RMS Titanic as National and World Heritage: Protecting the Wreck Site of the Titanic Pursuant to the National Historic Preservation Act and the World Heritage Convention

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I. INTRODUCTION

The wreck of RMS Titanic presents a unique scenario not contemplated by either the National Historic Preservation Act ("NHPA")¹ or the Convention Concerning the Protection of the World's Cultural and Natural Heritage ("World Heritage Convention").² This is because both the NHPA and the World Heritage Convention presume that (1) all historic properties exist within a territory owned or controlled by an international state, and (2) some person, entity, or government owns title to said property within that state.³ The Titanic, in contrast, falls outside the boundaries of these assumptions because it rests in the high seas, an international common area,⁴ and title to the vessel is either unknown or disputed and otherwise complicated by the grant of salvage rights to RMS Titanic, Inc., by the United States

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³ See infra Part II.A.3 (explaining that a property cannot be added to the World Heritage List without the consent of the state concerned); infra Part II.C.2 (explaining that a property cannot be added to the World Heritage List without the consent of the owner of the property).
District Court for the Eastern District of Virginia in Norfolk. The analysis set forth below attempts to rectify these uncertainties in a light most favorable to the preservation of the wreck site of RMS Titanic.

II. NHPA SECTION 402’S RELATIONSHIP WITH THE WORLD HERITAGE CONVENTION

Section 402 of the NHPA sets forth certain protections applicable to international properties included on the World Heritage List. That section states that the head of a federal agency “having direct or indirect jurisdiction” over an undertaking that may “directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register” shall “take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.” For the purposes of this Article, in order to determine whether the provisions set forth in section 402 apply to the wreck site of RMS Titanic, two questions must be answered: First, is the Titanic eligible to be nominated to the World Heritage List? Second, if the Titanic is eligible, can the United States propose its nomination? This Article will address each of these questions in turn.

7 Id. (“Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.”); see, e.g., Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *6-7 (N.D. Cal. Mar. 2, 2005) (the Japanese Law for the Protection of Cultural Properties satisfies the equivalency requirement of NHPA section 402) (discussed infra).
8 See infra Part II.A.
9 See infra Part II.C.
A. Can RMS Titanic be Nominated to the World Heritage List?

The World Heritage Convention sets out a modest set of requirements that must be satisfied in order for a property to be considered for addition to the World Heritage List of protected properties. One might expect the remains of the Titanic to satisfy these requirements easily. However, the Titanic lacks a direct nominating mechanism that would place it into consideration before the World Heritage Committee.

1. The property must be cultural heritage or natural heritage.

In order to be added to the World Heritage List, a property must be either cultural or natural heritage. Article 1 of the World Heritage Convention defines cultural heritage to include sites that meet the following description: "works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view." The Titanic should satisfy the World Heritage Convention’s definition of cultural heritage. The wreck area is an archeological site of extreme universal, historical, and cultural importance, and the wreck exists as a reminder of one of the worst civilian maritime disasters in the history of the world. The artifacts contained in the ship also represent unique anthropological

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10 See World Heritage Convention, supra note 2, at art. 11 (explaining the World Heritage Committee’s three-step nomination process to add a piece of property to the World Heritage List: (1) the property must be cultural or natural heritage; (2) the state in which the property is located must nominate the property; and (3) the World Heritage Committee determines whether to add the property to the World Heritage List).

