

The Case Against the "Salvage" of the Cultural Heritage

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I INTRODUCTION

Archaeologists and treasure salvors have been engaged in battles over historic shipwrecks for the past three decades. Although federal and state agencies generally have sided with archaeologists, treasure salvors have found refuge in the federal admiralty courts, which usually have held that salvage is necessary in order to protect the shipwreck from a marine peril.

Treasure salvors traditionally have argued that they own the abandoned ancient shipwrecks they discover under the common law of finds. In the alternative, salvors have sought rewards for their rescue services under the maritime law of salvage. Since the enactment of the Abandoned Shipwreck Act of 1987 ("ASA"),¹ many treasure salvors have changed tactics, arguing that the shipwrecks they recover are not abandoned and thus still subject to salvage.

This conflict between historic preservation laws and the maritime law of salvage continues to divide people who actually share a common interest in the protection of historic shipwrecks. At the center of this conflict is a difference in preference between preserving historic shipwrecks on the sites where they are discovered and the belief that shipwrecks are in "marine peril" and need to be salvaged to be protected.

The battle over historic shipwrecks is being waged on both the domestic and international law fronts. At home, legal challenges continue to be mounted against the ASA, the National Marine Sanctuaries Act of 1972 ("NMSA"),² and other federal historic preservation laws and programs. Abroad, nations are struggling over agreements for the protection of

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¹43 U.S.C. §§ 2101-2106.

²16 U.S.C. §§ 1431-1445.

particular wrecks, such as the *Titanic*, as well as a more comprehensive convention to protect all of the underwater cultural heritage ("UCH").³

On both fronts, treasure salvors and their allies argue that the public's interest in archaeology already is being addressed through the maritime law of salvage. They also suggest that if more needs to be done to protect the UCH, it should be accomplished through further modification of salvage law as opposed to developing an entirely new legal regime under historic preservation laws. On the other hand, archaeologists and their allies argue that the application of salvage law to the UCH must be stopped because salvage for commercial purposes destroys the UCH.

To evaluate the respective arguments of each side, this article will compare and contrast the public's interest embodied in historic preservation laws with that found in the law of salvage. Based on this evaluation, it will be suggested that because of the diverse needs and requirements of the various interests and users of the UCH, most, if not all, of the changes needed to protect the UCH should be accomplished through historic preservation laws which incorporate multiple use management. This conclusion is reached because, as will be shown, the central premise of salvage law—that historic shipwrecks are in marine peril and need to be rescued—is in direct conflict with the numerous benefits to be gained through in situ preservation.

II

THE NATIONAL POLICY OF ON-SITE PRESERVATION

A. *Marine Peril*

After a ship sinks, it immediately begins a natural process of change through which it adapts to its new underwater environment. The rate of deterioration of a shipwreck depends on a variety of factors, including the ship's composition, the surrounding sea life, the amount of oxygen in the water, and the presence or absence of certain chemicals. As time progresses, the shipwreck becomes part of the marine environment. Once a shipwreck is covered by the seabed, the rate of deterioration becomes very slow due to the lack of oxygen. The shipwreck site is now in a preserved state and is by no means in marine peril. To the contrary, any excavation of the site at this stage will expose the UCH to the water column and oxygen and threaten the

³See further Nafziger, *The Titanic Revisited*, 30 J. Mar. L. & Com. 311 (1999), and Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. Mar. L. & Com. 331 (1999).

stability of the site. Exploration which involves disturbing the seabed as well as any subsequent salvage actually places the site in marine peril.⁴

B. Federal Statutes

Federal historic preservation laws, policies, and management programs evince a strong preference to leave sites undisturbed and prevent the recovery of artifacts. This is in direct contrast with the general presumption under the maritime law of salvage that historic shipwrecks are in marine peril and need to be salvaged so that they can be returned to the stream of commerce.⁵

1. Federal Archaeological Program

Congress has codified the public's interest in preserving historic resources in a number of federal statutes which collectively constitute the Federal Archeological Program ("FAP"). Under the National Historic Preservation Act of 1966 ("NHPA"),⁶ federal agencies are to survey, inventory, and preserve historic resources.⁷ Federal agencies also are directed to ensure that there is compliance with professional archaeological standards.⁸ Although all federal agencies must comply with the FAP, it is the National Park Service that actually oversees the development of the FAP guidelines which other agencies must follow or integrate into their cultural resource management programs.

The vast majority of FAP statutes were developed with terrestrial sites in mind. However, two of these land-based historic preservation statutes have been applied to the underwater cultural heritage: the Antiquities Act of 1906⁹ and the Archaeological Resources Protection Act of 1979 ("ARPA").¹⁰

The Antiquities Act has two main components. First, a criminal enforcement element provides for the prosecution of persons who appropriate, excavate, injure, or destroy any historic or pre-historic ruin or monument, or

⁴See *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 808, 1985 AMC 609 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302, 1986 AMC 1216 (11th Cir. 1985); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 560-561 n.20, 1983 AMC 1018 (S.D. Fla. 1982).

⁵See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 1978 AMC 1404 (5th Cir. 1978); *Cobb Coin*, 549 F. Supp. at 557.

⁶16 U.S.C. §§ 470 to 470x-6.

⁷16 U.S.C. §§ 470f, 470h-2.

⁸16 U.S.C. §§ 470a-2, 470h-4.

⁹16 U.S.C. §§ 431-433.

¹⁰16 U.S.C. §§ 470aa to 470mm.

any other object of antiquity, on lands owned or controlled by the United States. Second, a permitting process grants consent for the examination of ruins, excavation of archeological sites, and gathering of objects of antiquity on lands owned or controlled by the United States.

