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## Cultural Resources Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute

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## Law Note

### CULTURAL RESOURCES PRESERVATION AND UNDERWATER ARCHAEOLOGY: SOME NOTES ON THE CURRENT LEGAL FRAMEWORK AND A MODEL UNDERWATER ANTIQUITIES STATUTE

*The growth of underwater archaeology in the last twenty-five years continues to provide unprecedented opportunities to learn about past civilizations from marine antiquities. Preserving cultural resources is a national policy in the United States. Within the current statutory framework, this Note examines the extent to which cultural resources preservation may be extended to the seabed. It discusses seabed antiquities jurisdiction and federal and state antiquities statutes and concludes by setting forth a model underwater antiquities statute—a composite of desirable features from current statutes and the author's innovations—that may assist in extending historic preservation seaward.*

Methought I saw a thousand fearful wrecks  
Ten thousand men that fishes gnaw'd upon;  
Wedges of gold, great anchors, heaps of pearl,  
Inestimable stones, unvalued jewels,  
All scatter'd in the bottom of the sea.

Shakespeare  
*King Richard III*

#### INTRODUCTION

#### *Underwater Archaeology and the National Policy to Preserve Cultural Resources*

Preserving cultural resources is a national policy in the United States. Congress has declared that "the spirit and direction of the Nation are founded upon and reflected in its historic past"<sup>1</sup> and that "the historical and cultural foundations of the Nation should be preserved . . . in order to give a sense of orientation to the American people . . . ."<sup>2</sup> Close scrutiny of this policy reveals that a bifurcated

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1. 16 U.S.C. § 470 (1970).

2. *Id.*

process is used in its implementation: first, *protecting* cultural resources (including archaeological resources) from the forces of destruction that are multiplying and gaining momentum;<sup>3</sup> second, *preserving* and *maintaining* objects of national significance "for the inspiration and benefit of the people of the United States."<sup>4</sup>

As modern technological advances continue to provide greater access to the seabed and its resources,<sup>5</sup> the growth of underwater archaeology in the last twenty-five years<sup>6</sup> continues to provide unprecedented opportunities to learn about past civilizations from archaeological material found on the ocean floor.<sup>7</sup> Sunken ships,<sup>8</sup> submerged cities and harbors,<sup>9</sup> and prehistoric sites now inundated after

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3. The next fifty years—some would say twenty five—are going to be the most critical in the history of American archaeology. What is recovered, what is preserved, and how these goals are accomplished during this period will largely determine *for all time* the knowledge available to subsequent generations of Americans concerning their heritage from the past. It is incumbent [to do the] utmost *now* to insure that the maximum amount of critical data is preserved. Our generation cannot postpone the decision to work towards this preservation, for the forces of destruction are multiplying and gaining momentum. The next generation cannot study or preserve what has already been destroyed.

C. MCGIMSEY, PUBLIC ARCHAEOLOGY 3 (1972).

4. 16 U.S.C. § 461 (1970).

5. See J. GORES, MARINE SALVAGE (1971); Arnold & Clausen, *A Magnetometer Survey with Electronic Positioning Control and Calculator Plotter System*, 4 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 353 (1975); Bascom, *A Tool for Deep-Water Archaeology*, 1 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 180 (1972); Throckmorton, Edgerton, & Yalouris, *The Battle of Lepanto Search and Survey Mission (Greece), 1971-72*, 2 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 121 (1973).

6. See H. RACKL, DIVING INTO THE PAST 41-69 (1968); P. THROCKMORTON, SHIPWRECKS AND ARCHAEOLOGY: THE UNHARVESTED SEA 169-89 (1970). In 1942 Jacques-Yves Cousteau and Emile Gagnan invented the Aqualung, a device that enabled them to remain underwater for long periods of time with complete freedom of movement. The inception of modern underwater archaeology occurred in 1952 when Cousteau and Frederick Dumas excavated *le Grand Congloué* off the coast of Marseilles. They proved that it was possible for free divers using the Aqualung to work safely underwater for thousands of hours. In the excavation that began as an experiment, over 200 tons of material, including amphoras, pottery, gallery utensils, and ship fittings, were recovered over a five-year period. It was shown that excavation of a shipwreck was not only feasible but also worthwhile.

7. See G. BASS, ARCHAEOLOGY UNDERWATER (1970); E. BORGESE, THE DRAMA OF THE OCEANS 49-80 (1975).

8. See P. THROCKMORTON, SHIPWRECKS AND ARCHAEOLOGY: THE UNHARVESTED SEA (1970). The number of wrecks is too legion to mention. Sunken vessels may be the most concentrated archaeological assemblage available because they represent a single day in history when the ship foundered and went to the bottom with all its artifacts. These artifacts have rested on the ocean floor, preserved by layers of sand and sediment, since the day of the disaster.

For an explanation of the *archaeological assemblage* and other related terms, see V. CHILD, A SHORT INTRODUCTION TO ARCHAEOLOGY 9-25 (1956).

9. See Mayes & Mayes, *Port Royal, Jamaica: The Archaeological Problems and Potential*, 1 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION

transgression of sea level<sup>10</sup> yield significant cultural, historical, and scientific information. The histories of art, technology, harbors, ship-building, and international trade, for example, have been greatly enhanced by underwater archaeological discoveries.<sup>11</sup>

However, in addition to having significant historical value,<sup>12</sup> marine antiquities may have substantial financial value.<sup>13</sup> For instance, the cargoes of the Spanish treasure galleons sunk during hurricanes in the Gulf of Mexico have been estimated to be worth hundreds of millions of dollars.<sup>14</sup> While humankind has probably always been susceptible to the lure of the deep and of sunken treasure, today, for the first time in history, technology makes this treas-

97 (1972); Shaw, *Greek and Roman Harbourworks*, in A HISTORY OF SEAFARING BASED ON UNDERWATER ARCHAEOLOGY 87-112 (G. Bass ed. 1972).

10. Many prehistoric Indian sites existing along the coastline some 8,000-10,000 years ago have survived the transgression of sea level. These sites could be an invaluable source of prehistoric information. Interview with James Moriarty, Underwater Archaeologist, Professor of Anthropology, University of San Diego, formerly with Scripps Institute of Oceanography, in San Diego (Oct. 15, 1976).

11. *The history of art.* Before the discovery at Piraeus in 1959 of an important hoard of statues, all the great Greek bronzes, with the exception of the charioteer of Delphi, had come from underwater excavations or discoveries . . . .

*The history of technology.* The Antikythera wreck, excavated in 1900, yielded a navigational instrument, the purpose of which has only recently been understood, and which has revealed an advanced and even unsuspected state of ancient technology. It was an astronomical computer indicating the movement of the sun within the signs of the zodiac as well as the rise and setting of the principal stars.

*The history of harbours.* The classic study by Lehmann-Hartleben, 1923, . . . must be supplemented and modified on the strength of . . . underwater exploration of the harbours of Tyre (1934-36) . . . , Sidon, 1946 . . . , Apollonia, 1958-59 . . . , and certain other ports of north Africa . . . , Athlit in Israel 1965-66 . . . , Rouad, also called Arwad, Arados . . . , Anthedon in Boeotia 1966 . . . and Cosa . . . .

*The history of international trade.* The study of the distribution, dating and composition of ancient cargoes found on the seabed, . . . enables us to establish important links between different regions of the ancient world.

In all these areas, the results of underwater archaeology have added to our previous sum of knowledge either by simple increase, or on occasion, by revolutionizing our earlier assumptions.

Basch, *Ancient Wrecks and the Archaeology of Ships*, 1 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 1-2 (1972).

12. This Note makes no attempt to address the philosophical notion of *value*, quantitative or qualitative, or to weigh different kinds of values—for example, *historical* and *financial* against each other. *Historical value* as used here means simply having some property through which we might attain insight concerning times past.

13. "The value of a thing / Is just as much as it will bring." K. MARX, CAPITAL 3 n.1 (1867).

14. See J. COUSTEAU & P. DIOLE, DIVING FOR SUNKEN TREASURE 12-18 (1971).

ure readily accessible. At this juncture of increased accessibility, heightened historical interest, and rising financial value, an abundance of legal issues has arisen, generated principally by attempts on the part of state and federal governments to protect and preserve underwater archaeological resources.

This Note identifies many of the issues and suggests a course of action to reduce their number. It also examines the ways in which the national policy of protecting and preserving cultural resources may be implemented within the current legal framework relating to marine antiquities. It begins by discussing the extent to which federal and state governments have jurisdiction over objects of antiquity located on the seabed. Beginning with thirteenth century common law, the discussion traces the evolution of principles governing the disposition of material abandoned at sea. The next section examines current federal and state antiquities legislation for its capacity to regulate exploration for and excavation of submerged antiquities in furtherance of the national policy of historic preservation.<sup>15</sup> Amendments are suggested to ameliorate the weaknesses and inconsistencies in these statutory schemes. The final section sets forth a model underwater antiquities statute whose purpose is to extend the national policy of historic preservation to cover the seabed.

#### *Limitations on the Scope of This Note*

It must be emphasized at the outset that this Note does not discuss the moral and philosophical issues arising from government intervention that creates, distributes, destroys, and redistributes interests in underwater archaeological resources.<sup>16</sup> Ultimately, the quest should be to analyze the nature of the rights and duties—moral, philosophical, and legal—of individuals, of governments, and of humankind concerning a res with historical and cultural significance. Does any government entity have a *right* to regulate the activities of individuals interested in recovering sunken treasure? And if so, what is the nature of this right, and what is its foundation? How far should we tolerate governmental intrusion? Or does a government have a *duty* to protect and to preserve historical and cultural resources for the edification of its citizens or all humankind? And if so, who should define historical or cultural value and according to which criteria? These questions are particularly intriguing, and obvi-

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15. For purposes of this discussion, this Note assumes the legitimacy of a national policy of historic preservation without questioning its philosophical or moral underpinnings.

16. For an interesting and enlightening treatment of the issues and consequences of government-induced wealth distribution, see Reisch, *The New Property*, 73 *YALE L.J.* 773 (1964).

ously the inquiry could continue indefinitely with ramifications that extend far beyond the subject of underwater antiquities and historic preservation.

#### UNDERWATER ARCHAEOLOGY AND THE JURISDICTION QUESTION

##### *The Objective: To Preserve the Integrity of Underwater Archaeological Sites*

Excepting competent, systematic excavation, an archaeological site must not be disturbed if it is to yield maximum critical data, for the context in which an artifact is found may be as important as is the artifact itself. Unlike some natural resources, archaeological resources are non-renewable. A site that has been carelessly disrupted may have irretrievably lost considerable significance.<sup>17</sup> Thus, the first step in achieving preservation of archaeological resources is protecting them from intentional and inadvertent destruction so that they can be properly excavated by competent professionals.

At present, treasure hunters may be the greatest single threat to underwater archaeological resources.<sup>18</sup> Modern treasure hunters are usually corporations that employ the most sophisticated detection equipment available<sup>19</sup> to locate and recover the vast riches of sunken treasure fleets.<sup>20</sup> They may have little or no concern for the ar-

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17. R. HEITZER & J. GRAHAM, *A GUIDE TO FIELD METHODS IN ARCHAEOLOGY* 74 (1967). See also Coggins, *Archaeology and the Art Market*, 175 *SCIENCE* 263 (1972). As stated by the Committee on the Public Understanding of Archaeology of the Society of American Archaeology: "Archaeological resources are akin to an endangered species—even more endangered—for no matter how hard we work to protect them, they cannot reproduce or increase." U.S. DEP'T OF INTERIOR, *ARCHAEOLOGY AND ARCHAEOLOGICAL RESOURCES: A GUIDE FOR THOSE PLANNING TO USE, AFFECT, OR ALTER THE LAND'S SURFACE* 21 (1972).

18. Other threats are simply the result of increased activities on the seabed, such as oil and gas production, aquaculture, seabed mining, and so forth, during which underwater archaeological resources may be inadvertantly disrupted. Treatment of problems relating to these activities, however, is beyond the scope of this Note.

19. See J. GORES, *MARINE SALVAGE* (1971). Some of their instruments include fathometers that assist in producing accurate maps of the seabed, side scan sonars, proton magnetometers that provide data from which the presence of shipwreck sites are determined and that cost more than \$50,000, and various tracking and plotting systems.

