

UNITED STATES of America, Plaintiff-Appellee,
v.
Rodney Phillip TIDWELL, Defendant-Appellant.

No. 98-10164.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 11, 1999

Filed Aug. 20, 1999

Defendant was convicted in the United States District Court for the District of Arizona, Earl H. Carroll, J., of conspiracy, illegal trafficking in Native American cultural items under the Native American Graves Protection and Repatriation Act (NAGPRA), theft of tribal property, and trafficking in unlawfully removed archaeological resources, and he appealed. The Court of Appeals, Thomas, Circuit Judge, held that: (1) NAGPRA was not unconstitutionally vague as applied to defendant; (2) any error in excluding evidence purporting to show that defendant had constructed one or more of the masks involved was harmless; and (3) evidence was sufficient.

Affirmed.

[1] CRIMINAL LAW ⇨1139

110k1139

Challenge to statute under which a defendant was convicted, as being unconstitutionally vague, is reviewed de novo.

[2] CRIMINAL LAW ⇨13.1(1)

110k13.1(1)

In evaluating vagueness of a criminal statute, Court of Appeals considers whether the challenged law: (1) sufficiently defines the offense so that ordinary people can understand the prohibited conduct; and (2) establishes standards to ensure that law enforcement officers enforce the law in a nonarbitrary and nondiscriminatory manner. U.S.C.A. Const.Amend. 5.

[3] CONSTITUTIONAL LAW ⇨42.2(1)

92k42.2(1)

A plaintiff who engages in some conduct that is

clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. U.S.C.A. Const.Amend. 5.

[4] CONSTITUTIONAL LAW ⇨258(3.1)

92k258(3.1)

The Native American Graves Protection and Repatriation Act (NAGPRA) was not unconstitutionally vague as applied to defendant, on theory that relevant terms are defined by Native Americans and that, because tribal law regarding cultural patrimony is not written, it was impossible for defendant to have fair notice of his wrongful conduct, where defendant was a dealer in Native American art and had previously been convicted under the NAGPRA, and thus had the background knowledge sufficient to put him on notice of statutory prohibitions, and in light of scienter element and requirement of consultation with Native American officials, so that NAGPRA does not foster arbitrary enforcement. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 1170(b); Native American Graves Protection and Repatriation Act, § 2(3)(D), 25 U.S.C.A. § 3001(3)(D).

[4] INDIANS ⇨36

209k36

The Native American Graves Protection and Repatriation Act (NAGPRA) was not unconstitutionally vague as applied to defendant, on theory that relevant terms are defined by Native Americans and that, because tribal law regarding cultural patrimony is not written, it was impossible for defendant to have fair notice of his wrongful conduct, where defendant was a dealer in Native American art and had previously been convicted under the NAGPRA, and thus had the background knowledge sufficient to put him on notice of statutory prohibitions, and in light of scienter element and requirement of consultation with Native American officials, so that NAGPRA does not foster arbitrary enforcement. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 1170(b); Native American Graves Protection and Repatriation Act, § 2(3)(D), 25 U.S.C.A. § 3001(3)(D).

[5] CRIMINAL LAW ⇨1170(1)

110k1170(1)

In prosecution for violation of the Native American Graves Protection and Repatriation Act (NAGPRA), theft of tribal property, and conspiracy, any error in

excluding evidence purporting to show that defendant had constructed one or more of the masks identified by the government's experts as authentic Hopi masks was harmless, where the proffered evidence showed only that defendant had some of the materials with which to make masks and that some unidentified masks appeared to be under construction in his house. 18 U.S.C.A. §§ 371, 1163, 1170.

[6] CRIMINAL LAW ⇨1144.13(3)
110k1144.13(3)

Court of Appeals reviews the evidence presented at trial in a light most favorable to the prosecution to determine if the evidence was sufficient from which a rational jury could have found the essential elements of the charged crime beyond a reasonable doubt.

[6] CRIMINAL LAW ⇨1159.2(7)
110k1159.2(7)

Court of Appeals reviews the evidence presented at trial in a light most favorable to the prosecution to determine if the evidence was sufficient from which a rational jury could have found the essential elements of the charged crime beyond a reasonable doubt.

[7] CONSPIRACY ⇨47(3.1)
91k47(3.1)

Conviction of conspiracy to commit illegal trafficking in Native American cultural items was supported by evidence that defendant told undercover agent he had received the masks from a third person on the Hopi Reservation, that third person identified the masks sold by defendant to agent, and that another witness connected third person to improperly acquired Hopi masks. 18 U.S.C.A. § 371.

[8] CONSPIRACY ⇨24(1)
91k24(1)

To satisfy a conspiracy charge, the government must present sufficient evidence to demonstrate: (1) an overt act, and (2) an agreement to engage in criminal activity. 18 U.S.C.A. § 371.

[8] CONSPIRACY ⇨27
91k27

To satisfy a conspiracy charge, the government must present sufficient evidence to demonstrate: (1) an overt act, and (2) an agreement to engage in

criminal activity. 18 U.S.C.A. § 371.

[9] CONSPIRACY ⇨44.2
91k44.2

An implicit agreement, supporting a conspiracy charge, may be inferred from circumstantial evidence if the nature of the acts would logically require coordination and planning. 18 U.S.C.A. § 371.

[10] INDIANS ⇨36
209k36

Under the criminal component of the Native American Graves Protection and Repatriation Act (NAGPRA), the government had to prove that defendant: (1) knowingly, (2) sold, purchased, used for profit, or transported for sale or profit, (3) Native American cultural items obtained in violation of the NAGPRA. 18 U.S.C.A. § 1170(b).

[11] INDIANS ⇨36
209k36

Conviction for violating the Native American Graves Protection and Repatriation Act (NAGPRA) was supported by expert testimony that the masks defendant purchased and sold belonged to the Hopi Indians and were "cultural patrimony," and by evidence from which the jury reasonably could deduce that defendant knew he was selling proscribed tribal artifacts. 18 U.S.C.A. § 1170(b).