The Antiquities Act was applied to protect the UCH in *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*.¹¹ In this case, the United States successfully argued that Randy Lathrop, who was salvaging what was believed to be an 18th century Spanish galleon in the Cape Canaveral National Seashore area in Florida, needed an Antiquities Act permit as well as a dredge and fill permit under the Rivers and Harbors Act of 1899.¹² The public interest in historic preservation of the UCH prevailed over a more general public interest in the recovery of commodities under the maritime law of salvage. The Antiquities Act also has been applied in underwater national parks and national marine sanctuaries. To date, however, it has not been successfully applied outside federal marine protected areas.

The ARPA is another historic preservation statute that has been successfully applied to the UCH. ARPA was specifically enacted to prevent the looting and destruction of archeological resources. Like the Antiquities Act, ARPA has an enforcement and a permitting component. The former provides for the imposition of both criminal and civil penalties, while the latter allows for the recovery of certain artifacts consistent with the standards and requirements of the FAP. ARPA had been used to protect the UCH in the Key Biscayne National Park in Florida.¹³

There are other, more procedural, environmental laws, such as the National Environmental Policy Act of 1969 ("NEPA")¹⁴ and the NHPA, which also prefer on-site protection over salvage. While these statutes do not prohibit the removal or destruction of the UCH, they do require federal agencies to give consideration to the impact their activities will have on the environment, including natural and cultural resources. So long as these matters are taken into account, the agency has fulfilled its obligation and may proceed with the project or permit. As a result, these statutes do not offer comprehensive protection of the UCH.

Under the FAP, there is a preference to protect the UCH on the site where it has been discovered. Accordingly, the FAP has prevented unwanted salvage through the assertion of rights of federal agencies as owners and public trustees and through their regulatory authority. A review of the FAP

¹¹817 F. Supp. 953 (M.D. Fla. 1993).

¹²33 U.S.C. §§ 401-467.

¹³See *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1985 AMC 2970 (11th Cir. 1985); *United States v. Hampton*, Crim. Docket Nos. P169925, P169927, and P169928 (S.D. Fla. July 18, 1986).

¹⁴42 U.S.C. §§ 4321-4370d.

statutes specifically addressing the UCH is the best indication of the public's interest in salvage versus in situ preservation.

2. Federal Statutes Specifically Addressing the UCH

Congress has expressed a specific interest in protecting and preserving historic shipwrecks. Although historic shipwrecks are subject to some multiple use management regimes, the declared preferred policy is in situ preservation.

a. Abandoned Shipwreck Act of 1987

To deal with the salvage of historic shipwrecks, Congress passed the ASA. With regard to the issue of salvage versus in situ preservation, the ASA expressly provides that the maritime law of salvage and the common law of finds should not apply to the UCH.¹⁵ The ASA's legislative history states that the laws of salvage and finds are "obviously inappropriate for underwater archaeological sites as it would be for ancient ruins on land."¹⁶ Thus, a policy against the salvage of the UCH has been codified in the ASA. The ASA's preference for on-site protection is evident in the provision for the public to have access to these shipwrecks and the suggestion that parks and other types of marine protected areas be established to protect these resources.¹⁷

At the time the ASA was passed, archaeologists and others thought that the UCH in and on state submerged lands would be preserved and protected from salvage. However, as recent cases illustrate, the law of salvage continues to frustrate government efforts to preserve historic shipwrecks where they lie.¹⁸

Although there is a general preference for on-site protection of the UCH, the ASA does "allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites."¹⁹ This provision is the result of a Congressional compromise among salvors, archaeologists,

¹⁵See 43 U.S.C. § 2106.

¹⁶Statement of Sen. Bill Bradley (D-N.J.), 133 Cong. Rec. 36,578 (1987).

¹⁷See 43 U.S.C. § 2103.

¹⁸See, e.g., *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 1997 AMC 315 (9th Cir. 1996), *aff'd in part and vacated in part*, 118 S. Ct. 1464, 1998 AMC 1521 (1998), and *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993).

¹⁹43 U.S.C. § 2103(a)(2)(C).

recreational divers, and other multiple users. The ASA therefore provides a model of compromise for future legislation and agreements.

b. R.M.S. Titanic Maritime Memorial Act of 1986

The R.M.S. Titanic Maritime Memorial Act of 1986²⁰ provides the National Oceanic and Atmospheric Administration ("NOAA") and the Department of State with the authority to negotiate an international agreement designating the *Titanic* a maritime memorial and specifying how it should be protected and managed. The designation of the *Titanic* wreck site as a maritime memorial clearly indicates a preference for on-site protection. Moreover, the Act specifically provides that there should be no salvage of the *Titanic* unless and until there is an international agreement which provides for such activities.²¹ This statute is another example of Congress codifying its preference for on-site protection and opposing any salvage which is not guided by historic preservation laws and principles.

c. National Marine Sanctuaries Act

As indicated above, the FAP statutes and guidelines apply to the UCH in federal marine protected areas such as national parks, reserves, seashores, and sanctuaries. The FAP statutes have been used to enforce in situ historic preservation laws and policies in federal marine protected areas. A non-FAP statute which has been successfully used to prevent unwanted salvage and enforce in situ preservation policies is the NMSA.

Under the NMSA, Congress has empowered the Secretary of Commerce with the authority to designate and manage "certain areas of the marine environment possess[ing] conservation, recreational, ecological, *historical*, research, education or aesthetic qualities which give them special national . . . significance."²² In fact, the very first sanctuary, designated in 1975, was established to protect the Civil War-era shipwreck *Monitor* from looting and unwanted salvage.

