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THE ABANDONED SHIPWRECK ACT OF 1987 IN THE NEW MILLENNIUM: INCENTIVES TO HIGH TECH PIRACY?

Russell G. Murphy*

I. INTRODUCTION

An estimated fifty thousand shipwrecks lie in the territorial waters of the United States.1 Five to ten percent of these wrecks are believed to have historical significance.2 An extraordinarily high percentage of these wreck sites are located within state boundaries.3 The Abandoned Shipwreck Act4 of 1987 (hereinafter ASA) controls the search for and exploration of these historic wrecks and sets the legal and practical parameters for contemporary “treasure hunting” in the United States.5 Recent decisions6 interpret-

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ing or relating to the ASA confirm the longstanding criticism\(^7\) of the Act that it is poorly designed to achieve one of its primary goals: to promote archeologically and environmentally sensitive historic shipwreck exploration.\(^8\) An examination of these cases suggests that current law regulating historic shipwrecks not only discourages lawful search and recovery but actually encourages covert, unauthorized and illegal salvage operations.\(^9\) Such decisions seem destined to lead to the emergence of a new breed of technologically sophisticated "pirates." This article explores some of the problems created by the ASA as judicially interpreted by presenting three "models" of shipwreck exploration pursuant to the Act: The "Compliance" Model,\(^10\) "Negotiation" Model\(^11\) and "Pirates" Model.\(^12\) It addresses a basic question facing modern treasure hunters—will successful shipwreck search, discovery, exploration and recovery be fairly rewarded—and proposes some modest revisions\(^13\) of the ASA to help answer that question in the affirmative.

I. THE ABANDONED SHIPWRECK ACT OF 1987

The Abandoned Shipwreck Act\(^14\) of 1987 asserts federal governmental sovereignty over historic abandoned shipwrecks located within state
borders or state territorial waters. United States title is claimed to any wreck "(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 (the wreck) is included in or determined eligible for inclusion in the National Register (of Historic Places)." Exempted from operation of the Act are shipwrecks located outside the three geographic [or, in a few cases, nine nautical] mile limit of state territorial waters, on public lands of the United States or on Indian tribal lands. Also excluded are wrecks that are not "embedded" in state lands nor eligible for inclusion in the National Register, as well as all sovereign ships of the United States regardless of location. After asserting title to these wrecks, the Act automatically transfers title to "the state in or on whose submerged lands the shipwreck is located." States are vested with full administrative and management authority for shipwreck exploration and site control subject to non-binding guidelines promulgated by the Secretary of the Interior through the National Park Service. The authority of the states extends expressly to "abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." In a most controversial provision, the ASA effectively removes federal court jurisdiction over claims to shipwrecks covered by the Act by specifically prohibiting the federal courts from applying the age-old

16. 43 U.S.C. § 1312 (Supp. 2002). Territorial waters extend out three geographical miles (or nine nautical miles for Florida, Texas and Puerto Rico) from the coast of each state. Id.
18. Id.
23. Id. at § 2101(a).
24. Id. at § 2104; See also 55 Fed. Reg. 50,116 (1990).
25. Id. at § 2101(b).
26. See generally McLaughlin supra note 5, at 170–71 and accompanying text (noting most controversial provision that removes federal admiralty jurisdiction over shipwrecks covered by ASA).
maritime law concepts of “salvage”\textsuperscript{27} and “finds”\textsuperscript{28} to ASA cases.\textsuperscript{29} This means that, in essence, once it is determined that a shipwreck is covered by the ASA, all rights and claims to it are dependent on state law, must be asserted in state court, and will be evaluated without reference to the traditional body of admiralty law that has been applied by the federal courts since the enactment of the United States Constitution.\textsuperscript{30}

This dramatic and unusual restructuring of maritime law is supported by several specific Congressional goals. The overarching purpose of the ASA is historic shipwreck and wreck site protection.\textsuperscript{31} This is to be achieved by transferring title and legal control of wrecks to the individual states.\textsuperscript{32} Congress concluded that states are closest to the problems of near-shore shipwreck exploration, are best equipped to deal with them, and have the greatest interests at stake.\textsuperscript{33} Additionally, Congress determined that state title, regulation, management and, when required, litigation would solve the “confusion”\textsuperscript{34} over ownership of abandoned wrecks caused by prior federal court application of admiralty law.\textsuperscript{35} This, in turn, would reduce federal court litigation.\textsuperscript{36} The ASA also seeks to fill gaps in federal legal protection of shipwrecks arising under the Archaeological Resources

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 88–96 and accompanying text (explaining traditional maritime law of salvage).
\item See infra notes 97–100 and accompanying text (explaining law of finds in admiralty law).
\item 43 U.S.C. § 2106(a) (2002).
\item See U.S. CONST. ART. III, § 2 (extending judicial power of United States to all cases arising under admiralty and maritime law); 28 U.S.C. § 1333 (2002).
\item H.R. REP. NO. 514(II), supra note 1, at 8 (identifying “protection of our nation’s maritime heritage” as goal of ASA).
\item Owen, supra note 33 and accompanying text (explaining purposes behind ASA enactment).
\item See H.R. REP. NO. 514 supra note 1, pt. II, at 2–3, reprinted in 1988 U.S.C.C.A.N. at 370–72; see also, Anne G. Giesecke, The Abandoned Shipwreck Act Through the Eyes of its Drafter, 30 J. MAR. L. & COM. 167, 168 (and accompanying notes 5 and 6); McLaughlin, supra note 5, at 174 (“uneven” federal court decisions); Forrest Booth, Who Owns Sunken Treasure? The Supreme Court, the Abandoned Shipwreck Act and the Brother Jonathan, 11 U.S.F. MAR. L. J. 77, 85 (1998–1999) (Congress was “concerned that shipwreck and salvage litigation was tying up the [federal] courts and [such litigation] was only likely to increase.”).
\end{enumerate}
\end{footnotesize}
Protection,\textsuperscript{37} Outer Continental Shelf Lands,\textsuperscript{38} Submerged Lands,\textsuperscript{39} Antiquities,\textsuperscript{40} and National Marine Sanctuaries Acts.\textsuperscript{41}

One final goal motivated enactment of the ASA: the elimination of private salvage of historic wrecks.\textsuperscript{42} This statute is premised on the view that historic shipwreck exploration and recovery should be carried out by state governments using tax revenues rather than private salvors using private risk capital.\textsuperscript{43} The investor-backed private salvor\textsuperscript{44} was, and is, regarded as a threat to wrecks and their surrounding marine environments.\textsuperscript{45} Marine archeologists,\textsuperscript{46} historic preservationists,\textsuperscript{47} state natural resources officials,\textsuperscript{48} and various organizations\textsuperscript{49} are on record as condemning search and recovery practices\textsuperscript{50} of private salvors. The ASA effectively
disempowers these salvors by subjecting them to unlimited, nonuniform and unreviewable state regulation, and by eliminating the system of incentives and rewards provided by federal admiralty courts that justified the salvor's work. The ASA does not, however, specify how the work historically performed by the private salver will be accomplished under the Act. A review of ASA-based state laws illustrates this problem.

A. The States' Response

Over thirty states have enacted laws pursuant to the grant of

Stevens, supra note 34, at 577 (blasting, dredging, winching, and blow torching); McLaughlin, supra note 5, at 181 (noting primary objection to “mailboxing”); see also, BARRY CLIFFORD, THE PIRATE PRINCE (DISCOVERING THE PRICELESS TREASURES OF THE SUNKEN SHIP WHYDAH), 90 (Simon & Shuster 1993) (describing mailboxes or propwash diverters as "huge metal elbows that slip over the propellers of a twin screw boat . . . [a]fter anchoring you start the engine, and when the propellers are engaged the mailboxes force a stream of water into the sand, blowing a pit about eight feet wide at the bottom and up to fifteen feet deep.").


52. See infra note 103 and accompanying text (discussing disincentives for legal wrecking and salvage activities).

53. See, e.g., McLaughlin, supra note 5, at 187 (noting "under the Act, there is no incentive for the states to survey for shipwreck locations, much less to excavate the wrecks.").

management responsibility provided in the ASA and guidelines \(^{55}\) issued by the Department of the Interior. These shipwreck management programs differ from state to state on such crucial matters as: areas of state jurisdiction; \(^{56}\) definition of resources regulated; \(^{57}\) nature of claim(s) made by the state to protected resources; \(^{58}\) permit requirements \(^{59}\) for private search and recovery; rewards and incentives; \(^{60}\) penalties for unauthorized salvage; \(^{61}\) and agencies charged with enforcement. \(^{62}\) The ASA has spawned extensive state bureaucracies charged with administering state laws and regulations that are often confusing and contradictory. Today, a law-abiding salvor committed to historic shipwreck exploration must make an informed guess at which state’s law will apply (based on location of the wreck), \(^{63}\) obtain authority from the state to search or recover, and rely on state law for compensation. As later sections of this article indicate, \(^{64}\) even with state

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\(^{59}\) Cf., e.g., N.Y. Laws § 14 (Consol. 2001) (regulatory authority); N.C. Gen. Stat. § 121.22 (2001) (title); but see Giesecke Shipwrecks supra note 54 (vast majority of states assert title).