20. See J. COUSTEAU & P. DIOLE, *DIVING FOR SUNKEN TREASURE* 12-18 (1971). The treasure they seek may be enormous. In the Carribean Sea, for example, lies a coral reef known as the Silver Bank, which has claimed more wrecks per square mile than any other spot on earth. Historians and economists have estimated that the gold, silver, and art works now encrusted in coral may be worth up to \$600,000,000.

chaeological significance of the wrecks they plunder, blasting them apart with dynamite, for example, to facilitate artifact recovery.

If the national policy of historic preservation is to be extended to cover seabed antiquities, the activities of treasure hunters must be regulated.<sup>21</sup> However, to legitimately regulate these activities, the regulator must have jurisdiction over both the seekers and the archaeological material that is the object of their search. The following sections discuss jurisdiction over the res.

### *Common Law Notions of Abandonment*

The property status of the res is a linchpin issue arising from government attempts to regulate the activities of individuals concerned with recovering submerged antiquities. Whether an individual or a government entity is able to demonstrate some possessory or ownership interest in the res may have a significant impact upon its ultimate disposition. For instance, if regulation of exploration and excavation is necessary to implement the national policy of historic preservation, under which circumstances may the government or an individual legitimately establish an interest in itself so that it may either permissibly regulate or be free from regulation? Thus, analysis of interests in personal property that is found after having been separated from its owner is a convenient starting point.

Of the different categories of found personal property,<sup>22</sup> *abandoned* probably best describes marine antiquities. Abandonment may occur either by deliberate desertion, as when objects are cast away, or by relinquishing a search after an unintentional loss. Abandonment in law depends upon the concurrence of intention to abandon and some overt act, or failure to act, that carries the

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21. Treasure hunters are not necessarily destructive. Some are bona fide underwater archaeologists called treasure hunters because they deal in the artifacts they recover. As Robert F. Marx, President of Seafinders, Inc., explains it: "Although Seafinders is essentially interested in furthering knowledge of history and archaeology, as a private corporation requiring capital to operate, they will engage in treasure recovery as is necessary and not in conflict with their research goals." Interview with Robert F. Marx, in New York City (Jan. 8, 1977).

22. The classifications of personal property that is found after becoming separated from its owner are *lost*, *mislaid*, *abandoned*, and *treasure trove*. *Lost* property is that which the owner parted with involuntarily through neglect, carelessness, or inadvertence, the whereabouts of which is unknown. 1 AM. JUR. 2d *Abandoned, Lost, Etc., Property* §§ 2-3 (1962). *Mislaid Property* has been intentionally left in a place where the owner can resort to it at a later time, but subsequently forgets where it was left. *Id.* § 2. *Abandoned Property* is defined in the text. See text accompanying notes 22-26 *infra*. *Treasure Trove* is gold or silver coin, plate, bullion, or other specie found to have been concealed by the owner in the earth or some private place for safekeeping. *Id.* § 4. See also 1 BLACKSTONE'S COMMENTARIES, ch. 8, at 286 (1765).

implication that the owner neither claims nor retains any interest.<sup>23</sup> Thus, the essence of abandonment is that the owner has no intention of reclaiming possession or reassuming ownership and enjoyment of the thing in the future. The consequence of abandonment is that all property<sup>24</sup> has left the thing that is abandoned.

A well established common law precept is that the finder of abandoned property who first reduces it to possession may exercise complete dominion and control over it.<sup>25</sup> Absent legislation to the contrary,<sup>26</sup> by the act of possession, the finder obtains the right, within the law, of exclusive beneficial use of the thing. But if this general rule is viable, and marine antiquities are abandoned objects, by which authority or design may a government regulate the activities of the finders? What becomes of the "exclusive beneficial use" under the burden of government regulation? And how does the concept of abandonment and the national policy of historic preservation relate to the rights and duties of the government, of individuals, and of humankind, with regard to historic property?

These kinds of questions go to the heart of property acquisition theory and the relationship between government and the individual. No doubt they warrant further detailed analysis,<sup>27</sup> which unfortunately is beyond the scope of the present inquiry. Nevertheless, raising these issues makes apparent the fact that analyzing the property status of marine antiquities is no simple task. Consider, for instance, the uniqueness of the problems that surround search for or recovery of objects that have become separated from their owners while they were at sea: the res,<sup>28</sup> the prior owner,<sup>29</sup> the finder,<sup>30</sup> the govern-

23. 1 AM. JUR. 2d *Abandoned, Lost, Etc., Property* § 1 (1962).

24. In the strict legal sense *property* is "an aggregate of rights" to enjoy, control, or dispose of a thing or object in any legal way, "to possess it, to use it, and to exclude everyone else from interfering with it." BLACK'S LAW DICTIONARY 1382 (4th rev. ed. 1968).

25. 1 AM. JUR. 2d *Abandoned, Lost, Etc., Property* § 18 (1962).

26. *Id.* § 6.

27. At present it is hoped that an article concerning these important subjects, as well as the moral and philosophical underpinnings of a national policy of historic preservation, will be forthcoming.

28. Concerning the *res*, what exactly is the thing with which we are dealing? How is it to be defined, for what purposes, and by whom? How is the value of the thing to be analyzed, and can the thing be defined independently of its value(s)? How do we distinguish historical value or cultural value from value in general and so forth?

29. Concerning the *prior owner*, how did he or she acquire the res? Purchase? Manufacture? Find? Gift? Theft? Pillage? Who should define these



ment,<sup>31</sup> the chain of title,<sup>32</sup> the accounting period,<sup>33</sup> the current technology,<sup>34</sup> cause, probability, and chance,<sup>35</sup> and so forth. The complexity is overwhelming.

Perhaps, for our present purposes, however, one need only infer from the existence and complexity of some of these factors that the law pertaining to abandonment at sea might have evolved to accommodate them. Consequently, varying rules of acquisition may have developed.

### *Common Law and Abandonment at Sea: The Rule of Sovereign Prerogative*

At early common law, property abandoned at sea was categorized as *wreck*, *jetsam*, *flotsam*, and *lagan*.<sup>36</sup> Finders' rights attached ac-

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terms and for which purposes? Does the manner of acquisition by the prior owner have any effect on the ultimate disposition of the res? Does the manner of separation from the prior owner make any difference? Sold? Abandoned? Lost? Stolen? Given away? Inadvertantly dropped in a place where the technology is not available to retrieve it?

30. Concerning the *finder* of the res, who should make this characterization, and for which purpose? Was the res acquired by theft, discovery, gift, purchase? What is the significance of the fact that the finder found the location of the res through investigation of the naval archives? Or that the finder developed the technology to recover the res that everyone knew was out there?

31. Concerning the *government*, is it the definer of the res? Is it the definer of interests in the res? Is the government the acquisition-arbiter among competing claims? Is it the protector of the prior owners' or finders' interests in the res, or is it a protector of the res for future generations?

32. Concerning the *chain of title*, what is the mechanism by which ownership is traced? How is title obtained? Finders keepers, losers weepers? Is possession nine points of the law? Does the government have an ultimate reversionary interest in all property?

33. Concerning the *accounting period*, is there any statute of limitation on claims to the res, and against whom does it run and for which purpose? If so, how can the statute be tolled? At which point may we ignore prior claims to the res, including those of the former owner? Are there any restraints upon alienation? What is the effect of time on the prior owner-finder relationship? What is the effect of "historical value" upon any of these questions?

34. Concerning the *current technology*, does "lost" plus "technology" equal found? What is the relationship of technology to ownership concepts? Does the developer of the technology that enabled the "finder" of the res to recover it have an interest in the res? Why, or why not? What is the effect of technology on notions of abandonment? May the prior owners be said to have intended to relinquish their claims to a res when they simply did not have the technology to search for or to recover it?

35. Concerning *cause, probability, and chance*, does anyone own good luck? Is technology merely the conversion of chance into probability? What is the difference between "that's mine because I worked hard for it," and "that's mine because windfalls belong to the windfallee"?

36. Wreck, by the antient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land. . . . Jetsam is where goods are cast into the sea, and there sink and remain under the water: flotsam is where they continue swimming on the surface of the

cordingly. For example, *wreck*, material from a ship lost at sea that somehow reaches shore, belonged to the Crown according to sovereign prerogative.<sup>37</sup> Later, in 1275, this principle was codified in the Statute of Westminster.<sup>38</sup> The Statute refers to wreck only, however, and is thought to have been intended to favor distressed proprietors by allowing them to sue to recover their goods within a year and a day of the loss.<sup>39</sup> When this period expired, title to the merchandise vested in the Crown.

In 1601, the *Constable's Case*<sup>40</sup> held that sovereign prerogative extended to the other categories of objects abandoned at sea.<sup>41</sup> Then in 1798, an admiralty court stated in *The Aquila*<sup>42</sup> its belief that the general rule of civilized countries was that property found abandoned at sea belonged to the sovereign.<sup>43</sup> Subsequent English deci-

waves: Ligan [also known as *lagan*] is where they are sunk in the sea, tied to a cork or buoy, in order to be found again.

1 BLACKSTONE'S COMMENTARIES, ch. 8, at 280-82 (1765).

37. *Id.* at 280. "[F]or it was held, that, by the loss of the ship, all property was gone out of the original owner." *Id.*

38. Concerning wrecks of the sea, it is agreed, that where a man, a dog, or a cat escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck; but the goods shall be saved and kept by view of the sheriff, coroner, or king's bailiff, and delivered into the hands of such as are of the town where the goods were found; so that if any sue for these goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices of the wreck belonging to the king.

Statute of Westminster, 1275, 3 Edw. 1, c. 4.

39. See 1 BLACKSTONE'S COMMENTARIES, ch. 8, at 280-81 (1765).

40. 77 Eng. Rep. 218 (K.B. 1601).

41. *Id.* at 223. The Court of King's Bench determined that the Statute was merely a codification of the common law and "therefore, all that which is provided as to wreck extends also to *flots, jetsam* and *lagan*." *Id.*

42. 165 Eng. Rep. 87 (Adm. 1798). *The Aquila* involved a derelict Swedish ship. The vessel was returned to the owners, but the cargo remained unclaimed. The finders vied with the king for ownership of the cargo.

43. It is certainly very true that property may be so acquired [that is, by possession]; but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant: But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself for the positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons, as, for instance, to the State itself, or to its grantees.

It will depend, therefore, on the law of each country to determine, whether property so acquired by occupancy, shall accrue to the individual finder, or to the Sovereign and his representatives? and I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the Sovereign, if no

sions have supported this holding.<sup>44</sup>

Thus, the rule of sovereign prerogative appears to diverge from the usual abandoned property concept. At common law, property abandoned at sea is acquired for the exclusive beneficial use of the sovereign rather than of the finder. This rule could have important ramifications for extending the national policy of historic preservation to cover the seabed. The sovereign with complete dominion and control over the res, for example, might legitimately regulate its acquisition. Therefore, the sovereign might be able to prevent unauthorized excavation of submerged archaeological resources through conscientious regulation of treasure hunting activities.

### *Sovereign Prerogative in the United States: An American Rule?*

In the United States the status of the sovereign prerogative doctrine is unclear. Although British courts consistently conclude that title to property abandoned at sea vests in the sovereign, courts in the United States appear to favor the finder.<sup>45</sup> Some say that a basic sovereign right exists but that unless it is legislatively asserted, the finder must prevail.<sup>46</sup>

Several commentators, apparently attempting to establish certainty where none exists, have labelled these doctrines the *British Rule* and the *American Rule*.<sup>47</sup> It is not altogether clear, however, that a dichotomy exists or that the courts in the United States are bound to follow an American Rule. For example, when historic properties have been involved, some courts in the United States have favored the

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owner shall appear. Seldon . . . lays it down as a right annexed to sovereignty, and acknowledged amongst all nations ancient and modern. Loccenius . . . mentions it as an incontestable right of sovereignty in the north of Europe. Valin . . . ascribes the same right to the crown of France . . . In England, this right is as firmly established as any one prerogative of the crown.

*Id.* at 89.

44. See, e.g., *The King v. Two Casks of Tallow*, 166 Eng. Rep. 414 (Adm. 1837) (two casks washed up on shore); *H.M.S. Thetis*, 166 Eng. Rep. 390 (Adm. 1835) (vessels with cargo lying on the bottom of the ocean); *Talbot v. Lewis*, 172 Eng. Rep. 1383 (Adm. 1834) (valuable coins found upon the shore); *The King v. Property Derelict*, 166 Eng. Rep. 136 (Adm. 1825) (gold watches and coins found upon a vessel drifting abandoned at sea).

