining the common law action of trespass, the interest was sufficient enough to enjoin the defendants from proceeding without a permit. The permit in

the Ray case was a Rivers & Harbors Act permit to be issued by the Army Corps of Engineers).

²⁹⁷ The Outer Continental Shelf Lands Act states that the seabed and subsoil of the Outer Continental Shelf appertaining to the United States are subject to U.S. jurisdiction and control. 43 U.S.C. §§ 1331 *et seq.*

²⁹⁸ UNCLOS Part VI, Article 76

²⁹⁹ 43 C.F.R. § 10.2(g)(3)

³⁰⁰ 43 C.F.R. § 10.2(g)(4)

³⁰¹ Repatriations by the Smithsonian Institution are governed by the National Museum of the American Indian Act of 1989 as opposed to NAGPRA. See 25 U.S.C. 3001 (4) definition of Federal agencies and (8) definition of museums both of which expressly exclude the Smithsonian Institution. This careful use of exclusions in the definitions for the Smithsonian Institution bolsters the argument that definition of Federal lands includes the OCS because it was not expressly excluded as it was in the definition of public lands under ARPA.

³⁰² 42 C.F.R. § 10.4(b) (2011) (“Any person who knows or has reason to know that he or she has discovered inadvertently human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands or tribal lands after November 16, 1990, must provide immediate telephone notification of the inadvertent discovery to the responsible Federal agency official with respect to Federal lands...”)

³⁰³ 25 U.S.C. § 3001 (definitions).

³⁰⁴ 93 Stat. 721; 16 U.S.C. § 470aa *et seq.* The reliance or incorporation of the permit system under ARPA makes sense in that both were enacted to protect Native American Heritage and this avoids minimizing the number of permits required as well as duplicating effort. However, this incorporation of ARPA’s permit system may be used in an argument challenging the application of NAGPRA on the OCS because ARPA expressly excluded the OCS in its definition of public lands. On the other hand, this may be rebutted by the comparison and analysis of the definitions of Federal lands under NAGPRA as reflecting the intent that it not be limited to public lands as defined under ARPA and include those lands subject to its jurisdiction and control such as the OCS.

³⁰⁵ 43 C.F.R. § 10.3(b)(2) (2011).

³⁰⁶ *Id.*

³⁰⁷ 43 C.F.R. § 7.7

³⁰⁸ http://www.nps.gov/nagpra/TRAINING/NAGPRA-ARPA_Procedures.pdf

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- ³⁰⁹ 25 U.S.C. § 3002(d)(1)
- ³¹⁰ 25 USC 3007 (a) and (b) (Penalty is limited to violations by museums and the amount of the penalty is determine in implementing regulations). See 43 CFR § 10.12 (Civil Penalties).
- ³¹¹ § 3002(b) (unclaimed remains); § 3007(c)(5) (provisions for culturally unidentifiable material); § 3007 (penalties).
- ³¹² Chapter 65 specifically addresses Article 5 of the 2001 UNESCO Convention (Art. 5: Activities incidentally affecting underwater cultural heritage).
- ³¹³ Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (enacted as “An Act Making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes” March 3, 1899).
- ³¹⁴ 33 C.F.R. pt. 329.4 (*available at* <http://www.gpo.gov/fdsys/pkg/CFR-2011-title33-vol3/pdf/CFR-2011-tit33-vol3-sec329-4.pdf>)
- ³¹⁵ 43 U.S.C. § 1333(e); *see* 33 C.F.R. pt. 322. See also *Lathrop*, 817 F. Supp. at 959 (dicta statement of the USACE about application of section 10 to the OCS in case involving UCH)
- ³¹⁶ See *United States v. Ray*, 294 F. Supp. 532 (S.D. Fla. 1969), *aff’d in part, rev’d in part*, 423 F.2d 16 (5th Cir. 1970).
- ³¹⁷ Section 10 does not use the term “person” or similar term, however, “person” is used under the enforcement penalties in section 12.
- ³¹⁸ 33 U.S.C. § 403.
- ³¹⁹ 33 U.S.C. § 406.
- ³²⁰ *United States v. Ray*, 294 F. Supp. 532 (S.D. Fla. 1969), *aff’d in part, rev’d in part*, 423 F.2d 16 (5th Cir. 1970); *see also Lathrop*, at 817 F. Supp at 962 (dicta on application of RHA on OCS in treasure hunting case).
- ³²¹ For a brief summary of this history of coastal states rights, *United States v. California* and the history of the SLA *see* M. Reed, Vol III, SHORE AND SEA BOUNDARIES pp 3-6 (discussion of GPO, 1999)
- ³²² *Id.*, at Glossary of Terms. Cannon Shot Rule - Said to be the original criterion for establishing the breadth of the marginal sea. Advanced by Cornelius Van Bynkershoek in 1702 when cannon were said to have a range of approximately three miles.
- ³²³ Truman Proclamation, Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945).

