



Case Western Reserve Journal of International Law

Volume 22 | Issue 1

1990

Shipwreck Legislation and the Preservation of Submerged Artifacts

Timothy J. Runyan

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Timothy J. Runyan, *Shipwreck Legislation and the Preservation of Submerged Artifacts*, 22 Case W. Res. J. Int'l L. 31 (1990)
Available at: <https://scholarlycommons.law.case.edu/jil/vol22/iss1/2>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Shipwreck Legislation and the Preservation of Submerged Artifacts

*Timothy J. Runyan, Ph.D.**

INTRODUCTION

This article will examine the relationship of the law to a particular type of art: a submerged ship and its contents. Today, shipwrecks are a principal object of those archaeologists who seek to expand our knowledge of history through a study of submerged material culture.¹ Their enthusiasm for retrieving and preserving that culture has spawned the field of maritime or underwater archaeology. It has also spawned a debate over the ownership of submerged artifacts. An examination of maritime or admiralty law and its relationship to shipwrecks forms the core of the first part of this Article and is followed by an analysis of the conflict which has arisen between preservationists and commercial or treasure salvors. It will be argued that the enactment of the Abandoned Shipwreck Act (1987) attempted to resolve issues of ownership and preservation, but it has not completely resolved these issues. The conclusion describes a proposed model shipwreck preserve in the Great Lakes which illustrates how the power granted to the states by the Abandoned Shipwreck Act may benefit the preservation and analysis of submerged cultural resources.

Should an historic artifact retrieved from a shipwreck be treated with the same respect as one unearthed by an archaeological dig on land? Most observers would respond that it should, but until recently the law gave no clear answer. The Abandoned Shipwreck Act was an attempt to resolve the question of ownership of sunken vessels in waters of the United States. This law, signed by former President Reagan on April 28, 1988,² addressed an issue of significance to a broad range of interested

* Professor of History at Cleveland State University. The author has written extensively on maritime history. He is an officer of the International Commission on Maritime History, past President of the North American Society for Oceanic History and President of the Great Lakes Historical Society. The author wishes to thank Mr. James P. Delgado, Robert Grenier, Anne Giesecke and especially Laurie Andrijeski for their assistance in the preparation of this article.

¹ It is estimated that there are 50,000 shipwrecks located in the navigable waters of the United States. An estimated 5-10% are of historical value. HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, ESTABLISHING TITLE OF STATES IN CERTAIN ABANDONED SHIPWRECKS, H.R. REP. NO. 514, 100th Cong., 2d Sess. pt. 1 (1988) [hereinafter H.R. REP. NO. 514].

² Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (1988). See *Appendix*

parties: historical preservationists, sport divers, dive boat operators, diving instructors, underwater archaeologists, conservators, commercial or treasure salvors, local, state, and federal agencies, and environmental biologists.³

The law was a response to an increasing public awareness of the value of shipwrecks to the historical community. This public awareness was heightened by two developments. First, the recent media attention given to the seas and inland waters acting as storehouses of artifacts of significant value to the historical record and of great value to the individual salvor or finder increased.⁴ Second, advances in the technology of diving and remote sensing equipment which facilitates discovery and access to shipwrecks. Salvors in search of wrecks for commercial purposes, often undertaken by the vessel owners themselves, are now complemented by sport divers, treasure hunters and others who can afford the sensing and diving equipment necessary to locate and reach submerged wreck sites.

However, the growing popularity of diving on the sites of sunken ships has led to concern regarding the disturbance and plunder of vessel sites of historical and cultural significance. Historians, archaeologists, and others in the public sector have joined in expressing their concern that submerged cultural resources not be exploited. They have argued vehemently that qualified authorities must assess the shipwrecks to determine their significance and contribution to the national and international heritage, and that only after this determination has been made should a wreck site be abandoned to the public.⁵

On the other hand, treasure seekers, sport divers, and others have argued for free access to all shipwrecks.⁶ In particular, the most outspoken have called for a *laissez faire* policy which has existed *de facto* since control of wrecks was a power reserved to admiralty law.⁷ Yet, under admiralty law the plunder of wrecks by salvors or treasure seekers has

A. The first Abandoned Shipwreck Act, H.R. 3194, was proposed in 1983. It passed the House in 1984, but failed in the Senate. In 1987, Bill S. 858 was passed in the Senate (Cong. Rec. S18,509, daily ed. Dec. 19, 1987), and in the House on April 13, 1988 (Cong. Rec. H1488, daily ed. April 13, 1988) where the vote was 340 to 64.

