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February 23, 2009

Dave Kelch  
Ohio Sea Grant Program  
42110 Russia Road  
Elyria, OH 44035

Re: Application of Salvage Law to "Stranded Ice Fishermen" Incident (MASGP 09-008-03)

*This product was prepared by the National Sea Grant Law Center under award number NA06OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.*

Dear Dave,

Below is the summary of research regarding the question you posed to the National Sea Grant Law Center about the application of salvage law to equipment and fishing gear abandoned on Lake Erie. The following information is intended as advisory research only and does not constitute legal representation of Ohio Sea Grant or its constituents. It represents my interpretations of the relevant laws based upon research conducted in the limited time frame afforded by the request.

The scenario, as I understand it, is this. Every year, ice fishermen on Lake Erie are stranded when the ice they are fishing on breaks free. When rescue personnel arrive in helicopters and airboats, the fishermen are forced to leave their equipment, which includes snowmobiles, ATVs, and fishing gear, behind. Some fisherman quickly contract for salvage, paying an airboat captain or someone else to retrieve their property. Others wait for the ice floe to reattach to the shore and then venture out to retrieve their own equipment. Sometimes when those who waited return to their fishing hole, they find their equipment gone.

While the law of salvage traditionally applies to vessels and their cargoes, "whatever of value found in or upon navigable waters that is properly within admiralty jurisdiction is subject to the law of salvage."<sup>1</sup> The admiralty jurisdiction of the federal courts extends to the Great Lakes.<sup>2</sup> The equipment of the stranded ice fishermen should be considered property that is subject to salvage.

<sup>1</sup> Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-2.

<sup>2</sup> *The Great Western*, 29 F. Cas. 777, No. 17443 (N.D. NY 1862).

## Abandoned Property and Lake Erie

Before discussing the application of salvage law to this scenario, a brief note about Ohio state law with respect to abandoned property in Lake Erie is warranted. To provide special protection for historic shipwrecks and associated artifacts in Lake Erie, the Ohio Legislature granted the Director of the Department of Natural Resources (DNR) the authority to establish submerged lands preserves.<sup>3</sup> A permit from the DNR is needed to salvage abandoned property located within a designated Lake Erie submerged lands preserve. Abandoned property is defined as

a submerged aircraft; a submerged watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of a submerged aircraft or watercraft; the personal property of the officers, crew, and passengers of a submerged aircraft or watercraft; the cargo of a submerged aircraft or watercraft that has been deserted, relinquished, cast away, or left behind and for which attempts at reclamation have been abandoned by the owners and insurers; and submerged materials resulting from activities of prehistoric and historic native Americans.<sup>4</sup>

The equipment and gear left behind by the ice fishermen would not fall within this definition because they are not submerged. Even if they did fall through the ice, the equipment and gear is not associated with an aircraft or watercraft. The DNR regulations with respect to this program, therefore, would be inapplicable.

### Is the equipment considered abandoned? If so, can anyone lay claim to this gear?

The finder of property abandoned at sea can acquire title to it, in limited circumstances, under the law of finds. "The law of finds is a common law principle granting title to the first party to discover and reduce to possession unknown or abandoned artifacts found in the sea."<sup>5</sup> This is similar to the familiar childhood rule "finders, keepers." For policy reasons, however, admiralty law favors salvage over finds<sup>6</sup> and its application is limited to two situations: "(1) where the owners have expressly and publicly abandoned their property; and (2) where items are recovered from an ancient shipwreck and no one comes forward to claim them."<sup>7</sup>

A state court in Washington recently stated that abandonment, under the law of finds, "occurs through the act of deserting property without hope of recovery or intention of returning to it."<sup>8</sup> Abandonment is a voluntary act that "must be proved by a clear and unmistakable affirmative

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<sup>3</sup> OHIO REV. CODE § 1506.31(A). ("A preserve may be established for any area of submerged lands that contains a single watercraft or aircraft of historical value, two or more watercraft or aircraft constituting abandoned property, or other features of archaeological, historical, recreational, ecological, environmental, educational, scenic, scientific, or geological value other than sand, gravel, stone, and other minerals and substances authorized to be taken and removed in accordance with [other provisions of state law].")

<sup>4</sup> *Id.* § 1506.30(A).

<sup>5</sup> *In re Tortorelli*, 66 P.3d 606, 611 (Wash. 2003).

<sup>6</sup> The law of salvage, by encouraging individuals to rescue property that is in danger of being lost and return it to its rightful owner, is more in line with societal needs and values. The law of finds is solely concerned with title to property and thus can lead to unscrupulous behavior.

<sup>7</sup> Schoenbaum, *supra* note 1, at § 16-7.

<sup>8</sup> *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989).

act to indicate a purpose to repudiate ownership.”<sup>9</sup> Abandonment, therefore, is more than leaving property behind. The owner must leave the property with the intent to relinquish all claims to it.

It is unlikely that the equipment left behind by the ice fishermen would be considered abandoned under the law of finds. First, the fishermen did not intend to leave their equipment and fishing gear on the ice. The equipment was left behind when rescue personnel began transporting the fishermen back to shore. Some fishermen probably welcomed the rescue boats, but I suspect some doubted that they needed rescuing and would argue that they were forced to abandon their property. Either way, the property was not left on the ice voluntarily.

Second, it is doubtful that any of the fishermen left their equipment on the ice “without hope of recovery or intention of returning to it.” Unless the ice was expected to melt quickly, the fishermen would have had an expectation that someone would be able to return to the ice floe and retrieve the equipment and gear.