\(^{62}\) Cf., e.g., N.Y. Laws § 14 (Consol. 2001) (misdemeanor at judges discretion); N.C. Gen. Stat. § 121.22 (2001) (fine or imprisonment of less than two years); S.C. Code Laws Ann. § 54.7.400 (2001) (fine not to exceed $10,000 or imprisonment for two years); Fla. Stat. Ann. § 267 (West 1999) (forfeit of artifacts plus fine not to exceed $500 or imprisonment of two years).


\(^{64}\) See 43 U.S.C. § 2105(a); 43 U.S.C. § 1312 (defining extent of territorial waters).

\(^{65}\) See, e.g., infra notes 189-217 and accompanying text (detailing litigation resulting from twenty-six year effort to recover wreck in state waters).
permission and rewards, litigation subsequent to discovery may delay or deny the salvor's claims. This uncertainty is a major threat to the goals of the ASA.65

B. Salvors and the Law of "Salvage" and "Finds" in the ASA System

For hundreds of years prior to enactment of the ASA, the private salvor was the central figure in shipwreck location and exploration.66 A rich body of literature chronicles the exploits and escapades of these treasure hunters.67 One of them, Key West's Mel Fisher,68 began using advanced scientific technologies69 in the 1960's to search for and salvage historic wrecks such as the Atocha70 and the 1715 Spanish Plate fleet.71 Federal admiralty court enforcement of the salvage rights of adventurers like Fisher

65. See, e.g., McLaughlin supra note 5, at 192–93 (McLaughlin states “there is no cohesive, nationwide harmony in the [state] management of shipwrecks . . . . Under the current system, a salvor must consult a discouraging host of state laws, administrative codes, and uninformed agencies before salvage work can begin . . . .”) Id. at 192–93. (“[T]he lucky salvor . . . [will gain] the reward at the end of the labyrinth . . . .”) Id. at 197.

66. See JOHN VIELE, THE FLORIDA KEYS VOLUME 3, THE WRECKERS, 43–57 (Pineapple Press, Inc. 2001). In May 1928 Congress “established the Superior Court for the Southern Judicial District of the Territory of Florida,” the original wreckers' court of Key West. Id. at 57. In 1847, two years after Florida became a state, it was replaced by the District Court of the United States for the Southern District of Florida. Id. The court was to be open at all times for admiralty cases. Id. “The Key West court was the only court in the United States authorized to license (private) wrecking captains and wrecking vessels and to revoke licenses for misconduct.” Id.


68. EUGENE LYON, SEARCH FOR THE MOTHER LODE (Florida Classics Library, 1989) (describing Fisher's use of advanced science to aid in exploration).

69. See, e.g., Stevens supra note 34, at 174–98 (summarizing technological developments making shipwrecks accessible); See also Mather, Technology and the Search for Shipwrecks, 302 MAR. L. & COM. 175 (1999).


led directly to the passage of the ASA and the imposition of extensive state restrictions on this type of salvage.72

Modern salvage of historic shipwrecks is difficult (compared to "find[ing] an exceedingly small needle in a dauntingly large haystack"),73 expensive,74 time-consuming,75 heavily regulated,76 dangerous77 and, in financial terms, potentially highly rewarding.78 Until enactment of the ASA, the salvor's primary, if not exclusive, incentive in undertaking the risky, uncertain and expensive task of salvage was the availability of a federal admiralty court grant of either a liberal salvage award79 or an outright grant of title to an abandoned shipwreck and cargo.80 The admiralty concepts of "salvage"81 and "finds,"82 together with exclusive federal court jurisdiction over admiralty and maritime cases,83 provided the foundation for a centuries old private salvage industry. The ASA's express

72. See supra note 42 and accompanying text (discussing the primary goal of ASA as elimination of private salvage of historic wrecks).


76. See supra note 4 and accompanying text (detailing ASA restrictions on private salvage).

77. Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Vessel, 569 F.2d 330, 333 (5th Cir. 1978) (son and daughter of salvor Mel Fisher plus two others killed by accident during recovery operation); see also The Blackwall, 77 U.S. 1, 14 (1869) (shipwreck salvage is a "perilous . . . laborious and . . . dangerous enterprise . . .").

78. See, e.g., Columbus America Discovery Group v. Atlanta Mutual Insurance Co., 974 F.2d 450, 458 (4th Cir. 1992) (estimating overall value of cargo from the S.S. Central America at up to one billion dollars).

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


81. See infra notes 88–96 and accompanying text (explaining maritime salvage law).

82. See infra notes 97–100 and accompanying text (explaining maritime law of finds).

elimination of both admiralty court jurisdiction and substantive salvage law seriously undermines this foundation. 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. Today, once a historic wrecksite is located, there is, in fact, a strong incentive to keep the discovery secret.

Under the law of salvage, a salvor's investment in wreck recovery is compensated by a court-ordered reward from the salvaged property. The consistent policy underlying admiralty's salvage awards is that salvors will be liberally rewarded. Admiralty holds out a continuing incentive to undertake the physical and financial risks entailed in salvage. Marine treasure salvors are well-aware of this policy, and are guided by its constancy. So long as a salvor makes voluntary efforts to save a vessel in marine peril on or under navigable waters, and demonstrates some degree of success in these efforts, a salvage award is made and enforced by a lien on the vessel and its cargo. The owner of the vessel is not a necessary or indispensable party to the in rem action but can intervene to recover what remains after the salvage award is paid. The amount of a

85. Id.
86. See infra note 103 and accompanying text (describing the uncertainty created by ASA).
87. See, e.g., Christopher L. Meazell, Being and Embeddedness: The Abandoned Shipwreck Arts' Historical Proxy is All at Sea, 34 GA. L. REV. 1743, 1768 (2000). ("The ASA forces would-be finders and salvors to resort to secretive measures in order to retain control over discovered wrecks); Id. ("Because experienced divers and treasure hunters will know about the requirements of the ASA, they will be discouraged from disclosing their finds. They will work in secret to avoid governmental intervention, and will be given an incentive to perjure themselves on the stand, as they are often the only persons with first-hand knowledge of the wreck...);" see also, LYON, supra note 68, at 22-3 "[T]reasure hunters...are secretive, jealously guarding their knowledge of sunken ships... One Fort Pierce...[salvor] failed to get a salvage contract (permit) because he would never put the location of his shipwreck into writing.").
88. See 3A Norris, BENEDICT ON ADMIRALTY, § 16 (8th ed. 1992); Com. v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 551 (Mass. 1988) ("The law of salvage...was meant to encourage the rescue of imperiled or derelict marine property by providing a liberal reward to those who recover property on or in navigable waters."). Id.
91. See generally SCHOENBAUM, supra note 80, at 834-39; see also The Sabine, 101 U.S. 384 (1879); Jupiter Wreck Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988). Note also that actions may be brought in personam against an owner who is subject to the courts' personal jurisdiction. SCHOENBAUM, supra note 80 at § 1-2.
92. Id.
salvage depends on the factors set forth by the United States Supreme Court in *The Blackwall*93 including 1) the type of danger faced by the property; 2) the value of the saved property; 3) the risk incurred by the salvors; 4) the salvors' skill (which some courts in treasure cases have taken to mean the extent to which salvage was conducted with due regard to historical, archaeological and environmental concerns)94 5) the value of the salvor's equipment; and 6) time and labor costs in the salvage operation.95 Awards amounting to or exceeding eighty percent of the value of a wreck and its cargo are not unusual.96

In the alternative, a federal court can apply the American rule of finds.97 A salvor who discovers a lost and abandoned wreck, and reduces the wreck or some portion thereof to possession, is granted title to it against the world.98 Finds, a less favored remedy to that of salvage,99 is normally available only when the vessel's owner is unknown or has abandoned ownership claims.100

Procedurally, once a wreck has been found and partial recovery of goods or artifacts has been made, the salvor will file a federal court action requesting either an award of salvage or outright title to the wreck and its contents. The complaint in federal court will request the issuance of a warrant for the *in rem* "arrest" of the vessel and the appointment of the salvor as its "temporary custodian." Injunctive relief is often sought to keep competing salvors, state and federal government officials, sport divers and others from interfering with the salvor's possession and recovery efforts. A claim of finds is usually asserted in the alternative.101

The Abandoned Shipwreck Act abolishes this system of federal court

94. See Schoenbaum, supra note 80, at 842 fn.1.
95. *Id.* at 842.
97. See generally Schoenbaum, supra note 80, § 14–7 pp. 851–54 (detailing law of finds in American admiralty jurisprudence).
98. Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 551 (noting law of finds grants title to first party discovering and reducing to possession things found under sea which have not been owned or are property which is long-lost or abandoned).
101. See supra notes 91 and 92 and accompanying text (discussing court's jurisdiction, *in rem*).
jurisdiction and remedies for all historic abandoned shipwrecks covered by the Act.\textsuperscript{102} In so doing, it creates great uncertainty for the salvor and establishes a powerful deterrent to lawful wrecking.\textsuperscript{103} This is best understood by examining a series of difficult questions that must be answered by the salvor under the ASA system.