45. See, e.g., *Thompson v. One Anchor & Two Anchor Chains*, 221 F. 770 (W.D. Wis. 1915); *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902); *Rickard v. Pringle*, 293 F. Supp. 981 (E.D.N.Y. 1968); *Brady v. The Steamship African Queen*, 179 F. Supp. 321, (E.D. Va. 1960); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452 (E.D. Va. 1960).

46. See, e.g., *Sara E. Thompson v. United States*, 62 Ct. Cl. 516 (1926).

47. See Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 14-17 (1971); Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 383-98 (1967); Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 361-66 (1969).

sovereign over the finder.<sup>48</sup> Thus, reliance upon these labels tends to confuse the issue of title to underwater archaeological resources.

### *Murphy v. Dunham*

Commentators have relied upon several theories to support their belief in the separate existence of an American Rule. Some rely upon the holding of *Murphy v. Dunham*,<sup>49</sup> which states that courts in the United States easily find exception to the British Rule and prefer the finder over the sovereign.

*Murphy v. Dunham* was a libel action for tortious conversion of coal in a vessel that had sunk in Lake Michigan.<sup>50</sup> The respondent sought to use the Statute of Westminster to divest the libellant of his interest in the coal "by reason of his failure to appear within a year and a day to make claim to it."<sup>51</sup> But the court rejected this contention, stating that the coal was not technically "wreck of the sea," so the Statute of Westminster had "no application to the case under consideration."<sup>52</sup>

Apparently, the *Murphy* court expressed no opinion about the sovereign's rights in the coal or about the acceptance or rejection of

48. See *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356 (S.D. Tex. 1973); *State v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 160 S.E.2d 482 (1968). Although *Platoro Ltd., Inc.* was reversed and remanded with directions to dismiss for lack of jurisdiction, the theoretical basis for the original holding is nevertheless viable. See *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113 (1975).

49. 38 F. 503 (E.D. Mich. 1889). For the commentators' discussion of this case, see Kenny & Hrusoff, *The Ownership of the Treasure of the Sea*, 9 WM. & MARY L. REV. 383, 393-94 (1967); Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 FLA. L. REV. 360, 365 (1969).

50. 38 F. 503, 504-05 (E.D. Mich. 1889). Respondent Dunham owned a schooner that had sunk in a storm while carrying a cargo of coal. Respondent abandoned all his rights in the insured part of the vessel to his underwriters, reserving, however, the benefit of salvage in the uninsured part. The underwriters then sold the vessel to libellant Murphy, who later located the wreck and was the first finder. Murphy determined that it could not be saved. Subsequently, correspondence ensued whereby Dunham requested authorization to raise the vessel, which request Murphy refused. Respondent Dunham salvaged 981 tons of coal despite libellant Murphy's refusal to authorize this action and sold the coal at a private sale. Murphy then sued for tortious conversion. *Id.* at 504-05.

51. *Id.* at 509. See also Statute of Westminster, 1275, 3 Edw. 1, c. 4; note 38 *supra*.

52. 38 F. at 508-09. The court apparently did not consider British decisions subsequent to the Statute of Westminster which extended sovereign prerogative to all kinds of material abandoned at sea. See, e.g., *The Aquila*, 165 Eng. Rep. 87 (Adm. 1798); *Constables Case*, 77 Eng. Rep. 218 (K.B. 1601); text accompanying notes 40-44 *supra*.

sovereign prerogative only because the doctrine was not applicable to the facts of that case.<sup>53</sup> Moreover, because neither the United States nor any individual state was a party to the litigation, the sovereign's rights were not at issue.<sup>54</sup> Thus, *Murphy v. Dunham* does not appear to support a theory of distinct American and British Rules of sovereign prerogative.

### Devolution

Another theory suggests that the American Rule-British Rule dichotomy exists because the common law rule of sovereign prerogative did not devolve to the United States. This theory maintains that because the British Rule was not firmly established until 1798 in *The Aquila* decision, courts in the United States are not obliged to follow it. That is, they are not bound to follow a common law rule that was adopted twenty-two years after the Declaration of Independence.<sup>55</sup>

Firmly established or not, the doctrine of sovereign prerogative later advanced in *The Aquila* was recognized in the American Colonies and enforced by the Crown's Admiralty Courts there prior to the American Revolution.<sup>56</sup> Whether devolution occurred after the principle was firmly established in *The Aquila* seems irrelevant when the principle was in fact acknowledged and enforced in the Colonies prior to independence. Thus, the anti-devolution theory does not appear to support the notion of a distinct American Rule.

### Legislative Assertion

Perhaps the most acceptable theory of a distinct American Rule suggests that the sovereign has the bare right to ownership of a res abandoned at sea, but that the right must be legislatively asserted. Otherwise the finder prevails.<sup>57</sup> Thus, the court held in *Sara E.*

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53. The court ruled that the Statute of Westminster and the doctrine of sovereign prerogative had "no-application to the case under consideration." 38 F. at 509.

54. See note 50 *supra*.

55. See Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 16 (1971); Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 393 (1967); Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 365 (1969).

56. See 2 J. KENT, COMMENTARIES ON AMERICAN LAW 260 (5th ed. 1844): "[B]y the colony laws of Massachusetts and Connecticut, wrecks were preserved for the owner; and if found at sea, they were supposed to belong now to the United States, as succeeding in this respect, to the prerogative of the English Crown."

57. See Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 16 (1971); Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 394-97 (1967); Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 365-66 (1969).

*Thompson v. United States*:<sup>58</sup>

It seems well settled that when a vessel is derelict and abandoned in the navigable waters of the United States or anywhere else it belongs to that person who finds it and reduces it to possession. Congress could undoubtedly provide that the proceeds of derelicts and abandoned vessels in the navigable waters of the United States be paid into the Treasury; but no such law has been passed, and until it is the principles of natural law must prevail.<sup>59</sup>

This theory appears to be widely accepted.<sup>60</sup> Indeed, the existence of a distinct American Rule might go unquestioned were it not for three recent decisions that favor the sovereign despite the absence of a legislative assertion of sovereign prerogative.<sup>61</sup> The holding in *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*<sup>62</sup> is representative of this approach. "Under the better view and what this court believes to be the common law adopted by Texas and the United States, abandoned 'wrecks of the sea', including both vessels and cargo, belong, on recovery, to the sovereign, unless claimed by the

58. 62 Ct. Cl. 516 (1926). This litigation concerned title to an iron tanker that had sunk in the Mississippi River.

59. *Id.* at 524.

60. *See, e.g.*, *United States v. Tyndale*, 116 F. 820 (1st Cir. 1902). This case involved a sum of money found on a body floating on the high seas. The court ruled that

it would have been appropriate, and within its constitutional powers, for congress to have taken control of this fund; but it has not done so. There is neither any statute nor any settled practice which requires the treasurer of the United States to receive it, or authorizes us to direct that it shall be received by [the treasury].

*Id.* at 821. *See also* the cases cited note 45 *supra*.

61. *See Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd and remanded with directions to dismiss*, 508 F.2d 1113 (1975) (Plaintiff sought to establish a claim to a Spanish vessel that had sunk c. 1554 in the Gulf of Mexico, but the court ruled that the vessel and its cargo belonged to the state of Texas.); *State v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 160 S.E.2d 482 (1968) (North Carolina sought to enjoin the defendant's salvage of blockade runners that had sunk c. 1700, and the court concluded that the hulks belonged to the state in its sovereign capacity.). In *State v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956), litigation was initiated by Florida to enjoin a salvage company from salvaging a wreck of the battleship *Massachusetts*. The court held

that the wreck of the vessel is a "derelict" which, at common law, would belong to the Crown in its office of Admiralty at the end of a year and a day, under the authority of the English cases above cited [including the Statute of Westminster, *Constable's Case*, *The Aquila*, and their progeny]; that since the property was resting in the territorial waters of the State of Florida . . . it . . . belongs to the State in its sovereign capacity.

*Id.* at 910. Concerning *Platoro Ltd., Inc.*, *see also* note 48 *supra*.

62. 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd and remanded with directions to dismiss*, 508 F.2d 1113 (1975). *See also* note 48 *supra*.

owner within a year and a day."<sup>63</sup> Apparently some courts do not believe that they are bound by an American Rule of sovereign prerogative.

#### Summary: Another View

Thus, in the United States the status of the doctrine of sovereign prerogative remains unclear. Although most judicial decisions concerning title to property abandoned at sea have held for the finders, some recent cases have been decided in favor of the sovereign. Concerning the ultimate disposition of the res, it is not possible, as the foregoing discussion demonstrates, to ascertain a clear, convincing, guiding principle from the commentaries and many judicial opinions on the subject.

Even though the issue of the existence of a distinct American Rule remains unresolved, these inconsistent holdings can perhaps be reconciled, for one subtle distinction can be found in the facts of the cases. When the abandoned res is something that might be acquired for the beneficial use and enjoyment of many people over a long period of time, the courts have favored the sovereign<sup>64</sup>—the sovereign takes on behalf of its people. In *Platoro Ltd., Inc.*,<sup>65</sup> for instance, articles of unique historical and cultural significance were retained by the State of Texas for public use and enjoyment in museums. However, in the cases holding for the finders, the litigation concerned title to fungible goods<sup>66</sup>—important perhaps only for the salvage value to the finder.

This distinction may not be dispositive of the issue of entitlement to abandoned objects with historical significance,<sup>67</sup> but it might provide a clue. Perhaps, according to some utilitarian calculus,<sup>68</sup> it is permissible to say that because they yield priceless historical and

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63. *Id.* at 360.

64. See *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 371 F. Supp. 356 (S.D. Tex. 1973), *rev'd and remanded with directions to dismiss*, 508 F.2d 1113 (1975) (objects of unique cultural and historical significance retained by Texas for museum display); *State v. Massachusetts Co.*, 95 So. 2d 902 (Fla. 1956) (fishing reef created by an abandoned battleship preserved for sport fishing); *State v. Flying "W" Enterprizes, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968) (objects of unique cultural and historical significance retained by North Carolina for museum display).

65. 371 F. Supp. 256 (S.D. Tex. 1973), *rev'd and remanded with directions to dismiss*, 508 F.2d 1113 (1975). See also note 48 *supra*.

66. See, e.g., *Russel v. Forty Bales of Cotton*, 21 F. Cas. 42 (S.D. Fla. 1872); *Peabody v. Proceeds of 28 Bags of Cotton*, 19 F. Cas. 39 (D. Mass. 1870); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452 (E.D. Va. 1960); *Murphy v. Dunham*, 38 F. 503 (E.D. Mich. 1889).

67. For a discussion of the complexity of abandonment at sea, especially when "historic properties" are concerned, see notes 22-35 and accompanying text *supra*.

68. See J. MILL, *UTILITARIANISM* (1863).

cultural information, abandoned objects of antiquity are more valuable to humankind than to individual salvors.<sup>69</sup> Thus, when no statutory authority and only conflicting case precedent exist, this kind of philosophical inquiry might provide some useful insight.

At any rate, entitlement to the res might have some bearing on attempts to extend the national policy of historic preservation to cover the seabed,<sup>70</sup> for a sovereign legitimately entitled to the abandoned objects of antiquity found on the ocean floor might be able to regulate their acquisition so as to preclude trespass and to encourage systematic excavation. But the spectre remains of an all-encompassing sovereign prerogative, and courts have yet to articulate a satisfactory principle that reconciles the conflicting holdings. Therefore, perhaps the best approach to implementing historic preservation of marine archaeological resources in the United States is to firmly establish the now uncertain requirement of a legislative assertion of sovereign prerogative.

### *Legislative Assertion of Sovereign Prerogative*

#### The Abandoned Property Act

Because of the inability to conclusively refute the American Rule, it should be acknowledged, and a legislative assertion of sovereign prerogative should be sought. The Abandoned Property Act of 1870<sup>71</sup> might satisfy these requirements.

The Abandoned Property Act authorizes the Administrator of General Services

to make such contracts and provisions as he [or she] may deem for the interest of the Government, for the preservation, sale, or collection of any property, . . . which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States.<sup>72</sup>

The sweeping language of this statute apparently allows the Administrator to acquire any wrecked or abandoned property that may be deemed to be of interest to the sovereign. However, the qualifica-

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69. This statement begs several important questions, the most obvious of which, perhaps, concern the nature of "value" of "historical" or "cultural" objects and the right-duty relationships of the state, the individual, and humanity. Inquiries of this sort are beyond the scope of this Note, but hopefully, they will be the subject of a forthcoming article.

70. See text accompanying notes 1-15 *supra*.

71. 40 U.S.C. § 310 (1970).

