

Supplement to Final Regulatory Flexibility Analysis
for the Final Regulations Implementing the Final
Management Plan for the Florida Keys National Marine
Sanctuary: Commercial Treasure Salvors

June 1997

National Oceanic and Atmospheric Administration

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INTRODUCTION

The Final Regulatory Flexibility Analysis (FRFA) for the final regulations implementing the designation of the Florida Keys National Marine Sanctuary (FKNMS or the Sanctuary) was published in January 1997. The following supplement to the FRFA is based on public comments on the FRFA and a suggestion by the Small Business Administration that there should be a more detailed analysis of the commercial treasure salvage business.

Treasure hunting is a controversial resource management topic, particularly in Florida. On one hand, the treasure hunters¹ claim they serve the public's interest by creating jobs to recover lost resources and then place them back in the stream of commerce. On the other hand, archaeologists, historians, and others claim that treasure hunters destroy valuable historic and natural public resources, as well as interfere with non-harmful recreational use of wreck sites. Recreational divers want sites protected for present and future public access, but some divers take artifacts they find as souvenirs.

State and Federal resource managers, including those at the National Oceanic and Atmospheric Administration (NOAA or the Agency) are in the middle of the controversy surrounding commercial treasure salvors, archaeologists, government and its regulations to protect and manage submerged cultural resources (SCRs). Consistent with Federal historic preservation laws, the Federal government has traditionally sided with historic preservation interests which have opposed treasure hunting because of the threat posed to SCRs and other resources. Congress sought to assist States in preventing further loss of historic shipwrecks in State waters by enacting the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101-2106. Under the ASA, non-destructive recreational public access to certain shipwrecks is guaranteed. The ASA also provides that there be some private recovery permitted, if it is conducted in an

¹ While most treasure salvors preferred to be identified as "treasure hunters" particularly early in the process (around 1991), others subsequently wanted to disassociate themselves from the traditional term and its image of destructive unscientific exploration and excavation to recover treasure. A group was formed and created the term "historic shipwreck salvors"; other salvors requested that they be referred to as "commercial treasure salvors" while a few still retained the "treasure hunter" label. Mr. Duncan Mathewson, an archaeologist who primarily works with most of the treasure salvors who use an archaeologist, specifically requested that NOAA change its Draft Management Plan and Draft Environmental Impact Statement (DMP/DEIS) to use the term "commercial treasure salvors" and only refer to "treasure hunting" as the exploration and excavation of treasure without regard for archaeological interests and concerns. NOAA adopted that comment.

environmentally and archaeologically sound manner.

The National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1431 et seq., (also known as Title III of the Marine, Protection, Research, and Sanctuaries Act of 1972, (MPRSA)) directs NOAA to protect and manage sanctuary resources in a manner which facilitates multiple uses of the Sanctuary compatible with the primary objective of resource protection. Sanctuary resources are defined to include natural and historical resources. In the FKNMS statutorily designated by Congress, the Sanctuary resources include coral, seagrass and historical shipwrecks. Historical shipwrecks are presently used by: 1) commercial treasure salvors seeking to discover them and remove valuable cargo for private profit; 2) recreational divers who use them as dive sites; 3) museums which use recovered artifacts for tourist attractions, research and education; 4) fishermen and boaters who fish and boat around such sites; and 5) researchers and educators. These uses are not necessarily compatible with resource protection and also involve conflicts among competing users.

Under the Final Management Plan-Environmental Impact Statement (FMP/EIS) and regulations for the Sanctuary, treasure hunting is prohibited to preserve SCRs for non-destructive uses such as research, education, viewing appreciation and recreation within the Sanctuary. Consistent with the ASA, private recovery, including commercial treasure salvage, is permissible under limited circumstances where no natural resources are destroyed and historically significant artifacts are preserved in museums for research, education, and viewing enjoyment outside the Sanctuary. The regulations prohibit unauthorized recovery, and permit recovery only by those who demonstrate that the research and recovery will be conducted in an environmentally and archaeologically sound manner pursuant to a detailed operational plan that describes the professional qualifications of the salvors and their planned scientific methodology.

I. STATEMENT OF NEED FOR, AND OBJECTIVES OF, THE RULE

Need for Sanctuary permit system to manage and accommodate recovery by commercial treasure salvors consistent with ASA/FAP/NMSA and interests of other user groups (e.g., divers, archaeologists, fisherman, educators)

Prior to Sanctuary designation, the recovery of artifacts from historic shipwrecks by treasure hunters and commercial salvors was controlled by a contract system under Florida State law and the maritime admiralty law of finds and salvage outside State submerged lands and waters. The statutory designation of the FKNMS in 1990 made historic shipwrecks public Sanctuary resources, just like the coral, seagrass beds and other natural resources of the Sanctuary. Federal historic preservation law generally prohibits the unauthorized removal and privatization of

public resources. Therefore, unless the recovery is conducted pursuant to some valid pre-existing Federal or State authorization or is expressly authorized by a Sanctuary permit, the salvage is prohibited. The Sanctuary regulations include a permit system for recovery and privatization of public resources under certain circumstances. Without this permit system, no private recovery would be lawful under the existing Federal Archaeological Program (FAP), the underlying Federal Historic Preservation Laws and the NMSA.

Prior to the development of the Draft Management Plan for the FKNMS, commercial salvage of historic shipwrecks in national marine sanctuaries has never been permitted. In 1975, the USS MONITOR, was designated as the first national marine sanctuary. The purpose of the designation was to protect this historic shipwreck from claims under admiralty law of finds and salvage. Since then, management plans and regulations for sanctuaries include management and protection of the shipwrecks within them. Only permits for archaeological research consistent with the FAP have been considered. No permits have been issued for the private for-profit recovery of these historic public resources. The NMSA and FAP policy was that the historic shipwrecks were being preserved and protected in the Sanctuary and should not be allowed to be removed without reasonable evidence that the resources were threatened by remaining in the Sanctuary.

At the early stages of scoping on issues and topics to be addressed in the FKNMS management plan development process, it was apparent that the regulation of treasure salvage would have to be addressed. Workshops with user groups, including treasure salvors were held in an effort to obtain consensus on the issues. Treasure salvors commented that the Sanctuary would preclude them from treasure salvage and put them out of business. They suggested that the status quo be maintained: meaning that treasure salvage would continue under the State contract system in State submerged lands and waters, and that admiralty law of finds and salvage would be controlling in Federal submerged lands and waters of the Sanctuary. After NOAA took legal action against certain salvors for the destruction of Sanctuary resources due to the unauthorized use of propeller-wash deflectors (prop-wash deflectors or mailboxes), and issued a policy against treasure salvage in the Sanctuary, the commercial treasure salvage representative on the Sanctuary Advisory Committee (SAC), resigned.

Public meetings were held during which there were angry and heated comments and accusations. At the forefront of the opposition to the establishment and implementation of the Sanctuary was the Conch Coalition. The Conch Coalition is comprised of treasure salvors, fishermen and representatives of other interests in Monroe County, Florida. The Conch Coalition asserted that the treasure salvors have been put out of business

by the Sanctuary and that this is an indicator of what will happen to other user groups, particularly fishermen.

While the Sanctuary Program policy and FAP policy against for-profit removal and sale of historic public resources was well established, the Sanctuary Program researched the underlying legal requirements and constraints on the program policy with a view towards maximizing accommodation of the commercial treasure salvage interest groups, consistent with Federal law. That research concluded in a recommendation by legal counsel that if regulations were developed in conjunction with the State of Florida implementing the ASA statutory provisions and ASA commercial salvage guidelines throughout the Sanctuary, and not just in State waters, then the Sanctuary could provide legal means for accommodating this interest group. The restrictions against the sale or transfer of archaeological resources appeared to be primarily based on the professional ethics of archaeologists, and the underlying Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa et seq. The ARPA provisions regarding publicly owned lands were not directly applicable to the submerged lands of the Sanctuary. There also appeared to be some flexibility within the definition of "archaeological resources" to permit salvage that would not conflict with ARPA. Thus, it appeared that a permit system for private recovery of historic public resources could be crafted consistent with ASA and other FAP requirements.

Even under this approach there was at least one direct conflict; the ASA guidelines specifically suggest that commercial treasure salvage in sanctuaries be prohibited.² However, since the guidelines are not legally binding on States or other Federal agencies, there was some room for discretionary policy. Moreover, given the large size of the FKNMS (over 2800 square nautical miles (snm)), the zoning approach suggested in the ASA guidelines could be implemented consistent with the zoned approach suggested in the Florida Keys National Marine Sanctuary and Protection Act (FKNMSPA), Pub. L. No. 101-605, 104 Stat. 3089 (1990). Salvage would be precluded in non-consumptive zones (Ecological Reserves/Sanctuary Preservation Areas (ERs/SPAs)) and other areas containing coral, seagrass or other significant natural resources, and consideration of permits for commercial salvage of certain artifacts could be given in areas relatively devoid of such natural resources.

It was determined that while no other Federal Program had ever permitted commercial treasure salvage of public resources, a Sanctuary permit system could be crafted consistent with the ASA, provided the FAP professional and scientific standards for

² See ASA Guideline 7, 55 Fed. Reg. 50116, 50127 (December 4, 1990).

research and recovery were followed. Consistent with the resource protection and multiple use objectives of the ASA and NMSA, NOAA developed a SCR plan which ensured public access and the protection of certain SCRs in the Sanctuary. It also provided a permit system for private recovery.

II. SUMMARY OF SIGNIFICANT ISSUES RAISED BY THE PUBLIC COMMENTS IN RESPONSE TO THE INITIAL REGULATORY FLEXIBILITY ANALYSIS, THE AGENCY'S RESPONSE TO THOSE COMMENTS, AND A STATEMENT OF ANY CHANGES MADE TO THE RULE AS A RESULT OF THE COMMENTS

While an Initial Regulatory Flexibility Analysis was determined not to be required for the DMP/DEIS, a socioeconomic impact analysis was conducted and was summarized in the DMP/DEIS.³ The socioeconomic impact analysis stated that the adverse impacts were expected to be minimal for several reasons, including past and present salvage activities, the likelihood of new discoveries, enactment of the ASA and other Federal historic preservation laws, and the shift of the treasure salvage industry away from the Florida Keys to waters outside the United States, particularly in the Caribbean.

The following issues and comments with respect to the management of SCRs were raised by the public, and for the most part, treasure salvors, particularly the Historic Shipwreck Salvage Policy Council (HSSPC), throughout the development of the final regulations and management plan, including comments received by the Small Business Administration on the Final Regulatory Flexibility Analysis.

A. Ban on Treasure Salvage

Comment: The lost revenues and lost small business throughout the 5th year ban of commercial salvage has not been addressed; these impacts could be between \$5,000 for a person hunting coins off the beach, up to \$1,000,000 for a small business recovering historical artifacts such as Mel Fisher.

Answer: The economic impacts to commercial salvors are addressed in the Draft and Final Environmental Impact Statements; the assessment conducted pursuant to E.O 12866 and the Final Regulatory Flexibility Analysis, as well as in this supplement. State law prohibited the unauthorized collection of coins off of the beach and other otherwise in State submerged lands prior to the Sanctuary's designation. To the extent there was a Federal ban on treasure salvage supplementing State prohibitions, it was done by Federal statute and not by NOAA Sanctuary regulations which will not become effective until July 1, 1997. Since the Sanctuary's designation, NOAA and the State considered and issued

³ See Vol. II DMP/DEIS 189-90.

permits in the interim to salvors who demonstrated they had valid rights of access pre-dating Sanctuary designation. For example, a Sanctuary permit was issued to Mel Fisher pursuant to an application to NOAA for conducting his work on the Atocha and Margarita in the Sanctuary. Mel Fisher has continued to work these sites throughout the last 5 years and has reported to continuously recover emeralds; the large majority of gold, silver and other metallic artifacts which are detected by remote sensing equipment are believed to have been recovered some time ago.

B. Penalties

Comment: NOAA issuance of violation could stop all work on site putting 95% of salvors out of business immediately, and other 5% seriously impacted.

Answer: NOAA agrees that salvors who violate the law will be the most severely impacted and they will likely have to find work outside the Sanctuary or will be put out of business if they are unwilling to work within the Sanctuary under the regulations and permit system. It would be inconsistent with law and policy to minimize impacts to those violating the laws of Congress and the implementing regulations.

Comment: The confiscation of vessel by NOAA pursuant to NMSA 312 would end operations. "It should be noted here that salvor operations have already been stopped by NOAA." The costs to Mel Fisher, including lost time, expenses for idle vessels, personnel costs, legal costs, etc have been estimated around \$1,000,000. The damage assessment is charged to responsible party and could be around \$300 per day for vessel operations, and \$200 an hour for scientific evaluation.

Answer: Again, the greatest impacts on salvors appear to be associated with violation of the law. The NMSA provides NOAA with the authority to seize and forfeit vessels which violate the NMSA and implementing regulations. In general, it is done only as a last resort as a measure to get security for extensive damages done to Sanctuary resources by the vessel and the responsible parties (owner/insurer) are unable or unwilling to provide alternative security bond, letter of credit, etc. In most cases, some security is provided and the vessel remains under the control of the owners. NOAA agrees that regulations are needed to permit salvage that would otherwise be prohibited by the NMSA and Federal Historic Preservation laws. With regard to Mel Fisher, he continues to work in the Sanctuary at the Atocha and Margarita sites. He also reportedly appears to be working in areas outside the Sanctuary in Florida, the Bahamas and the Caribbean. It should be noted that some of the legal costs Fisher incurred as a plaintiff in at least 2 cases NOAA is aware of. NOAA agrees that, similar to the polluter pays principle underlying many environmental laws, those who do the

damage pay for damage assessment and restoration instead of the general public.

C. Prevent Treasure Hunting & No Permits for Private Profit

Comment: Several commenters, including the National Park Service (NPS), Mineral Management Service, and the Navy stated that no treasure hunting should be permitted in the Sanctuary and that the proposed SCR permit system was in conflict with the FAP, particularly the NPS ASA guidelines. Other commenters indicated that some commercial treasure salvage should be permitted, but strictly regulated to avoid harm to natural resources in the Sanctuary.

Response: NOAA agrees that "treasure hunting" in its traditional sense should not be permitted in the Sanctuary. However, the SCR plan does provide for public and private sector recovery of shipwrecks consistent with the protection of historical values and the environmental integrity of the shipwrecks and sites. NOAA will not allow "treasure hunting", which could be defined as the search for and recovery of intrinsically valuable artifacts without any regard for the archaeological context and historical significance of the finds. However, NOAA and the State of Florida have agreed that the SCR plan would, consistent with multiple use mandates in the NMSA and the ASA, provide for in situ preservation of highly significant historical Sanctuary resources. The plan strictly regulates the recovery of SCRs to ensure that recovery is only permitted when determined to be in the public's interest and done in an environmentally and archaeologically sound manner. No recovery permits will be issued in areas containing coral, seagrass or other significant natural resources. However, private recovery of certain SCRs may be permitted in others areas of the Sanctuary which are relatively devoid of natural resources. In such recovery efforts, the highly significant resources will be required to be preserved in a museum of public access consistent with the standards of the FAP. Objects of low to moderate historic or archaeological significance may be deaccessioned or transferred for sale or other disposition.

With regard to the ASA guidelines, NOAA acknowledges that the accommodation of commercial salvage does appear to conflict with certain ASA guidelines suggesting that no commercial salvage be permitted in marine sanctuaries. However, NOAA's position is that the SCR plan is consistent with the ASA guidelines when read as a whole. In other words, there is no commercial salvage permitted in the zoned areas and other areas of significant natural resources. Commercial salvage is only permitted in areas relatively devoid of significant natural resources. "Commercial salvage" is defined as the search for and the recovery of shipwreck artifacts using archaeological recovery techniques and

historical documentation to maximize the intrinsic value of the finds. NOAA does not suggest that the FKNMS SCR plan be used as a model for other national marine sanctuaries, or for other Federal/State protected areas or preserve systems. There are several distinguishing reasons for the departure from those ASA Guidelines in this particular Sanctuary: 1) the size of the Sanctuary is 2800 sqnm and its extensive use by the public has resulted in careful balancing of multiple use and resource protection in the Sanctuary overall, 2) 65% of the Sanctuary is in State waters - under the NMSA and the ASA due deference must be given to the State's interests in managing Sanctuary resources, particularly abandoned shipwrecks to which the State has title, 3) treasure hunting and commercial salvage of historic shipwrecks has been a traditional activity in the Florida Keys for decades and is part of the local culture, 4) the NMSA and the ASA are multiple use statutes, 5) the establishment of multiple use areas where commercial salvage may occur, while not permitting any recovery in areas containing coral, seagrass or other significant natural resources, is analogous to the zoning approach proposed for protecting natural resource habitat areas, 6) the SAC recommended that some commercial salvage be permitted in the Sanctuary, and 7) numerous other public comments recommended that some commercial salvage be permitted in the Sanctuary.

Consistent with the recommendations of the SAC, the State, and public comments, the SCR plan provides a permit system which will strictly regulate private for profit recovery of SCRs, provided the recovery is performed in an environmentally and archaeologically sound manner and is otherwise shown to be in the public interest, involving public display of recovered SCRs. Some SCRs will be permitted to be recovered. The shared concerns of protection, preservation and public access are addressed by requirements that certain SCRs be maintained in museums and similar institutions of public access while duplicative objects may be deaccessioned and transferred to the permittee for sale or other disposition, after properly recording and reporting the archaeological information. Under the multiple use mandate of the NMSA and the ASA, some SCRs may be recovered while other more significant SCRs will remain in the Sanctuary for in situ preservation and use by present and future generations.

Comment: The NPS commented that the Antiquities Act applies in National Marine Sanctuaries and therefore an Antiquities Act permit should be required for the excavation and recovery of SCRs.

Response: NOAA agrees that the Antiquities Act of 1906 (Antiquities Act), 16 U.S.C. §§ 431 et seq. applies in the Sanctuary. In order to reduce the burden of multiple permits on the public, NOAA is working with the Department of the Interior (DOI) to enter into a Memorandum of Understanding whereby the

requirements of the Antiquities Act could be fulfilled through issuance of a Sanctuary SCR permit.

Comment: The Navy objected to the SCR permits and expressed concern about the Navy's historic shipwrecks in the Sanctuary, as well as the potential precedent for the treatment of other Navy historic shipwrecks outside the Sanctuary.

Response: The permit for private recovery and transfer only applies to abandoned vessels. As a trustee for such resources, NOAA will continue to respect the interests of the owners of the vessels and the sovereigns that represent those interests consistent with domestic and international law. Sunken warships and other public vessels entitled to sovereign immunity, regardless of location, remain the property of the nation to which it belonged at the time of sinking, unless that nation has taken formal action to abandon it or to transfer title to another party. It is a longstanding Navy policy that it does not abandon its public vessels. Therefore, no permits will be issued for the private recovery of Navy vessels without the express written permission of the Navy. In considering permits for the private recovery of other vessels entitled to sovereign immunity, NOAA may require the express permission of the appropriate sovereign representatives, or otherwise consider their interests in the vessel and its recovery.

D. SCR Plan/Permits & Costs to Treasure Salvors' Businesses

Comment: At the scoping meetings, workshops, SAC meetings, other public meetings, and in public comments the treasure salvors have continuously asserted that the FKNMS would put them out of business and requested that the Sanctuary adopt the State's existing contract system. Certain commenters requested that commercial treasure salvage should be allowed under certain circumstances, but strictly regulated to prevent harm to natural resources from various commercial treasure salvage techniques, including mailboxing.

Response: The Florida contract system and the division ratio (80% salvor, 20% State) was considered as an alternative, but was not adopted because it is inconsistent with the FAP and with the ASA Guidelines. Prohibiting commercial salvage throughout the Sanctuary was also considered and rejected for reasons discussed above. The draft SCR Plan was the result of a careful balancing of resource protection and reasonable accommodation for commercial salvage in certain areas for certain SCRs. If the cargo from a wreck is duplicative of other finds and of little or no historical or archaeological significance, then nearly all of the recovered objects would be transferred to the permittee. On the other hand, if the artifacts are of high historical and cultural significance, then the permittee would have possession

of the artifacts and could seek return on the investment through other means. However, there would be no transfer of ownership of public resources to a private party unless and until it is determined that the resource is of little or no historical or archaeological value. In developing the draft plan, NOAA considered the threats to natural and historical-cultural resources and sought to develop strict regulations which were responsive to the socioeconomic needs of treasure salvors and others, while never compromising the idea of sound environmental and archaeological treatment of SCRs. In response to comments, additional changes were made in the final regulations and plan in an effort to formulate a permit management system which would be more pragmatic from the perspective of the commercial salvors, but would still achieve the primary objectives of protecting significant natural and historic Sanctuary resources. In the interim, NOAA has already issued several permits to commercial salvors who had pre-existing admiralty rights. While the permit conditions may be more rigorous than the requirements of the admiralty court or the State contract system, and thus may involve additional costs, those permittees continue to work their sites.

Comment: The HSSPC and other treasure salvors also raised specific concerns about the economic burden to permittees in the FKNMS Submerged Cultural Resources Action Plan such as requiring: performance bonds, general liability insurance, permanent public display of certain SCRs, professional nautical conservators and supervision by professional archaeologists.

