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## Regulating the Business of Culture: The Abandoned Shipwreck Act - Can Preservationists, Salvors, and Divers Sail in Calmer Waters?

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## REGULATING THE BUSINESS OF CULTURE: THE ABANDONED SHIPWRECK ACT — CAN PRESERVATIONISTS, SALVORS, AND DIVERS SAIL IN CALMER WATERS?

I must go down to the seas again, to the lonely sea and the sky,  
And all I ask, oh august Court, is a case to steer me by.<sup>1</sup>

### INTRODUCTION

When Erasmus mused that “[a] common shipwreck is a source of consolation to all” . . . he quite likely did not foresee inconcinnate free-for-alls among self-styled salvors. Without doubt the Dutch scholar also could not imagine legal brawls involving self-styled ‘finders’ from Ohio, British and American insurance underwriters, an heir to the Miller Brewing fortune, a Texas oil millionaire, an Ivy League university, and an Order of Catholic monks. Yet that is what this case involves, with the prize being up to one billion dollars in gold.<sup>2</sup>

A rather unusual phenomena, an advance in technology and an increased interest in sport diving and underwater adventurers, resulted in access to the deepest, darkest depths of the ocean, otherwise un-navigable because of its pitch blackness and unknown dangers, for

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1. Herbert Baer, *Preface to the Third Edition to ADMIRALTY LAW OF THE SUPREME COURT* (3d ed. 1979).

2. *Columbus-America Discovery Group v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 974 F.2d 450, 454 (4th Cir. 1992). With the recent interest in lost shipwrecks and the expanding technology, several diverse groups have shown an increased interest in hunting for these lost treasures. In the case of the *Columbus-America*, such notables as Harry John, the heir to the Miller Brewing Company, and Jack Grimm, a Texas oil multi-millionaire who also searched for Noah’s Ark, the Loch Ness Monster, and the Titanic, and a Catholic monastic order who received the rights to the *Columbus-America* when Grimm believed them to be worthless, were interested in the recovery of the ship. *Id.* at 457.

In August of 1857, four hundred passengers, including recently wealthy prospectors, the infamous California Judge Alonzo Castle Monson, who resigned from the bench after losing his house and all his possessions in a poker game, and a well known former dance hall girl known as “the notorious Jenny French” boarded the S.S. *Sonora* for San Francisco. Along with passenger gold, the ship also contained about \$1,600,000 (an 1857 value) of gold being shipped from California merchants, such as Levi Strauss, to New York Banks. *Id.* at 455. After reaching Panama, many of the travelers and most of the gold boarded the *Central America*, which entered a hurricane that eventually extinguished the fires in the ship’s boilers causing the pumping system to fail. *Id.* at 456. After thirty hours in which every male passenger systematically bailed water out, the *Columbus America* sank. *Id.* Only 153 passengers survived: all the women and children, save one, fifty men who, after the ship sunk had managed to float to the top and were found nine hours after the sinking, and a lifeboat containing three men discovered nine days and 450 miles away from the sinking. *Columbus-America*, 974 F.2d at 456.

masses of tourists, archeologists, adventure divers, salvors, and treasure hunters. As a result, many historically important shipwrecks, which remained untouched at the bottom of the ocean for hundreds of years, are now explored, salvaged, pillaged, and excavated by anyone who can afford the equipment and possesses a taste for adventure.

In the past decade, these distinct groups have litigated for possession of recently uncovered treasures under the Abandoned Shipwreck Act (ASA).<sup>3</sup> In 1987, Congress passed the ASA to protect the cultural resources of the sea in light of the large number of individuals visiting abandoned shipwrecks.<sup>4</sup> According to the ASA, if a ship is embedded in state land, submerged in water, and abandoned, the state receives title.<sup>5</sup> However, if a ship fails to satisfy the ASA requirements, then the court determines the proper claimant to title based upon the law of finds or the law of salvage.<sup>6</sup> By regulating ownership of ships embedded in state territories, Congress hoped to save the perfectly preserved evidence of former cultures lying at the bottom of the ocean for years while, at the same time, allowing interested individuals access to these historic sites.<sup>7</sup>

This Comment will address the problem caused by the lack of a clear definition of abandonment under the ASA for courts to follow, which, as a result, has become the central issue in most ASA litigation. In Part II, the history of maritime law with respect to abandonment and the enactment of the ASA will be reviewed.<sup>8</sup> Second, the goals of preservation, the central purpose behind the ASA, and the importance of protecting cultural resources will be examined.<sup>9</sup> Finally, the major cases discussing abandonment under the ASA will be outlined.<sup>10</sup> In Part III, the effects of emerging technology and its costs on abandonment will be analyzed.<sup>11</sup> Part IV details an alternative standard for abandonment that gives courts discretion, yet also protects property law's strong interest in the true owner.<sup>12</sup>

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3. Abandoned Shipwreck Act, 43 U.S.C. § 2101 et seq.

4. See *infra* notes 72 - 84 and accompanying text.

5. See *infra* note 74 and accompanying text.

6. See *infra* notes 71 and accompanying text.

7. See *infra* notes 75 - 77 and accompanying text.

8. See *infra* notes 13 - 90 and accompanying text.

9. See *infra* notes 91 - 125 and accompanying text.

10. See *infra* notes 125 - 225 and accompanying text.

11. See *infra* notes 226 - 305 and accompanying text.

12. See *infra* notes 306 - 315 and accompanying text.

## II. BACKGROUND

The purpose of the Abandoned Shipwreck Act (ASA) was to institute a uniform law for all abandoned shipwrecks in state waters and to clear up confusion surrounding abandoned shipwreck litigation. Prior to the enactment of the ASA, however, several state laws and federal regulations existed to monitor maritime law and the United States' underwater resources.

### A. *Traditional Maritime Law*

As a result of the unique characteristics of commerce by water and the hazards of the sea, maritime law traditionally contained its own legal rules and concepts separate from those of state common law.<sup>13</sup> Unlike most legal principles created in the United States, maritime law commands a worldwide consistency because of the international implications of maritime commerce.<sup>14</sup> Because oceans and seas connect the entire world, a common worldwide maritime law aids courts in fair adjudication of these claims.

Admiralty courts typically hear cases regarding commercial endeavors; however, several constitutional and state safeguards govern the law of the sea. The United States confers original jurisdiction to the federal courts over admiralty and maritime law cases through Article III, section 2 of the United States Constitution.<sup>15</sup> After the American Revolution, no system of national courts existed under the Articles of Confederation as each state had enacted its own laws, setting up separate tribunals for the state and admiralty law.<sup>16</sup> Because conflicting opinions and a lack of uniform laws plagued the new country, the Founders created a separate maritime jurisdiction.<sup>17</sup> "The experience

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13. See THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME* 1 (1987).

14. *Id.* at 1.

Because of this, the laws of the sea were uniform and universal, a characteristic never completely lost, even in our own times, although it is not true today in anything like the extent that it then was. Indeed, it cannot be too strongly emphasized that throughout classical antiquity, through the Dark and Middle Ages, and until comparatively recent times, the greatest characteristic of maritime law has been that its uniform provisions were known and enforced in every seaport of every nation.

*Id.* at 7, (citing F. SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME COMMERCIAL LAW* 19 (1930)). See generally DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES* 67-70 (1970) (discussing interaction of federal and state courts in maritime law).

15. U.S. CONST. art. III, § 2.

16. SCHOENBAUM, *supra* note 13, at 17.

17. *Id.* "Constitution . . . referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would

of the uncontrolled and divergent activity of these state maritime courts was largely responsible for the apparently uncontroverted view among the delegates and drafters of the United States Constitution that there should be a system of national admiralty courts."<sup>18</sup> Admiralty law holds a unique place in American legal history because Article III represents the only instance that the Constitution confers jurisdiction over an entire subject matter to the federal courts.<sup>19</sup>

Congress further strengthened the power of the separate maritime law system by enacting 28 U.S.C. §1333, which permitted federal courts to develop a substantive body of general maritime law.<sup>20</sup> As a result, federal maritime law comes from both Congress, in the form of statutes, and federal common law; hence, state law plays a diminished role.<sup>21</sup> Even today, the United States Supreme Court conscientiously works to ensure the uniformity of maritime law.<sup>22</sup>

Prior to the ASA, the Submerged Lands Act of 1953 transferred ownership of all natural resources and submerged lands, up to three miles out, to the states in order to further preserve this country's underwater resources.<sup>23</sup> In addition, twenty-eight states wrote laws detailing the management of shipwrecks in state waters.<sup>24</sup> In addition to the Submerged Lands Act and state created laws, the Secretary of Commerce has the power, under the National Marine Sanctuary Program,<sup>25</sup> to designate certain underwater areas as national marine sanctuaries in order to preserve these sites for historical research, ecological protection, and archeological purposes.<sup>26</sup> Unfortunately, in contrast to the Founders' intentions, conflicts in application and in-

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have defeated the uniformity and consistency at which the Constitution aimed . . . ." *The Lot-tawanna*, 88 U.S. 558, 575 (1870).

18. Schoenbaum, *supra* note 13, at 17. However, no record of reasoning or discussion exists to explain why they chose to create a separate jurisdiction for maritime cases because the Founders drafted Article III during deliberations. *Id.* at 18 n.9.

19. *Id.*

20. 28 U.S.C. § 1333 (2000). *See also*, Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 371 (to be codified at 43 U.S.C. §2101 et seq.).

21. SCHOENBAUM, *supra* note 13, at 61.

22. *See also* John D. Kimball, *Miles: "This Much and No More . . .," in AN ADMIRALTY LAW ANTHOLOGY 7* (Robert M. Jarvis, ed., 1995). Kimball believes that the Supreme Court understated its role in maritime law in past decisions, "[u]nder the Constitution, the Court has an equal, if not preeminent, role and is vested with jurisdiction to declare the general maritime law." *Id.*

23. *See* Public Lands: Definitions, 43 U.S.C. §1301, 291 (1994).

24. *See* Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 370 (to be codified at 43 U.S.C. §2101 et seq.).

25. Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 370-71 (to be codified at 43 U.S.C. §2101 et seq.).

26. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-39 (2000).

consistent judicial determinations between the application of these state laws and federal admiralty law occurred.<sup>27</sup>

### 1. *Law of Salvage and the Law of Finds*

The ASA leaves “abandonment” undefined with the exception of comments made during committee hearings and advisory regulations.<sup>28</sup> Under traditional property law, abandonment consists of two elements: an act of abandonment and an intent to abandon.<sup>29</sup> When determining abandonment in maritime cases, courts found both express abandonment, such as giving notice,<sup>30</sup> and inferential abandonment when all the circumstances indicate that the owner intended to abandon.<sup>31</sup> Since the passage of the ASA, courts have struggled with the definition of abandonment, whether it is express or implied.<sup>32</sup> Maritime law itself does not directly define abandonment; instead, maritime courts look to cases that interpret maritime insurance claims,<sup>33</sup> salvage claims,<sup>34</sup> or traditional concepts of property law to determine if an owner abandoned his ship.<sup>35</sup> An owner does not definitively lose his property rights to a sunken ship unless he abandons it<sup>36</sup> or fails to make a claim within the required statutory period after recovery.<sup>37</sup>

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27. See *Abandoned Shipwreck Act: Hearings on S.858 Before the Subcomm. on Pub. Lands, Nat'l Parks and Forests Comm. on Energy and Natural Resources*, 100th Cong. 251, 252 (1987) [hereinafter *Hearings*] (additional material submitted for the Record from the National Oceanic and Atmospheric Administration). These areas could also include historical shipwrecks. *Id.*

28. See *infra* note 85 - 87 and accompanying text. See also 55 Fed. Reg. 50116, 50121 (1990).

29. 1 Am. Jur. 2d *Abandoned, Lost and Unclaimed Property* § 11 (1994).

30. See *Thompson v. U.S.*, 62 Ct. Cl. 516 (1926) (holding that the owner abandoned the sunken ship by notifying the United States Army of the wreck).

31. See *Steinbraker v. Crouse*, 169 Md. 453 (1935) (applying inferential abandonment). See also *Ervin v. Mass. Co.*, 95 So. 2d 902 (Fla. 1956) (holding that the length of time was central to finding of abandonment); D. David Lorello, Jr., *The Abandoned Shipwreck Act of 1987: Navigating Through the Fog*, 35 GONZ. L. REV. 75, 77 (2000) (explaining that there are three types of maritime abandonment in traditional maritime law: (1) owner's express notice, (2) implied from owner's inaction or lapse of time, and (3) no identifiable owner exists.)

32. See *infra* notes 125 - 221 and accompanying text. See also Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 583 (1992) (noting that the confusion over abandonment results from difference of American law, which follows finders keepers, and English law in which the sovereign keeps what is found).

33. H.B. Chermiside, Jr., Annotation, *Rights In and Ownership of Wrecked or Derelict Vessels and their Contents not Cast upon the Shore*, 63 A.L.R.2d 1369, 1370 (1959).

34. See *Nunley v. Dauntless Colocotronis*, 863 F.2d 1190, 1199 (5th Cir. 1989).

35. See *Deep Sea Research v. The Brother Jonathan*, 883 F. Supp. 1343, 1351 (N.D. Calif. 1995).

36. Chermiside, *supra* note 33, at 1372 (citing *De Bardeleben Coal Co. v. Cox*, 76 So. 409 (Ala. Ct. App. 1917)).

37. Chermiside, *supra* note 33, at 1371. See also, *Murphy v. Dunham*, 38 F. 503 (D.C. Mich. 1889). Therefore, merely finding property at sea does not constitute right to the title of the ship,

In maritime law, abandonment is usually determined under the law of salvage or the law of finds, depending on whether the true owner asserts and proves title.<sup>38</sup> The ASA, however, abolished the law of finds and the law of salvage as means for adjudicating abandoned shipwrecks.<sup>39</sup> In order to understand maritime abandonment and the implications of the ASA on maritime law, a review of the law of salvage and the law of finds is necessary.

#### a. The Law of Salvage

Issues of abandonment usually arise and are best expressed in the context of the law of salvage. Under the law of salvage, abandonment follows the traditional property definition: maritime abandonment requires the act of leaving property without the hope or intention of ever recovering it.<sup>40</sup> However, contrary to common law, maritime salvage law grants a reward to a salvor,<sup>41</sup> the person who found a lost vessel and recovered it and its goods from the ocean.<sup>42</sup>

The “[l]aw of marine salvage developed in response to important social policies, to encourage efforts to save property from destruction and to discourage embezzlement by salvors.”<sup>43</sup> Originally, salvage only applied to property in peril at sea. “From the standpoint of the owner of property, it . . . [was] the price of safety”<sup>44</sup> because a distressed vessel did not merely wait for the goodwill of another ship;

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but only a right of possession with title to a reasonable reward for his services. *Chermside*, *supra* note 33, at 1373. *See also* *The Amethyst*, 1 F. Cas. 762 (D.C. Me 1840). Even if the owner of a ship has abandoned his title to the insurance company, the ship is not effectively abandoned because the title has now transferred to the insurance company. *See Chermside*, *supra* note 33, at 1376. Hence, a vessel and its cargo must effectively be abandoned by all concerned. *Id.*

38. *See infra* notes 40 - 64 and accompanying text.

