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The Antiquities Act Regulating Salvage of Historic Shipwrecks

The Antiquities Act of 1906, 16 U.S.C. Section 431, et seq., which provides for the protection of antiquities on lands owned or controlled by the United States, has recently proven to be very successful in protecting historic shipwrecks located on submerged lands under federal control. The application of the Antiquities Act to the marine environment is the latest approach used by the United States to protect these nonrenewable resources against treasure-hunters. While the determination of ownership of such vessels and their cargo can often be unclear, a federal court has now recognized that the United States can exercise its regulatory authority to help ensure that salvage of historic shipwrecks is done in a manner consistent with the federal archeological program.

The dispute between treasure-hunters and federal and state governments concerning possession of recovered historic shipwrecks and their cargo has been in existence for over 30 years.¹ During the last several decades, treasure-hunters have traditionally asserted that admiralty law justifies recovery of historic shipwrecks. Specifically, they argue that, under the law of finds, title to abandoned historic vessels and their cargo vests in the person who first reduces those artifacts to his or her possession with the intention of becoming the owner thereof.² Alternatively, the treasure-hunters have argued that salvage law authorizes a salvage award for services rendered.³ In some instances, courts will grant treasure-hunters a salvage award that is equal to the value of the entire vessel and its cargo.⁴

Until somewhat recently, the United States' main defense to the treasure-hunters' position is that the United States has ownership rights to abandoned historic vessels and their cargo in waters under federal control.⁵ Unfortunately, the position taken by the United States' has not been entirely successful in protecting historic shipwrecks.⁶

Several developments in this area of the law, however, have recently occurred that should prove to be more promising in protecting submerged cultural resources. For example, on April 28, 1988, The Abandoned Shipwreck Act of 1987 ("ASA") became effective.⁷ In passing the ASA, Congress

exercised the United States' sovereign prerogative by asserting federal title to abandoned shipwrecks and their cargo located within state and territorial waters. The ASA further provides that the United States then transfers title to those shipwrecks and their cargo to the states and territories in or on whose submerged lands the shipwrecks are located.⁸ This transfer of title allows states and territories to manage these submerged cultural resources as part of their duty to manage natural resources.⁹ While the ASA now solves the problem of protecting abandoned historic shipwrecks found within the submerged lands of the states and territories of the United States, the problem of protecting historic shipwrecks that are located on submerged lands outside of state and territorial waters still remains a challenge.

Another statute that has shown to be very helpful in protecting historic shipwrecks is the National Marine Sanctuary Act ("NMSA").¹⁰ Under the NMSA, Congress provided that the Secretary of Commerce shall have the authority to designate and manage "certain areas of the marine environment possess[ing] conservation, recreational, ecological historical, research, education, or esthetic qualities which give them special national significance."¹¹ In fact, the very first marine sanctuary that was designated under the NMSA was established in 1975 to protect the USS *Monitor*, which was lost when it sank off the coast of North Carolina on December 31, 1862.¹²

The NMSA is also being used as a preservation tool today by the Department of Justice, on behalf of the National Oceanic Atmospheric Administration, in the pending matters of *United States v. Melvin A. Fisher, et al.*, Case No. 92-10027 CIVIL-DAVIS (S.D. Fla., filed April 21, 1992) and *Motivation, Inc. v. The Unidentified, Wrecked and Abandoned Vessel, et al.*, Case No. 95-10051 CIVIL-DAVIS (S.D. Fla., filed August 3, 1995). Both of these cases concern the salvage activities of treasure-hunter Melvin Fisher, his son and others that occurred within the Florida Keys National Marine Sanctuary. In the *United States v. Fisher* matter, the United States is taking the position that Mr. Fisher, et al. performed their treasure-hunting activities in violation of the NMSA, which resulted in damage to sanctuary resources. In the *Motivation, Inc.* matter, the United States is arguing that Mr. Fisher, et al. not only violated the NMSA, but also failed to obtain an Antiquities Act permit prior to conducting his treasure-hunting activities, in violation of Section 3 of the Antiquities Act of 1906. These two cases are prime examples of how submerged cultural resources can be protected under the NMSA.

