

ARE CRITICISMS OF THE ABANDONED SHIPWRECK ACT ANCHORED IN REALITY?

*Shelly R. McGill**

TABLE OF CONTENTS

INTRODUCTION	106
I. THE LAW OF SHIPWRECKS: FROM MARITIME LAW TO THE ASA.....	107
A. The Law of Finds and the Law of Salvage.....	107
B. Recognizing the Archeological Value of Shipwrecks.....	108
C. Statutory Protection of Shipwrecks.....	110
1. The Purpose of the ASA.....	111
2. ASA Mechanics and Elements of a Claim.....	112
3. The National Park Service Guidelines	114
II. ARE CRITICISMS OF THE ASA ANCHORED IN REALITY?.....	115
A. Critics Claim the ASA Fails to Accomplish its Primary Goal	115
B. Opponent Claims Lack Merit.....	117
1. Incentive to Salvage.....	118
2. State Incentive and Capability	119
CONCLUSION	122

INTRODUCTION

The word "shipwreck" conjures up notions of romance, intrigue, tragedy, and adventure. It invokes ancient visions of piracy and modern visions of SCUBA divers, equipped with flashlights and tools that glimmer in the shadowy depths. But lurking just below the glamorous surface are property claims and heated legal battles.

Experts estimate that approximately fifty thousand shipwrecks rest on submerged lands within United States territory, and that five to ten percent of these possess historical significance.¹ Often, historical value translates into economic value, which automatically raises the stakes involved and the number of interested parties. Until 1988, admiralty law handled the complex legal issues triggered by shipwreck exploration and salvage. Salvors requested title to the wreck under the law of finds,² or an award under the law of salvage.³

However, the picture became more convoluted in the 1940's when technological advancements began paving the way for public access to shipwrecks. Archeologists soon realized that shipwrecks offered unique insight into the worlds from which the ships came. The public started to become more aware of the damage careless salvors inflicted on historically valuable shipwrecks. People began recognizing that the salvors' goal to excavate and raise ships as quickly as possible is inherently incompatible with archeological preservation. By the 1980's it became clear that the then existing patchwork of legislation failed to directly address the problems surrounding shipwreck exploration and instead led to an increase in legal skirmishes. Congress responded to these concerns by passing the Abandoned Shipwreck Act (ASA or the Act), which grants states title to abandoned shipwrecks embedded in their submerged lands. Congress believed that a state could most effectively monitor public access to the archeological resources in its waters.

Despite Congress' valiant effort in passing this legislation, opponents question whether the ASA has achieved its goals. Opponents argue that by preempting admiralty law, the ASA eliminated the financial incentive which drove salvage operations. They contend that the lack of state incentive and

* J.D. Candidate, University of California, Davis School of Law, 2006.

¹ Russell G. Murphy, *The Abandoned Shipwreck Act of 1987 in the New Millennium: Incentives to High Tech Piracy?*, 8 OCEAN & COASTAL L.J. 167, 167 (2003).

² Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 604-05 (1995). Under the law of finds, the first person to discover abandoned property obtains title to it. *Id.*

³ M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223, 231 (1997). Under the law of salvage, a salvor may obtain a lien on property which the salvor voluntarily and successfully rescued from marine peril. *Id.*

resources to conduct searches will leave shipwrecks undiscovered and unstudied. While this would ensure the preservation of these sites, the public would not benefit from careful archeological study of the wrecks.

Part One of this article tracks the evolution of law as it relates to shipwrecks, and its culmination in the passage of the ASA. It focuses on the stated purpose of the Act, its contents, and its directives. Part Two addresses questions concerning the efficacy of the Act. It explores the merits of claims opposing the passage of the Act, and ultimately concludes that critics overstate these claims and base the claims on unfounded presumptions.

I. THE LAW OF SHIPWRECKS: FROM MARITIME LAW TO THE ASA

A. *The Law of Finds and the Law of Salvage*

Article III, section 2 of the United States Constitution confers jurisdiction of maritime and admiralty law to the federal courts.⁴ “[This] represents the only instance that the Constitution confers jurisdiction over an entire subject matter to the federal courts.”⁵ Before Congress passed relevant statutes, the courts relied solely on the law of finds and the law of salvage to determine the property rights to shipwrecks.

The law of finds dates back to 1861 as applied to the marine context and further to 1722 as applied terrestrially.⁶ Under the maritime law of finds, the courts consider abandoned property to have been returned to a state of nature.⁷ The first person to lawfully establish possession over abandoned property may be granted legal title.⁸ Under admiralty law, “abandonment requires the act of leaving property without the hope or intention of ever recovering it.”⁹ While courts have agreed that express renunciation suffices to show abandonment, courts have been inconsistent in their decisions addressing whether shipwrecks were impliedly abandoned.¹⁰ In addition to proving that the owner abandoned the property, the finder must demonstrate that the finder maintained actual or constructive possession of the property.¹¹ To show constructive possession of

⁴ Mary Ann Becker, *Regulating the Business of Culture: The Abandoned Shipwreck Act – Can Preservationists, Salvors, and Divers Sail in Calmer Waters?*, 51 DE PAUL L. REV. 569, 571 (2001).