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- ³²⁴ United States v. California, 332 U.S. 19 (1947).
- ³²⁵ Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* (2006).
- ³²⁶ 43 U.S.C. § 1301(a)(2)
- ³²⁷ A geographic mile is a unit of linear measure equal to one minute of latitude at the equator. 6080.2 feet. Also known as a nautical mile. Unless otherwise noted, references to a "mile" in this work are to the geographic or nautical mile see MICHAEL W. REED, SHORE AND SEA BOUNDARIES GLOSSARY (2000); see also http://www.gc.noaa.gov/gcil_glossary.html
- ³²⁸ 43 U.S.C. § 1312.
- ³²⁹ MICHAEL W. REED, SHORE AND SEA BOUNDARIES 32 (2000) (stating that Congress withheld areas that had previously been separately acquired or set aside for Federal use from the SLA under 43 U.S.C. § 1313(a)).
- ³³⁰ 43 U.S.C. § 1301(e).
- ³³¹ 347 U.S. § 272 (1954).
- ³³² 43 U.S.C. § § 1301.
- ³³³ 43 U.S.C. § 1301(b) (states in which the land was granted from the Kingdom of Spain have a 3 marine league (9nm) boundary).
- ³³⁴ 43 U.S.C. §§ 1331 *et seq.* (2006).
- ³³⁵ 43 U.S.C. § 1334
- ³³⁶ 43 U.S.C. § 1337(a)
- ³³⁷ 43 U.S.C. 1350(c)
- ³³⁸ 5 U.S.C. App § § 2 and 4 (1998).
- ³³⁹ 30 C.F.R. part 250, subpart N.
- ³⁴⁰ PRESERVING AMERICA'S HISTORIC PLACES, NPS.GOV, <http://www.nps.gov/history/40th/> (last visited July 3, 2013).
- ³⁴¹ 16 U.S.C. § 470h-2(a).

³⁴² 16 U.S.C. § 470h-2(a)(2)(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning

³⁴³ 16 U.S.C. § 470h-2(d).

³⁴⁴ 16 U.S.C. § 470h-2(k).

³⁴⁵ 16 U.S.C. 470w (defines “Historic property” or “historic resource” as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.”).

³⁴⁶ National Register of Historic Places Criteria for Evaluation, 36 C.F.R. 60.4.

³⁴⁷ Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (limit of a State’s submerged lands is 3 nm, except in Texas, Puerto Rico and the Gulf Coast of Florida where the limit is 9 nm)

³⁴⁸ See 16 U.S.C. § 470f; National Historic Preservation Act Seaward Limit Page, NOAA.gov, http://www.gc.noaa.gov/gcil_seaward.html#nhpa (last visited December 26, 2013) (see for an explanation of how the Department of the Interior, Department of Commerce and NOAA apply the NHPA in the OCS/EEZ, for example in the Titanic case).

³⁴⁹ See, e.g. “Clarification of Authorities and Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf” (1980), p. 598 (1980 Department of the Interior solicitor’s opinion stating that its activities for exploring and exploiting oil, gas, and minerals on the OCS are undertakings that require compliance with section 106 when mineral exploitation actions may “significantly affect” an historic property).

³⁵⁰ 16 U.S.C. § 470s (authorizing the Council to “promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety”); Protection of Historic Properties, 36 CFR Part 800.