The success of the approach taken in the marine sanctuary program is illustrated by *Craft v. National Park Service*.²³ In *Craft*, an administrative law judge assessed \$132,000 in civil penalties against several members of a dive club for removing and damaging historic sanctuary resources in the Channel Islands National Marine Sanctuary. Both the United States District

²⁰16 U.S.C. §§ 450rr to 450rr-6.

²¹See 16 U.S.C. § 450rr-5.

²²16 U.S.C. § 1431(a)(2) (emphasis supplied).

²³34 F.3d 918, 1994 AMC 2941 (9th Cir. 1994).

Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit upheld the imposition of these civil penalties. The particular significance of this case is that a federal appeals panel upheld agency regulations implementing in situ historic preservation policies against salvage activities within the boundaries of a national marine sanctuary.

The NMSA also is being successfully used as a preservation tool in the Florida Keys National Marine Sanctuary ("FKNMS"). In *United States v. Fisher*,²⁴ the activities of Kane Fisher occurring within the FKNMS are being challenged by the United States. The courts have found Fisher guilty of conducting salvage activities within the sanctuary that have resulted in the unauthorized removal and destruction of sanctuary resources. Again, the preference for on-site protection of the UCH has prevailed over maritime salvage law.

Kane Fisher has asserted that he had a right to conduct salvage activities and obtain title to a historic shipwreck under the law of finds or, alternatively, a salvage award under the law of salvage. The United States District Court for the Southern District of Florida held that the laws of salvage and finds do not apply to historic shipwrecks in the FKNMS and ordered Fisher to return the salvaged artifacts to NOAA. The court also held him liable for approximately \$600,000 in damages to the seagrass beds in the sanctuary. The case currently is on appeal and is expected to have a significant impact on NOAA's authority to enforce the NMSA's in situ preservation rules against salvors.

The NMSA provides NOAA with the authority to protect historic shipwrecks in sanctuaries located within the 200-nautical mile exclusive economic zone ("EEZ") of the United States "consistent with international law." NOAA has clear authority to enforce the NMSA against United States nationals and vessels flying the United States flag. More tricky is the question whether it also may take enforcement action against foreign nationals and foreign-flagged vessels. The 1982 United Nations Convention on the Law of the Sea ("UNCLOS")²⁵ provides coastal States with clear authority over the UCH in the 12-mile territorial sea and a contiguous zone out to 24 miles. It is less clear whether a historic preservation law could be enforced against a foreign-flag vessel operating beyond the contiguous zone. The trend in international law appears to be moving towards coastal States

²⁴See 22 F.3d 262 (11th Cir. 1994), later proceedings at 977 F. Supp. 1193 (S.D. Fla. 1997).

²⁵U.N. Doc. A/CONF.62/122 (1982), reprinted in United Nations, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, U.N. Sales No. E.83.V.5 (1983), 21 I.L.M. 1261 (1982).

having the authority to protect the UCH on their continental shelf and within their EEZ.

Under existing international law, the NMSA may clearly be enforced in United States ports or through cooperation with the foreign-flag state. The appropriate implementation mechanism largely will depend on the facts of a particular case and the NMSA provisions to be enforced.

C. The Clash of Commerce and Science

Congress and the executive branch uniformly have acted to protect and manage the UCH under environmental and historic resource management laws and policies. There is no federal statute or regulation which supports the application of the law of salvage to the UCH. However, the judicial branch continues to “protect” and manage historic shipwreck through the auspices of the law of salvage. Salvage law was not developed to protect and manage the UCH and is more appropriately limited to vessels subject to recent marine casualties. The application of salvage law to the UCH has never been reaffirmed through the democratic legislative processes in Congress or the public rulemaking processes of the executive branch. Thus, a conflict has arisen between congressional statutes and federal common law.

Under the federal maritime law of salvage, it is within the public interest to salvage vessels which are the subject of recent marine casualties. The courts also have found that the public interest extends to the recovery of ships that are no longer navigable. As indicated above, the public interest in the salvage of the UCH is inconsistent with the preferred policy of in situ preservation. Under historic preservation law, the UCH is viewed as a time capsule that should be left undisturbed for present and future generations. Non-intrusive access and research of time capsules is encouraged. Intrusive research and salvage is discouraged. Admiralty courts have considered and rejected the concept of shipwrecks as time capsules as well as the underlying historic preservation purposes of maintaining such vessels in situ.²⁶ Instead, admiralty courts have found shipwrecks to be in marine peril and have deemed expert testimony regarding archaeology and science to be irrelevant for purposes of salvage law.²⁷ This rejection of science and the underlying historic preservation principles reveal why salvage law is inappropriate for the purpose of structuring a compromise with archaeologists and others who prefer in situ preservation.

There are a few cases in which admiralty courts have ruled that historic

²⁶*Cobb Coin*, 549 F. Supp. at 559–61.

²⁷*Id.* at 557.

shipwrecks are being preserved on-site and are not in a marine peril.²⁸ In these cases, the courts have deferred to scientific experts and evidence presented about the status of the wreck site. Thus, there may be room for a compromise, if salvage law integrates the scientific principles underlying historic preservation, including in situ preservation. This could involve the use and analysis of scientific evidence by experts regarding the significance of the site and the rate of deterioration (so as to determine whether it is relatively stable or in fact threatened by the elements and thus in marine peril). Professional archaeologists could act as special masters for the court on this and other scientific issues. If science and the underlying historic preservation principles are integrated into the decision-making process as to whether shipwrecks are in marine peril under salvage law, then it may be viewed more as a merger of science and law than a compromise of the professional ethics of archaeologists.