Response: Pursuant to consultation with the State of Florida, NOAA agreed to delete the regulatory provisions requiring a performance bond for all applicants. As the treasure salvors noted, the regulations elsewhere require all permittees to demonstrate their financial ability to carry out proposed projects and activities requiring permits. NOAA agrees that the underlying purpose of requiring a performance bond (to ensure that there are ample funds to finish the research and recovery work, once initiated) appears to be covered by the other regulations and that removing the requirement will allow more flexibility in the permit system. While the removal of the regulatory requirement should reduce the costs for meeting the permit criteria for most applicants, a performance bond may still be reasonable and appropriate in certain cases where applicants have not finished prior projects or have difficulty demonstrating their financial ability to complete the proposed project.

Obtaining general liability insurance is a statutory requirement under section 310 of the NMSA. However, NOAA has modified the regulatory provisions to clarify that other security instruments may be utilized in lieu of an insurance policy. In addition, NOAA modified the regulatory language to clarify that the scope of coverage required is for "potential claims for damages to

Sanctuary resources arising out of permitted activities" and to clarify that the amount of insurance or security should be reasonably equivalent with an estimated value of the Sanctuary resources in the vicinity of the permitted area and activities.

With regard to the requirement that SCRs be publicly displayed, NOAA did not intend to require that all SCRs be publicly displayed for all time. Instead, it was expected that this would be addressed in the curation agreements and that standard museum practices would be followed, consistent with the FAP. The regulations have therefore been modified to indicate that SCRs must be placed on "periodic" public display.

With regard to the requirement that a professional archaeologist be in charge of the archaeological research and recovery, that requirement has not been changed or modified. Recovery of historical and cultural resources inherently involves the destruction of contextual and other important archaeological information. The only way that such information can be preserved is through scientific recording of the recovery efforts consistent with standard archaeological principles. It is therefore imperative that a professional archaeologist supervise the recovery operations. That is not to say that, as supervisor, the archaeologist needs to be on site at all times. However, the archaeologist needs to oversee the operations. The public's interest in the preservation of this archaeological information justifies the additional costs to the permittee. In addition, the administrative record indicates that many commercial salvors already employ an archaeologist.

With regard to the requirement of a professional nautical conservator, the plan has been modified to delete "professional" and insert "authorized" as suggested in comments in order to provide more flexibility in the permit system and allow for the consideration of field experience. As the professional archaeologist is responsible for supervising the operations, NOAA will give due deference to the supervising archaeologist's selection for nautical conservator in considering its authorization.

E. Special Use Permits; Fees/Waiver in SCR Context

Comment: The HSSPC suggested adding a third criteria to Special Use Permits, i.e., "to promote private sector participation when advantageous to the taxpayers" and shifting the costs for Special Use Permits from the permittee to NOAA and the State. The HSSPC also suggested that the costs for Special Use Permits be limited to the costs for issuing the permit. Other administrative costs, such as monitoring activities, should be deleted. The assessment of a fair market value for use of Sanctuary resources should also be deleted.

Response: Section 310 of the NMSA provides the authority for, and sets forth two criteria for issuing, Special Use Permits. Section 310 also provides for the assessment of associated fees to cover the administrative costs as well as a fair market value return to the public for use of public resources.

With regard to the addition of a third criterion, the promotion of private participation is not a section 310 criterion or even a general statutory purpose or policy. However, facilitation of compatible multiple use is a statutory policy and the SCR plan has been modified accordingly.

With regard to the assessment of costs and waiver of fees, in implementing Special Use Permit authority, NOAA has the discretionary authority to consider waiver of costs and/or fees on a case by case basis when permitted activities result in a public benefit, whose value can be determined. For example, in the SCR context, the preferred policy is that the SCR be preserved on site. Waiver of fees for the removal of SCRs which are not under threat is unlikely. However, if it is determined that the SCR is being threatened by remaining in the Sanctuary, then the research and recovery would appear to be in the public interest and reduction and/or waiver may therefore be considered in the cost and/or fee determination. The extent that private use promotes resource protection, research, education and similar FKNMS management strategies is given due consideration in determining the amount of costs and fees.

F. Public Access to SCRs (Land v. Sea)

Comment: The HSSPC suggested that the plan should require SCRs to be managed in a manner that brings them to a large proportion of the population noting that scuba divers amount to less than 1% of the population. Several others, including the NPS, commented that SCRs should be preserved in the Sanctuary but that nonintrusive public access for research, education and recreation should be allowed, and that intrusive public access should be strictly regulated.

Response: The policy preference under the FKNMS Plan, consistent with the preservation policy in the FAP, and the resource protection mandate in the NMSA is that SCRs be preserved on site in the Sanctuary, unless the SCRs are under threat and removal is required to preserve them. As discussed above, there has been some accommodation for commercial salvage in certain areas of the Sanctuary and for certain SCRs to facilitate multiple use of SCRs in this Sanctuary. Besides being inconsistent with resource protection, the suggestion that all or most of the SCRs be removed from the Sanctuary is not consistent with the multiple use mandates of the NMSA and the ASA and has therefore not been incorporated. The ASA and the NMSA are both concerned about public access to SCR for boaters, divers and others within the

Sanctuary. The suggested change in policy appears to primarily benefit one special interest group, the commercial salvors. Access to Sanctuary resources for members of the public unable to enter the Sanctuary itself is accomplished through a variety of education and research products and media, including print, film, and computer informational products. The public access goal does not require physical access to the SCRs; nor does it require their removal for land based exhibits. However, as previously indicated, the SCR plan in this Sanctuary does provide for some commercial salvage, which will in turn result in the public display of certain recovered SCRs in museums and exhibits.

G. Inventory of SCRs: Responsibility & Expense

Comment: The HSSPC suggested that the Florida Department of State/Bureau of Archaeological Resources (DOS/BAR) have the lead responsibility in the inventory of SCRs and that NOAA's role be limited to a financial assistance role. The HSSPC also suggested that the inventory be accomplished through the use of the private sector, when funding is available, in order to lessen the burden on taxpayers.

Response: No change was made to the plan regarding NOAA's lead responsibility for the inventory of SCRs because it is NOAA, not the State, that is legally responsible for accomplishing this task. Section 110 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. §§ 470 et seq., requires Federal agencies to inventory historic resources such as SCRs. However, as indicated in the plan, NOAA will work with the State and any other public and private entities interested in activities which fulfill this responsibility. Accordingly, the SCR plan has been revised to indicate that NOAA will also consider all public and private opportunities for accomplishing the inventory in a reasonable and cost-effective manner, including private sector funding through permits and otherwise.

H. Survey/Inventory Permits

Comment: The HSSPC suggested that the regulations expressly states that no Sanctuary permit is required for non-intrusive non-exclusive remote sensing activities, but also suggested that the survey/inventory permits expressly grant exclusive rights to explore the permitted areas. The HSSPC also suggested that these permits provide for limited manual alteration of the seabed, including hand fanning, provided there is no negative impact to coral, seagrass, sponges and other natural resources.

Response: The allowed activities section of the regulations states that unless an activity is prohibited, it is expressly allowed. In addition, the sections on Sanctuary permits, certification, and authorizations indicate that permits, certifications and authorizations are only required for

conducting activities which are prohibited by Sanctuary regulations. Non-intrusive remote sensing is not prohibited. Therefore, the regulations expressly state that such activity does not require a permit. The regulations indicate that permits may provide for limited manual alteration of the seabed, including handfanning, provided there is no adverse effect on Sanctuary resources. Limited manual alteration of the seabed will continue to be considered on a case-by-case basis.

The HSSPC suggestion for exclusive rights for a survey/inventory permit is not entirely consistent with the suggestion that remote sensing not require a permit. NOAA cannot prevent non-intrusive remote sensing in an area unless it is prohibited in the regulations, which it is not. However, NOAA and the State are cognizant of the underlying economic concerns of applicants and permittees in investing and expending financial resources in exploration. In an effort to alleviate these concerns, the regulations have been modified to indicate that NOAA will not grant survey/inventory permits or research/recovery permits for areas covered by existing permits, unless authorized by the original permittee. There is no entitlement to these and other permits; rather, it involves the discretionary authority of NOAA and the State in granting a privilege which is determined to be in the public's interest.

III. A DESCRIPTION AND ESTIMATE OF THE NUMBER OF SMALL ENTITIES TO WHICH THE RULE WILL APPLY

A. Creation and Evolution of Treasure Hunting-Commercial Salvage Industry (Technological Advances-Access-Discovery-Recovery)

The historic shipwrecks in the Florida Keys believed to be of primary interest to salvors are the Spanish Galleons: the 1622 fleet, the 1715 silver plate fleet and the 1733 fleet (19-22 shipwrecks) as well as other individual shipwrecks of Spanish Galleons. While there are an estimated 1,000 historic shipwrecks in the FKNMS, less than 10% are Spanish Galleons. The large majority of historic shipwrecks are of little or no interest to treasure salvors, but of great interest to archaeologists, historians, educators, recreational divers and the public interested in the history and culture of this nation and the world.

Art McKee has been identified as the Grandfather of treasure hunting. While he reportedly first discovered lost treasure in the 1930s, it was not until after World War II that he became a full time professional treasure hunter. Through the 1950s, 1960s and into the 1970s, treasure hunters were salvaging the 1733 fleet. However, by the 1980s there was little salvage on the 1733 fleet because most of the vessels had been thoroughly salvaged, and the costs of salvaging was approaching and/or

exceeding the returns on the remaining objects.⁴

In the late 1960s, treasure hunting efforts began shifting to the 1715 fleet around Fort Pierce on the Atlantic shoreline. In contrast to the Keys dive season, the Atlantic shoreline dive season was short, the dive areas were high energy, and the wrecks were dispersed. This made discovery and recovery more difficult.

Also in the 1960s, Mel Fisher started looking for the Atocha, one of the vessels of the 1622 fleet. The Atocha is located approximately 40 nautical miles from Key West, and 11 miles from the Marquesas Key (outside of State waters but within the boundary of the Sanctuary). It was discovered by Mel Fisher on June 12, 1971. The wreck was positively identified on July 4, 1973 by comparing serial numbers on silver bars with those on the Atocha manifest.⁵ Mel Fisher has been salvaging the wreck ever since. The current salvage efforts have been limited to searching for emeralds. These cannot be detected by magnetometers and other remote sensing equipment.

Most of the shipwrecks in the Florida Keys have been thoroughly salvaged; no serious salvage has been conducted in State waters in the Florida Keys since the 1970s. Since 1983, only 12 applications for exploration and salvage contracts have been submitted for activities within the State waters portion of the Sanctuary, compared to 87 in State waters outside of the Keys. Of these, one salvage and three exploration contracts were executed, all of which have since expired or lapsed. The salvage contract was issued by Florida to conduct salvage activities in State waters on the San Jose, one of the 1733 fleet ships.

The threat to Sanctuary resources from removal has been related to the technology available for discovery and removal.⁶ The modern day gold rush did not really get under way until the mid 1940s with the commercial development of scuba gear that allowed anybody with access to a boat to become a treasure hunter.⁷ By the 1950s, the remains of old ships in the clear and shallow

⁴ Interview by Ole Varmer, NOAA Office of General Counsel, of Jim Miller, Florida Department of State, Chief, Bureau of Archaeological Research (J. Miller interview); see also Florida permit files.

⁵ See Perdue v. Commissioner, T.C. Memo 1991-478, 62 T.C.M. (CCH) 845 (1991) (Perdue).

⁶ "The Caribbean Treasure Hunt", Sea Frontiers 49, 51 (June 1992) (Sea Frontiers article).

⁷ Id.

waters of Florida were being discovered.⁸ Thus, a new generation of wreckers began to scavenge these wreck sites. The rush and competition resulted in the development of technologies for quick discovery and recovery, such as the "mailbox" or propeller-wash deflector. One hole from the blow of a mailboxing can be 15 feet wide and just as deep.⁹

The post-World War II period also saw an increase in recreational boating and waterborne tourism, both offshore, in the Intercostal Waterway, and in the rivers throughout the State. In the 1970s and 1980s, exploitation of Florida's resources caused growing concern for the living environment as well as historic sites embedded in it. This concern prompted protective legislation, such as a bill to restrict the proximity of commercial vessels sailing past the Florida Reef and to create a marine sanctuary throughout the Keys.

Recent innovations in the development of undersea robots and other high-tech devices are making discovery and recovery of wrecks more affordable¹⁰ thereby increasing the risk of destruction of SCRs by destructive methodologies of some treasure hunters.¹¹ Some treasure hunters have indiscriminately blown holes in the seabed with propeller-wash devices, explosives and

⁸ Id.

⁹ The activity has been likened to strip mining. P. Throckmorton, "The World's Worst Investment: The Economics of Treasure Hunting with Real Life Comparisons" analyzes 16 Caribbean expeditions of which he had personal knowledge. The paper was published in the Underwater Archaeology Proceedings from the Society for Historical Archaeology Conference, Editor Toni Carrel, Society for Historical Archaeology, Tuscon, Arizona 1990 (Throckmorton Article). National Geographic described the site of the Atocha as a battle ground filled with moon like craters. "Atocha: Quest for Treasure"; National Geographic Video. In U.S. v Fisher, Case No. 92-10027-CIV-DAVIS; Case No. 95-10051-CIV-DAVIS (S.D. Fla.) (Fisher) experts testified that the destruction to the seabed and seagrass by the mailboxes in that case was directly comparable to the destruction caused inadvertently by Navy bombs off the coast of Puerto Rico. See testimony of Jay Zieman, Fisher, supra.

¹⁰ "Deepest Wrecks Now Visible To Cameras", NY Times, February 2, 1993; R. Marx, "Treasure Hunting Goes High Tech", Skin Diver Magazine, 1995 (Marx article).

¹¹ Orange County Register Dec. 25, 1992, by Jonathan Yenkin of AP, "Some Scientists Fear Looting of Sunken Ships - Researchers Seek to Preserve Artifacts", Interview of Research Assoc. Porter Hoagland of Woods Hole.

other technologies to search and rapidly recover valuable artifacts.¹² Prop-wash deflectors can blast away 500 tons of sand in 15 minutes, and open a hole in the seabed 15 feet deep, 50 feet across at the top and 15 feet across at the bottom.

Another example of current undersea technology being used as a tool in discovery and salvage is the case of the SS Central America. Tommy Thompson was able to locate the wreck, see it with real time imaging, mechanically manipulate artifacts, and generally control the site with the help of the Nemo, a remote controlled submarine equipped with sophisticated video, cameras, and robotic arms.¹³ Submersibles and remote sensing equipment have been used to locate and identify the RMS Titanic and to recover artifacts outside of the hull.

B. Description of Current Commercial Treasure Salvage Industry in Florida and the Florida Keys

For purposes of this analysis, there are three general categories of commercial treasure salvors: 1) the full-time professional commercial treasure salvage operator, 2) the part-time para-professional treasure salvor, and 3) the amateur souvenir collector/hobbyist who occasionally searches for treasure in relation to diving, coin collecting, antique collecting or other hobbies. According to Throckmorton, as a result of changes in the laws, litigation, and prosecution, many promoters of treasure salvage have moved to the Caribbean.

The Boston Globe estimated that there were about a half a dozen treasure hunters in 1968, and approximately 100 hunting for treasure around the world in 1991.¹⁴ Throckmorton states that worldwide, about 25 treasure hunting companies start up every year. About half of those are able to obtain financing, for a total of up to \$100 million.¹⁵ Salvor archaeologist Duncan Mathewson estimated that in the 1970s there could have been as many as 1,000 salvage divers regularly recovering artifacts off shipwrecks throughout American waters. However, most of those were recreational wreck divers focussed on artifact recovery in California, New England, the Jersey Shore, the Carolinas and

¹² Sea Frontiers article, supra; ASA Guidelines.

¹³ "Admiralty Law: Sunken Treasure", The Economist, (August 26, 1989).

¹⁴ D. Arnold, Treasure Hunting Becoming A Growth Industry, Boston Globe, (October 21, 1991), at 27, col. 1. (Arnold article).

¹⁵ See Throckmorton article, 1990.

Florida.¹⁶

Treasure salvor Jack Haskins (International Research Co. in Islamorada, FL.) estimated that there are 35-40 commercial wreck excavating companies employing several hundred people within the Florida Keys. Salvor Geoff Chapman estimated that there are 115 salvage companies and 200 individual salvors in the Keys. No documentary support or other verification has been provided by salvors. However, a review of the State contract files and admiralty court records indicates this number is too high.

Duncan Mathewson also stated that:

In the Florida Keys it has always been difficult to get a good handle on how many salvage divers there were at any one time. In 1985 there were at least ten active Federal Admiralty claims on historic shipwrecks off the Keys. Excluding Mel Fisher's operations, these claims probably represented at least 40-50 professional commercial salvors. Fisher's archaeological salvage operation on the Atocha and Margarita sites from 1985-1987 involved as many as six boats on the water at any one time and over 100 divers, boat crew and site support staff. This included museum, office and laboratory staff. The passing of the Abandoned Shipwreck Act in 1988 greatly diminished the number of salvage contracts being applied for anywhere in Florida waters. Rather than apply for contracts in the Florida Keys, professional salvors chose to go to the Bahamas and the Caribbean to search for shipwrecks. Those who have continued their work periodically along the Keys have now gone 'underground'.¹⁷

Mr. Mathewson also stated that since the designation of the FKNMS in 1990 even fewer salvors have pursued permits. He estimates there are "probably 25-30 salvage divers periodically looking for shipwreck artifacts along the Keys", excluding Mr. Fisher's operations.¹⁸ Mel Fisher commercial treasure salvage companies include Motivation Inc., Salvors Inc., and Treasure Salvors, Inc. Fisher companies have at least three vessels, employing several individuals. David Pugh, who has researched and written in this area agreed that Geoff Chapman's estimate was exaggerated and

¹⁶ Memorandum from Duncan Mathewson, salvor archaeologist, to Ole Varmer, NOAA Office of General Counsel, (November 10, 1993) (Mathewson Memo).

¹⁷ Id.

¹⁸ Id.

that Mr. Mathewson's estimate was likely to be more accurate.¹⁹

The State Bureau of Archaeology estimates that there are 8-12 incorporated treasure salvage entities working or prepared to work in the Florida Keys.

1. Professional Treasure Hunters

Professional treasure salvors are those whose search, recovery, sale and/or display of recovered items is their primary source of income. According to available literature, over time the list of professional treasure hunters off the Florida coast included Art McKee (Real Eight Co.), Mel Fisher operations (TSI, formerly Jamestown Inc., formerly Treasure Salvors Inc., and Salvors' Inc., formerly Cobb Coin Co., and Motivation Inc.) and Robert Marx.²⁰

a. General Operation

In order to secure legal rights to discovered shipwrecks and protect their finds from other treasure hunters, admiralty claims are filed, and contracts with the State are entered into.

In the Florida Keys, the only professional treasure hunter operating full time is Mel Fisher through his company Salvors' Inc., formerly Cobb Coin.²¹ Salvors' Inc. has the majority of the State contracts for salvage which is for the 1715 fleet. Under these contracts the State retains 20% and Salvors' Inc. 80%. It is estimated that of Salvors' Inc.'s 80%, 40% usually goes to a general partner [Mel Fisher] and 20% to a subcontractor [such as Geoff Chapman]. This leaves 20% to split among investors.²²

¹⁹ 1993 conversation between NOAA Office of General Counsel and David Pugh.

²⁰ Others who allege to be willing and able to be full time commercial treasure salvors include Terrace Lyssenko of AT&T Recovery who reportedly salvages World War II vessels in the Great lakes, and Jay Usher (Discovery International) who alleges to have done commercial salvage in Australia.

²¹ J. Miller interview. Treasure Salvors, Inc. was sold to an Atlanta Group (F. Callaway, L. Hyre, P.K. Ridley and R. Barnes) for \$7,000,000 in 1986. See M. Greenwax, "Atlantans Buy Out Fisher's Treasure-Hunt Firm", The Atlanta Journal/The Atlanta Constitution, December 6, 1986 (Greenwax article).

²² See File Memo on Interview with Jim Miller.

In 1988, Throckmorton spotted seven different salvage vessels mailboxing in the Vero Beach area where the 1715 Fleet sunk. These vessels were working under concessions from the Fisher organization which holds the contracts with Florida.

In a October 21, 1991, Boston Globe article, Kim Fisher said they had 200 divers and 20 boats hunting for the Hampton Court and several other wrecks in Florida. The Hampton Court, part of the 1715 fleet, is an English frigate captured by the Spanish.