72. *Id.*



tion, "which ought to come to the United States," may raise some barriers against this expansive interpretation.

Thus, in *Russell v. Forty Bales of Cotton*,<sup>73</sup> an 1872 decision, a district court concluded that the phrase "ought to come to the United States" defined the kind of property over which the Act granted jurisdiction. The court held that the Act applied only to abandoned property that had been involved in "naval and military operations" during the Civil War and that it "should come to the United States, either from being originally the property of the United States, or the property of the public enemy."<sup>74</sup> This view was reiterated in *United States v. Tyndale*,<sup>75</sup> decided in 1902, which held that the statute "relates, apparently, to property which ought equitably to go to the United States, and not to wreckage of any kind."<sup>76</sup>

A consideration of the statute as it was originally enacted may help to explain these holdings. The Act read:

[Abandoned property] . . . which ought to come to the United States, or any moneys, dues, and other interests lately in the possession of or due to the so-called Confederate States, or their agents, and now belonging to the United States, which are now withheld or retained by any person, corporation or municipality whatever, and which ought to come into the possession and custody of, or been collected or received by, the United States.<sup>77</sup>

The italicized language was omitted as obsolete during codification in 1965.<sup>78</sup>

Because the Abandoned Property Act no longer explicitly refers to property "lately in the possession of . . . the so-called Confederate States," perhaps a more expansive reading of the Act is permissible. Indeed, since codification, the Act has been used routinely by the federal government as the statutory authority under which it administers its historic properties.<sup>79</sup> Recently, for instance, under the

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73. 21 F. Cas. 42 (S.D. Fla. 1872).

74. *Id.* at 43.

75. 116 F. 820 (1st Cir. 1902).

76. *Id.* at 822.

77. Abandoned Property Act of 1870, June 21, 1870, Res. No. 75, 16 Stat. 380 (codified at 40 U.S.C. § 310 (1970)).

78. Pub. L. No. 89-30, § 4, 79 Stat. 119.

79. Interview with Michael W. Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, in Washington, D.C. (Dec. 29, 1976). Archaeologists excavating government-owned sites under permit from the Secretary of the Interior may contract with the Administrator of General Services (the Secretary of the Treasury prior to 1965) according to the Abandoned Property Act if they wish to keep any of the artifacts which they recover. These contracts usually provide for a 50-50 split of the recovered artifacts between the government and the archaeologist. See 40 U.S.C. § 310 (1970). See also S. REP. NO. 234, 89th Cong., 1st Sess., reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1575, 1577: "The Department [of the Treasury (before codification when the responsibilities were shifted to the Adminis-

authority of the Abandoned Property Act, the United States contracted for the excavation of a nineteenth-century steamboat that had sunk in the Missouri River.<sup>80</sup>

At present, the Abandoned Property Act is also routinely used in conjunction with federal antiquities legislation to protect, preserve, sell, and collect terrestrial antiquities within federal jurisdiction. Thus, the government is able to regulate excavation and to prohibit unauthorized interference with terrestrial archaeological sites.<sup>81</sup>

The Abandoned Property Act might be acknowledged as a legislative assertion of the sovereign's prerogative concerning submerged antiquities. Perhaps abandoned historic property "ought to come to the United States" in the interest of preserving the nation's heritage.<sup>82</sup> But are underwater archaeological resources "within the jurisdiction of the United States," as the Abandoned Property Act requires? And if they are, may the government use the Abandoned Property Act in conjunction with current antiquities legislation to extend the national policy of historic preservation to include the seabed?

### The Antiquities Act

The federal government takes the position that submerged antiquities located on the outer continental shelf<sup>83</sup> are protected by the

trator of General Services)] during the past ten years, has entered into twelve contracts for salvage of wrecked, abandoned or derelict property."

80. See J. PETSCHÉ, *THE STEAMBOAT BERTRAND* (1974). See also Corbino v. United States, 203 Ct. Cl. 278, 488 F.2d 1008 (1973), *aff'd on rehearing*, 208 Ct. Cl. 1002 (1976).

81. See The Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1970). According to the provisions of this Act, unauthorized people are forbidden to "appropriate, excavate, injure, or destroy any . . . object of antiquity" on government land without first obtaining a permit from the Secretary of the Interior. *Id.* § 433. Permits are issued only to "reputable museums, universities, colleges, or other recognized scientific or educational institutions." *Id.* § 432. See also 43 C.F.R. § 3.10 (1976) (reports must be made to the Smithsonian Institution at regular intervals); *id.* § 3.14 (a government field officer may examine the excavation at any time).

82. See 40 U.S.C. § 310 (1970). See also text accompanying notes 1-15 *supra*.

83. See 43 U.S.C. § 1331 (1970). The outer continental shelf has been defined as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in [the Submerged Lands Act of 1953, 43 U.S.C. § 1301 (1970)], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." See also Pres. Proc. No. 2667, 3 C.F.R. 67 (1945), *reprinted in* 13 DEP'T STATE BULL. 485 (1945). According to the Convention on the Continental Shelf, art. 1(a), *done at Geneva*, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311, the continental shelf is "the

Antiquities Act of 1906.<sup>84</sup> This position raises substantially the same issue as that raised by the Abandoned Property Act: Does the United States have jurisdiction over archaeological resources on the seabed?

The Antiquities Act authorizes the President to declare "objects of historical or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."<sup>85</sup> However, whether the provisions of this Act apply to archaeological resources on the seabed necessarily depends upon whether the seabed is land "owned or controlled" by the federal government.

This question was addressed for the first time in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*,<sup>86</sup> decided in 1976. There a district

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seabed and subsoil of the submarine areas adjacent to the coast but outside of the territorial sea, to a depth of 200 metres."

84. Letter from Michael W. Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, to James Kevin Meenan (Aug. 24, 1976). See Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1970) (on file with the *San Diego Law Review*).

85. 16 U.S.C. § 431 (1970).

86. 408 F. Supp. 907 (S.D. Fla. 1976), appeal docketed, No. 76-2151 (5th Cir. Apr. 28, 1976). On September 5, 1622, a Spanish fleet of twenty-eight ships encountered a hurricane in the Straits of Florida. Eight vessels carrying 550 people and cargoes of gold, silver, and jewels worth more than one and one half million ducats—in modern terms perhaps 250 million dollars—were lost. On July 4, 1973, Treasure Salvors, Inc., a modern treasure hunting corporation, located one of the ships, the *Nuestra Señora de Atocha*, and began recovering the treasure. See Lyon, *The Trouble with Treasure*, 149 NAT'L GEOGRAPHIC 787 (1976). The wreck site is approximately 10 nautical miles west of the Marquesa Keys on submerged lands until recently claimed to be within Florida's boundaries. Florida, like a number of coastal states, claims title to objects of antiquity found on state submerged lands, and it rigidly controls recovery of all artifacts. See FLA. STAT. ANN. §§ 267.011-267.14 (West 1977). The plaintiffs, Treasure Salvors, Inc., entered a series of contracts with the state to explore for and excavate the *Atocha* site. Their work was closely supervised by state agents aboard the salvage vessels for five years. The contract called for a split of the recovered treasure between the salvors and the state in order to assure that a representative sample of artifacts would be preserved for museum display. For an explanation of the Florida Archives and History Act, see Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 369-77 (1969). On March 17, 1975, the Supreme Court upheld the ruling of its Special Master in *United States v. Florida*, which held that the submerged lands that include the *Atocha* wreck site are outside Florida's jurisdictional limits and fall under the control of the United States. S. Ct. No. 52 Original (March 17, 1975). The plaintiffs then repudiated their contracts with Florida and filed this action to establish their sole right to the *Atocha* and its tackle, apparel, cargo, and armament. The State of Florida and the Department of the Interior immediately requested the Department of Justice to intervene to protect the objects of antiquity that had now been determined to lie on the outer continental shelf. On September 11, 1975, the federal government intervened and asserted a federal claim to these objects. This claim, like the claim made earlier by the State of Florida, is based on sovereign prerogative, especially as it has been legislatively asserted in the Antiquities Act (16 U.S.C. § 431 (1970)) and the Abandoned Property Act (40 U.S.C. § 310 (1970)). Interview with Michael W.

court stated that "the sole issue to be resolved . . . is whether the provisions of the Antiquities Act . . . or of the Abandoned Property Act . . . are applicable to the salvage of a shipwreck discovered on the continental shelf outside the territorial waters of the United States."<sup>87</sup> In granting summary judgment for the plaintiffs, the court concluded that the Acts did not apply because "the property of the wreck involved in this case is neither within the jurisdiction of the United States nor owned or controlled by our government."<sup>88</sup>

The *Treasure Salvors, Inc.* holding may have been unduly narrow. At any rate, within the current federal statutory scheme it stands as a roadblock to efforts to extend the national policy of historic preservation to cover the seabed. However, if some legitimate basis exists for the proposition that the seabed is land "owned or controlled" by the federal government, the provisions of the Antiquities Act<sup>89</sup> might apply to submerged antiquities. And if so, it might qualify, like the Abandoned Property Act,<sup>90</sup> as a legislative assertion of sovereign prerogative by which the United States would be entitled to beneficial use of the res. The next inquiry, therefore, must concern seabed jurisdiction.

#### *Jurisdiction over the Seabed*

##### The Truman Proclamation

The Truman Proclamation of 1945<sup>91</sup> was the beginning of the quest for federal jurisdiction over the submerged lands and resources of the continental shelf. President Truman declared that "the Government of the United States regards the natural resources of the subsoil and the seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States . . . ."<sup>92</sup>

Shortly thereafter, the federal government became entangled in litigation with several states over title to the natural resources of the

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Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, in Washington, D.C. (Dec. 29, 1976).

87. 408 F. Supp. 907, 908 (S.D. Fla. 1976), *appeal docketed*, No. 76-2151 (5th Cir. Apr. 28, 1976).

88. *Id.* at 910.

89. 16 U.S.C. § 431 (1970).

90. 40 U.S.C. § 310 (1970).

91. Pres. Proc. No. 2667, 3 C.F.R. 67 (1945), *reprinted in* 13 DEP'T STATE BULL. 485 (1945).

92. *Id.*

adjacent seabed of both the territorial sea<sup>93</sup> and the continental shelf.<sup>94</sup> The Supreme Court recognized that plenary control over these submerged lands vested in the federal government<sup>95</sup> and that this control extended beyond natural resources.<sup>96</sup>

### The Submerged Lands Act and the Outer Continental Shelf Lands Act

The states returned empty-handed from the litigation with the federal government over title to seabed resources. Congress, therefore, enacted the Submerged Lands Act (SLA)<sup>97</sup> and the Outer Continental Shelf Lands Act (OCSLA),<sup>98</sup> which gave the resources and submerged lands in the territorial sea to the coastal states<sup>99</sup> and retained control over the continental shelf for the United States.<sup>100</sup>

The next question is whether these Acts conferred jurisdiction over archaeological resources as well as natural resources. In *Treasure*

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93. The territorial sea is an area of the water, seabed, and air extending a defined distance seaward of, and perpendicular to, the established coastal baseline. *See* Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

94. The continental shelf is "the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea, to a depth of 200 metres." Convention on the Continental Shelf, *supra* note 83, art. 1(a).

95. *See* United States v. California, 332 U.S. 804 (1947). "The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean . . . and outside the inland waters." *Id.* at 805; *accord*, United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

96. *See* United States v. Texas, 399 U.S. 707 (1950).

Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the *property, whatever it may be*, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.

*Id.* at 719 (emphasis added).

97. 43 U.S.C. § 1301 (1970).

98. *Id.* § 1331.

99. *See id.* § 1311.

It is determined and declared to be in the public interest that . . . title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are . . . recognized, confirmed, established, and vested in and assigned to the respective States.

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coastline . . . .

*Id.* at § 1312. In addition, Florida and Texas received grants of up to three marine leagues, or nine geographical miles, along their Gulf of Mexico coasts. *See id.* § 1301(b). *See also* United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960).

100. *See* 43 U.S.C. § 1332(a) (1970). "It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition, as provided in this subchapter."