11 See supra Part I.

12 World Heritage Convention, supra note 2, at art.1-2, 11.

13 Id. at art. 1.


opportunities for the study of past cultures.\textsuperscript{16}

Natural heritage is defined in article 2 to include "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view" and "natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."\textsuperscript{17} The wreck of the \textit{Titanic} could also possibly be considered natural heritage because it provides a unique opportunity to study deep-sea biological processes.\textsuperscript{18} Ultimately, the wreck site of the \textit{Titanic} should suffice as either cultural or natural heritage or both, and thus would be eligible for nomination to the World Heritage List.\textsuperscript{19}

2. Member states must nominate properties situated on their territories.

In order for the World Heritage Committee to consider adding a property to the World Heritage List, the state in which the property is located must nominate the property.\textsuperscript{20} Article 3 of the World Heritage Convention provides the following: "It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above [i.e., which constitute cultural or natural heritage]."\textsuperscript{21} Article 3 does not, however, squarely

\textsuperscript{16} See BALLARD, supra note 15, at 276-77.
\textsuperscript{17} World Heritage Convention, supra note 2, at art. 2.
\textsuperscript{19} See supra notes 14-15 and accompanying text.
\textsuperscript{20} World Heritage Convention, supra note 2, at art. 3.
\textsuperscript{21} Id.; see also id. at art. 11, §§ 1, 6 ("Every State Party to this Convention shall . . . submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list . . . . Before refusing a request for inclusion . . . the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.").
apply to RMS Titanic.\textsuperscript{22} The Titanic lies in the high seas, a common territory controlled by no single state.\textsuperscript{23} The World Heritage Convention does not appear to contemplate the nomination of such a property to the World Heritage List, and, thus, contains no express provisions allowing for the nomination of properties in international common areas, nor prohibitions against such nominations.\textsuperscript{24} As a result, it is unclear as to which state carries the authority to or responsibility for nominating the Titanic to be considered for addition to the World Heritage List. Some support, however, does exist for the proposition that because the high seas are common property shared jointly by all international states,\textsuperscript{25} any state with an identifiable interest in the Titanic wreck site should be allowed to nominate the site to the World Heritage List, if not any (or every) international state.\textsuperscript{26}

The 2001 Convention on the Protection of the Underwater

\textsuperscript{22} R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 435 F.3d 521, 524 (4th Cir. 2006) (stating that the RMS Titanic “lies in international waters”).

\textsuperscript{23} See id.; R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 286 F.3d 194, 196 (4th Cir. 2002); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 951 (4th Cir. 1999) (stating that the wreck was discovered 400 miles off the coast of Newfoundland).


\textsuperscript{24} World Heritage Convention, \textit{supra} note 2.

\textsuperscript{25} See Convention on the Law of the Sea, \textit{supra} note 4, at arts. 87 & 89.

\textsuperscript{26} See \textit{id.} at art. 303 (recognizing that all states have a duty to protect objects of archeological or historical value found at sea, including in the high seas, and “shall cooperate for this purpose”); see also \textit{id.} at art. 149 (“All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”); \textit{Id.} at pmbl. (“\textit{Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared \textit{inter alia} that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States . . . .}”).
Cultural Heritage ("UNESCO Convention") was designed, in part, to deal with the omission of explicit provisions protecting underwater cultural heritage in the World Heritage Convention. Article 1(1)(a) of the 2001 UNESCO Convention defines "underwater cultural heritage" to mean

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts [sic] and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

The Titanic is more than 100 years old and, therefore, falls within the scope of the protections offered by the 2001 UNESCO Convention. However, despite entering into force on January 2, 2009, the UNESCO Convention has not yet enjoyed the widespread adoption and ratification for which many had hoped; at the time of this writing, the 2001 UNESCO Convention had only forty-five member states. The World Heritage Convention, in contrast, has, at the current time, more than 190 member states.

3. The World Heritage Committee decides whether to add the

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29 Id.; see also EUGENE L. RASOR, THE TITANIC: HISTORIOGRAPHY AND ANNOTATED BIBLIOGRAPHY, 51 (2001) ("TITANTIC [sic] sank at about 2:30 AM 15 April 1912.").
nominated property to the World Heritage List.

Once nominated, the World Heritage Committee ultimately decides whether a property has sufficient “outstanding universal value” to be included on the World Heritage List. The World Heritage Committee is composed of representatives from twenty-one states.