⁵ *Id.* at 572.

⁶ Kevin Berean, *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 BROOK. L. REV. 1249, 1251-52 (2002).

⁷ *Id.* at 1252.

⁸ Gerstenblith, *supra* note 2, at 604-05.

⁹ Becker, *supra* note 4, at 574.

¹⁰ Berean, *supra* note 6, at 1253.

¹¹ Gerstenblith, *supra* note 2, at 605.

something, "a finder must be actively and ably engaged in efforts to reduce it to possession."¹² Accordingly, a finder must show that any absences from the wreck were consistent with an overall attempt to possess it.¹³ Another obstacle may exist in establishing gaining legal title; even if a finder satisfies the abandonment and possession requirements, the finder may be denied legal title because of an exception which applies to "embedded" property.¹⁴ Courts will usually grant title property embedded in soil to the land owner, rather than to the finder.¹⁵

If a finder cannot establish his right to title in order to prove that the owner abandoned the discovered property, the court may grant an award under the law of salvage. As opposed to acquiring title as a finder would, salvors obtain a lien on the property so that they may bring a suit *in rem* against the vessel and its contents.¹⁶ To obtain a lien, a salvor must prove that the salvor voluntarily and successfully recovered property that was in marine peril.¹⁷ Salvors prefer monetary compensation to a lien, but the award granted by the court will sometimes include all or part of the rescued property.¹⁸ Because the courts want to encourage recovery of items which may have economic or cultural value, the award amount normally exceeds the cost of the salvage operations.¹⁹

In determining the award amount, a court will consider the following factors: 1) the labor expended by the salvor in rendering the salvage service; 2) the speed, skill, and energy displayed in rendering the service and saving the property; 3) the value of the property used in the salvage and the danger to which the property was exposed; 4) the risk incurred by the salvor in securing the property; 5) the value of the property saved; and 6) the degree to which the property was rescued.²⁰

B. *Recognizing the Archeological Value of Shipwrecks*

A driving policy force behind the law of finds and the law of salvage is the swift return of commodities to the stream of commerce.²¹ This objective is at

¹² *Id.*

¹³ *Id.* at 605-06.

¹⁴ *Id.* at 606.

¹⁵ *Id.*

¹⁶ Berean, *supra* note 6, at 1254.

¹⁷ Harris, *supra* note 3, at 231. See also Gerstenblith, *supra* note 3, at 607-08 (stating that courts will assume a shipwreck is in "marine peril" even if it has been resting undisturbed and despite the absence of any immediate danger, unless the vessel's owner does not want it rescued).

¹⁸ Gerstenblith, *supra* note 2, at 608.

¹⁹ *Id.* at 608-09.

²⁰ *Id.* at 609.

²¹ Jeffrey T. Scrimo, *Raising the Dead: Improving the Recovery and Management of Historic*

odds with the archeological preservation of shipwrecks, which entails careful study of the site before it is disturbed.²² This inherent conflict was not recognized until the latter half of the 20th century, when archeological practitioners began to appreciate the special value of sunken vessels.

People have long understood the general value of historical knowledge, and its role in the process of self-actualization. When people can peer into the past, they have the opportunity to develop a better understanding of themselves within a vast temporal, geographical, and multicultural context.²³ More recently, the public began to appreciate that archeology is a unique discipline of historical study because it does not rely solely on writings drafted exclusively by political leaders and the elite.²⁴ "To an archeologist, the everyday action of the masses can be read, not in diaries or official reports, but in the material footprints that they leave behind."²⁵ Archeologists use artifacts to fill in the gaps left by other disciplines to construct representative pictures of past cultures and societies.²⁶

The archeological study of shipwrecks was not a reality until the development of self-contained underwater breathing apparatus ("SCUBA") in 1943.²⁷ Over the years, additional advancements such as rebreathers, mixed-gas diving, and global positioning systems have expanded the pool of accessible sites to include deeper and more enigmatic wrecks.²⁸ Soon archeologists realized that sunken ships contain precious information, and are distinctly amenable to archaeological study. Unlike terrestrial sites, many submerged artifacts have not been subjected to human disturbance.²⁹ They are also exceptionally preserved because of the unique nature of the marine environment.³⁰ These unspoiled sites offer knowledge about marine commerce, and about the lives of those who worked at sea.³¹ They hold clues which enable

Shipwrecks, 5 OCEAN & COASTAL L.J. 271, 291 (2000).

²² Becker, *supra* note 4, at 584-85.

²³ Scrimo, *supra* note 21, at 273.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Craig Forrest, *Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?*, 34 J. MAR. L. & COM. 309, 313 (2003).

²⁷ *Id.* at 311.

²⁸ *Id.*

²⁹ Becker, *supra* note 4, at 582.