³ *Id.*

⁴ Enthusiasm for treasure hunting rose with the discovery of Spanish treasure ships off Florida, among others, the Spanish plate fleets and the *Nuestra Señora de Atocha*. For the historical record, see G. BASS, SHIPWRECKS OF THE AMERICAS: A HISTORY BASED ON UNDERWATER ARCHAEOLOGY (1988).

⁵ See, e.g., Mayer, *The Law of Shipwrecks: Conflict and Controversy*, PRESERVATION L. REP. 2072 (1983); For international law, see: Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM. J.L. & ARTS 353 (1988).

⁶ Fisher, *The Abandoned Shipwreck Act: The Role of Private Enterprise*, 12 COLUM. J. L. & ARTS 373, 376 (1988).

⁷ U. S. CONST. art. III, § 2.

resulted in the destruction of significant historical ships and the loss of important artifacts to the public.⁸ The story which the salvors and wrecks have to tell is unique in many instances since shipwrecks are time capsules containing materials from an earlier age frozen in location at the moment of their sinking. The discovery of an undisturbed wreck, such as the Civil War ironclad USS *Monitor* or Henry VIII's flagship the *Mary Rose*, which sank in 1545 and was raised in 1982 with over 15,000 artifacts, is comparable to a discovery on land of an important early frontier settlement frozen in time by a catastrophic natural event such as a volcanic eruption which buries the site and preserves it.⁹

Rather than allow the contents of significant historical wreck sites to be excavated by private investors for personal financial benefit, frequently the practice under admiralty law,¹⁰ the preservationist community has sought to have such sites placed under the control of a more protective agency. The Abandoned Shipwreck Act places the responsibility for shipwrecks in the hands of the states and territories, except in the case of U.S. or international government vessels and a few other special instances.¹¹ The federal law is superseded by state law as a means to effect the assessment and conservation of submerged cultural resources. The law impacts cultural artifacts and art in all aspects from coins to carvings. Yet, the law was not enacted without a fight, and the conflicting arguments define positions which directly impact claims upon and disposition of valued historical artifacts.¹²

The right to claim a ship as "wreck of the sea" has roots which reach deep into English law. While the customs surrounding the right of wreck can be traced back to the Anglo-Saxon era,¹³ the more immediate source is found in the laws of Oléron. These laws were the decisions of *jurats* on the Ile de Oléron off the coast of La Rochelle in the Bay of Biscay.¹⁴ This popular stop along the trade routes became a court in

⁸ H.R. REP. NO. 514, *supra* note 1.

⁹ Watts, *The Civil War at Sea: Dawn of an Age of Iron and Engineering*, in SHIPWRECKS OF THE AMERICAS 207 (1988); M. RULE, THE MARY ROSE: THE EXCAVATION AND RAISING OF HENRY VIII'S FLAGSHIP (1982).

¹⁰ The disturbance of shipwreck sites by treasure hunters was a principal factor in the support of the Abandoned Shipwreck Act. The National Maritime Historical Society filed a protest with Sotheby's in New York for auctioning off artifacts taken from the *Wydah* wrecked off Cape Cod. Letter by Peter Stanford, President, National Maritime Historical Society, to Michael Aislie, President, Sotheby's (May 31, 1989). A similar protest was filed over the sale of artifacts at Christie's taken from the HMS *Feversham* in Canadian waters. Letter by Peter Stanford, President, National Maritime Historical Society, to Christopher Burge, President, Christies (June 1, 1989).