D. Advantages of On-Site Preservation Over Salvage

1. A Precautionary Approach to UCH Management

In the past, archaeologists recovered artifacts from the pyramids of Egypt and brought them home to put in museums. While perhaps such recovery was well-intended at the time, in retrospect it would have been much better for science and the Egyptian culture to have left the artifacts where they were discovered. It clearly would be preferable to be able to study the objects where they were found. Their removal undoubtedly resulted in the loss of much information about this culture. Present-day archaeologists prefer to leave artifacts where they are discovered so as to be able to share the valuable UCH site with interested individuals. Future generations are likely to have a better understanding and superior equipment to uncover the stories of history and culture which may be hidden from even the trained eye of present-day archaeologists.

Under historic preservation laws and policies, there is a general preference for on-site preservation. Unless a particular UCH site is threatened, such as by a development project or the natural environment, the UCH should remain intact as an underwater laboratory and museum. The in situ preservation policy implements a precautionary approach to the management of UCH sites consistent with international environmental laws and policies. Under a precautionary approach, the UCH site should only be salvaged if it can no longer be preserved because of the threat of destruction

²⁸See *Klein*, 758 F.2d at 1515; *Chance*, 606 F. Supp. at 806–07.

from human intervention or the natural environment. The threat from the natural environment should not be presumed (as it generally is under salvage law). Under this precautionary approach, the UCH site should not be salvaged unless and until there is scientific information that the site is deteriorating at such a rate that UCH resources and information will soon be lost forever.

2. UCH Sites as Time Capsules

The UCH time capsules have unique characteristics which present an important distinction from heritage resource sites on dry land. The terrestrial heritage site generally has been subject to generations of human use and intervention. As a result, the site is more of a mix of time capsules from different periods. In contrast, the historic shipwreck site is more likely to be a single period time capsule. Not only is an underwater historic shipwreck site a more pristine time capsule of its period, it often can help explain the mix of time capsules contained on a terrestrial site. For example, a historic shipwreck site in Virginia's James River has proved very helpful in sorting out the puzzle of artifacts being recovered at archaeological digs in the historically-significant Jamestown settlement.

There are several reasons why in situ preservation of the UCH site is preferred over salvage. First, the artifacts and contextual information are kept intact so that present and future generations can continue to learn about our history and culture through non-intrusive research. Based on the advancement of knowledge and technology available to UCH sites over the past fifty years, there can be little doubt that future generations will have much greater knowledge and better technology available to them for use in gleaning more information from these irreplaceable resources. This is one of the primary reasons for treating the UCH as time capsules that should be preserved in situ for present and future generations.

In situ preservation also is better for present-day research. By permitting only non-intrusive research, the UCH site is available to multiple research projects, as opposed to just one research and recovery project which results in the destruction of the site. Accordingly, by prohibiting intrusive research and salvage, the site remains available for education, recreation, and tourism.

Artifacts generally are lost in salvage operations even when conducted pursuant to archaeological guidelines. As the artifacts are uncovered from a stable environment in the seabed they become exposed to oxygen, water, and other changes which put them in a less stable environment. If such artifacts are not recovered and preserved through a conservation process, or at least returned to the more stable seabed environment, they will be lost much more

quickly than if they had never been uncovered in the first place. As such, the UCH time capsule needs to be preserved as a whole.

Unfortunately, in salvage projects the costs of excavation, recovery, conservation, and curation of the entire shipwreck and cargo can be great. From a commercial perspective, salvors need to focus on the recovery of artifacts from which their investors can garner some return on their investment. Under salvage law, there is no requirement to salvage the entire time capsule. In addition, to expend time and money recovering artifacts and information which will reduce the return on investment may put salvors in conflict with agreements that they may have entered into with their investors. The proper recovery of the entire time capsule in accordance with professional scientific standards may be in conflict with the commercial laws underlying the agreements to finance the salvage project. As a result, the destruction or degradation of the UCH site which directly conflicts with historic preservation laws and policies may be found legally justified under salvage and other commercial laws.

Under salvage law, the equity analysis of the reward focuses on the commercial interests. A few courts have factored the benefits of recording archaeological information into their consideration of who should be awarded salvage rights. However, only a handful of courts have factored in the scientific considerations, including damage to the time capsule, in denying salvage rights. As the underlying commercial public interest of salvage directly conflicts with that of historic preservation, compromise under salvage law appears to be very difficult. The loss under historic preservation principles from partial or even full salvage is not limited to artifacts. In addition to the artifacts, the time capsule contains valuable contextual information.

3. The Need to Preserve Contextual Information

The UCH site does not contain just artifacts. It also holds potentially valuable contextual information. The particular location of the artifacts and their proximity to other artifacts, and most importantly the hull of the ship they are associated with, is significant in preserving the entire time capsule. This location information may be important for revealing history and culture. For example, the precise number and location of binoculars in the steering room, the lookout post, or elsewhere on a shipwreck like the *Titanic* may be important for learning the full story of how and why she sank. The precise location of some tools in a particular portion of some ancient vessel may reveal stories about how her crew and passengers lived, what they believed, and other cultural facts. This information is important to the scientist, but is often of little interest to the commercial user of the UCH site.

For years, salvage has focused on recovering treasure which could readily be sold or displayed. Unfortunately, there has been little if any regard for the comprehensive professional recording of this contextual information or provenance data. Some admiralty courts have considered the recording of archaeological information as one of the factors in determining exclusive salvage rights and the reward for services.²⁹ However, there is no salvage law requirement to uniformly record any of this information at UCH sites. The use of science in salvage law is left to the discretion of the judge and ultimately the salvor. In the few instances where a judge has required the recording of contextual information, the scientific approach and information recorded has been too rudimentary to preserve all of the knowledge contained in the time capsule.