³⁰ Forrest, *supra* note 26, at 313. See also e-mail from Pamela Griggs, Staff Counsel, California State Lands Commission (Apr. 19, 2005, 16:34:30 PST) (on file with author) (explaining that item submerged in water for a period of time can achieve atmospheric equilibrium).

³¹ SUBMERGED CULTURAL RESTORATION UNIT, CALIFORNIA STATE LANDS COMMISSION, A GUIDE FOR SPORTS DIVERS (1995).

archeologists to reconstruct the experience of seafaring passengers.³² They reveal naval construction techniques, often coveted, and only shared orally between father and son.³³ These shipwrecks provide historical snapshots – time capsules which contain a set of artifacts that date to one era.³⁴

C. Statutory Protection of Shipwrecks

Until recently, the United States had no law that aimed to protect the intrinsic archeological value of shipwrecks. Congress passed the Historic Sites, Buildings, and Antiquities Act in 1935, and designated a number of sites as “historic.”³⁵ However, the designations did not include shipwrecks.³⁶ Thirty-seven years later, Congress enacted the Marine Sanctuaries Act.³⁷ In so doing, Congress designated specific marine areas as “sanctuaries.”³⁸ To ensure that the Act *would* apply to shipwrecks, Congress defined a “sanctuary resource as ‘any living or nonliving resource...that contributes to the conservation, recreational, ecological, *historical*, research, educational, or aesthetic value of the sanctuary.’”³⁹ Although the Act provides shipwrecks with some protection, the Act limits this protection to those wrecks which have been recognized as a “sanctuary resource.”

In 1988, Congress finally passed a law which squarely addresses shipwrecks.⁴⁰ The Abandoned Shipwreck Act (“ASA”) “can be traced back to 1953 when Congress enacted the Submerged Lands Act (“SLA”).”⁴¹ The SLA grants states title to the submerged lands within three miles of the state coastline, and “the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law.”⁴² Presumably, shipwrecks are not “natural resources.” Nevertheless, states began promulgating regulations to govern activity aimed at the shipwrecks resting on their submerged lands.⁴³ The courts reacted inconsistently to these regulations;

³² *Id.*

³³ Scrimo, *supra* note 21, at 275-76.

³⁴ *Id.* at 275.

³⁵ Lawrence J. Kahn, *Sunken Treasures: Conflicts between Historic Preservation Law and the Maritime Law of Finds*, 7 TUL. ENVTL. L.J. 595, 600 (1994).

³⁶ *Id.*

³⁷ Marine Sanctuaries Act, 16 U.S.C. §§ 1431 (1972).

³⁸ *Id.* at 601.

³⁹ *Id.*, emphasis added.

⁴⁰ Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (1988).

⁴¹ Roberto Iraola, *The Abandoned Shipwreck Act of 1987*, 25 WHITTIER L. REV. 787, 790 (2004).

⁴² 43 U.S.C. § 1311 (1953).

⁴³ Iraola, *supra* note 41, at 791.

some awarded jurisdiction over the wrecks to the states while others found that federal admiralty law preempted state laws.⁴⁴

1. The Purpose of the ASA

Congress passed the ASA to address this confusion,⁴⁵ to fill in gaps created by the patchwork of applicable federal legislation,⁴⁶ and to acknowledge the nation's increasing appreciation for archeological preservation⁴⁷. Members of Congress recognized that the law of finds and the law of salvage, both commercially inspired doctrines, do not adequately protect the historical value of shipwrecks.⁴⁸

The Committee recognizes that the management of long-submerged and abandoned shipwrecks now presents concerns far removed from the traditional admiralty interests in safety and in returning goods to the streams of commerce. As new technologies have allowed the recovery of wrecks that have been lost for long periods of time, a new concern has been developed for the historic and recreational interests in shipwrecks. Shipwrecks are no longer viewed as lost commercial resources . . . [but rather] as invaluable and irreplaceable archeological resources.⁴⁹

The committee members also noted that while admiralty courts remain the most appropriate venue for addressing commercial issues in the maritime context, state and federal governments have experience in historical site management.⁵⁰ Ultimately, Congress concluded that states would be the most appropriate stewards of near-shore shipwrecks as states have fiscal and altruistic motivations to preserve them, and are equipped to do so.⁵¹

Congress offered the states direction in the text of the statute. Congress expressly recognized the recreational and educational opportunities shipwrecks offer to interested groups, and the resources they provide for tourism, biological sanctuaries, and historical research.⁵² In support of this acknowledgement, and to ensure reasonable public access to abandoned shipwrecks, Congress spelled out its official policy in the same section. The provision provides that the state are to manage abandoned shipwrecks so as to protect natural resources,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Murphy, *supra* note 1, at 170-71.

⁴⁷ Becker, *supra* note 4, at 579.

⁴⁸ Gerstenblith, *supra* note 2, at 611-12.

⁴⁹ S. REP. NO. 100-241, at 6 (1987).

⁵⁰ *Id.* at 6-7.

⁵¹ Murphy, *supra* note 1, at 170.