[12] INDIANS ⇨36
209k36

To convict for theft of tribal property, the government must show that defendant: (1) stole or knowingly converted for his use or the use of another, (2) any property belonging to any tribal organization. 18 U.S.C.A. § 1163.

[13] INDIANS ⇨36
209k36

Evidence that defendant knew that the Hopi owned the masks he sold and were not permitted to sell them was sufficient to sustain the verdict convicting him of theft of tribal property. 18 U.S.C.A. § 1163.

[14] HEALTH AND ENVIRONMENT ⇨
25.5(8)
199k25.5(8)

To convict for trafficking in unlawfully removed archaeological resources, the government had to

prove that defendant: (1) purchased or sold, (2) an archeological resource, (3) that was removed from Indian lands, (4) without a permit. Archaeological Resources Protection Act of 1979, § 6(b), 16 U.S.C.A. § 470ee(b).

[15] HEALTH AND ENVIRONMENT ⇨
25.5(8)

199k25.5(8)

Conviction for trafficking in unlawfully removed archaeological resources by purchasing and selling Native American robes was supported by the government's expert archeological testimony and evidence that the robes were owned by tribe. Archaeological Resources Protection Act of 1979, § 6(b), 16 U.S.C.A. § 470ee(b).

[16] INDIANS ⇨**36**

209k36

In enhancing defendant's sentence by six levels under the Sentencing Guidelines based on the amount of the loss, following convictions based on illegal trafficking in Native American cultural items, there was no clear error in using defendant's asking price for items, where they did not have a broad and active market. U.S.S.G. § 2B1.1, comment. (n. 2), 18 U.S.C.A.

[17] CRIMINAL LAW ⇨**1139**

110k1139

District court's determination of obstruction of justice, for purposes of adjustment of base offense level under the Sentencing Guidelines, is reviewed for clear error, but Court of Appeals reviews de novo whether a defendant's conduct constitutes an obstruction of justice. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[17] CRIMINAL LAW ⇨**1158(1)**

110k1158(1)

District court's determination of obstruction of justice, for purposes of adjustment of base offense level under the Sentencing Guidelines, is reviewed for clear error, but Court of Appeals reviews de novo whether a defendant's conduct constitutes an obstruction of justice. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[18] CRIMINAL LAW ⇨**1312**

110k1312

Findings of fact related to a defendant's attempt to obstruct justice, for purposes of adjustment of base

offense level under the Sentencing Guidelines, must be supported by a preponderance of the evidence, but a sentencing judge may consider hearsay testimony or other evidence that would not otherwise be admissible at trial. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[18] CRIMINAL LAW ⇨**1313(2)**

110k1313(2)

Findings of fact related to a defendant's attempt to obstruct justice, for purposes of adjustment of base offense level under the Sentencing Guidelines, must be supported by a preponderance of the evidence, but a sentencing judge may consider hearsay testimony or other evidence that would not otherwise be admissible at trial. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[19] CRIMINAL LAW ⇨**1313(2)**

110k1313(2)

Determination that defendant obstructed justice, for purposes of adjustment of base offense level under the Sentencing Guidelines, was supported by evidence that defendant willfully created affidavits with the expectation that they would mislead the court, and by evidence, though controverted, that he attempted to improperly influence a witness by offering cash and that he intimidated a witness. U.S.S.G. §§ 3C1.1, 3C1.1, comment. (n. 4), 18 U.S.C.A.

*978 Jess A. Lorona, Burch & Cracchiolo, Phoenix, Arizona, for the defendant-appellant.

Paul Charlton and Diane Humetewa, Assistant United States Attorneys, Phoenix, Arizona, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona. Earl H. Carroll, District Judge, Presiding, D.C. No. CR-97-00093-02-EHC.

Before: HERBERT Y.C. CHOY, PAUL R. MICHEL, [FN1] and SIDNEY R. THOMAS, Circuit Judges.

FN1. The Honorable Paul R. Michel, United States Circuit Judge for the Federal Circuit, sitting by designation.

THOMAS, Circuit Judge:

Rodney Tidwell appeals his jury conviction and

sentence, primarily contending that the Native American Graves Protection and Repatriation Act ("NAGPRA") is unconstitutionally vague. We affirm the conviction and the sentence imposed by the district court.

I

Defendant-appellant Rodney Tidwell and Ernest Chapella were indicted on twelve counts of illegal trafficking in Native American cultural items, eleven counts of theft of tribal property, one count of *979 trafficking in unlawfully removed archaeological resources, one count of interstate transportation of stolen property, and conspiracy to commit illegal trafficking of Native American cultural items and theft of tribal property. Soon thereafter, Chapella committed suicide.

The government's indictment arose out of an undercover investigation of Tidwell after it received a tip from a confidential informer that Tidwell was trafficking in stolen or protected Native American cultural items. Agent John Fryar, an investigator with the Bureau of Indian Affairs, conducted the investigation and presented himself to Tidwell as a purchaser of Native American art. In a series of meetings with Tidwell, Fryar purchased and attempted to purchase a number of items that the government later learned were religious, cultural, or historical items belonging to two different Native American groups. These items included eleven Hopi masks, also called Kwaatsi or Kachina, and a set of priest robes from the Pueblo of Acoma.

During his final meeting with Tidwell, Fryar discussed the purchase of three other masks. While Tidwell and Fryar discussed this purchase, federal agents executed a search warrant on Tidwell at his home. In addition to the three masks that Fryar was in the process of purchasing, the agents found two more masks at Tidwell's house.

At trial, the government introduced the taped conversations between Agent Fryar and Tidwell. The government also introduced a number of experts on Native American religion and culture who testified that the masks and the robes were prohibited from being sold under the NAGPRA. In his defense, Tidwell introduced testimony of Native Americans who testified that the masks were not authentic Hopi masks and also that the masks

Tidwell purchased and sold were not the type of cultural item protected by the NAGPRA.