The treasure hunter must first determine whether a potential wreck or wreck site is generally covered by the ASA.\textsuperscript{104} If it is, it must then be determined whether the wreck meets the technical requirements of the Act so as to force the salvor to comply with state laws regulating shipwreck exploration. To be covered by the ASA, the wreck must be "historic," "abandoned," "embedded," (or if not embedded the wreck site must be "eligible for inclusion in the National Historic Register") and located in the "navigable waters" of the United States.\textsuperscript{105} Next, the salvor must predict which specific state’s law will control. This will be based on the salvor’s ability to pinpoint the precise location of the wreck within a state’s territorial waters.\textsuperscript{106} Finally, the state’s regulations must be interpreted and followed, and state law must provide an express form of compensation in order for the salvor’s work to be rewarded.\textsuperscript{107}

Based on the best guess at answers to these questions, the salvor must make a choice. If the ASA applies, the salvor must obtain authority to search and recover under the controlling state’s regulations and rely on the state’s system of rewards for compensation. Litigation over the applicability of the ASA (and, therefore, the core authority of the state to regulate) and whether its requirements are satisfied is likely.\textsuperscript{108}

\textsuperscript{102} 43 U.S.C. § 2106(a) (2002).

\textsuperscript{103} See, e.g., Yukon Recovery, L.L.C. v. Certain Abandoned Property, 205 F.3d 1189, 1196 (noting "[t]he ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is ‘abandoned’ or ‘embedded’ [on state lands] and therefore subject to the ASA . . . . A salvor could expend immense resources to locate, survey and salvage a wreck only to have a court later rule that the salvor is entitled to nothing . . . ." (emphasis added); see also statement of Rep. Norman D. Shumway (R-Cal.), H.R. REP. No. 514(II), 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 370, ("the likely result (of the ASA) will be laws which create major disincentives to private efforts to discover shipwrecks.").

\textsuperscript{104} 43 U.S.C. § 2105; infra note 118 and accompanying text (discussing Sea Hunt litigation).

\textsuperscript{105} 43 U.S.C. § 2105.

\textsuperscript{106} Id.

\textsuperscript{107} See supra notes 56–63 and accompanying text (detailing state statutory provisions regulating salvage).

\textsuperscript{108} See, e.g., Zych v. Unidentified, Wrecked and Abandoned Vessel, 746 F. Supp. 1334 (N.D. Ill. 1990); 755 F. Supp. 213 (N.D. Ill. 1991); Deep Sea Research, Inc. v. Brother Jonathan, 883 F. Supp. 1343, 1398 (N.D. Ca. 1995) ("the exact location of the Brother Jonathan [was] . . . stipulated . . . [to be] within California's territorial sea even though it appeared that the wreck was not more than four and one half miles off shore.").
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If the salvor concludes that the ASA does not control, a traditional federal court salvage and finds action may be filed in federal court.\textsuperscript{109} Litigation in that court over ASA issues similar to those presented at the state level is again likely.\textsuperscript{110} If a federal court decides that a wreck is governed by the ASA, the salvor must again look to the state and seek state authority to search and recover. Because prior wreck identification and exploration will have occurred without state permission, the state may simply deny any prospective authority on procedural grounds.\textsuperscript{111}

The private salvor has one final option. A salvor may conclude that good-faith efforts to follow federal and/or state law cannot promise a fair reward with sufficient certainty and timeliness. In that case, the salvor may choose to work outside the law by taking the treasures of lost shipwrecks secretly and without legal authority.\textsuperscript{112} That is, to become a modern-day pirate. Ironically, the ASA provides a powerful incentive to following this option.

II. THREE “MODELS” OF SHIPWRECK EXPLORATION IN THE POST—ASA ERA

Very few professional treasure hunters (and organizations) possess the funding, technical skills, vessels and equipment, and commitment to engage in sophisticated historic shipwreck exploration.\textsuperscript{113} Salvage is not, however, limited to professionals. The ASA restricts the salvage activities of professionals and amateurs alike. The absence of rewards and incentives in this statute is a deterrent to all private shipwreck exploration. 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”\textsuperscript{114} or pursue exploration with the same skill and dedication exhibited by private salvors.\textsuperscript{115}

\textsuperscript{109} See infra notes 189–216 and accompanying text (detailing litigation in which ASA did not apply).

\textsuperscript{110} See 43 U.S.C. § 2105; supra notes 104 and 108 and accompanying text (presenting examples of cases moving between state and federal courts).

\textsuperscript{111} See supra notes 56–63 and accompanying text (noting complex requirements of applicable state statutes regulating private salvage pursuant to ASA).

\textsuperscript{112} See, e.g., supra note 87 (discussing situations in which a would-be salvor has incentive to act outside the law).

\textsuperscript{113} See Horan, supra note 74.

\textsuperscript{114} See, e.g., McLaughlin, supra note 5, at 184 (“The ASA gives the power of shipwreck management to state agencies whose finances often preclude efforts to survey, salvage, or preserve . . . wrecks”).

\textsuperscript{115} See Giesecke, supra note 36, at 167–68 (noting drafter of the ASA provided list of positive consequences of the Act that made no mention of state-sponsored historic
exploration may simply stop and there will be no newly discovered historic vessels to preserve and protect. Hundreds, if not thousands, of historically important wrecks will remain undiscovered or be secretly salvaged.  

Recent shipwreck decisions illustrate the many obstacles faced by a law-abiding salvor in the post-ASA world. These obstacles force the new-Millennium salvor to choose whether to comply with ASA-based state regulations, negotiate a private search and recovery arrangement with a state, or become a pirate who salvages secretly and outside the law. This article presents these options as three models for ASA shipwrecking: the "Compliance" Model, "Negotiation" Model and "Pirates" Model.

A. The Compliance Model—Poor Harry Zych!

The obvious choice for the private salvor is compliance with applicable state law from the beginning of an exploration. Thus far, the ASA has withstood constitutional and substantive admiralty law challenges. As valid controlling federal legislation, the ASA treats the wrecking and salvage business no differently than federal law treats other heavily regulated industries. As such, salvors are legally obligated to follow state regulations from the outset. However, as the following case studies demonstrate, full compliance with state law is no guarantee that a law-abiding salvor will be financially rewarded (or historically recognized) for the discovery of an historic shipwreck.

A recent illustration of the "Compliance" explorational model is Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels. In the late 1990’s, Sea Hunt discovered what it believed to be the remains of two Spanish military frigates, La Galga de Andalucía (LA GALGA) and the JUNO. The JUNO was lost in a hurricane in 1802 and was thought to
be carrying a cargo of Spanish gold coins. The LA GALGA and a small fleet of merchant ships it was guarding sank in a 1750 hurricane off the coast of the Maryland/Virginia border. The LA GALGA fleet was transporting “gold and silver bullion and other valuable New World products.” Both vessels’ remains were located within three miles of Virginia’s Assateague Island National Seashore. They thus appeared to Sea Hunt and Virginia to fall within the ASA and be subject to ownership and regulation by the state.

Sea Hunt Inc., applied to Virginia’s Marine Resources Commission for a permit to begin recovery of items from the wreck sites. On June 10, 1997, a permit was granted providing exclusive salvage rights to these shipwrecks within two separate six-square mile zones off the Virginia coast. The permit specified the search and recovery methods to be used required documentation of artifacts and proper storage mandated the on-site presence of a state-approved archaeologist at all times and provided compensation to Sea Hunt of seventy-five percent of the value of all goods salvaged with title to all historic artifacts reserved exclusively to the state.

In order to comply with Virginia law, Sea Hunt’s application required the review or approval of the Virginia Marine Resources Commission, Virginia Department of Historic Resources (DHR), Virginia Institute of Marine Science, Virginia Department of Environmental Quality and the U.S. Army Corps of Engineers. General supervisory authority over the recovery process was vested in the DHR. The DHR was also charged with the responsibility of payment to permittees such as Sea Hunt, Inc., of a “reasonable” percentage of the value of the recovery.