It is also important to note that these two cases link the effects treasure-hunting on natural

resources with those effects on submerged cultural resources. The establishment of this important link has proven to be very successful due to the fact that people have become increasingly more aware of the importance of protecting marine resources such as coral, seagrass and marine animals. By recognizing that our nation's submerged cultural resources are also part of the marine environment, we will be better able to protect our submerged cultural resources.¹³

As discussed above, the Antiquities Act can also be used to protect submerged cultural resources. The Antiquities Act provides, in pertinent part:

. . . That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

* * *

That permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

* * *

—*Antiquities Act, sections one and three (emphasis provided in original).*¹⁴

Prior to the initiation of the *Motivation, Inc.* matter, the Antiquities Act has been applied to submerged cultural resources in two other cases—one in which the United States was not successful, *Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel*, and the other in which the United States was very successful, *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993). The *Treasure*

Salvors matter involved a challenge to the ownership of the historic shipwreck believed to be the *Nuestra Senora de Atocha* (“the Atocha”), located beyond state waters on the outer continental shelf. The dispute was between Mel Fisher and the United States. As discussed above, Mel Fisher asserted that, under admiralty law, he was entitled to possession of and confirmation of title to the *Atocha*.¹⁵ In its counterclaim, the United States asserted title to the vessel.¹⁶ The basis for the United States’ ownership claim was based on two grounds, including the application of the Antiquities Act to objects located on the outer continental shelf of the United States.¹⁷ Specifically, the United States argued that the Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1331, et seq. (“OCSLA”), demonstrates a “Congressional intent to extend the jurisdiction and control of the United States to the outer continental shelf.”¹⁸ Accordingly, the United States argued that the Antiquities Act was applicable because the *Atocha* was located on lands under the control of the United States.¹⁹ The Fifth Circuit, however, disagreed with the United States’ application of the Antiquities Act. It held that the OCSLA only extended United States control over the outer continental shelf for purposes of exploration and exploitation of the natural resources of the continental shelf and, therefore, the United States did not, for purposes of the Antiquities Act, have “control” over the submerged lands upon which the *Atocha* rested.²⁰ Based on the Fifth Circuit’s rejection of the United States’ theory of ownership under the Antiquities Act and on all other grounds, the Court ultimately ruled in favor of Mel Fisher in the *Treasure Salvors, Inc.* matter.²¹

The United States was, however, successful in its application of the Antiquities Act in the *Lathrop* case.²² In January of 1988, prior to the effective date of the ASA, Randy L. Lathrop filed his admiralty action in the United States District Court for the Middle District of Florida.²³ The *Lathrop* case involved a treasure-hunter, Randy L. Lathrop, who sought either 1) title to an unidentified historic vessel allegedly located within three miles of the Florida coast in the Cape Canaveral National Seashore, north of Cape Canaveral, Florida; or, alternatively, 2) a salvage award for his services.²⁴

After filing his admiralty action, Lathrop published a notice of the pending action in a local newspaper in March of 1988.²⁵ Due to a lack of response to his notice of publication, or an asserted interest in the alleged vessel, Lathrop filed a Motion for Entry of Default, which was subsequently granted.²⁶ Lathrop then conducted salvage activities between the months of August and December in 1989 and in the early months of

1990.²⁷ In April of 1990, Lathrop tried to resume his salvage activities, but was met with opposition from both the State of Florida and the United States. The State of Florida informed Lathrop that he would first need to obtain a permit before conducting his salvage operations.²⁸ Accordingly, Lathrop submitted a permit application to the State of Florida Division of Historical Resources.²⁹ The State, however, later informed Lathrop by letter from the State Archaeologist and Chief of the Bureau of Archaeological Research that a salvage contract would be inconsistent with the permitted land uses for the Cape Canaveral National Seashore, which includes the preservation and protection of the outstanding natural and historic values of the Seashore.³⁰ An Assistant United States Attorney also informed Lathrop that the United States took a similar position.³¹ As a result, Lathrop filed a Motion for Preliminary Injunction seeking to prohibit any interference with his salvage operations in June of 1990.³² At the hearing and during briefing, the United States raised the issue of ownership of the alleged shipwreck.³³ The Court then granted Lathrop's Motion for a period of 90 days, claiming that general admiralty law would not be consistent with the United States' claim of ownership.³⁴ After the preliminary injunction was entered, Lathrop resumed his salvage activities, utilizing the boat's prop-wash deflectors and creating large craters in the seabed and causing damage to the Cape Canaveral National Seashore.³⁵

On October 22, 1990, Lathrop filed a Motion to Modify the Preliminary Injunction seeking to have the injunction remain in effect until October 1, 1991.³⁶ The Court denied Lathrop's Motion on January 11, 1991, due to the fact that the salvage season had ended.³⁷ For the next six months, Lathrop did not conduct salvage activities because the State of Florida had informed him that it had worked out an agreement in principle that would permit Lathrop to conduct his salvage activities.³⁸ The State, however, emphasized that two conditions must be met before the agreement could be finalized: 1) additional time would be needed to obtain final approval of the agreement and to prepare a written document; and 2) Lathrop must also obtain permission from the United States to conduct his salvage operations.³⁹