¹¹ Pub. L. 100-298, 102 Stat. 432, § 3(c) (1988).

¹² Principal opponents have been commercial salvors, sport divers, and treasure hunters. See Fisher, *supra* note 6.

¹³ Hamil, *Wreck of the Sea in Medieval England*, in 6 UNIVERSITY OF MICHIGAN HISTORICAL ESSAYS 1-24 (A.E.R. Boak ed. 1937).

¹⁴ For the Law of Oléron, see 2 P. STUDER, *Oak Book of Southampton* 54-103 (1910-11).

which mariners sought to resolve disputes. From the late twelfth century, the laws were expanded to many other ports and became common to most sailors in the Northern Seas of Europe.¹⁵ Ultimately they were adopted by England and enforced by the Admiralty Court.¹⁶

The jealousy of the English common law courts to an admiralty court capable of rendering equity led to hot dispute which was won by the common law lawyers who placed restraints upon the Admiralty Court.¹⁷ Nonetheless, the court helped define property lost, abandoned, or left in or on the sea. These definitions include the shipwreck itself and further categories of property: flotsam, jetsam, and lagan. Wreck¹⁸ was defined as property lost at sea which came to shore. Flotsam¹⁹ was property lost at sea and still afloat. Jetsam²⁰ was sunken goods thrown overboard to lighten and save the ship. Lagan²¹ was buoyed jetsam, goods tossed overboard but with an identifying mark so that they might be recovered. In the English statutes of 1275, a wreck which washed upon shore was retained by owners as long as a man, dog, or cat escaped alive.²²

In subsequent centuries, the laws covering wrecks and goods lost or abandoned at sea altered some, but one common element was the sovereign's right to a portion.²³ In more recent times the Commissioner of Internal Revenue acts on behalf of the sovereign. Early admiralty law is fascinating in its remedies and scope. The Laws of Oléron said nothing regarding wrecked ships, but did prescribe the loss of the right hand and left eye of a pilot who wrecked a ship while bringing it into port.²⁴ Under laws dating to the thirteenth century, the sovereign could return wreck or goods to the owner if a claim was made within a year and a day. Thereafter they were treated as abandoned and reverted to the sovereign.²⁵ In the 1798 *Aquila* case, the vessel was returned to the owners, but the cargo was retained by the King who was supported by the court.²⁶ By 1837, the finder of goods could not claim ownership on the

¹⁵ 4 T. TWISS, *THE BLACK BOOK OF THE ADMIRALTY*, (1871-76) includes examples of the definitions of the laws.

¹⁶ Runyan, *The Laws of Oléron and the Admiralty Court in Fourteenth Century England*, 19 AM. J. OF LEGAL HIST. 95 (1975).

¹⁷ *Id.* at 109-10.

¹⁸ Sir Henry Constable's Case, 5 Co. Rep. 106 (1601), reprinted in 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 560, n. 3 (1922).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Statutes of Westminster, 1272, 3 Edw., § 4.

²³ *Id.*

²⁴ Rolls of Oléron, see *supra* note 15, vol. 2, at 457.

²⁵ The Statutes of Westminster, *supra* note 22.

²⁶ The *Aquila*, 165 Eng. Rep. 87 (Adm. 1798).

basis of occupancy.²⁷ The lord of a manor claimed possession of two casks which washed upon his property, but the Crown asserted that the goods were still afloat when discovered and so belonged to the sovereign whether they be derelict, flotsam, jetsam, or lagan.²⁸ Riparian rights did not apply.²⁹

The distinction between ownership and possession became an issue in the 1924 case, *Tubantia*.³⁰ In that case, a Dutch vessel sank in the North Sea in 1916. Six years later efforts were made to raise her and were hindered by others who wanted to establish a claim. An injunction was sought and obtained on the claim that the plaintiffs had sufficient use and possessory rights. The court further declared that the vessel had been abandoned, but that the original owner could claim possession and salvage rights.³¹