A property cannot be added to the World Heritage List without the “consent of the State concerned.” Pursuant to article 11(3), where the property is located in a “territory, sovereignty or jurisdiction over which is claimed by more than one State,” the inclusion of such a property to the World Heritage List “shall in no way prejudice the rights of the parties to the dispute.”

There is no formula to predict whether the World Heritage Committee would approve the nomination of the Titanic to the World Heritage List. The World Heritage List currently contains no explicit references to shipwrecks that lie in the high seas. There are shipwrecks that are protected because they otherwise lie within the boundaries of World Heritage Sites, but many of these sites, in addition to their shipwrecks, feature other natural or cultural resources.

As seen above, article 11(3) anticipates that a property may be located in a territory claimed by more than one state, and, moreover,

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32 See World Heritage Convention, supra note 2, at art. 11(2) (“On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of ‘World Heritage List,’ a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established.”).

33 Id. at art. 8(1).

34 Id. at art. 11(3).

35 Id.


does not appear to discriminate against the inclusion of such a property on the World Heritage List.\(^{38}\) Despite this apparent anticipation, the World Heritage Convention provides no explicit mechanism for the nomination of such properties.\(^{39}\) However, the fact that a property, which is in the "territory" of no single or absolute state, is capable of being added to the World Heritage List highlights possible flexibility in the joints of the World Heritage List nominating process.\(^{40}\) Such flexibility might also allow for the nomination of sites in international common areas as well.\(^{41}\)

### B. Is the Titanic Listed on an Applicable Country’s Equivalent of the National Register?

The best guidance available to assist in assessing the sufficiency of a property’s listing on a foreign state’s national register (or its equivalent) is found in *Dugong v. Rumsfeld*,\(^ {42}\) where the court recognized that the Japanese Law for the Protection of Cultural Properties satisfied the equivalency requirement of NHPA 402.\(^ {43}\) In so recognizing, the court stated that it "interprets the section as requiring that the foreign list be ‘corresponding or virtually identical especially in effect or function.’"\(^ {44}\) In holding that the Japanese cultural protection laws satisfied the equivalency requirement, the *Dugong* court observed that "the statutes demonstrate an equivalent commitment to protecting significant bridges between human culture and history."\(^ {45}\) But, while helpful, this precedent is somewhat limited when applied to the Titanic.\(^ {46}\) With a vast potential pool of national lists of historic and cultural properties found in international states spread across the world,

\(^{38}\) See World Heritage Convention, *supra* note 2, at art. 11(3).

\(^{39}\) See generally id. (highlighting that the World Heritage Convention contains no explicit language in its provisions outlining the nomination of a property that is located in a territory claimed by more than one state).

\(^{40}\) Id. at art. 11(3).

\(^{41}\) Id.


\(^{43}\) Id. at *8.

\(^{44}\) Id. at *7.

\(^{45}\) Id.

\(^{46}\) See *supra* Part I.
an equivalency analysis must be conducted on a case-by-case, statute-by-statute, country-by-country basis.

Another significant limitation in the precedent is the question of what constitutes an “applicable country.” In Dugong, since the federal undertaking took place on Japanese soil, the court deemed Japan to be the applicable country.\textsuperscript{47} However, the case law gives no further guidance as to how to determine the applicable country for a shipwreck in the high seas.\textsuperscript{48} Would a flag state be an applicable country? Or perhaps a citizen-state with a significant number of nationals aboard the vessel? These and other questions remain unresolved.

C. Can the United States Nominate the Titanic for Addition to the World Heritage List?

The NHPA Amendments of 1980 provide two primary requirements that must be met before a property can be nominated by the Secretary of Interior for inclusion on the World Heritage List: (1) the property must have national, as well as international, significance, and (2) the owner of the property must consent.\textsuperscript{49} Before the NHPA applies to a given action toward the Titanic wreck site, the action must constitute a federal “undertaking.”\textsuperscript{50}

1. Properties of national and international significance.

Section 401(b) of the NHPA states that “The Secretary of the Interior shall periodically nominate properties he determines are of international significance to the World Heritage Committee on behalf of the United States. No property may be so nominated unless it has previously been determined to be of national significance.”\textsuperscript{51} Although in practice this section has been carried out mostly, if not entirely, with

\textsuperscript{47} Dugong, 2005 WL 522106, at *6-7.

