

21 November 2002

Admiral James D. Watkins, USN (Retired), Chairman
U.S. Commission on Ocean Policy
1120 20th St., NW
Suite 200 North
Washington, DC 20036

Dear Admiral Watkins:

I am pleased that the U.S. Commission on Ocean Policy is examining historic shipwreck management issues during its review of ocean issues. There are tens of thousands of shipwrecks in U.S. waters and each one of them contains information about a unique time and event in our nation's long maritime history. What makes these shipwrecks important is that many of them are associated with significant historical events or persons, or because of their distinctive construction, or because they contain information important in prehistory or history. How the United States protects and preserves its historic shipwreck sites is an important and complex matter that merits examination by the Commission.

As the Departmental Consulting Archeologist in the Department of the Interior, my office carries out the Secretary of the Interior's responsibilities to provide general guidance and coordination for the Federal Government's archeological programs. In this capacity, my office advises government departments on submerged archeological resources issues, and seeks ways to improve the underwater archeology policies and programs of government agencies in the United States. For example, following enactment of the Abandoned Shipwreck Act, we developed the Abandoned Shipwreck Act Guidelines to guide agencies in implementing the statute. We also provided government experts who sat on the U.S. Delegation at five meetings of United Nations Educational, Scientific, and Cultural Organization (UNESCO) experts to negotiate the Convention on the Protection of the Underwater Cultural Heritage. Currently, we are participating in other international negotiations to develop agreements for protecting specific shipwreck sites, like RMS Titanic, and collections of artifacts removed from such sites, and in interagency deliberations to develop legislative proposals for improving protection of sites. With this as background, I am pleased to provide the U.S. Commission on Ocean Policy with my views and suggestions for improving the management of historic shipwrecks in U.S. waters.

Dozens of federal agencies have archeological programs related to their own activities and responsibilities on federal and tribal land, as well as programs related to federally financed, permitted, or licensed actions on nonfederal land. Many agencies, such as the Minerals Management Service, the U.S. Army Corps of Engineers, the National Oceanic and Atmospheric Administration, and the National Park Service, are responsible for preserving and protecting both terrestrial and submerged archeological resources, including historic shipwrecks. Virtually all of the states, including U.S. territories and possessions, are responsible for preserving and protecting historic shipwreck sites located on submerged lands of the states.

Shipwreck sites are managed under a broad and complicated set of local, state, federal, and foreign laws and regulations, and in a manner consistent with international treaties, conventions, and agreements. Background information about many of these laws and

regulations was compiled by my office and provided to Mr. Peter Hill on the Commission's staff on October 24, 2002. By our count, at least one dozen federal laws and 59 states laws contain provisions relating to, or that are applied to, historic shipwreck sites. Some of the laws, such as the maritime law of salvage and the common law of finds, apply in all U.S. waters while others, such as the Abandoned Shipwreck Act, apply in only some zones or portions of zones. Others apply only to specific agencies, like the National Park Service, or to specific types of sunken vessels, like warships.

Despite this seeming arsenal of legislation, there are many gaps that leave historic shipwrecks unprotected and subject to unregulated recovery and salvage. In the paragraphs that follow, we briefly describe major areas of concern. We encourage the Commission to examine each of them and make recommendations to the President and the U.S. Congress that would make marked improvements in how the United States manages and protects its underwater cultural heritage.

Historic shipwreck sites are archeological resources and should be managed as such. Archeological resources, whether on land or underwater, under the jurisdiction or control of government agencies are managed in accordance with archeological laws and rules. Most historic shipwrecks, however, are not subject to archeological laws and rules and, instead, are subject to the maritime law of salvage or the common law of finds. This inequity has caused many historic shipwreck sites to be damaged or destroyed by unregulated recovery and salvage. As a first step toward correcting this problem, the Abandoned Shipwreck Act removed three categories of shipwreck sites on state submerged lands from the jurisdiction of federal admiralty courts. However, tens of thousands of historic shipwreck sites in U.S. waters remain subject to the maritime law of salvage or the common law of finds. Additional steps could be taken under existing law, especially for sites located beyond state waters, most of which presently enjoy no protection. The United States could, for example, assert ownership over shipwreck sites in the territorial sea beyond 3 nautical miles from the coastline. In addition, the United States could assert jurisdiction over shipwreck sites in the contiguous zone. In both of these zones, the United States should make the sites subject to archeological laws, such as the Archaeological Resources Protection Act, and rules and remove the sites from federal admiralty jurisdiction.