After the trial, the jury convicted Tidwell of conspiracy under 18 U.S.C. § 371, seven counts of illegal trafficking in Native American cultural items under 18 U.S.C. § 1170, eleven counts of theft of tribal property under 18 U.S.C. § 1163, and one count of trafficking in unlawfully removed archaeological resources under 16 U.S.C. § 470ee. The masks and the robes formed the basis of the convictions under the NAGPRA, the masks alone formed the basis for the convictions for theft of tribal property and the conspiracy conviction, and the robes alone formed the basis for the conviction for trafficking in unlawfully removed archaeological resources.

The district court then added a two-level adjustment to Tidwell's base offense level for obstruction of justice and a six-level increase based on the amount of the loss and sentenced Tidwell to thirty-three months in prison.

Previous to these convictions, Tidwell had been arrested and convicted under the NAGPRA.

II

[1][2][3] We review Tidwell's challenge that the NAGPRA is unconstitutionally vague de novo, see *United States v. Lee*, 183 F.3d 1029, 1031-32 (9th Cir.1999), and hold that the NAGPRA is not unconstitutionally vague as applied to Tidwell. In evaluating vagueness, we consider whether the challenged law: (1) sufficiently defines the offense so that ordinary people can understand the prohibited conduct; and (2) establishes standards to ensure that law enforcement officers enforce the law in a nonarbitrary and nondiscriminatory manner. See *id.*; *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir.1997). However, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

[4] The section of the NAGPRA under which Tidwell was convicted states:

*980 Whoever knowingly sells, purchases, uses for

profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 1170(b). Cultural items are defined in the NAGPRA and include, inter alia, "cultural patrimony." 25 U.S.C. § 3001(3)(D). Cultural patrimony is:

[A]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Id. Tidwell specifically challenges as vague the two elements of cultural patrimony: the "inalienability" of an item, and an item's "ongoing historical, traditional, or cultural importance" to a Native American group. He argues that because these terms are defined by Native Americans and because tribal law regarding cultural patrimony is not written, it was impossible for him to have fair notice of his wrongful conduct as proscribed by the NAGPRA. Further, Tidwell points to the testimony introduced at his own trial to demonstrate the uncertainty in the law: The government introduced expert witnesses who stated that the masks and the robes were cultural patrimony; he introduced expert witnesses who testified that the masks were not authentic.

In holding that the NAGPRA is constitutional, we adopt the reasoning of the Tenth Circuit in *United States v. Corrow*, 119 F.3d 796 (10th Cir.1997), cert. denied, --- U.S. ---, 118 S.Ct. 1089, 140 L.Ed.2d 146 (1998). Like *Corrow*, Tidwell is and claims to be a dealer in Native American art. Therefore, he had the background knowledge sufficient to put him on notice that some of the items he traded might be inalienable objects belonging to a Native American group. Even if he was not sure about whether a particular item was protected, he

had sufficient understanding of Native American art and the NAGPRA to know that he would have to inquire further or consult an expert when he purchased the items. As we repeated in *United States v. Bohonus*, "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." 628 F.2d 1167, 1174 (9th Cir.1980) (citations and internal quotation marks omitted). Similar to the facts presented in *Corrow*, "this is not a case in which an unsuspecting tourist ... innocently purchase[d]" an item protected by the NAGPRA. Id. at 803. Tidwell already had been convicted under the NAGPRA and was aware of its statutory prohibition.

We also note that the NAGPRA requires the government to establish that the defendant "knowingly" traded in cultural items in violation of the NAGPRA. This scienter element protects the unwary from criminal punishment. See *Village of Hoffman*, 455 U.S. at 499, 102 S.Ct. 1186; *United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir.1999); *United States v. Lee*, 937 F.2d 1388, 1394-95 (9th Cir.1991).

Finally, as determined by the *Corrow* court, the NAGPRA does not foster arbitrary enforcement because law enforcement officials must consult with Native American officials to identify items that are cultural patrimony before they can investigate and arrest a suspect. See 119 F.3d at 804. For these reasons, we hold that the Act is not unconstitutionally vague as applied to Tidwell.

III

[5] Tidwell's argument that he was improperly precluded from presenting evidence *981 in his defense fails. Tidwell sought to introduce evidence that he had constructed one or more of the masks identified by the government's experts as authentic Hopi masks. Tidwell's strategy was that, because the NAGPRA only protects items with historical, traditional, or cultural significance to Native Americans, he might avoid criminal liability by persuading the jury that he had constructed the masks himself. However, the asthenic evidence Tidwell sought to introduce would not have proven that Tidwell had made the masks that he was charged with selling at trial. Rather, the tendered witnesses only could testify generally that Tidwell

had some of the materials with which to make masks and that some unidentified masks appeared to be under construction in Tidwell's house. Thus, any error the district court committed in excluding the evidence was harmless beyond a reasonable doubt. See *United States v. Vargas*, 933 F.2d 701, 705-06 (9th Cir.1991).

IV

[6] Tidwell argues that the government did not provide sufficient evidence from which a rational jury could have convicted him under the charged statutes. We review the evidence presented at trial in a light most favorable to the prosecution to determine if the evidence was sufficient from which a rational jury could have found the essential elements of the charged crime beyond a reasonable doubt. See *United States v. Castro*, 972 F.2d 1107, 1110 (9th Cir.1992).

[7][8][9] There was sufficient evidence from which a jury could have convicted Tidwell of engaging in a conspiracy with Chapella. To satisfy a conspiracy charge, the government must present sufficient evidence to demonstrate: (1) an overt act, and (2) an agreement to engage in criminal activity. See *United States v. Garcia*, 151 F.3d 1243, 1245 (9th Cir.1998). An implicit agreement may be inferred from circumstantial evidence if "the nature of the acts would logically require coordination and planning." *Id.* Here, Agent Fryar testified that: (1) Tidwell told him he had received the masks from an Ernest Chapella up on the Hopi Reservation, and (2) Chapella identified the masks sold by Tidwell to Fryar. In addition, Witness Clifton Ami connected Chapella to improperly acquired Hopi masks.

