

# Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf

Ole Varmer\*

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\* Ole Varmer is an attorney in the International Section of the National Oceanic and Atmospheric Administration (NOAA) Office of General Counsel in the Department of Commerce. However, this Article was written in his personal capacity; the views expressed herein are those of the author and do not necessarily reflect those of NOAA, the Department of Commerce, or any other agency of the United States. This Article is primarily based upon an Underwater Cultural Heritage (UCH) Law Study that was the subject of an Interagency Agreement between the Department of Interior, the Bureau of Ocean Energy Management (BOEM), the Department of Commerce (DOC), and NOAA. See OLE VARMER, BUREAU OF OCEAN ENERGY MGMT., OCS STUDY No. 2014-005, UNDERWATER CULTURAL HERITAGE LAW STUDY (2014), available at <http://www.data.boem.gov/PI/PDFImages/ESPIS/5/5341.pdf>; BUREAU OF OCEAN ENERGY MGMT., ACCESS No. 00050, TECHNICAL SUMMARY: UNDERWATER CULTURAL HERITAGE STUDY (2014), available at <http://www.data.boem.gov/PI/PDFImages/ESPIS/5/5340.pdf>. This Article and the underlying UCH law study also revisit and update the issues raised by the author and Caroline Blanco in an essay published by National Park Service (NAT'L PARK SERV.) in their *Common Ground* magazine. Ole Varmer and Caroline M. Zander, *Closing the Gaps in Domestic and International Law: Achieving Comprehensive Protection of Submerged Cultural Resources*, NAT'L PARK SERV. ARCHEOLOGY PROGRAM: COMMON GROUND ONLINE (Fall/Winter 1996), available at [http://www.nps.gov/archeology/Cg/vol1\\_num3-4/gaps.htm](http://www.nps.gov/archeology/Cg/vol1_num3-4/gaps.htm).

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## I. INTRODUCTION

The public interest in protecting our human environment is reflected in the international and domestic laws that preserve our natural and cultural heritage.<sup>1</sup> Under international law, as

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1. *See generally* National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (2012) (establishing that under American law, federal agencies have responsibility to establish a historic preservation program and avoid or minimize impacts to historic properties); National Environmental Policy Act (NEPA), 42 U.S.C. § 4331(b)(4) (2012) (establishing that under American law, federal agencies have a responsibility to protect the human environment, which includes not only natural resources, but also the responsibility to “preserve important historic, cultural, and natural aspects of our national heritage”); United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC] (establishing an obligation to protect natural and cultural heritage

reflected in the Law of the Sea Convention (LOSC), nations have duties to protect our underwater cultural heritage (UCH) and cooperate for that purpose.<sup>2</sup> While the LOSC recognizes that a coastal State (nation) may exercise its jurisdiction over the activities of foreign-flagged vessels or nationals to protect natural heritage within its 200 nautical mile (nm) Exclusive Economic Zone (EEZ) and on its continental shelf, coastal State jurisdiction<sup>3</sup> is limited to the twenty-four-nm contiguous zone in regard to cultural heritage. As such, there has been a perceived “gap” in protection of UCH on that portion of the continental shelf beyond the twenty-four-nm contiguous zone. In order to address this gap and further delineate the duty to protect under the LOSC, nations negotiated the 2001 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention).<sup>4</sup>

Even though the United States is not a party to either of these conventions, there are a number of U.S. statutes that address the duty to protect natural and cultural heritage consistent with these conventions and the practice of nations. While the United States has demonstrated leadership in protecting natural and cultural heritage in all of the maritime zones,<sup>5</sup> there are gaps in protection, particularly on the U.S. Outer Continental Shelf (OCS). This Article provides a brief summary of the applicable international and U.S. federal laws that protect UCH, identifies the gaps in protection on the U.S. OCS, and then makes some

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under international law, with Articles 149 and 303 being particularly relevant).

2. LOSC, *supra* note 1, at 517 (describing the duty to protect objects found at sea of a historical or archaeological nature and to cooperate for that purpose).

3. Under international law, as reflected in the LOSC, nations with coastal waters have authority and jurisdiction over foreign vessels and nationals that flow from land territory and extend out to internal waters, territorial sea, contiguous zone, and the EEZ. *See id.* Note that in this article, “States” refers to nations, particularly within the context of international law, while “states” denotes states within the U.S.

4. United Nations Education Science Cultural Organization Convention on the Protection of Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 [hereinafter 2001 UNESCO Convention]. This Convention is viewed by many as being contemplated under LOSC Article 303(4) in providing more detail on how to fulfill the duty to protect UCH and cooperate for that purpose under Article 303(1). It fills the perceived gap in protection on the OCS resulting from coastal State jurisdiction being limited to the twenty-four-nm contiguous zone and Article 149 being limited to the Area under the high seas beyond the Extended Continental Shelf. *See SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 36* (James Crawford & John S. Bell eds., 2013).

5. *See, e.g.*, Sunken Military Craft Act of 2004, 10 U.S.C. § 113 (2012) (applying protections to wrecks located in the high seas and on the continental shelves of other nations); R.M.S. *Titanic* Maritime Memorial Act of 1986, 16 U.S.C. §§ 450rr–450rr-6 (2012).

recommendations on how to fill those gaps in a manner consistent with international law. First, however, this Article provides background on what UCH is, where it is located, who is interested in it, and why it should be preserved for present and future generations as a matter of law and policy.

## II. BACKGROUND, SCOPE AND DEFINITIONS FOR PRESERVATION OF UNDERWATER CULTURAL HERITAGE

### A. *What Is Underwater Cultural Heritage?*

Over the past few decades in the United States, many different terms have been used to identify resources of cultural value, historical significance, or archaeological interest in the terrestrial and marine environment. The Antiquities Act of 1906 (AA), the first U.S. historic preservation law, used the term “antiquity” primarily to protect Native American artifacts located on lands owned or controlled by the federal government from the “pot hunters” that were collecting souvenirs, if not outright looting public lands for personal profit.<sup>6</sup> This law was followed by use of the term “historic sites” in the Historic Sites Act of 1935 to address historic preservation concerns arising in government construction projects.<sup>7</sup> “Historic properties” is the term used in the National Historic Preservation Act of 1966 (NHPA),<sup>8</sup> still one of the most important preservation laws in the United States. The first sanctuary to be designated under Title III of the Marine Protection Research and Sanctuaries Act of 1972 was the U.S.S. *Monitor* in 1974.<sup>9</sup> The Archaeological Resources Protection Act of 1979

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6. 16 U.S.C. § 433 (2012).

7. *Id.* §§ 461-67.

8. “Historic property” is defined to mean “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.” *Id.* § 470w(5). A “fifty year rule of thumb” has developed as a matter of practice such that a property that is fifty years or older should be subject to consideration as a property that may satisfy the requirements of historical significance. *National Register of Historic Places Program: Fundamentals*, NAT’L PARK SERV., [http://www.nps.gov/nr/national\\_register\\_fundamentals.htm](http://www.nps.gov/nr/national_register_fundamentals.htm) (last visited Jan. 24, 2014).

9. *About Your Sanctuary*, MONITOR NATIONAL MARINE SANCTUARY, <http://monitor.noaa.gov/about/welcome.html> (last visited Jan. 24, 2014). Sanctuaries were initially designated in Title III of the Marine Protection, Research, and Sanctuaries Act of 1972 “for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values.” Pub. L. No. 92-532, 86 Stat. 1052 (1972). The Act was subsequently amended in 1984 to expressly add “historical” to the values supporting sanctuary designation of shipwrecks like the *Monitor*. Pub. L. No. 98-498, 98 Stat. 2296 (1984).

(ARPA)<sup>10</sup> was enacted by Congress in large part to address the holding of *United States v. Diaz*, in which the Ninth Circuit ruled that the AA was unconstitutionally vague as applied to a criminal case where the “antiquity” was only three or four years old.<sup>11</sup>

While these laws were primarily enacted to address preservation issues in the terrestrial environment, they have been applied to heritage in the marine environment. The R.M.S. *Titanic* Maritime Memorial Act of 1986<sup>12</sup> and the Abandoned Shipwreck Act of 1987 (ASA)<sup>13</sup> were the first U.S. statutes to focus exclusively on underwater cultural heritage, and thus provide guidance on what type of UCH should be protected under U.S. law and policy. This essay will use the 2001 UNESCO Convention definition of underwater cultural heritage, which largely determines the scope of what heritage is protected under its provisions:

[A]ll traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, 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 [pre-Columbian contact] character.<sup>14</sup>

Most of the U.S. federal historic preservation laws—including the ASA, AA, ARPA, NHPA, the National Marine Sanctuaries Act (NMSA), and the Sunken Military Craft Act (SMCA)—are sufficiently broad to include those resources covered by this

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10. 16 U.S.C. § 470bb (2012). “Archaeological resources” is defined as “any material remains of past human life or activities which are of archaeological interest,” including, but not limited to, “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items,” so long as they are at least 100 years of age. *Id.*

11. 499 F.2d 113, 115 (9th Cir. 1974).

12. 16 U.S.C. §§ 450rr–450rr-6 (2012). For more information about *Titanic*, this Act, the resulting NOAA *Titanic* Guidelines, international agreements, and cases, see *R.M.S. Titanic*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., OFF. OF GEN. COUNSEL, [http://www.gc.noaa.gov/gcil\\_titanic.html](http://www.gc.noaa.gov/gcil_titanic.html) (last visited Feb. 15, 2014).