In 1992, Mel Fisher's operations used three vessels in his search for treasure in Coffin's Patch. In a 1992 permit application, Mel Fisher proposed a 5 day trip (weather permitting) and the use of an 8 inch airlift to vacuum in the emerald field at the Atocha. The overburden would be placed onto a barge which would be taken to Stock Island to be sorted for emeralds. In 1993, Geoff Chapman used one vessel for salvage operations at the Atocha.

b. Costs

When considering the economically efficient allocation of SCRs, the cost of exploration and recovery needs to be taken into account. Costs of operation generally include equipment, labor, overhead, and legal. According to Throckmorton, "[t]he cost of undersea treasure hunts is double that of projects carried out by competent scientists."²³

In his study of 16 Caribbean expeditions, Mr. Throckmorton²⁴ concluded that, setting aside the Atocha, 15 projects that cost altogether slightly over \$17 million returned to their investors a total of between \$3 and \$4 million. Of these 15, only the Concepcion II returned any profit to the investors. The most efficient treasure hunt spent \$500,000 for 16 days at sea.²⁵ The search for the Atocha from 1968 to 1971 cost about \$2 million.²⁶ From 1972-1986, the Atocha expedition costs were \$13 million.²⁷ In 1985, Fisher's annual expenses were estimated to

²³ Throckmorton article, supra.

²⁴ Id.

²⁵ See Throckmorton article, supra.

²⁶ See State of Florida, Dept. of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir., 1980) (Treasure Salvors II).

²⁷ Throckmorton article, supra.

be at \$1 and 1.2 million per year.²⁸ In 1986, continued search on the Atocha was estimated to be \$2 million per year.²⁹ Fisher is reported to also have spent \$1.2 million in legal fees in litigation with the State.³⁰

i) Equipment

The equipment for discovery and recovery includes vessel(s), magnetometers, sonar, metal detectors, propeller-wash devices, explosives, airlifts, and an assortment of excavation tools (e.g., hammers, chisels, crow bar, bags). Modern sonar field equipment that bounces sound waves off the ocean bottom for locating and accurate imaging of the seabed and its shipwrecks costs around \$200,000.³¹ A high quality underwater magnetometer, which detects minute variations in the earth's magnetic field to indicate the location of ferrous metals, can cost \$10,000.³²

ii) Personnel

Vessel personnel generally include a captain, crewmen, divers, and a marine archaeologist, if proper recording is to be conducted. Shore personnel may include coin experts, researchers, metallurgists, accountants, office personnel, conservators, marketers and lawyers. In a July 31, 1986 article, approximately 50 employees were reported as sharing in the division of that year's recovery for Treasure Salvors Inc.³³ However, in another article Treasure Salvors Inc. was reported to

²⁸ AP, "Investors Waiting for Riches from Treasure Find", Boston Globe, September 15, 1985 (AP article); W. Banks, "The Curious Deals Behind the Key West Treasure", Money, 46 (September 1985) (Banks article).

²⁹ Greenwax article, supra.

³⁰ Arnold article, supra.

³¹ P.F. Johnston, The Duty to Save Sunken Booty, 73 Business & Society Review 18-21 (1990) (Johnston article). The author is curator of maritime history at the Smithsonian Institution, also chairs the Advisory Council on Underwater Archaeology and the Archaeology Committee of the Council of American Maritime Museums.

³² Id.

³³ W. Smith, "Treasure: Anticipation mounts as Atocha founders near 'Divy Day'", Chicago Tribune, July 31, 1986 (Smith article).

have a staff of 125 employees.³⁴

iii) Time

Treasure hunting cannot be conducted year round due to weather and sea conditions, but is possible for several months a year. Funds available for vessels, equipment and personnel appear to be more of a constriction. However, if sufficient investors have been brought in to finance the search, great areas can be searched.

c. Investors/Lenders

Treasure salvage companies generally are structured as limited partnerships.³⁵ Usually, salvage operations are financed by limited partner investors and reportedly can run well over \$1 million a year.³⁶

Mel Fisher's operations have involved investments for specified periods, with each investor receiving a proportional share of what is recovered during that period.³⁷ For example, one prospectus provided that for \$1,000 investors would receive 1/10,000 of the treasure recovered over a year.³⁸ Investors in 1984 received only a few coins each as a return on their investment.³⁹ The greatest yield from the Atocha, and thus for investors, corresponds with the year the motherlode of the Atocha was discovered, 1985. The return on investment was reported to be 20-1.⁴⁰ Treasure Salvors Inc. (TSI) reportedly had 460

³⁴ Greenwax article, supra.

³⁵ Joseph Pereira, "Despite Considerable Risk, Many Investors Sink Cash into Hunts for Sunken Treasure" Wall Street Journal, September 2, 1987, at 21, col. 4 (Pereira article). See also "Some Still Like Limited Partnerships", Atlanta Constitution, November 5, 1990, at C4, col. 2. This was also confirmed by research of other articles conducted by legal intern George Richards. Based on Mr. Richards' literature search, and a search of files at the Securities Exchange Commission (SEC), there appeared to be only one treasure hunting corporation, Seahawk Deep Ocean Technology, filing 10-Ks with the SEC.

³⁶ Johnston article, supra.

³⁷ AP article, supra.

³⁸ Banks article, supra.

³⁹ Id.

⁴⁰ Arnold article, supra.

limited partners, comprised of 400 stockholders and 50 or so employees at the time.⁴¹ However, another more recent article reported that there were some 600 investors who divided the profits.⁴²

For Mel Fisher's operations, many of the smaller investors are individuals who have visited his museum. As of 1985, Fisher was reported to have raised \$15,000,000 over the years from investors.⁴³ In 1985, 1,016,000 shares of stock in TSI were outstanding. TSI was not registered with the SEC, and thus did not have to comply with disclosure rules, but was limited to the number of investors to whom it could sell shares. Mr. Fisher was accused of violating Florida security laws in 1973, and signed a consent order agreeing not to sell unregistered stock to more than the allowed number of investors.⁴⁴ Investors often traded shares through classified advertisements in the daily Key West Citizen. At that time shares ranged in price from \$20-\$1,000. The stock paid small dividends -- usually in items of treasure-- and only in years when treasure was recovered.⁴⁵

Mel Fisher has subsequently turned to limited partnerships to finance his treasure hunting. In 1985 there were three principal limited partnerships with claims on the Atocha -- a 30 unit limited partnership with large investors and two 500 unit deals with \$1,000 minimums. In the 30 unit limited partnership, known as Treasure Co. (established in 1980 to raise money for Atocha and Margarita), each investor agreed to pay \$150,000 in exchange for a share in the partnership's claim on 10% of all the treasure taken from the two ships. They also got to write off 100% of their investment and take a 10% investment tax credit.⁴⁶

With respect to the two larger unit limited partnerships; in one, unit holders divide up a 5% share of the haul from the Atocha, Margarita, and a third wreck; in the other, they receive 10% of the salvage from five Spanish 1715 fleet ships off Vero Beach. In these deals, partners write off 90% of their investment. These are one year, self-terminating partnerships.⁴⁷

⁴¹ Smith article, supra.

⁴² Arnold article, supra.

⁴³ Banks article, supra.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

A tax-shelter analyst at the accounting firm of Price Waterhouse in San Francisco, stated:

Such deals allow Fisher to keep the cash howing in, while maintaining tight control over the payout. And the annual renewal feature gives steady business to [the underwriter] who gets 10% in underwriting fees. . . . If you are serious about investing, you can't read the prospectus without laughing. All the cards are in the hands of the general partner. He's the one saying how much is down there, how much comes up in a year and what your actual distribution is.⁴⁸

When unable to attract enough investors, Mel Fisher has also financed his expeditions through sales and loans. In the 1970's Mel Fisher sold 5% of the Atocha for \$9,000.⁴⁹ A commercial fisherman, Brooks White, has given Mel Fisher \$40,000 for a 1/400 share. Around 1980, Mr. Frank Perdue lent TSI \$50,000. He later received \$80,000 in lieu of repayment of the loan, apparently derived from treasure given as security for the loan. In 1982, TSI did not have sufficient funds to meet current obligations and bank credit was not available. TSI owed \$40,000 in back payroll taxes and funding for further search of the mother lode was insufficient. Mr. Perdue loaned \$90,000 on November 19, 1982, payable in one year, no interest, and secured by a gold disc weighing 4 pounds, 7.2 ounces. The loan was evidenced by a promissory note, and an option agreement for purchase of the disc if the note was not paid in full at maturity.⁵⁰

d. Items Recovered

For most operations, the material recovered does not generally amount to much money for investors, or discoverers.⁵¹ This was confirmed by research of the reports filed by treasure hunters in admiralty court files located in Miami, Florida and Atlanta, Georgia. Of the 27 admiralty claim sites within the Florida Keys (excluding the Atocha and the Margarita), only eight reported finding any artifacts and for the most part, they were not items of intrinsic value. While they may have cultural or historic value, they do not represent significant value in the sales market. Items generally recovered include nails, iron pieces, guns, cannons, cannon balls, ballast material, tools, and occasionally some coins. The only finds in the area of what is

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Perdue, supra.

⁵¹ Throckmorton article, supra.

now the Sanctuary of any monetary significance are the Atocha and the Margarita. However, even the Atocha is subject to debate regarding its return to investors.

The Miami Herald report shows that the luckiest Atocha investors probably didn't even break even. The 3:1 return does not include investors. A low rated project such as the Atocha can achieve something, if good money is continually thrown after bad, but it is unlikely to return a profit.⁵²

On July 20, 1985, the main body of the treasure cargo (the mother lode) was uncovered. In the remainder of 1985, TSI divers recovered 1,041 silver ingots, 115 gold bars, 60 gold coins, 200 copper ingots, over 100,000 silver coins in some 30 chests, 750 pieces of silverware, 350 uncut emeralds, and various jewelry, muskets, swords and other ship's tackle and equipment. The mother lode contained around 20 times as much treasure as had been found previously from the Atocha.⁵³

By 1988, Mel Fisher was being sued by investors. In 1988, Business Week reported:

Much of Fisher's legal trouble stems from the fact that he greatly overestimated the Atocha booty's value. Before discovering the sunken ship, he guessed the goods on board would be worth at least \$400,000,000. but experts now say they're worth far less. The Atocha's 100,000 silver coins, it turns out, are not in great demand by collectors. Most aren't considered rare, and many were badly eroded by centuries in salt water. Fisher acknowledges that fewer than 10% of the goods can be restored to command the prices his investors expected.⁵⁴

e. Amounts of Money Recovered from Sales

As of 1978, material retrieved off the Atocha was valued at \$6 million; the cargo estimated at \$250 million.⁵⁵ The amounts recovered for particular salvaged items varies, although Fisher appears to be the best at maximizing the amount recovered. The TSI museum shop sold 18 coins in the first quarter of 1984 for a

⁵² Id.

⁵³ Perdue supra.

⁵⁴ A.N. Fin, "A Passion for Rifling Davy Jones's Locker", Business Week, (June 6, 1988) (Fin article).

⁵⁵ Treasure Salvors II, supra.

total of \$9,600, and sold 397 coins and other artifacts in 1985 for \$55,406.50. However, Money magazine questioned the use of these sales for valuation purposes.⁵⁶ In 1985, the Fisher Museum shop reported selling pieces of eight for as little as \$180 to as much as \$1,200 depending on the quality of their markings. "Yet Joel Rettew's Rare Coin Gallery in Beverly Hills, which tends to be frequented by serious collectors as opposed to giddy tourists, is currently selling pieces of eight . . . for \$85. Tom Tesoriero, antiquities specialist at Joel D. Coen Inc., a rare coin retailer in New York City, puts the top value of pieces of eight circa. 1600 at \$300, but adds: 'Those in less than top condition, which is often the case when they've been underwater, would be worth \$75 and down.'"⁵⁷

In 1987, Treasure Coins, Ltd. of NJ sold 80 silver pieces of eight from the Atocha getting \$350 to \$1,250, most selling in the lower range.⁵⁸ Also in 1987, at an auction held by Butterfield & Butterfield in Las Vegas, items from the Atocha and other Spanish ships rated under the State's point system were sold. Eight gold coins sold for \$5,500 [101 pt. value - \$54/pt.], a gold disc weighing 14.09 ounces for \$68,750 [1,036 pts. - \$66/pt.], two gold coins for \$6,600 [80 pts. - \$83/pt.], and a gold chain for \$110,000 [1,018 pts. - \$108/pt.].⁵⁹

According to a 1988 Wall Street Journal article, a sale at Christies in NY brought in \$2.9 million.⁶⁰ The projected value was between \$3-5 million. One of a kind objects did the best. A 5 foot chain of gold went for \$319,000. A gold handled cup went for \$275,000. Two astrolabes were sold to Portugal at \$85,000 and \$132,000. Silver objects ranged from \$1,000 to \$10,000 per item. Less than half of the "generic" treasure (uncut emeralds, silver ingots, gold bars) found buyers.⁶¹

A 1990 article indicates a single gold coin can bring \$8,000, if it is in good condition and relatively rare.⁶² According to a 1991 Boston Globe article, in the 1970s and 1980s people were lucky to get \$25 for a piece of eight, and Mel Fisher can get

⁵⁶ Banks article, supra.

⁵⁷ Id.

⁵⁸ Pereira article, supra.

⁵⁹ Perdue, supra.

⁶⁰ A. Berman, "Salvagers Try to Cash In", Wall Street Journal, June 22, 1988, at 22 (Berman article).

⁶¹ Id.

⁶² Johnston article, supra.

\$1,000 a piece, despite the increase in supply.

f. Profit

According to a Forbes magazine article in 1986 no treasure hunters are getting rich and few are finding any thing but tax writeoffs.⁶³ NOAA's investigation indicates that only Mel Fisher has made profits which appear to have been reinvested in subsequent operations. His gain in wealth from the Atocha and other wrecks appears modest at best.⁶⁴ However, Carl Paffendorf, President of Vanguard Ventures, Treasure Co.'s Glen Cove NY syndicating firm: "We've already received about \$4,500,000 in treasure from Fisher, enough to pay back all the investors now."⁶⁵

According to Business Week (1988), Donald Younger invested \$3,000 and got seven silver coins and fragments of two emeralds that Fisher said were worth a total of \$3,700.⁶⁶ An independent appraiser put the value at closer to \$1,000.⁶⁷

There is much exaggeration and hype by treasure hunters to stir up investment for continuing operations as there is a romantic aura around finding treasure and getting rich quick.⁶⁸ The costs of treasure hunting operations are high, with little or no return on the investment on nearly all ventures. Treasure hunting is a very high risk speculative investment that has been likened to "wildcatting" for oil, but perhaps more accurately

⁶³ R. Bauer, "Play LOOT-O", Forbes, June 16, 1986, at 146 (Bauer article). The article is based on interviews with investors, maritime attorneys, brokers, and treasure hunters. "Success" stories include Mel Fisher on the Atocha and the Margarita, Michael Hatcher and the Geldermalsen (the Nanjing, a China pottery ship), and Tommy Thompson on the Central America. See Sea Frontiers article, supra.

⁶⁴ Fin article, supra.

⁶⁵ Banks article, supra.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See Id. See also Pereira article, supra. (According to James Williams, editor of Treasure Magazine, "Treasure hunters hype the value of the treasure at the beginning to gain investor interest. Then the values do a slow decent. They get lower for the IRS, and even lower when it comes time to cash in the loot.")

compared to a lottery and other forms of gambling.⁶⁹

9. Ancillary Operations

Treasure hunters derive income from ancillary rights, such as reproduction of artifacts, admissions to museums, touring exhibitions, shares in partnerships, and selling their stories to publishers, and the media.

2. Part-time Treasure Hunters

Part-time treasure hunters are those who hunt for treasure on a regular basis for fun, and/or as a potential secondary source of income, but have other jobs as their primary source of income. Part-time treasure hunts are generally small operations where resources of a few individuals are pooled. Agreements regarding the disposition of recovered artifacts appear to range from formalized companies to informal understandings of the division of recovered material based on who found the wreck, who has the equipment, and who is paying the operating expenses.

For example, the Jupiter Wreck⁷⁰ is being excavated by a lifeguard, Peter Leo, and a marina operator, Dominic Addario, who also owns the 20 foot vessel used for recovery operations.⁷¹ A cannon was discovered on July 13, 1987 by the lifeguard while on duty. Shortly thereafter, he returned to the site with his friend who had a boat to recover the cannon. Upon obtaining legal advice, he formed a corporation, filed an admiralty claim, and requested that the court make the corporation the substitute custodian for the US Marshall. Over the next 10 days Mr. Leo used a metal detector to find four more cannons, a nine-foot anchor, and their first silver coin, dated 1658. Handfanning sand on the surface subsequently uncovered 1,000 coins, Spanish reales or pieces of eight, an 80 lb. silver ingot, 200 musket balls and 25 cannon balls, and a 10 gallon copper cooking pot.

Another example would be Dr. Molinari, a dentist, who has an admiralty claim on the San Jose de las Animas of the 1733 fleet. According to his application dated 8/21/92, he is self-funded and works the site "very part time . . . approximately 1 day per week or less." The items he anticipates recovering are: 1) pottery shards, 2) iron nails, 3) spikes, 4) ship's hardware, 5) intact

⁶⁹ See Pereira article, supra.

⁷⁰ Off Jupiter Beach, Florida, in state waters. See Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988).

⁷¹ Jane Neibch, "East Coast Wrecks: Florida's San Miguel De Archangel", Skin Diver 8 (January, 1992) (Neibch article).

wooden blocks, 6) sheaves, 7) glass, porcelain, lead fragments, 8) coins (corroded silver), and 9) ceramic figurines. His agreement with the State provides for an 80%-20% split. The marine archaeologists working with him are Mr. Mathewson, and Roger Smith, the State liaison who works for the Florida Bureau of Archaeological Research.⁷²

On Sept. 24, 1992, Duke Long claimed to have signed on with 10 other salvors as subcontractors to James King, holder of the admiralty claim for the 1733 fleet wreck, Capitana.⁷³ Mr. Long indicated he used a blower. Don Washington obtained a permit to work the same wreck. Mr. Washington contracted Mr. Mathewson to supervise the marine archaeology work and made arrangements with Kimbell's museum for preservation and display.

Tom Scott and Kimbell's Museum joined forces for a self-funded research and recovery operation to identify a wreck believed to be the Northern Light. Their application stated that all of the artifacts would be properly recovered, recorded, preserved and placed on display in a museum of public access. There were 14 individuals identified in the application, including 2 archaeologists, a biologist, divers, cameramen, and photographers.

These operations use similar equipment but appear to be on a much smaller scale than the full-time treasure hunters. Operating equipment includes a vessel, a small inflatable powerboat, a magnetometer, some buoys, a hand-held metal detector, an airlift and a few hand tools. Although marine archaeologists have been used in some instances, there is little or no evidence that marine archaeologists are ordinarily used.

3. Amateur Souvenir Collectors/Hobbyists

Amateur souvenir collectors/hobbyists are generally individuals or small groups that search for and recover artifacts on an intermittent, ad-hoc basis, primarily for recreation. They may use metal detectors and small scale excavation techniques, e.g., hand fanning, chisels, and crowbars to collect souvenirs. Operating expenses are low and covered by the individuals conducting the activities. Souvenir collectors may use their own vessels or conduct the activity from dive charter vessels. Sites that souvenir collectors select include those that may have been the subject of a larger salvage operation in the past, and the

⁷² See Dr. Molinari's permit application dated August 21, 1992, (permit issued as FKNMS-02-92) in NOAA Sanctuaries and Reserves Division permit files.

⁷³ Kevin Wadlow, Keynoter (October 3, 1992) (Wadlow article).

areas around established recreational wreck dive sites routinely visited by dive charters, or accessible to privately owned vessels.

C. Other Groups Interested in Historic Sanctuary Resources (Recreational Divers, Archaeologists, Historians, Educators, Fishermen, and the Public Interested in its History and Cultural Origins)

Treasure hunters value SCRs because of the intrinsic or antique value of cargo [gold, silver jewels], and the value of the coins. Some also appreciate their historic, cultural and artistic value which also increases the market value of the materials recovered. According to Anthony Phillips of Christies in NY, a scholarly catalog of historical significance increases the value of the items.⁷⁴

Other diverse groups are interested and use SCRs. These multiple use interests often result in conflicts among the users and with the primary objective of protecting Sanctuary resources. SCRs are clearly valued by society. The value of SCRs is difficult to quantify but can be estimated by directly or indirectly calculating the costs, and/or businesses related to use by various groups, and also society's interest in their continued existence. There is an intrinsic value that may be placed on objects which people may never physically come to the Sanctuary and use, but which they will appreciate nonetheless for their historical significance and value. There are many diverse groups comprised of people who want to preserve the wrecks for present and future generations and consider the destruction of these wreck sites to be against the public interest.

SCRs are directly used by scuba divers, snorkelers, boaters, fishermen, researchers, educators, historic preservationists and treasure hunters. SCRs that are properly removed and conserved are also a direct attraction for museums.

The legislative history of the ASA identified three private sector groups with an active interest in abandoned shipwrecks. The largest group was the sport diving community, approximated in 1984 to be 2 million people.⁷⁵ In 1994-1995, the National Survey on Recreation and the Environment (NSRF)⁷⁶ estimated that 7.24% (14.5 million) of those 16 years or older engaged in snorkeling and/or scuba diving in the United States. The second

⁷⁴ Berman article, supra.

⁷⁵ H.R. Rep. No. 98-887, 98th Cong. 2d Sess. Part 1 (1984).