*Salvors, Inc.*, the court concluded that the SLA and the OCSLA granted jurisdiction over only *minerals* of the seabed<sup>101</sup> and not sunken vessels.<sup>102</sup> Archaeological resources, the court reasoned, are not "natural resources" as this term is defined in these Acts,<sup>103</sup> and because jurisdiction does not extend to antiquities located on the seabed, the provisions of the Antiquities Act<sup>104</sup> and the Abandoned Property Act<sup>105</sup> are not applicable to underwater archaeological resources.<sup>106</sup>

This part of the *Treasure Salvors, Inc.* holding may have been unduly narrow because the SLA and the OCSLA granted plenary control over the *seabed* and *subsoil* of the continental shelf, as well as over its natural resources.<sup>107</sup> The Senate Report on the OCSLA, for

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101. 408 F. Supp. 907 (S.D. Fla. 1976), *appeal docketed*, No. 76-2151 (5th Cir. Apr. 28, 1976). "However, [the OCSLA] merely asserts jurisdiction over the minerals in and under the continental shelf." *Id.* at 910.

102. *Id.* *Treasure Salvors, Inc.* cites *Guess v. Reed*, 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962), to support this proposition. *Guess* holds that "the Continental Shelf Lands Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf." *Id.* at 625. *Guess*, however, did not concern ownership and control of the continental shelf, and indeed, the United States was not even a party to the litigation. Rather, *Guess* was a wrongful death action arising out of a helicopter crash in the waters above the outer continental shelf. The plaintiffs attempted to join the insurers of the helicopter's manufacturer under Louisiana's Direct Action Statute. LA. REV. STAT. ANN. § 22:655 (West 1959). This statute applies, however, only if the injury occurred within the State of Louisiana, and the court would therefore not permit the joinder. Because the OCSLA adopts state law as federal law for certain purposes, plaintiffs sought a ruling that state law applied to the water column where the crash occurred. The court held:

Jurisdiction was asserted over "the subsoil and seabed" of the outer Continental Shelf. It is only for "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon" that the State law applies. This does not include the sea above the subsoil and the seabed and does not include the air above the sea.

290 F.2d at 625 (citation omitted).

103. 408 F. Supp. at 910.

104. 16 U.S.C. § 431 (1970).

105. 40 U.S.C. § 310 (1970).

106. 408 F. Supp. at 910.

107. See 43 U.S.C. § 1311 (1970) ("title to and ownership of the *lands* beneath the navigable waters . . . and . . . the natural resources . . . are . . . recognized . . ." (emphasis added)); *id.* § 1332 ("the *subsoil* and *seabed* . . . appertain to the United States, and are subject to its jurisdiction, control, and power of disposition . . ." (emphasis added)). For a judicial support of the proposition that federal jurisdiction extends to the *subsoil* and *seabed* of the outer continental shelf, see *United States v. Maine*, 420 U.S. 515, 526 (1975) ("Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three mile limit when . . . it enacted the [OCSLA] in 1954.");

example, asserts that “the jurisdiction and *plenary control* of the United States *is extended to the seabed and subsoil* of the entire continental shelf . . . *instead of merely to the natural resources* of the subsoils and the seabed.”<sup>108</sup>

It is not unreasonable to conclude, therefore, that jurisdiction over the seabed and subsoil should include jurisdiction over the underwater archaeological resources located therein. True, archaeological resources are not natural resources, but perhaps *natural resources* should be liberally construed to include them.<sup>109</sup> At any rate, it is a fundamental tenet of property law that abandoned property lodged in the soil belongs to the owner of the soil.<sup>110</sup>

The explicit plenary control over the seabed and subsoil, in conjunction with a liberal construction of *natural resources*, leads to the reasonable conclusion that the federal government should have jurisdiction over underwater archaeological resources located on the seabed. If this assumption is correct, the Abandoned Property Act and the Antiquities Act should enable the government to extend the national policy of historic preservation to include the seabed.<sup>111</sup>

#### The United Nations Convention on the Continental Shelf

The *Treasure Salvors, Inc.* court further frustrated the government's claims of jurisdiction over underwater archaeological resources when it held that the Geneva Convention on the Continental Shelf<sup>112</sup> would not permit liberal construction of *natural resources*.<sup>113</sup> The Convention provides that “[t]he coastal state exercises over the continental shelf sovereign rights for the purpose of

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United States v. California, 382 U.S. 448 (1966); United States v. Louisiana, 363 U.S. 1 (1960).

108. S. REP. NO. 441, 83d Cong., 1st Sess. 2 (1953) (emphasis added).

109. See Auburn, *Convention for Preservation of Man's Heritage in the Ocean*, 185 SCIENCE 763 (1974). “For purposes of the Continental Shelf Convention the term ‘natural resources’ should be deemed to include archaeological and cultural artifacts, and wrecks not less than 100 years old.” *Id.* at 764.

110. See 1 AM. JUR. 2d *Abandoned, Lost, Etc., Property* § 4 (1962).

111. For examples of national monuments that include offshore submerged lands, see 16 U.S.C. § 450 qq (1970) (Biscayne National Monument); Pres. Proc. No. 3443, *reprinted in* 76 Stat. 1441 (1961) (Buck Island Reef); Pres. Proc. No. 2281, *reprinted in* 52 Stat. 1541 (1938) (Channel Islands [enlarged to include submerged lands by Pres. Proc. No. 2825, *reprinted in* 63 Stat. 1258 (1949)]); Pres. Proc. No. 2112, *reprinted in* 49 Stat. 3430 (1935) (Fort Jefferson); Pres. Proc. No. 1733, *reprinted in* 43 Stat. 1988 (1925) (Glacier Bay). For the management plans for the resources of three of these national monuments, see 36 C.F.R. § 7.27 (1977) (Fort Jefferson); *id.* § 7.73 (1977) (Buck Island Reef); *id.* § 7.84 (1977) (Channel Islands). All national monuments are subject to the regulations of the National Park Service. 36 C.F.R. §§ 1.1-60.17 (1977). See also The Antiquities Act of 1906, 16 U.S.C. § 431 (1970).

112. Convention on the Continental Shelf, *supra* note 83.

113. 408 F. Supp. at 910.

exploring it and exploiting its *natural resources*."<sup>114</sup> One interpretation of *natural resources* is found in the International Law Commission report on the proposed Convention on the Continental Shelf,<sup>115</sup> which reads: "It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil."<sup>116</sup>

The court reasoned that even liberal interpretation of *natural resources* in the OCSLA would be ineffective to acquire jurisdiction for the federal government because the Geneva Convention on the Continental Shelf supersedes any incompatible terminology in that Act.<sup>117</sup> To support its reasoning, the court cited *United States v. Ray*,<sup>118</sup> which held that "[t]o the extent that any of the terms of the [OCSLA] are inconsistent with the later enacted Geneva Convention on the Continental Shelf they should be superseded."<sup>119</sup> However, *Treasure Salvors, Inc.* does not acknowledge the fact that the *Ray* court continued: "[T]here is nothing in the pertinent language of the Geneva Convention on the Continental Shelf which detracts from or is inconsistent with the Outer Continental Shelf Lands Act. To the contrary, the Geneva Convention confirms and crystalizes the exclusiveness of those rights."<sup>120</sup> Thus, *United States v. Ray* does not appear to support this part of the *Treasure Salvors, Inc.* holding. In addition, when the United States ratified the Geneva Law of the Sea Conventions,<sup>121</sup> the Senate gave its advice and consent with the

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114. Convention on the Continental Shelf, *supra* note 83, art. 2(1). (emphasis added). The Convention defines *natural resources* as "the mineral and other non-living resources of the seabed and subsoil, together with living organisms belonging to sedentary species." *Id.* art. 2(4). See also the North Sea Continental Shelf Cases, [1969] I.C.J. 322.

115. 11 U.N. GAOR, Supp. (No. 9) 40, U.N. Doc. A/3159 (1966).

116. *Id.* at 42.

117. 408 F. Supp. at 910.

118. 423 F.2d 16 (5th Cir. 1970). *United States v. Ray* concerned a claim to an area of the Florida Reef approximately four miles offshore. The individual claimants sought to build up the submerged reef to create a new island nation. They intended to dredge the seabed and to place the fill on the submerged reef, but inevitably this action would destroy a valuable resource—coral. The issue was whether the United States has the authority to regulate activities that are deleterious to the natural resources of the outer continental shelf. The court concluded that it did, so the federal government successfully asserted its right to protect these resources.

119. *Id.* at 21.

120. *Id.*

121. See Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the Continental Shelf, *done at Geneva*, Apr. 29, 1958, 15 U.S.T.



understanding that no federal law would be superseded by their ratification.<sup>122</sup>

### The United Nations Convention on the Continental Shelf and Underwater Archaeological Resources

It is not unreasonable to view the Law of the Sea Conventions as contracts between nations. By ratifying the Conventions, the signatories have agreed, for example, "that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities or make claim to the continental shelf without the express consent of the coastal State."<sup>123</sup> The technologically advanced nations thus have consented not to exploit the natural resources of the continental shelves of developing countries without the latter's consent.

The rationale underlying the International Law Commission's report that underwater archaeological resources are outside the scope of the Convention on the Continental Shelf is not clear.<sup>124</sup> It can be surmised, however, that minerals, fish, and other natural resources were included because they may comprise a significant portion of the economic livelihood of the signatory States. Perhaps exploitation of submerged antiquities—of far less economic consequence—was thought not to warrant a place in this type of an international cooperative agreement. Whatever the true rationale, this explanation is as plausible as any yet articulated.<sup>125</sup>

The conclusion, then, is that the drafters of the Conventions intended to leave regulation of activities concerning submerged anti-

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471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the High Seas, *done at Geneva*, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

122. See 106 CONG. REC. 11,188 (1960) (remarks of Sen. Mansfield, then Chairman of the Senate Foreign Relations Committee: "[N]o State or Federal law will be overridden by the [four Law of the Sea Conventions negotiated in Geneva in 1958]").

123. Convention on the Continental Shelf, *supra* note 83, art. 2(2).

124. See *id.* Article 5(1) of the Convention on the Continental Shelf purports to guarantee the right of "fundamental oceanographic or other scientific research," and exploitation of the shelf must not result in any "unjustifiable interference" with such research. Article 5(8) provides, however: "The consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there." For a proposal to resolve this ambiguity, see Korthals Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77 (1976). "A sound interpretation would be that the Continental Shelf Convention is only concerned with the non-living mineral resources of the continental shelf, while research on any other items is beyond its scope." *Id.* at 80.

125. See Korthals Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77, 79-80 (1976).

quities to other legal processes rather than to add more issues to an already complex international agreement. If this conclusion is valid, it would be entirely appropriate for a State to unilaterally legislate regulation of exploitation of underwater archaeological resources. This position is essentially that of the United States in its attempts to extend the national policy of historic preservation to the seabed.

*The Rule in Treasure Salvors, Inc. v. Abandoned Sailing Vessel*

In *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*,<sup>126</sup> the court concluded that possession and title were rightly conferred upon the finders of the vessel.<sup>127</sup> After reasoning that the United States did not have jurisdiction over submerged antiquities on the continental shelf, the court determined that the Antiquities Act<sup>128</sup> and the Abandoned Property Act<sup>129</sup> did not secure any government interest in the vessel. "Congress," said the court, "has not exercised its sovereign prerogative to the extent necessary to justify a claim to an abandoned vessel on the outer continental shelf."<sup>130</sup> In summarizing the preceding analyses of the doctrine of sovereign prerogative,<sup>131</sup> the Abandoned Property Act,<sup>132</sup> and jurisdiction over the seabed,<sup>133</sup> perhaps it would be reasonable to conclude that a different holding might have been more appropriate.

First, the *Treasure Salvors, Inc.* court concluded that it was bound to follow an American Rule of sovereign prerogative.<sup>134</sup> Whether a distinct American Rule exists, however, is not altogether certain.<sup>135</sup> Moreover, even though the issue of devolution remains unresolved, some recent decisions holding for the sovereign under similar circumstances<sup>136</sup> indicate that courts in the United States are not necessarily bound to follow an American Rule. Thus, *Treasure Salvors*,

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126. 408 F. Supp. 907 (S.D. Fla. 1976), *appeal docketed*, No. 76-2151 (5th Cir. Apr. 28, 1976).

127. *Id.* at 911.

128. 16 U.S.C. § 431 (1970).

129. 40 U.S.C. § 310 (1970).

130. 408 F. Supp. at 911.

131. See text accompanying notes 36-70 *supra*.

132. See text accompanying notes 71-82 *supra*.

133. See text accompanying notes 91-125 *supra*.

134. 408 F. Supp. at 909.

135. See text accompanying notes 45-63 *supra*.

136. See 371 F. Supp. 356 (1973), *rev'd and remanded with directions to dismiss*, 508 F.2d 1113 (1975); 273 N.C. 399, 160 S.E.2d 482 (1968). See also note 48 and text accompanying notes 61-69 *supra*.