[10][11] The government also presented sufficient evidence to convict Tidwell for violating the NAGPRA. Under the criminal component of the NAGPRA, 18 U.S.C. § 1170(b), the government had to prove that Tidwell: (1) knowingly, (2) sold, purchased, used for profit, or transported for sale or profit, (3) Native American cultural items obtained in violation of the NAGPRA. See 18 U.S.C. § 1170(b). The government produced expert witnesses who testified that the masks Tidwell purchased and sold belonged to the Hopi Indians and were "cultural patrimony." From Agent Fryar's testimony, the jury reasonably could deduce that Tidwell knew he was selling proscribed tribal

artifacts. The government also introduced witnesses who testified that although they had sold the Acoma robes to Tidwell, they had told Tidwell that they were prohibited from selling them. A rational jury could have believed the government's witnesses; therefore, sufficient evidence existed to support the conviction under the NAGPRA.

[12][13] Tidwell also challenges his convictions under 18 U.S.C. § 1163. Under § 1163, the government must show that Tidwell: (1) stole or knowingly converted for his use or the use of another, (2) any property belonging to any tribal organization. See 18 U.S.C. § 1163. The government's evidence that Tidwell knew that the Hopi owned the masks and were not permitted to sell them was sufficient to sustain the verdict.

[14][15] Last, Tidwell challenges his conviction under 16 U.S.C. § 470ee for lack of sufficient evidence. To convict Tidwell for a violation of this statute, the government had to prove that Tidwell: (1) purchased or sold, (2) an archeological resource, (*982 3) that was removed from Indian lands, (4) without a permit. See 16 U.S.C. § 470ee(b). The government's expert archeological testimony and evidence that the robes were owned by the Pueblo of Acoma were sufficient to permit a rational jury to conclude that Tidwell violated § 470ee(b) by purchasing and selling the robes.

V

[16] The district court did not err in enhancing Tidwell's sentence by six levels based on the amount of the loss. The value of loss is a factual issue. See *United States v. Lopez*, 64 F.3d 1425, 1427 (9th Cir.1995). Under the United States Sentencing Guidelines, a district court must first look to market value when determining the value of the loss of stolen goods. See *United States v. Choi*, 101 F.3d 92, 93 (9th Cir.1996), cert. denied, 520 U.S. 1120, 117 S.Ct. 1255, 137 L.Ed.2d 335 (1997). " 'Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue.' " *Id.* (quoting U.S.S.G. § 2B1.1 application note 2). In cases in which market value " 'is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.' " *Id.* In *United States v. Pemberton*, we affirmed a district court's valuation

of stolen technical drawings based on their contract price because the drawings were unique and without a "broad and active market." See 904 F.2d 515, 517 (9th Cir.1990).

In this case, the district court valued the masks at the prices Tidwell asked Fryar to pay for them. Because the items do not have a broad and active market, the district court's decision to use Tidwell's "asking price" was not clearly erroneous.

[17][18] Tidwell also challenges the district court's finding that Tidwell obstructed justice. We review a district court's determination of obstruction of justice for clear error, but review de novo whether a defendant's conduct constitutes an obstruction of justice. See *United States v. Morales*, 977 F.2d 1330, 1330-31 (9th Cir.1992). Findings of fact related to a defendant's attempt to obstruct justice must be supported by a preponderance of the evidence, see *United States v. Garcia*, 135 F.3d 667, 670 (9th Cir.1998), but a sentencing judge may consider hearsay testimony or other evidence that would not otherwise be admissible at trial, see *United States v. Sustaita*, 1 F.3d 950, 952 (9th Cir.1993).

[19] The district court did not err in determining that Tidwell obstructed justice. The court found by a preponderance of the evidence that Tidwell willfully created affidavits with the expectation that they would mislead the court. Further, there was evidence, although controverted, that Tidwell attempted to improperly influence a witness by offering cash and that Tidwell intimidated a witness. Therefore, the district court could have determined that a preponderance of the evidence supported the adjustment. See U.S.S.G. § 3C1.1 & application note 4.

VI

In sum, we reject Tidwell's vagueness challenge to the NAGPRA and affirm his convictions as supported by sufficient evidence. Any error the district court made in excluding testimony was harmless. The district court did not err in its sentencing adjustments.

AFFIRMED.

END OF DOCUMENT

Robson BONNICHSEN, C. Loring Brace, George W. Gill, C. Vance Haynes, Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele, Plaintiffs,

v.

UNITED STATES of America, DEPARTMENT OF THE ARMY, U.S. Army Corps of Engineers, Bartholomew B. Bohn II, Donald R. Curtis, and Lee Turner, Defendants.

ASATRU FOLK ASSEMBLY, Stephen A. McNallen, William Fox, Plaintiffs,

v.

UNITED STATES of America, DEPARTMENT OF THE ARMY, U.S. Army Corps of Engineers, Ernest J. Harrell, Donald R. Curtis, and Lee Turner, Defendants.

Civil Nos. 96-1481-JE, 96-1516-JE.

United States District Court,
D. Oregon.

June 27, 1997.

Scientists seeking to study human remains, believed to be over 9000 years old, and members of religious group, claiming the remains were of European descent, challenged decision of Corps of Engineers that remains were subject to the Native American Graves Protection and Repatriation Act (NAGPRA) and should be transferred to Indian tribe for reburial. On motion of Corps for summary judgment and motions of plaintiffs to be allowed to study the remains, the District Court, Jelderks, United States Magistrate Judge, held that: (1) plaintiffs had standing; (2) suit was not moot despite notice issued by the Corps stating that previous notice of intent to transfer was rescinded; (3) decision would be vacated for reconsideration; and (4) study would not be permitted in the interim.

Motions denied, decisions vacated and matter remanded, and action stayed.

[1] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2

When deciding whether the plaintiff has standing to maintain an action, the court ordinarily will assume that it has the ability to grant the relief that the plaintiff seeks, and the court also will assume the truth of the evidence proffered by the plaintiff, at least where those factual issues are inseparable from the merits of the case itself.