39. *See infra* note 65 and accompanying text.

40. *See* 3A, M. NORRIS, *THE LAW OF SEAMEN* § 145 (3d ed. 1970).

41. *Id.* at § 186

42. A salvor is someone who offers his service to save a ship in distress, often he has no other relation with the ship. A salvor only need to possess intention and ability to rescue a ship in peril. 68 Am. Jur. 2d *Salvage* § 38 (2000). Professional salvors, whose primary motive is professional gain, still receive compensation because the motive is unimportant. *Id.* at § 37. Some professional salvors are even awarded a greater amount in compensation because of the expense necessary to remain ready to perform. *Id.* *See also* *The Blackwall*, 77 U.S. 1, 14 (1869). In *Blackwall*, the Court held that the factors for determining a salvage award are:

(1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued. *Id.* at 14.

43. SCHOENBAUM, *supra* note 13, at 500.

44. GEORGE CANFIELD AND GEORGE DALZELL, *THE LAW OF THE SEA* 180 (1983). *See also* *Protection of Historic Shipwrecks and the National Maritime Museum: Hearings before the Sub-*

but, instead, an owner relied on the security that another ship desiring the salvage reward would rescue it.

Two types of salvage exist: pure salvage and contract salvage. Pure salvage occurs when a salvor voluntarily saves a lost or imperiled vessel.<sup>45</sup> Under contract salvage, which is usually used on sunken ships, a vessel owner creates a contract with a salvor for the retrieval of his goods.<sup>46</sup> A salvor can receive payment based on an hourly or daily rate, regardless of the salvor's success. Alternatively, the salvor can receive payment conditioned on his success.<sup>47</sup> Although a salvor may not impose salvage upon an owner and expect a reward, he may salvage an abandoned vessel without the owner's consent.<sup>48</sup> The purpose of salvage law is to give the salvor a right to compensation, not title, even in derelict or abandoned property.<sup>49</sup>

Viewed as treasure hunters preying on another's misfortune, salvors developed a roguish reputation. While the drafters of the ASA believed that application of salvage law to historic shipwrecks resulted in the destruction of artifacts and the exploitation of historic landmarks,<sup>50</sup> in reality, maritime law punishes salvors for plundering or damaging cargo or vessels.<sup>51</sup> "Compensation for salvage services presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance so far as the property is within the reach or under the control of the salvors."<sup>52</sup> It is critical to note that under the law of salvage the salvor never actually obtains title to the wreck, because title remains with the owner;<sup>53</sup> hence, the salvor's primary interest is to keep the property in good condition so that he will receive a higher reward for his services. A salvor's commercial success depends

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*comm. on Public Lands and Reserved Water, Senate Energy and Natural Resources Comm.*, 98th Cong. 29 (1983) [hereinafter *Hearings*].

45. BAER, *supra* note 1, at 575.

46. *Id.*

47. *Id.*

48. SCHOENBAUM, *supra* note 13, at 504.

49. *Id.* at 512. See also, Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 371 (to be codified at 43 U.S.C. §2101 et seq.).

50. See *Hearings*, *supra* note 44, at 29-30. The committee compared the plight of historic shipwrecks to historic land sites at the beginning of the twentieth century, such as Native American sites, destroyed by people scavenging for arrowheads or other valuable artifacts. *Id.* at 30.

51. *Id.* at 608. See also *Mason v. Ship Blaireau*, 6 U.S. 240 (1804) (denying a ship captain his salvage reward because he embezzled part of the cargo).

52. See *Hearings*, *supra* note 44, at 609 (citing Justice Grier's opinion in *Cromwell v. The Island City* 66 U.S. 121, 130 (1861)).

53. Lorello, *supra* note 31, at 77.



on his ability to safely and effectively harvest artifacts from historic shipwrecks.<sup>54</sup>

b. The Law of Finds

Although not as common, some admiralty courts applied the law of finds to sunken ships.<sup>55</sup> In order to succeed under the theory of finds with respect to a shipwreck in maritime law, a litigant must prove that the property had never been owned and, therefore, belonged to the finder.<sup>56</sup> This is commonly known as “finder’s keepers.”<sup>57</sup> Typical “finds” include whales or large fish; in this situation the owner not only keeps the property, but also the proceeds from the property.<sup>58</sup>

Courts also apply the maritime law of finds to shipwrecks discovered in international waters because this application assures uniform legal protection to those who search for and find the ships.<sup>59</sup> In order for the law of finds to apply, a salvor, first, must take control of a wreck and prove that it has been abandoned.<sup>60</sup> Next, a court must find that the abandoned ship has returned to a natural state as a result

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54. The supporters of the ASA did not believe that admiralty’s application of the law of salvage adequately protected historic shipwrecks. See generally Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365 (to be codified at 43 U.S.C. §2101 et seq.). At the committee hearings, Edward M. Miller, a professional salvor and sport diver, testified to the importance of professional salvors and their importance in the excavation of historic shipwrecks. See *Oceanography Miscellaneous, Part 1: Hearings before the Subcomm. on Oceanography, House Merchant Marine and Fisheries Comm.*, 99th Cong. 60 (1985) [hereinafter *Hearings*] (statement of Edward M. Miller). While running a primarily financial enterprise, salvors may also be of assistance in harvesting these artifacts and eliminating some of the financial burden on the government. *Id.* The opponents of the ASA encouraged the Committee to understand the importance of commercial salvors with regards to historic shipwrecks. See *Id.* (statement of Hon. Dante B. Fascell, Rep. Fla.). Representative Fascell urged that the encouragement of commercial salvors and the application of the law of salvage would benefit private enterprise, alleviate financial burdens, and allow for the romance of exploration and discovery that has motivated many commercial salvors in the past. *Id.* Instead of deciding between salvors and archeologists, as the ASA does, both could have been satisfied by merely setting some new guidelines. *Id.* However, the writers of the ASA disagreed and the statute specifically states that the law of salvage and the law of finds do not apply to historic shipwrecks falling under the ASA. 43 U.S.C. §2106(a). See *infra* note 65 and accompanying text.

55. See *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). A finder must first gain control and possess the property before he receives title to the property. See *Hearings*, *supra* note 44, at 34.

56. See *Adams v. Unione Mediterrane di Sicesta*, 220 F.3d 659, 671 (5th Cir. 2001).

57. 3A BENEDICT ON ADMIRALTY § 158 (Martin J. Norris et al., eds. 7th rev. ed. 1995), *The law of salvage, right to possession* (2000). See also Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 366 (to be codified at 43 U.S.C. §2101 et seq.).

58. See NORRIS, *supra* note 57, at § 160.

59. Drew Horrell, *Telepossession is Nine-Tenths of the Law*, 3 PACE Y.B. INT’L L. 309, 343-347 (1991).

60. See Lorello, *supra* note 31, at 77.

of its submersion in the sea or ocean floor.<sup>61</sup> Essentially, the ship reverts to a "state of nature" and becomes the type of property that has no owner, such as fish and ocean plants.<sup>62</sup>

Typically, when a salvor fails to prove abandonment and an owner exists, the court will then apply the law of salvage, not the law of finds.<sup>63</sup> However, courts have found that the ASA transfers title of the ship to the state; therefore, the ship has not been abandoned and the law of finds may apply.<sup>64</sup>

### c. The Law of Salvage and the Law of Finds After the ASA

In light of maritime law's treatment of abandoned shipwrecks, the ASA explicitly states that the laws of salvage and finds do not apply to abandoned shipwrecks.<sup>65</sup> A conflict exists between the ASA's ideals of preservation, believing a historic shipwreck should remain at the site where it was found, and a salvor's desire to protect a historic shipwreck by retrieving the artifacts and important parts of the ship to preserve them above ground.<sup>66</sup>

Federal historic preservation laws, policies, and management programs evince a strong preference to leave sites undisturbed and prevent the recovery of artifacts. This is in direct contrast with the general presumption under the maritime law of salvage that historic shipwrecks are in marine peril and need to be salvaged so that they can be returned to the stream of commerce.<sup>67</sup>

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61. *Id.* at 78.

62. *See Hener v. U.S.*, 525 F. Supp. 350, 355 (S.D.N.Y. 1981).

63. *Id.* at 356.

64. *See* Seena Foster, Annotation, *Validity, Construction, and Application of Abandoned Shipwreck Act of 1987*, 163 A.L.R. FED. 421, 428 (2000). In this convoluted reading of the law, the ASA simply applies traditional admiralty law. *Id.*

65. Relationship to Other Laws, 43 U.S.C. §2106 (1994).

(a) Law of salvage and law of finds. The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act [43 USCS § 2105] applies.

(b) Laws of United States. This Act [43 USCS §§ 2101 et seq.] shall not change the laws of the United States relating to shipwrecks, other than those to which this Act [43 USCS §§ 2101 et seq.] applies.

(c) Effective date. This Act [43 USCS §§ 2101 et seq.] shall not affect any legal proceeding brought prior to the date of enactment of this Act [enacted April 28, 1988].

*See also Abandoned Shipwreck Act of 1987; Preserving Wetlands, Historic, and Prehistoric sites in the St. John's River Valley, Florida: Hearings before the Subcomm. On Pub. Lands, Nat'l Parks, and Forests, S. Energy and Nat'l Res. Comm.*, 100th Cong. 255 (1987) [hereinafter *Hearings*].

66. Ole Varmer, *Non-Salvor Interests: The Case Against the "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 279 (1999).

67. *Id.* at 281.

These conflicting viewpoints on preservation could have added to the belief that salvors and admiralty courts only concerned themselves with the financial rewards of historic shipwrecks.<sup>68</sup>

Prior to the ASA, when a salvor claimed title under the laws of finds or salvage, a state could intervene through a state preservation statute in order to hinder the salvor; the courts would then weigh the competing interests of the state and the salvor under maritime law.<sup>69</sup> Today, if a state satisfies all the ASA's elements, the title of the wreck transfers to the state and falls out of the jurisdiction of admiralty courts.<sup>70</sup> However, if the state fails to prove any one element of the ASA, such as abandonment, admiralty law will control and the salvor will receive either a salvage reward or title to the vessel.<sup>71</sup>

### B. *Passage of the ASA*

Both state and federal courts claimed authority over historic ships and items salvaged from them prior to the enactment of the ASA.<sup>72</sup> Under the ASA, the United States asserts title to any abandoned shipwreck that is "(1) embedded in the submerged lands of a state, (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."<sup>73</sup>

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68. "[The ASA] would be helpful in this regard because it would effectively place historic shipwrecks outside the jurisdiction of admiralty law, which currently recognizes only the commercial value of abandoned historic shipwrecks." See Hearings, *supra* note 65, at 255. "Only by removing abandoned shipwrecks from the jurisdiction of admiralty law can we begin to treat these important cultural resources with the same care as similar resources on land." *Id.* at 257.

69. See Lorello, *supra* note 31, at 81.

70. See *supra* note 65 and accompanying text. See also *Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the "Seabird,"* 941 F.2d 525, 528-29 (7th Cir. 1991) (emphasizing limited scope of ASA: it eliminated the law of salvage and finds in order to better protect historic shipwrecks).

71. *Zych*, 941 F.2d at 528-29. The burden shifts to the state under the ASA to prove abandonment; in contrast to admiralty law in which the salvor proves abandonment. *Id.*

72. Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 366 (to be codified at 43 U.S.C. §2101 et seq.).

73. Rights of Ownership, 43 U.S.C. §2105 (1994).

(a) United States title. The United States asserts title to any abandoned shipwreck that is—

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

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

The Act further provides that “[t]he title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.”<sup>74</sup> The drafters of the ASA hoped that by transferring title to the states, the states would assume the role of salvor and recover the lost treasures, but with an eye toward preservation.<sup>75</sup>

Because admiralty law developed largely out of the need to control commercial ventures, rather than the need to manage cultural resources, Congress expected state courts to recognize the cultural value of discovered shipwrecks, not merely their commercial value.<sup>76</sup> Congress removed historic shipwreck litigation from admiralty’s jurisdiction even though shipwrecks remain in the oceans and usually arrived there as a result of commercial endeavors under the assumption that the states would care about historical preservation. Preservationists and archeologists criticized the maritime courts for their concentration on successful salvage, as opposed to preservation.

[A]s our judge told us . . . , it is the business of the Federal admiralty courts to encourage the recovery of material from shipwrecks to be

a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3) of this section.

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

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

(e) Reservation of rights. This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 of title 33. *Id.*

74. *Id.*

75. Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 151 (1995). “[T]he purpose of the ASA was not simply to rearrange substantive remedies but to transfer management of and litigation over embedded shipwreck sites from the federal courts to the states.” *Zych* 941 F.2d at 531.

76. See generally Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.A.N. (102 Stat. 432) 365, 366-77 (to be codified at 43 U.S.C. §2101 et seq.). See also *supra* note 23 and accompanying text. See also *Hearings, supra* note 65, at 252.

Currently, admiralty law recognizes only the commercial value of abandoned shipwrecks. The recognition that abandoned shipwrecks have additional values would be a first step to developing mechanisms for multiple use of these resources. In addition to their recognized commercial value, abandoned shipwrecks have recreational, historic, and archeological values that may be of local, regional, national, or international significance.

*Id.* at 251-52.

brought before the court. Our judge specifically told us it was not the business of the admiralty courts to be concerned about the character of the salvor or the disposition of the artifacts salvaged.<sup>77</sup>

In the past, shipwrecks and their recovery had been left to the devices of admiralty law because only those individuals familiar with oceans and salvage efforts attempted to raise or salvage abandoned ships. However, with the advent of new technologies in the past twenty to thirty years and an increase in scuba and sport diving, individuals with no previous interest in the oceans, such as archeologists, now have the ability to dive to the depths of the oceans to research the past as preserved on shipwrecks.<sup>78</sup> This new ability to explore the depths of the oceans led to tension between the traditional application of admiralty law and the newly enacted ASA.

Congress passed the ASA in the hope of clarifying which courts had authority over abandoned shipwrecks and, hence, maintained the right to manage and salvage them.<sup>79</sup> The ASA vests title of abandoned shipwrecks in the state within whose water the shipwreck rests.<sup>80</sup> Once the terms of the ASA are satisfied, the United States asserts title to the shipwreck and then transfers title to the state;<sup>81</sup> thus, the federal government loses control over the shipwreck. Opponents of the ASA argued that the transfer of title to the state contradicts Article III of the Constitution, which gives federal courts jurisdiction over all admiralty and maritime issues as this power includes the right to salvage wrecks.<sup>82</sup>

The ASA also clarified that shipwrecks in state waters are a public commodity and must be preserved for the public's use and benefit.<sup>83</sup> However, while a state provides the public with access to these shipwrecks, it must also protect the natural resources surrounding the shipwreck, guarantee exploration for sport divers, and permit public

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77. *Oceanography Misc., Part 2: Hearings before Subcomm. on Oceanography, House Merchant Marine and Fisheries Committee, 97th Cong.* 170 (1982) [hereinafter *Hearings*].

78. *Id.* at 169. "We have come to regard shipwrecks as archeological sites as significant as land sites, as significant as the Chaco ruins in New Mexico." *Id.*

79. However, prior to the ASA, state common law courts could have jurisdiction over maritime cases that concerned quantum meruit services or breach of salvage. McLaughlin, *supra* note 75, at 160. State courts adequately adjudicated these issues because contract problems are common law problems, not issues particular to the sea.