English common law decisions and American courts have supported the claims of the owner in most cases involving wreck.³² While the English solution to the question of possession was resolved by setting the time limit of a year and a day for filing a claim, the U.S. courts determined that possessory rights to a ship or its contents were not forfeited until the property was abandoned.³³ Abandonment, in this instance, refers to wreck, flotsam, jetsam, or lagan where all reasonable attempts at recovery have ceased. The passage of time does not necessarily mean that the property has been abandoned as long as the owner can show continuous intent to salvage.³⁴ However, there is a distinction between the English and American rules. Under the American rule, the finder, not the sovereign, becomes the owner if no valid claim is made by the owner.³⁵

Identifying the ownership of abandoned property can become com-

²⁷ *The King v. Two Casks of Tallow*, 166 Eng. Rep. 414 (Adm. 1837).

²⁸ *Id.*

²⁹ Riparian rights. The rights of the owners of lands on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc. Term is generally defined as the right which every person through whose land a natural watercourse runs has to benefit of stream as it passes through his land for all useful purposes to which it may be applied. BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

³⁰ *The Tubantia*, 18 Lloyd's Rep. 158 (Adm. 1924).

³¹ The English court protected the first salvor who had actual possession of only a portion of the vessel. Recovery and claim to a portion extended their right to the unrecovered portion as well the court determined, since the wreck was to be treated as a whole unit even though in separate portions. *Id.* at 160.

³² This practice can be found in Roman and Medieval law. See Hamil, *supra* note 13, at 3 & n.9.

³³ See, e.g., *Eads v. Braselton*, 12 Ark. 499 (1861); *Wyman v. Hurlburt*, 12 Ohio 81 (1834).

³⁴ *The Port Hunter*, 6 F. Supp. 1009 (D. Mass. 1934).

³⁵ The Federal district courts have original jurisdiction over all admiralty and maritime cases by Article III, Section 2 of the Constitution and 28 U.S.C. § 1333. The common law principles of admiralty including the law of finds and the law of salvage are applied by the courts.

plicated by claims involving cargo on the seabed without a ship, since it can be argued that such property is not a wreck site. In *Murphy v. Dunham*,³⁶ a cargo of coal was lost in Lake Superior. The federal court reasoned that because the cargo could not be considered wreck, flotsam, jetsam, or lagan it must be property lying at the bottom of the lake awaiting its original owner.³⁷

The case of *United States v. Tyndale*³⁸ demonstrates the complexities of "finders keepers" laws. In this case, money was found on a body floating on the high seas.³⁹ Both the United States government and a Massachusetts probate court official claimed the money.⁴⁰ The court in *Tyndale* reasoned that there were two issues. First, Congress could enact legislation that would certify that the money belonged to the United States. Second, in the absence of such legislation the money belonged to the finder.⁴¹ A further case illustrates the difficulties in American law where a finder, while attempting to gain the possession of submerged property, is interrupted by a rival claimant. *Delkyn v. Davis*⁴² concerns a British frigate which sank in New York's East River in 1781. The plaintiffs asserted that they had attached chains and pulleys to the frigate with the intention of raising her and that the defendants had impeded their efforts by anchoring near the wreck.⁴³ The defendants claimed that they had title to the adjoining shoreline and had raised 22 guns from the ship in 1816-17, four years before the plaintiffs began their operation.⁴⁴ The court refused to grant injunctive relief because it was uncertain who owned the frigate.⁴⁵ The court ignored the issue of possessory right.⁴⁶

The Supreme Court of Florida provided one of several rulings which challenged the established law in *State v. Massachusetts Co.*⁴⁷ The State of Florida attempted to enjoin The Massachusetts Company in a joint salvage operation of the battleship *Ervin*, sunk during target practice in 1922. The United States government had repudiated all claims to the ship. The defendants claimed salvage rights and obtained a permit from the Army Corps of Engineers to begin work.⁴⁸ The Massachusetts Co. marked the ship with lines and buoys, at which point the State of Florida

³⁶ 38 F. 503 (E.D. Mich. 1889).

³⁷ *Id.* at 509.