[1] FEDERAL CIVIL PROCEDURE k103.3
170Ak103.3

When deciding whether the plaintiff has standing to maintain an action, the court ordinarily will assume that it has the ability to grant the relief that the plaintiff seeks, and the court also will assume the truth of the evidence proffered by the plaintiff, at least where those factual issues are inseparable from the merits of the case itself.

[2] INDIANS k27(1)
209k27(1)

Scientists who were experts in study of origins of humanity in the Americas satisfied Article III jurisdictional requirements for standing to sue to halt transfer of ancient human remains to Indian tribe for reburial pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), despite contention that such scientists did not have absolute right to study the remains, as there was evidence that such requests are routinely granted, action of Corps of Engineers immediately interfered with one plaintiff's conduct in relation to the remains, scientists had concrete plan for studies and were willing and able to commence them immediately, and studies could advance their professional careers. U.S.C.A. Const. Art. 3, § 1 et seq.; Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[3] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2

Unlike the jurisdictional requirements of Article III, the "zone of interests" test for standing is a judicially self-imposed prudential limitation, which requires that plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. U.S.C.A. Const. Art. 3, § 1 et seq.

001826

See publication Words and Phrases for other judicial constructions and definitions.

[4] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2

The primary purpose of the "zone of interests" test of standing is to prevent a statute or regulation from being perverted to a purpose, or used in a manner, that Congress clearly never intended, and in some cases, the rule may also reflect a concern that, because of his unique interest or motives, plaintiff is not the proper plaintiff to bring the particular action and to establish a precedent that effectively could bind others who have a more direct interest in the subject matter.

[5] INDIANS k27(1)
209k27(1)

Scientists seeking to study certain ancient human remains met zone of interests test for standing to sue to halt transfer of the remains to Indian tribe for reburial pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA); standing to contest agency action under the Act is not limited to those seeking to enforce a right thereunder, as opposed to those who may be injured by over-enforcement. Native American Graves Protection and Repatriation Act, § 15, 25 U.S.C.A. § 3013.

[6] INDIANS k27(1)
209k27(1)

Members of church representing a pre-Christian, European religion had standing to sue to halt transfer of certain ancient human remains to Indian tribe for reburial pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), where members contended that the remains were of European descent, that they were entitled to possession of the remains, and that the governmental defendants erred by not adequately considering their rights and by not allowing tests to be conducted that would support or refute their claim to the remains, and where members also raised issues regarding the constitutionality of NAGPRA as applied to them and to these remains. Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[7] FEDERAL COURTS k13
170Bk13

Suit to halt transfer by Corps of Engineers of ancient human remains to Indian tribe for reburial pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA) was not moot despite notice issued by the Corps stating that previous notice of intent to transfer was rescinded, where the Corps asserted contrary position in memoranda filed in court just one month later, and where challenged actions of seizing the remains and forbidding any study of them had already occurred. Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[8] ATTORNEY AND CLIENT k70
45k70

Views expressed in a legal memorandum filed with court are presumed to fairly represent the position of the client in the matter.

[9] FEDERAL CIVIL PROCEDURE k1741
170Ak1741

A case is "moot" when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome, but federal court may not dismiss an action for mootness unless it concludes with assurance that there is no reasonable expectation that the alleged violation will recur and it is plain that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

See publication Words and Phrases for other judicial constructions and definitions.

[9] FEDERAL COURTS k12.1
170Bk12.1

A case is "moot" when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome, but federal court may not dismiss an action for mootness unless it concludes with assurance that there is no reasonable expectation that the alleged violation will recur and it is plain that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

See publication Words and Phrases for other judicial constructions and definitions.

[10] FEDERAL COURTS k12.1

170Bk12.1

Defendant claiming voluntary withdrawal of challenged decisions bore "heavy burden" of demonstrating that the action had become moot.

[11] FEDERAL COURTS k12.1

170Bk12.1

A change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy.

[12] FEDERAL COURTS k12.1

170Bk12.1

The courts are particularly reluctant to find an action moot when the defendant voluntarily ceases the challenged conduct in the face of a pending lawsuit but continues to assert the lawfulness of the challenged conduct.

[13] ADMINISTRATIVE LAW AND PROCEDURE k413

15Ak413

Court would be less deferential than usual to agency's interpretation of statute and regulations, where it was one of several agencies separately interpreting and administering the statute.

[13] STATUTES k219(1)

361k219(1)

Court would be less deferential than usual to agency's interpretation of statute and regulations, where it was one of several agencies separately interpreting and administering the statute.

[14] ADMINISTRATIVE LAW AND PROCEDURE k763

15Ak763

Under the Administrative Procedure Act, depending upon the circumstances, the agency's failure to gather or to consider relevant evidence may be grounds for setting aside the decision. 5 U.S.C.A. § 706(2)(A).

[15] ADMINISTRATIVE LAW AND PROCEDURE k507

15Ak507

After considering the relevant data, agency must articulate a satisfactory explanation of its action including a rational connection between the facts found and the choice made, and agency decision will not be upheld under the arbitrary and capricious standard unless the court finds that the evidence before the agency provided a rational and ample basis for its decision. 5 U.S.C.A. § 706(2)(A).

[15] ADMINISTRATIVE LAW AND PROCEDURE k763

15Ak763

After considering the relevant data, agency must articulate a satisfactory explanation of its action including a rational connection between the facts found and the choice made, and agency decision will not be upheld under the arbitrary and capricious standard unless the court finds that the evidence before the agency provided a rational and ample basis for its decision. 5 U.S.C.A. § 706(2)(A).

[16] ADMINISTRATIVE LAW AND PROCEDURE k763

15Ak763

An agency's decision may be set aside if the agency has relied on factors that Congress has not intended the agency to consider, has entirely failed to consider an important aspect of the problem, has offered an explanation for its decision that runs counter to the evidence before the agency, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2)(A).