13. As in the case of the AA, the lack of a definition of “abandoned” has created confusion as to whether the ASA applies in particular cases. However, if the State can reasonably demonstrate that the shipwreck is “(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register” then the State will likely prevail. *See* 43 U.S.C. § 2105(a) (2012).

14. 2001 UNESCO Convention, *supra* note 4, at 41.

definition of UCH. Of course, the location of the UCH is a threshold consideration as to which laws may apply and against whom they may be enforced in a manner consistent with international law, and the LOSC in particular.

*B. Where Is Underwater Cultural Heritage Located?*

Wherever humans conduct activities, there are often traces of their existence and their close connection to the sea. Since the dawn of humankind, people settled along the coasts in order to use the abundant resources available from the marine environment. As humans evolved, they developed structures used for fishing off the coasts and waterborne transportation. As humans developed coastal settlements into towns and cities with ports, lighthouses, and industries reliant on maritime commerce, rising sea levels submerged some settlements and many vessels inevitably sank due to natural disasters or human error. While the protection and management of UCH involves the protection of shipwrecks and other physical artifacts found along our current coast, evidence of our prehistoric heritage may also be found several miles seaward on the continental shelf, as it was the coast when the sea level was much lower than it is today.<sup>15</sup> The location of the UCH is a threshold consideration of what laws may be applied and whether they can be enforced against foreign-flagged vessels and nationals. If the UCH is located outside the twenty-four-nm contiguous zone, then it is outside the coastal State jurisdiction of a nation, and thus enforcement may be limited to flag State jurisdiction<sup>16</sup> and the jurisdiction a nation has over its nationals unless there is some treaty or agreement providing consent to

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15. Amy E. Gusick & Michael K. Faught, *Prehistoric Archaeology Underwater: A Nascent Subdiscipline Critical to Understanding Early Coastal Occupations and Migration Routes*, in TREKKING THE SHORE: CHANGING COASTLINES AND THE ANTIQUITY OF COASTAL SETTLEMENT 27, 28 (N. F. Bicho et al. eds., 2011) (explaining that in North America, there are several examples of prehistoric archaeological sites on OCS in the Pacific and Atlantic oceans, as well as in the Gulfs of Mexico and California); see also Michael K. Faught, *Continental Shelf Prehistoric Archaeology: A Northwest Florida Perspective*, PANAMERICAN CONSULTANTS, INC. [http://home.comcast.net/~mfaught/continentalshelf/cont\\_shelf\\_principles.html](http://home.comcast.net/~mfaught/continentalshelf/cont_shelf_principles.html) (last visited Apr. 4, 2014) (stating that evidence for human occupation sites such as fluted points is expected on the continental shelves off the coast of Florida).

16. DROMGOOLE, *supra* note 4, at 249-50. Under the Nationality principle, a nation has authority to regulate its nationals and vessels registered to fly its flag even when they are conducting activities outside the territory of the nation. *Id.* at 244. For a good discussion of States' jurisdiction under international law, see *id.* at 241-75. For a good discussion of such jurisdiction in the context of UCH, see *id.* at 276-306.

enforcement.<sup>17</sup>

C. *Who Is Interested in Underwater Cultural Heritage?*

There is a general public interest in UCH in the United States and throughout the world, as reflected in both the 2001 UNESCO Convention and the U.S. laws protecting UCH. Many different people, institutions, and industries interested in UCH must be considered stakeholders in its protection and management.<sup>18</sup> The owner of a sunken ship or associated cargo, as well as the descendants of the people associated with the ship, cargo, or settlement, may have a particular interest in, if not legal rights to, the remains. Other stakeholders that have a particular interest in UCH include archaeologists, historians, educators, recreational divers, museum patrons, tourism operators, commercial salvors, and treasure hunters.<sup>19</sup> Many fishermen, offshore developers, sailors and others who use the marine environment for their livelihood sometimes inadvertently discover UCH and are interested in its protection.

III. INTERNATIONAL LAWS THAT ADDRESS THREATS TO UNDERWATER CULTURAL HERITAGE

A. *Jurisdictional Maritime Zones: Customary International Law and UNCLOS III*

The practice of coastal States exercising jurisdictional rights and authority over activities in their coastal waters dates back to at least the seventeenth century, when a three nm territorial sea was recognized as the limit of a coastal State's control.<sup>20</sup> This recognition has been attributed by some to the range of cannon in the seventeenth century, and is commonly known as the "Cannon

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17. *Id.* at 264.

18. SHERRY HUTT, CAROLINE M. BLANCO & OLE VARMER, *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT* 396-400 (1999).

19. *Id.* at 396 ("As indicated in the legislative history of the Abandoned Shipwreck Act of 1987 (ASA), three primary groups interested in historic shipwrecks have been identified: archeologists/historians, treasure salvors, and recreational divers [H.R. Rep. No. 887, 98th Cong., 2d Sess. Part 1 (1984)]. Museums and the general public also have an interest in underwater heritage."); *see also* Abandoned Shipwreck Act Guidelines Introduction, NAT'L PARK SERV., <http://www.nps.gov/archeology/submerged/intro.htm> (last visited Feb. 15, 2014).

20. DROMGOOLE, *supra* note 4, at 9 (discussing the tension between coastal States and flag States regarding 'open seas' and 'closed seas' dates back to at least the seventeenth century).

Shot Rule.”<sup>21</sup> Seaward of the territorial seas were the high seas, in which all vessels had the freedom of the seas, including the freedom of navigation and exploitation. A customs zone or belt of water adjacent to the territorial sea later developed in which states recognized the coastal States’ right to enforce certain customs and trafficking laws for violations committed with the territory.<sup>22</sup> Centuries later, through President Harry Truman’s 1945 proclamation concerning the continental shelf, the United States asserted jurisdiction and control over the natural resources of the continental shelf, recognizing the shelf as a natural prolongation of U.S. territorial lands.<sup>23</sup> Shortly thereafter, as the need for a comprehensive legal framework became more apparent, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) in 1956, which resulted in four conventions: the 1958 Convention on the Territorial Sea and Contiguous Zone,<sup>24</sup> the 1958 Convention on the Continental Shelf,<sup>25</sup> the 1958 Convention on the High Seas,<sup>26</sup> and the 1958 Convention on Fishing and Conservation of Living Resources of the High Seas.<sup>27</sup> The United

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21. See *History of the Maritime Zones Under International Law from the Cannon Shot Rule to UNCLOS*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., OFF. OF COAST SURVEY, [http://www.nauticalcharts.noaa.gov/staff/law\\_of\\_sea.html](http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html) (last visited Feb. 17, 2014). However, this has been contested or clarified. See Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 616 (1959); Wyndham L. Walker, *Territorial Waters: The Cannon Shot Rule*, 22 BRIT. Y.B. INT’L L. 210, 213 (1945) (stating that while some nations, like Holland, may trace their territorial sea to the cannon shot rule, other nations used four miles, and the three nm or one marine league ended up being the compromise that resulted in the practice of most nations).

22. Mariano J. Aznar, *The Contiguous Zone as an Archaeological Maritime Zone*, 29 INT’L J. MAR. & COASTAL L. 1, 3 n.7 (2014) (citing the British ‘Hovering Acts’ and the Spanish customs zones as the origins for the contiguous zone that was recognized in the Convention on the Territorial Sea and the Contiguous Zone, art. 24, Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sept. 10, 1994)). See generally A.V. Lowe, *The Development of the Concept of the Contiguous Zone*, 52 BRIT. Y.B. OF INT’L L. 109 (1981).

23. Proclamation No. 2667, 50 Fed. Reg. 12,303, 12,303 (Sept. 28, 1945); see also *The United Nations Convention on the Law of the Sea: A Historical Perspective*, U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA (1998), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm#HistoricalPerspective](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#HistoricalPerspective) (citing the Truman Proclamation as an early extension of coastal State jurisdiction beyond the territorial sea that raised concerns about freedom of seas).

24. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 22, at 205.

25. Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311 (entered into force Oct. 6, 1964).

26. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

27. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966).

Nations held a second conference regarding the Laws of the Sea in 1960 (UNCLOS II), but this conference did not result in any convention or agreement. Another UN conference was called in 1973 to address certain unresolved issues (UNCLOS III).<sup>28</sup> This conference was concluded in Montego Bay, Jamaica in 1982, and resulted in the LOSC.<sup>29</sup> The LOSC came into force in 1994 upon receiving the necessary number of signatories.<sup>30</sup>

### B. 1982 Law of the Sea Convention

The LOSC sets forth a comprehensive legal framework for the use and protection of the sea, the seabed and subsoil, and the marine environment, including both natural and cultural heritage resources.<sup>31</sup> Through a wide range of provisions, the LOSC establishes clear guidelines with respect to states' navigational rights, maritime zones and boundaries, and economic jurisdiction, while also providing member states a mechanism for international cooperation and dispute resolution. At UNCLOS III it was agreed that there would be a new 200-nm EEZ, that the territorial sea may extend twelve miles beyond the baseline and internal waters, and that the contiguous zone may extend twenty-four nm from the same baseline.<sup>32</sup> It was also agreed that the continental shelf may extend out to 200 nm even if it is part of an abyssal plain.<sup>33</sup> Moreover, the conference developed rules for recognizing the portion of the continental shelf that naturally extends beyond the 200 nm EEZ, and a new regime for the Area that is the seabed beyond the continental shelf under the high seas.<sup>34</sup> In addition to providing a balance of jurisdiction between coastal States and flag States over uses of the sea in these various zones,<sup>35</sup> Articles 149 and

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28. DROMGOOLE, *supra* note 4, at 10.