80. *See supra* note 73 and accompanying text. *See also* Lorello, *supra* note 31, at 81.

81. Lorello, *supra* note 31, at 81.

82. *See* H.R. REP. NO. 100-514(II), at 16 (1988) (dissenting views of Norman D. Shumway et al.).

83. Rights of Access, 43 U.S.C. §2103 (1994). "(a) Access rights. In order to - (1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research." *Id.*

and private recovery of the items on the shipwrecks consistent with preservation of the site.<sup>84</sup>

Congress identified and defined the majority of terms contained in the ASA.<sup>85</sup> However, the ASA failed to define the essential, and most litigated, term: abandonment.<sup>86</sup> At the time of the ASA's enactment, the Committee determined that abandonment "does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession in a shipwreck."<sup>87</sup> The Committee created one explicit exception to this interpretation of abandonment: United States warships.<sup>88</sup> The United States only abandons its title to sunken warships through an affirmative act,<sup>89</sup> thus, neither passage of time nor the failure to positively assert the right establishes abandonment in the isolated instance of sunken United States warships.<sup>90</sup>

### C. *The Goal of Preservation*

"Cultural property is that specific form of property that enhances identity, understanding, and appreciation for the culture that pro-

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84. *Id.*

It is the declared policy of the Congress that States carry out their responsibilities under this Chapter to develop appropriate and consistent policies so as to - (A) protect natural resources and habitat areas; (B) guarantee recreational exploration of shipwreck sites; and (C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

*Id.* In order to assist states with preserving the abandoned shipwrecks, funds are available through the Historic Preservation Fund to create underwater parks that would provide additional protections for resources.

(b) Parks and protected areas. In managing the resources subject to the provisions of this Chapter, States are encouraged to create underwater parks or areas that provide additional protection for such resources. Funds available to states from grants from the Historic Preservation Fund shall be available, in accordance with provisions of title 1 of the National Historic preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

*Id.*

85. See Definitions, 43 U.S.C. §2102 (1994). Essential terms such as embedded, submerged lands, State, National Register, public lands, and shipwreck are all defined. *Id.*

86. *Id.* No definition for abandonment exists in the definition section of the ASA.

87. Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 366 (to be codified at 43 U.S.C. §2101 et seq.).

88. *Id.* at 367-68.

89. *Id.* at 367.

90. *Id.* at 368

duced the particular property.”<sup>91</sup> The United States has often been accused of having a “short cultural memory”;<sup>92</sup> however, an increase in legislation intended to protect cultural property began to remedy this situation.<sup>93</sup> In addition, the United States Supreme Court reinforced and promoted the purpose of preservation when it found that historical preservation legislation is important because it promotes the general welfare.<sup>94</sup>

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. “[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing –or perhaps developing for the first time –the quality of life for people.”<sup>95</sup>

Underwater sites are unique because, unlike land sites, they have not been touched or disturbed by man; underwater sites remain completely protected, resulting in “untouched storehouses of historical data.”<sup>96</sup> Immediately after a ship sinks, it begins to adapt to its new underwater environment, and eventually it becomes a part of the

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91. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569 (1995).

92. Marilyn Phelan, *A Synopsis of the Laws Protecting our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 64 (1993).

93. See generally *Id.* at 64 for a synopsis of American cultural preservation laws.

94. See *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1985) (holding that New York’s landmark preservation laws do not constitute a Fifth Amendment taking because they promote the general welfare).

95. *Id.* at 107-08.

96. See *Hearings*, *supra* note 54, at 76.

Land sites have usually been subject to generations of human use and intervention. As a result, the site is more of a mix of time capsules from different periods. In contrast, the historic shipwreck site is more likely to be a single period time capsule. Not only is an underwater historic shipwreck site a more pristine time capsule of the period, it often can help explain the mix of time capsules contained on a terrestrial site.

Varmer, *supra* note 66, 288.

marine environment.<sup>97</sup> A thin coating of “snow” grows over the wreck from perishing marine organisms.<sup>98</sup> The amount of deterioration of a ship depends on several factors, such as the amount of oxygen in the water, different chemicals that may exist in the water, and the ship’s actual composition; however, once the seabed covers a shipwreck, deterioration greatly slows as a result of the lack of oxygen.<sup>99</sup> The seabed acts as a preserver and maintains the ship in the same condition as when it sank.<sup>100</sup> Once excavation begins or the shipwreck is disturbed, oxygen begins to seep into the ship and preservation becomes threatened.<sup>101</sup>

Historic shipwrecks provide key insight to our cultural history because a facet of life from a former time period has been completely preserved while submerged below the sea.<sup>102</sup> These perfectly preserved artifacts, discovered on historic shipwrecks, are essential to understanding the life and history of the United States.<sup>103</sup> Excavation destroys a ship and the cultural history it possesses.<sup>104</sup>

Excavation, even careful excavation, is a destructive activity that changes a site forever and destroys the potential for future data collection. That is why the decision to excavate is not made lightly; the disturbance of a site should be abandoned if it cannot be done properly, or delayed if there is a chance that in the future we can approach it with improved methods or equipment.<sup>105</sup>

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97. *Id.* at 280. For example, in 1993, Deep Sea Research located the *Brother Jonathan* four and half miles off the coast of Crescent City, California in 250 feet of water, with its hull, floor, galley, and cabins largely intact. *Deep Sea Research v. The Brother Jonathan*, 883 F. Supp. 1343, 1347 (1995). The wreck remained so well preserved in its resting spot on the ocean floor that even the smallest bit of cargo, such as dishes, can be plainly seen sitting on the ocean floor. *Id.* In addition, Deep Sea Research found other well-preserved artifacts, such as china, a corked full champagne bottle, a medicine bottle, an ale bottle, and a brass spike from the ship’s hull. *Id.*

98. Robert D. Ballard, *How We Found the Titanic*, 168 NAT’L GEOGRAPHIC 695, 696 (1985).

99. Varmer, *supra* note 66, at 280.

100. *Id.* at 280-81.

101. *Id.* at 281.

102. *Hearings, supra* note 65, at 254. The “study of shipwrecks provides an invaluable opportunity from several disciplinary viewpoints to study the physical remains of man’s activities upon the sea. In many instances, the wrecks are well preserved and relatively undisturbed by man or the marine environment.” *Id.* However, it is important to remember that not all shipwrecks maintain this historical importance. *Id.*

103. *See generally* Gerstenblith, *supra* note 91, at 609. Professor Gerstenblith clarifies that cultural property and art are two distinct ideas: art represents the creative and society gives it a monetary value; whereas, cultural objects are objects that give insight into a particular community and manifest an expression of that community regardless of its monetary value or creative aspects. *Id.* at 569.

104. D.K. Abbass, *A Marine Archeologist Looks at Treasure Salvage*, 30 J. MAR. L. & COM. 261, 261 (1999); Varmer, *supra* note 66, at 280-81.

105. Abbass, *supra* note 104, at 262.



Archeologists prefer to study recovered artifacts in the environment they are found because removing the artifacts from their resting places result in a large loss of information about the culture.<sup>106</sup> The environment provides clues as to how the ship sank and how the crew and passengers lived.<sup>107</sup> For example, when the *Titanic* was discovered, the placement of the lookout post and the number and precise location of binoculars in the steering room aided the archaeologists in building the story of how the *Titanic* actually sank.<sup>108</sup>

Exploration by salvors and divers often resulted in the destruction of the seabed and the historic shipwreck because disassembling the wreck disturbed the preservation process.<sup>109</sup> Explorers sometimes used explosives and propeller-wash deflectors that destroyed the seabed and the ship without prior research and exploration into the site of the shipwreck or the surrounding areas, which may also have contained important cultural information.<sup>110</sup> "This approach is more akin to strip mining than it is to archaeological research and [it] has destroyed countless natural and cultural resources, in addition to the contextual information contained in these time capsules."<sup>111</sup>

Prior to the ASA, the legislature enacted several other programs aimed at restoring historic landmarks and artifacts.<sup>112</sup> However, as a result of improvements in technology, previously enacted laws failed to protect the special needs of historic ships against sport divers and

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106. Varmer, *supra* note 66, at 287. Varmer illustrates the importance of leaving the preservation area untouched through the pyramids in Egypt. *Id.* When archaeologists retrieved artifacts from the Egyptian pyramids, they took them out of the pyramids and doled them out to museums across the world. *Id.* "[I]t would have been much better for science and the Egyptian culture to have left the artifacts where they were discovered. It clearly would be preferable to be able to study the objects where they [were] found. Their removal undoubtedly resulted in the loss of much information about this culture." *Id.*

107. Varmer, *supra* note 66, at 290.

108. *Id.* See *infra* notes 291 and 295 and accompanying text.

109. See generally Varmer, *supra* note 66, at 281.

110. *Id.*, at 295-96. Many concerns exist over the destruction of natural resources, as well as shipwrecks, in the excavation process. For example, in "mailboxing," a salvage vessel's propellers are pointed downward into the seabed where they push through layers of sand and seabed to find artifacts and treasures. McLaughlin, *supra* note 75, at 181. A debate continues as to whether practices such as mailboxing are any more damaging to the sea environment than sport diving or a strong storm; however, this argument underscores the importance of protecting cultural resources as well as the ships. *Id.*

111. Varmer, *supra* note 66, at 295.

112. Federal agencies have protected historic properties, including shipwrecks, located on public lands beginning with the *Antiquities Act* in 1906 (16 U.S.C. 431-433), affirmation of this goal in 1979 with the enactment of the *Archaeological Resources Protection Act* (16 U.S.C. 470aa-mm), and expansion of the *National Historic Preservation Act* in 1980 (16 U.S.C. 470 et seq.). See generally, Phelan, *supra* note 92, at 63 (listing preservation laws, protections, and impact).

salvors.<sup>113</sup> Congress expected the enactment of the ASA to remedy this gap in protection.<sup>114</sup> In reaction to the ASA, all states now include underwater resources in their state historic plans.<sup>115</sup> Presently there are 579 sites listed as underwater parks in comparison to the thirty-six listed sites in 1988, and many states have created underwater parks.<sup>116</sup>

While the ASA is an important step to recognizing the importance of valuable underwater resources, critics believe that it fails miserably in its application and goals.<sup>117</sup> In *Zych v. Unidentified, Wrecked, Abandoned Vessel, Believed to be the Lady Elgin and the Seabird*,<sup>118</sup> the United States Court of Appeals for the Seventh Circuit determined whether the *Lady Elgin* fell under the terms of the ASA. The ship's recovery received extensive media attention, which alerted other divers and salvors to its location.<sup>119</sup> Because title to the ship remained undetermined, no one could act to preserve the artifacts, leaving them vulnerable to the means and devices of less ethical and less careful divers.<sup>120</sup> "Unhappily, the broad statutory language of 'abandoned' and 'embedded' does not resolve these controversies; in-

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113. Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Balast For the States*, 37 VILL. L. REV. 573, 575-78 (1992).

114. *Id.*

115. Anne G. Giesecke, *The Abandoned Shipwreck Act Through the Eyes of its Drafter*, 30 J. MAR. L. & COM. 167, 168 (1999).

116. *See Id.* Giesecke lists five specific improvements resulting from the ASA: (1) in 1988, only twenty-seven states had laws specifically addressing underwater resources, now all the states have re-evaluated their underwater resources management, (2) all states now include underwater resources in their historic preservation management plans, (3) in 1988, only thirty-six underwater resources were listed in the National Register of Historic Preservation, today 579 sites are listed, (4) in 1988 only Florida had an underwater park, and "dozens of states now have dozens of parks," and (5) as opposed to facing forty or fifty salvor claims a year, for the last seven years, courts have been dealing with the same four vessels. *Id.*

117. *See infra* notes 120-121 and accompanying text.

118. 941 F.2d 525 (7th Cir. 1991).

119. Paul N. Keller, *Salvor-Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin*, 30 J. MAR. L. & COM. 245, 246-47 (1999).

120. *Id.* For example, while still deep in litigation, Paul Keller and Zych requested a meeting with Illinois State officials to discuss ways of preserving the artifacts after the onslaught of media attention. *Id.* at 246. The State of Illinois refused to enter into any agreement unless Zych conceded that the *Lady Elgin* was property of Illinois. *Id.* at 247. In September 1992, after the case went back to the district court on remand, another diver discovered the wreck and sold the information to the State of Illinois. *Id.* Fortunately, while the district court still could not determine who possessed title to the *Lady Elgin*, the district court judge issued an injunction prohibiting any other entity from claiming ownership. *Id.* at 248. Next, the State of Illinois sent a letter to the Underwater Archeological Society of Illinois (UASC) that authorized it to act as an agent of Illinois. *Id.*

Now designated 'agents of the State,' the leaders of the UASC appointed themselves the *Lady Elgin* research team . . . . They began diving the wreck site and continued for the next two years, at first daily, then weekly, and finally periodically . . . . Within a few

stead, disputes have arisen concerning the definitions and the standard of proof to resolve recurring problems that have been removed from experienced admiralty courts and transferred to state administrative agencies."<sup>121</sup>

In addition, because the ASA failed to adequately define a "historic" shipwreck, it covers most shipwreck artifacts regardless of the age of the shipwreck or the historical or cultural value that the shipwreck may have.<sup>122</sup> Because of their great historical value and the number of years that have passed since their sailing, the historical value of Greek and Roman shipwrecks is evident.<sup>123</sup> The "quintessential" example of a historic shipwreck would be a vessel that is several hundred years old and connected to Christopher Columbus' voyages.<sup>124</sup> However, merely basing historical value on age may be im-

months, all of the smaller and most valuable artifacts had disappeared from the site. In short, the [State of Illinois], through the UASC, wrecked the *Lady Elgin*. *Id.* at 249. The misfortunes of the *Lady Elgin* illustrate the problems resulting from lack of federal or state regulation in historic shipwreck preservation under the ASA.

121. Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 197 (1999). Richard Tobol, general counsel for the Columbus-America Group noted that, "Sadly, the judicial system appears incapable of resolving even the simplest underwater cultural resource questions in a timely or efficient matter. The issue of 'abandonment' is illustrative." Richard T. Robol, *Legal Protection for Underwater Cultural Resources: Can We Do Better?*, 30 J. MAR. L. & COM. 303, 308 (1999). The very problems the ASA intended to solve, increased litigation and lack of uniformity, actually have become more frequent as result of the unclear statutory language.

122. McLaughlin, *supra* note 75, at 154. The Committee estimated that of the approximately 50,000 shipwrecks existing, only five to ten percent actually possessed historical significance. See Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365 (to be codified at 43 U.S.C. §2101 et seq.). See also Rights of Ownership to Abandoned Shipwrecks, 43 U.S.C. §2105 (1994); *supra* note 73 and accompanying text. The National Register means the Secretary of the Interior's National Register of Historic Places under 16 U.S.C. § 470 (2000). See 36 C.F.R. 18.2(h). In determining a need for the National Historic Preservation Act, Congress found:

- (1) the spirit and direction of the Nation are founded upon and reflected in historical heritage;
- (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
- (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency . . . .

National Historic Preservation Act, 16 U.S.C. §470 (2000). *Cf.* Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessels Known as the Captain Lawrence, 913 F. Supp. 552, 556 (N.D. Mich. 1995) (stating that Michigan had found that none of the artifacts from *Captain Lawrence* were historically significant, unique, or a good specimen; therefore, they failed to satisfy the prerequisite for historic preservation).

123. GEOFFREY BRICE, MARITIME LAW OF SALVAGE 259 (3rd ed. 1999).

124. Foster, *supra* note 64, at 443. The United States District Court for the Northern District of Illinois in the *Zych* case reasoned that Congress understood the ASA could potentially cover more than just historic shipwrecks. *Zych v. Unidentified Wrecked, and Abandoned Vessel, Believed to be the S.S. Seabird*, 881 F. Supp. 1300, 1308 (N.D. Ill. 1992). The court rationalized Congress' failure to define "historic" by concluding that the "embeddedness" requirement must

practicable because some ships could acquire historic interest at an early stage while some "old" ships may not necessarily possess any historical value.<sup>125</sup> Mired in its basic purpose of historic preservation, the ASA was just beginning to encounter the problem of emerging technologies.

#### D. *Litigation Under the ASA*

Since its enactment, very few cases have been litigated under the ASA. The initial cases interpreting the ASA discussed its constitutionality and the effect of the Eleventh Amendment on the Act. Currently, a split exists among the Appellate Circuits over the definition of abandonment, specifically whether it is implied or express.

Four cases comprise the heart of the ASA. In the first to reach an appellate court, *Zych v. Unidentified, Wrecked, and Abandoned Vessel* believed to be the *Seabird*,<sup>126</sup> the United States Court of Appeals for the Seventh Circuit addressed the constitutionality of the ASA and the term "embedded."<sup>127</sup> In a second case, *California & State Lands Commission v. Deep Sea Research*,<sup>128</sup> the United States Supreme Court declared the constitutionality of the ASA and attempted to clarify the definition of abandonment.<sup>129</sup> The last two cases created a

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be rationally related to the protection of shipwrecks. *Id.* Relying on the legislative hearing of the Act, which indicated it was mainly for the preservation of historic ships, the court reasoned that embedded related to historic because the U.S. asserts title to ships that are (1) embedded in submerged lands, (2) embedded in coralline formations, or (3) on submerged lands and included in the National Register. *Id.* See Rights of Ownership, 43 U.S.C. §2105 (1994); *supra* note 73 and accompanying text. However, the Abandoned Shipwreck Advisory Guidelines states that "The commentators recommended that 'historic' shipwrecks be defined according to their historical qualities only, without regard to whether they are embedded. The definition has been revised accordingly." Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50117 (1990). Moreover, common sense indicates that any ship that sank and remained in the ocean for a number of years would also be embedded and submerged; thereby conferring historical stature on every submerged or embedded shipwreck. This court's interpretation further illustrates the confusion surrounding the ASA and its application despite Congress' intent to simplify the law surrounding abandoned shipwrecks.

125. BRICE, *supra* note 123, at 259. A moral question may also exist as to what ships should be historically important. For example, a Nazi submarine has an important historical placement in World War II; but does such a ship possess the cultural artifacts that the ASA was designed to protect? Many critics also raise moral questions regarding abandoned shipwrecks. For example the *Juno* contained gold and silver stolen from indigenous peoples of Central and South America; moreover, these people were also slaves to the Spanish. William J. Broad, *Court Ruling on Spanish Frigates Foils Modern-Day Treasure Hunt*, N.Y. TIMES, July 31, 2000, at A1. "If Spain recovers its lost booty . . . it will raise questions of whether it should pay compensation, just as Germany has agreed to make financial amends to victims of the Nazis." *Id.* at A11.

126. 941 F.2d 525 (7th Cir. 1991).

127. *Id.*

128. 523 U.S. 491 (1998).

129. *Id.*

split at the appellate level. The United States Court of Appeals for the Sixth Circuit determined that abandonment could be inferred from the evidence in *Fairport International Exploration v. The Shipwrecked Vessel Known as Captain Lawrence*.<sup>130</sup> In contrast, the United States Court of Appeals for the Fourth Circuit held that express abandonment applies under the ASA, particularly when the ship belonged to a sovereign in *Sea Hunt v. the Unidentified Shipwrecked Vessels or Vessel*.<sup>131</sup>

### 1. *The Constitutionality of the ASA and Abandonment*

The first appellate court to apply the ASA to an abandoned ship, the United States Court of Appeals for the Seventh Circuit, followed maritime law's definition of abandonment when it found that abandonment occurs "by an express or implied act of leaving or deserting property without the hope of recovering it and without the intention of returning to it."<sup>132</sup> Harry Zych, who owned a commercial salvaging business, found the *Seabird* off the shore of Waukegan, Illinois in 1989 after hours of library research and ten days of diving.<sup>133</sup> He then filed an *in rem* action seeking title to the ship under either the law of finds or the law of salvage.<sup>134</sup>

The *Seabird* litigation was primarily concerned with the term "embedded"<sup>135</sup> from the ASA and was remanded to determine whether

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130. 105 F.3d 1078 (6th Cir. 1997).

131. 221 F.3d 634 (4th Cir. 2000) *cert. denied*, *Virginia v. Spain*, 531 U.S. 1144 (2001), and *cert. denied* *Sea Hunt, Inc. v. Spain*, 531 U.S. 1144 (2001).

132. *Zych v. Unidentified, Wrecked and Abandoned Vessel*, believed to be the "Seabird," 941 F.2d 525, 527 (7th Cir. 1991). Although the court's dicta discussed the definition of "abandonment," the actual issue in this case was "embeddedness." *Id.* at 529-30.

133. *Id.* at 526-27.

134. *Id.* at 527. Initially, Zych's claim involved two ships: the *Seabird* and the *Lady Elgin*. *Zych v. Unidentified, Wrecked, Abandoned Vessel*, 746 F. Supp. 1334, 1336-37 (N.D. Ill. 1990). The *Lady Elgin* carried mail, freight, and passengers on Lake Michigan and Lake Superior. *Id.* at 1336. It sank on September 8, 1860 while returning from a Democratic Party rally in Chicago for presidential candidate Stephen Douglas. Some have attributed the change of political power in Milwaukee from Irish to German to the sinking of the *Lady Elgin* because a great majority of the three hundred passengers that perished were Irish political activists. *Id.* The *Seabird*, a 638 ton sidewheel steamer, sank in Lake Michigan on April 9, 1868 taking with it ninety-eight of the one hundred passengers. *Zych*, 746 F. Supp. at 1137. The large stove kept going all night to warm the passengers on that particularly cold night. *Id.* However, while cleaning the stove the next morning, the porter threw the hot ashes into the wind; caught in the wind, the ashes flew back into the cargo on the ship. *Id.* Several highly varnished tubs were swiftly ignited and the fire quickly spread through the cabin as a result of newly painted woodwork. *Id.*

135. "[T]he term 'embedded' means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any party thereof." Definitions, 43 U.S.C. §2102(a) (2000). See generally Christopher Meazell, Note, *Being and Embeddedness: The Aban-*

the ship was in fact embedded.<sup>136</sup> The Seventh Circuit addressed Zych's uniformity concern by relying on the ASA's preservation goals. The court found that the preservation of abandoned shipwrecks is a central concern in admiralty law; hence, state management of shipwrecks that satisfy the ASA cannot violate the uniformity principle.<sup>137</sup>

## 2. *The Supreme Court Fails to Define Abandonment*

The United States Supreme Court has reviewed only one case interpreting the ASA, *California & State Lands Commission v. Deep Sea Research*, which raised issues of abandonment and the Eleventh Amendment.<sup>138</sup> The Eleventh Amendment prohibits a citizen from bringing an action against his state in federal court.<sup>139</sup> In an attempt to circumvent federal courts, states asserted that actions against a ship embedded in state lands actually constituted an action against the state because the ship became part of the state lands.<sup>140</sup> The Supreme Court found the Eleventh Amendment to be inapplicable to abandoned shipwrecks because it does not bar federal jurisdiction over vessels; therefore, federal courts may adjudicate the claims to a shipwreck under the ASA.<sup>141</sup>

The *Brother Jonathon* sank when it hit a submerged rock in 1865, off the coast of Northern California, taking with it the lives of ninety-three passengers, cargo, and valuables, including gold.<sup>142</sup> Shortly after the sinking, five insurance companies paid claims totaling \$48,490 for the loss of the ship; however, two-thirds of the cargo was uninsured.<sup>143</sup> In October 1993, Deep Sea Research located the wreck four and a half miles off the coast of Crescent City, California in 250 feet of

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*doned Shipwreck Act's Historical Proxy is All at Sea*, 34 GA. L. REV. 1743 (2000) (discussing various circuits' application of "embedded" under the ASA).

136. *Zych*, 941 F.2d at 534.

137. *Id.* Note, however, that the justification for removing abandoned shipwrecks from admiralty law's jurisdiction was to promote preservation, a goal the Congress believed the admiralty courts could not fill. See *supra* notes 84-112 and accompanying text.

138. *California & State Lands Commission v. Deep Sea Research*, 523 U.S. 491 (1998).

139. U.S. CONST. Amend. XI. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commence or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

140. See *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1347 (N.D. Cal. 1995).

141. *California and State Lands Comm'n. v. Deep Sea Research*, 523 U.S. 491, 507-08 (1998).

142. *Deep Sea Research*, 883 F. Supp. at 1347.

143. *Id.* It is estimated that the ship's cargo also included \$2 million in gold and the United States Army payroll of \$250,000. Carl Nolte, *1865 Shipwreck Discovered Off the North Coast Legend Says Steamer Sank with Gold, Booze, Camels*, SAN FRANCISCO CHRONICLE, Feb. 25, 1994, p. 1.

water with the *Brother Jonathon's* hull, floor, galley, and cabins largely intact.<sup>144</sup> The United States District Court for the Northern District of California found that an abandoned shipwreck was "any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person."<sup>145</sup> In order to prove abandonment under the district court's standard of clear and convincing evidence, the state must show (1) the original owner's intent to abandon and (2) physical acts carrying out that intent.<sup>146</sup>

California argued that the *Brother Jonathon's* owners abandoned it because they had not attempted to salvage the vessel since 1865.<sup>147</sup> However, California only offered the testimony of one historian who erroneously stated the facts and primarily based his research on three newspaper articles.<sup>148</sup> Deep Sea Research argued that the ship had not been abandoned because no affirmative act of abandonment existed, the technology did not exist to discover the ship until recently, and insurance claims had been paid on the vessel in 1865.<sup>149</sup> As a result, the underwriters actually possessed title to the *Brother Jonathon*.<sup>150</sup>

When the *Deep Sea Research* case reached the United States Supreme Court, it primarily addressed the Eleventh Amendment issue.<sup>151</sup> With respect to the issue of abandonment, the Court postulated that the lower court's determination that the ship had not

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144. *Deep Sea Research*, 883 F. Supp. at 1347.

145. *Id.* at 1351 (quoting 55 Fed. Reg. 50116, 50120 (Dec. 4, 1990)). In addition, ships for which insurance claims had been paid were excluded from the definition of abandonment because the owner received full value for the ship. *Id.* Hence, title to the shipwreck remains with the insurance company that paid the owner. *Id.*

146. *Id.* at 1351.

147. *Id.*

148. *Id.* 1351-52. Rand Frank Herbert, the historian, testified inaccurately to the number of passengers and cargo the ship carried and the number of victims that actually perished. *Deep Sea Research*, 883 F. Supp. at 1351. While he did not find any record of the owner's salvage attempts, he did find that other divers attempted to salvage the ship; although he could not determine on which portions of the cargo insurance claims were paid, he did find evidence that some insurance claims were paid. *Id.* Although the state had five months to prepare, it hired Herbert a mere eight days before trial. *Id.* at 1352. During that period he conducted only twenty-two hours of research reviewing newspaper articles in the library. *Id.* Moreover, he did not research the insurance records nor did he try to contact the underwriters. *Id.* Most important, however, Herbert failed to discover any proof that the owner or the insurance company publicly disclaimed ownership interest in the *Brother Jonathon*. *Id.*

149. *Id.*

150. *Deep Sea Research*, 883 F. Supp. at 1351. See *infra* notes 217-258 and accompanying text discussing technology and its effect on the definition of abandonment.

151. California and State Lands Comm'n., 523 U.S. at 494. See *supra* note 139 and accompanying text for Eleventh Amendment explication.

been abandoned was influenced by their false belief that the Eleventh Amendment was a central issue.<sup>152</sup> While the Supreme Court decided not to make the determination itself, it gave the lower courts guidance with two illusive sentences: “[W]e decline to resolve whether the *Brother Jonathon* is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of ‘abandoned’ under the ASA conforms with its meaning under admiralty law.”<sup>153</sup> The problem remains, however, that courts do not know which admiralty law definition of abandonment to follow: express or implied abandonment.

### 3. *The Sixth Circuit Recognizes Implied Abandonment*

In *Fairport International Exploration v. The Shipwrecked Vessel Known as the Captain Lawrence*, the United States Court of Appeals for the Sixth Circuit held that “[c]ommon sense makes readily apparent that the statute did not contemplate a court’s requiring express abandonment; such explicit action is obviously rare indeed, and application of such rule would render the ASA a virtual nullity.”<sup>154</sup>

In 1924, the Boy Scouts of America acquired the *Captain Lawrence* to train scouts; it was originally a two-master schooner yacht built in 1898.<sup>155</sup> It first sank in 1931 and was later exhumed.<sup>156</sup> While still in damaged shape, the Boy Scouts sold it to Wilfred Behrens for \$150.<sup>157</sup> In 1933, the *Captain Lawrence* sank again near Poverty Island, Michigan while being used to search for a Civil War treasure chest filled with gold<sup>158</sup> in an amateur diving expedition led by Behrens.<sup>159</sup> A strong wind caused the wreck, throwing the ship onto the beach and into rocks.<sup>160</sup> Although Behrens had no insurance, he estimated the *Captain Lawrence’s* value to be \$200,<sup>161</sup> which was significant in determining abandonment because a comparable vessel in the 1930s would have sold for \$14,500.<sup>162</sup>

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152. *California and State Lands Comm’n.*, 523 U.S. at 508.

153. *Id.*

154. *Fairport Int’l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997).

155. *Fairport Int’l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 913 F. Supp. 552, 555 (N.D. Mich. 1995).

156. *Id.*

157. *Id.*

158. *Fairport Int’l Exploration*, 105 F.3d at 1080.

159. *Fairport Int’l Exploration*, 913 F. Supp. at 555.

160. *Id.* at 555.

161. *Id.* This estimate was his total loss as he was carrying no cargo. *Fairport Int’l Exploration*, 105 F.3d at 1080.

162. *Fairport Int’l Exploration*, 105 F.3d at 1080.