⁷⁶ NSRF; U.S. Forest Service, Outdoor Recreation and Wilderness Assessment Group, Athens, GA.

largest group was the archaeological and historic preservationists' community, approximated at several thousand people. The third and smallest group was the treasure hunter community.⁷⁷

SCRs may therefore be factored in making a particular area a tourist destination for divers, boaters and others. Generally, the SCRs contribute to the totality of the recreational experience in the FKNMS.⁷⁸ Whether the use is directed toward searching for wrecks on a dive trip or an ancillary use through reef fishing, diving and/or snorkeling, the preservation and protection of wrecks yields benefits to users at all levels.

For example, from June 1995 to May 1996, in the Florida Keys it has been estimated that scuba divers and snorkelers (visitors and residents) had a total recreational user value of \$170,590,000.⁷⁹ An estimated 831,019 snorkel/scuba divers used the Florida Keys, accounting for 3,053,100 user days.⁸⁰ Of that group approximately 18% participated in wreck diving. For the Keys, this translates into 39,310 wreck divers or 130,200 user days.⁸¹ Each diver had a daily recreational user value of \$77 or a total user value for all wreck divers of \$7.4 million. The value of the resource can be diminished by cumulative impacts by recreational users or by some harmful activity or use that is incompatible with the long-term protection of the resource. Degradation of the resource will diminish its value and subsequently its use. Thus, degradation or destruction of the resource will lead to negative economic impacts.

The exploration and salvage of SCRs by treasure hunters can cause significant environmental harm and thus has related socioeconomic costs. However, there are circumstances under which there may be socioeconomic benefits from environmentally and archaeologically sound recovery, and conservation of these resources. The SCRs potentially provide economic benefits to the users and related industries as part of an aesthetic package of resources in the

⁷⁷ H.R. Rep. No. 98-887, 98th Cong. 2d Sess. Part 1 (1984).

⁷⁸ See F.W. Bell, The 1990 Florida Recreational Survey.

⁷⁹ Visitor Profiles: Florida Keys/Key West, Leeworthy and Wiley, National Oceanic and Atmospheric Administration, November 1996; A Socioeconomic Analysis of the Recreation Activities of Monroe County Residents in the Florida Keys/Key West, Leeworthy and Wiley, National Oceanic and Atmospheric Administration, June, 1997 (Leeworthy and Wiley reports).

⁸⁰ Id.

⁸¹ Id.

Sanctuary.

1. **Historians, Marine Archaeologists, Teachers and Students**

SCRs contain information and stories of the past, particularly the maritime heritage of the area. Such information supports or rebuts theories of historical events, as well as explains or confirms how people lived, how their vessels were constructed and operated, how and why we came to where we are today. For example, the "Dive Into History Program" gets divers interested in shipwrecks under the training and supervision of professionals for conducting research. The value of this information to the researchers, the divers, and the general public is difficult to quantify, but may well be of much greater value than the precious cargo the vessels may contain.

2. **Museums**

Museums value SCRs as objects for conservation and display to attract use of the museum by visitors and tourists, but also researchers, educators and students. In 1990, Kearney/Centaur estimated 834,715 visitors or 862,368 user days for archeological and historic sites. Between June 1995 and May 1996, there were approximately 859,934 visitors and residents that went to museums and historic sites in the Florida Keys, accounting for a total of 1,875,300 user days.⁸² The ASA Guidelines⁸³ cite the Swedish success story of the Vasa and suggest museums as a potential source of funding for archaeological programs.⁸⁴ In 1997, Mel Fisher's archaeologist, Mr. Mathewson, estimated that 500,000 people visited the Mel Fisher museum last year.⁸⁵

3. **General Public: Existence/Bequest/Option Value or Non-Use Value**

SCR's also have value to those who appreciate their existence even though they do not directly use, touch or see them. In their 1989 book, Using Surveys to Value Public Goods: the Contingent Valuation Method, Robert Mitchell and Richard Carson identified four types of existence values falling into two

⁸² See Leeworthy and Wiley reports.

⁸³ 55 Fed. Reg. 50128 (December 4, 1990).

⁸⁴ See also, generally, Throckmorton article, supra, and Arnold article, supra.

⁸⁵ Between June 1995 through May 1996, the total number of visitors and residents visiting museums in the Florida Keys was estimated to be 418,812. Leeworthy and Wiley reports.

categories, vicarious consumption and stewardship.

In the case of vicarious consumption values, utility is gained from knowing about the consumption of others. The 'others' may be generalized, or they may be particular individuals known to the respondent. . . . We distinguish two types of stewardship values. Bequest values exist when someone enjoys knowing that the current provisions of an amenity will make it available for others--family or future generations--to enjoy in the future. Also part of stewardship are inherent values, which stem from the respondent's satisfaction that an amenity itself--a wilderness area, for example--is preserved regardless of whether it will ever be used by anyone.⁸⁶

Existence value has been applied to environmental resource management by the Department of Interior, and to marine resources in law suits such as the Exxon Valdez involving damages to natural resources. In a May 19, 1993 paper submitted to Coastal Management entitled "The Value of Historic Shipwrecks: Conflicts and Management", authors Yoshiaki Kaoru and Porter Hoagland suggest a management framework that includes the application of theories of nonmarket valuation to management of SCRs. In this paper, three types of non-use values were identified: existence, option, and bequest.

Existence value was first discussed by Krutulla (1967) regarding preservation of natural resources. . . . Option value, first introduced by Weisbrod (1964), is defined as the premium over expected future benefits from historic shipwreck resources that individuals are willing to pay in order to preserve future access (Smith 1987; Freeman 1984; Greenley, Walsh and Young 1981). Individuals may be uncertain about the future availability or importance of one or more particular shipwrecks, and the 'option value' concept is a method of characterizing this value. . . . Bequest value is defined as an individual's willingness to pay for the satisfaction of preserving particular historic shipwrecks for future generations (Walsh, Loomis and Gillman 1984; and Sutherland and Walsh 1985).

Vrana (1992) conducted the only study that has evaluated the recreational use benefits of a marine park with historic shipwrecks. In his survey, on average, a respondent was willing to pay \$13.50 for a hypothetical daily use permit to

⁸⁶ R. Mitchell & R.T. Carson, "Using Surveys to Value Public Goods: The Contingent Valuation Method", Resources of the Future [Wash. D.C.] 463 (1989) (Mitchell/Carson article).

dive in a Great Lakes aquatic park.⁸⁷

IV. A DESCRIPTION OF THE REPORTING, RECORDKEEPING, OR OTHER COMPLIANCE REQUIREMENTS OF THIS RULE

The reporting and recordkeeping requirements under this rule is limited to the SCR permit system which consists of: 1) a survey/inventory permit (phase 1), 2) a research/recovery permit (phase 2), and 3) a Special Use permit for deaccession/transfer (phase 3). No permit is required for the search with non-intrusive remote sensing devices. However, a permit is required if there is even limited excavation for identification purposes because of the potential loss or injury to Sanctuary resources (natural and historic).

Pursuant to requests from commercial treasure salvors, particularly the HSSPC to ease the permit application process, draft survey/inventory guidelines and draft model permit forms have been developed and provided to the HSSPC for their distribution, review and comment. Phase 1, the survey/inventory permit, should not be difficult or burdensome for a professional commercial treasure salvor or even a para-professional. The burden of doing an environmental assessment is commensurate with the proposed area to be worked and the diversity of natural habitat in the area, however, as there will be little or no excavation permitted, the assessment should only take a paragraph or two for areas away from sensitive habitat. The permit report will simply summarize the remote sensing and other research and attach corresponding data and information. This is basically the same as the Florida State, phase 1 permit, in its contracts. There will be no duplication of effort. While not previously required in salvage cases outside State waters, it is a familiar requirement that is not unduly burdensome.

With regard to phase 2, the research/recovery permit, there are existing NMS Archaeological Research Guidelines available to assist in developing an application for research/recovery. However, pursuant to request from the HSSPC, draft Research/Recovery Guidelines and draft model permits have been developed and distributed to the HSSPC for dissemination, review, and comment. Many of the requirements under this phase are already required in existing State phase 2 contracts as well as Federal admiralty court requirements commonly referred to as the Cobb Coin guidelines. However, the Sanctuary application process may be more rigorous to ensure the compliance with FAP standards. The permit/application is generally not expected to exceed 15 pages, but is apparently more rigorous than existing State contracts which are generally 2 pages for this phase. The reporting requirements are flexible, but must meet FAP scientific

⁸⁷ Kaoro/Hoagland article, supra.

standards. Note that the FAP requirements upon permittees apply to public and private research uniformly.

Guidelines for phase 3, a Special Use Permit for deaccession/transfer, have yet to be developed, but will be done so through a public process in which commercial treasure salvors will participate. The development of criteria and the decision making process for privatization of public resources is expected to be difficult and potentially time consuming at the outset. However, for the most part, the paperwork burden is largely addressed in phase 2.

V. A DESCRIPTION OF THE STEPS NOAA HAS TAKEN TO MINIMIZE THE SIGNIFICANT ECONOMIC IMPACT ON SMALL ENTITIES CONSISTENT WITH THE STATED OBJECTIVES OF APPLICABLE STATUTES, INCLUDING A STATEMENT OF FACTUAL, POLICY, AND LEGAL REASONS FOR SELECTING THE ALTERNATIVE ADOPTED IN THE FINAL RULE AND WHY EACH ONE OF THE OTHER SIGNIFICANT ALTERNATIVES TO THE RULE CONSIDERED BY NOAA WHICH AFFECT THE IMPACT ON SMALL ENTITIES WAS REJECTED

In the 25 year history of the National Marine Sanctuary Program, and consistent with the FAP, commercial treasure salvage has never been permitted in any national marine sanctuary prior to this plan. In fact, the first national marine sanctuary, the USS Monitor National Marine Sanctuary, was designated in 1975 specifically to protect and conserve this historic shipwreck for the public. Since then every ecosystem-wide sanctuary has established regulations to protect and manage historic shipwrecks within them and only permitted limited recoveries that were determined to be in the public interest, and then artifacts had to be conserved in a museum of public access.

A. Relevant Statutes and Policies

Before Congress designated the FKNMS in 1990, and well before the implementing regulations were drafted, the commercial treasure salvage business in the Florida Keys was already subject to a variety of Federal and State regulations depending on the location of the wreck and its legal status.

1. Florida Submerged Lands and Waters

Under the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., title to submerged lands from the coastal baseline out to 3 miles was transferred to the states.

2. Florida Statutes

The State of Florida has recognized shipwrecks as the cultural heritage of its people and of all people.⁸⁸ The State has further recognized its responsibility to protect and preserve that heritage by ensuring that any recovery from shipwreck sites is performed in a safe and archaeologically responsible manner so that the cultural value of artifacts is preserved. Accordingly, the State developed a comprehensive plan designed both to ensure protection of the historical and archaeological value of shipwreck artifacts, and to provide liberal compensation to salvagers. The plan is outlined in Chapter 267 of the Florida Statutes and Fla. Admin. Code Rules 1A-31.01 - 1A-31.12.⁸⁹

3. Florida Exploration and Salvage Contracts⁹⁰

As previously indicated, historic shipwrecks in Florida are associated with three fleets: 1) the 1733 fleet - through the Upper and Middle Keys, such as the San Pedro which is located within the Sanctuary; 2) the 1622 fleet - around the Marquesas and Tortugas, such as the Atocha which is also within the Sanctuary; and 3) the 1715 fleet, which is outside the Sanctuary around Fort Pierce, such as the Urca de Lima.

Basically, the State's program requires treasure hunting companies to obtain contracts with the State for conducting exploration and salvage operations on shipwrecks sites. Any treasure hunter interested in working a site may apply to the State for a contract to conduct salvage operations in a specified area.⁹¹

Exploration contracts are agreements between treasure hunters and the State for remote sensing and other non-intrusive exploration activities. These agreements may be amended in a second phase to allow excavation, provided necessary environmental permits are obtained. These agreements require compliance with archaeological guidelines and an annual report that is reviewed by a professional archaeologist.

⁸⁸ See Section 267.061, Fla. Stat.

⁸⁹ Formerly Section 267.01-08 (1965) and Fla. Admin. Code Rules 33-1.01-.11 (1966).

⁹⁰ The underlying State statute governing the archaeological research of these shipwrecks uses the term "agreement" as opposed to permit or contract.

⁹¹ Fla. Admin. Code Rule 1A-31.03.

Salvage contracts are agreements between that State and a salvage company to remove material in a manner consistent with State approved archaeological guidelines. A salvage contract describes the site, the method of salvage, and the compensation. The material found is split; 20% to the State and 80% to the salvor. Eligibility for a salvage contract is determined by professional qualifications, methodology, equipment, personnel and other factors.⁹² A salvage contract also provides for storage and safekeeping of recovered materials, for the cleaning and preservation of materials by a State laboratory for the purpose of scientific and historical evaluation, and for comprehensive, detailed record-keeping.

The State determines whether the salvage company has sufficient equipment and financing, as well as capable personnel so that the operation will meet the State's goal of maximizing safety and preservation.⁹³

During actual salvage operations, the State assigns at least one salvage and exploration field agent to work with the salvor aboard the salvage vessel,⁹⁴ both for the purpose of diving and photographing materials in their original positions on the ocean floor, and for the purpose of recording and tagging each artifact as it is brought aboard the vessel.

By the terms of the contract, all materials recovered from wreck sites must be stored in a manner and in facilities approved by the state marine archaeologist since artifacts which have been in a marine environment for a long period of time begin an immediate deterioration process once exposed to air. The artifacts must be stored immediately in proper conditions and then processed through sophisticated laboratory techniques in order to become stabilized for exposure to the non-marine environment.

For almost 30 years, the State's program has been in effect to accomplish the following objectives: 1) protection and development of the cultural heritage of the people through monitored, archaeologically responsible salvage operations; 2) preservation of the artifacts themselves by channeling them through the State's sophisticated laboratory facilities;

⁹² In addition to a salvage agreement, treasure hunters need to obtain dredge and fill permits from the State Department of Environmental Protection (DEP) (formerly the Department of Environmental Resources-DER) and/or the Army Corps of Engineers (COE). They would also need permission from the State submerged lands authority.

⁹³ Fla. Admin. Code Rules 1A-31.03(2)(4), 1A-31.11(5).

⁹⁴ See Fla. Admin. Code Rules 1A-31.10.

3) prevention of "range wars" between competing salvagers by allowing only one salvage company to work a wreck site at a time; and 4) provisions for liberal compensation for the salvage companies.

The salvage companies who have worked shipwreck sites under contract with the State have generally been satisfied with the program. The salvage companies benefit because the State can ensure that no one encroaches on their salvage contract areas,⁹⁵ and because the State's field agents, archaeologists, and lab facilities provide invaluable assistance to the salvage companies in terms of recording, preservation and expert processing or recovered artifacts. Furthermore, the State's supervision of the salvage operations and tagging of artifacts enhances market value as it provides authentication -- forgeries, counterfeits, and salting of sites are common problems in the treasure hunting and distribution business.

4. The Federal Archaeological Program (FAP)

The FAP is the program developed by the Department of Interior and implements the Federal Preservation Statutes for DOI and other Federal agencies. The FAP includes the Antiquities Act (AA), ARPA, the National Historic Preservation Act and the ASA. Although the Antiquities Act has not been repealed, for the most part it has been superseded by ARPA which was enacted to strengthen historic resource protection and management as well as address deficiencies of the AA.⁹⁶ ARPA was enacted to improve on the protection to archaeological resources on "public lands" and Indian lands. By definition, the scope of ARPA does not include national marine sanctuaries.⁹⁷

⁹⁵ Section 267.13 Fla. Stat. and Fla. Admin. Code Rule 1A-31.12 provide penalties for persons exploring, or altering or removing artifacts protected by Section 267 on state lands without a salvage or exploration contract.

⁹⁶ See sections 470cc(h)(1)&(2), ARPA, which recognize the validity of existing Antiquities Act permits but prohibit issuance of Antiquity Act permits for any activity authorized under ARPA. Lars Hanslin, Senior Attorney for the NPS, confirmed that the Antiquities Act is basically "dead" law and that any new permits for the collection of antiquities on "public lands" would be issued under ARPA.

⁹⁷ ARPA defines "public lands" to mean: (A) lands which are owned and administered by the United States as part of-- (i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are

NOAA does not have title to State submerged lands which might be within a particular sanctuary. Title to submerged lands from the coastal baseline out to three miles was transferred to the States by the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 *et seq.*, at the same time Federal jurisdiction and control over natural resources on the Outer Continental Shelf was clarified under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* Subsequent clarification concerning historic resources was made in the ASA whereby title to abandoned shipwrecks found in State submerged lands and waters was claimed by the United States and transferred to the State.

The preservation of artifacts and associated information is in the public's interest and since there may be just one opportunity to collect all of the information properly the qualifications of personnel and the methodology to be used are critical. As indicated in Klein v. Unidentified Wrecked and Abandoned Sailing Vessel (Klein), 564 F. Supp. 1562, 1564 (S.D. Fla. 1983), *aff'd* 758 F. 2d 1511 (11th Cir., 1985), "it is in the public interest that if artifacts are to be removed from the wreck the removal be conducted with scrupulous care."⁹⁸ "The historic value of each artifact is enhanced by careful monitoring of archeological provenance." Id.

Private profit from the display of artifacts collected pursuant to the NMSA is not precluded by the FAP. The Sanctuary Program may permit private museums to display historic resources and those museums may make a reasonable profit from display provided it does not undermine the public's access to public resources.

5. The National Historic Preservation Act of 1966 (NHPA)

The NHPA which was enacted in order to preserve, restore, and maintain for "the inspiration and benefit of the people"⁹⁹ the federally owned sites, structures, and objects of historical, architectural or archaeological significance. Section 106 of NHPA requires that a Federal agency take into account the effects of its undertakings on properties included in or eligible for inclusion in the National Register of Historic Places, and prior to approval of an undertaking, to afford the Advisory Council on

under the jurisdiction of the Smithsonian Institution. 16 U.S.C. § 470bb(3) (emphasis added).

⁹⁸ Klein involved artifacts from a shipwreck in an underwater national park which the U.S. had fee title to the submerged lands.

⁹⁹ See Executive Order No. 11593, 36 Fed. Reg. 8921 (May 13, 1971).

Historic Preservation (Advisory Council) a reasonable opportunity to comment on the agency's undertaking.¹⁰⁰

Section 110(a)(2) of NHPA, codified as 16 U.S.C. § 470h-2(a)(2), requires that each agency exercise caution to assure that property that may be eligible for inclusion is not "inadvertently" transferred or sold. This language has been interpreted to mean the section 106 process must be followed before the property is transferred or sold¹⁰¹. The purposes of the section 106 process is to identify potential conflicts between historic preservation concerns and the needs of Federal undertakings in the public interest.¹⁰²

The NHPA also has a strong public policy to preserve, restore, and maintain for the benefit of the public any federally owned objects of historical or archaeological significance. The NHPA does not preclude an agency from transferring or selling historic artifacts which are listed or may be eligible for listing in the National Register as long as the agency follows the section 106 process or in the alternative, enters into a Programmatic Agreement with the Advisory Council on Historic Preservation.

6. Abandoned Shipwreck Act of 1987 (ASA)

The United States via the ASA asserted title to three categories of shipwrecks within State's submerged lands and transferred title to the States, except for those on public lands and Indian lands.¹⁰³ The ASA expressly precludes the application of the law of salvage and the law of finds to ASA shipwrecks. Thus, the management of these shipwrecks rests with the states, not the admiralty courts. The ASA represents a compromise between the often conflicting desires of preservationists, sport divers, and treasure hunters.¹⁰⁴

As directed by the ASA, the NPS developed guidelines to assist the States and Federal agencies in developing legislation and regulations for effective management of shipwrecks in waters under their ownership or control. "The Abandoned Shipwreck Act

¹⁰⁰ 36 C.F.R. § 800.1(a).

¹⁰¹ Telephone conversation with Lars Hanslin, Senior Attorney for the NPS, May 5, 1992.

¹⁰² 36 C.F.R. § 800.1(b).

¹⁰³ 43 U.S.C. §§ 2101-2106.

¹⁰⁴ See Owen, "The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea", 19 Journal of Maritime Law & Commerce 499, 500 (1988).

Guidelines and the philosophy upon which they are based are the result of three decades of shipwreck management experience within units of the national park system."¹⁰⁵ While the guidelines state they are advisory and therefore non-binding upon the States and Federal agencies, NOAA regulations incorporate FAP guidelines. Thus, NOAA is required to comply with the ASA guidelines to the extent practicable.

a. **ASA Guidelines for State Managers**

The ASA Guidelines suggest that the states assign the authority over State owned shipwrecks to an appropriate, adequately staffed agency which involves interest groups, and advisory boards in its long-term management. Cooperation with other states and Federal agencies is encouraged, with the specific suggestion that states integrate shipwreck management into the states' coastal zone management plans. While provision is made for the recovery of shipwrecks for the public by the private sector, the guidelines specifically state that recovery using explosives, dredging or "propeller wash deflectors" is unscientific and would destroy the environment surrounding the site as well as the historic information it contains.¹⁰⁶ Of particular import is the suggestion that States create and manage underwater parks or preserves to provide additional protection to historic shipwrecks. While these protected areas are to accommodate multiple use values, the guidelines specifically state that "souvenir collecting, commercial salvage, and treasure hunting at shipwrecks (whether historic or non-historic) should be prohibited in underwater parks and preserves."¹⁰⁷

b. **ASA Guidelines for Federal Managers**

The ASA Guidelines for Federal shipwreck management programs are not as stringent as the AA, ARPA and other historic preservation acts. Because of these differences, the Committee on Merchant Marine and Fisheries said that "Federal agencies . . . should manage their historic shipwrecks consistent with the (Abandoned Shipwreck Act) guidelines to the extent consistent with other applicable federal law."¹⁰⁸ The guidelines set forth the important components of sections 106 and 110 of the NHPA, the permit requirements of ARPA for recovery of historic shipwrecks, the applicability of section 307 of the CZMA, the use of the

¹⁰⁵ 55 Fed. Reg. 50116, 50120 (December 4, 1990).