29. *Id.*

30. *United Nations Convention on the Law of the Sea of 10 December 1982*, U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) (last updated Aug. 22, 2013).

31. *See generally* LOSC, *supra* note 1. Although not yet a party to the treaty, the U.S. nevertheless observes the LOSC as reflective of customary international law and practice.

32. *See id.* at 400, 409, 418-19 (defining the coastal baseline, contiguous zone, boundaries of the EEZ, and the size of the EEZ).

33. *The Continental Shelf*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/Renewable-Energy-Program/Renewable-Energy-Guide/The-Continental-Shelf.aspx> (last visited Apr. 6, 2014).

34. LOSC, *supra* note 1, at 525.

35. Coastal State jurisdiction refers to that exclusive jurisdiction states have over the exploitation and conservation of the environment within their 200 nm EEZ and

303 provide some framework for the legal protection of UCH found at sea.<sup>36</sup>

Article 149 provides 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, with 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.<sup>37</sup>

While it is not always clear which nations have preferential rights, it is clear that they would include the flag States of the sunken ship and nation from where the cargo came. Article 303(1) sets forth a duty to protect objects of an archaeological and historical nature found at sea, and a duty to cooperate to ensure that protection.<sup>38</sup> While Article 149 applies just in the Area under the high seas beyond national jurisdiction, Article 303 is under Part XVI (General Provisions) and applies in all of the maritime zones. As most, if not all, of the LOSC is now recognized as customary international law, it may be argued that the duty to cooperate to protect UCH is also recognized as an established part of international law. While the LOSC does not recognize a coastal State's authority and jurisdiction to unilaterally enforce its UCH laws against a foreign-flagged vessel on the OCS beyond the twenty-four-nm contiguous zone, nations may enter into agreements, such as the 2001 UNESCO Convention,<sup>39</sup> to provide their consent to enforcement of UCH laws against their flagged vessels and nationals. In addition, there appears to be consensus that any salvage or recovery of UCH should be conducted in compliance with international scientific standards as reflected in the Annex Rules of the 2001 UNESCO Convention.<sup>40</sup>

While LOSC Article 303(1), which covers all the maritime zones, provides a clear duty to protect UCH found at sea and to cooperate for that purpose, as indicated above, there has been a perceived gap in LOSC's protection on the OCS. This perceived gap in jurisdiction arises from the applicability of Article 149 of the

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continental shelf including prescription and enforcement of their laws against foreign-flagged vessels and nationals. *See id.* at 418-19.

36. *Id.* at 450, 517.

37. *Id.* at 450.

38. *Id.* at 517.

39. *See generally* 2001 UNESCO Convention, *supra* note 4.

40. The Annex Rules to the Convention on the Protection of the Underwater Cultural Heritage were adopted with consensus, including support by the U.S.

LOSC only to UCH in the deep seabed “Area” beyond the seaward limit of the continental shelf, and Article 303(2)’s express limitation of a coastal State’s jurisdiction over UCH to the twenty-four-nm limit of the contiguous zone.<sup>41</sup> As a result, it has been asserted that there is a gap in protection of UCH under the LOSC for that portion of the continental shelf beyond twenty-four-nm.<sup>42</sup> Also, as indicated above, since the application of the law of salvage and finds to UCH is considered by many to be a direct threat to UCH, concern has been expressed about the clause in LOSC Article 303(3) that states: “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.”<sup>43</sup> A number of scholars have speculated that this provision may have encouraged salvage of UCH.<sup>44</sup>

In the face of continued threats to UCH from looting and unscientific salvage, and the perceived gap in the protection of UCH on the continental shelf extending beyond the twenty-four-nm contiguous zone under the LOS, nations came together to develop an international convention to protect UCH in a manner consistent with the LOSC.<sup>45</sup> The 2001 UNESCO Convention is now considered by many nations, archaeologists, and legal experts to provide the minimum standards and requirements for protecting UCH. These standards and requirements fill the gap under the LOSC and, more specifically, address threats to UCH in a manner consistent with the legal framework of the LOSC.<sup>46</sup> Article 303(4) provides: “This article is without prejudice to other international

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41. Under the LOSC, “Area” means “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” LOSC, *supra* note 1, at 399.

42. DROMGOOLE, *supra* note 4, at 35-36; Patrick J. O’Keefe, *Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention*, 20 MARINE POL’Y 297, 298-99 (1996); Tullio Scovazzi, *A Contradictory and Counterproductive Regime*, in THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION 7-8 (Roberta Garabello & Tullio Scovazzi eds., 2003).

43. LOSC, *supra* note 1, at 517.

44. DROMGOOLE, *supra* note 4, at 34-35; Scovazzi, *supra* note 42, at 8-9; *see also* ANASTASIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 125 (1995) (discussing the inappropriateness of applying the law of salvage to the regulation of access to sites containing UCH).

45. For a discussion of events and work leading up to the 2001 UNESCO Convention, *see* DROMGOOLE, *supra* note 4, at 48-52.

46. *See generally* 2001 UNESCO Convention, *supra* note 4. Forty-six States are party to the treaty as of 2014. *See Convention on the Protection of Underwater Cultural Heritage*. Paris, 2 November 2001, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Apr. 6, 2014).

agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.”<sup>47</sup> This statement is considered evidence that those negotiating the LOSC contemplated the need for a more specific agreement developed to protect UCH.<sup>48</sup>

C. *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*

Adopted in 2001 by UNESCO’s General Conference, and entered into force on January 2, 2009,<sup>49</sup> the 2001 UNESCO Convention represents an international response to the concerns of looting and destruction of UCH. The 2001 UNESCO Convention is based on four main principles: 1) the obligation to protect UCH;<sup>50</sup> 2) *in situ* preservation policies<sup>51</sup> and scientific rules for research and recovery;<sup>52</sup> 3) a prohibition on commercial exploitation of this heritage;<sup>53</sup> and 4) cooperation among States to protect this heritage, particularly with regard to training, education, and outreach.<sup>54</sup> The primary purpose of the 2001 UNESCO Convention is to protect UCH by 1) controlling activities that may directly<sup>55</sup> or incidentally harm it;<sup>56</sup> and 2) by authorizing activities directed at UCH only when they are conducted in accordance with the professional archaeological standards and practices set forth in the Annex Rules.<sup>57</sup> The geographic scope of the 2001 UNESCO Convention includes UCH located in all maritime zones, as well as on the continental shelf and seabed Area beyond national jurisdiction.<sup>58</sup> Under the Convention, a party

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47. LOSC, *supra* note 1, at 517.

48. DROMGOOLE, *supra* note 4, at 36; Markus Rau, *The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea*, in 6 MAX PLANCK Y.B. OF UNITED NATIONS L. 387, 401 (2002).

49. *Convention on the Protection of the Underwater Cultural Heritage 2001*, UNESCO, [http://portal.unesco.org/en/ev.phpURL\\_ID=13520&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.phpURL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Jan. 28, 2014).

50. *See* 2001 UNESCO Convention, *supra* note 4 at 41 (objectives and general principles); *id.* at 51 (Annex I, providing general principles).

51. *Id.* at 41, 51 (*in situ* preservation shall be considered as the first option for protection before considering intrusive research and recovery).

52. *See id.* at 51-56 (describing complex rules for scientific research).

53. *Id.* at 42, 51.

54. *Id.* at 42, 48, 51.

55. *See id.* at 43-46.

56. *Id.* at 43.

57. *Id.* at 43-46.

58. Article 7 sets forth obligations regarding UCH in internal waters, archipelagic

agrees to protect UCH by controlling “activities directed at underwater cultural heritage”<sup>59</sup> through a system of authorizations or permits that require compliance with the current international standards and requirements for research and recovery in the Annex Rules.<sup>60</sup> There is also a much softer legal obligation 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.”<sup>61</sup> There are over forty parties to the 2001 UNESCO Convention, including France, which is the first “major maritime power” to ratify the 2001 UNESCO Convention and become a party.<sup>62</sup> Although the United States supports the underlying purpose of the 2001 UNESCO Convention, and a number of its provisions, including the Annex Rules, it has not yet become a party for a number of reasons.<sup>63</sup> Its two primary concerns are 1) “creeping jurisdiction” by coastal States over activities directed at UCH beyond the twenty-four-nm contiguous zone but within the EEZ/OCS; and 2) the use of “should” instead of “shall” in regard to the obligation for coastal States to notify the foreign-flagged State of the discovery of foreign sunken warships within the coastal State’s territorial sea.<sup>64</sup> Regardless of whether it is a party, the United States has a number of laws and policies that are consistent with the parties’ obligations under the 2001 UNESCO Convention.