\textsuperscript{48} See id.


\textsuperscript{51} Id. § 470a-1(b) (originally enacted as National Historic Preservation Act, Pub. L. No. 96-515, § 401(b), 94 Stat. 2987, 3000 (1980)).
respect to properties that have first been nominated to the National Register of Historic Places ("National Register"), the statute does not explicitly require such precursory actions, and it appears that no case law holds otherwise.\footnote{2}

The wreck site of the RMS Titanic is not listed on the National Register.\footnote{3} However, the United States Congress, through the R.M.S. Titanic Maritime Memorial Act of 1986, explicitly declared the Titanic to be of both national and international significance.\footnote{4} Section 2(a)(3) of the Act states the following: "The R.M.S. Titanic . . . is of major national and international cultural and historical significance, and merits appropriate international protection."\footnote{5} While this theory has not yet been tested, it would appear that the Titanic meets the requirements of section 401(b), even absent addition to the National Register.\footnote{6}

2. With consent of the owner of the property.

Section 401(c) of the NHPA mandates that "No non-Federal property may be nominated by the Secretary of the Interior to the World Heritage Committee for inclusion on the World Heritage List unless the owner of the property concurs in writing to such nomination."\footnote{7} The Titanic wreck site, however, sits in the high seas, an international commons owned by no single person or state.\footnote{8} Although there are potentially some legal interests in the wreck site—the Titanic was a British flagged vessel, and the wreck site sits on the slope of Canada's continental shelf—it appears that nobody legally owns the Titanic at

\footnote{2}{See, e.g., Duncan's Point Lot Owner's Ass'n v. Fed. Energy Regulatory Comm'n, 522 F.3d 371, 376-77 (D.C. Cir. 2008); § 470a-1(b) (lacking explicit nomination requirement).}


\footnote{5}{See id.}


\footnote{7}{See id.}

\footnote{8}{See BALLARD, supra note 15, at 210; Christopher B. Havern, Sr., The Short Life and Tragic End of RMS Titanic, 69 THE COAST GUARD J. OF SAFETY AND SECURITY AT SEA 6, 12 (2012).}
this point in time, most likely due to the passage of more than a century since the wreck occurred.\footnote{See BALLARD, supra note 15, at 210; Christopher B. Havern, Sr., The Short Life and Tragic End of RMS Titanic, 69 THE COAST GUARD J. OF SAFETY AND SECURITY AT SEA 6, 12 (2012).} Because section 401(c) assumes that a property will either be owned by a private individual, by a group of private individuals, or by a government entity, this section does not directly or fully apply to the Titanic.\footnote{See 16 U.S.C. § 470a-1 (originally enacted as National Historic Preservation Act, Pub. L. No. 96-515, § 401(c), 94 Stat. 2987, 3000 (1980)).}

Complicating the picture, R.M.S. Titanic, Inc. has received certain salvage rights in the wreck of the Titanic from the district court.\footnote{See R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 924 F. Supp. 714, 716 (E.D. Va. 1996).} However, it is unlikely that salvage rights, by themselves, would suffice as an interest significant enough to constitute ownership of the Titanic wreck site under the NHPA.\footnote{See National Register of Historic Places, 36 C.F.R. § 60.3(k) (2012).} The court in \textit{R.M.S. Titanic v. The Wrecked and Abandoned Vessel} best explained the relationship of salvage rights to ownership rights:

Along with granting salvor-in-possession status, the law imposes on salvors the “duties of good faith, honesty, and diligence in protecting the property in [the] salvors’ care.” Because a salvor acts on behalf of a true owner, even when that owner has not been identified, it serves as a trustee of the owner’s property and is therefore not permitted to use that property for its own purposes. Consistent with trust-law principles, when the salvor violates that trust, it may forfeit its salvage rights, including the right to exclusive possession and a salvage award.\footnote{See R.M.S. Titanic v. Wrecked and Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 2006) (citations omitted).}

Similarly, the NHPA regulations define owner as “those individuals, partnerships, corporations or public agencies holding fee simple title to property.”\footnote{See 36 C.F.R. § 60.3(k).} The terms “owner” and “owners” do not
include "individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature." Thus, salvage rights should not constitute "ownership" under the statute.

In terms of owner notification and concurrence to the nomination of a historic property to the World Heritage List, the regulations require that "[i]f a unit of the United States government [whether federal, state, or local] owns or controls the property" then "a letter from the owner(s) demonstrates concurrence."

The ownership requirement for private property, in turn, is much more complicated. The legislative history of the 1980 amendments suggests that the Committee on Interior and Insular Affairs, one of the reviewing and drafting committees to the NHPA amendments, anticipated potential ambiguities in the "ownership" requirement for private property. The House Report No. 96-1457, states the following about ownership:

The Committee recognizes that the new requirement for regulations for owner notification and concurrence before properties may be included on the National Register or designated as National Historic Landmarks may present administrative difficulties, particularly for the State Historic Preservation Officers. There are, for example, problems with multiple ownerships of individual buildings, the volume of ownerships in historic districts, multiple ownerships where surface and mineral rights are owned separately, and absentee owners. By providing for regulations to implement the requirements of paragraph (6), there should be adequate flexibility to address the various situations that might arise. In drafting regulations, the Secretary should consult with the Committee to assure that the intent of

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65 Id.
66 See id.
67 Id. § 73.7(b)(2)(i).
68 See infra note 70.
69 See infra note 70.
this provision is carried out.  

Although the regulations provide guidance on the relationship between the ownership requirement and the nomination process, they do not directly address the scenario exemplified by the *Titanic*. The following extractions illustrate this point. The NHPA regulations state only this about the relationship between the ownership requirement and the World Heritage List nomination process:

All owners must concur before the Assistant Secretary can include their property within a World Heritage nomination. . . . NPS [National Park Service] will seek the concurrence of those who own or control any non-Federal property interest if we determine that the property interest is integral to the entire property’s outstanding universal values.

But, in a helpful and related note, in discussing nominations via State Historic Preservation programs, the regulations additionally discuss the ownership requirement for private property as follows:

As part of the nomination process, each State is required to notify in writing the property owner(s), except as specified in paragraph (d) of this section, of the State’s intent to bring the nomination before the State Review Board. The list of owners shall be obtained from either official land recordation records or tax records, whichever is more appropriate, within 90 days prior to the notification of intent to nominate. If in any State the land recordation or tax records is not the most appropriate list from which to obtain owners that State shall notify the Keeper in writing and request approval that an alternative source of owners may be used. The State is responsible for notifying only those owners


\[71\] 36 C.F.R. § 73.7(b)(2)(iii).

\[72\] Id. § 60.6(c).
whose names appear on the list consulted . . . . 73

For a nomination with more than 50 property owners . . . [t]here shall be provided general notice to property owners concerning the State’s intent to nominate . . . . . Such general notice must be published in one or more local newspapers of general circulation in the area of the nomination . . . . If such a general notice is used to notify the property owners for a nomination containing more than 50 owners, it is suggested that a public information meeting be held in the immediate area prior to the State Review Board meeting. 74

The House Report No. 96-1457 also notes:

The Committee notes that owner consent is not required for determinations of Register eligibility necessary for the review of Federal undertakings by the Advisory Council on Historic Preservation. These determinations should be based solely on the professional evaluations of eligibility, to insure that historic resources are given proper consideration in Federal decision-making . . . . The Committee did not require owner consent prior to a property’s initial consideration or professional evaluation by the States or certified local governments. Nor is the owner’s consent required for the State or local inventories under this Act. 75

The Committee Report makes it clear that the ownership provision is designed to protect a private owner’s property rights in the historic property. 76 The Committee on Interior and Insular Affairs notes the following:

It is doubtful that in the future many owners would

73 Id.
74 Id. § 60.5(d).
76 Id.
object to having their properties included on the National Register; those that do, however, should be given that opportunity at the time of nomination.\textsuperscript{77}

The regulations reinforce this conceptualization:

Upon notification, any owner or owners of a private property who wish to object shall submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the private property, as appropriate, and objects to the listing.\textsuperscript{78}

If a property has been submitted to and approved by the State Review Board for inclusion in the National Register prior to the effective date of this section, the State Historic Preservation Officer need not resubmit the property to the State Review Board; but before submitting the nomination to the NPS shall afford owners of private property the opportunity to concur in or object to the property’s inclusion in the Register pursuant to applicable notification procedures described above.\textsuperscript{79}

Taking these observations into consideration, the most ideal solution is to side-step the potential “ownership” debate simply by gaining support by all those with potential legal interests in the \textit{Titanic} wreck site for the nomination.\textsuperscript{80} Thus, support should be obtained from the following: (1) Canada, since the wreck site lies on the slope of Canada’s continental shelf; (2) the United Kingdom, because the \textit{Titanic} was a British flagged vessel; (3) the United States, since United States courts have issued judicial orders and opinions concerning legal rights and interests in the wreck site; and, possibly, (4) R.M.S. \textit{Titanic}, Inc., because it has been granted certain salvage rights to the \textit{Titanic} wreck site.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} 36 C.F.R. § 60.6(g).

\textsuperscript{79} \textit{Id.} § 60.6(h).

\textsuperscript{80} See supra Part II.C.
site.\textsuperscript{81} Arguably, in order for the protections potentially offered under NHPA and the World Heritage Convention to be most successful, all parties with a legal interest should support the nomination.\textsuperscript{82}

However, if some of these parties do not consent to or support the nomination of the \textit{Titanic}, then the best argument in favor of listing the \textit{Titanic} is that because there is no owner of the historic property and, thus, no ownership rights to violate (as this Article has already established that salvage rights do not equate to ownership), this provision has no practical application.\textsuperscript{83} There is neither a clear government owner nor a private owner capable of concurring to the potential nomination.\textsuperscript{84} While this theory is untested and does not find any direct support from the statute, relevant case law, or the legislative history, it is logically based on the observation that the ownership provisions in the NHPA are designed to protect an owner's property interest in historic property potentially up for nomination.\textsuperscript{85}

Alternatively, if an interest in the \textit{Titanic} wreck site is shared by mankind generally, it is arguable that the \textit{Titanic} has too many owners to provide notice and opportunity to concur, and, consequently, the posting of a general notice, as is done with state properties having more than fifty owners, is sufficient to satisfy the ownership requirement.\textsuperscript{86} But, once again, this argument finds little support in the regulations, case law, or legislative history.

Another alternative is to argue that the \textit{Titanic} wreck site is federally owned, or more likely, federally controlled.\textsuperscript{87} This argument is perhaps the least persuasive, at least until Congress passes legislation implementing the International Titanic Agreement, which would install

\begin{itemize}
\item \textsuperscript{81} See supra Part II.C.
\item \textsuperscript{82} See generally NAT'L PARK SERV., SECTION I OF THE PERIODIC REPORT ON THE APPLICATION OF THE WORLD HERITAGE CONVENTION (Dec. 2004), available at www.nps.gov/oia/topics/Section1Rpt.pdf (describing the application of the World Heritage Convention in the United States and discussing why all owners should support the nomination to benefit from the NHPA and the World Heritage Listing).
\item \textsuperscript{83} See supra Part II.C.2.
\item \textsuperscript{84} See generally supra Part II.C.
\item \textsuperscript{86} See 36 C.F.R. § 60.6(d) (2013); supra notes 20-26 and accompanying text.
\item \textsuperscript{87} See § 73.7(b)(2)(i).
\end{itemize}
a regulatory licensing or a permitting process to grant access rights to the wreck site. 88 Without a licensing or permitting process, it remains unclear as to how the wreck site is subject to federal control.