³⁵¹ 16 U.S.C. § 470(a)(2). See also *Dugong v. Gates*, 543 F. Supp. 2d 1082 (D.C. N.D. Cal. 2008) and *Dugong v. Rumsfeld*, No. C 03-4350 MHP (D.C. N.D. Cal. 2005) for the prevailing interpretation of section 402. See also http://www.gc.noaa.gov/gcil_seaward.html#nhpa for a brief summary of the seaward application of the NHPA and copies of these cases and other relevant documents.

³⁵² 16 U.S.C. § 470i.

³⁵³ 16 U.S.C. § 470j.

³⁵⁴ 16 U.S.C. § 470a(1)(A).

³⁵⁵ 16 U.S.C. § 470a(2).

³⁵⁶ 16 U.S.C. § 470A-1(b).

³⁵⁷ 16 U.S.C. § 470(h)(2)(d).

³⁵⁸ Sherry Hutt, Caroline M. Blanco, Walter E. Stern, Stan N. Harris, Cultural Property Law, 2004 A.B.A. SEC. ENV'T, ENERGY, AND RESOURCES 129.

³⁵⁹ National Environmental Policy Act of 1969, 42 U.S.C. § 4321.

³⁶⁰ 42 U.S.C. § 4331(b).

³⁶¹ 42 U.S.C. §4332(F).

³⁶² 42 U.S.C. §§ 4321 *et seq.* (2006)

³⁶³ *See* Hutt, *supra* note 220 at 129 (As NEPA is only implicated when there is a major Federal undertaking affecting the quality of the human environment, UCH must be affected by that action before it can be protected under the Act.).

³⁶⁴ 40 CFR Pts. 1500-1508

³⁶⁵ 42 USC § 4332.

³⁶⁶ *Environmental Defense Fund Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993). *See also* *Swinomish Tribal Community v. Federal Energy Regulatory Commission*, 627 F.2d 499, 511 (D.C. Cir. 1980) (allowing Canadian plaintiffs to intervene in a case challenging the sufficiency of an environmental impact report); *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999) (holding that NEPA would apply extraterritorially to a Russian shipment passing near the U.S. border because the shipment was under the control of the U.S. Government and it may have domestic impact); *NRDC v. U.S. Dept. of Navy*, No. CV-01-07781 CAS (RZX), 2002 WL 32095131 (C.D. Cal. 2002) (holding that the presumption against extraterritorial application of U.S. statutes did not bar extraterritorial application of NEPA to Navy sonar sea tests affecting the U.S. Exclusive Economic Zone); *Center for Biological Diversity v. National Science Foundation*, No. 02-5065, 2002 WL 31548073 (N.D. Cal. 2002) (applying NEPA to acoustical research being conducted by the National Science Foundation in the Gulf of California that had potential effects on Mexico's Exclusive Economic Zone); *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (holding that NEPA requires assessment of effects in the United States of power plants built in Mexico).

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- ³⁶⁷ NOAA Administrative Order (NAO) 216-6, Environmental Review Procedures for Implementing the National Environmental Policy Act (May 20, 1999), sections 3.01 and 7.01. *But see* Natural Resources Defense Council (NRDC) v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir. 1981) (finding that NEPA does not impose an environmental impact state requirement on nuclear export decisions with respect to impacts falling exclusively within foreign jurisdictions); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (holding that NEPA did not apply to require Department of Defense to prepare environmental impact studies for United States military installations in Japan); Greenpeace v. Stone, 748 F. Supp. 749 (D. Hi. 1990) (holding that NEPA does not apply to movements of munitions through and within West Germany pursuant to a presidential agreement because such application would have grave foreign policy implications), appeal dismissed, Greenpeace v. Stone, 924 F.2d 175 (9th Cir. 1991); Basel Action Network v. Maritime Administration, 370 F. Supp. 2d 57 (D.D.C. 2005) (holding that NEPA does not apply beyond U.S. territorial waters on the high seas where the United States does not have legislative control).
- ³⁶⁸ Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. §§ 1455b *et seq.* (2011).
- ³⁶⁹ 16 U.S.C. § 1453(1).
- ³⁷⁰ 43 U.S.C. §§ 1301 *et seq.*
- ³⁷¹ 48 U.S.C. § 709.
- ³⁷² 48 U.S.C. § § 1801 *et seq.*
- ³⁷³ 48 U.S.C. § 1705; 16 U.S.C. § 1453.
- ³⁷⁴ *Id.*
- ³⁷⁵ Presidential Proclamation 5030 of March 10, 1983: Exclusive Economic Zone of the United States (48 Fed. Reg. 10605); Presidential Proclamation 2667 of September 28, 1945 (10 Fed. Reg. 12303).
- ³⁷⁶ 16 U.S.C. § 1456.
- ³⁷⁷ National Park Service Archeology Program Abandoned Shipwreck Act Guidelines, Guideline 6 available at <http://www.nps.gov/archeology/submerged/state.htm> (last visited July 3, 2013) (“Award of Coastal Zone Management grants under sections 306, 306A, and 309 of the Coastal Zone Management Act (16 U.S.C. 1455, 1455a, and 1456b) for State shipwreck management program development, implementation, and related activities.”).
- ³⁷⁸ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (2006) (Clean Water Act became the common name with the 1972 amendments)