#### IV. U.S. FEDERAL STATUTES THAT CONTROL ACTIVITIES DIRECTED AT

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waters and territorial sea; Article 8 addresses UCH in the contiguous zone; Articles 9 and 10 address UCH in the EEZ and on the continental shelf; and Articles 11 and 12 address UCH in the Area under the high seas beyond coastal State jurisdiction. *Id.*

59. “Activities directed at underwater cultural heritage” means activities that have UCH as their primary object and that may, directly or indirectly, physically disturb or otherwise damage UCH. *Id.* at 41. Early in the negotiation process, progress was made on the important scoping provisions of the 2001 UNESCO Convention, particularly in limiting the Annex Rules and many other provisions to “activities directed at underwater cultural heritage,” so it was clear that the general scope of the 2001 UNESCO Convention was directed at looting, salvage, and research and did not directly cover pipeline and cable laying, fishing, and military activities.

60. *See id.* at 51-56.

61. *Id.* at 43.

62. *See UNESCO, supra* note 49.

63. *See generally* Robert C. Blumberg, Statement Regarding the U.S. Views on the UNESCO Convention on the Protection of Underwater Cultural Heritage (Oct. 29, 2001), available at [http://www.gc.noaa.gov/documents/gcil\\_heritage2\\_blumberg.pdf](http://www.gc.noaa.gov/documents/gcil_heritage2_blumberg.pdf).

64. *See* O. Varmer, J. Gray & D. Alberg, *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 5 J. OF MAR. ARCHAEOLOGY 129-141 (2010) (providing a more detailed discussion of the U.S. position on the 2001 UNESCO Convention).

## UNDERWATER CULTURAL HERITAGE

A. *Antiquities Act of 1906*

The AA was the first U.S. statute to provide general protection of natural and cultural heritage and reflects the earliest U.S. policy on historic preservation.<sup>65</sup> The AA was enacted to prevent the looting of Native American heritage on lands owned and controlled by the Federal government.<sup>66</sup> It authorizes the President to make proclamations creating national monuments on lands that are owned or controlled by the United States to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.”<sup>67</sup> President Teddy Roosevelt created the first national monument at Devils Tower, Wyoming.<sup>68</sup> While the vast majority of national monuments are on terrestrial public lands managed by the NPS, there are now a number of marine national monuments that are managed by NOAA.<sup>69</sup> The Papahānaumokuākea Marine National Monument was created by President Bush in 2006 to protect the coral reef system as well as other natural and cultural heritage.<sup>70</sup> “Under

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65. See generally Antiquities Act, 16 U.S.C. §§ 431-33 (2012); see also CAROL HARDY VINCENT & KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 1, 1-2 (2010).

66. See generally Raymond Harris Thompson, *The Antiquities Act of 1906 by Ronald Freeman Lee*, 42 J. SW. 199 (2000) (providing a detailed analysis of the long process to enact this law); see also *Antiquities Act*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://csc.noaa.gov/data/Documents/OceanLawSearch> (last modified July 29, 2013) (follow “Summary of Law—Antiquities Act.pdf” hyperlink) (providing the legislative history of the AA available from the NOAA Coastal Services Center’s Ocean Law Search website).

67. 16 U.S.C. § 431 (2012).

68. Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906); see also *Devils Tower National Monument: Wyoming*, NAT’L PARK SERV., <http://www.nps.gov/deto/historyculture/places.htm> (last updated Jan. 9, 2014).

69. See *Antiquities Act 1906-2006: Maps, Facts, and Figures*, NAT’L PARK SERV., <http://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited Jan. 28, 2014) (listing monuments managed by the NPS); *Similar to National Marine Sanctuaries, Marine National Monuments Are Designed to Protect Areas of the Marine Environment*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L OCEAN SERV., <http://oceanservice.noaa.gov/facts/marine-monument.html> (last updated Jan. 23, 2014).

70. See Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006); see also Proclamation No. 8112, 72 Fed. Reg. 10,031, 10,031 (Feb. 28, 2007) (changing monument name from Northwestern Hawaiian Islands Marine National Monument); O. Varmer & T.M. Beuttler, *Papahānaumokuākea Inscribed as a World Heritage Site*, MARINO RESOURCES COMM. NEWSL., May 2011, at 3-7, available at [http://www.americanbar.org/content/dam/aba/publications/nr\\_newsletters/mr/201105\\_mr\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/mr/201105_mr_authcheckdam.pdf) (last visited Jan. 28, 2014) (discussing how Papahānaumokuākea was the first U.S. World Heritage site in fifteen years and the

NOAA's existing authorities and the AA, the Marine National Monument Program works with federal and regional partners and stakeholders to conserve and protect the marine resources in these large marine protected areas.<sup>71</sup>

In addition to the authority for the President to create national monuments, the AA also requires permits for research and recovery of antiquities on lands owned or controlled by the U.S. Government.<sup>72</sup> The requirement has been applied on public lands outside of national monuments including lands with a marine component. For example, in *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, the AA was applied to protect a historic shipwreck in the Cape Canaveral National Seashore and prevented looting and unwanted salvage outside of the monument, albeit within another Federal marine protected area.<sup>73</sup> Citing *Panama R.R. Co. v. Johnson*,<sup>74</sup> the *Lathrop* court noted that Congress had the constitutional authority to alter or qualify maritime and admiralty law in limited situations.<sup>75</sup> The court then decided that the modification of maritime law of salvage by requiring certain permits for salvage through the AA and the Rivers and Harbors Act were appropriate uses of this authority.<sup>76</sup> The AA and section 10 of the Rivers and Harbors Act of 1899 constitutionally altered substantive maritime law by requiring compliance with the permitting provisions of the AA and the Rivers and Harbors Act before allowing salvage activities.<sup>77</sup> The application of the AA on the OCS outside of federal marine protected areas is, however, not without some controversy which arose in the landmark case for treasure hunters, *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*.<sup>78</sup>

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first U.S. site on the "mixed" natural and cultural heritage list); *Papahānaumokuākea*, UNESCO, <http://whc.unesco.org/en/list/1326> (last visited Jan. 28, 2014) (documenting Papahānaumokuākea's designation as a World Heritage Site on July 30, 2010, further demonstrating the commitment of the United States and the state of Hawai'i to conserve this important place).

71. *Marine National Monument Program*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES, [http://www.fpir.noaa.gov/MNM/mnm\\_index.html](http://www.fpir.noaa.gov/MNM/mnm_index.html) (last visited Jan. 21, 2014).

72. 16 U.S.C. § 432 (2012).

73. 817 F. Supp. 953, 967 (M.D. Fla. 1993).

74. 264 U.S. 375, 386 (1924).

75. *Lathrop*, 817 F. Supp. at 962.

76. *Id.* at 962-63.

77. *Id.* at 962.

78. 459 F. Supp. 507 (*Treasure Salvors I*) (S.D. Fla. 1978). In addition to questions about the application of the AA outside the U.S. territorial sea, there has also been some controversy and questions about the enforcement of the criminal provision of the AA in

The 1978 *Treasure Salvors* case involved the famous treasure hunter Mel Fisher and the gold, silver, artifacts, and armament from the Spanish vessel *Nuestra Senora de Atocha* that sank off the coast of Florida in 1622.<sup>79</sup> The State of Florida was initially involved, but was dismissed when it became apparent that the wreck was on the OCS, a mile or so beyond Florida's submerged lands.<sup>80</sup> The U.S. government claimed ownership over the *Atocha* wreck site under the Abandoned Property Act and the AA.<sup>81</sup> The Fifth Circuit disagreed, and held that these acts did not apply to the Spanish shipwreck located outside of the U.S. territory (at the time extending only out to 3 nm).<sup>82</sup> In regard to Outer Continental Shelf and Lands Act (OCSLA), the court noted that the exercise of jurisdiction over oil, gas, and mineral exploitation was limited to natural resources and was not an exercise of the sovereign's right or prerogative to exercise control over activities directed at cultural resources like the *Atocha*.<sup>83</sup> As indicated above, however, the AA has subsequently been recognized to apply within the 200 nm EEZ for the purpose of establishing marine national monuments.<sup>84</sup> For example, the boundary of Papahānaumokuākea Marine National Monument extends seaward out fifty nm from the islands, well beyond the twelve nm territorial sea, and the exercise of sovereign prerogative in President Bush's Proclamation of 2006 establishing the monument includes UCH as well as the natural

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the Ninth Circuit. In *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), the court held that the term "object of antiquity" was vague, and that the failure of the Antiquities Act to provide notice of what the law prohibited rendered it void. While ARPA was enacted in 1979, in part to address constitutional issues with the application of the AA in *Diaz*, the AA continues to apply and is of particular use on the outer continental shelf. As seen above in *Lathrop*, the Act's permitting provision has successfully been used post-*Diaz* to prevent looting and unauthorized salvage conducted on federal lands in the marine environment.

79. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel (Treasure Salvors II)*, 569 F.2d 330, 338 (5th Cir. 1978).

80. *Id.* at 333 n. 1.

81. *Id.* at 335 n. 7.

82. *Id.* at 335, 340.

83. *Id.* at 338-40.