⁵² 43 U.S.C. § 2103 (1988).

guarantee opportunities for recreational exploration, and allow for public and private recovery consistent with historical and environmental values.⁵³ By empowering states with legal ownership rights, and providing them with explicit guidance, Congress hoped to promote responsible shipwreck exploration and study.

2. ASA Mechanics and Elements of a Claim

Congress attempted to accomplish the above objectives by recognizing that the federal government has power to assert title to any abandoned shipwreck embedded in submerged lands, embedded in coral, or resting on submerged lands and listed/eligible for listing in the National Register.⁵⁴ The federal government then immediately transfers title to the state that has territorial control over the area in which the wreck was found. After title is transferred, states are expected to develop policies that aim to protect natural resources, provide for recreational exploration of shipwrecks, and allow for public and private recovery consistent with historical and environmental preservation.⁵⁵ The Act also preempts the law of salvage and the law of finds.⁵⁶ Once a state shows that the state has satisfied the ASA elements, “all rights and claims to [the shipwreck] are dependant on state law, must be asserted in state court, and will be evaluated without references to the traditional body of admiralty law.”⁵⁷

However, establishing a claim under the ASA has not been a simple matter. The term “abandoned” has given rise to significant confusion. The statute fails to provide an official definition, so clarification must be sought from other sources.⁵⁸ Section 2101 of the Act explains that states have the responsibility for management of “certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.”⁵⁹ Legislative history indicates that the abandonment element “does not require the original owner to actively disclaim title or ownership,” and that abandonment “may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.”⁶⁰ Guidelines promulgated by the National Park Service as required by the ASA,⁶¹

⁵³ *Id.*

⁵⁴ *Id.* § 2105.

⁵⁵ *Id.*

⁵⁶ *Id.* § 2106.

⁵⁷ Murphy, *supra* note 1, at 170.

⁵⁸ 43 U.S.C. § 2102 (1988).

⁵⁹ *Id.* § 2101.

⁶⁰ H.R. REP. NO. 100-514(I) (1988) at 2.

⁶¹ 43 U.S.C. § 2104 (1988).

define an abandoned shipwreck as “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.”⁶² The guidelines further note that abandonment can be inferred when an owner fails “either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice” to the appropriate U.S. agency.⁶³ Based on these descriptions, commentators offered varying interpretations and courts required inconsistent evidentiary showings.

A momentary silence fell over the competing voices when, ten years after the ASA was passed, the Supreme Court agreed to resolve a dispute between the State of California and a private salvage company.⁶⁴ Deep Sea Research discovered the *Brother Jonathon* over 125 years after the vessel struck a submerged rock while traveling from San Francisco to Vancouver in 1865.⁶⁵ It took less than an hour for the ship to sink.⁶⁶ Most of its passengers and crew perished, and its cargo worth over two million dollars in 1865, was lost.⁶⁷ The case raised issues of state immunity under the Eleventh Amendment, and the applicability of the ASA. Interested parties waited with bated breath for the Court’s handling of the abandonment element.

Ultimately, the Court declined to resolve the abandonment question, disappointing those waiting for clarification of this issue.⁶⁸ After concluding that the trial court’s determination was tainted by Eleventh Amendment considerations, it remanded the case “with the clarification that the meaning of ‘abandoned’ under the ASA conforms to its meaning under admiralty law.”⁶⁹ Not surprisingly, this guidance did not eradicate the uncertainty and judicial dissonance surrounding the term “abandoned.”

The Fourth Circuit requires evidence of express abandonment by clear and convincing evidence when an owner appears and asserts title. The First, Fifth, and Eleventh Circuits allow an inference of abandonment based on the passage of time. The Sixth and Ninth Circuits, and the lower courts in the Third Circuit, all recognize an inference of abandonment based on the totality of the circumstances.⁷⁰

⁶² Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50,120 (Dec. 4, 1990).

⁶³ *Id.*

⁶⁴ *Cal. and State Lands Comm’n v. Deep Sea Research*, 523 U.S. 491 (1998).

⁶⁵ *Id.* at 495.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 508.

⁶⁹ *Id.*

⁷⁰ Iraola, *supra* note 41, at 809-11.

The embeddedness requirement has also raised uncertainty and doubt. The statute defines "embedded" as "firmly affixed . . . such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck."⁷¹ A Seventh Circuit Court declared that the statute refers to ships that are "at least partially buried"⁷² and clarified that the term, as it is used in the ASA, should be consistent with the "embedded exception" used in the law of finds.⁷³

Congress included the embedded requirement in an effort to limit the ASA's application to shipwrecks of historical significance.⁷⁴ However, opponents argue that "embeddedness" is a poor proxy for historical value.⁷⁵ Due to the constant flux of ocean currents, a shipwreck can become embedded overnight and totally exposed just as quickly.⁷⁶ An object's state of "embeddedness" is made further unstable by natural threats such as earthquakes and volcanic activity, and by human threats such as looting and natural resource extraction.⁷⁷ For these reasons, critics of the embeddedness element express concern that the requirement renders the ASA both overinclusive and underinclusive.⁷⁸

The "embeddedness" condition is further complicated by the fact that ships often break apart when they sink. Thus, pieces of the vessel and the cargo it contained may come to rest in scattered patterns across the ocean floor.⁷⁹ This begs the question as to whether a court will find that a shipwreck, comprised of some buried and some unburied components, is "embedded" for the purposes of the ASA.⁸⁰ In short, what appeared on the face of the statute to be a straightforward process of transference has been convoluted by judicial interpretation.