On July 8, 1991, the United States Army Corps of Engineers informed Plaintiff's counsel that the court's admiralty jurisdiction did not preclude the Corps from exercising its regulatory authority over salvage activities that occurred within the Corps' dredge-and-fill jurisdiction.⁴⁰ Although the United States remained firm on its position that Lathrop needed to obtain a federal permit prior to conducting any further salvage activities, Lathrop resumed his salvage operations.⁴¹

At that point, after the above-mentioned events had occurred, and while the case was still pending, in mid-July of 1991, I was assigned to represent the United States in the Lathrop matter. After learning that Lathrop had resumed his salvage operations, I informed Lathrop's counsel that the United States took the position that his client's activities were illegal and must immediately cease until such time as he obtains a dredge and fill permit from the Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Section 403. Lathrop's salvage operations did not cease and, accordingly, the Corps of Engineers issued a cease and desist order.⁴²

After a status conference in September of 1991, Lathrop and the United States entered into settlement negotiations.⁴³ As a result of these negotiations, Lathrop agreed to complete his Corps dredge and fill permit and stop all dredging and salvaging activities within the boundaries of the Cape Canaveral National Seashore, including using a metal detector or magnetometer, which is in violation of National Park Service regulations.⁴⁴ In addition, I informed Lathrop that he would also need to obtain an Antiquities Act permit. I explained to Lathrop that, pursuant to the dedication instrument, the State of Florida delegated exclusive management and control of the submerged lands of the Cape Canaveral National Seashore to the United States. Accordingly, an Antiquities Act permit must first be obtained prior to conducting salvage activities on an historic shipwreck. I then handed Lathrop an application form.

In January of 1992, Lathrop had made little progress in obtaining the State of Florida's consent to perform his salvage activities.⁴⁵ As a result, Lathrop filed a Second Motion for Preliminary and Permanent Injunction on February 24, 1992.⁴⁶ Subsequently, the Corps denied Lathrop's dredge and fill permit application due to the fact that Lathrop failed to obtain the other necessary permits, which is a prerequisite to obtaining a permit under Section 10 of the Rivers and Harbors Act of 1899.⁴⁷ Additionally, the State of Florida's Department of Environment Regulation denied Lathrop's permit application under its regulatory authority.⁴⁸ Lastly, Lathrop refused to even submit his Antiquities Act permit, citing his ineligibility under the accompanying regulations to obtain such a permit.⁴⁹

In his brief in support of his Second Motion for Preliminary and Permanent Injunction and at the hearing on his Motion, Lathrop asserted that admiralty law exempts him from complying with any Act of Congress such as the Antiquities Act or the Rivers and Harbors Act. In essence, Lathrop's theory amounted to an "admiralty law conquers all" approach to treasure-hunting. The United

States, however, argued that several Congressional enactments, such as the Antiquities Act and the Rivers and Harbors Act, modified the substantive law of admiralty. In short, regulation as to the manner of salvaging historic shipwrecks does not interfere with the underlying principles of admiralty law. The court agreed: “[c]ongressional enactments restricting the manner in which a potential salvor excavates property located on federally owned or managed lands does not offend these sound constitutional limitations [to maritime law and admiralty jurisdiction].”⁵⁰

The court was also persuaded that regulation of Lathrop’s activities was necessary as the dedication of the Cape Canaveral National Seashore by the State of Florida was done for a specific purpose: “to preserve and protect the outstanding natural, scenic, scientific, ecologic, and historic values of certain lands, shoreline, and waters of the State of Florida, and to provide for public outdoor recreation use and enjoyment of the [park].”⁵¹ If Lathrop were to conduct his salvage activities, the Seashore would be used in a manner inconsistent with the specified purpose. In such an event, pursuant to the terms of the reverter clause contained in the dedication instrument, the State of Florida would be allowed to reenter and reclaim possession of the Seashore.⁵² As a result, Congress, in an effort to protect the Cape Canaveral National Seashore, “enacted legislation allowing the Secretary to terminate a right of use and occupancy retained by an owner of improved property in the park if the land is being used in a manner inconsistent with its specified purpose.”⁵³ The court specifically referred to the Antiquities Act and the Rivers and Harbors Act as being among those statutes Congress enacted to protect the Seashore.⁵⁴ Specifically, the court stated:

In order to protect national parks, such as the Cape Canaveral National Seashore from being endangered, Congress has passed various laws which prohibit the appropriation of historic artifacts [the Antiquities Act], or excavation [the Rivers and Harbors Act] on federal lands without first obtaining a permit from the Corps of Engineers [in the case of a Rivers and Harbors Act permit or from the National Park Service in the case of an Antiquities Act permit]. The permitting process is comprehensive, but it considers the effects of the proposed activity on the public interest as well as the effect on the environment, wildlife, and historical and cultural resources. Such laws, however do not deprive a federal court of admiralty jurisdiction. Nor do they necessarily prohibit a potential salvor from conducting salvage activities, although they might. Rather, these statutes supplement

admiralty law by providing substantive rules for lawfully conducting salvage operations on federally owned or managed lands.

The requirement that a salvor act lawfully while salvaging a vessel is consistent with general admiralty law. By itself, possession of abandoned property is not sufficient to establish a salvage claim. Before a valid claim can be established, a salvor must acquire possession lawfully. Otherwise, as one court noted, “buccaneering would again flourish on the high seas.” It is for Congress—through appropriate legislation—to substantively supplement admiralty law and determine the lawfulness of certain salvage activities.

Lathrop, 817 F. Supp. at 963 (citations and footnotes omitted) (emphasis in original).⁵⁵ The Court continued its discussion supporting regulation of salvage activities:

Without any restrictions, Plaintiff’s salvage activities could not only destroy the alleged vessel and its historic artifacts, but also could disrupt the delicate marine life living on the seabed. . . . Legislation which supplements admiralty jurisdiction by imposing necessary restrictions on salvage activities is an important legislative function properly reserved to Congress.

Id. (footnote omitted). Based on this reasoning, the Court held that, due to his failure to obtain the necessary permits prior to conducting his salvage activities, Lathrop did not demonstrate a substantial likelihood of prevailing on his salvage claim.⁵⁶ Accordingly, and in addition to other reasons stated in the Court’s opinion, Lathrop’s Second Motion for Preliminary and Permanent Injunction was denied.⁵⁷

As demonstrated by the Lathrop case, the Antiquities Act of 1906 is clearly a modern archeological protection tool, particularly in the marine environment. It has proven to be a powerful statute that can protect historic shipwrecks on lands owned or controlled by the United States. The reach of the Antiquities Act when linked with the NMSA can be even further extended as the NMSA provides a basis for application of the Antiquities Act to the submerged lands of a marine sanctuary, wherever located, within 0-200 miles offshore.⁵⁸ The linkage of these two statutes cures the Fifth Circuit’s concerns set forth in the *Treasure Salvors, Inc.* holding as Congress did exercise the United States’ sovereign prerogative to protect marine resources, including historic shipwrecks, when it passed the NMSA. Thus, the NMSA gives the United States, for purposes of applying the Antiquities Act, control over submerged lands within a marine sanctuary, even if located up to 200 miles offshore.⁵⁹

Perhaps, with the enactment of additional legislation designed to protect submerged cultural

resources located beyond state waters, historic shipwrecks will be afforded even better protection, which they so desperately deserve. Until that time, we must continue to rely on statutes such as the Antiquities Act of 1906, which has proven to be extremely important to the preservation of our cultural heritage. In any event, it can certainly be said that the Antiquities Act of 1906 is alive and well on its 90th Birthday.