84. RANDOLPH D. MOSS, U.S. DEP'T OF JUSTICE OFF. OF LEGAL COUNSEL, MEMORANDUM OPINION FOR THE SOLICITOR ON ADMINISTRATION OF CORAL REEF RESOURCES IN THE NORTHWEST HAWAIIAN ISLANDS (2000), available at <http://www.justice.gov/olc/coralreef.htm> (noting that the opinion was not contrary to *Treasure Salvors* because the case was decided before the 1983 Proclamation of a 200-nm EEZ and the 1988 Proclamation of a twelve-nm Territorial Sea; it also involved a foreign shipwreck over which the U.S. Government had no sovereign control instead of coral and other natural resources over which the President had proclaimed sovereign rights and control under international law).

heritage.<sup>85</sup>

The Proclamation, including protections for natural and cultural heritage in the Monument is consistent with international law. Enforcement of the AA in the EEZ/OCS against a foreign-flagged vessel or national is in accord with the jurisdiction and authority to conserve natural heritage under Article 56 of the LOSC.<sup>86</sup> Enforcement of the AA permit provisions protecting UCH against unauthorized removal by foreign-flagged vessels and nationals within the twenty-four-nm contiguous zone is also within coastal state jurisdiction recognized under Article 303(2) of the LOSC.<sup>87</sup> However, enforcement of the AA permit requirements against foreign-flagged vessels in that portion of the EEZ/OCS beyond the twenty-four-nm contiguous zone may require consent of the foreign-flag State unless looting, salvage or other activities directed at the UCH also interfered with U.S. sovereign rights and jurisdiction over natural heritage in the EEZ/OCS.<sup>88</sup> Of course, there is no question under international law that the U.S. government may establish a Marine National Monument on its OCS and within its EEZ and enforce the AA against U.S. nationals and U.S.-flagged vessels flying in the U.S. EEZ.

In sum, it is clear that the U.S. government has authority under the AA to establish monuments to protect natural and cultural heritage within the EEZ/OCS. The listing of the Papahānaumokuākea Marine National Monument as a World Heritage Site under the 1970 UNESCO Convention and its designation as a Particularly Sensitive Sea Area by the International Maritime Organization are evidence of international recognition of the application of the AA under international law. It is also clear that the AA permit provisions within those Marine National Monuments may be enforced against U.S. nationals and U.S.-flagged vessels as well as foreign-flagged vessels in a manner consistent with international law. What remains unclear is whether the U.S. government will take the next step and reassert its authority to apply and enforce the AA permit provisions in the EEZ/OCS outside of the Marine National Monuments.

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85. See Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006).

86. LOSC, *supra* note 1 at 418.

87. *Id.* at 517.

88. *Id.*

### B. *Archaeological Resources Protection Act of 1979*

Like the AA, ARPA was enacted to address the threats to Native American heritage on public lands from looting.<sup>89</sup> In particular, ARPA provided a clear definition of “archaeological resources”<sup>90</sup> in order to address the holding in *United States v. Diaz* that the AA was unconstitutionally vague as applied to a criminal enforcement.<sup>91</sup> As the AA did not define “antiquity,” APRA’s clear definition of what objects are covered, its updating of criminal provisions, and its addition of civil enforcement provisions, including trafficking, improved the AA’s ability to preserve cultural resources.

ARPA is also an exercise of the U.S. government’s sovereign prerogative to exercise control over such resources for activities within its jurisdiction and control. It was this control that the *Treasure Salvors* Court stated that Congress had not exercised on the OCS under OCSLA, the AA, or the Abandoned Property Act.<sup>92</sup> Unfortunately, Congress failed to exercise its sovereign prerogative to assert control over looting and other activities directed at UCH on the OCS. Instead, Congress appears to have been persuaded to codify the decision in *Treasure Salvors* and exclude the OCS from the scope of its application in the definition of public lands.<sup>93</sup> Various presidents have exercised their sovereign prerogative in providing notice to the international community that it may enforce U.S. law against foreign-flagged vessels and nationals in a twelve-mile territorial sea, twenty-four-nm contiguous zone and a 200-nm mile EEZ consistent with international law as reflected in the LOSC.<sup>94</sup> Some laws have been enacted to not only control

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89. Archaeological Resources Protection Act, 16 U.S.C. § 470aa (2012).

90. *Id.* § 470bb(1) (defining “archaeological resource” as “any material remains of past human life of archaeological interest,” including “but not limited to: pottery, basketry, bottles, weapons, projectiles, tools, structures, pit houses, rock paintings, graves, [and] human skeletal materials . . . at least 100 years of age”).

91. 499 F.2d 113, 115 (9th Cir. 1974); *see also* Judith Benderson, *The Archeological Resources Protection Act and the Native American Graves Protection and Repatriation Act*, OFFS. OF THE U.S. ATTORNEYS, [http://www.justice.gov/usao/briefing\\_room/ic/artifacts.html](http://www.justice.gov/usao/briefing_room/ic/artifacts.html) (last visited Apr. 4, 2014).

92. *Treasure Salvors II*, 569 F.2d 330, 338-40 (1978).

93. 16 U.S.C. § 470bb-(3)-(B) (2012) (defining “public lands” to include “all other lands the fee title to which is held by the U.S., other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution”).

94. Proclamation No. 7219, 64 Fed. Reg. 48,701, 48,701 (Aug. 2, 1999); Proclamation No. 5928, 54 Fed. Reg. 777, 777 (Dec. 27, 1988); (extending seaward limit of the contiguous zones from twelve to twenty-four-nm from the baseline); Proclamation No. 5030, 48 Fed. Reg. 10,605, 10,605 (Mar. 14, 1983).

activities to protect and manage our natural and cultural heritage in the EEZ,<sup>95</sup> but also to protect natural and cultural heritage outside the U.S. EEZ on the high seas.<sup>96</sup> Of course, U.S. statutes protecting natural and cultural heritage outside of U.S. territory and EEZ only apply to activities conducted by U.S.-flagged vessels and nationals and would not apply to foreign-flagged vessels and nationals unless the foreign-flagged state provided its consent.<sup>97</sup>

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95. Congress has the jurisdiction and authority to prescribe rules for exploration and exploitation of natural and cultural resources on the OCS as exercised in the Marine Protection Research and Sanctuaries Act of 1973. The MPRSA was subsequently amended to expressly reference the 200 nm EEZ and the extension of the territorial sea to twelve nm to maximize the enforceability of the law against foreign-flagged vessels and nationals consistent with international law. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445C (2012); *see also* 33 U.S.C. 1401-45 (2012) (permitting establishment of national marine sanctuaries to the outer limit of the EEZ).

96. Congress also has the authority to prescribe rules of law to control the conduct of activities in the high seas by U.S.-flagged vessels and nationals. *See, e.g.*, Marine Mammals Protection Act, 16 U.S.C. §§ 1361-1423h (2012) (applies to takings by U.S. persons and U.S. vessels within and outside the territorial limits of the U.S.); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012) (prohibiting takings of endangered species on the high seas by persons and vessels that are subject to U.S. jurisdiction); Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1811(b) (2012) (providing that

“[t]he United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following: (1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that the management authority does not extend to any such species during the time they are found within any waters of a foreign nation; (2) All Continental Shelf fishery resources beyond the exclusive economic zone.”);

Deep Seabed Hard Minerals Resources Act, 30 U.S.C. §§ 1401-1473 (2012) (regulating conduct of U.S. citizens and others subject to U.S. jurisdiction when they engage in exploration or exploitation of deep seabed hard mineral resources in or under the seafloor beyond national jurisdiction); Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978); *see also generally* *Seaward Limit of U.S. Laws*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., OFF. OF GENERAL COUNSEL, [http://www.gc.noaa.gov/gcil\\_seaward.html#nmsa](http://www.gc.noaa.gov/gcil_seaward.html#nmsa) (last visited Feb. 8, 2014).

97. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (discussing two categories of a State's jurisdiction that are subject to limitation under international law: jurisdiction to prescribe and jurisdiction to enforce); DROMGOOLE, *supra* note 4, at 241-75, 276-306 (providing an excellent discussion of jurisdiction in the context of UCH, the LOSC, and the 2001 UNESCO Convention). There may not be any jurisdiction for enforcement against foreign-flagged vessels or nationals, except to the extent the foreign nations have consented by agreement in a treaty or perhaps in a specific case. Fortunately, there are a few examples of laws that specifically protect certain natural and cultural heritage in the high seas and even on the continental shelves of other nations. The proposed legislation to implement the International Agreement on R.M.S. Titanic demonstrates how Congress may exercise its jurisdiction and control over exploration and exploitation by U.S. salvors on U.S. flagged vessels in the high seas and on the continental shelf of another nation, in this case, Canada, to protect the British flagged vessel Titanic. *See generally* S. REP. NO. 2279, at 1 (2012). The Sunken Military Craft Act, Pub. L. No. 108-375, 118 Stat. 2094-2098 (2004), is another

Unfortunately, however well-intentioned, ARPA is an example of how Congress failed to enact a law to fully protect our natural and cultural heritage in those zones from U.S. nationals and flagged vessels much less from foreign threats.

On the bright side, the most comprehensive law enacted by Congress and signed into law by President Nixon to protect our heritage on the OCS is the Marine Protection Research and Sanctuaries Act (MPRSA) of 1972.<sup>98</sup> Title III of the MPRSA is now better known as the NMSA.

### C. National Marine Sanctuaries Act of 1972

The NMSA provides authority for comprehensive protection of natural and cultural heritage in sanctuaries on the OCS and within the 200-nm EEZ.<sup>99</sup> While protection of natural heritage was the primary purpose of the NMSA, the first national marine sanctuary was established to prevent looting and unscientific salvage of UCH—specifically, of the U.S.S. *Monitor*. At the time of its designation in 1975, the wreck was lying on the seafloor beneath the high seas about sixteen nm from shore on the OCS.<sup>100</sup> As the UCH was in the high seas at the time, any enforcement would be limited to U.S. flagged vessels and nationals. Since then, however, the U.S. EEZ has been extended out to 200 nm in regard to natural heritage and the U.S. contiguous zone has been extended out to twenty-four nm. Therefore, the international community is on notice that the laws protecting the U.S.S. *Monitor* may now be enforced against foreign-flagged vessels and nationals as part of the coastal State jurisdiction that is recognized under the LOSC.