¹⁰⁶ Id. at 50132.

¹⁰⁷ Id. at 50138.

¹⁰⁸ H.R. Rep. No. 100-514, 100th Cong., 2d Sess. Part 2, at 7 (1988). See also 55 Fed. Reg. 50116, 50125 (December 4, 1990).

Abandoned Property Act, the applicability of certain NPS guidelines, and the special protection that shipwrecks are to be given in National Parks and national marine sanctuaries and other Federally managed areas. Thus, NOAA and the State of Florida are directed to prohibit souvenir collecting, commercial salvage, treasure hunting, and other activities which damage historic shipwrecks in national marine sanctuaries.

7. NMSA

The NMSA gives the Secretary of Commerce¹⁰⁹ the authority to designate and manage "certain areas of the marine environment [that] possess conservation, recreational, ecological, historical, research, education, or esthetic qualities which give them special national significance."¹¹⁰ Sanctuary resources are defined as "any living or non-living resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary."¹¹¹ The NMSA is one of a few statutes which has integrated historic preservation into environmental protection.

Under the NMSA implementing regulations, "historical" means possessing historical, cultural, archaeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events."¹¹² The NMSA's implementing regulations require that management of these resources be consistent, to the extent practicable, with the declared national policy for the protection and preservation of these resources as stated in the NHPA, the Archeological and Historical Preservation Act of 1974, 16 U.S.C. §§ 469 et seq., and the ARPA.

The protection of national marine sanctuaries and their resources is primarily accomplished through individual Sanctuary regulations, research, education, and other non-regulatory management activities. However, there are also broad NMSA provisions applicable to all sanctuaries, and perhaps the only means of protecting sanctuaries statutorily designated while implementing regulations and management plans are being developed.

¹⁰⁹ The authority to designate and manage National Marine Sanctuaries has been delegated to NOAA. DOO 10-15, DAO 25-5.

¹¹⁰ 16 U.S.C. § 1431(a)(2) (emphasis added).

¹¹¹ 16 U.S.C. § 1432(8).

¹¹² 15 C.F.R. § 922.2(c).

The NMSA findings state that the Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high-water mark.¹¹³ While the effects of particular activities has led to enactment of resource-specific legislation, these laws cannot in all cases provide a coordinated and comprehensive approach to the conservation and management of special areas of the marine environment.¹¹⁴ The overlap of Federal and State laws and jurisdictions in the marine environment is complex. NOAA is directed to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities. Another NMSA purpose and policy is to facilitate to the extent compatible with the primary of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.¹¹⁵ The NMSA designation process and subsequent management provisions require consultation with other Federal, State and local agencies, Regional Fishery Management Authorities, as well as Indian tribes and Congress.¹¹⁶

Protection of special marine areas can contribute to maintaining a natural assemblage of living resources for future generations.¹¹⁷ A purpose of the NMSA is to maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate.¹¹⁸

¹¹³ 16 U.S.C. § 1431(a)(1).

¹¹⁴ 16 U.S.C. § 1431(a)(3).

¹¹⁵ 16 U.S.C. § 1431(b)(5).

¹¹⁶ Protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas. 16 U.S.C. § 1431(b)(6). See 16 U.S.C. §§ 1433, 1434 for the requirements of consultation including consultation with Congress on identifying sanctuaries, consultation with other Federal agencies in developing the Resource Assessment for the EIS, consultation with state coastal zone management programs, Congressional review of sanctuary plans and regulations and continuing interagency coordination or consultation after the sanctuaries are designated.

¹¹⁷ 16 U.S.C. § 1431(a)(6).

¹¹⁸ 16 U.S.C. § 1431(b)(9).

Protecting special marine areas involves protection of habitat as well as the species dependent upon the area. Thus, Sanctuaries are management tools for conservation of the biodiversity of the marine environment and the underlying ecosystem. A review of the NMSA provisions reveals that NOAA's authority to protect and manage sanctuaries and sanctuary resources is very broad and comprehensive.¹¹⁹

8. FKNMSPA

On November 16, 1990, the FKNMSPA was signed into law. The FKNMSPA specifically gives the Secretary of Commerce, through NOAA, the jurisdiction and authority to protect and manage Sanctuary resources in conjunction with the State of Florida. This in turn has given NOAA stewardship or trustee responsibilities of historic shipwrecks in the Sanctuary and the means by which to prevent unwanted claims under admiralty law of salvage and the law of finds. Thus, for abandoned shipwrecks on State submerged lands of the Sanctuary, the State has title and NOAA is a co-trustee for protection and management. Outside State submerged lands of the Sanctuary, NOAA is the trustee for protecting and managing historic shipwrecks which are public resources. In an April 30, 1997 order in Fisher, supra, the United States District Court for the Southern District of Florida stated that the FKNMSPA bars the application of admiralty law of salvage and finds to historic Sanctuary resources.

¹¹⁹ E.g., sections 301 and 302 describe the policy and findings of the NMSA. 16 U.S.C. §§ 1431, 1432. Section 306 of the NMSA provides broad language that fortifies enforcement authority for prohibited activities. 16 U.S.C. § 1436. The various aspects of the NMSA enforcement authority are provided in section 307, including making clear that the authority to designate, protect and manage sanctuaries includes the United States territorial sea and exclusive economic zone, consistent with international law. 16 U.S.C. § 1437. Section 309 provides for the promotion and coordination of efforts for the use of national marine sanctuaries for research, monitoring and education purposes. 16 U.S.C. § 1440. Section 310 authorizes the issuance of special use permits and provides for the collection of fees. 16 U.S.C. § 1441. Under section 312, NOAA may undertake or authorize all necessary actions to prevent or minimize the destruction or loss of, or injury to, Sanctuary resources, or to minimize the imminent risk of such destruction, loss or injury. 16 U.S.C. § 1443. Section 312 is consistent with the polluter pays principle underlying many environmental laws.

B. Meeting with Commercial Treasure Salvors to Identify Problems and Potential Solutions (Scoping Meeting 4/91 and Treasure Salvage Workshop 11/91)

In 1991 NOAA held numerous meetings with various user groups, including treasure to solicit their comments and concerns about the Sanctuary for consideration in developing the proposed management plan and regulations for the Sanctuary. NOAA met with treasure salvors several times throughout the process to solicit their comments. NOAA met with the treasure salvors to give them an opportunity to discuss their business, as well as their concerns about the Sanctuary. NOAA also established a seat on the SAC for treasure salvors.¹²⁰

April 1991 Scoping Meetings

At these meetings written comments were received from five commercial treasure salvors, an archaeologist/salvor and a student interested in finding common ground between sparring interest groups. They appear consistent and reflect the concerns of other commercial treasure salvors.

Jack Haskins commented that commercial treasure salvage should not be shut down and noted that it is consistent with the free enterprise system, which is at the core of this country.

Don Washington stated that most commercial salvors are more responsible than Jacques Cousteau for archaeological research and recovery as well as conservation-preservation (museums). He noted the public benefit that has been accomplished through private financing. He argued that you can't legislate the industry based on a few bad examples. He suggested that there should be cooperation between the private and public sectors, rather than confrontation.

¹²⁰ While NOAA worked with the initial salvor representative on the SAC and independently as PRIDE's representative, the representative resigned from the SAC shortly after the Department of Justice filed a complaint in April 1992 against Mel Fisher, Kane Fisher and Salvors' Inc. for their destruction to Sanctuary resources, including seagrass. While NOAA sought a replacement for the seat on the SAC, treasure salvors focused their efforts on a Congressional repeal of the Sanctuary and rejected participating on the SAC, claiming that it was inconsistent with their mission. However, after the draft plan was released in the Spring, 1995, the treasure salvors reversed their position. Shortly thereafter, the treasure salvors chose a new representative for the SAC.

Pat Yanaton, the leader of the salvors' group called Preservation of our Right as Individuals to Discovery and Exploration (PRIDE) commented that NOAA should consider the socioeconomic impact and said that the law requires that the socioeconomic of a community must not be compromised, i.e., the commercial treasure salvor community. He noted the private preservation of salvaged treasures for public good through museums as a solution to the problem of inadequate Federal and State funding for recovery. He said if the artifacts are not recovered, they will perish. Duplicative items should be available for sale by the salvors.

Charles Troutman also of PRIDE stated that environmental corrosion is destroying the historic wrecks, specifically criticizing NOAA for letting the Monitor deteriorate without research and recovery. The NPS-ASA Guidelines won't address the threat to SCRs, and specifically said that the ASA (50/50) split is not enough return for commercial treasure salvors.

Duke Long explained his role in salvage has been as an artist/cartographer and diver. He stated that salvors are willing to follow accepted archaeological standards, but they want to continue to work. His work and the work of other salvors contributes to the public good (resource recovery, conservation in museums). A lot of time and money has been invested by those in the commercial treasure salvage industry.

Duncan Mathewson (archaeologist/salvor) stated there is a need to protect and preserve SCRs by preventing the careless recovery of intact artifacts. Also, there is a need to prevent the deterioration of SCRs from the environment. He suggested that we should not unduly restrict public access. He encouraged the use of an underwater maritime museum, underwater trails and cultural tourism.

Jay Jeffries (student marine affairs) submitted a plan for management that identified 6 interested user groups, and suggested a balancing of their needs and interests. He suggested utilizing the cooperative methods employed by salvors and archaeologists on the salvage of the Central America as a model, as well as the ASA and ASA guidelines. He also suggested the establishment of a Committee on SCR Management. He recommended that the SCR Management Plan list and characterize SCRs, determine their historic value per National Historic Trust guidelines and determine the recreational value (access). There should be a case-by-case review and a filing fee for support operations. He suggested that the plan rely on salvage law, if the SCRs are not of historic or recreational significance. He suggested that the (salvors) contractors fully finance all permitting, insurance, archaeological research and interpretation, along with site and artifact conservation, as well as shoreside site interpretation, with provisions for loans to other institutions. In return, the private

contractor/developer would get a share of the artifacts and renewable concessionaire rights to interpretation (shoreside and Sanctuary site). SCRs would not be removed without a permit.

November 1991 SCR/Treasure Salvage Workshop

In November 1991 a special workshop on treasure salvage and SCRs was convened to identify the concerns and interests of commercial treasure salvors and to get a better understanding of their perspective and ideas to be considered in the development of the draft SCR management plan. There were thirty attendees, including representatives of treasure salvors, NOAA's Sanctuaries and Reserves Division, PRIDE, and the Center for Marine Conservation (CMC).

The following documents were submitted at the meeting or thereafter:

- 1) 1985 Cobb Coin (Fisher Co.) Archaeological Guidelines: The guidelines negotiated between the State of Florida and Mel Fisher's Cobb Coin company pursuant to an admiralty case for the recovery of artifacts in a debris field, i.e., low to moderate significance. These minimum standards include requirements for recording location of excavation and artifacts recovered, provenance [contextual information of artifacts in the environment and with regard to one another], mapping the wreck site, tagging artifacts, handling, security, project supervision, reporting requirements, artifact processing, stabilization and conservation as well as diver safety.
- 2) Excavation Plan/Recovery Contract (PRIDE, 1/8/92) : Recovery would be performed under contracts with Sanctuary committees, comprised of Federal and state government representatives, historian-archaeologist, salvors, and an attorney specializing in admiralty law whereby the recoverer would agree to: a) provide lists of vessels and personnel, b) use the least destructive measures for recovery, and c) abide by the Cobb Coin archaeological guidelines. Ownership would be determined by an admiralty court under admiralty law, but incorporate the 80%-20% split of artifacts utilized in State contracts.
- 3) DRAFT Phase I Survey of Upper Keys (Mr. Mathewson, 11/26/91) : Management plan suggestions include a SCR classification scheme for the protection and management of SCRs, including inventory of all SCRS and a permit system for private recovery for certain classes of SCRs, i.e., low to moderate significance provided the salvor would be willing to "turn private gain into public good"; preserve shipwrecks of high significance for archaeologists; also protect shipwrecks for recreational diving access and education.

4) Results of SCR Workshop November 13, 1991:

PRIDE presented a video depicting the organization as being comprised of conscientious history buffs and explorers who are devoted to preserving maritime heritage.

CMC proposed a balance between destructive salvage and the need to protect natural and historic resources; suggested economic aspects of tourism and shipwrecks as reason for preserving wreck sites.

Duncan Mathewson identified four issues: 1) the tradition of treasure hunting in the Florida Keys and the need for consensus between salvors and the government SCR management, 2) the need to define the value of education, research and commercial use of SCRs, 3) the need for proper management of shipwreck sites, given the limited number of sites and the non-renewable nature of SCRs, and 4) the role of the public sector in scientific, systematic exploration and discovery of shipwrecks in the Sanctuary.

Jack Haskins reiterated Mr. Mathewson's comments about the treasure hunting tradition, and acknowledged that historians, divers and academia as well as salvors, have an interest and therefore suggested the following approach, by zones: 1) heavy coral growth, (viewing only, with little diver access), 2) sparse coral cover, rubble, soft corals and 3) sand, dead coral, and limited seagrass (to be used by all divers). He also suggested a corresponding classification system for salvors: 1) no equipment -- education, 2) bare-handed excavation only, 3) minimal amount of equipment, and 4) all equipment on a permit basis. He was critical of the current State contract/permit system. While State contracts in the late 1960s had reasonable requirements and an acceptable amount of delay, "the present number of special permits [DOS/BAR contracts plus DEP water quality permits] are so expensive and time consuming to obtain only the richest of commercial salvors can afford it. This is not fair to all recoverers, and maximum benefit will not be served the public if this persists." He specifically stated that having an archaeologist on board at all times was too expensive.

NOAA carefully considered the comments and documents submitted by commercial treasure salvors in developing a draft SCR management plan that was published in April 1995. The draft plan adopted many of the suggestions including providing for private (for profit) recovery of certain public historic resources in certain areas provided it was done in an archaeologically and environmentally sound manner. The permit system was developed to incorporate elements similar to what Duncan Mathewson stated were used by him and Mel Fisher on the Atocha, as well as existing State contract elements. Finally, the permit requirements would be tested out on salvors with interim Sanctuary permits.

Meetings on Draft SCR Plan

After the draft plan was issued in April 1995, NOAA held information meetings at which it could answer the public's questions about the draft plan and listen to their concerns. The commercial salvors refused to attend the meetings and demanded a special meeting solely to address their concerns and interests. NOAA met with the commercial salvors and some of their supporters in Marathon in May 1995 (approximately 75 attendees). At this meeting, the commercial salvors complained about not being involved in the development process and subsequently 10 commercial treasure salvors¹²¹ formed the HSSPC. The HSSPC took a two-pronged approach: 1) it opposed the Sanctuary and sought a Congressional repeal, and, alternatively, 2) rejected the preferred alternative, and proposed to adopt the State's 80%-20% system in both Federal and State waters, modified through a new "model permit system."

C. Sanctuary Advisory Council (SAC)

When the SAC was initially established in 1991, commercial treasure salvors nominated a representative to sit on the SAC. In 1992, that representative resigned in protest of the enforcement action taken by the Department of Justice and NOAA against Salvors, Inc. and treasure hunters Mel and Kane Fisher. For some time, NOAA was unable to get another commercial salvor to sit on the SAC because the salvors felt that such representation would appear to be a buying into the development process and thus undermine their primary objective of getting Congressional repeal of the Sanctuary. However, commercial salvors attended every SAC meeting and provided comments.

After the release of the draft plan in 1995, the commercial salvors reversed their position and requested a seat on the SAC, nominating a new representative who was accepted by NOAA. The SAC established subgroups to review and make recommendations on various action plans. The subcommittee for the SCR plan consisted solely of commercial salvors and did not include any participation by government officials or others. The subcommittee made recommendations to the SAC which deleted the entire draft SCR plan and substituted another developed by the HSSPC.¹²²

¹²¹ John Brandon, Pat Clyne, Mel Fisher, David Gilliland, Jack Haskins, Joe Kimbell, Chuck Mitchell, PT Rampy, Jay Usher and Don Washington.

¹²² November, 1995, Research, Recovery and Exploration Agreements, Contracts and Archaeological Guidelines. See also Letter to Gov. Chiles dated October 9, 1995, attaching September, 1995 Position Statement of the HSSPC; November 29, 1995 Comments Addressing the Proposed FKNMS Draft Management Plan; December 22,

D. Steps Taken During the Development of the Proposed Management Plan and Regulations to Minimize Adverse Impacts on Treasure Salvors

The most significant step taken to minimize adverse impacts was the provision in the proposed management plan and regulations that would permit, under limited circumstances, the private, for profit, recovery of public submerged cultural resources. Such proposal was the first of its kind for any of the national marine sanctuaries, or any other Federal programs

With regard to the permit system, the draft regulations and permit requirements were crafted in light of the comments received at the scoping meeting and workshop as well as the documents submitted by salvors and their representatives, particularly those submitted by treasure salvor archaeologist Duncan Mathewson who worked with the Fishers as well as other salvors such as Don Washington and Dr. Molinari. In particular, the suggested characterization of SCRs into categories of relative historical-archaeological significance (low-medium-high) being factored into NOAA/State decisions about whether a particular SCR should be available for private recovery was suggested in a document submitted by Mr. Mathewson, and supported by comments from treasure salvors. Mr. Mathewson also indicated that much of the permit requirements reflected the work he and Mr. Fisher did on the Atocha and were suggested in his comments and documentary submissions. The SCR plan was revised to reflect reliance on his comments and documents in the final plan.

E. Management Alternatives Considered in Drafting the SCR Plan and Reasons for Not Preferring in the Proposed Alternative Certain Alternatives Proposed by Commercial Treasure Salvors

1. Management Alternatives Considered

Draft MP Alternative I (No Access)

Under this alternative there would be no access to the Sanctuary for consumptive activities such as treasure salvage. This alternative was dismissed early in the process from more thorough consideration because its inconsistent with the FKNMSPA and NMSA goals of facilitating multiple use.

Draft MP Alternative II

Under this alternative, the National Marine Sanctuary Historic Resource Program policy-guidelines-regulations that apply in other sanctuaries would be applied throughout the FKNMS. As with

the other 13 sanctuaries, including Looe Key and Key Largo, there would be no commercial salvage. There would be no privatization of public resources. Private recovery would be permitted only if all historic resources are properly conserved and available for research, education, and public viewing enjoyment. Consistent with the FAP, the general preference is to leave historic Sanctuary resources in the Sanctuary. The items recovered would remain public resources but loaned for conservation, research and viewing in museums with public access. Intrusive research would be discouraged; and non-intrusive public access encouraged. There would be strict adherence to the professional qualifications and methodology under the FAP. There would be a precautionary approach to research and recovery; if there was any doubt relating to qualifications, methodology or whether there was a threat to resources, the intrusive activity would not be permitted. This alternative is consistent with ASA Guidelines provisions for sanctuaries, preserves and other protected areas.

This alternative was not selected in order to minimize the economic impacts on commercial treasure salvors.

Draft MP Alternative III

NOAA, in conjunction with the State of Florida Chief Archaeologist, developed the mid-range "preferred" alternative in the draft SCR plan relying heavily on the ASA as well as public comments at scoping meetings, SCR workshops, and SAC recommendations. Under this alternative, in situ preservation is preserved. This alternative would apply a multiple use zoning concept where commercial salvage is not permitted in certain core areas, i.e., protected zones, or other significant habitat areas where there are coral, seagrass or other significant natural or historic resources. However, in areas relatively devoid of coral, seagrass, hardbottom communities and other significant natural habitat systems, permits would be available for the recovery of SCRs of low to moderate significance (dispersed wrecks and cargo not intact ships). Such recovery would have to be done in accordance with the FAP standards. The permittee would be required to conserve and publicly display all significant and unique SCRs, but could sell duplicative coins, gems, bullion and other objects after the archaeological information has been properly recorded, analyzed, and made publicly accessible.

Under this alternative, Alternative II policies would be applied in protected zones and where coral, seagrass or other significant natural resources would be potentially harmed by excavation. Since private recovery would be limited to relatively barren areas where there would be little or no harm to natural resources, permit conditions requiring restoration of the site would be considered on a case-by-case basis. Recovery would be conditioned on it being conducted in an environmentally and

archaeologically sound manner utilizing the ASA Guidelines, and the FAP to the extent practicable. Permits would require that a professional archaeologist supervise the research and recovery and would contain an agreement for division of recovered items. Consistent with the ASA guidelines, the division of the artifacts would be 50/50, with possible case-by-case exceptions where appropriate.