³⁸ 116 F. 820 (1st Cir. 1902).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 821-824.

⁴² 1 Hopk. Ch. 135 (1824).

⁴³ *Id.*

⁴⁴ *Id.* at 136.

⁴⁵ *Id.* at 142.

⁴⁶ *Id.*

⁴⁷ 95 So. 2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957).

⁴⁸ *Id.* at 903.

intervened. The state asserted that, as sovereign, it had a proprietary interest in the vessel.⁴⁹ The court sided with the state⁵⁰ citing considerable precedent in English law.⁵¹ The reasoning of the court was that if the vessel were abandoned and derelict at common law, it would belong to the crown in its jurisdiction in admiralty at the end of one year and a day. Since the wreck was within the territorial waters of Florida, it belonged to the state in its sovereign capacity.⁵² Arguments put forth by the court went back to the 1275 Statute of Westminster which had provisions regarding wreck,⁵³ thereby ignoring American law on shipwreck. Yet the ship was not actually wreck, since it was purposely sunk. The federal statutes giving the United States power over derelict ships merely allow the Secretary of the Army (through the Corps of Engineers) to remove any craft which endangers or obstructs the navigable waters of the United States.⁵⁴ These provisions do not award ownership to the federal government. The costs of the removal may be charged to the owner of the craft, and the United States is not responsible for any damage done to the craft during its removal.⁵⁵

Cases involving shipwrecks over the past decade have resulted in conflicts between the authority of state governments and the federal court. Most federal court actions supported state claims to shipwrecks until the case of *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel* ("*Cobb Coin II*").⁵⁶ This 1982 decision by the District Court for Southern Florida determined that the court held jurisdiction over a shipwreck in state waters.⁵⁷ The court ruled that the Submerged Lands Act of 1953⁵⁸ transferred title to lands and their natural resources beneath navigable waters to the states, but that title to abandoned wreck sites was not included.⁵⁹ The Cobb Coin Company was able to claim salvage rights over the wreck.⁶⁰ Public interest was to be served by a portion of the wreck, including artifacts, being awarded to the state.⁶¹

The *Cobb Coin II* decision gave federal courts under admiralty juris-

⁴⁹ *Id.* at 904.

⁵⁰ *Id.* at 907.

⁵¹ *Id.* at 904-907.

⁵² *Id.* at 907.

⁵³ The Statutes of Westminster, *supra* note 22.

⁵⁴ 42 U.S.C. §§ 1301-15 (1982 & Supp. V 1987).

⁵⁵ 3 U.S.C. §§ 414-415 (1964).

⁵⁶ 549 F. Supp. 540 (S.D. Fla. 1982); *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981) ("*Cobb Coin I*").

⁵⁷ *Id.* at 548.

⁵⁸ 43 U.S.C. §§ 1301-15 (1982 & Supp. III 1985).

⁵⁹ *Cobb Coin II*, 549 F. Supp. at 549.

⁶⁰ *Id.* at 561.

⁶¹ *Id.*

diction the right to award title over shipwreck artifacts to private salvors while exempting them from state regulations requiring salvors to protect shipwrecks of archaeological or historical significance.⁶² A related case heard in Texas in 1981 raised the question of competence on the part of salvors to do underwater investigations for the purpose of determining the historical value of a submerged shipwreck and its contents.⁶³ The court refused to hold salvors to that standard which was sought by the state in deciding that case.⁶⁴

Decisions subsequent to *Cobb Coin II* left unclear the power of the states to protect shipwrecks. The U.S. District Court for Maryland in *Subaqueous Exploration and Archaeology Ltd. v. The Unidentified, Wrecked and Abandoned Vessel* (1983) found for the state.⁶⁵ The court dismissed the action declaring it lacked jurisdiction.⁶⁶ The court ruled that the salvor's claim was in fact a suit against the state.⁶⁷ The eleventh amendment prevents the federal courts from hearing an action against a state without its consent.⁶⁸ Those federal courts concerned with the treatment of historic shipwrecks upheld the primacy of admiralty law, but demanded a sensitivity to archaeological and historical values on the part of salvors.⁶⁹ In a case where the federal court chose not to exercise jurisdiction, the state court elected to apply admiralty law instead of state law.⁷⁰