Notes

- 1 See, e.g., *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456-57 (E.D. Va. 1960); *Rickard v. Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968); *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978); and M. Norris, *The Law of Salvage Section 156* (1958).
- 2 *Id.*
- 3 See, e.g., *Treasure Salvors, Inc.* at 336-37.
- 4 *Id.* at 337.
- 5 See, e.g., *id.*
- 6 See, e.g., *id.* at 330-43. But see *Klien v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (The United States was held to have ownership of an 18th-century shipwreck partially buried in the submerged lands of the Biscayne National Monument based on both exceptions to the law of finds: 1) the vessel was found to be embedded in submerged lands belonging to the United States that are part of National Park System; and 2) the United States had constructive possession of the shipwreck because the wreck was indicated on an archeological assessment, performed on behalf of the National Park Service, demonstrating that the United States had the power and intention to exercise dominion and control over the wreck.)
- 7 The Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 43 U.S.C. sections 2101-2106 (1988).
- 8 *Id.* The ASA, however, does not apply to abandoned shipwrecks located in or on federal public lands and abandoned shipwrecks located in or on Indian lands. 43 U.S.C. sections 2101, 2105.
- 9 *Id.*
- 10 The NMSA is Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. sections 1431, et seq..
- 11 16 U.S.C. Section 1431(a)(2) (emphasis added).
- 12 When the USS *Monitor* was found in 1973, there was excitement about the discovery and concern about its potential destruction due to looting or salvage. In order to protect and preserve the USS *Monitor*, two avenues were pursued: 1) designating it as a National Historic Landmark under the National Historic Preservation Act, 16 U.S.C. Section 470a and the regulations promulgated thereunder; and 2) designating it as a National Marine Sanctuary. As a result, the USS *Monitor* became the first national marine sanctuary in 1975.
- 13 For example, the United States successfully linked the effects of treasure-hunting on an alleged historic shipwreck to those effects on turtle nesting grounds in the matter of *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).
- 14 Sections one and three of the Antiquities Act. It should also be noted that the Antiquities Act was under a constitutional attack in two cases: 1) *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (In that case, the Ninth Circuit held that the Antiquities Act was unconstitutionally vague and therefore a violation of due process. Specifically, the Court found that the definitions of "ruin," "monument," or "object" could also include objects made recently and, as a result, provided insufficient notice to the public of the applicability of the Act's penalty provisions); and 2) *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (In the Smyer case, the Tenth Circuit upheld the constitutionality of the Antiquities Act. The Court distinguished the Smyer case from the Diaz case: the Diaz case involved face masks made in 1969 or 1970 as opposed to the objects appropriated in the Smyer case, which involved artifacts that were 800-900 years old and were taken from ancient sites for commercial purposes. *Id.* The Court found that, as it applied to the case before it, the Act suffered "no constitutional infirmity" and must be considered "in the light of the conduct with which the defendant is charged." *Id.*).
- 15 *Treasure Salvors, Inc.*, 569 F.2d at 333.
- 16 *Id.*
- 17 *Id.* at 337.
- 18 *Id.* at 338 (while the Court recognized that Congress can exercise the United States' sovereign prerogative to extend U.S. jurisdiction to protect historic resources on the outer continental shelf, it held that Congress did not do so under the OCSLA).
- 19 *Id.*
- 20 *Id.* at 337-40.
- 21 *Id.* at 330-43.
- 22 *Randy L. Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).
- 23 *Id.* at 956.
- 24 The Cape Canaveral National Seashore is owned in fee title by the State of Florida. By means of a dedication instrument dated April 1, 1980, the United States was given exclusive use, management and control of the Seashore. Subsequent to the execution of the dedication instrument, the Cape Canaveral National Seashore was established by Congress as a National Seashore, to be administered by the United States National Park Service. 16 U.S.C. Section 459j.
- 25 *Lathrop* at 956.
- 26 *Id.*
- 27 *Id.* at 956-57.
- 28 *Id.* at 957.
- 29-32 *Id.*
- 33 *Id.* at fn.3.
- 34 *Id.* at 957-58.
- 35 *Id.* at 958.
- 36 *Id.*
- 37 *Id.* at 959.
- 38-42 *Id.*
- 43 *Id.* at 960.
- 44 *Id.* The Park Service regulations which the United States argued that Lathrop had violated include 36 C.F.R. sections 2.2(a)(2), 2.31(c)(2) and (c)(3).
- 45 *Lathrop*, 817 F. Supp. at 960.
- 46 *Id.*
- 47 *Id.* See also Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Section 403 and the regulations promulgated thereunder.
- 48 *Lathrop*, 817 F. Supp. at 960.
- 49 See Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary and Permanent Injunction at 6.
- 50 *Lathrop*, 817 F. Supp. at 962 (emphasis in original).
- 51 *Id.* (quoting 16 U.S.C. Section 459j).
- 52 *Lathrop*, 817 F. Supp. at 963.
- 53 *Id.* (citing 16 U.S.C. Section 459j-2(b)) (emphasis in original).
- 54 *Lathrop*, 817 F. Supp. at 963.
- 55 *Id.* (quoting *Martha's Vineyard Scuba HQ. v. Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987)) (citations and footnotes omitted) (emphasis in original).
- 56 *Lathrop*, 817 F. Supp. at 963 (footnote omitted).
- 57 *Id.* at 967.
- 58 The NMSA can be applied to "those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone [up to 200 miles offshore], consistent with international law . . ." 16 U.S.C. Section 1432(3).
- 59 *Id.*

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