[17] STATUTES k219(2)

361k219(2)

When Congress has unambiguously expressed its intent, that is controlling, but if the statute is silent or ambiguous and agency is construing a statute that it administers or regulations that it has promulgated, agency's construction will be

upheld if it is based upon a permissible construction; however, similar deference is not afforded to an agency's interpretation of a statute that it does not administer, or of regulations that were promulgated by other agencies.

[17] STATUTES k219(4)

361k219(4)

When Congress has unambiguously expressed its intent, that is controlling, but if the statute is silent or ambiguous and agency is construing a statute that it administers or regulations that it has promulgated, agency's construction will be upheld if it is based upon a permissible construction; however, similar deference is not afforded to an agency's interpretation of a statute that it does not administer, or of regulations that were promulgated by other agencies.

[18] INDIANS k27(7)

209k27(7)

Decision of Corps of Engineers that certain ancient human remains were subject to the Native American Graves Protection and Repatriation Act (NAGPRA) and should be transferred to Indian tribe for reburial would be vacated and matter remanded for further consideration, where the Corps failed to consider all of the relevant factors, acted before it had all of the evidence, and failed to articulate a satisfactory explanation for its action; but since matter concerned a res, court would retain jurisdiction to protect interests of all parties in the interim. 5 U.S.C.A. § 706(2)(A); Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[19] CONSTITUTIONAL LAW k90.1(1)

92k90.1(1)

The First Amendment is not limited to "speech" per se; it protects both the right to send and also to receive information. U.S.C.A. Const.Amend. 1.

[20] CONSTITUTIONAL LAW k38

92k38

Congress has extraordinarily broad authority with respect to legislation pertaining to Indians in general, and regarding the fulfillment of federal trust obligations to the tribes in particular; however, such power is not absolute, and such legislation may still be reviewed for compliance with the United States Constitution..

[20] INDIANS k6(1)

209k6(1)

Congress has extraordinarily broad authority with respect to legislation pertaining to Indians in general, and regarding the fulfillment of federal trust obligations to the tribes in particular; however, such power is not absolute, and such legislation may still be reviewed for compliance with the United States Constitution..

[21] CIVIL RIGHTS k242(1)

78k242(1)

Scientists seeking to study ancient human remains which Corps of Engineers contended had to be turned over to Indian tribe for reburial, under the Native American Graves Protection and Repatriation Act failed, at preliminary stage of case, to show equal protection violation, as there was nothing in the record to suggest that a Native American archaeologist would be permitted access to the remains, but a Caucasian archaeologist would not. U.S.C.A. Const.Amend. 14; Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[22] CONSTITUTIONAL LAW k215.2

92k215.2

Native American Graves Protection and Repatriation Act (NAGPRA) was not shown, at preliminary stage of case, to violate equal protection because it applies only to Native American remains and cultural objects, as Congress reasonably could have concluded that state and local laws against abusing a corpse, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains, and in light of special obligation of Congress to legislate for the benefit of Native Americans. U.S.C.A. Const.Amend. 14; Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

[22] INDIANS k6(1)

209k6(1)

Native American Graves Protection and Repatriation Act (NAGPRA) was not shown, at preliminary stage of case, to violate equal protection because it applies only to Native American remains and cultural objects, as Congress reasonably could have concluded that state and local laws against abusing a corpse, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains, and in light of special obligation of Congress to legislate for the benefit of Native Americans. U.S.C.A. Const.Amend. 14; Native American Graves Protection and Repatriation Act, § 2 et seq., 25 U.S.C.A. § 3001 et seq.

*631 Alan L. Schneider, Portland, OR, Paula A. Barran, Dian S. Rubanoff, Lane, Powell, Spears & Lubersky, Portland, OR, for Plaintiffs in No. 96-1481.

Michael T. Clinton, Portland, OR, for Plaintiffs in No. 96-1516.

Lois J. Schiffer, Assistant Attorney General, Daria J. Zane, U.S. Department of Justice, Environmental & Natural Resources Div., General Litigation Section, Washington, DC, Kristine Olson, U.S. Attorney District of Oregon, Tim Simmons, Assistant U.S. Attorney, Portland, OR, for Defendants.

David J. Cummings, Douglas Nash, Nez Perce Tribal Executive Committee, Office of Legal Counsel, Lapwai, ID, for Amicus Curiae Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation.

JELDERKS, United States Magistrate Judge:

The focal point for this controversy is a set of human remains, believed to be over 9000 years old, that were discovered in 1996 near Kennewick, Washington, along the bank of the Columbia River. [FN1] The facts and procedural history of this case are detailed at length in a prior opinion filed on February 19, 1997. Following oral argument on June 2, 1997, I issued several rulings from the bench. The present opinion is intended to supplement and amplify those bench rulings, and to provide additional guidance to the defendants so that this controversy may be resolved in a timely and orderly manner.

FN1. The skeleton was found by a spectator watching a boat race from the shoreline. A local anthropologist, Dr. James Chatters, examined the cranium at the request of the county coroner. Chatters then went to the scene with the coroner and police, and found several additional bone fragments. After Dr. Chatters concluded that the skeleton was not of recent origin, he contacted the Army Corps of Engineers. The Corps advised Chatters to apply for an "ARPA" permit, which he did. Dr. Chatters then finished excavating the skeleton.