122. See Sea Hunt, 221 F.3d at 639.
125. Sea Hunt, 221 F.3d at 639.
126. See VA. CODE ANN. § 10.1–2214(B) (Michie 1998).
127. Sea Hunt, 221 F.3d at 639.
128. Kang, supra note 124, at 91.
129. Id.
130. Id. at 107.
131. Id. at 108.
Within a year of having been granted the permit, and after searching for more than three years and expending more than one million dollars, Sea Hunt filed a federal court *in rem* salvage action against the JUNO and the LA GALGA.\(^{133}\) It did so because, apparently, Sea Hunt was concerned that claims by the Government of Spain and other salvors would jeopardize its recovery and compensation under the Virginia permit.\(^{134}\) Sea Hunt sought a declaratory judgement that Spain had abandoned the two vessels.\(^{135}\)

This admiralty court action was exactly the kind of litigation the ASA was intended to remove from the federal courts.\(^{136}\) Sea Hunt (and Virginia by intervention) invoked the ASA at the federal level to establish Virginia’s title to the JUNO and LA GALGA and validate Sea Hunt’s exclusive permit.\(^{137}\) The government of Spain filed a verified claim to the shipwrecks.\(^{138}\) Spain, with the support of the United States, argued that under international law, national governments must expressly abandon sovereign vessels and, Spain asserted, it had never done so.\(^{139}\) Without abandonment, the ASA would not apply, Sea Hunt’s permit would confer no legal rights, and Spain would be authorized to exclude all parties from the wreck sites. At best, Sea Hunt might be eligible for a federal court salvage award.\(^{140}\)

After three years of litigation, Sea Hunt learned the consequences of good-faith compliance with ASA-based state regulation. On July 21, 2000, the United States Court of Appeals for the Fourth Circuit ruled that the 1902 Treaty of Friendship and General Relations between the United States and Spain\(^{141}\) required express abandonment of Spain’s claims to the JUNO and LA GALGA.\(^{142}\) The court determined that neither Article XX of the 1763 Definitive Treaty between France, Great Britain and Spain\(^{143}\) nor the 1819 Treaty ending the War of 1812 between the United States and

\(^{133}\) *See* Sea Hunt, 221 F.3d at 639.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) *See* Booth, *supra* note 36 and accompanying text (noting one purpose of ASA to reduce litigation in this area).

\(^{137}\) *See* Sea Hunt, 221 F.3d at 640.

\(^{138}\) Id. at 639–40.

\(^{139}\) Id. at 640.

\(^{140}\) Id. at 639 (discussing Sea Hunt admiralty complaint that sought a salvage award as an alternative remedy to a grant of title); *see generally* *supra* notes 88–96 and accompanying text (discussing maritime law of salvage).


\(^{142}\) *Sea Hunt*, 221 F.3d at 642.

\(^{143}\) Id. at 643–46.
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Spain, contained such express abandonment of these vessels. The court held that "[t]he mere passage of time since a shipwreck is not enough to constitute abandonment." Without abandonment, Sea Hunt was entitled to no legal protection from the ASA.

An additional blow to Sea Hunt's expectations was delivered in a footnote to the Appeals Court decision. Sea Hunt's in rem complaint asserted a salvage claim against Spain as an alternative to the ASA claim. "Because Sea Hunt had prior knowledge [before filing its federal court lawsuit] of Spain's ownership interests and had reason to expect Spain's . . . refusal to agree to salvage activity. . . ." Sea Hunt was not entitled to a salvage award. The United States Supreme Court denied certiorari.

Other cases highlight the importance of the term "abandonment" to a salvor's attempts to comply with federal and state salvage law. For example, in Fairport International Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence, Fairport International and its president, Steven Libert, began searching for the location of the wreck of the Captain Lawrence in 1984. Library and archival research led Libert to conclude that the owner of the Captain Lawrence, Wilfred H. Behrens, had discovered a cache of gold lost in northern Lake Michigan during the Civil War. Libert believed that Behrens' logbook and, perhaps, a chest of gold, were on the Captain Lawrence when the ship sank on August 26, 1933, adjacent to the shore of Lake Michigan's Poverty Island.

Libert found the wreck in 1993 and confirmed that artifacts previously discovered at the location of the wreck were from the Captain Lawrence. As in Sea Hunt, Libert applied to the state for a permit to "dredge an area of the lake bed in which he believed the Captain Lawrence [was] embedded." Michigan denied the application. Libert then obtained a "Salvage Bill of Sale" to the vessel from Behrens' heirs that assigned to Fairport the

144. See Sea Hunt, 47 F. Supp. at 690–91.
145. See Sea Hunt, 221 F.3d at 643 n.1.
146. Id. at 647.
147. Id. at 639; see supra note 140 and accompanying text (describing complaint seeking salvage award as alternative to grant of title to res).
148. Sea Hunt, 221 F.3d at 647–48 n.2.
149. Id.
151. See generally McLaughlin, supra note 5, at 164–67 (analyzing doctrine and authorities on abandonment of shipwrecks).
152. Fairport International Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence, 177 F.3d 491 (6th Cir. 1999).
153. Id. at 494.
154. See id. at 494 n.2.
155. Id. at 494.
exclusive right to salvage the Captain Lawrence. In June of 1994, Fairport filed an admiralty complaint in the U.S. District Court for the Western District of Michigan requesting an arrest of the vessel, a declaration that Fairport was its sole owner, a salvage award, and an injunction against salvage by any other parties. The Court granted the State of Michigan’s motion to intervene. In June of 1995, Michigan’s motion to dismiss for lack of jurisdiction was granted. The Fairport International Exploration, Inc., litigation was thus born. More than five years of court battles followed during which the Captain Lawrence lay unexplored and unsalvaged, and Fairport remained uncompensated.

Fairport’s initial legal difficulties were caused by the interplay between the ASA and the Eleventh Amendment to the United States Constitution. The original trial court found in 1995 that Michigan had established abandonment of the Captain Lawrence by its owner, Behrens, by a preponderance of the evidence. Abandonment under the ASA established a “colorable claim” to the vessel by the state. Thus, as several other courts had determined, a suit by a claimant such as Fairport was a suit in the federal courts by a citizen directly against the state and was prohibited by the Eleventh Amendment. In 1997, the Sixth Circuit affirmed the trial court’s dismissal for lack of jurisdiction but that decision was vacated by the United States Supreme Court in 1998. In California v. Deep Sea Research, Inc., the Supreme Court limited the application of the Eleventh Amendment to cases involving ASA claims to vessels in the state’s actual “possession” and required trial courts to find abandonment by clear and convincing evidence of the type of “abandonment” defined and recognized by traditional admiralty and maritime law principles.

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156. Id.
157. Id.
158. Fairport, 177 F.3d at 494.
160. See 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, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.”).
162. Id. at 559.
163. Id.
164. See Fairport, 105 F.3d at 1083.
165. Fairport, 523 U.S. at 1091.
167. Id. at 507–08.
168. Id. at 501–08.
Based on this decision by the Supreme Court, *Fairport* was remanded to the Sixth Circuit.\(^{169}\) In 1999, that Court remanded in turn to the District Court with instructions to review the 1995 trial evidence for proof of abandonment by Behrens.\(^{170}\) Without a hearing and based on the original trial record, the Court found abandonment and dismissed Fairport’s admiralty *in rem* action.\(^{171}\) Subsequent appeals were unsuccessful.\(^{172}\)

Fairport’s attempts to comply with the law left it with extremely limited options. A federal court salvage award was barred by the ASA.\(^{173}\) Michigan was free to explore and salvage based on Fairport’s work. Fairport’s only hope of compensation was a resort to Michigan’s system for shipwreck exploration.\(^{174}\) That same system had barred Fairport’s search efforts in 1994\(^{175}\) and would be unlikely to sanction or reward exploration *post facto*.

*Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*\(^{176}\) is another example of the effects of attempted ASA compliance on a salvor’s business operations. Sunken Treasure Inc. (STI) found the “remains of a vessel from the era of Christopher Columbus”\(^{177}\) on the Estate Salt River in the Virgin Islands. The submerged lands in which the vessel was embedded were in the territorial waters of the Virgin Islands.\(^{178}\) The wreck was also located in an area designated by Congress\(^{179}\) as a National Historic Park and Ecological Preserve.\(^{180}\)

STI sought authority from the Virgin Islands government to dredge in the area of the Salt River in which an anchor from the vessel was believed to be located.\(^{181}\) STI was told that local and federal permits would be

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170. Fairport Int’l Exploration, Inc. v. Shipwrecked Vessel, Known as the Captain Lawrence, 177 F.3d 491, 501 (6th Cir. 1999).
172. *Id*.
174. Michigan had no statute relating to the management of abandoned shipwrecks within its waters. This absence of regulation is a prime example of the uncertainty created by the ASA.
175. *See generally* *Fairport*, 177 F.3d 491 (6th Cir. 1999).
177. *Id.* at 1130.
178. *Id*.
181. *Id.* at 1131.
required.\textsuperscript{182} However, no formal licensing procedure existed in the Virgin Islands.\textsuperscript{183} STI then attempted to gain authorization through an Act of the Virgin Island Legislature but, after many delays, it lost "patience with . . . legislative channels"\textsuperscript{184} and prepared to "commence operations despite lack of formal authorization."\textsuperscript{185} This open declaration of piracy was met by an order from the Virgin Islands Department of Planning and Natural Resources prohibiting STI from removing anything from the Salt River. STI complied but filed an \textit{in rem} admiralty action seeking salvage or finds in the local federal District Court on September 18, 1991. The United States intervened as a defendant and the Government of the Virgin Islands entered as a plaintiff.\textsuperscript{186}

On July 14, 1994, almost three years later, the District Court upheld the Virgin Islands ASA claim of ownership to the wreck based on a finding that the Act was constitutional.\textsuperscript{187} Consequently, the federal admiralty court lacked jurisdiction and was barred from awarding a salvage fee to STI. STI's case was dismissed with recourse available only in the Virgin Islands territorial courts.\textsuperscript{188} STI abandoned its public recovery efforts.