The ASA reflects a compromise between preservationists, recreational users, and treasure hunters. While strict adherence to the ASA Guidelines would clearly justify Alternative II, Alternative III takes a more flexible application of the spirit of the ASA utilizing different parts of the ASA Guidelines through a Sanctuary zoning concept which prohibits treasure hunting in core areas but allows private recovery, provided it is conducted in an environmentally and archaeologically sound manner. This flexible application of the ASA guidelines would further minimize the economic impacts upon commercial treasure salvors from Sanctuary designation and implementation.

Under Alternative III, NOAA would implement a program to manage all shipwreck sites within the FKNMS. In order to do this, a comprehensive survey of the area to locate all sites is needed to conform with Federal and State regulations. The status of each site must be determined and then a management program must be implemented to protect and determine the level of accessibility for recreational or educational use. Once each site is on record and the appropriate authorities have determined how much use is appropriate, a permitting program may be implemented for users of these sites. The purpose of such a strategy is to protect the SCRs from undesirable disturbances and to ensure that the sites are preserved for research, education, science and recreational activities. The strategy also calls for permitting for excavation and salvaging activities within the FKNMS.

Draft MP Alternative IV

Alternative IV would allow commercial treasure salvage throughout the Sanctuary. The current 80%-20% split in State of Florida agreements would be applied throughout the Sanctuary as suggested by some salvors. Existing State requirements could be applied throughout the Sanctuary.

Draft MP Alternative V (No Action)

Alternative V is the No Action alternative. Some salvors suggested that the [pre-Sanctuary designation] status quo be maintained where state contracts (artifacts split, 80% salvor and 20% State) would be relied upon in state lands and waters, and Federal admiralty courts handle the remaining cases outside state lands pursuant to the law of salvage and finds. The professional qualifications and scientific methodology (i.e., Cobb Coin)

requirements currently used in admiralty cases would be used in IV as opposed to FAP requirements under II, and III.

In State waters salvors currently enter into contracts with the State and split the items recovered 80%-20%. As indicated in the public comments, this system is considered to be below the FAP standards by the archaeological/historical community, as well as by other States and Federal agencies. In Federal waters, salvors rely on admiralty courts. The problem is that under admiralty law, historic resources are treated as a commodity to be recovered and put back in the stream of commerce; the historical resources and corresponding contextual information are not adequately protected, managed, and preserved and many of the artifacts and corresponding archaeological information is generally lost. In addition to the public comments and expert opinions about the State system, the ASA was enacted to preclude the application of the law of salvage and finds to abandoned shipwrecks. Thus, NOAA has determined that the application of the status quo (state system and salvage system) fails to meet Federal legal requirements in the NMSA and the FAP.

It must be emphasized that because historic shipwrecks are sanctuary resources they are subject to the application of various historic preservation laws (NHPA/AA), as well as the NMSA section 306 prohibition against destroying, causing the loss of, or injuring sanctuary resources. The No Action alternative would not reinstate the pre-Sanctuary designation status quo, but would in fact preclude lawful recovery of historic sanctuary resources. In other words, without a regulatory sanctuary system for private recovery, unless the salvor had some rights to shipwrecks pre-dating Sanctuary designation, there would be no further salvage.¹²³

2. Selection of the Preferred Alternative in the Draft Management Plan

In sum, the Florida contract system and the division ratio (80% salvor- 20% State) was considered as an alternative, but was not preferred because it is inconsistent with the FAP and with the ASA Guidelines. Prohibiting commercial salvage throughout the Sanctuary was also considered and rejected. The proposed SCR Plan (Alternative III) was the result of a careful balancing of resource protection and reasonable accommodation for commercial salvage in certain areas of the Sanctuary for certain SCRs. If the cargo from a wreck is of little or no historical or

¹²³ See Fisher, supra. In the April 30, 1997 Order on Summary Judgment, the U.S. District Court for the Southern District of Florida states that the FKNMSPA precludes the application of admiralty law of finds and salvage to historic sanctuary resources.

archaeological significance and duplicative, then nearly all of the recovered objects may be transferred to the permittee. On the other hand, if the artifacts are of high historical-cultural significance, then the permittee will have possession of the artifacts and may seek return on the investment through other means. However, there would be no transfer of ownership of public resources to a private party unless and until it is determined it is of little or no historical or archaeological value. The SCR plan places a burden upon private sector permittees to demonstrate that the research and recovery will be in the public's interest consistent with the statutes, regulations, plan and SCR Agreement. In developing the proposed plan, NOAA considered the threats to natural and historical-cultural resources and sought to develop strict regulations to ensure recovery was environmentally and archaeologically sound, while at the same time proposing a permit system that was sensitive to the socioeconomic considerations of the commercial salvors and others.

F. Changes Made to the Regulations and Plan Based on Suggestions and Comments from Commercial Treasure Salvors

1. Consideration of the HSSPC Alternative SCR Plan and Reasons for not Selecting Certain HSSPC Proposed Alternatives

In a November 29, 1995 letter, the HSSPC submitted numerous line-by-line specific Comments-Suggestions-Alternatives (hereinafter comments) to Volume I of the Draft Management Plan, SCR Action Plan and Regulations. The following breaks the suggestions-alternatives into 34 specific "Comments" followed by NOAA's Responses.

**SECTION I
GENERAL INTRODUCTION
MANAGEMENT PLAN REQUIREMENTS**

1) Comment: Commenters have suggested here and in numerous other parts of the SCR plan that there should be a requirement that SCRs be managed "with the least possible burden to the taxpayer."

Response: Under the Constitution, Congress determines the burden to the taxpayer for Executive Branch Federal Programs. However, as a trustee for public resources, NOAA should protect and manage SCRs consistent with the public's interest which includes conducting research, education and other management operations in a reasonable cost-effective manner. Consistent with the spirit of the comment, the SCR Action Plan (i.e., the description of funding and Sanctuary objectives) has been revised to indicate that the expenditure of Federal and State funds will be done in a

reasonable and cost-effective manner.

2) Comment: The SCR plan should require that SCRs be managed in a manner that brings SCRs to the largest segment of the population noting that scuba divers amount to less than 1% of the population.

Response: The suggested management policy conflicts with the NMSA, the ASA and the FAP on several counts and has therefore not been incorporated. First, the NMSA/FAP policy preference is that SCRs be preserved on site in the Sanctuary, unless the SCRs are under threat and removal is required to preserve them. Second, the NMSA and the ASA are multiple use statutes requiring that SCRs be managed for all uses compatible with the primary purpose of resource protection. In the case of SCRs, that would mean that SCRs should be available for research, education, recreation and other public access. Third, the suggested policy conflicts with the ASA. Specifically it would require the SCR plan to guarantee access for recreational diving. Public access to Sanctuary resources can be accomplished through education and research products of various tools and mediums, including print, film, and computer informational products. The public access goal does not require physical access to the SCRs; nor does it require their removal for land based exhibits. However, consistent with the recommendations of the SAC, the State, and public comments, the SCR plan provides a permit system which will allow private for profit recovery of SCRs, provided it is done in an environmentally and archaeologically sound manner and is otherwise shown to be in the public interest, including public display of recovered SCRs. Some SCRs will be permitted to be recovered. Concerns of public access are addressed by requirements that certain SCRs be maintained in museums and similar institutions of public access while duplicative objects may be sold or transferred by the salvor after proper recording and reporting of archaeological information. Under the multiple use mandate of the NMSA and the ASA, some SCRs may be recovered while other SCRs will remain in the Sanctuary for use by present and future generations. Non-intrusive public access to SCRs in the Sanctuary does not require a permit.

PREFERRED ALTERNATIVE/MANAGEMENT PLAN Administration

Special Use Permits

3) Comment: The costs for Special Use permits should be limited to the costs for issuing the permit. Other administrative costs such as monitoring activities should be deleted. The assessment of a fair market value for use of Sanctuary resources should also be deleted.

Response: Section 310 of the NMSA provides the authority for issuing Special Use Permits and for the assessment of associated fees which are to cover the administrative costs as well as a fair market value return. This portion of the management plan merely describes the statutory provisions and will remain consistent with the NMSA 310 provisions. However, in implementing Special Use Permit authority, NOAA may consider waiver of costs/fees on a case by case basis when such waiver is determined to be in the public's interest.

4) Comment: Suggests inserting language regarding DOS/BAR's work with private sector historic shipwreck salvors at "little cost to the taxpayer."

Response: The description of DOS/BAR's work has been revised to reflect work with private sector historic shipwreck salvors. However, as the DOS/BAR expends \$100,000 annually on the contract salvage work alone, it would be incorrect to state that DOS/BAR's work with salvors is done at "little cost to the taxpayer."

5) Comment: Suggests deleting language describing NOAA's responsibility to protect SCRs and in its stead inserting language that NOAA should ensure that DOS/BAR's polices are enforced, presumably the current State of Florida 80%-20% contract system.

Response: The suggested change is in conflict with the NMSA mandate that NOAA protect and manage Sanctuary resources, including SCRs. DOS/BAR's existing 80%-20% contract system has been determined to be inconsistent with the NMSA and the ASA. Thus, the description of NOAA's responsibility has not been altered as suggested.

6) Comment: Suggests DOS/BAR have the lead responsibility in the inventory of SCRs and that NOAA's role be limited to financial assistance to DOS/BAR's inventory.

Response: Section 110 of the National Historic Preservation Act requires Federal agencies to inventory historic resources such as SCRs under the Federal agencies' management responsibility. This responsibility is conferred upon NOAA and cannot legally be shifted to the State as suggested.

7) Comment: Suggests that the inventory be accomplished by the private sector in order to lessen the burden on taxpayers.

Response: The SCR inventory strategy has been revised to allow for consideration of all public and private opportunities for accomplishing the inventory in a reasonable and cost-effective manner, including private sector funding through permits and otherwise.

SECTION II
REGULATIONS

8) Comment: Delete the requirement for the purchase and maintenance of general liability insurance.

Response: This is a requirement of section 310 of the NMSA (Special Use Permits). There is no discretion under section 310 for waiving or deleting the requirement to obtain general liability insurance. However, there is some discretion as to the amount of insurance coverage required for a particular Special Use Permit. NOAA modified the regulations to clarify that other security instruments may be utilized in lieu of an insurance policy, and to indicate that the amount of insurance required will be commensurate with the value of Sanctuary resources in the permitted area so that the cost of insurance is not unreasonable.

9) Comment: Revise the regulations to make issuance of SCR permits mandatory rather than discretionary.

Response: The discretionary authority provided in the regulations is consistent with the resource protection and management mandates in the NMSA and the ASA. The suggested change would alter the NMSA resource protection with compatible multiple use management program and transfer it into an entitlement program for a particular group, the treasure salvors. This would be contrary to the NMSA and the ASA and has therefore been rejected. Permits will be granted if it is determined to be in the public's interest. Any denial of a permit is subject to appeal to ensure that such denials are neither arbitrary nor capricious.

10) Comment: Delete the requirement for a performance bond for SCR Special Use Permits for deaccession/transfer.

Response: This requirement has been deleted from the regulations. However, applicants for all permits must still be able to demonstrate their financial ability to complete the proposed activity. This showing is particularly important for projects involving intrusive and potentially destructive activities with SCRs because once such activities are initiated, the SCRs may become more at risk than before. Thus, the applicant may under certain circumstance need to demonstrate the financial ability to complete the project as well as develop contingency plans. This may be shown in a variety of means, and may include the use of performance bonds, or other security to cover the costs associated with the recovery, conservation and final report.

11) Comment: In lieu of insurance, the permittee should be allowed to place artifacts in an approved storage facility.

Response: NOAA revised the regulations by deleting the regulatory requirement for storage and insurance of artifacts to allow for more case-by-case flexibility through conservation and curation agreements. Further, as indicated above, with regard to liability insurance, the general liability insurance is a statutory requirement under section 310 of the NMSA. However, NOAA has modified the regulatory provision to clarify that other security instruments may be utilized in lieu of an insurance policy. In addition, NOAA modified the regulatory language to clarify that the scope of coverage required is for "potential claims for damages to Sanctuary resources arising out of permitted activities" and to clarify that the amount of insurance or security should be reasonably equivalent with an estimated value of the Sanctuary resources in the vicinity of the permitted area and activities.

12) Comment: Insert a provision in the regulations that the permittee have exclusive rights to conduct non-intrusive surveys and inventories within certain areas.

Response: The regulations have been modified to indicate that NOAA will not grant survey/inventory permits for areas covered by existing permits, unless authorized by the existing permittee. There is no entitlement to these and other permits. NOAA, through its discretionary authority, and the State grant such a privilege, when it is determined to be in the public's interest. As indicated in the plan and below, remote sensing is not prohibited and therefore may be conducted without a permit. Further, as survey/inventory permittees will be given priority consideration for Special Use permits for deaccession/transfer, there is a clear incentive to work within the permit system. Such priority consideration is given provided applicants have demonstrated their professional scientific abilities in carrying out their survey/inventory permit and in the application for a Special Use Permit for deaccession/transfer. In the event there are competing applicants, NOAA and the State will apply the statutory and regulatory criteria in determining what action is in the public's interest. If it is determined to be in the public's interest, NOAA and the State will consider granting exclusive rights for these permits, consistent with any valid preexisting rights.

13) Comment: Consistent with the management plan and Florida law, the Sanctuary regulations should expressly state that no permit is required for non-invasive/non-exclusive searches using remote sensing devices.

Response: There is no prohibition against searching with remote sensing devices. The regulations also expressly provide that if an activity is not expressly prohibited by statute, regulations or permits, it is allowed. As the commenter indicated, this is further clarified in the management plan. It has been determined

that further clarification in the regulations is not necessary or appropriate.

14) Comment: The regulations should clarify that limited manual alteration of the seabed, such as hand fanning, be permitted, provided there is no negative impact to coral, seagrass, sponges, etc.

Response: The regulations have been modified to expressly provide that survey/inventory permits may provide for limited manual alteration of the seabed, including handfanning, provided there is no adverse effect on Sanctuary resources. Limited manual alteration of the seabed will continue to be considered on a case-by-case basis as part of the balancing on whether to issue a permit and for the appropriate conditions to protect resources and manage multiple uses.

15) Comment: Survey information provided by the applicant-permittee should be required to be held in confidence.

Response: NOAA agrees that confidential treatment of certain information may be appropriate, particularly if the release of such information may threaten the SCR. While the NMSA does not provide the express authority to treat information about public resources confidentially, NOAA will pursue obtaining confidential treatment of the location of SCRs and other information about SCRs under the NHPA. In addition, the applicant-permittee may request that such information be treated as confidential business information for the purposes of the Freedom of Information Act (FOIA). Pursuant to such requests, NOAA will endeavor to release only such information as required by the Federal law and procedures which determine whether such information actually comes within the FOIA exemption for business confidential information. However, considering the competing interest of public education and access under the NMSA, a case-by-case analysis of each such request is more appropriate than a mandatory requirement in the regulations.

16) Comment: Modify the regulations to expressly provide that all rights to publicity, movies, etc. are exclusively the property of the applicant-permittee.

Response: Such rights may be appropriate for SCRs which are private property. However, public information about public resources is generally public domain. The NMSA does not provide NOAA the authority to grant such rights of entitlement to public resources and therefore the regulations have not been modified as suggested. Permittees may be able to demonstrate in certain cases that such rights exist or have been obtained under other laws such as copyright law. In addition, NOAA remains open to suggestions as to how it can properly manage access to SCRs and SCR information in a manner consistent with the public's interest

in the protection and management of SCRs.

17) Comment: Change the supervisory role of the professional archaeologist in research/recovery permits, to an assisting or consulting role.

Response: The permit system will be difficult to enforce and control and will be largely based on trusting the applicant to fulfill the requirements and spirit of the permit, plan and NMSA. One of the important protections in this system is putting the professional archaeologist in charge of the proper recording of archaeological information and other preservation requirements. One of the primary problems with admiralty salvage has been it was primarily concerned with putting cargo back in the stream of commerce and thus, preservation often was compromised or abandoned. Putting the professional archaeologist in supervision is the rational response to this threat to preservation. Therefore, the regulation has not be revised as suggested.

18) Comment: Modify the regulations so they require that the nautical conservator be "approved" rather than "professional."

Response: The suggested modification has been made. However, the FAP and the ASA set forth the professional standards for approval of the nautical conservator. While those professional requirements are not altered, the change does provide more flexibility so that the practical experience in conservation may be considered in the approval determination.

19) Comment: Delete the requirement for public display for recovered objects.

Response: The commenter's premise, at least in part, is that it is in the public's interest that SCRs be recovered so as to maximize physical public access to the SCRs. If recovery is to be determined to be in the public interest, then it follows that the public display of significant SCRs is a reasonable and appropriate condition precedent. More importantly, facilitating public access to public resources is required by the NMSA and the FAP. However, the regulation has been modified so that the requirement for public access and periodic public display provides more flexibility in particular cases.

PERMITS Regulations

20) Comment: Insert into the regulations on various permits language indicating the permits will provide an incentive for private sector activities.

Response: The NMSA requires protection of SCRs and facilitation of multiple uses which are compatible with the primary objective

of resource protection. While modifying the regulations as suggested was determined to be inappropriate, NOAA revised the SCR Action plan discussion of permits to indicate that historical resource permits will "facilitate" the use of SCRs by the private sector.

SPECIAL USE PERMITS Regulations

21) Comment: Add a third criteria to Special Use Permits, i.e., "to promote private sector participation when advantageous to the taxpayers" and shifting the costs for Special Use Permits to NOAA and the State.

Response: The promotion of private sector participation is not a section 310 criterion or even a general statutory purpose or policy. As previously indicated, facilitation of compatible multiple use is more appropriate and the SCR plan has been modified accordingly. With regard to the assessment of costs, the suggested change is in conflict with section 310. However, in implementing the Special Use Permit authority, NOAA has the discretionary authority to consider waiver of costs and/or fees on a case by case basis when permitted activities result in a public benefit, whose value can be determined. For example, in the SCR context, the preferred policy is that the SCR be preserved on site. Waiver of fees for the removal of SCRs which are not under threat is unlikely. However, if it is determined that the SCR is being threatened by remaining in the Sanctuary, then the research and recovery would appear to be in the public interest and reduction and/or waiver may therefore be considered in the cost and/or fee determination. The extent that private use promotes resource protection, research, education and similar FKNMS management strategies is given due consideration in determining the amount of costs and fees.

SCR ACTION PLAN Introduction

22) Comment: Delete "conservative" and insert "reasonable and informed" in a general introduction to the SCR plan to describe the approach to SCR management.

Response: Protection, preservation and conservation are all statutory responsibilities for SCR management. However, the introduction has been modified to use the term "precautionary approach" to describe the SCR management approach.

23) Comment: Insert language which includes historic shipwreck research and recovery in the litany of specialists working in SCR research and recovery and that use of the private sector be pursued whenever possible, to accomplish SCR management objectives.

Response: The SCR plan has been modified to acknowledge private sector research and recovery and indicates that NOAA and the State will explore all public and private partnerships in fulfilling SCR management and will consider private sector implementation, if it is determined to be in the public's interest.

24) Comment: Change the general policy description so that Florida makes the ultimate decision for abandoned shipwrecks under the ASA.

Response: The State has title to abandoned shipwrecks in State waters under the ASA. However, the SCR Plan and particularly the SCR Agreement set forth how NOAA and the State will jointly manage the SCRs.

25) Comment: In the general policy section, add "artifacts" to the list of items of little or no historical significance which may be sold.

Response: The section was revised adding "objects" to the list.

26) Comment: Add the statement that the majority of SCRs will most likely prove not to be of significant historical or archaeological importance.

Response: The suggestion was rejected. It is a subjective opinion and not appropriate in the policy statement or elsewhere.

27) Comment: Add "allow for research and recovery by the private sector" to the description of National Goals.

Response: This description is based on the NMSA and has been revised to state the national goal of facilitating multiple uses which are compatible with resource protection. As this is the only sanctuary where private for profit recovery of public resources is being permitted, it would not be correct to place the statement in the national goals section. However, the Sanctuary goals have been revised to incorporate the suggested language.

28) Comment: Insert language in the Sanctuary information objective limiting disseminating information about SCRs if it is in conflict with proprietary constraints or a threat to SCRs.

Response: That section has been revised to state that the information objective should be done "to the extent consistent with resource protection and private proprietary interests."

29) Comment: Revise the description of DOS/BAR/FDHR inventory to reflect the contribution of the private sector recovery of SCRs.

Response: While NOAA cannot revise the State' inventory, the State agreed and revised its inventory accordingly.

30) Comment: Change the inventory subactivity for a scientific study program to require substantial underwater experience and preclude Federal funding of amateurs.

Response: The subactivity was determined inappropriate for the inventory strategy. Experience is a factor considered for Federal and State permitted activities. However, the requirement limiting the use of Federal funds for training would be inappropriate.

31) Comment: Revise the inventory subactivity 5 to include details of the private sector discoverer.

Response: The section was revised to indicate that the "site database should be accurate and detail who discovered the SCR."

32) Comment: Revise inventory subactivity 5 so that the field unit is run by the State and primarily supports permit functions.

Response: This section will be revised, but NOAA will run the field unit in coordination with the State. The work will of necessity include functions other than permitting.