The group Fairport International Exploration (Fairport) located the *Captain Lawrence* believing it might provide the missing link in its search for the Civil War gold.<sup>163</sup> Since 1978, Libert, the President of Fairport, had been researching the gold supposedly lost near Poverty Island during the Civil War.<sup>164</sup> Many of the stories reference a ship named *St. Lawrence* that found the gold in the 1930's, and then sank off the Coast of Poverty Island.<sup>165</sup> Libert determined that the *St. Lawrence* was actually the *Captain Lawrence* and believed it contained one chest of gold and logs supplying information regarding the location of the remaining treasure.<sup>166</sup>

The district court found that the ASA's definition of abandonment followed traditional maritime law and relied on two sources for its determination.<sup>167</sup> The first was *Benedict on Admiralty*, which defines abandonment as "the act of leaving or deserting such property by those who were in charge of it, without hope on their part of recovering it and without the intention of returning to it."<sup>168</sup> The second definition was derived from the legislative history of the ASA stating that abandonment "does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating a claim of possession of the shipwreck."<sup>169</sup>

The court found that although abandonment cannot be inferred merely by the passage of time or by lack of technology to adequately salvage the wreck, it often must be inferred based on the surrounding circumstantial evidence.<sup>170</sup> The court held that Behrens clearly intended to abandon the vessel for several reasons: the wreck was recent, it sank in shallow water, pieces of the ship were found only forty to sixty feet from the coast, it was technically feasible to locate and salvage the wreck, Behrens valued the vessel at only \$200, he had no insurance on it, and he declared it a total loss.<sup>171</sup> Moreover, Behrens,

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163. *Id.*

164. *Fairport Int'l Exploration*, 913 F. Supp. at 555-56.

165. *Id.* at 556.

166. *Id.* Once Libert discovered the two ships were one in the same, he contacted Behrens' daughters. *Id.* They tried to assist Libert in the search, but because their father always remained secretive as to what he did, they were unable to provide any helpful information. *Id.*

167. *Id.* at 357-58.

168. 913 F. Supp. at 557 (quoting 3A *BENEDICT ON ADMIRALTY* § 134 (Martin J. Norris et al., eds.) (7th rev. ed. 1995)).

169. *Id.* quoting the House of Representatives Committee on Interior and Insular Affairs H.R. Rep. No. 100-514(I), 100th Cong., 2nd Sess., reprinted in U.S.C.C.A.N. 365, 366 (1994).

170. *Fairport Int'l Exploration*, 913 F. Supp. at 558.

171. *Id.* at 558-59.

an accomplished salvor who continued to salvage for the remainder of his life, never attempted to salvage his own ship nor did he tell his family the ship's location. In addition, his heirs did not attempt to locate the ship.<sup>172</sup> Hence, the district court found that the state met its burden of proof by showing that Behrens abandoned the *Captain Lawrence* by a preponderance of the evidence.<sup>173</sup>

The United States Court of Appeals for the Sixth Circuit cited the district court's findings and affirmed its holding of abandonment, when it stated that "[t]he evidence, although circumstantial, clearly demonstrates Wilfred Behrens' intent to abandon the vessel."<sup>174</sup> The Sixth Circuit relied on the district court's determination in *Deep Sea Research* that abandonment occurs either (1) when the title is affirmatively renounced or (2) abandonment is inferred as a result of lapse of time or the owner's failure to pursue salvage attempts.<sup>175</sup> The Sixth Circuit held that "there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances. And here, there is no question that the district court's finding of abandonment was not clearly erroneous, as there was an abundance of circumstantial evidence justifying an inference of abandonment."<sup>176</sup>

#### 4. *The Fourth Circuit and Express Abandonment*

The United States Court of Appeals for the Fourth Circuit, in contrast to the Sixth Circuit, held in *Sea Hunt, Inc. v. The Unidentified Shipwreck Vessel* that the ASA required express abandonment: "Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express

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172. *Id.*

173. *Id.* at 559.

174. *Fairport Int'l Exploration*, 105 F.3d at 1081.

175. *Id.* at 1084. The Sixth Circuit acknowledged the opposing view from *Columbus-America*, but noted that it was not an ASA case; the *Columbus-America* Court applied the law of salvage and the law of finds, not the ASA. *Id.* Although the United States Court of Appeals for the Fourth Circuit rendered its final decision in 1992, five years after the enactment of the ASA, the litigation commenced in 1987, just prior to the enactment of the ASA. See *Columbus-America Discovery Group v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 974 F.2d 450 (4th Cir. 1992); *Columbus-America Discovery Group v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 1998 U.S. Dist. LEXIS 668 (E.D. Va. 1988). Applying the law of finds, the *Columbus-America* court found that abandonment was a voluntary act that must be proved by a clear and unmistakable affirmative act indicating a purpose and intent to abandon, such as the owner's express declaration of abandonment. *Columbus-America*, 974 F.2d at 461. However, the court in *Fairport Int'l Exploration* distinguished treasure salvage by noting that "[i]n treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property, or there may even be an express disclaimer of ownership." *Id.* citing *Columbus-America*, 974 F.2d at 462 (citation omitted).

176. 105 F.3d at 1085.

acts.”<sup>177</sup> Sea Hunt, a maritime salvage company, obtained permits from the Virginia Marine Resources Commission after locating *La Galga* to salvage it and recover historic artifacts.<sup>178</sup>

*La Galga*, a Spanish frigate carrying slaves and gold, sank when it ran into a hurricane near Bermuda in 1750.<sup>179</sup> After its crew bailed water for seven days and threw cannons overboard to lighten the ship, *La Galga* sank near the present day borders of Maryland and Virginia.<sup>180</sup> The captain tried to salvage the ship, but he was unsuccessful because the local residents had already pillaged and looted most of the wreck.<sup>181</sup> Before the captain could begin salvage attempts again, another storm arose and destroyed the remains of the ship and with it, the captain’s hope of salvage.<sup>182</sup>

*La Galga* remained trapped at the bottom of the sea until Sea Hunt’s recent discovery and salvage of the ship.<sup>183</sup> Sea Hunt commenced an action by filing an *in rem* admiralty action against the two wrecks,<sup>184</sup> claiming that under the ASA, Virginia<sup>185</sup> was the rightful owner of the wrecks and, therefore, Sea Hunt was entitled to the rights granted in the permits issued by Virginia Marine Resources Commission as Spain no longer exercised sovereign immunity over

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177. *Sea Hunt, Inc. v. The Unidentified Shipwreck Vessel*, 221 F.3d 634, 64 (4th Cir. 2000). The court cites the *Columbus-America* case summarizing it to say, “[a]n inference of abandonment is permitted, but only when no owner appears.” *Id.*

178. *Sea Hunt, Inc. v. The Unidentified Shipwreck Vessel*, 47 F. Supp. 2d 678, 680 (1999).

179. *Id.* at 680-81. Spain lost a large number of ships because it started conquering other distant nations very early; from 1580 to 1640, it ruled Portugal, parts of Africa and Asia, and had acquired lands in the Americas and the Philippines. Broad, *supra* note 125, at A1.

180. *Sea Hunt Inc.*, 47 F. Supp. 2d at 681.

181. *Id.*

182. *Id.*

183. *Id.*

184. Sea Hunt located two ships, *La Galga* and *Juno*, a Spanish naval ship traveling similar routes to *La Galga*. *Id.* at 681. The district court found that no evidence existed in the treaty of 1819 or the 1898 Declaration of War. *Id.* at 691. The Fourth Circuit affirmed the District Court’s holding. *Sea Hunt Inc. v. The Unidentified Shipwreck Vessel*, 221 F.3d 637, 643 (4th Cir. 2000). The Fourth Circuit agreed with the district court’s finding that Spain did not expressly abandon *Juno* because Article II of the 1819 Treaty ceded only the territory and the Structures erected on the Territory. *Id.*

185. The litigation commenced by Sea Hunt with the State of Virginia eventually also involved “Attorney General Janet Reno, two U.S. Senators, the U.S. Park Service, the government of Spain and enough lawyers to field a baseball team.” Brian Duffy, *Treasure Hunting is No Job For a Guy Out to Avoid Stress*, WALL ST. J., July 17, 1998, at A1. Ironically, Mr. Benson, the head of Sea Hunt and a former navy submariner who was also a millionaire real-estate investor and owned his own timber company, retired at thirty-six because he had had two heart attacks related to stress. *Id.* He bought a yacht and all the newest technological advances in underwater research, such as sonar equipment, and intended to relax, dive, and search for treasures in the Caribbean. *Id.*

the ships.<sup>186</sup> The United States District Court for the Eastern District of Virginia held that the Treaty of Peace Between France, Great Britain, and Spain,<sup>187</sup> constituted strong and convincing evidence of express abandonment because its sweeping language<sup>188</sup> and the change in powers in North American colonies would have made it unlikely that Spain intended to or would have been allowed to continue to possess *La Galga*.<sup>189</sup> Moreover, Spain knew the location of the ship at the time of salvage and made no attempt to retrieve any of its remains even though the Treaty would have permitted it.<sup>190</sup>

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's finding of express abandonment because "[t]o adopt a lesser standard would . . . go beyond what the ASA requires."<sup>191</sup> The Fourth Circuit found that whenever an owner came before the court to assert his claim to title, abandonment would be hard to show; therefore, as long as the owner made a claim, express abandonment must be proven.<sup>192</sup>

Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.<sup>193</sup>

The Fourth Circuit also emphasized that sovereign vessels were to be treated differently than privately-owned vessels.<sup>194</sup> A House Report indicated that the United States could only abandon its title to a

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186. *Sea Hunt Inc.*, 47 F. Supp. 2d at 681.

187. The 1763 Treaty ended the Seven Years War and transferred several of Spain's territories in present America to Great Britain in return for Cuba. *Sea Hunt Inc.*, 47 F. Supp. at 689. In Article XX, Spain granted the territory and Sea Hunt claimed that this grant of land was an express abandonment of *La Galga*. *Id.*

188. Spain ceded its rights to everything owned in North America east of the Mississippi, including its rights to sunken vessels. *Id.* at 689.

189. *Id.*

190. *Id.*

191. *Sea Hunt, Inc.*, 221 F.3d at 640. The court of appeals may have considered a stricter standard for international policy reasons, rather than the ASA's purpose when it continued, "[a lesser standard] would also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations." *Id.* In contrast to the lower court, the court of appeals concentrated on who was claiming ownership. "Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its vessels." *Id.*

192. *Id.* at 640-41. Essentially, a mere assertion of title eradicates any hopes of implied abandonment. Accordingly, under this standard, express abandonment could never be proven because the owner will always come forward and claim title if he can.

193. *Id.* at 641 (quoting H.R. REP. NO. 100-514 (1), at 2 (1988), reprinted in 1998 U.S.C.A.N. 365, 366).

194. *Id.* David Bederman, a law professor at Emory University who assisted in *Sea Hunt's* representation, argued that the meaning of the terms sovereign and private changed greatly in

sunken warship by an affirmative act; neither passage of time nor failing to positively assert the right would constitute abandonment.<sup>195</sup> The Fourth Circuit believed that the House Report accorded the same protection to other state vessels: “[T]he same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State.”<sup>196</sup> Finally, the court found that Article X of the 1902 Treaty of Friendship and General Relations<sup>197</sup> between the United States and Spain explicitly required express abandonment because it required that Spanish ships receive the same rights as similarly situated American vessels.<sup>198</sup>

The *Columbus-America* Court, which found express abandonment, and the United States Supreme Court’s decision in *Deep Sea Research*, holding that the ASA does not alter traditional maritime law, influenced the Fourth Circuit’s decision.<sup>199</sup> “According to the Supreme Court, ‘the meaning of abandoned under the ASA conforms

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five hundred years and that private ships are much more common in modern times. Broad, *supra* note 125 at A1.

195. *Sea Hunt Inc.*, 221 F.3d at 642 (citing H.R. REP. NO. 100-514(II) at 13 (1988), *reprinted in* 1998 U.S.C.C.A.N. at 381).

196. *Id.* at 641.

197. *Id.* The court stated that,

Article X provides “In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases.” Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, “this provision is unique” in that no other “friendship, commerce and navigation treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity.” Statement of Interest, U.S. Dep’t of State, P 13 (Dec. 18, 1998).

*Id.* at 642.

198. *Id.* See Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 365 (to be codified at 43 U.S.C. §2101 et seq.). Article IV of the Constitution permits Congress to create rules regarding federal property; therefore, the Court reasoned that federal property can only be abandoned by an affirmative congressional act. *Sea Hunt Inc.*, 221 F.3d at 642. Because an American vessel could not be abandoned by a clear, affirmative act, Spanish war vessels could only be abandoned by an express renunciation. *Id.* at 643. “We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.” *Id.* The court also cited advisory guidelines from the Department of the Interior on the ASA, which stated that when a sovereign vessel appears to be abandoned it “remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party.” *Id.* (quoting 55 Fed. Reg. 50116, 50121 (1990)). The court also strongly considered a letter from the Department of State noting, “U.S. Domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment.” *Id.* (quoting Statement of Interest, U.S. Dep’t of State, P. 15).

199. *Sea Hunt, Inc.*, 221 F.3d at 641.

with its meaning under admiralty law . . . . Under admiralty law [according to *Columbus-America*], where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts.”<sup>200</sup> The Fourth Circuit found that express abandonment embodied traditional admiralty law because in admiralty law, when articles were lost at sea, the title remained with the true owner.<sup>201</sup> In addition, “[a]n inference of abandonment is permitted, but only when no owner appears.”<sup>202</sup>

The Fourth Circuit distinguished its adjudication of *La Galga* from the Sixth Circuit’s decision in *Fairport* because the Sixth Circuit applied the implied abandonment standard to a privately-owned vessel, not a vessel owned by a sovereign.<sup>203</sup> “To adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim.”<sup>204</sup>

After the Fourth Circuit determined that express abandonment governed the application of the ASA to sovereign vessels embedded and submerged in state lands, it determined that *Sea Hunt* and *Virginia* must prove by “clear and convincing evidence” that *La Galga* had been abandoned.<sup>205</sup> The Court of Appeals disagreed with the lower court’s interpretation of Article XX of the 1763 Treaty because it found that the plain language of the Treaty<sup>206</sup> failed to meet the high standard of clear and convincing evidence necessary to prove express abandonment.<sup>207</sup> Article XX never mentioned shipwrecks, vessels, frigates, warships, or any other common word that could have referred to *La Galga*, whereas other provisions of the Treaty explicitly

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200. *Id.*

201. *Id.*

202. *Id.* This belief completely negates the idea of inferential abandonment. Anyone could then appear and claim ownership of title even if they had abandoned the ship.

203. *Sea Hunt Inc.*, 221 F.3d at 642.

204. *Id.*

205. *Id.* at 644.

206. Article XX of the 1763 Treaty states:

His Catholick [sic] Majesty cedes and guaranties, in full right, to his Britannic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, every thing that depends on said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise . . . . So that the Catholick [sic] King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form . . . . It is moreover stipulated, that his Catholick [sic] Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

*Sea Hunt Inc.*, 221 F.3d at 644.