Under the NMSA, NOAA regulates activities, issues permits, assesses civil penalties, and conducts other enforcement to protect sanctuary resources.<sup>101</sup> The NMSA protects UCH by prohibiting: 1) the removal of, or injury to, historic sanctuary resources; and 2) any alteration of the seabed.<sup>102</sup> There is no question that NOAA

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example of Congress exercising its jurisdiction to control U.S. salvors and U.S. flagged vessels to protect UCH located on the U.S. OCS, on the seabed under the high seas, and on the continental shelves of foreign nations.

98. See generally Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972).

99. 16 U.S.C. § 1431-1445c (2012).

100. *What Was the First National Marine Sanctuary to be Designated?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/facts/firstnms.html> (last revised Jan. 23, 2014).

101. 16 U.S.C. §§ 1434, 1437, 1439, 1443 (2012); 15 C.F.R. § 922 (2014).

102. 15 C.F.R. § 922 (2014) (setting forth each sanctuary's regulations, which mostly

may enforce the first measure against U.S. nationals and vessels in the U.S. EEZ. However, the enforcement of this UCH regulation against a foreign-flagged vessel or national must be done in a manner consistent with international law, which would include obtaining the consent of the foreign nation.<sup>103</sup> However, if the looting or unauthorized salvage of UCH also involves alteration of the seabed, then the LOSC recognizes NOAA's authority to enforce that natural heritage provision even against foreign-flagged vessels and nationals without further consent.<sup>104</sup> These two regulations protecting UCH have withstood every legal challenge to date, including two challenges to regulations protecting the U.S.S. *Monitor* and others involving UCH in the Channel Islands National Marine Sanctuary.<sup>105</sup>

In *Craft v. National Park Service*, the National Park Service (NPS) caught scuba divers looting artifacts from the Channel Islands National Park and the adjacent Channel Islands National Marine Sanctuary.<sup>106</sup> Undercover rangers witnessed the dive master, Ferguson, announce to the divers that the shipwrecks were in a federal reserve, removing objects was illegal and that an underwater alarm would alert the group if a NPS enforcement patrol approached.<sup>107</sup> NOAA and NPS agreed that a civil enforcement case under the NMSA should be pursued because it had the largest fine provision of applicable laws.<sup>108</sup> Administrative Law Judge Hugh Dolan assessed civil penalties in the amount of \$132,000 for multiple violations of two regulations: (1) the removal of, or injury to, historic sanctuary resources, and (2) alteration of the seabed.<sup>109</sup> The district court granted summary judgment in favor of the U.S. government and rejected the plaintiffs' argument that they had a pre-existing right to salvage, and that the regulation prohibiting seabed alteration was unconstitutionally

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includes these two regulations); accord Varmer, Gray & Alberg, *supra* note 64, at 139.

103. See LOSC, *supra* note 1, at 517.

104. See *id.* at 448.

105. See Gentile, 6 O.R.W. A, at \*3c, \*4d (NOAA App. 1990) (stating that research is required for a permit, and that facilitating multiple uses does not entitle the public to physical access); Hess, 6 O.R.W. 720A, 720i (NOAA 1992) (finding that the denial of a permit was reasonable because the application for 'research' was inadequate and did not even propose elements of the scientific approach and methodology to be used).

106. 34 F.3d 918, 922 (*Craft IV*) (9th Cir. 1994).

107. *Id.* at 921.

108. *Id.*

109. *Craft (Craft I)*, 6 O.R.W. 684, 685 (NOAA App. 1992) (noting amount assessed and denying petition for discretionary review); *Craft*, 6 O.R.W. 687 (*Craft II*) (NOAA App. 1992) (denying separate petition for discretionary review).

vague and overbroad.<sup>110</sup> On appeal, the Ninth Circuit affirmed, holding that the regulation of seabed alteration was neither overbroad nor unconstitutionally vague as applied to the appellants' conduct.<sup>111</sup> The Ninth Circuit found that unless the activity falls within the two explicitly listed exceptions to the prohibition on altering the seabed (anchoring and trawling), any alteration is clearly prohibited.<sup>112</sup> The district court had gone so far as to say that the salvors acted in a "mocking derision" of the law,<sup>113</sup> and the Ninth Circuit agreed that "[T]here can be no doubt that appellants were aware that their activities were prohibited. . . . [A]ppellants' claims that they lacked fair warning that their actions were prohibited ring hollow."<sup>114</sup>

In *United States v. Fisher*, the United States brought an enforcement action against Mel Fisher, his treasure-hunting company, and several individuals for causing damage to and the loss of both seagrass and historic sanctuary resources in the Florida Keys National Marine Sanctuary.<sup>115</sup> The damage was a result of the salvors' use of a prop-wash deflector, also known as a "mailbox," that had created 600 holes in the seabed that were each about thirty feet across and several feet deep.<sup>116</sup> The holes were created in seagrass-containing areas that were part of the coral reef ecosystem.<sup>117</sup> The salvors, who blew the holes to recover approximately 200 artifacts, argued that they should not be held strictly liable for the alleged damages because their activities were authorized by federal admiralty law.<sup>118</sup> This argument was rejected on summary judgment, and the court found that the laws governing the Florida Keys National Marine Sanctuary constituted

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110. *Craft v. Nat'l Park Serv.*, No. 92-1769, slip op. at 4-7 (*Craft III*) (C.D. Cal. Oct. 28, 1992), available at <http://csc.noaa.gov/data/Documents/OceanLawSearch/Craft%20v.%20Nat%271%20Park%20Serv.,%20CV%20No.%2092-1769%20%28C.D.%20Cal.%201992%29.pdf>.

111. *Craft IV*, 34 F.3d at 921.

112. *Id.* at 922.

113. *Craft III*, slip op. at 7.

114. *Craft IV*, 34 F.3d at 923.

115. 977 F. Supp. 1193, 1195, 1200-02 (*Fisher II*) (S.D. Fla. 1997) (holding salvors liable for damages and permanently enjoining the salvors from use of mailboxes without a permit from NOAA). In a previous case, *United States v. Fisher (Fisher I)*, 22 F.3d 262, 269 (11th Cir. 1994), the Eleventh Circuit upheld the lower court's decision that the United States showed a substantial likelihood of success on the merits sufficient for issuance of a preliminary injunction regarding the salvors' use of a prop-wash deflectors to make 100 craters in the sanctuary seabed.

116. *Fisher II*, 977 F. Supp. at 1196.

117. *Id.* at 1197.

118. *See id.* at 1200.

a proper modification of admiralty law.<sup>119</sup> After a trial on the remaining issues, the defendants were found liable for nearly \$600,000 in damages to seagrass, and were ordered to return the artifacts to NOAA.<sup>120</sup> The *Fisher* case shows how the natural and cultural heritage in a national marine sanctuary can be protected from unauthorized salvage.

While these cases did not involve foreign-flagged vessels or nationals, they do show that salvage activities trigger regulations of natural heritage as well as cultural heritage. Even if the enforcement of the UCH regulation against foreign-flagged vessels and nationals is limited to UCH landward of the twenty-four-nm limit, if the foreign salvage activities involve altering the seabed, placing structures on the seabed, or some other activity, then that activity is regulated to protect natural resources, and is thus subject to U.S. jurisdiction under international law.<sup>121</sup> This approach is consistent with Articles 60 and 80 of the LOSC, which provide coastal State authority for the regulation of structures and installations in the EEZ and on the continental shelf.<sup>122</sup> Article 81 of the LOSC also provides for the regulation of drilling on the continental shelf for any purpose.<sup>123</sup> Since any salvage of UCH is likely to involve drilling or digging on the seabed, NOAA regulations protecting natural resources would be enforceable against foreign salvors to directly protect such natural resources and thereby indirectly protect any associated heritage resource in the EEZ or on the continental shelf.

#### D. *Abandoned Shipwreck Act of 1987*

Under section 6(c) of the ASA,<sup>124</sup> the U.S. government expressly exercised its sovereign prerogative, asserted title over abandoned shipwrecks on state submerged lands,<sup>125</sup> and then

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119. See *United States v. Fisher (Fisher III)*, No. 92-10027-CIV-DAVIS, slip op. at 11-12 (S.D. Fla., Apr. 30, 1997), available at <http://csc.noaa.gov/data/Documents/OceanLawSearch> (navigate to link titled “Fisher, Order on Summary Judgment (S.D. Fla. 1997).pdf”).

120. *Fisher II*, 977 F. Supp. at 1198-99, 1201.

121. See LOSC, *supra* note 1, 517.

122. *Id.* at 419, 430.

123. *Id.* at 431.

124. 43 U.S.C. §§ 2101-2106 (2012).