The Parties

The Bonnichsen plaintiffs are scientists who contend the discovery is of great historical and anthropological significance and want to study the remains. Defendant Army Corps of Engineers concluded that the remains were subject to the Native American Graves Protection and Repatriation Act ("NAGPRA"), Pub.L. 101-601, 25 U.S.C. § 3001, et seq. The Corps therefore decided to transfer the remains to an Indian tribe for reburial, and forbade scientific study of the remains. The Bonnichsen plaintiffs filed suit to halt the transfer and to enforce what they contend is a legal right to study the remains. The Asatru plaintiffs are members of the Asatru Folk Assembly, which is described in their complaint as a legally-recognized church "that represents Asatru, one of the major indigenous, pre-Christian, European *632 religions." The Asatru plaintiffs contend that the remains are actually of European descent, and seek custody of the remains for study and "for eventual reinterment in accordance with native European belief." The Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation have appeared as amicus curiae. According to the brief filed by amici:

The amici tribes' traditional beliefs and practices teach them that they have an inherent responsibility to care for those who are no longer alive. When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest. Handling human remains, the scientific study of human remains, and particularly the destructive study of human remains are extremely sensitive issues to the amici tribes. To put these spirits at ease, the remains must be returned to the ground as soon as possible. These beliefs teach the amici tribes to treat those who they share this life with and those who have left them to become a part of the Earth with the utmost respect. The amici tribes have requested the United States Army Corps of Engineers to respect those beliefs.

001830

Joint Tribal Amici Memorandum at 4-5 (internal citations omitted). The amici tribes have opposed plaintiffs' request for permission to study the remains.

Presently before the court are defendants' motion for summary judgment and the plaintiffs' motions for an order allowing them to immediately study the remains. Some of the issues presented in this case are questions of first impression that have not previously been addressed by any court in a published opinion. [FN2]

FN2. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F.Supp. 1397 (D.Haw.1995), is the only published opinion that has considered whether NAGPRA absolutely forbids any handling, examination, or study of human remains. The Na Iwi court concluded that examinations conducted for the purpose of accurately identifying the cultural affiliation or ethnicity of remains are permissible because they further the overall purpose of NAGPRA. *Id.* at 1415. The Na Iwi court did not consider whether NAGPRA permits or prohibits scientific studies beyond those needed to help identify the remains.

For the reasons set forth below, I deny defendants' motion for summary judgment. I conclude that plaintiffs have standing to maintain this action, and that this action has not been mooted. I also conclude that the prior decisions by the Corps of Engineers concerning these remains should be vacated (to the extent those decisions have not already been withdrawn by the agency), and the matter should be remanded to the Corps for further consideration. At the end of this opinion I have included a non-exclusive list of questions that I would like the Corps to consider on remand. This action will be stayed pending completion of the administrative proceedings. The court will retain jurisdiction over this matter. The Corps will maintain custody of the remains until this case is resolved. Plaintiffs' request for permission to study the remains while this action is pending is denied without prejudice. That request should be considered by the Corps on remand along with the other issues.

Defendants' Motion for Summary Judgment

1. Standing:

Defendants contend the plaintiffs have no standing to maintain this action. Although there are two sets of plaintiffs (Bonnichsen and Asatru), the parties have focused upon the question of whether the Bonnichsen plaintiffs have standing. I therefore will do the same, unless otherwise noted.

a. Legal Standards:

The question of standing "involves both constitutional limitations on federal- court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The "constitutional limitations" are those that are necessary to satisfy Article III's requirement of a "case" or "controversy," without which this court lacks jurisdiction. By contrast, "prudential limitations" are "judicially self- imposed limits on the exercise of federal jurisdiction," *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984), that are "founded in *633 concern about the proper--and properly limited--role of the courts in a democratic society." *Warth*, 422 U.S. at 498, 95 S.Ct. at 2205.

To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that:

(1) he or she has suffered (or is about to suffer) an "injury in fact": an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;

(2) there must be a causal connection between the injury and the conduct complained of: the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

(3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2135-37, 119 L.Ed.2d 351 (1992). Plaintiffs, as the party invoking federal jurisdiction, bear the burden of establishing these elements. *Id.* at 561, 112 S.Ct. at 2136-37.

001831

Defendants correctly observe that, on a motion for summary judgment, standing is not automatically presumed from the allegations of the complaint but is "an indispensable part of the plaintiff's case" that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2136. As a practical matter, however, if--in order to have standing--the plaintiff must prove that he has in fact been injured by this defendant, and that he is entitled to the relief sought, then the court would be obliged to try the entire case just to resolve the threshold question of whether the plaintiff even has standing to maintain the action.

[1] For that reason, when deciding whether the plaintiff has standing to maintain an action, the court ordinarily will assume that it has the ability to grant the relief that the plaintiff seeks. The court also will assume the truth of the evidence proffered by the plaintiff, at least where those factual issues are inseparable from the merits of the case itself. Cf. *Winter v. Calif. Medical Review Inc.*, 900 F.2d 1322, 1324 (9th Cir.1990) (the district court may hear evidence on jurisdictional questions and resolve factual disputes regarding that jurisdictional issue to the extent such disputes are separable from the merits of the case itself).

b. Analysis:

Defendants have cited the Supreme Court's decision in *Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, to support their contention that plaintiffs do not have standing. In *Defenders of Wildlife*, the plaintiffs sought a declaration that the Endangered Species Act requires federal agencies to consult with the U.S. Fish and Wildlife Service regarding any activities outside of the United States that those agencies fund or otherwise assist that may adversely impact endangered species. However, the plaintiffs were unable to establish that they personally had been (or were about to be) injured by the government's failure to conduct such consultations.

One of the *Defenders of Wildlife* plaintiffs had previously traveled to Egypt and observed the traditional habitat of the endangered Nile crocodile there, and hoped to do so again in the future. She feared that the crocodile's habitat might be harmed by various development projects that the Egyptian government was planning with American assistance. A second plaintiff said she had traveled to Sri Lanka a decade earlier, and while there had attempted to observe certain endangered species but had been unable to see any. She hoped to return to Sri Lanka in the future to try again, and feared that development projects planned for those areas might reduce her chances of successfully viewing those species. *Id.* at 563-64, 112 S.Ct. at 2137-38.