207. *Id.*

mentioned vessels, ships of war, factories, and artillery.<sup>208</sup> “When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet, nowhere does the Treaty specifically mention the cession of shipwrecks.”<sup>209</sup> Moreover, Spain ceded only what it owned on the continent of North America, which did not include items in the sea or seabed.<sup>210</sup> Although the Fourth Circuit acknowledged that its narrow holding applied only to sovereign shipwrecks, it stated that, even under a standard of implied abandonment, *La Galga* could not have been found to be abandoned because after the sinking Spain attempted to salvage it, the ship remained on Spain’s naval registry, and Spain asserted a right to title after *Sea Hunt* brought the action.<sup>211</sup> In addition, the technology to salvage the scattered shipwreck had only recently become available.<sup>212</sup> Hence, the court reversed the lower court’s decision and held that Spain had not expressly abandoned *La Galga*.<sup>213</sup>

### III. ANALYSIS

The Abandoned Shipwreck Act (ASA) passed, in light of new technologies, with the overriding goal of preserving historic shipwrecks and allowing more people greater access to abandoned shipwrecks. Understanding the process of shipwreck recovery is necessary to truly comprehend the effect of emerging technology on the ASA. The Columbus-America Discovery Group (Group) provides an excellent illustration.

An ocean engineer, a journalist, and a geologist comprised the Group created to locate and recover the *S.S. Central America*.<sup>214</sup> The Group began by raising an initial \$200,000 from investors to create a map, largely from historical accounts and meteorological data, detailing a 1400-square mile area in the Atlantic Ocean where the ship might be located.<sup>215</sup> The Group secured another \$1.4 million from investors and began using modern technology to find the wreck.<sup>216</sup> After forty days of searching the area, the Group discovered a poten-

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208. *Id.*

209. *Id.*

210. *Id.* at 645-46.

211. *Id.* at 647.

212. *Sea Hunt Inc.*, 221 F.3d at 647.

213. *Id.*

214. Justin S. Stern, Note: *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 *FORDHAM L. REV.* 2489, 2489 n.5-6 (2000).

215. *Id.*

216. *Id.* The Group used wide sonar technology that sent sonic images to the boat’s computers to scan the ocean floor. *Id.*

tial wreck one and one-half miles below the water's surface.<sup>217</sup> Because divers would have been subject to four thousand pounds-per-square-inch of pressure, a water temperature of thirty-eight degrees Fahrenheit, and total darkness, they sent a twelve thousand pound remote-operated robot with a camera to retrieve artifacts from the wreck.<sup>218</sup> The Group searched fruitlessly for two years before it decided to upgrade the robot.<sup>219</sup> Within a few months, the robot's sonar images showed the ship's sidewheels.<sup>220</sup>

The Group spent years searching for the ship, often fruitlessly, and at great expense. Their search is typical, particularly considering the effects of improved technology on a search. The drafters of the ASA failed to consider the true impact of emerging technology and its costs on the goal of preservation, or the effect these two areas would have on the term "abandoned." "There is agreement that valuable historic materials may be found underwater, that these historic materials may deserve investigation and preservation, and that the public may have the right of access to them. The disagreement revolves around who owns the materials . . . and who has the right to dispose of them."<sup>221</sup>

#### A. *Expenses Associated with Historic Shipwreck Preservation*

Improved technology continues to emerge and alter the face of shipwreck recovery and preservation. In order to understand the technology and its preservation aspects, it is first necessary to understand the costs involved.

Opponents stress that when Congress initially considered the ASA, the Act carried with it several stipulations that became diluted during its passage.<sup>222</sup> For example, House Report 1195 gave the Secretary of Interior the power to transfer title of a shipwreck to a state only upon a finding that the state actually maintained a shipwreck management program; if a state failed to meet the standards of preservation, it would automatically lose title to the shipwreck.<sup>223</sup> However, as enacted, the ASA awards absolute title to the states with no contingen-

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217. *Id.*

218. *Id.* at 2489-90.

219. Stern, *supra* note 214, at 2490.

220. *Id.*

221. Abbass, *supra* note 104, at 261. On the continual tension between archeologists and salvors, D.K. Abbass comments, "Not all lawyers are toadies to wreck-raiders hell-bent on ripping glittering treasure from glamorous shipwrecks. Not all archaeologists are effete intellectual snobs determined to keep important historical sites closed to the public." *Id.*

222. McLaughlin, *supra* note 75, at 182-84.

223. *Id.* at 182. H.R. 74 and H.R. 132 also required that states take on additional duties with the award of title. *Id.* at 182-183.



cies or requirements.<sup>224</sup> How can the states or the federal government comply with the ASA's underlying purpose of preservation if no real requirement exists for preservation?

The prominent reason that these stipulations were removed from the enacted ASA is monetary.<sup>225</sup> Preservation, active management of the sites, and regulation of states with title would have placed a heavy financial burden on state and federal governments.<sup>226</sup> Ironically, states themselves caused much of the damage to shipwrecks by generating insufficient surveys to locate historic and abandoned shipwrecks prior to dredging projects in which artifacts located on the seabed perished.<sup>227</sup> The surveys, and subsequent salvage and preservation of the wreck, require extensive funds.<sup>228</sup> "The intent of the ASA was to prevent a damaging free-for-all over shipwreck artifacts. Perversely, the Act's result may be a system of 'destructive retention.'"<sup>229</sup>

The costs associated with funding an underwater expedition range into the millions.<sup>230</sup> A successful endeavor requires a diverse group of experts and the funds to afford the rapidly advancing technology.

Determining the location of cultural deposits may involve such diverse disciplines as mathematics, probability theory, the behavior of sound and light, and survey methodology. Understanding the nature of the site, and how it came to be, involves engineering, marine biology, chemistry, physics, mechanics, and navigational science. The social sciences and the fine arts also lend assistance in solving U[nderwater] C[ultural] R[esource] riddles.<sup>231</sup>

In addition, a state hires professional archaeologists, most likely on contract from universities, to do the research.<sup>232</sup> Unlike federal or

224. *Id.* at 183. Mr. Keller, the attorney for Zych stated:

Unfortunately, the ASA has permitted (and even encouraged) some state historic preservation officials to believe that only they have the wisdom and the knowledge necessary to care for historic shipwrecks. Such administrators are willing to sacrifice the wrecks they claim to be protecting in a self-righteous and vainglorious assertion of authority. As I said at the beginning, this is not an encouraging tale.

Keller, *supra* note 119, at 251.

225. McLaughlin, *supra* note 75, at 184.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 185.

230. One commentator stated:

They do not realize that it takes millions and millions of dollars to salvage one shipwreck. You do not do it with \$100,000, you know. It takes large amounts of talented personnel, highly technical people. It is a very dangerous business; a lot of people lose their lives or get wounded.

*Hearings, supra* note 77, at 145.

231. Robol, *supra* note 121, at 304.

232. *See Hearings, supra* note 54, at 60.

state governments that are restricted by the expenses, commercial salvors have a staff of archaeologists and preservationists who make a living by salvaging and preserving these artifacts for resale.<sup>233</sup> Most salvage operations start by determining the location of a shipwreck through library research.<sup>234</sup> After determining where a ship sank and its importance, a promoter will look for investors to fund the exploration and excavation if the ship is found.<sup>235</sup> Even before a successful salvage operation commences, a salvor spends thousands of dollars on the following: negotiating sessions with investors, lenders, and government officials; drafting of documents, such as financial prospectuses, partnership agreements, employment contracts, equipment leases, and press releases; and if all these precautions fail, litigation.<sup>236</sup>

Considerable expense exists in excavating and storing the artifacts properly. Excavation is a destructive activity that changes a site forever and, once done, can never be repeated;<sup>237</sup> hence, extensive money and resources are spent to ensure proper location and adequate recovery of artifacts. Proper storage is necessary so that the artifact will be available for future research and study.<sup>238</sup> Unfortunately, the government, often unable to manage the large costs associated with salvaging operations and preservation of the artifacts, allows these insights into cultural history to deteriorate in a museum basement.<sup>239</sup>

Several courts adjudicating ASA cases were aware of the considerable costs associated with salvaging a shipwreck and that, often, commercial salvors expend the time and resources to find these wrecks while the title holder takes no action.<sup>240</sup> For example, the Seventh Circuit expressed sympathy for Zych. The court stated,

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233. *Id.* at 61.

You see, I have a staff a large staff, a larger staff than any State or the Federal Government, of archaeologists. They are all accredited and have been working with me for years. I also have a large staff of preservationists. They have been working with me for years. We have the largest preservation laboratory probably in the world, and the best museum pertaining to this type of material. We have excellent curators.

*Id.* (statement of Mel Fisher urging the House to consider another alternative to the ASA, such as archaeological guidelines, which would be more effective, cost efficient, and allow the romance of discovery to exist).

234. Edward R. Horan, *Organizing, Manning, and Financing a Treasure Salvage Expedition*, 30 J. MAR. L. & COM. 235, 235 (1999).

235. *Id.*

236. *Id.*

237. Abbass, *supra* note 104, at 262.

238. *Id.*

239. See *Hearings*, *supra* note 77, at 146.

240. *Zych*, 746 F. Supp. at 1351.

The court is not without some sympathy for plaintiff's position. It was the plaintiff who expended considerable time and resources in pursuing the wrecks. Without plaintiff's efforts, the wrecks might remain undiscovered. The State, in contrast, appears to have sat idly by, showing no interest in the wrecks until plaintiff brought this lawsuit. Plaintiff's contention that he should receive ownership, or at least a salvage award, for his efforts is attractive.<sup>241</sup>

The expenses associated with historic shipwrecks, such as locating, salvaging, and preserving shipwrecks, are closely tied to the emerging technology that enables the rescue of shipwrecks.<sup>242</sup> This technology remains prohibitively expensive, allowing only the very wealthy to search for shipwrecks. However, this technology will become less expensive with time and more readily available to sport divers and amateur sleuths.

### B. Emerging Technology

Not only has recent technology created the ability to further search the remains of shipwrecks, but it also resulted in increased exploration of oceans by novice divers. Beginning in the 1960s, improvements in scuba diving equipment opened the oceans to sport and recreational divers.<sup>243</sup> As a result, many more historic ships are accessed and visited by archaeologists, sport divers, and salvors interested in recreational, historical, and commercial discoveries.<sup>244</sup> Previously, the only restraint to harvesting these limited resources by multiple individuals was the limited technology.<sup>245</sup> However, the new and more readily

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241. *Id.*

242. "Within the last three years, advances in sonar technology have made it possible to locate shipwrecks in deep water with greater precision, and for less money, than with the technology that was previously available." *Deep Sea Research*, 883 F. Supp. at 1353. The new technology, such as pictures from a sonar record, reduced costs from \$20,000.00 per day (the cost of blindly operating a search vehicle in the dark) to \$1,750.00 for the pictures that detailed the location of the ship. Horrell, *supra* note 59, at 336. In addition, deep sea diving robots, an improvement in scientific technology, allow for underwater exploration as well as preservation by photographing the wrecks, thereby providing an alternative to destruction of the wreck in order to catalogue artifacts. William J. Broad, *Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. TIMES, Feb. 2, 1993, at C1.

243. See Giesecke, *supra* note 116, at 168. Behrens, who abandoned the *Captain Lawrence*, used heavy boots and a hard hat connected to an oxygen hose while diving because SCUBA was not available in the 1930s. *Fairport Int'l Exploration v. The Shipwrecked Vessel Known as Captain Lawrence*, 913 F. Supp. 552, 555 (N.D. Mich. 1995). During the advent of SCUBA in 1957, a waterproof watch that merely told time cost \$99.95. Today, however, SCUBA divers buy watches integrating all the capabilities of a dive computer for \$800. See *Scuba Diving Magazine, Gear Buying Guide: Then and Now*, at <http://www.scubadiving.com/gear/thennow/>, (last visited July 22, 2001).

244. See Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 365 (to be codified at 43 U.S.C. §2101 et seq.).

245. *Hearings, supra* note 65, at 255.

accessible technology seems only to be controlled by the enactment of the ASA, which aims to protect and preserve historic shipwrecks.

An examination of the new technology is required before proceeding to its effect on abandonment because

these technological developments have sharpened the debate between treasure-hunters and preservationists. Finding and exploring the *Titanic*, two-and-one half miles down, has demonstrated to both groups their capacity to reach the vast majority of wrecks, which lie in shallower coastal waters. Should we enlist the new accessibility to shipwrecks, and visibility of them, in the service of an underwater gold rush? Or should we, instead, use the new technology to provide a substitute for a physical recovery of wrecks, in the form of images and data for the public benefit.<sup>246</sup>

The ocean's mysteries will not remain hidden from this rapidly developing technology; in fact, limited knowledge is our only restraint in underwater research and technology.<sup>247</sup> In the past, excavation of lost ships has been confined to ships in shallow water; however, wrecks in deep ocean waters, which encompass ninety-seven percent of the world's oceans, remained unreachable.<sup>248</sup> New advances include better deep-diving robots, manned submersibles, accurate magnetic and acoustic mapping, improved navigation, and hydrographic software.<sup>249</sup>

Perhaps the biggest advance, and the one most welcome in the eyes of preservationists, occurred in the field of underwater photography.<sup>250</sup> Divers traditionally went to depths of 150 feet, but cameras and robots now have the ability to dive down as far as 2.5 miles into deep ocean water.<sup>251</sup> Today, deep-diving robots and manned submersibles travel miles underwater with underwater laser cameras that discharge beams of light that can capture images five to eight times farther than the mix of floodlights and cameras traditionally used in

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246. James A.R. Nafziger, *The Titanic Revisited*, 30 J. MAR. L. & COM. 311, 312 (1999). To locate the *Titanic*, Robert D. Ballard and Jean-Louis Michel used ANGUS, a camera steered by sonic beacons on the seafloor and blindly dragged by the researchers from the surface. Robert D. Ballard, *How We Found the Titanic*, 168 NAT'L GEOGRAPHIC 696, 700 (1985). The American divers also employed a vehicle they named "Argo," consisting of a steel frame carrying video cameras, side-scan sonar, and a computerized timing system. *Id.*

247. See *Hearings*, *supra* note 76, at 255.

248. Broad, *supra* note 242, at C1.

249. Nafziger, *supra* note 246, at 312.

250. See Broad, *supra* note 242, at C1.

251. William J. Broad, *Deep-Sea Scavenging Gets Easier*, N.Y. TIMES, July 18, 1993, at E6. These advancements particularly aid divers when no visibility exists. For instance, an archeologist from the Michigan Department of State dove to the *Captain Lawrence* and discovered the visibility in the area to be five to ten feet, which quickly turned to nothing because the silt easily moved up. *Fairport Int'l Exploration*, 913 F. Supp. at 556.

deep sea diving.<sup>252</sup> In the past twenty years, advancements in photographic exploration have developed rapidly. In the early 1980s, explorers used clumsy underwater robots with attached cameras to photograph underwater wrecks.<sup>253</sup> Within five years, a new camera had been developed using small computer circuits and optical fibers reinforced with Kevlar, a lightweight polymer as strong as steel, that sent data between the robot and man.<sup>254</sup> This deep-diving robot located a fourth-century Roman Empire shipwreck, one-half mile underwater; the photographs indicated that in the latter Roman period, the Empire relied on North Africa for its food and oil.<sup>255</sup> These findings have major implications, such as a better understanding of battles and controversial sinkings.<sup>256</sup> For example, salvors discovered a Nazi battleship that sunk in 1941, which historians believed imploded.<sup>257</sup> However, the camera's images indicated that the ship had actually been scuttled before receiving the final blow from the British Military.<sup>258</sup>

Preservationists laud the recent advances in deep-sea diving robots because they afford the ability to recover artifacts from wrecks while preserving the actual location of the artifacts for future research: "With a deep-diving robot, the company recovered not only pearls, gold bars and jewelry but wooden beams, olive jars and ballast stones, recording each item's position for future archaeological analysis. Even some human teeth were gingerly recovered, including a pre-eruptive molar of a child."<sup>259</sup>

Computers greatly changed the face of deep-sea research. By using hydrographic software packages, computers can now monitor and record the magnetic, acoustic, and positional data taken during the

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252. Broad, *supra* note 242, at C1. Much of this new underwater technology was originally perfected by the military in secret during the cold war; however, in recent years, private industries, such as off shore drilling enterprises, have caught up with military developments. *Id.* William J. Broad, *New Tools Yield Clues to Disasters at Sea*, N.Y. TIMES, March 16, 1999, at F1.

