

STUDY TITLE: Synthesis, Legislative Review, and Case Law History Applicable to Cultural Heritage in the Marine Environment.

REPORT TITLE: Underwater Cultural Heritage Law Study.

CONTRACT NUMBER(S): M11PG00050.

SPONSORING OCS REGION: BOEM Environmental Assessment Division

APPLICABLE PLANNING AREA(S): All Planning Areas.

FISCAL YEAR(S) OF PROJECT FUNDING: 2011.

COMPLETION DATE OF REPORT: January 14, 2014

COST(S): FY 2011; \$150,000; **CUMULATIVE PROJECT COST:** \$150.000

PROJECT MANAGER(S): Ole Varmer and Susan Glaize.

AFFLIATION: U.S. Department of Commerce: Office of General Counsel Law Library and National Oceanic and Atmospheric Administration Office of General Counsel International Section and National Ocean Service Coastal Services Center.

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KEY WORDS: Underwater Cultural Heritage; Outer Continental Shelf; law; statutes; cases; historic preservation; conservation; cultural property; marine environment; natural heritage; international law; law of the sea; maritime law; law of salvage; common law of finds, archaeology, shipwrecks, relics, treasure

BACKGROUND: The protection and management of Underwater Cultural Heritage (UCH) is a challenging topic, as it involves the interplay of United States (U.S.) statutes, maritime law, international law, and often complex issues regarding what law applies when and against whom it may be enforced. At the same time, there is ongoing risk from activities that may directly or indirectly destroy UCH, such as unscientific salvage or looting, energy development, dredging, and bottom trawling. No single statute comprehensively protects UCH from all of these human activities.

This UCH Law Study was generated by the Department of the Interior, Bureau of Ocean Energy Management and the Department of Commerce, National Oceanic and Atmospheric Administration to provide an analysis of existing laws protecting UCH on the U.S. Outer Continental Shelf (OCS), identify gaps in protection and recommend legislative changes to address any gaps. The results of the analysis indicate a need for legislative changes to better protect UCH, including proposals to amend the Archaeological Resources Protection Act and/or the National Marine Sanctuaries Act.

OBJECTIVES: (1) To identify, study, develop and digitize the legislative histories for the major statutes related to UCH on the OCS, including the National Historic Preservation Act of 1966 (NHPA), the

National Environmental Policy Act (NEPA), Antiquities Act of 1906 (AA), the Sunken Military Craft Act (SMCA) and the Outer Continental Shelf Lands Act (OCSLA) and make them available to the BOEM, the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce (DOC), and the general public in a searchable document format; (2) To prepare a study on the application of those laws to UCH in general, but in and on the OCS in particular, including a gap analysis and recommendations on how to fill the gaps.

DESCRIPTION: The project was divided into four phases (or tasks). The statutes reviewed under Task I included the AA; OCSLA; SMCA; NHPA; and the NEPA. The statutes reviewed in Task II included the National Marine Sanctuaries Act; Coastal Zone Management Act; the Rivers and Harbors Act; Admiralty Law; the American Indian Religious Freedom Act; and the Law of the Sea. The statutes reviewed in Task III included the Abandoned Shipwreck Act of 1987 (ASA); Archaeological Resource Protection Act of 1979; National Stolen Properties Act; and the Cultural Property Implementation Act; and the Submerged Lands Act. For the statutes in Tasks I, II, and III DOC/NOAA compiled legislative histories and source documents for those statutes; collected documents from the landmark cases, related those statutes, summarized those cases; collected important articles related those statutes, and summarized those articles. Under Task IV, a study was completed on the above-referenced laws that may be used to protect UCH on the OCS, along with a legislative gap analysis and three recommendations on how to fill those gaps. These documents and summaries are now publically available in a searchable document format at <http://csc.noaa.gov/oceanlawsearch/#/search>. This site contains the final study, a summary of the statutes and key cases related to UCH, and links to the various bills, reports, and other documents describing the legislative history on this issue.

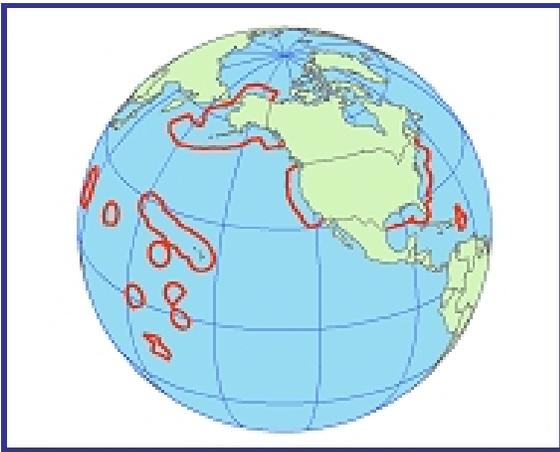
SIGNIFICANT CONCLUSIONS: The United States Government has enacted a number of statutes to protect and manage our cultural heritage. The NHPA, as well as some other laws and policies, appear to sufficiently address the obligation of each State Party under Article 5 of the 2001 UNESCO Convention to “use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.” There are, however, gaps in protection of UCH on the OCS and other maritime zones from activities directed at UCH such as looting and unwanted salvage. Along the coast and within state submerged lands that generally extend out 3 nautical miles (nm), the ASA and other laws provide direct protection for much of the UCH, although the law of salvage is periodically used to challenge state authority under the ASA as well as the federal government in federal marine protected areas such as parks and sanctuaries. Beyond state submerged lands on the OCS, there is a gap in direct protection for historic shipwrecks that are located outside of national marine sanctuaries and marine national monuments and are not protected under the SMCA. The Native American Graves Protection and Repatriation Act (NAGPRA) provides authority to protect Native American sites discovered on the OCS. On the seabed beyond the coastal State jurisdiction of the United States, there is no statute directly protecting UCH, with the exception of the SMCA for U.S. sunken military craft, and perhaps under the maritime law of salvage, in which the RMS *Titanic* is primarily protected by orders of the Admiralty Court. The U.S. courts sitting in Admiralty have also refused to award salvage rights to a U.S. company conducting unwanted salvage on the continental shelf of other nations (e.g., the “Black Swan” *Mercedes* case). Thus, there have been a number of decisions over the past decade or so by U.S. courts sitting in Admiralty Jurisdiction that have recognized the public interest in preserving UCH *in situ* or in place and refusing to grant salvage awards for UCH taken from areas beyond U.S. national jurisdiction. The courts are also recognizing the public interest and importance of adherence to professional standards of archaeology and historic preservation, such as in the case of *Titanic*. In doing so, some courts sitting in Admiralty, and other experts in maritime and historic preservation law, have also recognized the need for cooperation with other nations and gap-filling legislation in the U.S. to control the looting and unwanted salvage of UCH here in the U.S. as well as control of U.S. vessels and nationals conducting looting and unwanted salvage abroad. There are a number of ways to fill the gaps in the direct protection of UCH left by current U.S. statutes in order to

meet the minimum requirements for protection set forth in the 2001 UNESCO Convention in a manner consistent with the Law of the Sea Convention.

STUDY RESULTS: The study identified the laws that apply on the OCS, identified the gaps in protection and provided recommendations on how to fill those gaps to address the obligations of State Parties to the 2001 UNESCO Convention.

STUDY PRODUCT(S): The deliverables for this interagency agreement to date include the quarterly progress reports, the draft report, the draft technical summary, the draft annotated bibliography, a searchable digital database, and a list of websites of the DOC GC Law library, the NOAA Coastal Services Center, and the International Section of NOAA.

* P.I.'s affiliation may be different than that listed for Project Manager(s).



Map showing areas of study.