*Inc.* might have reasonably reached a different conclusion on this issue and conferred possession and title upon the sovereign.

Second, *Treasure Salvors, Inc.* may have been unduly restrictive in its interpretation of the provisions and purpose of the Abandoned Property Act.<sup>137</sup> This Act might be reasonably acknowledged as a legislative assertion of the sovereign's prerogative to any abandoned property within the jurisdiction of the United States that might be acquired for the beneficial use of the sovereign.<sup>138</sup>

Although application of the Abandoned Property Act was initially restricted to Civil War properties, its scope was apparently expanded during codification.<sup>139</sup> At present, for example, it is routinely used in conjunction with federal antiquities legislation to administer federally owned historic properties.<sup>140</sup> Thus, the *Treasure Salvors, Inc.* court might have reasonably reached a different conclusion on this issue as well.

Third, concerning jurisdiction over submerged antiquities, *Treasure Salvors, Inc.* concluded that United States' jurisdiction extended only to "minerals in and under the continental shelf."<sup>141</sup> However, the Truman Proclamation,<sup>142</sup> the SLA, and the OCSLA<sup>143</sup> appear to extend jurisdiction to the seabed and subsoil of the continental shelf as well as to its natural resources.<sup>144</sup> Thus, notwithstanding the report of the International Law Commission<sup>145</sup> on the Geneva Convention on the Continental Shelf,<sup>146</sup> it might be reasonable to conclude that the seabed of the continental shelf is "owned or controlled by the Government of the United States."<sup>147</sup> Therefore, the provisions of the Antiquities Act<sup>148</sup> should be applicable to underwater archaeological resources on the continental shelf.

### Summary

The federal government intervened in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*<sup>149</sup> to attempt to impose strict excavation

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137. 40 U.S.C. § 310 (1970).

138. See text accompanying notes 71-82 *supra*.

139. See text accompanying notes 77-80 *supra*.

140. See note 79 *supra*.

141. 408 F. Supp. at 910.

142. Pres. Proc. No. 2667, 3 C.F.R. 67 (1945), reprinted in 13 DEP'T STATE BULL. 485 (1945). See also text accompanying notes 91-96 *supra*.

143. 43 U.S.C. §§ 1301-1343 (1970). See also text accompanying notes 97-111 *supra*.

144. See text accompanying notes 91-125 *supra*.

145. 11 U.N. GAOR, Supp. (No. 9) 40, U.N. Doc. A/3159 (1966).

146. Convention on the Continental Shelf, *supra* note 83.

147. See 16 U.S.C. § 431 (1970).

148. *Id.*

149. 408 F. Supp. 907 (S.D. Fla. 1976), appeal docketed, No. 76-2151 (5th Cir. Apr. 28, 1976).

standards on the salvors. The government sought to ensure that maximum critical data, in addition to artifacts, were recovered through the excavation.<sup>150</sup> However, in holding for the plaintiff and against the United States, *Treasure Salvors, Inc.* repudiated the national policy of historic preservation. Indeed, the decision stands as a roadblock to extending this policy to the continental shelf.

The following section examines current federal and state antiquities legislation for its capacity to extend the national policy of historic preservation to seabed antiquities. Modifications are suggested to facilitate this process.

#### ANTIQUITIES LEGISLATION

##### *Federal Antiquities Legislation*

##### The Antiquities Act

In the United States the forerunner of all legislation concerning archaeology is the Antiquities Act of 1906.<sup>151</sup> This statute authorizes the President "to declare . . . objects of historical or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."<sup>152</sup> Congress intended to preserve historic properties by "proper care and management" under the direction of the federal government.<sup>153</sup> The Secretaries of the Interior, Army, and Agriculture are authorized to grant excavation permits to operations conducted under the auspices of "reputable museums, universities, colleges, or other recognized scientific or educational institutions"<sup>154</sup> and to promulgate "uniform rules and regulations"<sup>155</sup> for interpretation of the Act and application of its provisions. The Antiquities Act further provides for a fine of up to \$500.00 or imprisonment for up to ninety days, or both, for any person who is convicted of "appropriating, excavating, injuring or destroying any historic or prehistoric ruin or monument, or

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150. Interview with Michael W. Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, in Washington, D.C. (Dec. 29, 1976).

151. 16 U.S.C. § 431 (1970). *See also* C. MCGIMSEY, PUBLIC ARCHAEOLOGY 102 (1972).

152. 16 U.S.C. § 431 (1970).

153. *Id.*

154. *Id.* § 432.

155. *Id.* § 433. *See also* 43 C.F.R. §§ 3.1-3.15 (1976).

object of antiquity situated upon [federally owned or controlled lands] without the permission” of the appropriate Secretary.<sup>156</sup>

### The Historic Sites Act

The Historic Sites Act of 1935<sup>157</sup> is the second federal statute affecting archaeology. This Act declares “that it is a national policy to preserve for public use, historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.”<sup>158</sup> The Secretary of the Interior, with the assistance of an advisory board representing various scientific and historical fields, is responsible for cataloging archaeological sites of exceptional value and for effectuating the ends contemplated by the Act.<sup>159</sup> The National Park Service currently shares this responsibility with the Secretary.<sup>160</sup>

### The National Historic Preservation Act

The National Historic Preservation Act of 1966<sup>161</sup> is the most far-reaching federal statute yet enacted for the protection and maintenance of archaeological resources. It is, for instance, the most definitive of the national policy to preserve historic sites and objects of antiquity.<sup>162</sup> This Act established the National Register of Historic Places,<sup>163</sup> which expands the cataloging system initiated by the National Park Service under the Historic Sites Act.<sup>164</sup> More importantly, however, this Act empowers the Secretary of the Interior to fund activities for nominating sites for the National Register and for maintaining them after they are declared to be historic sites.<sup>165</sup> In

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156. 16 U.S.C. § 433 (1970). *Cf.* *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (penal provisions of Antiquities Act unconstitutionally vague). It might be argued that the Antiquities Act was unconstitutionally applied only when the defendant was prosecuted for dealing in “antiquities” that were three years old.

157. 16 U.S.C. § 461 (1970).

158. *Id.*

159. *See id.* § 465.

160. *See id.* § 467. *See also* 36 C.F.R. §§ 1.1-60.17 (1977).

161. 16 U.S.C. § 470 (1970).

162. [T]he spirit and direction of the Nation is founded upon and reflected in its historic past; . . . the historical and cultural foundations of the Nation should be preserved . . . in order to give a sense of orientation to the American people; [and] it is . . . necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, [and] to give maximum encouragement to agencies and individuals undertaking preservation [as well as] State and local governments.

*Id.*

163. *See id.* § 470a.

164. *See id.* § 465. *See also* Palacios & Johnson, *An Overview of Archaeology and the Law: Seventy Years of Unexploited Protection for Prehistoric Resources*, 51 NOTRE DAME LAW. 706, 711 (1976).

165. *See* 16 U.S.C. § 470b (1970). “Matching grants-in-aid can also be awarded

addition, an Advisory Council on Historic Preservation has been established to recommend National Register nominations to Congress and the President.<sup>166</sup>

### Protection and Preservation

It would be useful at this point to elaborate upon a distinction made earlier<sup>167</sup> concerning two facets of historic preservation—protection and preservation. *Protection* of historic sites involves preventing their intentional or inadvertant destruction; *preservation* involves their upkeep or maintenance. These two facets of historic preservation are not mutually exclusive, but protection necessarily precedes preservation. This statement is especially true of archaeological sites at which the slightest disruption might destroy the contextual significance of the artifacts.

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to the states for their own programs for preservation of antiquities so long as those programs are in accordance with a comprehensive state plan which has been approved by the Secretary." Palacios & Johnson, *An Overview of Archaeology and the Law: Seventy Years of Unexploited Protection for Prehistoric Resources*, 51 NOTRE DAME LAW. 706, 711 (1976).

166. 16 U.S.C. § 470i (1970) (council comprised of representatives from various departments and agencies of federal government and individuals who have significant interest and experience in matters concerning historic preservation). The following criteria are used to guide the states, federal agencies, and the Secretary of the Interior in evaluating entries for the National Register:

The quality of *significance* in American history, architecture, archeology and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. that are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. that are associated with the lives of persons significant in our past; or
- C. that embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. that have yielded, or may be likely to yield, information important in prehistory or history.

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years *shall not be considered eligible* for the National Register.

NATIONAL REGISTER OF HISTORIC PLACES at xv (1976). The text then lists exceptional circumstances under which sites qualify notwithstanding the above characteristics. *Id.*

167. See text accompanying notes 1-4 *supra*.

Despite its limited application,<sup>168</sup> the Antiquities Act<sup>169</sup> appears to be well suited for accomplishing *protection* of archaeological resources because on its face it forbids unauthorized interference with objects of antiquity.<sup>170</sup> The Historic Sites Act<sup>171</sup> and the National Historic Preservation Act<sup>172</sup> appear to be better suited for accomplishing *preservation* after protection has been effectuated. According to these latter two Acts, protection follows inclusion on the National Register, and the protective mechanism may be inoperative before the antiquity is declared to be an historic site. However, because protection of antiquities may be effectuated automatically according to the Antiquities Act, this Act may be the most important federal statute for initially protecting archaeological resources, including those underwater. Subsequently, preservation may be accomplished according to the Historic Sites Act and the National Historic Preservation Act.

#### The Applicability of Federal Antiquities Legislation to Underwater Archaeological Resources

Notwithstanding the holding of *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*,<sup>173</sup> the provisions of the Antiquities Act<sup>174</sup> should be applicable to historic property located on the seabed of the continental shelf because this seabed is "controlled by the Government of the United States."<sup>175</sup> Moreover, the jurisdictional problems encountered by the government in *Treasure Salvors, Inc.* might be avoided by a simple amendment to the Antiquities Act. The first section of the Act should be revised to read, "objects of historic or scientific interest that are situated upon lands, *including submerged lands*, owned or controlled by the Government."<sup>176</sup> This revision would indicate Congressional intent to extend the national policy of historic preservation to the seabed and would incidentally be an adequate legislative assertion of sovereign prerogative.<sup>177</sup>

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168. The Antiquities Act is concerned with antiquities "that are situated upon lands owned or controlled by the Government of the United States." 16 U.S.C. § 431 (1970).

169. *Id.*

170. The Antiquities Act authorizes sanctions against any person "who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or object of antiquity." *Id.* § 433.

171. *Id.* § 461.

172. *Id.* § 470.

173. 408 F. Supp. 907 (S.D. Fla. 1976), *appeal docketed*, No. 76-2151 (5th Cir. Apr. 28, 1976).

174. 16 U.S.C. § 431 (1970).

175. *Id.* See also text accompanying notes 91-125 *supra*.

176. 16 U.S.C. § 431 (1970) (emphasis indicates suggested revision).

177. The suggested revision would probably enable a litigator to persuade a court of the Congressional intent that the provisions of the Antiquities Act

At present, some evidence of such an intent exists. Several national monuments that include submerged lands, for example, have been created under the authority of the Antiquities Act.<sup>178</sup> Shipwrecks and other submarine historic properties within the circumference of national monument areas are protected by regulations promulgated by the Department of the Interior.<sup>179</sup>

Once the jurisdictional problems are overcome, underwater archaeological resources could be protected and preserved through the same procedure currently used for historic preservation of terrestrial antiquities.<sup>180</sup> Following this procedure, the Department of the Interior would issue an excavation permit, which is a prerequisite to artifact recovery.<sup>181</sup> To qualify for a permit, treasure hunters either would be required to demonstrate their capability to work a proper excavation<sup>182</sup> or would have to agree to be accompanied by government-approved underwater archaeologists to supervise their work.<sup>183</sup> In addition, under the Abandoned Property Act<sup>184</sup> they would have to contract with the Administrator of General Services to keep any of the artifacts they recover.<sup>185</sup> The government would thereby retain its representative sample for museum display, leaving the remainder to the treasure hunters as an incentive to pursue the excavation.

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should be applicable to submerged antiquities on the outer continental shelf. Interview with Michael W. Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, in Washington, D.C. (Dec. 29, 1976).

178. See note 111 *supra*.

179. See 36 C.F.R. §§ 7.27, 7.73, & 7.84 (1977).

180. Interview with George R. Fischer, Southeast Archaeological Center, National Park Service, Tallahassee, Florida, in Ottawa, Ontario, Canada (Jan. 6, 1977).

181. See 43 C.F.R. §§ 3.1-3.9 (1977).

182. "Permits will be granted . . . to reputable museums, universities, colleges, or other recognized scientific or educational institutions." *Id.* § 3.3. Applications for permits are referred to the Smithsonian Institution for recommendation. See *id.* § 3.8.