**If the gear has not been intentionally abandoned, is removal by another individual considered theft? Or is this where salvage rights come into play?**

Removal of the equipment and gear is not necessarily theft. Under the traditional law of salvage, a party may take possession of property to save it from “marine peril.” Property is in marine peril if it is at risk of loss, destruction, or deterioration.<sup>10</sup> If services are voluntarily rendered and successful, “a salvor of imperiled property on navigable waters gains a right to compensation from the owner.”<sup>11</sup> The salvor may retain possession of the property until compensation is received.

**Does a salvager need permission from the rightful owner to salvage the equipment?**

With respect to vessels, salvage cannot be forced upon an owner who is in possession of the vessel.<sup>12</sup> If a boat is sinking with the owner onboard, the owner can refuse assistance from a would-be salvor. If the vessel is derelict, however, consent is not needed.<sup>13</sup> The law of salvage defines “derelict property” as “property on navigable waters which is abandoned and deserted by those who were in charge of it.”<sup>14</sup> This is a different test of abandonment than the one mentioned above under the law of finds. For example, if the crew leaves a ship to save their lives, they have deserted it for the purposes of salvage even though the owner of the ship has not “abandoned” title to it under the law of finds.

While the ice fishermen have not abandoned all claims to their equipment and gear, they have in a sense deserted it. If the equipment and gear is in “marine peril,” a third party may have a right to salvage it. Marine peril exists when a vessel or other property is “exposed to actual or apprehended danger which might result in her destruction.”<sup>15</sup> This is a fact-specific

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<sup>9</sup> *The Port Hunter*, 6 F.Supp. 1009, 1011 (D. Mass. 1934).

<sup>10</sup> *Id.*

<sup>11</sup> Schoenbaum, *supra* note 1, at § 16.1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at § 16.7.

<sup>15</sup> *Evanow v. M/V Neptune*, 80 F. Supp. 761 (D. Alaska 1948).

determination that would focus on such factors as thickness of the ice, time of year, and weather conditions.

If the fishermen were stranded late in the fishing season and the ice was quite unstable and expected to melt quickly, an attorney for the salvor might argue, for example, that there was a high risk that the equipment and gear would fall through the ice before the rightful owners could return or contract for retrieval. Salvage operations were therefore proper because the property was in "marine peril." However, if the fishermen were stranded during a time when the ice was expected to reattach and remain stable, an attorney for the fisherman might argue that the equipment and gear would have been safe for several weeks and therefore was not in marine peril.

**Does a salvor have the right to recover the property and keep it to resell, or must they first offer it back to the owner for a salvage fee? If a salvage claim is made, and the owner is offered a salvage fee for the return of their equipment, and chooses to not pay the fee, does this go to court? If so, what court? Local, state, Admiralty? Or can the salvor keep the equipment and sell it to recover their salvage expenses?**

Salvage claims fall within the exclusive jurisdiction of federal district courts over admiralty and maritime claims.<sup>16</sup> The process for obtaining a salvage award starts with the district court, not the rightful owner of the property. A salvor will first file an *in rem* proceeding in federal district court to receive a salvage award.<sup>17</sup> In such proceedings, the courts take control of the property, the "rem," until the rights of the affected parties can be determined.

Usually, when the court takes possession of the property, it will publish a legal notice in the newspaper or other publication. A rescued fisherman who left equipment behind should pay close attention to the legal notices in the local papers as that might be the only notification he receives that someone has taken possession of his property. Individuals may assert ownership over the property by filing a notice of claim with the court.

Courts rarely award title to the property to the salvor, regardless of whether someone claims the property. Traditional salvage law does not authorize a court of admiralty to vest title of derelict property with the salvor.<sup>18</sup> Salvors are instead entitled to a monetary award which "should not exceed the benefits to the owner of the salvaged property, nor the value of the salvaged property."<sup>19</sup> When no owner comes forward to assert a claim, the property is often sold and all or some of the proceeds awarded to the salvors.<sup>20</sup>

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<sup>16</sup> 28 USCA § 1333(a).

<sup>17</sup> Am. Jur. Salvage § 57.

<sup>18</sup> *Falgout Brothers, Inc. v. S/V Pangaea*, 966 F.Supp. 1143, 1145 (S.D. Ala.1997).

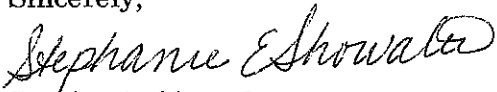
<sup>19</sup> Am. Jur. Salvage § 58.

<sup>20</sup> *Falgout Brothers*, 966 F.Supp. at 1146 ("In a case such as this where no one has made an appearance as owner of the derelict vessel, ordering that the vessel be sold and awarding one hundred percent of the proceeds as a salvage award is justified."); *Medina v. One Nylon Purse Seine*, 259 F.Supp. 769 (D.C. Cal. 1966) (Salvors of fishing net valued at \$15,000 were awarded \$7,500 from the proceeds of sale.).

If an owner does come forward, the property would be returned to him upon payment of the salvage award as set by the court. If the owner was unable to pay, the property would be sold to generate the funds to pay the salvage award. It is unlikely the salvor would be awarded title to the property in lieu of a monetary payment.

I hope you find this information helpful. If you would like additional information or have follow-up questions, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Showalter".

Stephanie Showalter

Director, National Sea Grant Law Center