253. Broad, *supra* note 242, at C1.

254. *Id.* Because the camera was covered in Titanium, a strong, but light metal, it resisted damage under the weight of the water and saltwater corrosion. *Id.* The cameras, which emit black and white photographs, cost around \$500,000 or more. *Id.*

255. *Id.* A marine archeologist located large clay jugs that indicated the Roman culture from different time periods. *Id.*

256. Broad, *supra* note 242, at C1. In 1992, the cameras explored the 1942 battle of the Guadalcanal, known as Ironbottom Sound because of the fourteen ships that sank. *Id.* A Navy historian commented that they had a better understanding of the battle because many of the ships actually sank many miles further than the actual location that had been reported at the time. *Id.*

257. *Id.*

258. *Id.*

259. Broad, *supra* note 251 at E6.

search of a wreck site.<sup>260</sup> Geographic Information Systems, a computer-based system, analyzes spatially related data; additionally, graphic images, such as maps or site plans can be linked to textual data.<sup>261</sup> Computer programs also aid a salvor or archeologist in determining where to search for a shipwreck.<sup>262</sup> With the aid of computer design programs, digitized historic maps can be placed over modern navigation charts to identify the shoreline changes with regard to the location of historic shipwrecks.<sup>263</sup>

Within the past ten years, a navigational satellite known as a Global Positioning System (GPS) now gives an accurate reading of a ship's position.<sup>264</sup> A GPS calculates a ship's location by measuring the distance between the ship and various satellites.<sup>265</sup> Although advanced GPSs are prohibitively expensive, the less expensive models still allow a discovered shipwreck to be located again for further research or salvaging.<sup>266</sup>

The most expensive technology lies in deep-water survey instruments, such as deep-towed sonar and sub-bottom profiler systems, that take acoustic images at the floor's bottom up to 750 meters wide.<sup>267</sup> Similarly, Remote Operated Vehicles (ROVs) are underwater robots used to collect artifacts and document a site, which attach to a manned submersible or ship and carry video and still cameras, lights, and mechanical arms.<sup>268</sup> Many companies now specialize in exploration technology, selling such items as seismic recording systems that create images from below the surface by measuring sound<sup>269</sup> and magnetometers that assist salvors by locating and measuring the weak magnetic fields produced by iron and iron oxides found in the soil surrounding buried objects from which a map can be created.<sup>270</sup> One salvor praised even the most minute improvement in magnetometer technology because the smallest advance greatly increases a salvor's ability to locate a shipwreck. "Yet in the end I've discovered wreck-

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260. Roderick Mather, *Technology and the Search for Shipwrecks*, 30 J. MAR. L. & COM. 175, 181 (1999).

261. *Id.* at 181.

262. *Id.* at 176.

263. *Id.* at 176.

264. *Id.* at 180. Prior to the development of Global Positioning Systems, landmarks, celestial navigation, and radio beacons from shore had been used to secure positioning. *Id.*

265. Mather, *supra* note 260, at 180.

266. *Id.* at 181.

267. *Id.* at 182.

268. *Id.* at 183.

269. For further descriptions of this product and its uses, see <http://www.geometrics.com/products/products.html> (last visited July 22, 2001).

270. *Id.*

age from ships dating to the 17th and 18th centuries that had gone undetected using previous magnetometers, and I've used 4 different mags over the past 20 years."<sup>271</sup>

This newfound technology is best understood as applied to perhaps the most famous shipwreck in the world: the *Titanic*. Until recently, the public believed that only a gigantic iceberg could sink a ship as stable as the *Titanic*; however, because the ship had been lost in water two and one-half miles deep and out of a researcher's reach, the actual reason for the sinking could never be confirmed.<sup>272</sup> With the use of new technologies, such as sound waves, computer simulations, ultrasound, and metallurgic analysis of the *Titanic's* steel, a group of researchers found that the damage was not a large gaping hole, as previously believed, but a series of six thin openings in the starboard hull.<sup>273</sup>

One year later, in 1998, scientists discovered further evidence that failed rivets from the *Titanic's* hull may have also caused, or at least contributed to, the sinking of the ship.<sup>274</sup> The rivets were found through sonar technology that probed the hull, which lay embedded in fifty-five feet of mud.<sup>275</sup> Scientists hypothesize that the narrow slits, discovered only one year earlier, resulted when rivets deteriorated causing the hull to pop open.<sup>276</sup> For almost a century,<sup>277</sup> the world believed that an iceberg sank the *Titanic* by tearing a gaping hole in the ship; however, as a result of new technology developed within the last few years, scientists discovered that six small slits actually sank the *Titanic*.

Most recently, Sea Hunt's discovery of the Spanish warships *La Galga* and *Juno*<sup>278</sup> brought to the forefront the problem of technology in abandoned wrecks. The American, French, and British governments sided with Spain against Sea Hunt and the State of Virginia.<sup>279</sup>

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271. Alan R. Riebe, Chief Operations Manager, El Salvador Shipwreck Project, <http://www.geometrics.com/Testimonials/testimonials.html> (last visited July 22, 2001).

272. William J. Broad, *Toppling Theories, Scientists Find 6 Slits, Not Big Gash, Sank Titanic*, N.Y. TIMES, Apr. 8, 1997, at C1.

273. *Id.* At the time of the sinking, one of the naval architects of the *Titanic* suggested that the actual cuts might be quite small; however, his testimony was ignored because it was incomprehensible that such a large safe ship could be sunk by a series of small cuts. *Id.*

274. William J. Broad, *Faulty Rivets Emerge as Clues to Titanic Disaster*, N.Y. TIMES, Jan. 27, 1998, at F1.

275. *Id.*

276. *Id.* After further researching the content of the rivets, scientists discovered that the rivets had a large amount of slag, causing them to be brittle and prone to fracture. *Id.*

277. The *Titanic* sank in 1912. *Id.*

278. See *supra* notes 177-182 and accompanying text.

279. Broad, *supra* note 125, at A1.

“Legal experts said those nations, and others with long maritime traditions, are increasingly eager to assert ownership of their old shipwrecks now that technology is fast opening the seas to exploration.”<sup>280</sup> Sea Hunt has already spent over two million dollars for the recovery and litigation regarding the two ships and must now decide whether to appeal the Fourth Circuit’s decision<sup>281</sup> to the United States Supreme Court: “There’s no case law to support their conclusion. It’s uncharted waters for the shipwreck industry as a whole.”<sup>282</sup>

The *Zych* court addressed the issue of new technology when it excused the insurance company’s inactivity because the technology to find the shipwreck had only recently been developed.<sup>283</sup>

There remains, however, the argument that the failure to take any steps to recover the wreck is sufficient evidence of intent to abandon when considered in light of the lapse of 130 years. The Foundation contends that Aetna’s failure to act is inconsequential because the technology has not previously been available to locate the wreck . . . . *Zych* might respond that the lack of late-1980’s technology did not dissuade others from attempting to locate the wreck. In light, however, of the law’s hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success.<sup>284</sup>

The district court forgave Aetna’s failure to search for the ship because it supposed that the search most likely would have been futile; however, the district court never addressed the fact that *Zych* and other salvors succeeded in locating the ship. The new technology also creates a concern with respect to the issue of abandonment: Under the new technology, when can an intent to abandon be inferred by a lack of action now that the new tools are readily available?<sup>285</sup>

### C. Abandonment

The ASA’s failure to define abandonment has led to an increased amount of shipwreck litigation and a split in the appellate circuits with

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280. *Id.*

281. See *supra* notes 191-213 and accompanying text. Mr. Benson, the president of Sea Hunt decided to sail to the Bahamas to meditate over his decision. Broad, *supra* note 125 at A1.

282. *Id.*

283. See McLaughlin, *supra* note 75, at 166.

284. *Zych*, 755 F. Supp. at 216.

285. “Implied abandonment did not begin to produce legal disputes until the present time because the technology to locate deep ocean wrecks and bring all or parts of them to the surface did not exist. Undersea warfare in World War II and its refinements during the Cold War account for this technological advance.” Sweeney, *supra* note 121, at 194.



respect to the applicable standard of abandonment. When presented with the opportunity to clarify the law surrounding abandoned shipwrecks, the United States Supreme Court poorly guided the lower courts by defining abandonment as traditional admiralty law had defined it.<sup>286</sup> Unfortunately, the lack of a clear definition for abandonment, express or implied, and the new technologies that significantly alter the application of abandonment halted modern shipwreck litigation.

The essential elements of abandonment are an intent to abandon and an external manifestation of that intent, or an act.<sup>287</sup> Abandonment may be express, as described, or implied.<sup>288</sup> When no express declaration of abandonment exists, implied abandonment may be inferred from lapse of time or non-use.<sup>289</sup> In *Deep Sea Research*, the Supreme Court attempted to resolve the applicable abandonment standard under the ASA “with the clarification that the meaning of ‘abandoned’ under the ASA conforms with its meaning under admiralty law.”<sup>290</sup> The Supreme Court failed to clarify abandonment because, in maritime law, abandonment may be express or implied through lapse of time, acts manifesting intent, or an express abandonment.<sup>291</sup> The Supreme Court left lower courts to follow the only clear guideline that remained: abandonment requires an intent to abandon.<sup>292</sup> The question of whether intent must be express or implied created the current split between the circuits.

The ASA’s legislative history and the federal guidelines promulgating the ASA accept an application of implied abandonment. While the Act itself leaves the term abandoned undefined, the Senate Com-

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286. See *supra* note 153 and accompanying text.

287. George F. Gabel, Jr., 1 AM. JUR. 2d *Abandoned, Lost, and Unclaimed Property* § 11 (1999). In maritime law, abandonment issues generally arise in two separate instances. The first is the traditional sense of the word in property law, and the second is in marine insurance when an insurer of damaged ship or cargo relinquishes control in order to completely recover for its total loss. Chermiside, *supra* note 33, at 1370. In maritime law, when a vessel sinks, an owner retains the right to the ship, unless he abandons it by showing an intent and an external manifestation of that intent. *De Bardeleben Coal Co. v. Cox*, 76 So. 409 (Ala. 1917).

288. Mark Thompson, *Comment, Finders Weepers Losers Keepers: United States of America v. Steinmetz, the Doctrine of State Succession, Maritime Finds, and the Bell of C.S.S. Alabama*, 28 CONN. L. REV. 479, 509 (1996). “In the case of ancient shipwrecks, this inference is particularly strong for to suggest that the owners of a wrecked vessel whose very location had been lost for centuries can still enforce their rights of ownership stretches fiction to absurd lengths. *Id.*”

289. *Id.* See also *Marex Int’l v. Unidentified, Wrecked, and Abandoned Vessel*, 952 F. Supp. 825 (1997) (holding that a vessel was abandoned when neither owners nor heirs had made an attempt to recover or assert claim since its sinking in 1840).

290. *California and State Lands Comm’n.*, 523 U.S. at 508.

291. Jeffrey T. Scrimo, *Comment, Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks*, 5 OCEAN & COASTAL L.J. 271, 303 (2000).

292. *Id.*

mittee determined the applicable standard to be implied abandonment during the drafting of the ASA.<sup>293</sup> The Committee noted that “[the] term ‘abandoned’ does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control or otherwise indicating his claim of possession of the shipwreck.”<sup>294</sup> Similarly, the federal guidelines state that “[b]y not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment . . . , an owner shows intent to give up title.”<sup>295</sup>

By the committee’s definition and the federal rules’ guidelines, a court may infer abandonment when an owner chooses not to salvage or rescue a wrecked vessel, never claims possession of the ship, or relinquishes the ship to the insurer by accepting the monetary value of the ship.<sup>296</sup> The Sixth Circuit found that “[t]he evidence, although circumstantial, clearly demonstrates Wilfred Behrens’ intent to abandon the vessel.”<sup>297</sup> The totality of Behrens’ actions indicated an intent to abandon the *Captain Lawrence*: he had no insurance and wrote it off as a total loss when it sank, he never attempted salvage operations even though he continued salvage diving, he declined the assistance of the Coast Guard, he never told his family the location of the ship, and his family never showed any interest in the ship.<sup>298</sup>

In contrast to the Sixth Circuit’s application of an implied abandonment standard, the Fourth Circuit applied express abandonment. The Fourth Circuit read the statutory text to mandate express abandonment because a shipwreck is abandoned when an owner relinquishes his rights.<sup>299</sup>

The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be

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293. Abandoned Shipwreck Act of 1987, Pub. L. 100-298, 1988 U.S.C.C.A.N. (102 Stat. 432) 365, 366 (to be codified at 43 U.S.C. § 2101 et seq.).

294. *Id.*

295. Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116, 50120 (Dec. 4, 1990).

296. *Id.* Most often, however, the insurer is a party in the litigation and involved in the determination of abandonment. See *Zych*, 941 F.2d at 525; *Fairport Int’l Exploration*, 105 F.3d at 1078.

297. *Fairport Int’l Exploration*, 105 F.3d at 1081.

298. *Id.*

299. *Sea Hunt Inc.*, 221 F.3d at 640. See also Findings, 43 U.S.C. §2101(b) (stating “included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention”).

hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim accords with the statutory text.<sup>300</sup>

The Fourth Circuit further disputed the application of the implied abandonment standard.

Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.<sup>301</sup>

The Fourth Circuit takes the force out of any standard of abandonment by finding that any time an owner makes a claim in court, the ship may not be abandoned; the crux of abandonment is the owner's intent. An owner shows intent through express renunciation of his claim to property, or his intent may be inferred from his actions. The Fourth Circuit effectively sent a message that any owner may idly wait for over a hundred years for another to expend the funds and the time to locate and salvage the shipwreck. Then, at an opportune time, the owner may legally step into a courtroom, claim that he never intended to abandon the ship, and successfully retain title because he has not yet expressly renounced his claim to the ship.<sup>302</sup>

According to the court in *Sea Hunt*, "Spain has vigorously asserted its interest in the wreck";<sup>303</sup> however, Spain merely intervened in the litigation, and that was only after the United States alerted Spain to the impending litigation.<sup>304</sup> Under the Fourth Circuit's interpretation of express abandonment, an owner merely needs to assert claim of title to retain ownership of the ship.<sup>305</sup> Is the court nullifying any possibility that abandonment could ever be found? The Fourth Circuit destroyed the purpose of the ASA by applying the express abandonment standard because a state will never have the opportunity to obtain possession of a ship's title. At the last hour, an owner who has been standing in the wings may claim title and thwart the preservation goals of the state. Effectively, the Fourth Circuit reinstated the law of

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300. *Sea Hunt Inc.*, 221 F.3d at 640-41.