183. "The field officer in charge may at all times examine . . . all work done under such permit." *Id.* § 3.14.

184. 40 U.S.C. § 310 (1970).

185. The Abandoned Property Act authorizes the Administrator of General Services to "make such contracts and provisions as he [or she] may deem for the interest of the government, for the preservation, sale, or collection" of federally owned objects of antiquity. *Id.* See also text accompanying notes 71-82 *supra*.



The Federal Government as Intervenor in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*

The federal government had a threefold purpose<sup>186</sup> when it intervened in *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*.<sup>187</sup> First, it sought to protect the archaeological integrity of the wreck site through the provisions of the Antiquities Act by requiring the salvors to conduct a systematic, scientific excavation in accordance with the procedure outlined in the preceding section.<sup>188</sup> Second, it sought to retain a representative sample of the recovered artifacts for the edification of the people of the United States. And third, it sought to establish a precedent under existing legislation (in the absence of a comprehensive federal underwater antiquities statute) for protecting and preserving valuable submerged historic properties.

Currently the government's attempt to establish a precedent for historic preservation of seabed antiquities must rely upon legislation that never contemplated underwater archaeology. This even now nascent discipline was virtually nonexistent in 1906 when the Antiquities Act was enacted.<sup>189</sup> Consequently, marine historic preservation is hindered by jurisdictional questions like those arising in *Treasure Salvors, Inc.* and by the cumbersome task of extracting principles from legislation designed for terrestrial antiquities and attempting to apply them to submerged antiquities. A comprehensive underwater antiquities statute, a proposed draft of which follows, would alleviate many of these problems.<sup>190</sup> But first, in order to provide a point of reference for this statute, current state antiquities legislation will be examined.

*State Antiquities Legislation*

In 1965, Florida became the first state to expressly include underwater archaeological resources in its antiquities legislation.<sup>191</sup> Since

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186. Interview with Michael W. Reed, Attorney, Marine Resources Section, Land and Natural Resources Division, United States Department of Justice, in Washington, D.C. (Dec. 29, 1976).

187. 408 F. Supp. 907 (S.D. Fla. 1976), *appeal docketed*, No. 76-2151 (5th Cir. Apr. 28, 1976).

188. See text accompanying notes 180-85 *supra*.

189. The Antiquities Act of 1906, Act of June 8, 1906, ch. 3060, §§ 1-4, 34 Stat. 225.

190. See A Model Underwater Antiquities Statute, pp. 660-62 *infra*.

191. The Antiquities Act of 1965 was enacted after substantial amounts of treasure were found in Florida's territorial waters. FLA. STAT. §§ 267.01-267.08 (1965), 1965 Fla. Laws ch. 66-300, §§ 1-8. This Act was soon replaced by the more comprehensive Archives and History Act of 1967. FLA. STAT. ANN. §§ 267.011-267.14 (West 1975), 1967 Fla. Laws ch. 67-50, §§ 1-11. See also Note, *Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360 (1969) (discusses development of Florida statute).

then, eight other states have followed Florida's lead.<sup>192</sup> The SLA<sup>193</sup> enables the states to extend historic preservation to seabed antiquities by extending their jurisdiction to "the lands beneath the navigable waters"<sup>194</sup> to "a line three geographical miles distant from [their coastlines]."<sup>195</sup> The more important provisions of these state statutes vary, sometimes drastically, but nevertheless, they provide a touchstone for a model underwater antiquities statute.<sup>196</sup> The main provisions concern title and definition, exploration and excavation permits, and artifact disposition.

### Title and Definitions

The state submerged antiquities statutes usually begin by defining *underwater archaeological resources* and vesting title to them in the state. The states are thus empowered to regulate excavations and to prohibit unauthorized interference with state-owned historic properties.<sup>197</sup>

Definitions of *submerged antiquities* range from simply "sunken or abandoned ships,"<sup>198</sup> to "wrecks of the sea and any part or the contents thereof,"<sup>199</sup> to "all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts . . . lying on the . . . bottoms of [state territorial waters]."<sup>200</sup> Age qualifications for the artifacts vary from "unclaimed for more than 10 years,"<sup>201</sup> to "pre-twentieth cen-

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192. See MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977), 1973 Mass. Acts ch. 989, § 5; MISS. CODE ANN. §§ 6192-101 to 6192-123 (Cum. Supp. 1972), 1970 Miss. Laws ch. 267, § 1; N.C. GEN. STAT. §§ 121-22 to 121-28 (Supp. 1967), 1967 N.C. Sess. Laws ch. 533 §§ 1-8, as amended by 1973 N.C. Sess. Laws ch. 476, § 48; R.I. GEN. LAWS §§ 42-45.1-1 to 42-45.1-13 (1977), 1974 R.I. Pub. Laws ch. 161, § 1; S.C. CODE §§ 54-321 to 54-328 (Cum. Supp. 1975), 1968 S.C. Acts (55) 3077; TEX. CIV. CODE ANN. tit. 106, art. 6145-9, §§ 1-22 (Vernon 1970), 1969 Tex. Gen. Laws 61st Leg., 2d C.S., at 98, ch. 2, emerg. eff. Sept. 10, 1969; VT. STAT. ANN. tit. 22, §§ 701-791 (Supp. 1977), 1975 Vt. Acts No. 109, § 4; VA. CODE §§ 10-136 to 10-145.9 (Cum. Supp. 1977), 1976 Va. Acts ch. 579.

193. 43 U.S.C. § 1301 (1970).

194. *Id.* § 1311.

195. *Id.* § 1312. *But see id.* § 1301 (Florida and Texas received three marine leagues, or nine geographical miles, along the Gulf Coast.). See also *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960).

196. See A Model Underwater Antiquities Statute, pp. 660-62 *infra*.

197. Again, it must be emphasized that the moral significance of this entitlement is beyond the scope of this Note.

198. FLA. STAT. ANN. § 261.061 (West 1975).

199. TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 5 (Vernon 1970).

200. N.C. GEN. STAT. § 121-22 (1977).

201. *Id.*; R.I. GEN. LAWS § 42-45.1-3(d) (1977); S.C. CODE § 54-321 (Cum. Supp. 1975); VT. STAT. ANN. tit. 22, § 701(10) (Supp. 1977).

tury,"<sup>202</sup> to "unclaimed for one hundred years or more."<sup>203</sup> The language vesting title in the state varies similarly.<sup>204</sup>

The variety of definitions and age standards signals potential problems. Often, for example, vessels stranded in hurricanes have struck reefs, breaking up gradually and over a considerable distance. A wreck site, therefore, may extend for several miles, transgressing state boundaries.<sup>205</sup> Parts of such a wreck located in one jurisdiction might be protected objects of antiquity, while other parts found in another jurisdiction might lack antiquity status. Protecting and preserving a wreck site under these conditions probably would be impossible. Thus, uniform principles appear to be necessary in order to prevent potential conflict between states and between a state and the federal government, and possibly even to encourage cooperation among them.

### Exploration and Excavation Permits

Although permit provisions vary, they usually specify to whom permits may be issued,<sup>206</sup> the geographic area to which the permit is confined,<sup>207</sup> its duration,<sup>208</sup> and cost.<sup>209</sup> Some states have different

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202. MISS. CODE ANN. § 6192-105 (Cum. Supp. 1972); TEX. CIV. CODE ANN. tit. 106, art. 6145, § 5 (Vernon 1970).

203. MASS. GEN. LAWS ANN. ch. 6, § 180 (West Supp. 1977).

204. *E.g.*, FLA. STAT. ANN. § 267.061(1)(b) (West 1975) ("[o]bjects having . . . historical and archaeological value which have been abandoned on . . . state-owned lands or state-owned sovereignty submerged lands shall belong to the state"); N.C. GEN. STAT. § 121-22 (1974) ("title to all bottoms of navigable waters within one marine league seaward from the Atlantic seashore . . . and the title to all shipwrecks . . . lying on the said bottoms . . . is hereby declared to be in the State"); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 5 (Vernon 1970) (defines the material and labels it "State Archaeological Landmarks . . . the sole property of the State"). *See also* MASS. GEN. LAWS ANN. ch. 6, § 180 (West Supp. 1977); MISS. CODE ANN. § 6192-105 (Cum. Supp. 1972); R.I. GEN. LAWS § 42-45.1-4 (1977); S.C. CODE § 54-321 (Cum. Supp. 1975); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-145.9 B (Cum. Supp. 1977).

205. Interview with Duncan R. Mattewson, State Underwater Archaeologist, Bureau of Historic Sites and Properties, Florida, in Ottawa, Ontario, Canada (Jan. 7, 1977).

206. *E.g.*, FLA. STAT. ANN. § 267.12 (West 1975) ("to institutions . . . properly qualified . . . , provided such activity is undertaken by reputable museums, universities, colleges, or other historical, scientific, or educational institutions"); MASS. GEN. LAWS ANN. ch. 6, § 180 (West Supp. 1977) ("to qualified persons . . . for the orderly salvage or removal of underwater archaeological resources"); N.C. GEN. STAT. § 121-25 (1974) ("any qualified person, firm or corporation desiring to conduct any type of exploration, recovery or salvage operations"). *See also* R.I. GEN. LAWS § 42-45.1-5 (1977); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-145.9 (Cum. Supp. 1977).

207. *See* FLA. STAT. ANN. § 267.12 (West 1975); MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977); MISS. CODE ANN. § 6192-109 (Cum. Supp. 1972); N.C. GEN. STAT. § 121-25 (1974); S.C. CODE § 54-323 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970); VA. CODE § 10-145.9 (Cum. Supp. 1977).

208. *E.g.*, MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977) ("[s]aid permits

permits for exploration and excavation.<sup>210</sup> The state antiquities committees in charge of administering historic properties<sup>211</sup> may issue permits when they believe<sup>212</sup> such action would serve the best

shall include . . . [the] time period covered"); N.C. GEN. STAT. § 121-25 (1974) ("for such a period of time . . . as the Department may deem to be in the best interest of the State"). See also FLA. STAT. ANN. § 267.12 (West 1975); MISS. CODE ANN. § 6192-109 (Cum. Supp. 1972); R.I. GEN. LAWS § 42-45.1-5 (1977); S.C. CODE § 54-326 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-145.9 (Cum. Supp. 1977).

209. *E.g.*, MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977) ("not to exceed one hundred dollars"); N.C. GEN. STAT. § 121-25 (1974) ("monetary fee to be set by the Department"). See also FLA. STAT. ANN. § 267.12 (West 1975); R.I. GEN. LAWS § 42-45.1-5 (1977); S.C. CODE § 54-322 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-145.9 (Cum. Supp. 1977). See Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 6 (1971) (salvage bond may be as high as \$15,000 in Florida).

210. See Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 6-7 (1971) (discusses Florida's exploration and salvage permits, and Texas permits for survey and reconnaissance, testing, excavation, and recording rock art).

211. *E.g.*, FLA. STAT. ANN. § 267.031 (West 1975) (the Division of Archives, History, and Research Management); MASS. GEN. LAWS ANN. ch. 6, § 179 (West Supp. 1977) (the Board of Underwater Archaeological Resources); MISS. CODE ANN. § 6192-110 (Cum. Supp. 1972) (the Board of Trustees of the Department of Archives and History); N.C. GEN. STAT. § 121-23 (1974) (the Department of Cultural Resources); R.I. GEN. LAWS § 42-45.1-5 (1977) (the State Historical Preservation Commission); S.C. CODE § 54-322 (Cum. Supp. 1975) (the South Carolina Institute of Archaeology and Anthropology, University of South Carolina); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 3 (Vernon 1970); VT. STAT. ANN. tit. 22, § 701 (Supp. 1977) (the Division of Historic Preservation); VA. CODE § 10-145.9 (Cum. Supp. 1977) (the Virginia Historic Landmarks Commission). The Massachusetts statute provides that

[t]he board shall consist of the state archaeologist, the state archivist, the commissioner of waterways, . . . the director of mineral resources, . . . and five members to be appointed by the governor, who shall include one representative of the Massachusetts Historical Commission, one marine archaeologist, one law enforcement specialist, and two qualified or certified divers, one to be chosen from a list submitted by recognized diving organizations.

The Texas Antiquities Committee is

to be composed of seven (7) members, namely: The Director of the State Historical Survey Committee, the Director of the State Parks and Wildlife Department, the Commissioner of the General Land Office, the State Archeologist, and the following citizen members, to-wit: one professional archeologist from a recognized museum or institution of higher learning in Texas, one professional historian with expertise in Texas history and culture, and the Director of the Texas Memorial Museum of The University of Texas.