The confusion presented by these cases is a consequence of the United States never having claimed title to historic shipwrecks. Sovereignty over a shipwreck in admiralty law is claimed by a statutory act.⁷¹ If there is no statutory claim, then a salvor may claim the wreck. Some states interpreted the 1953 Submerged Lands Act as a transfer of sovereignty by the federal government to the states.⁷² Yet as the *Cobb Coin II* cases have shown, the courts have not always supported this viewpoint.

⁶² *Cobb Coin II*, 549 F. Supp. at 548-49.

⁶³ *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981).

⁶⁴ *Id.*

⁶⁵ 577 F. Supp. 597 (D. Md. 1983).

⁶⁶ *Id.* at 603.

⁶⁷ *Id.*

⁶⁸ The U. S. District Court of Massachusetts invoked the eleventh amendment also in *Maritime Underwater Surveys, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, No. 82-3553, slip op. at 6 (D. Mass. 1983), *aff'd*, 717 F.2d 6 (1st Cir. 1983).

⁶⁹ *Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985). In this case the ship was embedded on state property. See also *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) involving a wreck at Biscayne National Park.

⁷⁰ *Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E. 2d 549 (1988).

⁷¹ See *supra* note 35.

⁷² 43 U.S.C. §§ 1301-15 (1982 & Supp. V 1987).

The newly passed Abandoned Shipwreck Act gives the states title to shipwrecks which are embedded in submerged state lands or coralline formations, or which are on submerged land of a state and are eligible for inclusion in the National Register of Historic Places under the National Historic Preservation Act.⁷³ The clear authority of the state to wreck sites will reduce expensive litigation on jurisdictional issues and permit states to establish their own legislative guidelines. Maryland was the first state to do so through the Maryland Historical Trust, however, preservationists have concerns with this law because it enables any diver to remove artifacts from wreck sites as long as they are removed by hand or with hand tools.⁷⁴ The other features of the law are protective and establish both an administrative body and a review body to assess shipwrecks to ascertain their historical significance before salvage or further disturbance to a site occurs. Other states have followed this lead, and it is anticipated that some underwater preserves will be established.⁷⁵

One such preserve is proposed in Lake Erie near Cleveland, Ohio. The Cleveland proposal is a useful example of the influence of legislation and the interests of preservationists. A study done in 1987 identified thirty-three shipwrecks in an area from Cleveland about thirty miles west to Vermilion, Ohio and extending north to the international line with Canada.⁷⁶ After careful examination of most of the wrecks, it was decided that many of these vessels were worthy of protection as valued historical artifacts. To prevent extensive pillaging, an effort is currently underway to create an underwater state park as a means of protecting the shipwrecks. The draft of the bill is presently under consideration by a committee and hearings are planned in order to gain public participation.⁷⁷ The Abandoned Shipwreck Act anticipated that underwater preserves might be created.⁷⁸ The Act encourages the states to create underwater parks and protected areas. Funding for the study, interpreta-

⁷³ Pub. Law No. 100-298, § 6(a), 102 Stat. 432 (1988). For a general discussion see Giesecke, *The Abandoned Shipwreck Act: Affirming the Role of the States in Historic Preservation*, 12 COLUM. J.L. & ARTS 379, 387 (1988).

⁷⁴ Interview with Paul Hundley, State Underwater Archaeologist, Maryland Historical Trust (Oct. 20, 1989).

⁷⁵ These states include Florida, Vermont, Michigan and South Carolina. In a survey conducted by the U.S. National Park Service, 22 states indicated their preservation plans include consideration of abandoned historic shipwrecks. Aubry, Delgado & Keel, *Implementation of the Abandoned Shipwreck Guidelines*, 1 OCEANS '89 147, 148 (1989).