For example, in most of the cases where the recording of contextual information has been conducted, it has not been done under the supervision of a professional archaeologist. It is important for a professional archaeologist to oversee the recording of archaeological information in a systematic scientific manner. Salvors and the admiralty courts have ignored this professional requirement, presumably because of the associated time and expense.

In *Fisher*, for example, the salvor's standards for recording contextual information did not meet FAP standards. Under the FAP, a research and recovery expedition is required to record the precise location of each artifact so that the UCH site can be reconstructed on a three-dimensional level (thereby preserving the site information). Kane Fisher merely recorded as the location the hole in the seabed which was closest to where the salvaged artifact was discovered after being blown by a propeller-wash deflector. This minimalist approach was acceptable to the court, but it was not good science because it did not preserve most of the UCH site information.

Under salvage law, the costs of doing proper science can be viewed as an inequitable burden on the salvor. The commercial interests and the requirement to reward the salvor generally outweigh any concerns about the scientific approach and the preservation of the UCH site information. As a result, information revealing our cultural heritage is lost through the application of salvage law to the UCH.

²⁹See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 56 F.3d 556, 1995 AMC 1985 (4th Cir.), cert. denied, 516 U.S. 938 (1995); *Marex Int'l, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 1998 AMC 484 (S.D. Ga. 1997); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 1983 AMC 966 (S.D. Fla. 1981).

4. Retrieval Decisions

Under both the law of salvage and historic preservation law, compromise is possible in several disputed areas, including using science to determine whether a particular historic shipwreck time capsule is ready to be recovered because it is threatened by human activities or the natural elements. There also may be time capsules which are not threatened but where there is a consensus that it is time for the capsule to be retrieved. However, any such decision to divert from the preferred policy of *in situ* preservation must also consider the other multiple interests and users of the UCH. There are many interests that need to be considered in the protection and management of the UCH besides those of salvors and scientists. Accordingly, UCH sites should be under a multiple use management system, as opposed to the system under salvage law which is essentially limited to the commercial use of the UCH.

E. Multiple Uses of UCH Sites and *In Situ* Preservation

Although legal disputes over UCH sites have historically been cast as pitting salvors against archaeologists, there actually are a number of groups interested in the protection and management of UCH sites. Multiple users of the UCH include (in addition to the general public at large) researchers, educators, sport divers, fishermen, boaters, museums, commercial salvors and their investors, owners and insurers of the wreck (including its cargo), journalists, tourist companies, and the family and descendants of those who lost their lives and for whom the wreck site is a final resting place. Most of these user groups benefit from on-site protection of the UCH.

I. Uses Consistent With *In Situ* Preservation

There are a variety of groups interested in using UCH sites. A shipwreck may be an engaging destination for diving or snorkeling. Shipwrecks often act as artificial reefs for fish. As a result, they may be of benefit to commercial and recreational fisherman. As the UCH has become intricately connected to the surrounding natural resources, a given site also may be of interest to the growing ecotourism and cultural tourist industry. The exploration and exploitation of a site often wreaks havoc with the surrounding natural resources. Sites also are underwater laboratories for a variety of scientific disciplines, including history, anthropology, and archaeology. A site also may be the final resting place of those who lost their life when the ship sank. As such, it may be looked upon by many as a grave site. If the UCH is a sunken warship, the responsible government may preclude any recovery from (and even access to) the site.

The commercial interest in historic shipwrecks is diverse. As indicated above, some of these interests seek to have the shipwreck preserved in the marine environment. On the other hand, there are a variety of users who wish to exploit the shipwreck for the intrinsic monetary value of its cargo, such as gold, silver, and precious gems. There also is a substantial market for objects of antiquity (such as china). If it is a famous shipwreck, such as the *Titanic*, *Constitution*, or *Mary Rose*, there even is a market for pieces of the coal used for fuel or slivers of wood from the ship. Some salvors have moved away from auctioning off salvaged goods and instead seek remuneration by charging fees for museum displays and the licensing of exclusive rights to access and photograph the site. Thus, museums, the media, and the general public all have a stake in UCH sites.

2. *Public Access to the UCH*

Public access to the UCH preserved on site may be accomplished through non-intrusive research, education, and outreach through publications, television, film, radio, the internet, and other mediums. The public has access to information about UCH sites through books, magazines, newspapers, land-based museums, documentary shows on cable and public television, videos, and government- and privately-produced education and outreach materials. Salvage therefore is not necessary to bring the UCH to the public.

3. *Preservation of Natural Resources, Habitat, and Ecosystems*

The protection and management of the UCH should avoid harm to the surrounding natural resources. This concern is consistent with both UNCLOS³⁰ and federal environmental and historic preservation laws.³¹

Federal agencies currently are expected to consider the impact their activities are likely to have on natural and cultural resources. While all of these laws support in situ preservation, the NMSA expressly provides for on-site protection and preservation of sanctuary resources. The exploration and salvage of historic shipwrecks has resulted in the destruction of coral, seagrass beds, and other habitats and related natural resources. Because such harm is discussed in more detail below, it is sufficient here to point out that the in situ preservation policies of our historic preservation laws are consistent with the preservation policies governing our natural resources. In

³⁰See arts. 192 and 194.

³¹See, e.g., 43 U.S.C. § 2103(a)(2)(A), (C) ("protect natural resources and habitat areas") ("recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites").

situ preservation also is consistent with the on-site preservation policies applicable to the management of grave sites. All of these policies are in conflict with the presumed public interest in the salvage of ships and cargo.