3. Extending the scope of the NHPA into the marine environment.

Despite these observations, there have been at least two empirical examples of the United States applying the NHPA to the marine environment: (1) the nomination of the Papahānaumokuākea Marine National Monument to both the United States National Register and the World Heritage List 89 and (2) the nomination of the USS Monitor to the United States National Register. 90

a. The nomination of the Papahānaumokuākea Marine National Monument

The Papahānaumokuākea Marine National Monument in the Northwestern Islands of Hawaii has been protected by various orders and designations since the issuance of Executive Order No. 1019 in 1909. 91 The area has been designated as a national wildlife refuge, 92 a state marine refuge, 93 and, finally, a marine national monument in

89 See Ole Varmer, Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf, 33 STAN. ENVTL. L.J. 251, 264-65 n.70 (2014); see also NAT’L OCEANIC & ATMOSPHERIC ADMIN., THE UNITED STATES OF AMERICA’S NOMINATION OF PAPAHANAUMOKUAKEA MARINE NATIONAL MONUMENT FOR INSCRIPTION ON THE WORLD HERITAGE LIST 1, 26, 57 (Jan. 2009), available at http://www.papahanaumokuakea.gov/management/wh_docs/wh_full_app.pdf (discussing the location of the Papahānaumokuākea Marine National Monument and areas, such as Nihoa and Mokumanamana, that are listed on the United States National Register).
90 See Varmer, supra note 89, at 254, 254 n.8.
93 See generally HAW. CODE R. § 13-60.5 (LexisNexis 2014) (establishing the Northwestern Islands of Hawaii as a marine refuge in the State of Hawaii).
In July of 2010, the Papahānaumokuākea Marine National Monument was added to the World Heritage List and is the first mixed (meaning that it includes both natural and cultural heritage) UNESCO World Heritage site in the United States. The Papahānaumokuākea Marine National Monument clearly establishes precedent, not only for the nomination and inclusion of marine sites to the National Register, but also for marine sites to be nominated and included in the World Heritage List. Additionally, the National Register features many aquatic shipwrecks. Thus, a Titanic nomination should not fail solely on the basis that the wreck site is located in the marine environment.

b. The nomination of the USS Monitor to the United States National Register

The USS Monitor, wrecked approximately sixteen miles off the coast of North Carolina, was first added to the National Register in 1975. The date of this addition is significant because at the time the

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98 See generally id. (indexing shipwrecks that are listed or determined eligible for the United States National Register); World Heritage Committee Inscribes Two New Sites on World Heritage List, supra note 95 (providing a list of marine sites that have been added to the World Heritage List).
99 See Finding and Identifying the USS Monitor, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (June 9, 2010), http://oceanexplorer.noaa.gov/explorations/monitor01/back
USS *Monitor* was added to the National Register it rested on the continental shelf below the high seas—beyond the territorial sea (what was then three nautical miles from baseline) and the contiguous zone (what was then twelve nautical miles from baseline). As evidenced by this empirical example, sites beyond the United States territorial sea can be added to the National Register.

According to article 76 of the 1982 Convention on the Law of the Sea, a nation’s continental shelf may extend beyond the exclusive economic zone into the high seas. In similar fashion to the circumstances in existence at the time the *Monitor* was listed, the *Titanic* sits on the continental shelf, beneath the high seas.