301. *Id.* at 641.

302. Broad, *supra* note 125, at A1; Duffy, *supra* note 185, at A4.

303. *Sea Hunt Inc.*, 221 F.3d at 647.

304. *Id.* at 634.

305. The court also relied heavily on the fact that the ship belonged to the Spanish government and, therefore, was a sovereign vessel. *Id.* at 643. The court treated a foreign nation's military vessel the same as it would have an American military vessel, which requires an affirmative act to constitute abandonment. *Id.* at 641. However, the court reaffirmed its previous findings in *Columbus-America* that express abandonment is the standard under the ASA because a lesser standard would extend beyond the intended boundaries of the ASA. *Id.* at 640.

salvage, allowing an owner to salvage, sell, or destroy the ship even if he let it lie for hundreds of years without notice or concern.

If express abandonment nullifies the preservation purposes of the ASA, does an implied abandonment standard better satisfy these goals? Application of an implied abandonment standard proves difficult in light of the previously unavailable technology that only now opens up the ocean to many would-be salvors and owners. In light of new technology, when does abandonment occur?

By applying the implied abandonment standard, courts need to determine when the technology to locate the ship became available, who can afford the technology, and at what point abandonment occurs for failure to take advantage of emerging technologies; hence, along with nonuse and passage of time, a court will account for the availability of technology. This new question essentially requires a court to look through a crystal ball. Because technology is always advancing and improving, at what point do courts decide that it is advanced enough to locate a shipwreck?

Will the standard be that a diver or salvor expended the time and energy where a title owner failed to take action? Or, will we require a constant "reclaiming" of ships in which title owners continually research the technology and its costs in order to prove that an owner has not yet abandoned the shipwreck? If so, an individual title owner may not have the funds to proceed. He could go to the state for financial assistance, but because he did not abandon the ship, the state will not want to help in light of its limited resources and no clear prospect of financial gain. Moreover, to go to a private salvor would require an owner to give up part of his treasure or ownership, of which he clearly claims title. In order to truly satisfy the ASA's goals of preservation and protect an owner's rights to title, courts should adopt an implied abandonment standard requiring a clear and convincing standard of proof.

#### IV. IMPACT

Admiralty courts initially developed maritime law in response to the unique conditions created by living, working, and trading on the sea.<sup>306</sup> The Abandoned Shipwreck Act (ASA) altered maritime law by explicitly forbidding the application of the law of finds and the law

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306. See generally Joseph W. Dellapenna, *The Internet and Public International Law: Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L. J. 809, 817 (1999). "Maritime law developed an entirely distinct set of rules governing these needs built around the reality that the ship and her crew were on their own." *Id.* at 317. Granted, the ship and the crew are no longer completely on their own as a result of the technologies that now

of salvage to historic shipwrecks.<sup>307</sup> While the drafters of the ASA hoped to clear up confusion surrounding shipwreck litigation and promote the goal of preservation, in reality, the ASA removed historic shipwrecks from the courts that best understood their adjudication, and thus created even more confusion and uncertainty.

The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is “abandoned” or “embedded” and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate, survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage.<sup>308</sup>

Abandonment is the crux of the ASA because once a court declares a ship abandoned, the state receives title; then, the action falls out of the purview of admiralty courts, and the state receives the right to preserve the ship and use its own salvors.<sup>309</sup> Hence, the salvor who expended the time and effort to locate and salvage the ship receives nothing. However, if a court finds that the ship is not abandoned, then the true owner retains title. The action remains in admiralty court because it maintains jurisdiction over claims involving salvage. Because the true owner exists and the salvor saved his ship, the salvor will receive a salvage award consistent with his efforts.<sup>310</sup>

But, how does a finding of abandonment affect the goals of preservationists? According to the ASA, when a state receives title to the historic shipwreck, it then works to achieve the goals of preservation.<sup>311</sup> No such requirement exists when the true owner retains title; he retains the right to dispose of his property as he wishes. Applying express abandonment will return more ships to their true owners, regardless of the owners’ inaction and apathy towards the wreck; whereas, an implied abandonment standard will transfer more shipwrecks to a state, allowing them to preserve and protect the shipwreck.

Courts adjudicating cases under the ASA became mired in the essential meaning of “abandonment.” A definitive time period for abandonment, which considers the availability of technology, would eliminate much of the confusion surrounding the definition of aban-

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connect them to the world. However, the sea still maintains a life and rules separate from those created on land.

307. See *supra* note 65 and accompanying text.

308. *Yukon Recovery v. Certain Abandoned Property*, 205 F.3d 1189, 1196 (9th Cir. 2000).

309. See *supra* note 70 and accompanying text.

310. See *supra* note 71 and accompanying text.

311. See *supra* note 75 and accompanying text.

donment. The International Law Association drafted a proposal in which it defined abandonment. A wreck is declared abandoned if the owner does not recover the shipwreck within twenty-five years from the discovery of the technology to retrieve it or, in the absence of technology, fifty years after the owner's last assertion of ownership interest.<sup>312</sup> A statutory definition, however, fails to adequately remedy the problem because it only accounts for lapse of time, without considering any of the other crucial factors, such as nonuse, technology, expense, or intent.

A statutory definition of abandonment would actually be more arbitrary than a court's application of implied and express abandonment because it would only consider the amount of time the shipwreck spent at the bottom of the sea, not facts, circumstances, or even an owner's declaration of ownership. Further, even under a statutory definition of abandonment, the question would still remain: How do courts determine when the new technology became available, and does the high expense of such technology factor into a determination? Because new discoveries and advances occur in technology every day, a defense claim always would exist under a statutory definition of abandonment that the necessary technology only recently developed; thereby, tolling the statute until a later date. A court would expend copious time wading through complicated analysis, expert testimony, and proof of technical discoveries and advances, and fail to remember the basic definition of abandonment and the ASA's spirit of preservation.

Currently, the appellate courts apply either express or implied abandonment. Under the express abandonment standard, the ASA becomes a nullity. According to express abandonment, an owner possesses the right to step forward at any point during the litigation and claim title, even when he has failed to assert any previous ownership interest. An owner will never expressly abandon a valuable historic

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312. David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 115-16 (1998). According to Professor Bederman, the ILA's time limit is too short to assume that an interested party would have abandoned the property. *Id.* He also claims that such a time limit is contrary to general maritime law under the express abandonment standard of *Columbus-America*. *Id.* at 117-18. In response to the confusion surrounding abandonment, several states enacted laws defining specific abandonment. See Douglas Cohen, *Should Noli Forfendi Apply to Sunken Ships?*, 73 B.U. L. REV. 193, 210-212 (1993) (*Salvage of Abandoned Shipwrecks and Other Underwater Archeological Resources grants title to North Carolina of all shipwrecks that remain unclaimed for more than ten years; Massachusetts receives title after one hundred years*). See also Clarissa A. Kong, *Note: Charting Through Protection for Historic Shipwrecks Found in U.S. Territorial Waters: Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 19 VA. ENVTL. L.J. 87, 112-18 (2000) (suggesting federal historic shipwreck management National Marine Sanctuaries Act).

shipwreck because he will always find a tenuous link between himself and a ship; hence, courts eradicate the ASA's overriding goal of preservation when they apply such a stringent standard. As a result, a shipwreck will never be deemed "abandoned" under the ASA and its title will not revert to the states. Because an owner would retain title, he would have the ability to destroy, salvage, or allow the ship to deteriorate in the water, which is contrary to the ASA's goals of shipwreck preservation and public use.

The essential question remains: What role will emerging technology play in shipwreck preservation? Advances in underwater recovery drastically alter the outcome of litigation surrounding the ASA and how courts determine abandonment.

If technological feasibility is to be a measure of excusable inaction, then the window of opportunity for doing nothing is clearly closing on owners, and recovery delay excused on such grounds should soon disappear from most shipwreck cases as courts take notice that technology has put all underwater wrecks within the reach of those with deep pockets and time to search. The future for a defense of delay excused by the absence of a commercially practicable recovery venture proposal is more difficult to predict, and would make excusable recovery delay on the part of the owner that is unexcused on the part of the salvor.<sup>313</sup>

Courts forgive owners who choose not to undertake the huge efforts and costs necessary to recover a shipwreck because of technical infeasibility. Yet, as technology becomes more advanced and economical, owners no longer enjoy this excuse for inaction. Under express abandonment, an owner may idly watch as "his" shipwreck is located and salvaged, only to enter the picture at the last moment and claim ownership. Because he had never expressly abandoned the ship and the technology that recovered his ship was only recently developed, the court will justify his lack of interest and action as a result of technical impracticability.

Superficially, express abandonment appears to be the best standard because it follows maritime law's strong protection of a true owner's property rights by acknowledging a presumption against a finding of abandonment.<sup>314</sup> However, the law should not protect owners who

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313. John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 MAR. L. & COM. 205, 216 (1999).

314. *Fairport Int'l Exploration v. The Shipwrecked Vessel Known as Captain Lawrence*, 177 F.3d 491, 498 (6th Cir. 1999).

We think that the apparent divergence of authority masks a degree of underlying agreement. A close reading of the cases reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will. To overcome this significant hurdle, the claimant may prove abandonment by in-

theoretically would have abandoned the ship but for the fact that it now possesses value. A finding of implied abandonment would still guard an owner's property interest as long as a court would also apply an exacting standard of clear and convincing evidence,<sup>315</sup> which places a high burden on the state to prove abandonment. Implied abandonment with a clear and convincing standard requires the court to look at all the factors, such as technology, expense, and the claimant's past attempts to salvage the wreck, and determine if all these factors constitute abandonment. Hence, a court would analyze the totality of the factors. By evaluating the available technology and scrutinizing owners' attempts to use this technology, idle owners would no longer have the excuse of technological impracticality unless the technology really did not exist.

Under the implied abandonment standard, a court would set flexible and realistic guidelines to determine whether a ship has in fact been abandoned. What effect should be given to the "lapse of time" factor considering the recent and rapid advances in underwater research technology? In the future, lapse of time may no longer be a factor because the technology currently exists to locate and salvage long lost ships. Additionally, should a true owner without adequate finances be required to salvage a shipwreck in order to retain title? These factors are immutable and will continually change as technology advances and becomes less expensive. By applying implied abandonment, a court possesses the flexibility to consider all these factors and how these questions apply to the particular case at bar.

The implied abandonment standard requiring clear and convincing evidence could be construed to be the same as express abandonment because clear and convincing requires a higher level of proof than a mere inference of abandonment. Express abandonment awards the latent owner of shipwreck title regardless of his efforts, the lapse of time, or his future plans for the shipwreck; whereas, implied abandon-

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ference as well as by express deed. The proposition finds support even from those cases cited as examples of the doctrine of express abandonment.

*Id.* at 499.

315. In *Fairport International*, the dissent agreed that implied abandonment was the appropriate standard under the ASA; but she argued for "strong proof" of abandonment as opposed to the majority's finding of clear and convincing evidence. *Id.* at 502 (J. Moore, dissenting). While the judge found no case law explicitly requiring a preponderance of the evidence standard, she felt that the clear and convincing evidence standard was counter to the express preservation goals of the ASA by taking historic shipwrecks out of the state's hands and placing them, more often, in the hands of the true owners. *Id.* at 502-03. The court of appeals in *Fairport* rejected the preponderance of the evidence standard applied by the lower courts in *Fairport* and *Brother John*. *Id.* at 500. "This burden of proof accords with maritime law and with the protection of private property rights against appropriation by the state." *Id.* at 501.



ment looks at all the circumstantial evidence surrounding a shipwreck, and a court considers an owner's inaction and non-use. Adding the clear and convincing standard would require courts to do more than a cursory review of the evidence; it would force the court to weigh the competing interests of an owner and the goals of preservation. Initially, the clear and convincing standard could hinder the goals of preservation because the state would not receive title to every historical shipwreck. The court would have large discretion in applying the factors; therefore, it should also look at the intended goals of the owner and his intentions in claiming ownership now to further aid preservation.

The implied abandonment standard allows courts to look at the reality of a particular case. For instance, an owner of a historic shipwreck desiring to profit from a salvor's discovery will want to earn as much money as possible from the salvor's finding. The owner may want to sell the ship to a museum or a salvage company for immediate profit. In contrast, a state may not have the funds or inclination to begin the preservation process and may allow the ship to remain deteriorating in the water. The court may decide that a true owner who maintains title may enact the goals of preservation better than the state.

Consequently, the spirit of preservation may not immediately be met upon implementation of this standard, but will be advanced further by a flexible and realistic application of the following factors: nonuse, lapse of time considering the advent of technology, availability of technology, expenses associated with technology, and owner's intent in claiming possession after an extended period of time. The high standard of clear and convincing evidence would require courts to determine whether or not the evidence offered satisfies abandonment; a court would not speculate, but would examine all these factors in light of admiralty's favoritism for the owner while also attempting to fulfill the goals of preservation.

## V. CONCLUSION

When Congress enacted the Abandoned Shipwreck Act (ASA) in 1987, it intended to create a uniform law applicable to all historic shipwrecks and to protect these ships from sport divers and clumsy salvors. The ASA awards title to the state if the shipwreck is embedded in a state land, submerged in water, and abandoned. Additionally, the ASA explicitly states that the law of salvage and the law of finds, which admiralty courts traditionally applied in shipwreck litigation, no

longer are sufficient because they do not adequately protect this valuable cultural asset.

Because the ASA failed to define abandonment, the courts have split as to the appropriate standard for abandonment, express or implied. Moreover, the new technological advances, which opened the deep sea to more salvors and archaeologists, further complicated this determination because, for the first time, an owner possessed the tools to successfully salvage a ship. Express abandonment completely nullifies the ASA's purpose of preservation because it awards title to the true owner regardless of his intent, the new technology, expense, or nonuse. Using implied abandonment with a clear and convincing standard of proof, courts will begin to fulfill the goals of preservation because this standard acknowledges the true owner's strong property interest while weighing the benefit to society.

Historic shipwrecks represent more than an interest in real property or a commercial land transaction; they contain amazing hidden treasures and give insight into our past cultural history. The ASA intended to protect the cultural past by eradicating salvage law from historic shipwrecks. By limiting salvors' rights and abilities, the ASA destroyed the romance of exploration and the discovery of hidden treasures, as now, salvors receive no reward, title, or enjoyment from their endeavors. Additionally, as a result of the resources spent litigating these claims, the public suffers because states lose some of the funding that could be used to preserve and protect historic shipwrecks.

By applying a standard of implied abandonment with the high standard of clear and convincing evidence, courts still protect historic shipwrecks while also rewarding those that study and search for these ships. Perhaps, when the Supreme Court handed down its ominous one sentence guide to lower courts, "the meaning of abandoned under the ASA conforms with its meaning under admiralty law,"<sup>316</sup> this is precisely what it intended.

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316. *California and State Lands Comm'n v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998).