4. UCH Sites as Grave Sites

The salvage of UCH sites serving as grave sites raises concerns about disturbing the final resting places of those who lost their lives in a shipwreck disaster. The salvage of such a site is perceived by many to be disrespectful and has been likened to grave robbing. These concerns are readily addressed by the in situ preservation policies of laws and policies associated with protecting and managing grave sites.

An example under international law is the wreck site of the *Estonia*. In February 1995, the nations of Estonia, Finland, and Sweden entered into an international agreement to treat the wreck site of the ferry *Estonia* as a grave site for the 852 people that died in that disaster.³² Diving with the intent of recovering victims or property is subject to criminal penalties. Another example of laws treating shipwrecks as grave sites is the previously mentioned Titanic Maritime Memorial Act, which states that only limited exploration and research should be permitted and that no physical disturbance or salvage of the site should be conducted unless permitted by international agreement. The developing consensus appears to be that recovery of artifacts from the debris field of the *Titanic* should be allowed, but that recovery of the hull segments should be prohibited. Even entry into the hull segments should not be permitted without substantial public interest justification. Thus, the in situ historic preservation policy is consistent with the policies treating the UCH site as a grave site. Salvage law does not address or even consider this interest.

If the shipwreck is a warship, the associated sovereign may have special rules and policies regarding the treatment of the site. For example, the United States Navy treats shipwrecks, such as the *Arizona* (sunk in Pearl Harbor during World War II), as war grave sites and prohibits the recovery of artifacts and human remains. Public access to war graves also may be restricted. While such restrictions are consistent with the in situ preservation policy, any public access restrictions to the grave site may be in conflict with the use of the site for other purposes. Of course, there also are multiple uses

³²See further Parliament Backs Ban on Diving Around Sunken Ferry, Agence France-Press, June 1, 1995, available at 1995 WL 7811073.

of the UCH site which are in conflict with in situ preservation (e.g., commercial fisherman may prefer to have shipwrecks removed to protect their fishing gear). The potential conflicts between multiple users of the site are more appropriately addressed through environmental and historic preservation laws than they are through salvage law, which focuses on the commercial interests in the recovery of commodities and not on resource management issues.

F. Rewarding Salvors While Maintaining UCH Sites

If a site is to be preserved in situ, the problem arises as to how the explorers who discovered the UCH site are to be rewarded. One solution would be to establish a system whereby the discoverers are paid fees for access to the site for commercial purposes, including a percentage of the returns of any commercial use of the site by others. A fee schedule could be developed that would include the appropriate factors of equity used in determining awards under the maritime law of salvage. Legal questions about the schedule could be addressed by the admiralty courts. If the commercial access is non-intrusive, then such awards would not appear to conflict with historic preservation laws. As such, the discoverer could reap financial rewards without actually having to physically salvage artifacts. This also would be consistent with an in situ preservation policy. However, to the extent such a system relies on restricting public access to the UCH site, there may be conflicts with the international right to free navigation and other laws.

Under several historic preservation statutes, the public interest determinations for recovery are not strictly limited to threatened UCH sites. There are provisions for recovery of the time capsule even if it is not threatened, provided the recovery is determined to be in the public's interest. Regardless, perhaps the best area for compromise between salvors and archaeologists are at UCH sites which are scientifically determined to be threatened by humans or the natural environment. Once there is consensus that the time capsule should be recovered or salvaged, then the focus turns to the scientific standards and methodologies to be applied to ensure that all of the information in the time capsule is preserved for present and future generations. A major obstacle to future compromise between salvors and archaeologists is the track record of past salvage efforts, which have been unscientific, resulted in the destruction of the UCH site, and harmed the natural environment.

III THE DANGERS OF UNSCIENTIFIC EXPLORATION AND EXPLOITATION

A. *Looking for Treasure*

Commercial ventures need to maximize the profit potential for the company and their investors. This results in the use of methodologies that minimize the costs for search, salvage, conservation, and curation. Unfortunately, this cost-effective approach has been taken at the expense of science, history, culture, and natural resources. Instead of investing in preliminary research and the scientific surveys needed to assess the environment and identify potential shipwrecks, too many exploration projects have used random search techniques that involve blasting holes in the seabed. The lack of a precautionary scientific approach results in the destruction of our natural and cultural heritage.

1. *Pre-Survey Work*

Before an archaeological research expedition goes forward, there generally should be a detailed study of the existing literature, records, and data regarding the shipwreck and the surrounding natural environment. The results help narrow the areas for survey. A scientific survey of the seabed would be scrupulously planned and utilize only non-intrusive remote sensing equipment so as to avoid harm to the potential UCH site and surrounding marine environment. This is in stark contrast to the destructive treasure hunting practices that have been conducted in coastal waters over the past three decades to rapidly uncover sites in the hopes of finding gold, silver, and other treasure. Treasure hunting too often has involved little, if any, pre-survey studies as well as highly intrusive survey techniques.

2. *Search Methods*

In the Florida Keys (and elsewhere), the exploration by treasure hunters too often has been based on hunch and rumor, coupled with the use of equipment—such as explosives and propeller-wash deflectors—that quickly blows holes in the seabed. This approach is more akin to strip mining than it is to archaeological research and has destroyed countless natural and cultural resources, as well as the contextual information contained in these time capsules.

Kane Fisher, for example, has proudly described himself as a "wildcatter." The court found that he had blown several hundred holes in the seabed and

destroyed at least 1.63 acres of seagrass.³³ Similar destruction of natural resources has been caused by treasure hunters throughout South Florida and around the world.