3. The National Park Service Guidelines

If a state successfully overcomes the ASA's ambiguous elements, it will receive title to the respective shipwreck. The state must then protect the historical and archeological value of the site, while still providing appropriate

⁷¹ 43 U.S.C. §§ 2102, 2105 (1988).

⁷² *Harry Zych v. Seabird*, 941 F.2d 525, 529 (7th Cir. 1991).

⁷³ *Id.* at 530 n.7.

⁷⁴ *Id.* at 529.

⁷⁵ Christopher L. Meazell, *Being and Embeddedness: The Abandoned Shipwreck Act's Historical Proxy is All at Sea*, 34 GA. L. REV. 1743, 1760-64 (2000).

⁷⁶ *Id.* at 1759.

⁷⁷ *Id.* at 1761.

⁷⁸ *Id.* at 1747.

⁷⁹ *Id.* at 1762.

⁸⁰ *See id.* at 1762-63.

access to the public.⁸¹ To assist states in this effort, the ASA directs the Secretary of the Interior to publish advisory guidelines based on the following objectives: 1) to maximize the enhancement of cultural resources; 2) to foster a partnership among sport divers, fishermen, archeologists, salvors, and other interested parties, to manage shipwreck resources of the States and of the United States; 3) to facilitate access to and utilization of the shipwreck by recreational interests; and 4) to recognize the interest of individuals and groups engaged in shipwreck discovery and salvage.⁸²

The National Park Service published the requisite guidelines on December 4, 1990.⁸³ These guidelines ("NPS guidelines") enumerate and describe the basic components of an effective, state-run shipwreck management program. In relevant part, the guidelines suggest that programs seek to: 1) locate and identify shipwrecks; 2) determine eligibility of shipwrecks for transfer to the state under the ASA; 3) discern which shipwrecks possess historical significance and ensure protection for historical wrecks; 4) identify potential uses for discovered wrecks; 5) conduct archeological research when appropriate; and 6) "[p]rovide for commercial salvage and other private sector recovery of shipwrecks when such activities are in the public interest."⁸⁴ To achieve these goals, the guidelines encourage states to: 1) involve interest groups; 2) create an advisory board; 3) assign responsibility for shipwreck management to appropriate agencies; 4) establish policies and promulgate consistent regulations; 5) provide adequate resources for staff, facilities, and equipment; 6) establish a procedure to enable concerned parties to comment on state activity adversely affecting shipwrecks; and 7) punish anyone willfully violating regulations promulgated through the program.⁸⁵ Arguably then, ambiguity will fade once a state proves each element of the ASA, and is provided with the specific directives contained in the guidelines.

II. ARE CRITICISMS OF THE ASA ANCHORED IN REALITY?

A. *Critics Claim the ASA Fails to Accomplish its Primary Goal*

Many archeologists believe that shipwrecks are most valuable when they are left in their resting places on the floor of the ocean, where they have

⁸¹ See *supra* note 49.

⁸² See *supra* note 56.

⁸³ Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50, 116 (Dec. 4, 1990).

⁸⁴ *Id.*

⁸⁵ *Id.*

achieved atmospheric equilibrium.⁸⁶ Removing objects disturbs site organization, which is the key to archeological interpretation, and places artifacts at risk of destabilization.⁸⁷ Other archeologists are less vehemently opposed to excavation and removal as long the site is studied beforehand, and the artifacts are properly preserved and maintained as a collection after removal. Despite their disagreement about how harmful salvaging activities are, archeologists agree that the law of salvage does not provide sufficient protection to ships of historical significance.⁸⁸ "Salvage law encourages the premature recovery of [artifacts] (often without any pre-disturbance survey to investigate the archeological importance of the wreck); it encourages quick and unscientific excavation techniques; and it encourages the piecemeal sale of artifacts rather than their preservation as a collection."⁸⁹

As discussed, this reality was one of the driving forces behind the passage of the ASA. "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."⁹⁰ However, critics question whether the ASA has, in practice, effectively enhanced the archeological study of historical shipwrecks.⁹¹ They argue that the Act "provides powerful disincentives for private salvage of historical shipwrecks," but "very little or no incentive for states to conduct their own search and recovery efforts."⁹²

These opponents contend that under admiralty law, salvors could undertake a project with confidence that they would be compensated for their effort. A federal court would likely grant them title to the wreck under the law of finds, or issue an award under the law of salvage.⁹³ But "[t]he ASA effectively disempowers these salvors by subjecting them to unlimited, nonuniform, and unreviewable state regulation. The ASA eliminates the system of incentives and rewards provided by federal admiralty courts that justified the salvors' work."⁹⁴ Since the passage of the ASA, a salvor must: 1) wade through and make sense of ASA case law in order to make a prediction as to whether the Act will apply to the discovered wreck; 2) if it appears that the ASA will apply, the salvor must determine in which state's territory the wreck is located; 3) decipher the state's law as it applies to shipwrecks; and 4) rely on the state for any possible

⁸⁶ Griggs, *supra* note 30.