Historic shipwreck sites should be managed consistently. Federal and state agencies manage historic shipwreck sites in accordance with applicable federal and state laws and rules. The authorities that apply in each situation are dependent upon which agency has jurisdiction and when two or more agencies share jurisdiction, the authorities can be inconsistent. This problem is intensified when both a state and a federal agency have jurisdiction, as in the case of many national marine sanctuaries, national park units, and national wildlife refuges, or in the case of sunken U.S. warships in state waters. The problem is further magnified when another nation also has jurisdiction, as in the case of a sunken foreign flagged warship in state waters. These are not insignificant matters that can result in unnecessary damage to sites, as well as in unnecessary litigation. In a few instances, some federal and state agencies and foreign governments have entered into cooperative agreements that address matters of jurisdiction and application of archeological rules. This approach seems workable, whether applied to a specific site or a category of sites, and its use should be encouraged at all levels of government.

Historic shipwreck sites should be managed in accordance with current professional archeological standards. The Annex to the UNESCO Convention on the Protection of the Underwater Cultural Heritage sets forth professional archeological standards designed specifically for use in managing historic shipwreck sites and other submerged cultural resources. The standards were established and adopted through consensus by the nations that participated in the UNESCO deliberations, including the United States. In fact, the United States strongly supported development of the standards and considers them to be consistent with the more inclusive standards used in the United States as set forth in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. Agencies at all levels of government in the United States are encouraged to incorporate the Secretary's standards and guidelines into their respective archeological and historic preservation programs. Agencies also should be encouraged to incorporate the standards in the UNESCO Annex into their shipwreck management programs. The standards also could be incorporated into the federal admiralty court system and applied to historic shipwreck sites that the courts have jurisdiction over.

Historic shipwreck sites discovered during exploration and development of mineral resources on the Outer Continental Shelf (OCS) should be protected. Section 106 of the National Historic Preservation Act (NHPA) requires the Minerals Management Service (MMS) to evaluate the effects of the activities it permits or funds on historic properties eligible for inclusion in the National Register of Historic Places. Such properties include both historic shipwrecks and prehistoric archeological sites that became inundated due to rising sea level at the end of the last glacial advance in North America. MMS accomplishes this mandate first by conducting studies to determine where significant cultural resources are most likely to exist on the OCS and then by requiring marine remote sensing surveys of those lease areas having potential for cultural resources prior to permitting OCS activities. If evidence of a possible submerged cultural resource is identified in the remote sensing data, MMS requires that the possible resource either be avoided by proposed activities or further investigated to conclusively identify the resource and evaluate its significance.

As a result of MMS-required marine remote sensing surveys, over two hundred shipwrecks, including many that are historically significant, have been located in the Gulf of Mexico in water depths ranging from 10 meters to over 2000 meters. Once a submerged cultural resource is identified, the MMS has the authority only to require its mineral lessees to avoid the identified resource with their lease activities. However, MMS does not have the authority to prevent other individuals or activities from impacting the resource that the agency caused to be identified through its compliance with Section 106 of the NHPA. This puts the MMS in the untenable position of causing significant cultural resources to be identified in order that they not be damaged by MMS-permitted actions only to leave the resources, so identified, open to exploitation with no legal recourse for their protection.

Currently, there are no federal laws that claim ownership of cultural resources outside of state waters or that claim jurisdiction over such resources outside specifically designated marine protected areas. As a result, historic shipwrecks lying within the OCS can be, and have been, exploited for their commercial value under maritime salvage law and the common law of finds. This is a serious discrepancy in federal law when it requires that significant archeological sites be located to protect them from one undertaking only to expose them to harm from other unregulated sources. Creation of a uniform national

policy that makes submerged archeological sites subject to the same laws, rules, and standards as terrestrial archeological sites would ensure that submerged sites within U.S. waters are preserved and available for study by scientists and enjoyment by the public in perpetuity.

Thank you for the opportunity to present my comments, ideas, and recommendations for a more coordinated and comprehensive national ocean policy on stewardship of submerged archeological resources. Please call on my office if we can be of further assistance.

Sincerely,

/s/ Francis P. McManamon

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