⁷⁶ G. Metzler, *Underwater Shipwrecks in Lake Erie, Cleveland to Vermilion: A Historical Resource* (1987) (unpublished M. A. thesis, Cleveland State University).

⁷⁷ The proposed Ohio Bill is sponsored by Ohio Representative John V. Bara. The working committee includes two representatives of sport divers, an archaeologist, a maritime historian and historic preservation officials. L.S.C. 118 0925, 118th General Assembly, Regular Session (1989-90).

⁷⁸ Pub. L. No. 100-298, 102 Stat. 432, § 4(b) (1988). For guidelines to be established by the National Park Services, see *Abandoned Shipwreck Act Guidelines*, 54 Fed. Reg. 13642-13658 (1989).

tion, protection, and preservation of historic shipwrecks and properties can be obtained in the form of grants from the Historic Preservation Fund.⁷⁹

The task facing proponents in this effort to preserve shipwrecks within a designated state is to ensure that the state legislative enactment will protect the park.⁸⁰ Should an omnibus bill fail and park not be created, individual applications would have to be made for each shipwreck. The objective is protection and preservation, requiring penalties for site disturbance and removal of objects to be determined. Michigan created four underwater preserves which have attracted divers and tourists.⁸¹ The dive community must be included in the development of such facilities as they are the principal users, but also to educate others and be educated concerning preservation of submerged cultural resources. It is through the education of sport divers that the wanton stripping of wreck sites will end and new wreck sites will be discovered, in light of recreational diving which is extremely popular and continues to grow at a rapid rate.⁸²

Since the Great Lakes are shared with Canada and international disputes may arise concerning wreck, salvage and related matters, it is instructive to see how Canada has addressed historic wreck sites. Underwater marine preserves have been created under provincial enactments, such as the Fathom Five Marine Park at Tobermory, Ontario. Twenty-one sail and steamships lie under waters within the park boundaries. The claim to the vessels was made by the province through its own powers and other underwater parks are planned in Canada including one at Red Bay, Labrador, the site of a sixteenth century wreck.⁸³ The latter has not required special designation because of the freezing water and presence of icebergs. However, the Basque whaling ship wrecked there is

⁷⁹ The Historic Preservation Fund was created by the National Historic Preservation Act, 16 U.S.C. § 470h (1982).

⁸⁰ For the significance of shipwrecks, see *C.A. Hulse, An Archaeological Perspective on the Value of Great Lakes Shipwrecks*, in *UNDERWATER PARKS: SYMPOSIUM PROCEEDINGS 57-59* (1979) (available in The Institute for Great Lakes Research, Bowling Green State University).

⁸¹ Halsey, *Michigan's Great Lakes Bottomland Preserves*, in 2 *MARINE PARKS AND CONSERVATION: CHALLENGE AND COMPROMISE* 65 (J. Lien and R. Graham eds. 1985). In 1984, 23,000 divers and companions visited Alger County and put \$3.4 million in the local economy.

⁸² Sport divers have assisted in almost every major archaeological excavation, including the famous recovery of Henry VIII's ship *Mary Rose*, which was raised of Portsmouth, England in 1982. Unfortunately, many divers fear they will be denied the right to dive on wrecks or will be subject to unjust penalties for the removal of artifacts due to the passage of preservation laws. See, e.g., Boyd, *Wreck Diving Threatened by Legislation*, *SKIN DIVER*, May 1983, at 14 and Aug. 1983, at 20. See Fisher, *supra* note 6 at 373-77. Fisher was the finder of the seventeenth century treasure ship, *Nuestra Señora de Atocha*. See also, Marx, *Divers - Archaeologist Must Unite to Save Underwater Sites*, *SKIN DIVER*, Aug. 1983, at 76-8.