33) Comment: Revise Sanctuary regulations so there are no corresponding ASA/FAP requirements; instead rely on the existing State agreements/contracts system.

Response: The suggested change conflicts with the NMSA mandate that NOAA protect and manage Sanctuary resources, including SCRs. DOS/BAR's existing 80%-20% contract system has been determined inconsistent with the NMSA, the ASA and the FAP. Thus, the description of NOAA's responsibility has not be altered as suggested. Nor have the corresponding NMSA, ASA and FAP requirements.

34) Comment: Detail requirements for permitted activities, including reporting, boarding rights, tagging, storage etc.

Response: The detailed requirements are addressed in the NOAA permit guidelines and the permits themselves which are not going through the notice and comment rulemaking. This is consistent with other public comments that the permit system should consist of flexible guidelines rather than binding regulations.

On DECEMBER 22, 1995, the HSSPC provided additional COMMENTS (Suggestions-Alternatives) on Volume II of the DMP/DEIS which sets forth the environmental impact analysis, including the socioeconomic impact analysis. The suggestions-alternatives have been summarized into 9 Comments followed by NOAA responses.

1) Comment: The description of the potential historical and cultural significance of shipwrecks in the Keys is challenged and there is an assertion that it is not likely that discovering shipwrecks will yield new historical cultural information.

Response: The significance of the SCRs is well documented and acknowledged by the HSSPC in its October 10, 1995 letter to Governor Chiles. Note that this comment appears to contradict a previous comment in the cover letter which stated that Florida has the most valuable and historically significant collection of artifacts. In fact, most of the artifacts are from the seaborne commerce of the Spanish Galleons. Excluding seaborne commerce would be inconsistent with NOAA's definition of historical resources and inconsistent with the FAP and the underlying historic preservation statutes.

2) Comment: In the discussion of submerged Paleo-Indian sites, delete the discussion of SCRs preservation on site because of reduced oxygen, temperature, and light; and note that this does not apply to shipwrecks.

Response: No change was made. There is scientific evidence to support the statement, which is appropriate for all SCRs including shipwrecks.

3) Comment: Add information describing the history of shipwreck salvage in the Keys.

Response: The comment was adopted in rewriting this section for the final plan.

4) Comment: In the description of the SCRs in the affected environment, insert a policy statement to address the threat from human intervention to keep valuables discovered and how information will be lost otherwise.

Response: This section simply describes the affected environment, in this case the SCRs. It is not an appropriate place for SCR management policies. Similar comments have been submitted in the scoping hearings and subsequent workshops, and have been considered in developing the final management plan.

5) Comment: In the discussion of human activities, revise the discussion to indicate that there are more shipwrecks to be found, and more treasure to be recovered from shipwrecks already

found.

Response: The section has been revised to indicate the dispute over the potential for new finds and additional treasure on existing finds.

6) Comment: The estimate of 40 to 50 people participating in treasure hunting during the 1980s at sites in the Florida Keys is disputed. Twenty-five companies and over 100 people worked the 1715 fleet and that 1,000 to 2,000 people were involved directly or indirectly in treasure operations in the Florida Keys in the 1980s.

Response: The section has been revised to indicate that the number of people involved in treasure hunting is in dispute, and to clarify that the estimates did not include those working on the 1715 fleet, but were limited to those estimated to be working in what is now the Sanctuary.

7) Comment: The statement that few treasure salvage operations use the experts identified (i.e., researchers, conservators, etc.) is in dispute.

Response: The disputed sentence has been deleted.

8) Comment: In the discussion of treasure hunting techniques, the statements regarding the destructive nature of mailboxes and other devices, as well as the potential significance of contextual information of SCRs is challenged.

Response: The potential destruction from treasure hunting is well documented, as is the potential significance of historical and archaeological information. No changes were made to the discussion.

9) Comment: The statement is disputed that there are conflicting interests between recreational divers, researchers, educators and commercial salvage because divers are more interested in visible modern wrecks whereas salvors are interested in submerged wrecks.

Response: The discussion has been revised to reflect this comment.

OCTOBER 9, 1995 HSSPC LETTER TO GOVERNOR CHILES CC: NOAA

In an October 9, 1995 letter to Governor Chiles, the HSSPC provided several comments-suggestions-alternatives about the draft Management Plan for the Sanctuary. The letter attached the HSSPC Position Statement which was similarly considered as setting forth comments-suggestions-alternatives. The following are a summary of 9 suggestions in the letter with NOAA Responses and then the HSSPC Position Statement followed by NOAA responses

which are indented.

1) Comment: The HSSPC opposes the FKNMS Draft Management Plan.

Response: This comment is noted.

2) Comment: The HSSPC believes NOAA suggested that the salvors appoint a committee for providing input.

Response: NOAA agreed to meet with salvor representatives to discuss the draft Management Plan and agreed to work with the committee that commercial salvors established.

3) Comment: The HSSPC opposes the Sanctuary and will continue to try to have the Sanctuary rescinded.

Response: This comment is noted.

4) Comment: The HSSPC asserts that: "Florida has the most intrinsically valuable and historically important collection of new world historical shipwreck artifacts and treasures in the world."

Response: NOAA does not know whether Florida has the most important collection in the world. However, NOAA agrees that the Florida Keys contain historic resources of national and international significance warranting special protection and management.

5) Comment: The HSSPC asserts that the entirety of Florida's collection of artifacts has been provided by private sector historical shipwreck salvors.

Response: Many shipwreck artifacts in Florida's collections were not collected by salvors.

6) Comment: Historical shipwreck salvors have provided accurate on-site archaeological data, as well as historical research to the public at virtually no cost to the taxpayers.

Response: NOAA agrees that some treasure salvors have provided such archaeological and historical information. However, often the objects are recovered and sold without a proper record of their context or provision for public access to the archaeological and historical information. Moreover, some treasure salvors have destroyed historic and cultural resources and information in the pursuit of treasure. The threat to historical resources from treasure salvage is well documented and the fact that some salvage is properly performed does not obviate the need for proper protection and management.

NOAA disagrees that the historical and cultural information provided to the public by treasure salvors has been done at virtually no cost to the taxpayers. Treasure salvage has been subject to State oversight in State lands and waters. Similarly, in Federal lands and waters, admiralty courts have overseen the treasure salvage. Both the State and admiralty courts' management systems involve funds that are derived from taxes. The draft Management Plan for SCRs will permit recovery of treasure in a manner which ensures that all recovery is in the public's interest. The shift in management from the admiralty court to resource management experts will result in a shift of administrative costs, but these costs are in the public's interest for both administrators.

7) Comment: "We [the HSSPC] feel that admiralty law should prevail outside 3 mile territorial limit of Florida, as it has for centuries. Within 3 mile territorial limit of Florida we believe Florida should still utilize our committee's suggestions as part of its proposed Submerged Cultural Resource Management Plan in order to manage its shipwreck resources with limited burden to the Florida taxpayers."

Response: NOAA disagrees and notes that applying the law of salvage and finds to historic shipwrecks is inconsistent with the ASA and the implementing guidelines. In 1987, the U.S. Congress was presented with the general conflict between those interested in historic preservation and those interested in commercial treasure salvage of ancient wrecks under admiralty law. Congress stated that the purposes of admiralty law of salvage were no longer appropriate or applicable to historic shipwrecks; that historic shipwrecks should instead be managed as irreplaceable archaeological resources as well as resources for divers and fisherman. Further, Congress stated that management of historic shipwrecks should be long-term preservation-conservation rather than salvage removal by one or looting by several.¹²⁴

Consistent with the ASA, NOAA independently developed a management program which has protected historic sanctuary resources from salvage since the USS Monitor was designated as the first National Marine Sanctuary in 1975. Under the ASA, admiralty law of salvage and the law of finds no longer apply to abandoned historic shipwrecks. The FKNMS includes portions of the State's 3 mile territorial waters as well as the Federal 12 mile territorial waters, and beyond that a contiguous zone in the Exclusive economic zone (EEZ). NOAA's Management Plan is consistent with the jurisdiction and authority under the NMSA and is consistent with the Congressional purposes and policies set forth in the ASA which directly address this issue. To ignore

¹²⁴ Abandoned Shipwreck Act (ASA) legislative history, H.R. Rep. No. 100-514, 100th Cong., 2d Sess. 6 (1988).

these Congressional environmental and historic preservation policies and revert back to the admiralty salvage law purposes of returning cargo lost in marine casualties would be contrary to the law of the land and contrary to the public's interest in natural and historic resources. It would also be a clear reversal of the trends in protecting the environment and historic resources as evidenced by U.S. and international law.

8) Comment: "[I]f state and federal archaeologists, and their respective departments, were required to work with the private sector in a reasonable fashion, who knows what fabulous things might be achieved and gained, at little cost to the taxpayers. . . . The political differences that are now occurring will be put behind us and private sector historical shipwreck salvors, [Florida and NOAA] will work cooperatively and together in the best interest of the Florida and United States taxpayers, to research, recover and document our maritime heritage."

Response: NOAA cannot respond to this comment about "political differences" because it is unclear as to what differences the commenter refers. However, NOAA's actions in developing the Management Plan and the permit system have been based solely on the NMSA, the ASA, the implementing regulations and the underlying policies. These actions have been based on law, not on politics. Thus, it would appear that the differences to which the commenter refers have more to do with what the law is and what salvors want the law to be. The State and NOAA have worked with the private sector in a reasonable and cooperative fashion throughout the process of developing a management plan and have done so in a manner commensurate with the fiduciary duties of their trustee responsibilities. This cooperative spirit is evidenced by the Draft Management Plan and the permits issued by NOAA to treasure salvors. NOAA plans to continue its efforts in cooperating with salvors and agrees with the HSSPC suggestion that this could include the contracting or hiring of archaeologists who have worked with salvors in the past.

9) Comment: "Our suggestions and ideas should be a matter of public record and subject to review by elected officials and other agencies, especially budgeting agencies which will decide how tax dollars are spent in the FKNMS, rather than just the Sanctuary managers and employees, to ensure a more dispassionate review than what might be gleaned from people that are so closely involved in the mounting storm of controversy surrounding the rationale of the FKNMS."

Response: These suggestions are included in the administrative record for the FKNMS and are a matter of public record. There are numerous checks and balances on the FKNMS. The FKNMS budget is scrutinized within the Sanctuary Program and up through the NOAA and Commerce Department hierarchy. The Office of Management and Budget and the Administration provide additional scrutiny

before submission to the Congress. The Congress has the ultimate check and balance on the funding of the Sanctuary Program through the appropriations process.

**ATTACHMENT #1 to OCTOBER 9, 1995 HSSPC LETTER TO GOVERNOR CHILES
CC: NOAA (Position Statement of the HSSPC)**

1) Comment: "It is important for government agencies to protect the Historical Shipwreck Resources as may be needed, based on scientific facts, incorporating sound reasoning and financial reality. . . . the various government agencies involved [should] utilize their resources of tax dollars, man power, equipment etc., in the best interest of the public and not in a frivolous or irresponsible manner."

Response: NOAA agrees and accordingly has provided a SCR Management Plan for the protection and management of SCRs which guarantees non-intrusive public access and permits intrusive public access if determined to be in the public interest.

2) Comment: "Historically important shipwrecks" should be defined as "those vessels that played a significant and pivotal role in history either as a result of their sinking or in their use within their lifetime. These vessels might be vessels lost while on voyages of colonization or exploration or vessels lost in important sea battles, etc."

Response: Historic sanctuary resources have been defined in the regulations and include the vessels suggested.

3) Comment: "The vast majority of vessels lost off Florida will not fit this definition [of historical shipwrecks] as most were only engaged in seaborne commerce. . . . While their losses may have caused financial hardships for individuals, companies or governments, they rarely played significant roles in the overall evolution of history."

Response: NOAA disagrees. The maritime heritage includes seaborne commerce. This comment appears to contradict a previous comment in the cover letter, which stated that Florida has the most valuable historically important collection of artifacts. In fact, most of those artifacts are from the seaborne commerce of the Spanish Galleons. Excluding seaborne commerce would be inconsistent with NOAA's definition of historical resources and inconsistent with the Federal Archaeological Program and the underlying historic preservation statutes. Examples of this restrictive view of what is historically significant further supports the importance for oversight of treasure salvage by historic resource managers.

4) Comment: "Archaeological importance" should be strictly construed to require that it "add significant previously unknown

data to the world body of knowledge pertaining to a given culture, time frame or technology."

Response: NOAA does not agree with the commenter's restrictive view of what is of archaeological importance, and the related collection of scientific data. The "world body of knowledge" is not defined or judged by the interests of one user group such as commercial treasure salvors; rather it is part of the common heritage of all peoples and user groups. Consistent with the NMSA and the FAP, including the ASA, NOAA protects both historic and archaeological resources. As both historic and archaeological resources are important to protect, NOAA's management plan and regulations do not draw distinctions between them.

5) Comment: The collection of redundant [archaeological] data is not good science, nor is it a cost effective use of public funds and resources. . . . The National Park Service and others have amassed millions of objects whose maintenance costs millions of dollars [to taxpayers]."

Response: In the draft Management Plan, NOAA incorporated salvors' workshop suggestions about being able to keep duplicative objects. Thus, NOAA has already shown it shares the concern about the costs of maintaining redundant collections and drafted a management plan which is a radical departure from the NPS's approach. However, that transfer of public resources to the private salvor is only in the public's interest if the objects were recorded using general archaeological standards. Even admiralty courts have ruled that proper recording of the objects is in the public's interest. To allow the destruction of archaeological contextual information and not preserve that information through proper recordation is not in the public's interest. NOAA remains open to suggestions as to how such recording can be done in the most cost effective manner.

In the case of shipwreck salvage, the supply of artifacts which are cared for by public institutions is largely determined by the salvors' rate of recovery, rather than any policy or decision by the public institutions.

6) Comment: "To be sure every historical shipwreck site must be explored with the assumption that it might yield significant new and unknown data to the world body of knowledge and therefore exploration and recovery must always be carried out under applicable and acceptable archaeological guidelines."

Response: NOAA agrees and accordingly proposed a management plan and guidelines to that end.

7) Comment: Government agencies should not "use taxpayer dollars for spurious or questionable shipwreck related projects that have

little or no chance of yielding previously unknown archaeological data nor will prove to be of pivotal historical importance. The vast majority of historical shipwreck research and recovery, such as surveying the FKNMS for historical shipwreck sites, can and should be done by private sector historical shipwreck salvors"

Response: NOAA agrees that it should not fund spurious projects. However, the survey and inventory of historic shipwrecks in the FKNMS is an important part of protecting and managing those resources. That is why such surveys are required by the NHPA. While use of NOAA funds for such surveys is reasonable and appropriate, fiscal constraints and competing trustee responsibilities are acknowledged in the plan and elsewhere. Accordingly, NOAA remains open to proposals for private ventures as well as coordination with other public and private entities to accomplish such surveys. However, the suggestion of a rule or policy that such surveys could only be conducted by the private sector does not appear to be reasonable, prudent or in the public's interest and may preclude surveys at little or no additional cost to the Government.

8) Comment: "Use taxpayer dollars to research, search for, locate, excavate and recover historical shipwrecks within the boundaries of the FKNMS only as a last resort and only after all reasonable private sector options have been considered, pursued and exhausted, except in those cases where absolute singularity or the reasonable expectation of such importance can be shown, which would be of a significant benefit of knowledge as would relate to the general public."

Response: Completing a survey and inventory of the Sanctuary's SCRs is a management priority and is required by the NHPA. While NOAA is interested in fulfilling its responsibilities with public and private partnerships of all kinds, including privately funded ventures, it cannot endorse a policy precluding Federal funding of a Federal legal responsibility. In response, NOAA will incorporate consideration of private ventures for SCR management. With regard to Federal funding for excavation and recovery, it is NOAA's general policy preference that SCRs remain in the Sanctuary and not be excavated. Only if SCRs are threatened by remaining in the Sanctuary, are excavation and recovery considered. However, NOAA will specifically indicate in the management plan that if NOAA determines that SCR should be removed in order to preserve the resource, NOAA will do so in a reasonable and cost-effective manner, including the pursuit of privately funded recovery.

9) Comment: "[NOAA and the State] should view experienced and reputable private sector historical shipwreck salvors as a resource to be utilized for the exploration and recovery of historical shipwrecks within the boundaries of the FKNMS, with

little or no cost to the taxpayers."

Response: NOAA agrees with this comment and the draft SCR Management Plan acknowledged this in its permit system.

10) Comment: "[NOAA and the State] should endeavor to appoint a Sanctuary archaeologist willing to work in a cooperative manner with private sector historical shipwreck salvors and after allowing for reasonable input in this selection by the private sector. The selection of an archaeologist whose record and position reflects a reluctance to work with the private sector should be avoided."

Response: NOAA has endeavored to cooperate with the private sector in issuing SCR permits and will seriously consider these specific suggestions in future hiring or contracting of qualified archaeologists. However, as the commenters are aware, there are presently very few qualified marine archaeologists who have worked with private salvors.

11) Comment: "All archaeological guidelines that are established should be construed as guidelines and not non-negotiable rules and regulations."

Response: NOAA has archaeological guidelines based on the FAP guidelines. In the past, NOAA has negotiated with private salvors, as to the application of such guidelines at a particular shipwreck site. NOAA will continue to be flexible to site by site considerations, provided that such flexibility does not harm SCRs or otherwise conflict with the FAP.

12) Comment: "[NOAA and the State should] endeavor to retain a reasonable representative cross section of artifacts recovered from all historical shipwreck sites discovered within the boundaries of the FKNMS while at the same time avoiding the collection of redundant artifacts which might lead to excessively repetitive artifact assemblages."

Response: NOAA prefers to leave the SCRs in the Sanctuary and has no management plans for recovering SCRs for a Sanctuary collection. Private recovery of SCRs will be permitted under certain circumstances, and representative artifacts will be maintained at private or public facilities with public access.

13) Comment: "[NOAA and the State should] endeavor to collect copies of all on site data collected during any exploration of any historic shipwreck that is allowed to be conducted within the boundaries of the FKNMS."

Response: Permittees are required to provide NOAA with copies of data collected.

14) Comment: "[NOAA and the State] ensure public access to all artifact assemblages, all on site data and interpretations, and all historic research they collect concerning historical shipwreck sites explored within the boundaries of the FKNMS. In some instances, public access may need to be restricted until such time as the salvor completes the project or agrees to the release of information. . . . The bulk storage of artifacts and data by [NOAA and the State] resulting in non-public access should be avoided."

Response: NOAA agrees that public access to SCRs and information is in the public's interest. NOAA also agrees that restrictions to public access to information about SCRs are sometimes necessary and appropriate to protect the SCRs. NOAA prefers to leave the SCRs in the FKNMS. Public access to representative cross-sections will be a condition of NOAA SCR permits. If a SCR is threatened and NOAA recovers the objects because private recovery is not readily available or public recovery is more reasonable under the circumstances, the public will have access to those recovered artifacts.

15) Comment: "[NOAA and the State] should make a list, based on current knowledge, of sites that may be within the boundaries of the FKNMS that might be deemed to be of singular historical and/or archaeological importance that might require special handling."

Response: NOAA agrees that an inventory of SCRs is appropriate, but does not share this restrictive view of what is historic and/or archaeological.

16) Comment: "[NOAA and the State] should advise citizens on how to acquire salvage rights, how to secure the services of shipwreck salvors and archaeologists."

Response: While NOAA seeks to protect Sanctuary resources in a manner that ensures sustainable development, NOAA does not agree with the suggestion that Federal funds should be used to support private commercial salvage enterprises. Such enterprises should be self sustaining.

17) Comment: "[NOAA and the State] should encourage the public to share their [SCR] finds without fear of reprisal or criminal action."

Response: NOAA agrees and notes that there are no criminal sanctions for violation of Sanctuary regulations.

18) Comment: "[NOAA and the State] should discourage other institutions or government agencies, who are using taxpayer dollars, from exploring shipwrecks within the boundaries of the FKNMS unless . . . significant archaeological or historical data

would be gleaned"

Response: NOAA does not share the commenters' limited view of historical and archaeological significance, nor support the limitations proposed on public or institutional access and use of SCRs. The suggestion that only the private sector be permitted to explore the FKNMS SCRs is contrary to the principles of management in the public interest, and contrary to the NMSA provisions requiring protection and management of the SCRs, as well as facilitating multiple uses of the FKNMS. NOAA plans to cooperate with all public and private endeavors to complete the survey and inventory of SCRs in the FKNMS which is not only required by the NHPA, but provides necessary baseline data about Sanctuary resources which is imperative to natural and historic resource management.

19) Comment: "[NOAA and the State] should establish a [private] review board to consider applications for search and salvage permits. . . . to evaluate applications, advise on methodologies, . . . resolve disputes about . . . divisions . . . ensure [federally funded] projects that are proposed . . . are genuinely in the best interest of the public."

Response: NOAA disagrees and rejects the proposal to transfer inherently governmental functions to a private review board representing private commercial interests. Under this unprecedented proposal, State and Federal projects would require approval from private interests. Moreover, the decisions as to which SCRs would no longer be public resources would be decided by those commercial interests rather than resource management experts. NOAA and the State, however, remain open to suggestions on checks and balances which ensures responsible management of SCRs and equitable treatment of salvors.