212. *E.g.*, FLA. STAT. ANN. § 267.12 (West 1975) ("to institutions which the division may deem to be properly qualified"); MASS. GEN. LAWS ANN. ch. 6, § 180 (West Supp. 1977); MISS. CODE ANN. § 6192-101 (Cum. Supp. 1972) ("as in the opinion of the board"); N.C. GEN. STAT. § 121-25 (1974); R.I. GEN. LAWS § 42-45.1-5

interests of the state<sup>213</sup> and when it appears "that the maximum amount of historic, scientific, archaeological and educational information may be recovered and preserved in addition to the physical recovery of items."<sup>214</sup> Various sanctions are imposed for unauthorized interference with state historic properties and for violation of any of the conditions of the permits.<sup>215</sup>

### Artifact Disposition

The final significant provision of state underwater antiquities statutes concerns the disposition of recovered artifacts. Treasure hunting is a profit-seeking commercial enterprise requiring operating capital, and treasure hunters usually sell artifacts they recover in order to finance future ventures. Carefully drafted regulations might accommodate this need as well as the need to curtail destructive practices and encourage proper scientific excavations.<sup>216</sup>

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(1977); S.C. CODE § 54-323 (Cum. Supp. 1975) ("[i]f the Institution shall find"); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977) ("[t]he director, with the advice of the state archeologist, may grant . . . a permit . . . as he [or she] may deem"); VA. CODE § 10-145.9 (Cum. Supp. 1977).

213. *E.g.*, FLA. STAT. ANN. § 267.12 (West 1975); MASS. GEN. LAWS ANN. ch. 91 § 63 (West Supp. 1977) ("and said operations are in the public interest"); MISS. CODE ANN. § 6192-110 (Cum. Supp. 1972) ("as in the opinion of the board would be in the best interest of the State of Mississippi"); N.C. GEN. STAT. § 121-25 (1974); R.I. GEN. LAWS § 42-45.1-5 (1977); S.C. CODE § 54-323 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-145.9 (Cum. Supp. 1977).

214. VA. CODE § 10-145.9 (Cum. Supp. 1977).

215. *E.g.*, FLA. STAT. ANN. § 267.13 (West 1975) ("a misdemeanor punishable by a fine not exceeding \$500 or by imprisonment in the County jail for a period not to exceed 6 months or both"); MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977) (the statute provides for "a misdemeanor punishable by a fine of not more than one thousand dollars, imprisonment for six months, or both, and shall forfeit any underwater archaeological resources he [or she] has obtained thereby. In addition his [or her] permit, if any, shall be subject to revocation or suspension"). *See also* MISS. CODE ANN. § 6192-117 (Cum. Supp. 1972); N.C. GEN. STAT. § 121-28 (1974); R.I. GEN. LAWS § 42-45.1-12 (1977); S.C. CODE § 54-321 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 17 (Vernon 1970); VT. STAT. ANN. tit. 22, § 791 (Supp. 1977); VA. CODE § 10-145.9E (Cum. Supp. 1977).

216. On the one hand, it is important to avoid discouraging treasure hunting altogether because some treasure hunters are bona fide archaeologists who are labelled treasure hunters because they trade in artifacts to finance their excavations. Because of their commercial interest, treasure hunters are often responsible for developing new techniques to facilitate artifact recovery. Moreover, in their search for treasure ships, they locate and chart many wrecks that would not be financially lucrative to excavate but that have archaeological significance nevertheless. Interview with Robert F. Marx, President, Seafinders, Inc., in New York City (Jan. 8, 1977).

On the other hand, some underwater archaeologists are vehemently opposed to treasure hunting under any circumstances. They believe that there are ways to finance excavation without trading in artifacts and that trading in priceless historic properties is immoral. Remarks made by Jeremy N. Green, Maritime Archaeology Department, Western Australia Museum, during a Panel Discus-

The states appear to accomplish this compromise by regulating the quality of excavations through permits<sup>217</sup> and by contracting to dispose of the recovered artifacts between the treasure hunters and the state. Disposition may be a statutorily imposed percentage split<sup>218</sup> or a fair share of the objects recovered.<sup>219</sup> In some cases the state may choose to compensate the treasure hunter with the reasonable cash value of the artifacts.<sup>220</sup> The disposition contracts enable states to retain a representative sample of the artifacts for their museums while providing the treasure hunters with the means to capitalize future undertakings.

### *Summary*

The state and federal governments in the United States have acknowledged the national policy of historic preservation through a variety of antiquities statutes. Unfortunately, however, the current statutory framework provides for only marginal historic preservation of underwater archaeological resources.

On the one hand, at the federal level, historic preservation of submerged antiquities is hindered by jurisdictional problems. These problems arise from efforts to extend historic preservation to the seabed, using statutes that were not designed to accommodate conflicting interests in underwater archaeological resources. Nevertheless, a theoretical basis<sup>221</sup> apparently exists for extending current federal antiquities legislation to the outer continental shelf; however, the procedure is unwieldy and consequently impracticable.

On the other hand, a few states have explicitly included provisions for the preservation of submerged archaeological resources in their antiquities statutes. These states are thus able to regulate treasure

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sion at the Eighth International Conference of Underwater Archeologists, in Ottawa, Ontario, Canada (Jan. 7, 1977).

217. See text accompanying notes 206-15 *supra*. See also Beall, *State Regulation of Search for and Salvage of Sunken Treasure*, 4 NAT. RESOURCES LAW. 1, 6-7 (1971).

218. See MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977) (permittee may retain 75% of recovered artifacts, or fair market value).

219. See S.C. CODE § 54-323 (Cum. Supp. 1975); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 9 (Vernon 1970); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977); VA. CODE § 10-146C (Cum. Supp. 1977).

220. *E.g.*, MASS. GEN. LAWS ANN. ch. 91, § 63 (West Supp. 1977) ("the Commonwealth . . . shall have first option to purchase within six months said resources at fair market value"). See also N.C. GEN. STAT. § 121-28 (1974); VT. STAT. ANN. tit. 22, § 782 (Supp. 1977).

221. See text accompanying notes 126-90 *supra*.

hunting activities within their territorial seas, thereby preventing wanton destruction of archaeological sites and fostering historic preservation. However, fundamental variations from state to state in the statutory provisions may leave insurmountable gaps in the protective network. The potential confusion indicates a pressing need for uniform principles.

#### A MODEL UNDERWATER ANTIQUITIES STATUTE

The following statute was designed as a model for the federal government and for those states that at present have no provisions for underwater archaeological resources in their antiquities statutes. In addition, current statutes might be amended to incorporate these principles in order to promote uniformity.

*Section 1. Title to Underwater Archaeological Resources is Vested in the State*<sup>222</sup>

(A) Title to the seabed and subsoil of all navigable waters<sup>223</sup> within the jurisdiction of the State<sup>224</sup> and title to all underwater archaeological resources lying in or on the seabed and subsoil remaining abandoned and unclaimed for fifty years or more<sup>225</sup> will be in the State. All the seabed, subsoil, and underwater archaeological resources will be subject to the exclusive dominion and control of the State.<sup>226</sup>

(B) *Underwater Archaeological Resources* will be given its broadest possible meaning to include any remnants of past civilization or other human achievement, including but not limited to, sunken wrecks and other vessels and all parts or remnants thereof, submerged harbors and cities, and all former habitation sites.

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222. For purposes of the Model Statute, *State* means any state government or the federal government.

223. See 43 U.S.C. §§ 1301-1343 (1970) (Submerged Lands Act and Outer Continental Shelf Lands Act).

224. It is determined and declared to be in the public interest that . . . title to and ownership of the lands beneath the navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters . . . are . . . recognized, confirmed, established and vested in and assigned to the respective States.

*Id.* § 1311.

The seaward boundary of each original coastal state is approved and confirmed as a line three geographical miles distant from its coastline.

*Id.* § 1312.

225. See note 166 *supra* (fifty-year standard in National Register of Historic Places). *One hundred years* may be too long. See MASS. GEN. STAT. ANN. ch. 6, § 180 (West Supp. 1977). *Ten years* may be too recent and might lead to confusion between the law of salvage and the law of underwater archaeology. See N.C. GEN. STAT. § 121-22 (1974); R.I. GEN. LAWS § 42-45.1-3 (1977); S.C. CODE § 54-321 (Cum. Supp. 1975); VT. STAT. ANN. tit. 22, § 701(10) (Supp. 1977). *Pre-twentieth Century* is too inflexible because to qualify as an historic wreck a vessel must be older with each succeeding year. See MISS. CODE ANN. § 6192-105 (Cum. Supp. 1972); TEX. CIV. CODE ANN. tit. 106, art. 6145-9, § 10 (Vernon 1970).

226. This provision should be an adequate legislative assertion of sovereign prerogative. See text accompanying notes 45-70 *supra*.

*Section 2. The Board of Underwater Archaeological Resources*

(A) The custodian of underwater archaeological resources will be the Board of Underwater Archaeological Resources,<sup>227</sup> which will be comprised of seven members appointed by the State antiquities committee and which will be empowered to promulgate such rules and regulations as may be necessary to protect, preserve, maintain, and excavate underwater archaeological resources so that maximum historic, cultural, scientific, and educational information may be recovered.

(B) The Board is authorized to establish a professional staff comprised of professional underwater archaeologists and advisors representing historical, cultural, scientific, and educational organizations for the purpose of supervising protection, preservation, maintenance, and systematic excavation of underwater archaeological resources.

(C) The Board is authorized with the approval of two-thirds of its members to issue Exploration Permits and Excavation or Salvage Permits to individuals or organizations representing reputable museums, universities, colleges, or other recognized scientific or educational institutions<sup>228</sup> or otherwise demonstrating capability to so conduct these activities as to promote the interests of history, culture, science, and education. The permits may stipulate to supervision by a staff member of the Board who may examine the activities of the permittees at any time. Detailed reports that comply with standards specified by the Board will be submitted to the Board at designated intervals. The permits will be limited to a designated geographic area that shall be inclusive, in the exploration permits, of an area not to exceed twenty-five square miles, and in the excavation or salvage permits, of an area not to exceed four square miles.<sup>229</sup> No permit will issue to an area already designated in another permit until the expiration or cancellation of the prior permit.

The duration of the permits will be not more than six months for exploration permits and not more than two years for excavation or salvage permits. Permits will be renewable within thirty days before expiration at the option of the permittee and subject to approval by the Board. Such approval will be conditioned on the permittee's compliance with the standards set forth in this section. Permits may be revoked by the Board if at a public hearing, two-thirds of the members of the Board determine that the permittee has failed to comply with the rules and regulations promulgated by the Board.

*Section 3. Disposition Contracts*

(A) The Board is authorized to contract with excavation permittees for the disposition of all recovered artifacts.

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227. For purposes of the Model Statute, it is assumed that a State antiquities committee already exists to administer terrestrial antiquities. The Board of Underwater Archaeological Resources would become a part of this committee.

228. See 16 U.S.C. § 431 (1970).

229. See FLA. STAT. ANN. § 267.12 (West 1975) (three square miles for excavation permit).



(B) At the discretion of the Board, the permittee will be entitled to retain up to seventy-five percent, but no less than fifty percent, of the recovered artifacts. The contract will stipulate that the Board will be entitled to select a representative sample of the artifacts for museum purposes within the restrictions outlined above.

(C) The Board is empowered to negotiate with the excavation permittees for compensating the permittees with the reasonable cash value of the artifacts when they appear to be of special historical or cultural significance. The State will have the first option to purchase, through the Board, within six months, the recovered artifacts at fair market value.

#### *Section 4. Violations*

Any person<sup>230</sup> violating a provision of this statute will be punishable by a fine of not more than one-thousand dollars, imprisonment for up to six months, or both, and will forfeit any underwater archaeological resources obtained thereby. In addition, his or her permit, if any has been issued, will be subject to revocation or suspension at the discretion of the Board.

#### CONCLUSION

Underwater archaeological resources continue to reveal significant facets of the mosaic comprising our heritage. Unfortunately, gaps in the current statutory framework hinder attempts to extend the national policy of historic preservation to cover the seabed. The law of marine antiquities is a labyrinth, but the basic principles presented in the model statute might lead us out of the maze toward the goal of extending historic preservation seaward.

**JAMES KEVIN MEENAN**

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230. "Person" includes juridical persons.