⁸⁷ *Id.*

⁸⁸ See, e.g., Forrest, *supra* note 26, at 334.

⁸⁹ *Id.*

⁹⁰ Becker, *supra* note 4, at 579.

⁹¹ Murphy, *supra* note 1, at 168.

⁹² *Id.* at 199.

⁹³ See *id.* at 175.

⁹⁴ *Id.* at 171-72.

compensation.⁹⁵ This daunting process discourages salvors from investing the upfront capital needed for shipwreck exploration. "Without the law of salvage and finds, and a federal court armed with the power to award them, a wrecker faces a colossal disincentive to search because of the unpredictability of the ASA/state law rewards system."⁹⁶

Critics concede that discouraging commercial salvage would be consistent with congressional intent *if* traditional salvage exploration was replaced by state-sponsored, "archeologically and environmentally sensitive historical shipwreck exploration."⁹⁷ However, opponents contend that because the NPS Guidelines are merely advisory⁹⁸ and state funds are scarce, effective state action in exploring shipwrecks is uncommon.

When privately funded salvors stop exploration because ASA-based salvage is not worth the investment, states are not likely to spend public monies on government sponsored "treasure hunts" or pursue exploration with the same skill and dedication exhibited by private salvors. Shipwreck exploration may simply stop and there will be no newly discovered historical vessels to preserve and protect. Hundreds, if not thousands, of historically important wrecks will remain undiscovered or be secretly salvaged.⁹⁹

Such concerns arose in congressional sessions prior to the enactment of the ASA. One member asked, "How then, are we protecting shipwrecks and promoting opportunities for learning from these historical vessels if the likely result will be state laws which create major disincentives to private efforts to discover shipwrecks?"¹⁰⁰

B. Opponent Claims Lack Merit

At first glance, these criticisms sound convincing. However, closer scrutiny reveals flaws. The affect the ASA has on salvage activities is overstated. The assumption that states will not act without mandates is inaccurate. Finally, states have more funding options than opponents recognize. California's approach to shipwreck management provides an example refuting the criticism of the ASA opponents.

⁹⁵ *Id.* at 178.

⁹⁶ *Id.* at 176.

⁹⁷ *Id.* at 168.

⁹⁸ *See supra* note 77.

⁹⁹ Murphy, *supra* note 1, at 179-80; Harris, *supra* note 3, at 252; *see also* Becker, *supra* note 4, at 600-01.

¹⁰⁰ H.R. REP. NO. 100-514(II), at 16 (1988).

1. Incentive to Salvage

Opponents to the ASA suggest that guaranteed compensation under traditional admiralty law provided incentive to salvors, incentive which the ASA framework eviscerated. However, opponents overstate this contention. Salvors have never been motivated to raise shipwrecks the ASA is meant to govern – those which are historically valuable, but may or may not contain currency or marketable artifacts. “While [the law of finds and the law of salvage] provide some financial incentive for salvors to locate and salvage wrecks . . . they do not provide efficient incentives for shipwrecks whose value is largely historical.”¹⁰¹ The ASA could not have removed the incentive for salvors to search for these ships if none existed before.

Even as applied to ships that do contain marketable objects, the ASA does not disrupt a system perfectly tailored to encourage salvage activities. Salvaging has always been a risky business. Salvage projects require the expenditure of time and money that is lost if the wreck is never located. Uncertainty remained even upon discovery.

Today, California “treat[s] the location of [a newly reported discovery] as confidential to preserve the right of the discoverer to apply for a permit for further investigation.”¹⁰² A salvor governed by admiralty law had to “defeat claims of numerous other parties.”¹⁰³ To establish a claim, the salvor had to prove voluntariness, the threat of marine peril, and successful rescue.¹⁰⁴ The second element may be difficult to prove because any object that has been preserved to the extent that it is worth salvaging has likely achieved equilibrium in its marine environment.¹⁰⁵ Therefore, the salvor may need to provide evidence that the property is at risk because of natural disasters, boat disturbance, or looters.¹⁰⁶ And the last element “is indicative of the great risk that a salvor undertakes in expensive salvage operations; if the operations are unsuccessful, the salvor is not entitled to any compensation for money and time expended.”¹⁰⁷ Clearly, it is inaccurate to suggest that establishing a claim to property under salvage law was effortless.

¹⁰¹ Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, U. OF CONN. DEP'T OF ECON. WORKING PAPER SERIES 1 (Dec. 2004).

¹⁰² *Supra* note 29.

¹⁰³ Kahn, *supra* note 33, at 607.