Not every ASA case leaves the private salvor empty-handed. The litigation between Harry Zych and the State of Illinois\textsuperscript{189} over the wreck of the \textit{Lady Elgin} demonstrated that a private treasure hunter could ultimately prevail on a claim to an historic shipwreck. However, the question raised by this case for salvors in the new Millennium is whether any treasure hunter is prepared to spend the time (almost ten years and five federal and state decisions)\textsuperscript{190} and money (many tens of thousands of dollars in

\begin{enumerate}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.} at 1131 n.1.
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Sunken Treasure}, 857 F. Supp. at 1137.
\item \textsuperscript{187} \textit{Id.} at 1137.
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} Zych v. Unidentified, Wrecked and Abandoned Vessel, believed to be the SB "Lady Elgin," 746 F. Supp. 1334 (N.D. Ill. 1990); Zych v. Unidentified, Wrecked and Abandoned Vessel, believed to be the SB "Lady Elgin," 755 F. Supp. 213 (N.D. Ill. 1990), \textit{as amended by} 1991 AMC 1261 (N.D. Ill. 1991); Zych v. Unidentified, Wrecked and Abandoned Vessel, believed to be the SB "Lady Elgin," 960 F.2d 665 (7th Cir. 1992), \textit{cert. denied}, 506 U.S. 985 (1992); People ex rel. Ill. Historic Preservation Agency v. Zych, 687 N.E. 2d 1387 (Ill. 1998); People ex re. Ill. Historic Preservation Agency v. Zych, 710 N.E. 2d 820 (Ill. 1999); (The "Lady Elgin" litigation was so protracted that the Illinois state trial judge originally assigned to the case in 1992 retired before the litigation was completed, \textit{see infra} note 191).
\item \textsuperscript{190} \textit{See supra} note 189 and accompanying text (detailing length and extent of Zych litigation).
\end{enumerate}
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(1987) attorney's fees) required of Zych to litigate to a favorable decision on his claim to the Lady Elgin.191

After searching for some sixteen years, Harry Zych found the Lady Elgin in 1989 on the shores of Lake Michigan.192 Regarded as one of the most notorious shipwrecks in the history of the Great Lakes, the Lady Elgin was carrying 450 passengers from a Democratic Party rally in Chicago towards Milwaukee, Wisconsin, when, in 1860, it collided with another vessel and sank.193 Shortly after the discovery, Zych filed an in rem admiralty action in an Illinois federal court. The Illinois Historic Preservation Society (IHPS) and Illinois Department of Transportation intervened, challenged the suit on Eleventh Amendment grounds, and eventually claimed ownership of the wreck under the Abandoned Shipwreck Act. The Lady Elgin Foundation (LEF), established in 1989 or 1990 by Zych and CIGNA insurance (the successor-in-interest to the original insurer of the Lady Elgin) to fund the Lady Elgin recovery project, intervened. By agreement, CIGNA eventually transferred its interest in the wreck to LEF in exchange for twenty percent of the gross proceeds from the sale of property or artifacts from the wreck site.194

At the federal level, three years of court proceedings and three separate opinions ultimately resulted in a dismissal of Zych and LEF's claims to the Lady Elgin. District Court decisions refusing to bar the case on Eleventh Amendment grounds and rejecting the state's ASA assertions of abandonment were eventually reversed by the Seventh Circuit.195 It held that even the mere existence of a state claim to the Lady Elgin triggered an Eleventh Amendment ban on federal jurisdiction.196 Zych was thus relegated to state procedures and remedies that would add five more years of frustration to his efforts.

In September, 1992, while Zych's original admiralty case was pending, Illinois and the IHPS sued Zych, CIGNA and LEF in the Cook County Circuit Court.197 Between 1992 and a bench trial decision in May, 1996, Zych struggled to protect his interests. He first attempted to get the state

193. Id. (noting loss of 300 passengers, most of them Democrats, caused a dramatic shift in the balance of political power in Milwaukee from the Irish to the Germans).
194. Id. at 1337–38.
to comply with the preliminary injunction issued by the Illinois federal court subsequent to the Seventh Circuit decision. The injunction prohibited any disturbance of the wreck site "other than (by) plaintiff Harry Zych, those persons expressly authorized by him, and . . . persons authorized as agents of the State of Illinois." A state official, William L. Wheeler, Associate Director and Counsel of the IHPA, disclosed the LORAN numbers locating the wreck site (shared with him by Zych in confidence) to a private diving club and designated them authorized agents of the state. This immunized the club from operation of the injunction. "Within months, all of the smaller and most valuable artifacts had disappeared from the site."

In 1993, a consent decree was entered in the Cook County Circuit Court under which Illinois would gain title to the wreck and all artifacts in Zych's possession, and Zych and LEF would be credited with the discovery, receive exclusive media and publication rights, and obtain all photos, films and videos held by State agents or officials. The decree was violated by Illinois almost immediately and, in 1994, the consent decree was vacated on Zych's motion based on a finding that Illinois had not acted in good faith.

The state continued to fight Zych by applying in 1994 to have the Lady Elgin listed on the National Register of Historic sites. This would, of course, place it within the ASA and bolster Illinois' claim of ownership. Based on a "misrepresentation" of the "fact" of ownership, this listing was approved in 1995.

A full trial of the state's 1992 lawsuit resulted in a May 1996 unpublished opinion finding that CIGNA had not abandoned the title to the wreck it had acquired as successor-in-interest insurer. The following year the Illinois Appeals Court reversed in a two-to-one decision that held that ATENA had abandoned the Lady Elgin by not searching for the wreck.

199. Id.
201. Id. at 249.
203. Id.
204. Id. at 250.
205. Id.
207. Keller, supra note 191, at 250.
208. Id.
The saga of Harry Zych's twenty six year effort to claim discovery and ownership of the *Lady Elgin* ended in 1999 when the Illinois Supreme Court reversed the Appeals Court and reinstated the trial judge's conclusions that: (1) CIGNA had acquired the original insurer's (AETNA) title arising from its payment of insurance to the *Lady Elgin*'s owner; and (2) its failure to actively search for the wreck until Zych's discovery in 1989 did not constitute abandonment of title or ownership. In support of these conclusions the court noted that: (1) for over a century AETNA and CIGNA had preserved six letters evidencing Aetna's coverage and ownership; (2) CIGNA officials testified that other documentation "most likely" existed but was lost in a Chicago fire; (3) although abandonment can be expressed or inferred, failure to search is not conclusive of abandonment when lack of technology made discovery impractical if not impossible, search could not occur until at least the late 1970's; (4) CIGNA asserted its rights as soon as it learned of Zych's discovery by entering into the agreement with LEF; and (5) the trial court applied the correct standard for abandonment which is not limited to express renunciation of ownership and considers circumstantial evidence. Accordingly, the ASA did not apply, Illinois had no lawful claim to the *Lady Elgin* and Harry Zych had finally won.

From a formalistic standpoint, compliance or noncompliance with the ASA is not an option for today's treasure hunter. The cases in this section emphasize, however, that compliance (obedience of the law) can force the salvor into a world of contentious and protracted litigation at state and federal levels. The preliminary conclusion that the ASA does or does not apply to a specific wreck is challengeable. Even if a salvor is correct that a particular state's law must be followed, attempted compliance with state requirements often triggers an adversarial relationship with the state. "[S]alvors are at the mercy of [state] government officials. When these bureaucrats are reasonable, knowledgeable and sincere, good things can happen. But when they have their own agendas, bad results are

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discovery . . . . [T]echnological developments . . . made it . . . easier to locate shipwrecks in the late 1960's and early 1970's . . . . [The insurer] made no efforts to salvage . . . for about 20 years.")


211. *Id.* at 826.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

inevitable." Those "bad results" may ultimately be undone or ameliorated by the courts. However, cases like Sea Hunt, Fairport, Sunken Treasure and, even, Zych effectively force the treasure hunter to ask whether other options exist to formal ASA compliance. A system in which finding gold is easier than being rewarded and recognized has inevitably led to non-traditional alternatives to compliance. One such option is the "Negotiation Model."

B. The Negotiation Model—David Paul Horan

The "Compliance Model" could justifiably be termed the "litigation" model. Lengthy, costly and, at times, inconclusive lawsuits often result from competing claims to shipwrecks covered by the ASA. The United States Supreme Court's 1998 opinion in California v. Deep Sea Research Inc.,218 joined with a strategy developed by Florida admiralty attorney David Paul Horan,219 provide an alternative model for post-Millennium treasure hunting.