3. *Expanding the Use of Scientifically-Sound Procedures*

As commercial treasure salvage has become more professional, more advance research and planning is being conducted. If there is agreement that it is in the public's interest for the time capsule to be recovered, then there would appear to be room for a compromise on the role of the private sector. Salvors should be required to use scientific methodology for surveying, researching, recording, and reporting and do so under the supervision of the professional scientific community. This appears particularly viable in the case of deep water explorations, which generally involve large expenditures of human resources and financial capital. The scientific approach used on deep water wrecks may need to be distinguished from those in shallower waters and even land-based archaeology. However, there is no room for compromise on the use of destructive technologies in exploration activities. The scientific community likely will remain skeptical at any proposed compromise with salvors because the commercial profit motive generally results in decisions at the expense of preserving the historic resource and related information. Thus, the focus on commercial profit also will need to be addressed in any compromise developed between salvors, archaeologists, and other user group representatives.

B. Recording Provenance Data

To maximize profit, salvors need to minimize expenses. Salvors are not required to use a professional archaeologist in salvage operations or otherwise.³⁴ Nor are salvors generally required to meet any archaeological standards to obtain salvage awards.³⁵ In a few cases, admiralty judges have considered the recording of archaeological information in their deliberations. In the *Central America* case, for example, the court factored the recording of archaeological information into the salvage award.³⁶ In a salvage case concerning the *Titanic*, the court granted exclusive access and photographic rights to the salvors because they intended to keep the artifacts

³³*Fisher*, 977 F. Supp. at 1195-97.

³⁴See *Cobb Coin*, 549 F. Supp. at 558.

³⁵See *Platoro Ltd. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981), *aff'd* in part and *vacated* in part, 695 F.2d 893, 1984 AMC 2288 (5th Cir.), cert. denied, 464 U.S. 818 (1983).

³⁶See *Columbus-America*, 974 F.2d at 468.

together in a collection.³⁷ Such considerations, however, are not the norm for admiralty courts.

In *Cobb Coin*, the court did instruct the salvors to record the provenance data.³⁸ Such data was defined by the court to be "the exact location, depth, and proximity of each item found with respect to the other items."³⁹ Unfortunately, this order does not appear to be the practice, even on the UCH sites within the court's jurisdiction. Treasure salvors in South Florida are not uniformly required to record such information. And when they do record provenance data, they merely note the coordinates of the blow holes they believe the artifacts came from. This methodology does not meet the scientific standards necessary for preserving the time capsule information. The UCH site is being destroyed by "salvage" and little, if any, contextual information is being preserved.

Some salvors working in sections where there are remains of the hull have recorded more detailed information, but most fail to preserve all of the provenance data that the UCH site contained. Duncan Mathewson, the archaeologist who has worked for Mel Fisher over the past several decades, explains in his book about the *Nuestra Senora de Atocha* how the salvors damaged that UCH site through the use of a propeller-wash deflector over a section of the hull in their rush to recover more treasure.⁴⁰ The careful scientific approach increases the costs of the salvage expedition which creates problems for a commercial venture.

Another cost problem for commercial ventures is the discovery of artifacts which have little or no commercial value. Too often these artifacts are treated as junk, as opposed to what they are—irreplaceable archaeological resources. It is doubtful that the contextual information of the location of such artifacts is being recorded.

IV DISPOSITION OF THE UCH

While there appears to be a trend in the commercial salvage of treasure toward a more scientific approach, because of the need to be cost-effective artifacts may be left on the seabed, "lost" in the conservation process, or otherwise not fully conserved or curated. With regard to artifacts which have been salvaged, conserved, and curated, we reach perhaps the most difficult

³⁷See *Marex*, 952 F. Supp. at 829.

³⁸See *Cobb Coin*, 549 F. Supp. at 559.

³⁹Id. at 558.

⁴⁰See D. Mathewson, *Treasure of the Atocha* 110–11 (1986).

potential conflict between salvors and archaeologists: what is to be done with the salvaged artifacts and archaeological information? Will the collection be preserved intact for present and future research, or will the artifacts be sold or disseminated to investors? Will there be a report of the archaeological information which at least replicates the UCH site, and preferably interprets the information?

A. Sale of Artifacts

Under the laws and policies of historic preservation, the artifacts, reports, studies, and underlying data must be kept together in a collection for research, education, and other public uses. The sale of publicly-owned archeological resources is specifically prohibited by the ARPA.⁴¹ These legal prohibitions are consistent with the canons of professional ethics of archaeologists.⁴²

B. Management of Artifacts

Significant archaeological collections need to be maintained intact for present and future research as well as other public access. However, perhaps all or part of a collection could be loaned out for commercial uses which are consistent with historic preservation, provided that the collection can be brought back together when necessary for specific research and education projects. Presumably, historic preservationists find it necessary or appropriate to periodically loan and even transfer their collections. Such transactions may involve the sale of all or part of a collection. Museums may charge fees for public and private access. Perhaps there is even some profit to be made from the display of all or portions of a collection.

The practices of public museums regarding the sale, transfer, and disposition of objects which are determined to be of little or no archaeological significance may provide guidance on the difficult issue regarding the disposition of salvage artifacts. If a collection is kept intact and is available to the public for research, education, and viewing enjoyment, the purposes of the FAP would appear to have been met.

⁴¹See 16 U.S.C. §§ 470cc(b)(3), 470ee.

⁴²See further Calvin R. Cummings, *A Matter of Ethics*, in *Proceedings of the 14th Conference on Underwater Archaeology* (1986).

There are state programs and at least one federal program which permit the sale of public resources under certain circumstances. The Florida Keys National Marine Sanctuary Submerged Cultural Resource Management Plan ("FKNMS-SCRMP") has been determined by NOAA to be consistent with the FAP. As such, the FKNMS-SCRMP may be a model for other multiple use UCH management regimes.