¹⁰⁴ Sherri J. Braunstein, *Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of 1987 is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks*, 8 WIDENER L. SYMP. J. 301, 305 (2002).

¹⁰⁵ Griggs, *supra* note 30.

¹⁰⁶ Berean, *supra* note 6, at 1255.

¹⁰⁷ Gerstenblith, *supra* note 2, at 608.

The critics also exaggerate the uncertainty salvors must endure since the ASA was enacted. Salvors conduct most preliminary "exploration" in libraries.¹⁰⁸ "Generally speaking, the first phase of any [exploration] is to conduct background research, looking at primary and secondary records on the prehistory, geology, environment, and prior studies of the targeted area."¹⁰⁹ This process has been streamlined by the creation of computerized databases.¹¹⁰ California compiled a database which provides the locations of more than 1500 shipwrecks resting in its territorial waters.¹¹¹ The database is posted online and can be searched using ship name, type of ship, county, latitude, or longitude.¹¹² Although some of the listings are suspect due to the age of the literary sources from which the information was derived, the database enables salvors to identify an area in which the wreck may be located so that the salvor can contact the appropriate state authorities. After acquiring an understanding of the applicable state law, the salvor can decide whether to move forward with the project. If she decides to abandon the project, relatively little time and money is relinquished. Indeed, salvors might well enjoy more security since the ASA was passed than they did under admiralty law.

2. State Incentive and Capability

Critics argue that states lack the incentive, resources, and expertise to effectively manage shipwrecks of historical or archeological value. They maintain that "there is no assurance that the states will implement policies that mirror the goals of the ASA."¹¹³ However, this contention ignores the symbiotic relationship that exists between the federal and state governments, and too easily dismisses the influence the federal government has over the states. Congress was explicit about the force it intended its directives to have.

While it is true that the NPS Guidelines are non-binding, the Committee strongly encourages the states to act consistently with the guidelines. If an affected party believes that a state is not acting generally consistent with the guidelines, that individual should bring that fact to the state's attention, and legal recourse should be provided under state law.¹¹⁴

¹⁰⁸ E-mail from Michele C. Aubry, Archeology Program, National Park Service (May 5, 2005, 10:59:49 PST) (on file with author).

¹⁰⁹ *Id.*

¹¹⁰ See California State Lands Commission Shipwreck Database, <http://shipwrecks.slc.ca.gov/ShipwrecksDatabase.html>.; DeeperBlue.net Forums, Government Shipwreck Databases, <http://forums.deeperblue.net/archive/index.php/t-40745.html>.

¹¹¹ See <http://shipwrecks.slc.ca.gov/ShipwrecksDatabase.html>.

¹¹² *Id.*

¹¹³ Braunstein, *supra* note 106, at 313.

¹¹⁴ See *supra* note 94, at 7.

The opposition's argument is also based on an incorrect assumption that states will not act for the public good unless ordered to do so. Rather, "[g]overnment agencies at all levels of government have a stewardship responsibility to locate, evaluate, document, preserve, and protect archeological resources under their jurisdiction or control."¹¹⁵ This dedication is evinced by the fact that more than 30 states have passed laws addressing the management of historical shipwrecks.¹¹⁶

Critics further maintain that even if states recognize the value of properly managing historical shipwrecks, they are limited by financial restrictions. It is true that exploration, archeological study, and salvage can be very expensive. Exploration of a site is usually conducted using sophisticated equipment like side-scan sonar, magnetometers, sub-bottom profilers, or remotely operated vehicles ("ROVs").¹¹⁷ The cost to rent or purchase this equipment is substantial. The less expensive ROVs, for example, may cost around \$10,000.¹¹⁸ Researching the site "requires time and trained people" and may necessitate travel to the ship's country of origin.¹¹⁹ The cost of raising any portion of the wreck or its cargo, if the state decides to do so, is exorbitant. "Artifacts made of wood or iron may take years to properly stabilize so that they don't crumble into dust when exposed to the air."¹²⁰ Even once the object is stabilized, preservation will require perpetual expenditures.¹²¹ Thus, opponents are correct to recognize that there are immense costs associated with salvage projects. It is also true that little state funding has been devoted to shipwreck exploration and management. In its report to Congress, the Congressional Budget Office stated that it did not anticipate the ASA having any significant impact on state budgets.¹²² Consistent with that conjecture, the California State Lands Commission ("SLC") "does not currently have a specific budget for shipwreck management."¹²³

Nevertheless, those that ground their opposition to the ASA in these facts suffer from short-sightedness as they fail to recognize that federal funding options exist. The NPS Guidelines encourage states to fund their shipwreck programs with annual appropriations, but they also refer to section 2103 of the

¹¹⁵ Aubry, *supra* note 109.

¹¹⁶ Murphy, *supra* note 1, at 179-80; *see also* Harris, *supra* note 3, at 252; Hallwood, *supra* note 102, at 1.

¹¹⁷ Griggs, *supra* note 30.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Aubry, *supra* note 109.