The Brother Jonathan, a 220 foot steamship, sank in 1865 when it hit a submerged rock off the coast of Crescent Heights, California. Its cargo included an estimated $2 million in gold and an Army payroll of $250,000, both at 1865 values.220 For over nineteen years, Deep Sea Research (DSR) researched and explored for the Brother Jonathan.221 In 1991 DSR found a wreck it believed to be the Jonathan and filed an in rem admiralty action in the federal court for the Northern District of California. The State of California intervened and asserted a claim to the wreck under the ASA. The case was initially dismissed without prejudice on DSR's motion but was reinstated in 1994 when DSR conclusively identified a different wreck located four and one-half miles off the California Coast as the Brother Jonathan.222

From the outset, the Brother Jonathan litigation was structured as an Eleventh Amendment sovereign immunity223 case. DSR stipulated that the

217. Keller, supra note 191, at 245.
219. See infra notes 240-45 and accompanying text (discussing Attorney Horan's model for treasure hunting).
223. See supra note 160 and accompanying text (describing constitutionally protected sovereign immunity).
wreck was "located upon submerged lands belonging to California" even though its location appeared to place it beyond the three mile territorial waters limitation of the ASA. With this stipulation, California could claim title under the ASA and a California Law vesting title in the state of "all abandoned shipwrecks . . . on or in the tide and submerged lands of California." In so doing, the state could assert that DSR’s admiralty complaint against the Brother Jonathan was "an action against the state in violation of the Eleventh Amendment" and move to dismiss the complaint for lack of subject matter jurisdiction.

Both the California District Court and the Ninth Circuit Court of Appeals rejected California’s position, held that the ASA preempted California laws regarding title to shipwrecks, and concluded that the Brother Jonathan was not abandoned for ASA purposes. On review by the United States Supreme Court, Justice O’Connor revisited and distinguished the Court’s Eleventh Amendment plurality ruling in Florida Dept. of State v. Treasure Salvors, Inc. that federal court in rem actions involving state claims were barred by the Amendment only in cases of lawful state possession of a vessel. The Court held that the Eleventh Amendment did not prohibit an in rem admiralty action against a vessel such as the Brother Jonathan that was not in the actual physical possession of the state. The Court declined to resolve the issues of ASA preemption raised in the appeal. The case was remanded with instructions to reconsider the Abandoned Shipwreck Act issues without reference to the Eleventh Amendment.

Now facing further proceedings on the remand, DSR and California decided that four years of litigation was enough. A settlement agreement was entered into under which DSR was granted a salvage permit in exchange for California’s receipt of twenty percent of gold coins recovered from the Brother Jonathan and title to all historic artifacts from the wreck. In essence, the state waived any ASA claims it had to the Brother

225. Id. at 496–98.
227. Id.
232. Id. at 508–509.
233. See id.
Jonathan, leaving DSR with authority to salvage. This in turn, allowed the original 1994 in rem admiralty action to proceed and enabled DSR to be rewarded by the traditional maritime remedies of injunction and, most importantly, salvage.

Attorney David Paul Horan of Key West, Florida, is one of this country's most prominent salvage lawyers. Attorney Horan foresaw the problems of protracted litigation symbolized by Deep Sea Research, Sea Hunt and Zych many years before the cases were brought. Mr. Horan represented Mel Fisher and Treasure Salvors, Inc., through the United States Supreme Court's decision in their favor, prevailed against the State of Florida in Cobb Coin, and, later, went on record against the ASA based upon federal constitutional principles. Attorney Horan's experience led him to employ a "negotiation" model for ASA salvaging as early as the 1980's.

Mr. Horan recognized that regardless of the eventual outcome of a case, both winner and loser would spend extraordinary sums on attorney's fees and litigation expenses. Years of recovery and preservation would be lost. Neither the state nor the treasure hunter could be certain of the strength of a claim to a wreck. This would be a clear deterrent to any kind of planned or controlled exploration. He therefore adopted a negotiation strategy that would, in essence, result in a settlement of potential competing claims prior to the initiation of any formal litigation.

To this day, Attorney Horan uses the Negotiation Model to free his clients from the constraints of the ASA. "Awards of eighty percent of salved items, with cross-sectional and unique items passed to the state," have been reached by contract with the state of Florida. Mr. Horan can succeed in this way for several reasons. He has a reputation for professionalism, skill, toughness, technical expertise, tenacity, and most importantly, success. He represents treasure hunters and investors with similar reputations. Mr. Horan is politically sophisticated and well-connected. His track record dates back to Mel Fisher's early 1970s discovery of the wreck.

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236. See supra notes 88–96 and accompanying text (examining maritime law of salvage).
240. Interview with David Paul Horan, Esq., at the offices of Horan & Horan, Attorneys at Law, Key West, FL (April 25, 2001). On file with author.
site of the 1622 Spanish galleon the *Atocha*\(^{242}\) and the federal courts' adoption of many of his arguments regarding the archeological, environmental and legal implications of shipwreck exploration.\(^{243}\)

The Negotiation Model allows attorneys with standing comparable to David Paul Horan's to approach appropriate state officials on behalf of qualified salvors. That official may be a Cabinet member (Secretary of State, Attorney General), legislator (Chair of the House or Senate Finance Committee), person charged with oversight of the state's historic shipwreck management program, or a member of the state's congressional delegation.\(^{244}\) The goal of such contact is the negotiation of a workable arrangement between the treasure hunter's lawyer on behalf of specified salvor(s) and the state.

The agreement can be as simple or as complex as the parties want, but the essentials are very straightforward. The contract must authorize search and recovery operations by the represented treasure hunter(s) for a designated period (e.g. one to five years) and either result in the issuance of a salvage permit or exempt the salvor(s) from applicable licensing or permit requirements under state law. The state must expressly waive, in advance, any potential ASA claims it might have during the contract period and must commit to not filing ASA cases or intervening in federal admiralty court litigation in which the contracting salvors are parties. In exchange, the salvor(s) must share with or donate to the state a specified percentage (normally in the twenty percent to thirty percent range) of the actual value of items recovered from the wreck. The contract must stipulate which items of historical significance will be claimed and/or donated to the state. In some cases, the value of donations must be made available as tax deductions for the donors (usually investors or financial backers of the salvor). Other matters that may be contractually addressed include authorized and prohibited search and recovery techniques; artifact preservation; role(s) of state officials, if any; exclusions, in terms of navigable areas not to be searched, existing sites, or pending claims; and methods for accounting, reporting and verification.\(^{245}\)

The benefits of the a negotiated approach are many. The state and salvor avoid the financial burdens of protracted litigation, save the costs of state-funded exploration, assure the quality of search and recovery operations, guarantee that successful discoveries will generate archaeologi-
cal and historical displays by the state, and protect the public interest in having historic items brought within state ownership. The salvor avoids the costs and delays of state permitting, and is assured that the state will not interfere with his projects through ASA lawsuits or other forms of litigation. Most importantly, the Negotiation Model restores the primary incentive for historic ship exploration — the guaranteed financial reward that was eliminated by the ASA. The Negotiation Model may prove unworkable where the state refuses to surrender its ASA rights. This usually occurs because the negotiation attorney lacks the standing necessary to earn the state’s trust or other political obstacles prevent negotiation. There is, of course, no way to monitor the frequency or success of this approach to shipwreck exploration. For these reasons, a third and final approach is available to the modern treasure hunter. The burdens and uncertainties of the Compliance Model, and the practical limitations of the Negotiation Model, may force the salvor to resort to the ancient art of piracy.

C. The Pirates Model—“I am a free prince . . .”

“Piracy. [A]n act of depredation with the intent of stealing committed on the . . . seas . . . [or] an act or practice of violence or depredation that would be felonious if done ashore committed . . . by one not acting under the authority of a politically organized community.

“Depredation. [A]n act of plundering, despoiling . . . or pillage . . .”

“Pirate. [O]ne who commits or practices piracy . . .”

Just below the surface of the court opinions, law review articles, and personal observations regarding historic shipwreck salvage examined in this Article, is a stark reality. Shipwreck exploration is private, secretive, isolated and in many cases, unobservable. As a result, strong and sometimes irresistible temptations exist to simply ignore the law when searching for wrecks and salvaging their riches. Some post-Millennium explorers will succumb to these temptations and use new technologies to

246. Id.
247. See supra note 103 and accompanying text (discussing ASA’s elimination of incentives for private salvors to engage in salvage operations on historic shipwrecks in state waters).
248. See supra note 240.
249. Clifford, supra note 67, at 25.
engage in modern-day piracy.

The Columbia-America Discovery Group (CADG) litigation over the rights to the S.S. CENTRAL AMERICA (Central America), while not a case of piracy, suggests why the temptation to pirate may be so great.