2. Meeting with the HSSPC Representatives to Discuss NOAA's Proposed Plan and the HSSPC Proposed Plan

In January 1996, NOAA met with representatives from the HSSPC, John Brandon, PT Rampy and Terrace Lyssenko, and the State of Florida, to discuss where there was common ground between the HSSPC's plan and NOAA's plan, identify differences, identify the adverse economic impacts on salvors from NOAA's plan, and discuss the reasons for the differences in the plans, including Federal legal requirements underlying NOAA's plan. Line by line, NOAA explained which provisions were legal requirements, which requirements were policy, which could not be changed and which could be considered for change, addressing salvors' concerns of obtaining reasonable and practical final rules which minimize adverse economic impacts on their industry.

3. Summary of Revisions to the SCR Regulations and Plan

The final regulations and management plan, as they pertain to SCRs and commercial treasure salvage, were based on the meetings with and comments from treasure salvors, comments from historic preservationists, and the public. In response to comments, the final regulations and plan reflect changes that were made in an effort to make the permit system more pragmatic from the perspective of the commercial treasure salvors without compromising the primary objectives of protecting significant natural and historic Sanctuary resources.

In particular, the final plan and regulations contain more detail on the criteria for NOAA/State decisions regarding the circumstances when SCRs may be recovered under the Sanctuary permit system. The regulations also establish a system by which a permittee may retain possession of the SCRs, make money off their display, and in certain circumstances, be able to privatize the public resource for sale, transfer or distribution to investors.

With regard to the economic burden on small businesses of the permit system, the final regulations no longer contain the requirement for a performance bond for all applicants. As the treasure salvors noted, the regulations elsewhere require all permittees to demonstrate their financial ability to carry out proposed projects and activities requiring permits. NOAA agrees that the underlying purpose of requiring a performance bond (ensure that there were ample funds to finish the research and recovery work once initiated) appears to be covered by the other regulations and that by removing the regulatory requirement for a performance bond, there will be more flexibility in the permit system. While the removal of the proposed regulatory requirement should reduce the costs for meeting the permit criteria for most applicants, such performance bond may still be reasonable and appropriate in certain cases where applicants have not finished projects or have difficulty demonstrating their financial ability to complete the proposed project. NOAA also deleted the proposed regulatory requirement for storage and insurance of artifacts to allow for more case by case flexibility through conservation and curation agreements.

With regard to the liability insurance, the general liability insurance is a statutory requirement under section 310 of the NMSA. However, per suggestions by commercial salvors, NOAA has modified the regulatory provision to clarify that other security instruments may be utilized in lieu of an insurance policy. In addition, commercial salvors feared that the insurance liability would be astronomical and asked NOAA to clarify so that insurance or security would be reasonable. In response, NOAA modified the regulatory language to clarify that the scope of coverage

required is for "potential claims for damages to Sanctuary resources arising out of permitted activities" and to clarify that the amount of insurance or security should be reasonably equivalent with an estimated value of the Sanctuary resources in the vicinity of the permitted area and activities.

With regard to the regulation requiring that SCRs be publicly displayed, NOAA followed the suggestion by salvors to modify the regulation to indicate that they must provide public access and "periodic" public display. This will allow much more flexibility for the permittee's curation of the resource.

With regard to the requirement that a professional archaeologist be in charge of the archaeological research and recovery, that requirement has not been changed or modified. Recovery of historical and cultural resources inherently involves the destruction of contextual and other important archaeological information. The only way that such information is preserved is through scientific recording of the recovery efforts consistent with standard archaeological principles. It is therefore imperative that a professional archaeologist supervise the recovery operations. That is not to say that, as supervisor, the archaeologist needs to be on site at all times. However, the archaeologist needs to oversee the operations. The public's interest in the preservation of archaeological information justifies the additional costs to the permittee. In addition, the administrative record indicates that many commercial salvors already employ an archaeologist.

With regard to the requirement for a professional nautical conservator, the plan has been modified to delete "professional" and insert "authorized" as suggested in the salvors comments in order to provide more flexibility in the permit system and allow for the consideration of field experience. As the professional archaeologist is responsible for supervising the operations, NOAA will give due deference to the supervising archaeologist's selection for nautical conservator.

With regard to the assessment of costs and waiver of section 310 fees, in implementing Special Use Permit authority NOAA has the discretionary authority to consider waiver of costs and/or fees on a case by case basis when permitted activities result in a public benefit and whose value can be determined. For example, in the SCR context, the preferred policy is that the SCR be preserved on site. Waiver of fees for the removal of SCRs which are not under threat is unlikely. However, if it is determined that the SCR is being threatened by remaining in the Sanctuary, research and recovery would appear to be in the public interest and reduction and/or waiver may therefore be considered in the cost and/or fee determination. In determining the amount of costs and fees, due consideration will be given to the extent that private use furthers resource protection, research,

education and similar FKNMS management strategies.

With regard to the survey/inventory permit, commercial salvors had comments which were inherently inconsistent for the regulations. On one hand they did not want a mandatory permit requirement for remote sensing, but on the other, they wanted to be able to enter into exclusive arrangements because of the potentially large financial investments and the risk that others would obtain a salvage permit resulting from their search and discovery. They also wanted to be able to do some limited excavation for SCR identification purposes. Consequently, NOAA clarified that non-intrusive remote sensing is not prohibited and therefore, no permits are required. To address the latter point, the regulations indicate that permits may provide for limited manual alteration of the seabed, including handfanning, provided there is no adverse effect on Sanctuary resources. Limited manual alteration of the seabed will continue to be considered on a case-by-case basis as part of the balancing on whether to issue a permit and for the appropriate conditions to protect resources and manage multiple uses.

As for the suggestion of exclusive rights, the regulations have been modified to indicate that NOAA will not grant survey/inventory or research/recovery permits for areas covered by existing permits, unless authorized by the existing permittee. There is no entitlement to these and other permits. NOAA, through its discretionary authority, and the State grant such a privilege, when it is determined to be in the public's interest.

Section II and section V.F.1 summarize the comments received and the changes to the plan and regulations that NOAA in response thereto.

G. Changes Made to the Final SCR Agreement during the NMSA 45-Day Review Period.

After the final regulations were published, there was a review period of 45 days continuous session of Congress during which Congress and the State of Florida reviewed the final plan and regulations. Under section 304 of the NMSA, the Governor has the authority to veto the application of the plan and regulations in State submerged lands and waters during this 45-day review period. During this review period, commercial treasure salvage representatives (John Brandon, PT Rampy and Terrace Lyssenko) met with officials from the Florida Department of State.

In sum, the SCR agreement was amended to clarify the State of Florida's rights and responsibilities as the owner of the State's submerged lands and abandoned shipwrecks therein, and to clarify that, in accordance with the ASA, the SCR plan would facilitate commercial salvage in a manner consistent with the primary NMSA objective of resource protection. Additional language was added

to state that the Florida Division of Historical Resources is an approved curation facility, consistent with the FAP, and the ultimate repository if commercial salvors are unable to enter into agreements with other approved institutions. Some of the requirements were changed from "shall" to "may". The policy preference for on site preservation was qualified to acknowledge that there may be public interest in recovery. NOAA and State consideration of the sovereign owner's interest in protection, management, and recovery was clarified. There was also clarification that employment of an archaeologist or anthropologist was not required for the permit application process, but that the research plan must include the employment of an archaeologist or anthropologist as part of the research team.

The most significant change, and of paramount importance for the State, was the clarification that sovereign rights were not relinquished to State owned SCRs. NOAA and the State agreed that guidelines for phase 3 of the permit process, deaccession/transfer, should be developed through a public process, perhaps utilizing the SAC or a SAC subcommittee on SCRs, for recommendation to NOAA, the State and the Advisory Council on Historic Preservation (ACHP). However the SCR agreement expressly provides that:

If NOAA and the State are unable to reach consensus on the deaccession/transfer pursuant to a Special Use permit under this Agreement, then the State may, without a special use permit, exercise its rights of ownership of SCR in State waters and independently determine how SCRs owned by the State shall be deaccessioned or transferred pursuant to current state law. The Secretary of State does not by this agreement divest the State of its ownership and the rights attendant thereto of SCRs located in State waters and accordingly retains the authority to dispose of SCRs recovered under this agreement.

VI. EXPECTED IMPACTS ON TREASURE SALVORS

COMMERCIAL SALVORS: PROFESSIONALS AND PARA-PROFESSIONALS

The economic impacts to commercial salvors are addressed in the Draft and Final Environmental Impact Statements; the assessment conducted pursuant to E.O 12866 and the Final Regulatory Flexibility Analysis, as well as in this supplement. State law prohibited the unauthorized collection of coins off of the beach and other otherwise in State submerged lands prior to the Sanctuary's designation. To the extent there was a Federal ban on treasure salvage supplementing State prohibitions, it was done by Federal statute and not by NOAA Sanctuary regulations which will not become effective until July 1, 1997. Since the

Sanctuary's designation, NOAA and the State considered and issued permits in the interim to salvors who demonstrated they had valid rights of access pre-dating Sanctuary designation. For example, a Sanctuary permit was issued to Mel Fisher pursuant to an application to NOAA for conducting his work on the Atocha and Margarita in the Sanctuary. Mel Fisher has continued to work these sites throughout the last 5 years and has reported to continuously recover emeralds; the large majority of gold, silver and other metallic artifacts which are detected by remote sensing equipment are believed to have been recovered some time ago.

The majority of the Sanctuary is in State waters, and therefore commercial treasure salvors are already subject to regulations similar to those that will be applied in the Sanctuary. Since the enactment of the Abandoned Shipwreck Act in 1988 terminated the application of the law of salvage and the law of finds in State waters, except for pre-existing contracts and admiralty claims, commercial treasure salvors businesses in the Florida Keys have either moved to the Bahamas/Caribbean or been conducted outside of compliance with existing Federal and State laws. Pursuant to the enactment by Congress of the FKNMSPA, NOAA is a steward for Sanctuary resources, including historic resources and has responsibility to protect and manage SCRs not just for salvors, but for all potential Sanctuary users.

The potential profit for commercial treasure salvors appears to be diminishing for a number of different reasons. Thus, the incremental economic impact of the management plan and regulations upon commercial treasure salvors is difficult to estimate and must be considered in the context of the economic impacts on others from treasure salvage as well as the environmental and economic benefits of strict regulation of commercial treasure salvage under the plan and regulations. As Throckmorton has pointed out: treasure hunting is unnecessarily destroying natural and historic resources that would environmentally and economically benefit from regulation which ensures the preservation of these resources in situ and proper recovery and conservation in museums.¹²⁵

The Florida Keys have largely been picked over by treasure hunters over the last few decades.¹²⁶ While new technology may result in finds in deep ocean areas, technology sufficient for discovering wrecks in the depths of the Sanctuary has been available and therefore it is unlikely new sites will be found. This is supported by a review of the Florida State files in which it appears that there has not been a discovery of a new site with

¹²⁵ See Throckmorton article, 1990.

¹²⁶ See J. Miller interview; report by J. Miller on State salvage files; admiralty court records.

treasure in the majority of the Sanctuary area for more than a decade. There are no State salvage contracts in the State portion of the Sanctuary.¹²⁷ From 1983 to 1992, 99 applications were received and acted upon by the State. Of these, 58 were denied for various reasons, and 41 approved. Of the 99 applications, 12 were for areas in the Florida Keys and 87 were for areas outside the Keys. During five of the ten years no applications were received for areas in the Florida Keys; during the other five of ten years, only two applications were received for areas in the Keys. Thus, most of the interest over the past decade in Florida has been outside the Sanctuary boundary. There are some exploration contracts in the State's portion of the Sanctuary, but the treasure hunters are not finding anything which would indicate there is treasure. Similarly, except for the Atocha and the Margarita, the admiralty court files do not indicate any great treasure finds in the last decade.

Further evidence of this is the shift in treasure hunting to the Caribbean and other areas of the world by American treasure hunters. Thus, based on reasonable projections of the significant costs and the unlikelihood of the recovery of items of great monetary value, the projected economic contributions of treasure hunters without being subject to new regulations appears minimal. For significant economic benefits to occur, one would have to assume the discovery of another site like the Atocha, which is highly unlikely.

Federal Archaeological Program Standards-Archaeological Supervision

Compliance with the Sanctuary regulations and permit requirements is expected to add additional costs to the three phase permit-application system described above in section IV. In addition to those costs associated with paperwork requirements, there are expected costs associated with the compliance of FAP scientific archaeological standards and requirements.

The most costly requirement of complying with Sanctuary regulations is reported by current interim permittee (Dr. Molinari) and Jack Haskins to be the expense of having an archaeologist to supervise intrusive research, recovery, and other activities requiring systematic scientific recording and reporting because the threat of loss or destruction of public historic resources is great. The Sanctuary regulations were revised to be flexible and generally rely upon the individual archaeologist's professional opinion as to the amount of direct

¹²⁷ The State's agreement with Mel Fisher on the Atocha was voided by the Court because sites were determined to be outside the State's submerged lands and waters. Treasure Salvors II, supra.

supervision that is required for a particular project.

Most professional companies already employ an archaeologist, so the costs for compliance with this requirement is not expected to substantially increase costs of operation. However, the permit requirements will empower the archaeologists by providing control over research and recovery. Consequently, there may be incremental costs if the archaeologist requires more care in systematically researching, recording and reporting search and recovery than is currently conducted when the salvor is making final decisions about archaeological recording and reporting.

The cost of complying with the Sanctuary regulations and permit system may be particularly burdensome on para-professionals and hobbyists due to compliance with FAP requirements. For these groups who generally do not use an archaeologist, this requirement will be the most expensive cost of compliance. However, the economic impact to these groups is not expected to be great because commercial treasure salvage is not their primary source of income. These groups conduct treasure salvage or souvenir collecting, part-time or on an intermittent, ad hoc basis.

The systematic approach required by the regulations is expected to, in the long run over the entire industry, lead to more efficient operations, and thereby provide some cost savings, as compared to treasure hunting without use of the scientific approach. The time conducting commercial salvage underwater has been estimated to be between 10 and 15 times greater than the bottom time of a carefully planned scientific archaeological research and recovery expedition.¹²⁸ While one carefully planned archaeological expedition would appear to take much longer than a commercial salvage without careful recording and reporting, there may be overall industry savings from more efficient recovery. When search and recovery is not conducted based on scientific data and methods, much time, money, personnel and equipment are used in wasted effort. Moreover, because little or no reporting and recording of recoveries is systematically and uniformly conducted, treasure salvors continue to repeatedly go over the same or overlapping areas.

Compliance with existing State and Federal (non-Sanctuary) permit requirements is reported by treasure salvors to already be too costly and time consuming, primarily because of the costs associated with Florida DEP water quality permits. If Florida DEP water quality requirements are more rigorous than existing Federal water quality permit requirements applied outside State waters, commercial salvors should expect costs to increase

¹²⁸ Throckmorton, "Marine Archaeology", 28 Oceanus No. 1 (Spring 1985).

throughout the Sanctuary commensurate with those in State waters in compliance with the Sanctuary Water Quality Action Plan which will extend similar requirements into Federal waters of the Sanctuary.

Salvors who violate the law will be the most adversely impacted and they will likely have to find work outside the Sanctuary or be put out of business if they are unwilling to work within the Sanctuary under the Sanctuary regulations and permit system. The NMSA provides NOAA with the authority to seize and forfeit vessels which violate the NMSA and implementing regulations. In general, it is done only as a last resort as a measure to get security for extensive damages done to Sanctuary resources by the vessel and the responsible parties (owner/insurer) are unable or unwilling to provide alternative security bond, letter of credit, etc. In most cases, some security is provided and the vessel remains under the control of the owners. It would be inconsistent with law and policy to minimize impacts to those violating the law or regulations.

Regulations are needed to permit salvage that would otherwise be prohibited by the NMSA and Federal Historic Preservation laws. Treasure salvors who violate the NMSA and implementing regulations may incur adverse economic impacts not only paying for the site restoration, but also the damage assessment. Similar to the polluter pays principle underlying many environmental laws, those who do the damage pay for damage assessment and restoration instead of the general public.

Special Use Permits: fees and insurance costs

Section 310 of the NMSA provides the authority for issuing Special Use Permits and for the assessment of associated fees to cover administrative costs as well as a fair market value return. The administrative costs are those directly incurred as a result of issuing the permit. The administrative processing fee for special use permits issued for public access to the USS Monitor was \$500 plus a \$200/day fee for NOAA observer, assessed only on days the observer was on site. The total amount collected was \$2,000. The total administrative costs for processing-monitoring other special use permits has ranged from \$300 - \$520. While the administrative costs vary depending upon the scope of the permit, based on past experience at the MONITOR and other sanctuaries, they are generally not expected to exceed \$2,000 annually for a special use permit. State contracts currently assess a fee of approximately \$600 for exploration contracts and \$1,200 for salvage contracts annually. NOAA does not plan to assess any charges for its corresponding phase 1 and 2 permits. However, under Sanctuary phase 3, if the State has not assessed its contract charges in phases 1 and 2, NOAA may recover its administrative costs incurred in phases 1 and 2 as part of the administrative costs assessed for a special use permit in phase 3

(deaccession/transfer).

With regard to the assessment of a fair market value for access to Sanctuary resources, until guidelines or regulations are subsequently developed, the agency practice has been to consult with the permit applicant on what would be a reasonable rate of return for the Government for their access to public Sanctuary resources. Based on past practice, this assessment is generally not expected to exceed 5% of the gross proceeds to permittee.

The regulations are flexible enough to avoid duplicative or unduly burdensome costs and assessments. Consistent with the Agency practice, there is a case by case consideration of what fees are reasonable and appropriate as the permits are often issued in connection with a charity event or other activity of public interest. NOAA considers waiving fees/costs on a case by case basis when such waiver is determined to be in the public's interest. For commercial treasure salvors that may include a NOAA/State determination that the SCR was under risk of being destroyed if it remains in Sanctuary and the permittee plans to properly recover and conserve artifacts, and to make SCRs available to the general public for research or viewing enjoyment.

Section 310 provides that permits "shall require the permittee to purchase and maintain comprehensive general liability insurance against claims arising out of activities conducted under the permit." While the regulations have been revised to provide the flexibility of obtaining other security instruments in lieu of insurance, unless the commercial salvors already carry insurance or other security for potential destruction of the environment arising from their activities, NOAA expects they will bear additional costs for such liability insurance or security coverage for the potential destruction of Sanctuary resources arising from their commercial treasure salvage activity.

OTHER USERS: DIVERS, ARCHAEOLOGISTS, EDUCATORS, GENERAL PUBLIC

SCRs are of value to different users within the Sanctuary including: 1) recreational divers who value the wrecks as part of their diving experience which is further enriched by the historical-cultural significance of the SCR, 2) archaeologists-historians, and educators who value SCRs for research and teaching, 3) wreck-fishermen and boaters who value the SCRs because the historical significance of the SCR may further enhance the fishing/boating experience.

These SCRs are also of value to others outside of the Sanctuary, including: 1) museum officials and those attending the museums, 2) archaeologists-historians, and educators who could research/study recovered artifacts and contextual information, 3) non-users who value or appreciate the long-term preservation

of SCRs for their mere existence or for potential use by other present and future generations.

In general, industries related to non-intrusive recreational use of the Sanctuary should economically benefit from preservation of natural and historic resources. The negative economic impacts to commercial treasure salvors has been minimized to the maximum extent possible under existing Federal Historic Preservation laws. Commercial salvage work continues at sites with pre-existing admiralty rights and the search/recovery of new sites would continue inside and outside of the Sanctuary.

Treasure salvage is a highly speculative venture and most treasure salvors admit that there are very few salvors lucky enough to make a profit from their endeavors.¹²⁹ The discovery and recovery of a large amount of new treasure in the Florida Keys is even more speculative and must be strictly regulated to avoid predictable costs of destruction of natural and historic resources that have more value to society if they are protected, managed, researched and enjoyed within the Sanctuary instead of removed. The rather speculative economic benefits to commercial treasure salvage and exploration must be factored against the risk of economic detriment to a much larger tourism industry that benefits from the preservation of natural and historic resources.

Under the final regulations, private recovery may be permitted, preferably where the economic benefits to discoverers are realized through fees at museums of public access. The privatization of certain gold, silver and jewels of lesser archaeological significance may be permitted to reimburse the investors, allow a reasonable return on investment, or finance preservation, curation, research and interpretation of more significant items. Thus, the negative economic impact on treasure salvors in the search and recovery operation is minimized and the potential for positive economic impact for those in the museum and tourism industry is enhanced. There may be an incremental increase in costs to commercial treasure salvors for recovery in an environmentally-archaeologically sound manner, however, the alternatives for further cost savings would violate Federal Historic Preservation law requirements and result in costs to other compatible Sanctuary uses such as fishing, diving, and cultural tourism. In addition, professionally supervised research and recovery in permitted areas improves the overall value of recovered items and avoids economic costs related to environmental damage. Thus, the related economic benefits to tourism would be maintained while minimizing the economic impact on commercial treasure salvors to the maximum extent legally possible.

¹²⁹ Marx article, supra.