³⁷⁹ 33 U.S.C. § 1311.

³⁸⁰ 33 U.S.C. § 1362(12).

³⁸¹ 33 U.S.C. § 1344.

³⁸² 33 U.S.C. § 1362(7)-(8) Congress limited the application of this provision to the 3 nm limit of the territorial sea well before the Presidential Proclamation of a 12 nm territorial in 1988. The President's Proclamation is a notice that US statutes may be enforced in the 12 nm territorial sea. The proclamation did not change this provision in the CWA from 3 to 12 nm, only Congress has that authority under the Constitution, However, since the CWA 33 U.S.C. § 1362(9).also includes the "contiguous zone" which reaches 12 nm seaward, the 1988 Proclamation is notice to the international community that the CWA may be applied and enforced against foreign flagged vessels and nationals out 12nm as well as EEZ at least in regard to NPDES permit system.

³⁸³ See *Pac. Legal Found. v. Costle*, 586 F.2d 650, 655-56 (9th Cir. 1978) (holding that beyond the three-mile limit of the territorial sea, only the EPA can issue NPDES permits).

³⁸⁴ 33 U.S.C. § 1362(10).

³⁸⁵ See Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983).

³⁸⁶ 33 U.S.C. § 1344.

³⁸⁷ 16 U.S.C. § 461.

³⁸⁸ 36 C.F.R. Part 65

³⁸⁹ 16 U.S.C. § 463(a).

³⁹⁰ 36 C.F.R. § 65.4.

³⁹¹ Frequently Asked Questions, National Historic Landmarks Program, <http://www.nps.gov/nhl/qa.htm#3> (last visited July 3, 2013).

³⁹² For summary of the history of this Act by one of the archaeologists who inspired Moss and Bennet's sponsorship of this bill see C. R. McGimsey, "This, Too, Will Pass": Moss-Bennett in Perspective. *American Antiquity* 50 (2):326-331 (1985)

³⁹³ 16 U.S.C. § 469.

³⁹⁴ MCMANAMON, *supra* note 3.

³⁹⁵ Reservoir Salvage Act of 1960, Pub. L. No. 86-523, 74 Stat. 220 (1960).

³⁹⁶ Francis P. McManamon, *Archeological and Historic Preservation Act*, in *ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA* (Linda Ellis ed., 2000), *available at* <http://www.nps.gov/archeology/tools/Laws/ahpa.htm>.

³⁹⁷ 16 U.S.C. § 469.

³⁹⁸ *Id.*

³⁹⁹ 16 U.S.C. § 469a-1(b).

⁴⁰⁰ *Id.*

⁴⁰¹ 16 U.S.C. § 469a-1(a).

⁴⁰² *Id.*

⁴⁰³ 16 U.S.C. § 469a-2(a).

⁴⁰⁴ 16 U.S.C. § 469a-2(c).

⁴⁰⁵ 16 U.S.C. § 469a-3(b)

⁴⁰⁶ 36 C.F.R. 79; MCMANAMON, *supra* note 3.

⁴⁰⁷ MCMANAMON, *supra* note 3.

⁴⁰⁸ 16 U.S.C. § 469b.

⁴⁰⁹ 16 U.S.C. § 469c(a).

⁴¹⁰ 16 U.S.C. § 469c(a).

⁴¹¹ *See generally Craft*, 34 F.3d 918.