The Fourth Circuit Court of Appeals opinion in Columbus-America Discovery Group v. Atlantic Mutual Insurance Co. sets forth the facts of a case of “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... [T]he prize... was up to one billion dollars in gold.”

The SS Central America was lost in a hurricane in 1857 approximately 160 miles off the coast of South Carolina. At the time, Central America was transporting $1,219,189 (1857 value) in gold from California to New York. The gold was en route to New York banks to soften the effects of the financial crisis termed the “Panic of 1857.” Also on board were “several hundred thousand dollars worth...” (1857 value) of passenger gold or cash coming out of the California gold rush.

Because this treasure lay on the ocean floor over 8,000 feet below the surface, attempts at finding the site and salvaging the gold were unsuccessful until CADG found the Central America in late 1988. CADG, and its president Tommy Thompson, had discovered a wreck in 1987 and retained Attorney David Horan to file a non-ASA federal court in rem action against this wreck in the Eastern District of Virginia. After two years of salvage efforts, CADG realized it had been working “the wrong ship” Salvage ceased and the search for the Central America was resumed. When it was ultimately found, CADG reactivated the Eastern District of Virginia case and, in 1989, persuaded the judge to issue a permanent injunction giving CADG exclusive control of the Central America wreck site. In August, 1990, the same Court awarded ownership of the Central America

251. See supra note 73 (detailing procedural history of Columbus-America lawsuits).
252. Columbus-America, 974 F.2d at 454.
253. Id. at 454.
254. Id. at 455.
255. Id. at 456.
256. Id. at 455.
257. Columbus-America, 974 F.2d at 456.
258. Id.
259. Id. at 455.
260. See supra notes 240–45 (describing a Negotiation Model for shipwreck exploration).
261. Columbus-America, 974 F.2d at 458.
262. Id.
263. Id.
to CADG pursuant to the maritime law of "finds." On appeal, the Fourth Circuit reversed the trial court's decision that the ship and passenger gold had been abandoned and thus belonged to CADG. The Court rejected the trial judge's conclusion that insurance companies that had paid claims on the lost gold had abandoned their interests. Of particular legal significance were the facts that (1) technology to search for this wreck was not available until the late 1970's, (2) the insurance underwriters never purposely destroyed or abandoned original insurance contracts or documents, and (3) as soon as the technology became available these companies worked with numerous salvors (including the award of some salvage contracts) in efforts to find the Central America. The Court remanded for various further proceedings and mandated application of the law of salvage to determine a "proper salvage award" for CADG's discovery of the insurance companies' gold. It was observed that "Columbus-America should . . . receive by far the largest share of the Treasure." The Court suggested "an award in specie" defined as "a percentage of the total recovery, rather than . . . a set monetary amount" because "salvaging efforts have not been completed." At the time of this decision, CADG had recovered "several hundred million dollars worth (present value) of gold coins, ingots, and bars" from the Central America. The overall value of the cargo was still estimated to be "up to one billion dollars." leaving vast amounts of gold to be brought up.

The CADG litigation traveled through the federal courts system for a decade. Ultimately, CADG was awarded a salvage fee equal to ninety percent of the value of the gold, recovered and unrecovered. A complicated (and confidential) marketing program for the phased sale of the gold was put in place. The United States Supreme Court denied

264. Id. at 459.
265. See supra notes 97-100 and accompanying text (explaining maritime law of finds).
266. Columbus-America, 974 F.2d at 468.
267. Id. at 466.
268. Id. at 466-67 ("[I]n at least one instance all the documents in an insurer's file on the CENTRAL AMERICA were stolen by a would-be salvor). Id.
269. Id. at 468.
270. Id.
271. Id. at 469.
272. Columbus-America, 974 F.2d at 468.
273. Id.
275. Id. at 296, 303.
certiorari three times before this process ended. 276 Three judges died during the litigation. 277

A settlement finally terminated this case. In it, the insurance underwriters relinquished their claims to ten percent of the total cargo of gold by taking an in specie ten percent share of the recovered items. 278 As against the insurance companies, CADG became the sole owner of future treasure salvaged from the Central. 279 CADG received a ninety percent share of recovered items in specie. 280 The District Court retained jurisdiction over CADG's in rem case. 281

Tommy Thompson and CADG had prevailed. But, they had done so only "after much effort and expense." CADG started its quest to find the Central America in the early to mid-1980's. Vast sums of money were spent. CADG broke new ground using sophisticated technologies to find an historic shipwreck in deep ocean water. CADG was willing to bear the costs of lengthy litigation and endure extended delays in being rewarded for its work.

The CADG experience inevitably raises this question for the future: if the modern-day salvor can find and recover treasure on wreck sites like the Central America, or the JUNO and LA GALGA, without anyone else's knowledge, is compliance with the law, literally or through negotiation, in order to salvage that treasure really worth it?

The Pirates Model's answer is "no"! There has always been a segment of the treasure hunting fraternity that has operated on the edge of the law. The ASA was enacted partially in response to this. 284 When the stakes are as high as they are in cases like Columbus-American or Sea Hunt, and the law as convoluted as it is in both ASA and traditional admiralty cases, a

276. See Columbus America, 974 F.2d 450 (4th Cir. 1992); Columbus America Discovery Group, 56 F.3d at 576; (showing tortured procedural history of Columbus-America); Columbus-America Discovery Group v. Unidentified Wrecked and Abandoned Salvaging Vessel, 742 F.Supp 1327 (E.D. Va. 1990).
277. Columbus-America Discovery Group, 203 F.3d at 296.
278. See, e.g., id. at 301.
279. Id. at 302.
280. Id. at 296-97.
281. Id. at 301.
282. Columbus-America, 974 F.2d at 458.
283. Columbus-America, 742 F. Supp. at 1330 ("A specially equipped ship was obtained . . . . Among the equipment was a side-scan sonar, satellite navigation, tele-operated deep-sea equipment submersible with stereo camera and robotic arms and computer modeling software.").
284. See supra notes 43-50 and accompanying text (discussing ASA as statutory response to perceived unlawful behavior by private salvors).
certain small number of treasure explorers will choose to become modern
day pirates.

No legitimate salvor will openly acknowledge pirate activity. However, circumstantial, anecdotal and off-the-record evidence exists to
substantiate the existence of unauthorized search and salvage operations
now and to predict increased private activity in the near future.\textsuperscript{285} A
recognized world-wide "black market" exists for trading in historic
shipwreck items of all kinds.\textsuperscript{286} A few treasure hunters have acquired
reputations for conducting unsanctioned salvage; some are already banned
from shipwreck exploration in certain countries.\textsuperscript{287} Others talk openly, if
privately, of planned pirate expeditions.\textsuperscript{288} And, most importantly, new
technologies and equipment exist to make it practically feasible to "go the
pirate's way."

The emergence of new Millennium pirates is greatly facilitated by the
availability of private submarines. Several submarine manufacturers now
offer high-tech vessels that are ideal for secret and unauthorized shipwreck
exploration.

At the lower end, Nautilus Underwater Systems of Ft. Lauderdale,
Florida, sells a twenty-four foot, five-man electric submarine that is yacht-
based. This million dollar vessel will descend to 525 feet for up to ten
hours. At the top end, for $78 million, U. S. Submarine of Shelton,
Washington, will build a 213-foot vessel, the Phoenix 1000, that has 5,000
square feet of interior space, portholes up to seven feet, and, for the
wrecker, a fully operational docking mini-sub. The most flexible boat may
be the $15 million Olympic 105 built by Olympic Submarine Technologies,
also of Shelton, Washington. This 105-foot sub accommodates up to ten
people for ten days and can be outfitted with a diver lockout chamber.\textsuperscript{289}
When combined with more traditional search and salvage methods\textsuperscript{290} these

\textsuperscript{285} In the course of researching this Article the author interviewed Florida-based
"treasure hunters" (self-described) and historic artifact buyers who readily acknowledged the
existence of modern day pirates. The author personally observed some of these artifacts and
was briefed on their apparently illegal importation into the United States. Notes on file with
author.

\textsuperscript{286} \textit{Id.}

\textsuperscript{287} \textit{See supra note 240.}

\textsuperscript{288} \textit{See supra note 285.}

\textsuperscript{289} Kent Steinriede, \textit{Underwater Indulgences, The American Way}, 84–7 (May 15,
2001).

\textsuperscript{290} \textit{See supra notes 69 and 283 (showing traditional methods of salvage activity).}
private submarines\textsuperscript{291} will encourage some salvors to resort to clandestine exploration and recovery.\textsuperscript{292}

The Pirates Model is an ironic consequence of the elaborate formalistic system of historic shipwreck exploration and preservation established by the ASA. "The Law" has always fostered "the Outlaw." The question is, however, whether any reform short of outright repeal of the ASA, and a return to the pre-ASA system of federal court admiralty jurisdiction over finds and salvage cases, will prevent high-tech piracy.\textsuperscript{293}

IV. REFORMS: MANDATED OR GUARANTEED REWARDS

Mel Fisher once observed that abandoned shipwrecks "have no social or cultural value as long as they remain in the seabed. They are simply abandoned."\textsuperscript{294} He could also have added that such wrecks lack monetary or historic value until they are located and salvaged.