¹²² *See supra* note 55, at 5; *supra* note 46, at 7.

¹²³ Griggs, *supra* note 30.

ASA.¹²⁴ The second provision of that section recognizes that states may seek grants from the Historic Preservation Fund “for the study, interpretation, protection, and preservation of historical shipwrecks and properties.”¹²⁵ In addition, the guidelines note that “[t]he National Oceanic and Atmospheric Administration’s Office of Ocean and Coastal Resource Management in the U.S. Department of Commerce have identified sections . . . of the Coastal Zone Management Act as potential funding authorities to assist States in developing and implementing state shipwreck management programs and related activities.”¹²⁶

States can also overcome financial restrictions by working with other stakeholders. During congressional hearings, Congress suggested that states “work with sports divers to locate shipwrecks and establish underwater parks.” Likewise, one congressperson noted that “it is not the intent of the Committee that states discourage private salvage of shipwrecks that is consistent with the protection of historical values and the environmental integrity of the shipwrecks and the sites.”¹²⁷ The NPS Guidelines expand on this idea by recommending that states collaborate with other state and federal agencies; apply for public and private grants; establish volunteer programs; and encourage science and educational organizations to participate in projects.¹²⁸

In fact, states have heeded this advice and the types of groups identified in the guidelines have been responsive to collaboration requests.

Several avocational [*sic*] archeology dive groups have done a spectacular job educating their members and work regularly with government agencies on projects to study shipwreck sites. Likewise, a number of universities work with government agencies on projects as a means for training their students. A few research institutions and federal agencies, too, conduct surveys in state waters to assist states in locating and evaluating shipwrecks.¹²⁹

California has been mindful of the financial benefits which can be had by forming partnerships. The State has cooperated with government agencies and nonprofit organizations when possible.¹³⁰ Funds designated by the legislature for the creation of the online shipwreck database were “stretched by using

¹²⁴ Murphy, *supra* note 1, at 170.

¹²⁵ S. REP. NO. 100-241, at 6 (1987).

¹²⁶ Murphy, *supra* note 1, at 170.

¹²⁷ *See supra* note 94, at 6

¹²⁸ *See supra* note 57.

¹²⁹ Aubry, *supra* note 109.

¹³⁰ Griggs, *supra* note 30.

student interns.”¹³¹ Brochures distributed by the State provide incentive for private parties to report discoveries.¹³² The State promises to keep the location confidential if the party wishes to apply for a permit to further investigate the site.¹³³ Those who don’t intend to investigate or salvage “may have their name(s) recorded with the ship in the inventory, and will be entitled to share in the results of any subsequent salvage activity.”¹³⁴

Furthermore, California law authorizes the SLC to form agreements with salvors. The legislature established the Shipwreck and Historic Maritime Resources Program in 1989.¹³⁵ Section 6309 of the California Public Resources Code authorizes the SLC to administer the program. The section requires anyone conducting a salvage operation to obtain a permit, and directs the SLC to provide “fair compensation to the permitholder in terms of a percentage of the reasonable case value, or share, of the objects recovered.”¹³⁶ SLC guidelines specify that, after the deduction of reasonable salvage costs, the State is entitled to 25% of the first \$25,000 worth of state owned objects and 50% of all value exceeding that amount.¹³⁷ The guidelines also declare that “[t]he State has the first right of selection of objects, and may retain any or all of the items salvaged.”¹³⁸ They further clarify that the State will reimburse the salvor if it elects to retain more than its agreed share.¹³⁹ California’s legal framework is particularly important because salvors can acquire large amounts of capital through stock sales and loans. Partnerships with these private entities enable the State to accomplish projects it might not otherwise be able to support if it were relying solely on the funding sources discussed in the previous section.

CONCLUSION

SCUBA gear and like technology significantly altered the underwater scene. It used to be ruled by commercial salvors, a small sector of the public who chose to invest in costly, specialized machinery. Eventually though, equipment advances enabled others to join the subsurface adventures. While salvors continued to focus on the commercial potential of shipwrecks, those new

¹³¹ *Id.*

¹³² *See supra* note 29.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ CAL. PUB. RES. CODE § 6309 (1989).

¹³⁶ *Id.*

¹³⁷ CAL. STATE LANDS COMM’N, GENERAL APPLICATION GUIDELINES FOR MARINE SALVAGE PERMITS (on file with author).

¹³⁸ *Id.*

¹³⁹ *Id.*

to the scene quickly realized their historical and archeological significance. Congress stepped in to protect this newly recognized value, but some claim the effort failed. Opponents maintain that the ASA discourages salvors from engaging in salvage operations, but fails to ensure such activities will be conducted by the states. They emphasize the advisory nature of the NPS Guidelines and the perpetual under-funding of government programs.

The opposition's arguments make sense intuitively, but more detailed analysis reveals that they are overstated and presumptuous. They ignore the force of congressional "suggestions," and dismiss the idea that states exist to promote the public interest. They disregard federal funding options and fail to recognize the contribution of partnerships to the effective management of historical shipwrecks.