125. The ASA incorporates the definition of “submerged lands” under the Submerged Lands Act but also expressly included the following territories: the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands. *Id.* § 2102.

transferred title and control to the states.<sup>126</sup> The ASA's scope extends to "any abandoned shipwreck" that is "(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."<sup>127</sup> Consistent with the Submerged Lands Act of 1953, the seaward limit of the ASA generally extends seaward three nm<sup>128</sup> from the coastline.<sup>129</sup> As such, it does not protect UCH on the OCS. The term "abandoned" was not expressly defined by the ASA because Congress was relying on the maritime admiralty law,<sup>130</sup> in particular the *Treasure Salvors* case and its progeny.<sup>131</sup> Unfortunately, the enactment of the ASA has not deterred all salvors, and there have been a number of federal cases over whether the ASA or the law of salvage applies, with varying results.

In *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be The "Seabird"*, the federal admiralty court held that Congress has the authority to define and even limit admiralty court jurisdiction.<sup>132</sup> The court held that the ASA does not interfere with Article III's purpose of ensuring national control over navigation, as well as interstate and foreign commerce in federal admiralty

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126. *Id.* § 2105(c).

127. *Id.* § 2105(a); *see also* Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,120, 50,121 (Dec. 4, 1990) (noting that shipwrecks entitled to sovereign immunity, such as warships or other sovereign noncommercial vessels, are presumed not to be abandoned by the flag nation).

128. The limit is three marine leagues or nine nm in Texas, Puerto Rico, and the Gulf Coast of Florida. *Maritime Zones and Boundaries*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., OFF. OF GEN. COUNSEL, [http://www.gc.noaa.gov/gcil\\_maritime.html](http://www.gc.noaa.gov/gcil_maritime.html) (last visited Feb. 28, 2014).

129. 43 U.S.C. §§ 2101-2106 (2012).

130. 33 U.S.C. § 409 (2012) (directing that a shipwreck may be considered abandoned if an owner fails either to mark and subsequently remove the wrecked vessel and its cargo, or to provide legal notice of abandonment to the U.S. Coast Guard and U.S. Army Corps of Engineers); *see also* H.R. REP. NO. 100-514(1) at 2 (1988) (noting that "abandonment . . . may be implied . . . by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.").

131. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 524 (S.D. Fla. 1978); *see also* *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (noting that long-lost shipwreck can be presumed to be abandoned); *Moyer v. Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp. 1099, 1105 (D.N.J. 1993) (analyzing an insurer's failure to engage in salvage activity and deciding the failure was significant enough to constitute abandonment).

132. 19 F.3d 1136, 1142 (7th Cir. 1994).

courts.<sup>133</sup> Furthermore, the particular provision of the ASA in question in this case, section 2106(a), does not even affect the law of salvage, which does not apply to abandoned shipwrecks subject to the ASA.<sup>134</sup> Article III federal admiralty courts used to determine whether the law of salvage or the law of finds applied.<sup>135</sup> Now, at least in state waters, the Article III federal courts will determine whether the law of salvage or the ASA applies. The ASA codified the exception to the law of finds whereby the sovereign has constructive possession of abandoned property embedded in its submerged lands.<sup>136</sup> The abandoned shipwreck is the property of the state and not of the finder.

In *Deep Sea Research, Inc. v. The Brother Jonathan and California*, the Supreme Court rejected the lower court's conclusion that the shipwreck was not abandoned because the technology had not been previously available to salvage it.<sup>137</sup> The case was then remanded to the district court to determine whether or not the wreck was "abandoned" consistent with that term's traditional meaning under admiralty law cases.<sup>138</sup> Although the Supreme Court did not state what that traditional meaning is, presumably the Court adopted the definition found in the majority of admiralty cases: that a wreck is deemed to be "abandoned" when a long period of time has passed and the owner of the vessel has not attempted to salvage it or establish a claim thereto.

A recent example supporting this view is *Northeast Research v. One Shipwrecked Vessel, her Tackle, Equipment, Appurtenances, & Cargo*, also known as the "Dunkirk Schooner" case.<sup>139</sup> In its summary judgment opinion, the court noted that abandonment may be inferred from clear and convincing evidence that the vessel had been wrecked for over 150 years, technology existed when it sunk to salvage it, and no one had even tried to locate the wreck.<sup>140</sup> On appeal, the court affirmed the summary judgment and held that abandonment may be inferred from circumstantial evidence.<sup>141</sup> The court rejected the argument that the state had to prove the

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133. *Id.* at 1139.

134. *Id.* at 1141.

135. *Id.* at 1139-40.

136. *Id.* at 1140.

137. 523 U.S. 491, 494-95 (1998).

138. *Id.* at 508.

139. 790 F. Supp. 2d 56 (W.D.N.Y. 2011).

140. *Id.* at 66.

141. *Ne. Research, LLC v. One Shipwrecked Vessel*, 729 F.3d 197, 200 (2d. Cir. 2013).

wreck was expressly abandoned even though questions remain as to the identity of the so called “Dunkirk wreck.”<sup>142</sup> While the ASA applies to UCH within the definition of “abandoned shipwreck,” it does not apply to sunken military craft and other public vessels, which are presumed to not have been abandoned.<sup>143</sup>

#### E. *Sunken Military Craft Act of 2004*

The SMCA was passed by Congress and signed into law by President George W. Bush on October 28, 2004.<sup>144</sup> The SMCA preserves the sovereign interests of the U.S. Government in sunken military vessels and aircraft by codifying: 1) the application of the principle of sovereign immunity to wrecks and associated contents and 2) U.S. ownership of such crafts, regardless of the passage of time.<sup>145</sup> The SMCA protects sunken U.S. military ships and aircraft wherever they are located, including wrecks in the high seas and in the maritime zones of foreign nations consistent with international law.<sup>146</sup> It provides authority for the protection of foreign sunken military craft located in U.S. internal waters, territorial sea, and the contiguous zone.<sup>147</sup> It also protects the archaeological and historical interests associated with such craft. As these wrecks often involve human casualties, the SMCA calls for respectful treatment of wreck sites that are also the graves of lost military personnel.

### V. LAWS PROTECTING UNDERWATER CULTURAL HERITAGE THROUGH CONTROL OF FEDERAL ACTIVITIES

#### A. *National Historic Preservation Act of 1966*

The NHPA is a procedural statute that addresses incidental threats to UCH from activities subject to U.S. jurisdiction.<sup>148</sup> The NHPA requires all federal agencies to consider whether their activities or undertakings will have an adverse effect on historic properties and to preference those that avoid or mitigate those

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142. *Id.* at 212.

143. *See* Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116, 50,120-21 (Dec. 4, 1990).

144. Sunken Military Craft Act, Pub. L. No. 108-375, 118 Stat. 181 (codified at 10 U.S.C. § 113 Note (2004)).

145. Sunken Military Craft Act of 2004, 10 U.S.C. § 113 note at § 1401 (2012).

146. *Id.* §§ 1401(2); 1406(b).

147. *Id.* § 1408(4)-(7).

148. National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2012).

effects.<sup>149</sup> Federal agencies must have a program or plan to identify, inventory, and assess the historical significance of heritage resources, including UCH that may be affected by agencies themselves.<sup>150</sup> Federal agencies must conduct this assessment prior to carrying out planned undertakings, including funding projects, issuing permits, and taking any other actions that may adversely affect historic properties.<sup>151</sup> The scope of the geographic area to which this process applies is determined by the congressionally defined mission, authority, and jurisdiction of the federal agency at issue.

Section 106 of the NHPA specifically requires federal agencies to take into account the effects of any proposed federal, federally assisted, or federally licensed “undertaking” on any historic property that is included in, or eligible for inclusion in, the National Register of Historic Places (NRHP).<sup>152</sup> Additionally, section 106 sets forth a process for consultation with appropriate parties that must be completed prior to issuing any license or permit, or going forward with an activity.<sup>153</sup> Section 106 of the NHPA does not prevent the undertaking from occurring and may not ultimately prevent an adverse effect; however, it does require a process, including consultation, which resolves those adverse effects through avoidance, minimization, or mitigation.<sup>154</sup>

NHPA section 110(a)-(2) requires federal agencies to manage heritage resources under their jurisdiction and control.<sup>155</sup> Such management includes the obligation to survey, inventory, and determine the eligibility of historic properties for nomination to the NRHP.<sup>156</sup> Section 110(a)-(2) also requires that each agency exercise caution to ensure that properties that may be eligible for inclusion are not inadvertently transferred or sold.<sup>157</sup>

#### B. *National Environmental Policy Act of 1969*

NEPA may also be cited to fulfill this obligation to address

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149. *Id.*

150. *Id.* § 470h-2(a)(2).

151. *Id.* § 470f.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* § 470h-2

156. *Id.* § 470h-2(a)(2).

157. *Id.* § 470h-2(e).

activities that may incidentally affect UCH.<sup>158</sup> The two primary purposes of 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.”<sup>159</sup> The federal government is responsible for using “all practicable means, consistent with . . . national policy, to improve and coordinate Federal plans, functions, programs and resources” to fulfill responsibilities under this policy.<sup>160</sup> 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 U.S., 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.”<sup>161</sup> Thus, federal agencies have a responsibility to protect the human environment that is not just about natural resources, but also includes the responsibility to “preserve important historic, cultural, and natural aspects of our national heritage.”<sup>162</sup>

Like the NHPA, NEPA may also incidentally protect UCH through a process in which federal agencies must take a hard look at the reasonably foreseeable impacts of their activities on the environment, including the incidental affect their activities may have on UCH. Similar to the NHPA, NEPA is enforced as agencies carry out their activities authorized by other statutes. The Council on Environmental Quality and the Advisory Council on Historic Preservation issued a handbook in 2013 with guidance on using existing regulatory provisions to align the NEPA process with the NHPA section 106 review processes.<sup>163</sup>

#### VI. GAPS IN PROTECTION OF UNDERWATER CULTURAL HERITAGE ON THE OUTER CONTINENTAL SHELF UNDER U.S. STATUTES

UCH located near the coast in the internal waters, submerged

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158. National Environmental Protection Act of 1969, 42 U.S.C. §§ 4321-4347 (2012).