However, distinguishing the *Titanic* from the *Monitor* is the fact that the *Titanic* lies not on the United States’ continental shelf, as did the *Monitor*, but on Canada’s continental shelf. There exists no clear precedent providing that the *Titanic* is eligible for inclusion on the National Register solely by reason of its location on a foreign state’s continental shelf. However, similar to its interests in the *Monitor* at the time of its addition to the National Register, the United States has a significant interest in the wreck site of the *Titanic* because a number of

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101 *See supra* note 100 and accompanying text.


103 Agreement Concerning the Shipwrecked Vessel RMS Titanic, 2004 A.M.C. 1850 (June 18, 2004).

104 *Id.*

United States citizens perished in the wreck. Evidencing this interest, the United States has passed specific legislation addressing the importance of the wreck site, and United States courts have issued orders and judgments concerning salvage rights over Titanic artifacts. Nominating the Titanic wreck site would also be consistent with the underlying goals and purposes of the NHPA and World Heritage Convention.


NHPA section 106 states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Similarly, the NHPA regulations define an undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or

107 See supra Part II.C.
109 Id. § 470(f) (originally enacted as the National Historic Preservation Act, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966)).
As of this writing, only one pair of related cases has attempted to decipher the extraterritorial application of NHPA section 402: *Dugong v. Rumsfeld* and *Dugong v. Gates.* At the center of these cases was the issue of whether the construction of a military base on the Japanese island of Okinawa constituted a “federal undertaking” under section 402. The court determined that “Congress intended the meaning of ‘undertaking’ in section 402 to have the same meaning as the same term used in section 106.” Thus, it appears that regardless of whether the Titanic wreck site was listed on the United States National Register of Historic Places, on a foreign country’s equivalent to the United States National Register, or on the World Heritage List, the site would receive certain protections from federal “undertakings.” In *Dugong v. Gates,* the court held that the construction of a military base, which was funded in part by the Department of Defense ("DOD"), was carried out on behalf of the DOD, and required the DOD approval (including issuance of permits), and constituted a federal undertaking under sections 106 and 402.

An agency engaged in a federal undertaking must “seek ways to avoid, minimize or mitigate the adverse effects” on registered historic properties. The regulations define “adverse effect” as follows:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting,

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110 36 C.F.R. § 800.16 (2014).
113 *Dugong,* 543 F. Supp. 2d at 1101 (citing H.R. REP. No. 96-1457 (1980)) (“The Committee also notes that the term ‘undertaking,’ as it is used in other sections of the Act, is meant to be used in the same context as described in Section 106.”).
115 *Dugong,* 543 F. Supp. 2d at 1101.
116 36 C.F.R. § 800.6(b) (2014).
materials, workmanship, feeling, or association. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.\(^{117}\)

Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.\(^{118}\)

Ultimately, the successful nomination of the Titanic to the World Heritage List via section 402 would provide some protections to the wreck site, including a federal agency’s obligation to seek ways to avoid, minimize, or mitigate any adverse effects on the Titanic caused by a federal undertaking.\(^{119}\) As is exemplified in the Dugong cases, this protection mirrors to some extent the federal undertakings analysis found in section 106.\(^{120}\)

III. Conclusion

As explored in this Article, there are certainly some persuasive arguments that section 402 of the NHPA applies to RMS Titanic and that this provision can act as a catalyst for nomination of the Titanic wreck site to the World Heritage Convention. However, due to the Titanic’s unique location within an international commons and its foggy record with respect to ownership rights, the success of an argument in support of nominating the Titanic to the World Heritage List through operation of the NHPA largely depends on the degree of flexibility at the joints of the statute. Unfortunately, while the arguments identified herein all potentially support addition of the Titanic to the World

\(^{117}\) Id. § 800.5(a)(1).

\(^{118}\) Id. § 800.8(a)(3).


Heritage List, there exists at the present time no clear legal precedent to assist in determining the likelihood of a successful nomination.