1. Multiple Use Resource Management Regimes

Under the FKNMS-SCRMP, NOAA permits public and private sector recovery when it is determined to be in the public interest. The research and recovery is accomplished through a sanctuary permit system which considers the public interest in natural, as well as cultural, resources. The permit process also considers the interests of commercial salvors, the tourist industry, researchers, educators, and all other users of the site. NOAA, the State of Florida, and the Advisory Council on Historic Preservation agreed that it was in the public's interest to protect and manage the UCH through environmental and historic preservation laws rather than the maritime law of salvage.

The FKNMS-SCRMP integrates the multiple use management concept consistent with the ASA and the NHPA. The requirements of the plan and permits are consistent with the professional archaeological standards of the FAP as well as the standards contained in the Charter of the International Council for Monuments and Sites. Where the plan may be viewed as a departure from historic preservation by some is the availability of private commercial recovery of the UCH, as well as the sale or transfer of objects determined to be of little or no archaeological value. After completion of the recovery project, including a final report, unworked materials such as gold, silver, and precious gems may be awarded to the commercial salvor. Even worked materials, such as bullion and coins, which are determined to no longer be archaeologically significant because they have been properly drawn, photographed, or otherwise recorded and reported may be awarded to the commercial salvor. If the salvor has served the public interest by preserving and maintaining the other historically significant materials, the plan allows for a salvage-type award.

For the private recovery of archaeological resources to be determined to be in the public interest, historic artifacts must be preserved and maintained in a collection for the general public through museums and other institutions of public access. The FKNMS-SCRMP is a compromise guided by the one reached by Congress in the ASA. Consistent with that compromise, the law of salvage does not apply to the UCH which is subject to the ASA and the

NMSA. By the same token, the law of salvage should not apply to other UCH sites.

2. *Salvage Law Regime*

Under the commercial salvage regime, artifacts generally are sold or distributed to investors, thereby resulting in their dispersal. Some professional salvors have sought to recover financial rewards through the museum display of certain artifacts. The salvors of the *Titanic* have pledged to keep the collection together and not sell any artifacts. They have sold pieces of coal from the *Titanic*, but apparently this was done after consultation with archaeologists who determined that the pieces had no archaeological value. The salvors apparently also have recorded archaeological information necessary to prepare a report. However, there are no commitments in place regarding the preparation of the report. The salvors have conducted conservation and curation on salvaged artifacts. Whether this case can provide a model for a compromise between salvors and historic preservationists remains to be seen; it is doubtful, however, that such a compromise can be as readily accomplished under salvage law as already has been accomplished under environmental and historic preservation multiple use management regimes. As noted above, there are several legal and policy obstacles to developing a compromise between salvors and archaeologists under salvage law.

V

PROBLEMS AND CONCERNS WITH THE MANAGEMENT OF THE UCH UNDER THE MARITIME LAW OF SALVAGE

Maritime salvage law has been used effectively to address private disputes over shipwrecks and determine salvage awards in recent marine casualties. As discussed above, there are many conflicts between the public interest in commercial salvage, the public interest in historic preservation, and other public and private interests in the UCH. Salvage law is too narrowly constructed to address all of these multiple and sometime conflicting public interests in the UCH. Although some salvage cases have considered archaeological concerns, there is no uniform application of these scientific concerns within the districts which have sometimes applied them, much less any uniform application in admiralty courts across the country. Even when a particular court has required archaeological recording, such recording has not met professional scientific standards. Nor is there any requirement for professional oversight. If the information recorded is inadequate, there is no remedy or punishment under salvage law. Salvage law does not adequately

address the concerns of historic preservation or the other multiple uses of the UCH.

Salvage law focuses on commercial recovery. It does not require the consideration of other uses and interests in the UCH site, such as boating, diving, fishing, tourism, history, science, and education. Salvage law also has failed to consider the impact on natural resources, as well as the grave site issue. There are no civil or criminal penalties for the looting or pirating of the UCH by salvors. To the contrary, salvage law has created an environment in which such activities are perceived as legitimate. This is not to fault the individual efforts of salvors or the admiralty judges who have creatively tried to fill the gaps in the laws protecting the UCH with salvage law. However, the problems presented in comprehensive UCH site management are larger and more complex than the ones salvage law was designed to address. Admiralty courts are ill-suited for managing public resources which have broad and often conflicting multiple uses, policies, and interests. The decision-making process for UCH management should be subject to the same administrative rules and procedures as other environmental resource management regimes.

Under the United States Constitution, the powers of the federal government are separate and distinct. The executive branch, not the judiciary, manages public resources. For the UCH, the role of the courts should be to resolve disputes of law between parties and to provide a check and balance on the executive branch's management of the UCH and other resources. The courts should ensure that agencies are acting reasonably and in compliance with the laws promulgated by the legislative branch. When the courts begin to perform resource management, however, the delicate system established by the Constitution is upset. Under salvage law, the courts may appropriately resolve disputes between parties. However, as efforts are made to use salvage law to address the proper management of the UCH, it becomes apparent that the rules and their enforcement are functions that should be performed by the executive branch, not the judicial branch.

VI CONCLUSION

The battle between salvors and archaeologists will continue. However, the trend in domestic and international law is toward protecting the UCH under historic preservation laws and precluding the application of the maritime law of salvage and the common law of finds. A compromise can be reached between these diverse and conflicting interest groups. In such a compromise,

recovery of the UCH by the private sector should be permitted, consistent with the underlying scientific purposes of historic preservation. But because salvage law and the admiralty courts are ill-prepared to manage UCH sites, given all of the diverse and often conflicting public interests attached to such sites, the compromise should be reached under environmental and historic preservation laws which incorporate a multiple use management concept.