⁸³ Developments concerning Red Bay were communicated to the author. Interview with Robert Grenier, Archaeologist for Parks Canada (Oct. 31, 1989).

of major historical importance.⁸⁴

What is interesting with regard to Canada and the law governing shipwreck is that the admiralty law incorporated from England retains federal government control over the wreck. This is found in Part X of the Canada Shipping Act which assigns superintendence to the Ministry of Transport.⁸⁵ The Act clearly states that the Admiralty Court means the Federal Court of Canada.⁸⁶ The provincial practices and claims have gone unchallenged at the federal level. In short, Canada has no equivalent to the Abandoned Shipwreck Act, even though several provinces have operated as if one existed.⁸⁷

The proposed underwater park in Lake Erie is but one effort among many to identify and preserve the unique material culture located underwater. Some of the most impressive archaeological finds of recent years have come from the bottoms of lakes, rivers, and seas. Artifacts recovered from these wrecks have done much to expand our knowledge of the past and enlighten the historical record. The survival of fragile artifacts of an earlier era depends on the creativity of legislators and the legal community to preserve submerged cultural artifacts and to promote a public appreciation of our underwater heritage.

⁸⁴ Grenier, *Basque Whalers in the New World: The Red Bay Wrecks*, in *SHIPWRECKS OF THE AMERICAS* 69-84 (1988).

⁸⁵ Canada Shipping Act, R.S.C. ch. 5-9, § 422 (1985).

⁸⁶ *Id.* at § 2.

⁸⁷ Interview with Doug Yurick, Senior Planner of Marine Parks (Oct. 31, 1989). Mr. Yurick acknowledged that the Provincial Parks Act (1972) and the Provincial Trespass Act were used to protect shipwrecks and create underwater parks and that as many as 29 parks are being considered in Canada. Even Fathom Five National Marine Park is not yet gazetted as part of the Bruce Peninsula National Park.

Appendix A

ABANDONED SHIPWRECK ACT OF 1987*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Abandoned Shipwreck Act of 1987".

SEC. 2. FINDINGS.

The Congress finds that—

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act (16 U.S.C. 470a);

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands

(1) that are "lands beneath navigable waters," as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301);

* Public Law No. 100-298, 102 Stat. 432 (1988). Signed by President Reagan, April 28, 1988. Legislative History - 5.858. Senate Reports: No. 100-241 (Comm. on Energy and Natural Resources). House Reports: No. 100-514, Pt. 1 (Comm. on Interior and Insular Affairs) and Pt. 2 (Comm. on Merchant Marine and Fisheries).

(2) of Puerto Rico, as described in section 8 of the Act of March 2, 1917, as amended (48 U.S.C. 749);

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1 of Public Law 93-435 (48 U.S.C. 1705); and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

SEC. 4. RIGHTS OF ACCESS.

(a) ACCESS RIGHTS. —In order to—

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 6 of this Act.

it is the declared policy of the Congress that States carry out their responsibilities under this Act to develop appropriate and consistent policies so as to—

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites;
and

(C) 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.

(b) PARKS AND PROTECTED AREAS. —In managing the resources subject to the provisions of this Act, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

SEC. 5. PREPARATION OF GUIDELINES.

(a) In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after the date of enactment of this Act

prepare and publish guidelines in the Federal Register which shall seek to:

- (1) maximize the enhancement of cultural resources;
- (2) foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;
- (3) facilitate access and utilization by recreational interests;
- (4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archaeologists, historic preservationists, and fishermen).

(c) Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this Act.

SEC. 6. RIGHTS OF OWNERSHIP.

(a) UNITED STATES TITLE. —The United States asserts title 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.

(b) The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) TRANSFER OF TITLE TO STATES. —The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) EXCEPTION. —Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) RESERVATION OF RIGHTS. —This section does not affect

any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under

(1) section 3, 5, or 6 of the Submerged Lands Act (43 U.S.C. 1311, 1313, and 1314); or

(2) section 19 or 20 of the Act of March 3, 1899 (33 U.S.C. 414 and 415).

SEC. 7. RELATIONSHIP TO OTHER LAWS.

(a) **LAW OF SALVAGE AND THE LAW OF FINDS.** —The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies.

(b) **LAWS OF THE UNITED STATES.** —This Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies.

(c) **EFFECTIVE DATE.** —This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act.