159. *Id.* § 4321.

160. *Id.* § 4331(b).

161. *Id.* § 4332(F).

162. *Id.* § 4331(b)(4).

163. COUNCIL ON ENVTL. QUALITY, EXEC. OFF. OF THE PRESIDENT & ADVISORY COUNCIL ON HIST. PRES., NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 (2013), *available at* [http://www.whitehouse.gov/sites/default/files/nepa\\_and\\_nhpa\\_handbook.pdf](http://www.whitehouse.gov/sites/default/files/nepa_and_nhpa_handbook.pdf).

state lands, and the corresponding territorial sea are protected by a number of federal and state statutes including the ASA, the SMCA, and laws that apply in federal marine protected areas such as National Parks and National Marine Sanctuaries. Outside of state submerged lands on the OCS, sunken military craft are protected under the SMCA, and the NMSA protects any UCH located in national marine sanctuaries.<sup>164</sup> At the same time, the maritime law of salvage has been applied to fill these gaps in legislation.

Unfortunately, despite the importance of uniform approach to the rules of salvage in recent marine casualties, the public interest in the preservation of UCH—evident in cases like the *Titanic*—has not been uniformly incorporated in all admiralty cases. UCH is still subject to looting and unscientific salvage without regard to the emerging international policy preference for *in situ* preservation and the international conservation and curation standards—set forth in the 2001 UNESCO Convention, particularly the Annex Rules—that should apply to salvaged or recovered UCH.

Thus, while under the LOSC, NHPA, and NEPA there is a duty and responsibility to protect and preserve this heritage for present and future generations, there is a significant gap in protection of UCH located within the EEZ/OCS, but outside of sanctuaries and marine national monuments, from looting and unscientific salvage. In addition, this deep-water UCH is potentially as or more significant than UCH along the coast because it may be more intact and the depths are often well outside the range of recreational scuba diving. Deep-water UCH is even beyond the reach of many commercial salvage operations that do not have the equipment necessary for deep-water salvage.

Enacting a gap-filling law to control activities directed at UCH would help fulfill the duty to protect UCH under international law and be consistent with emerging international law and standards. Agencies like Bureau of Ocean Energy Management and NOAA, which discover UCH in the EEZ/OCS, have responsibilities to protect and preserve them under the NHPA and NEPA, but have

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164. At present, there are two sanctuaries that do not have regulations directly controlling activities directed at historic sanctuary resources: 1) the Hawaii Humpback Whale National Marine Sanctuary; and 2) the Flower Garden Banks National Marine Sanctuary. See generally *Sanctuary Management Plans*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE SANCTUARIES, <http://sanctuaries.noaa.gov/management/mpr/welcome.html> (last visited Feb. 28, 2014) (providing the management plans and regulations for those sanctuaries, and particularly the definitions of sanctuary resources).

little or no authority to control looting and unscientific salvage that may destroy these irreplaceable resources. Unless the UCH is protected within a national marine sanctuary, or marine national monument, or otherwise protected by the SMCA, there is no law to prevent its looting or unwanted salvage. There are, however, a number of ways to fill the gaps in the direct protection of UCH left by current U.S. statutes. These measures would fulfill the duty to protect UCH and meet the minimum requirements for protection set forth in the 2001 UNESCO Convention in a manner consistent with the LOSC.

## VII. RECOMMENDATIONS ON HOW TO FILL THE GAPS IN U.S. STATUTES THAT DIRECTLY PROTECT UNDERWATER CULTURAL HERITAGE

### A. Preferred Alternative: Amend the National Marine Sanctuaries Act

The NMSA provides the most comprehensive protection of UCH on the OCS and EEZ, including the regulations protecting natural heritage and cultural heritage being applied in a UCH case, and the strongest civil penalties in any of the UCH laws that have already withstood challenges in U.S. admiralty court.<sup>165</sup> In addition, the integration of the protection and management of natural and cultural heritage enhances the potential protection and enforcement of the regulations against foreign-flagged vessels and nationals for UCH within EEZ/OCS that is beyond the twenty-four-nm contiguous zone. However, the NMSA only applies to UCH within National Marine Sanctuaries. Therefore, the author's preferred alternative would be to amend the NMSA to fill the gap in protection of UCH on the OCS. This could be accomplished by applying the existing authorization system and sanctions to activities directed at UCH outside of National Marine Sanctuaries. As the following example shows, such an amendment could be achieved without the comprehensive management regimes that

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165. See discussion *supra* Part IV.C (discussing the NMSA); see also *Craft v. Nat'l Park Service*, 34 F.3d 918 (9th Cir. 1994) (noting that the Department of the Interior, NPS, and NOAA agreed that enforcement under the NMSA provided greater potential success and higher penalties than under ARPA); *United States v. Fisher (Fisher II)*, 977 F. Supp. 1193 (S.D. Fla. 1997); *Gentile*, 6 O.R.W. A (NOAA App. 1990); *Hess*, 6 O.R.W. 720A (NOAA 1992); HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 126-27 (2004); O. Varmer & C. M. Zander, *Closing the Gaps in Domestic and International Law: Achieving Comprehensive Protection of Submerged Cultural Resources*, NAT'L PARK SERV. ARCHEOLOGY PROGRAM: COMMON GROUND ONLINE, [www.nps.gov/archeology/cg/vol1\\_num3-4/index.htm](http://www.nps.gov/archeology/cg/vol1_num3-4/index.htm) (last visited Feb. 15, 2014).

will continue to be limited to these areas and would 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, fuel and other hazardous material currently unprotected by any federal law and therefore vulnerable to looting, unauthorized salvage 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 law of salvage shall not apply to any cultural heritage resource or potentially polluting wreck subject to United States jurisdiction except as authorized under this Act. Nothing in this Act precludes the application of the 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. The National Oceanic and Atmospheric Administration 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 to the extent that the head of such agency specifically requests protection under this Title. The National Oceanic and Atmospheric Administration 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.

(f) 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 twenty-four-nm Contiguous Zone as well as such craft landward of that twenty-four-nm 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.

*B. Alternative 2: Amend the Archaeological Resources Protection Act to Apply on 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.<sup>166</sup> 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. Even this small change in text could fill a large gap in the law. Thus, arguably this is a preferable alternative, particularly from the perspective of the Department of the Interior, which implements ARPA. However, ARPA does not have a vigorous or

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166. See *supra* note 93.

well-tested civil penalty provision that has been applied in the marine environment much less the EEZ/OCS. In addition, it does not integrate or even address natural heritage. Thus, even if ARPA were amended as suggested below, it would not be enforceable against foreign-flagged vessels and nationals for UCH on the OCS beyond the limit of the twenty-four nm contiguous zone, unless there were corresponding provisions regarding the protection of natural resources instead of just archaeological resources. The following is proposed language for an amendment:<sup>167</sup>

*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.

*C. Alternative 3: Amend the Antiquities Act or its Implementing Regulations to Clarify its Application on the Outer Continental Shelf Outside of Marine National 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.

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167. 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.

## VIII. CONCLUSIONS

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

Governments and international organizations have recognized the public interest in preserving this heritage and responded to threats of looting and unscientific salvage particularly for UCH near the coast. The public interest in protecting our human environment is reflected in the international and domestic laws that seek to preserve our natural and cultural heritage throughout the marine environment. Under international law, as reflected in the LOSC, nations have a duty to protect their UCH and cooperate for that purpose. While there are a number of U.S. statutes that protect UCH, there are also a number of gaps in the law protecting UCH, particularly on the OCS, that need to be filled. The authority to control looting and salvage of UCH in the EEZ/OCS should generally be limited to U.S. vessels and nationals. Enforcement of a UCH law in the EEZ/OCS against foreign-flagged vessels or national would be not consistent with international law unless there is consent from the foreign nation.

As indicated above, there are 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 NMSA, ARPA, and the AA. The author suggests amending the NMSA as the preferred alternative because it already applies in the EEZ/OCS to natural and cultural heritage and has withstood a number of legal challenges in admiralty court. So applying certain provisions to the natural and cultural heritage in small discreet areas around UCH sites without establishing a new sanctuary may be an artful way to control activities with little or no impact on existing budgets and tax burdens.

The suggested ARPA amendment may be an even simpler way to fill those gaps. But it may not be enforced against foreign-flagged vessels and foreign nationals without the specific consent

of the foreign nation (or perhaps through the United States becoming a party to the 2001 UNESCO Convention that would serve as consent from the other parties to the Convention).

Amending the AA is also worth considering. But this may be the least attractive alternative, because of past controversy around the implementation and enforcement of the law.

While we wait for Congress to take further action in filling the gaps, federal courts sitting in admiralty may look to orders of other admiralty courts. They should also consider how existing international and U.S. statutes address the public interest in protecting UCH from looting and unwanted salvage. They should consider how those statutes seek to ensure that shipwrecks are preserved *in situ*, and that salvaged portions are kept together, consistent with international standards of the 2001 UNESCO Convention, particularly the Annex Rules.