Critics of the ASA have pointed out that the Act provides very little or no incentive for states to conduct their own search and recovery efforts and provides powerful disincentives for private salvage of historic shipwrecks.\textsuperscript{295} Both have been examined in this Article. Accordingly, any reform of the ASA must focus on guaranteeing an appropriate reward for private discovery of historic shipwrecks and recovery of items therefrom by methods sensitive to archeological and environmental concerns. This approach offers two immediate benefits. First, it restores the positive incentive to private treasure hunting lost by the Act’s removal of federal court salvage and finds jurisdiction. Second, it may discourage the kinds of illegal, covert and unauthorized treasure hunting referred to in the Pirates

\begin{itemize}
  \item \textsuperscript{291} See supra note 285 (one wrecker confided to the author that his submarine was almost finished and that he expected to be on a clandestine search and recovery expedition within months).
  \item \textsuperscript{292} It is unclear whether the private submarine will replace the traditional "mother ship" in the search process. If a sub can be equipped with side-scanning sonar and sub-bottom profilers, or can pull a state-of-the-art magnetometer sensor, a great deal of underwater exploration will become undetectable. See, CLIFFORD, supra note 67, at 88–9.
  \item \textsuperscript{293} A simple, straight forward and effective solution to the problem created by the ASA system analyzed in this Article is legislative repeal of the Act. Practically speaking, it is highly unlikely that Congress will either regard this matter as a priority issue in the post-September 11 world or accept the Act’s alleged short comings as a sufficient legal and factual basis to repeal it. For these reasons, this Article proposes only narrow and limited adjustments to the Act and the ASA system.
  \item \textsuperscript{294} Melvin A. Fisher, The Abandoned Shipwreck Act: The Role of Private Enterprise, 12 COLUM. VLA J.L & ARTS 373, 376 (1988).
  \item \textsuperscript{295} See supra notes 5, 87, 114 and accompanying text; See also Meazell, supra note 234, at 1771 ("There are perverse incentives [under the ASA] for shipwreck finders to keep the wreck’s location a secret.").
\end{itemize}
Model section of this article.

Under current law, states are not required to offer rewards for successful shipwreck discovery or salvage.296 There is significant lack of uniformity in state shipwreck permitting and management programs.297 Bureaucratic, political and, even, psychological obstacles can prevent compliance with state law or a negotiated reward.298 Therefore, the law regulating historic shipwreck exploration would be significantly strengthened by Congressional amendment of the ASA to provide any of the following reforms.

**A. Require the ASA Guidelines to Recognize the Importance of Guaranteed Rewards as Incentives to Responsible Historic Shipwreck Exploration**

Current ASA guidelines issued by the National Park Service in 1990 are openly hostile to the private salvor. The guidelines recommend that states: “protect . . . state-owned shipwrecks from commercial salvage, treasure hunting and private collecting activities”299 by, basically, prohibiting such work.300 In this spirit, the guidelines impose no requirement that states offer specified financial rewards for either discoveries made pursuant to state permits or brought to the states attention by conscientious treasure hunters who are aware of the ASA’s vesting of ownership in the states. Congress could amend sections 2104(a) and (b)301 of the ASA to require a new guideline issued by the Park Service providing that state management plans should “(5) provide state-guaranteed financial rewards for historic shipwreck discoveries reported to the state or identified, salved or explored pursuant to state authority.”

Issuance of such a guideline would impose no enforceable obligation on the state to put reward/incentive programs in place. The guidelines are advisory and non-binding.302 However, the addition of the proposed guideline (5) would at least highlight the problems caused by the absence of state rewards and, perhaps, force the states to examine existing reward programs, if any.

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297. See supra note 54–62 and accompanying text (noting lack of uniformity among State statutes).
298. See Keller, supra note 191.
300. Id.
B. Make the Guidelines Mandatory

In addition to specifying a requirement of state rewards, Congress could amend section 2104(a) of the ASA to provide that "such guidelines shall be binding on the states and appropriate federal agencies in developing legislation and regulations to carry out their responsibilities under . . ." the Act.

C. Condition Receipt of Federal Funds on Adoption of State Reward Programs

The optional character of the guidelines is the result of National Park Service commentary in the Introduction section to the guidelines indicating that the drafters rejected compulsory standards.\textsuperscript{303} Congress could amend sections 2104(a) and (b) to make state adoption of the guidelines (as modified above) a prerequisite for federal funding of state historic preservation programs authorized by the National Historic Preservation Act\textsuperscript{304} and supported by Historic Preservation Fund grant awards. Although this approach would not compel state adoption of salvage reward programs, for the first time states would have concrete incentives to do so.\textsuperscript{305} This approach could also be implemented by conditioning receipt of federal funds under any marine or environmentally-related federal legislation on state adoption of reward systems.

D. Fund State Rewards by Direct Congressional Appropriation

Congress could require the Department of the Interior to include in its annual budget a request for appropriation of funds for a program of state financial incentives. Grants based on state proposals or direct distributions to each state adopting a guaranteed reward program could be made based on a formula weighted to reflect the level of wrecking activity in each state over a period of time as recorded by the state.

Regardless of the financial incentives mechanism employed, the goal of legislative reform\textsuperscript{306} must be to encourage careful private historic

\begin{enumerate}
\item[303.] \textit{Id.}
\item[305.] ASA Guidelines, 55 Fed. Reg. 50,117 (1990). (The drafters of the Guidelines expressly noted "concerns that the National Park Service may make the guidelines a requirement for State historic preservation programs." The Park Service should now do so to give meaning to the policies reflected in the ASA and the Guidelines).
\item[306.] The reforms outlined in this section are preliminary proposals that will be more fully developed in a subsequent Article on the topic. Author's note.
\end{enumerate}
shipwreck exploration while preserving state and public interests and minimizing the temptations to search and salvage outside the law.

A particular advantage of formalized rewards programs is the opportunity to regulate the exploration process by limiting and controlling rewarded activity. Judicial standards for making state financial awards routinely include matters not covered by the original Blackwall factors traditionally considered by admiralty courts in salvage cases. For example, the court in Columbus-America added to Blackwall consideration of “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and the items salved.” One author has suggested awards limited to “disclosure of information pertaining to a shipwreck—such as its location, a detailed descriptions or reports of vandalism.” It was noted that “a standard policy to reward ‘honest and expeditious reporting of pertinent information . . . ’ would reduce the inclination for a finder . . . to pilfer the site . . . ” of an historic wreck. Reward programs would allow each state to implement broad shipwrecking goals and policies through the amount and availability of awards for specified exploration activities.

One final benefit would flow from reforms of this kind. At present, a treasure hunter’s chances for financial gain from historic shipwreck discovery depend on the fortuity of location. If a wreck is found within the three (or nine) mile limit of state territorial waters the ASA applies, the state has title, and the wrecker’s reward (if any) is controlled by state law. A discovery outside these waters triggers application of the maritime law of salvage and finds and offers a far more predictable reward. Amending the ASA and the guidelines to more strongly encourage or mandate state reward programs will eliminate the existing inconsistency in rights based solely on the accident of geography. A treasure hunter who knows that successful exploration will be properly rewarded by government is less likely to choose the pirates way.

307. The Blackwall, 77 U.S. 1 (1869) (discussing the Blackwall factors and subsequent ramifications).
308. Columbus-America, 974 F.2d at 468.
309. Stevens, supra note 34, at 615.
310. Id. at 615–16.
311. See supra notes 17, 18 and accompanying text (describing United States’ claim to title, and specific exemptions therefrom).
312. See supra notes 87–98 and accompanying text (discussing maritime law of salvage and finds).
V. CONCLUSION

The SECOND NEWPORT SYMPOSIUM on “Sunken Treasure: Law, Technology, and Ethics” identified “a number of commendable accomplishments” of the Abandoned Shipwreck Act of 1987.\textsuperscript{313} It was noted that, as a result of the ASA, “most states would not allow . . . [private] salvor activity . . . . Even in Florida, where salvor activity has a long history, few wrecks have been released to salvors since the passage of the ASA.”\textsuperscript{314}

This Article has examined the operation of the ASA through three models of treasure hunting: the Compliance, Negotiation and Pirates Models. Each model suggests that legislative destruction of the private salvage industry is not the positive achievement some commentators believe it to be. The Article calls for Congressional recognition of the fact that post-Millennium treasure hunters armed with high-tech equipment have the capacity to explore and salvage outside the law. The time has come to reexamine the ASA to determine whether creation of a new breed of modern day pirates is a tolerable consequence of the Act. This Article offers reasons to those concerned about the treasures of the sea supporting the conclusion that it is not.

\textsuperscript{313} See Giesecke, \textit{supra} note 36, at 167.

\textsuperscript{314} \textit{Id.} at 172.