The Supreme Court concluded that this was not enough to establish standing. Even assuming the injuries alleged would otherwise suffice to establish standing, the affiants had failed to demonstrate that those injuries were "imminent." They had no "concrete plans" but only a vague intent to "some day" *634 travel to these places. *Id.* at 564, 112 S.Ct. at 2138. A plurality of the Court also questioned whether a favorable ruling in that lawsuit would prevent or redress the alleged injury. The defendant in that action was the Secretary of Interior, who oversees the Fish and Wildlife Service, rather than the particular agency or the foreign government that actually was funding or constructing the overseas projects. Those non-parties would not be bound by the court's decision and would not be obliged to adhere to it. Moreover, the foreign governments would be free to continue with the projects, albeit without American assistance. *Id.* at 568-71, 112 S.Ct. at 2140-42 (plurality opinion). Consequently, any benefit to the plaintiffs was speculative at best.

[2] In the instant case, the circumstances are far different. In contrast to *Defenders of Wildlife*, the plaintiffs in this action have more than just an abstract interest in human remains overseas. Plaintiffs have asserted--and defendants have not disputed--that plaintiffs have devoted much of their careers to studying the origins of humanity in the Americas and are among the foremost experts in this field. Plaintiffs also have asserted, and defendants have not disputed, that--based upon the preliminary testing performed before the defendants intervened and halted further testing--the remains at issue appear to be one of the most ancient human skeletons ever discovered in North America and one of the best preserved skeletons from that era. In addition, plaintiffs have asserted that the preliminary studies raised questions regarding the racial origin of the man that--if substantiated by additional tests--could significantly alter traditional scientific theories concerning the history of humanity in the Americas.

Unlike the affiants in *Defenders of Wildlife*, the *Bonnichsen* plaintiffs have presented concrete plans, including a detailed description of the tests that each plaintiff proposes to conduct. These are not tests that they hope to conduct "some day"; plaintiffs desire to commence those tests immediately, if they are permitted to do so. Cf. *Defenders of Wildlife*, 504 U.S. at 563-64, 112 S.Ct. at 2137-38. It also is undisputed that plaintiffs have the means-- i.e., the skill and equipment--that

is required to perform those tests. Plaintiffs have identified a particular set of remains that they desire to study, they have presented a concrete plan for conducting those studies, and they are ready, willing, and able to commence those tests immediately.

Defendants contend this is all insufficient, and compare plaintiffs to a keeper of Asian elephants at the Bronx Zoo who claims standing to contest every development project or event anywhere in the world that potentially could harm Asian elephants or their habitat. See *Defenders of Wildlife*, 504 U.S. at 566, 112 S.Ct. at 2139-40. The analogy is inappropriate. Plaintiffs do not assert an abstract right to oppose any activity, anywhere in the world, that might damage ancient human remains or the places where such remains potentially could be found. Rather, they seek to study one specific skeleton, and have a detailed plan and timetable for those studies.

Although the results of these studies might be of interest to the general public, plaintiffs are not asserting a mere general grievance or interest that is shared by the world at large. Cf. *Defenders of Wildlife*, 504 U.S. at 573-78, 112 S.Ct. at 2143-46. The plaintiffs have asserted a personal interest in this controversy. They propose to personally conduct tests on the remains, and to analyze the results of those tests. This data will then be used to further their ongoing research. That is a sufficient nexus to confer standing. Cf. *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 n.4, 106 S.Ct. 2860, 2866 n.4, 92 L.Ed.2d 166 (1986) (allegation by plaintiff organization that the whale watching and studying of their members will be adversely affected by continued whale harvesting was sufficient to confer standing); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (organization has standing to contest construction of destination resort if members of organization allege that the proposed project would interfere with their aesthetic or recreational use of the area). In addition, I note that the results of plaintiffs' research likely will be published in *635 various scientific journals and could advance their professional careers.

Plaintiffs have also asserted, and defendants have not disputed, that-- until defendants interceded and seized custody--the remains were in transit to the Smithsonian Institution, [FN3] where they were to have been examined by plaintiff Owsley. The Corps' internal reports support plaintiffs' version of events:

FN3. At oral argument, there was some question as to whether the Smithsonian Institution was considered a "federal agency" for purposes of NAGPRA. It is not. See 25 U.S.C. § 3001(4) (Smithsonian is not considered a "federal agency" for purposes of this statute.)

d. On 31 August 1996, Dr. Douglas Owsley, Division Head for Physical Anthropology at the Smithsonian Institution's National Museum of Natural History, wrote to the Benton County Coroner. Dr. Owsley offered the coroner's archeologist, Dr. Chatters, airline accommodations in order to afford he [i.e., Dr. Owsley] and other Museum staff an opportunity to conduct an extensive evaluation of the skeleton here in Washington, D.C.

e. Upon learning of this offer, and having assured the coalition of [redacted] basin tribes and bands that the skeleton would not be subjected to further desecration via scientific study, the Walla Walla Commander had the remains moved to the archeology laboratory operated by the Battelle Corporation near Hanford, Washington.

* * * *

g. Throughout the implementation of the NAGPRA process, Dr. Owsley has repeatedly requested access to the skeleton for additional analysis ... He and all other members of the scientific community have been denied direct access because of the district's commitment to the tribal coalition.

(COE 0758-760) (report from Paul Rubenstein to the Commander of the Corps of Engineers, dated October 16, 1996.) By their own statement, the defendants' actions directly and immediately interfered with plaintiff Owsley's conduct in relation to these remains. Defendants also ordered the immediate termination of all tests of the remains (or fragments thereof) that were then in progress, and have prohibited any resumption of those tests. Other plaintiffs have attested that, once the remains had arrived at the Smithsonian, they intended to request, and would have received, permission to study the remains. Again, defendants' actions directly interfered with those plans.

Defendants contend that the decision to allow such study is discretionary, hence there is no guarantee that plaintiffs ever would have received permission to study the remains and thus any injury to them is merely speculative. Defendants likewise argue that the injury will not be redressed by a favorable ruling in this case, since plaintiffs will not have an absolute right to study the remains. Plaintiffs have responded with affidavits attesting that such requests for permission are routinely granted. [FN4]

FN4. At this stage of the case, I elect not to resolve the party's conflicting views upon the applicability or interpretation of the various curation regulations and similar rules. There will be time to litigate those issues later if required for the ultimate disposition of this case.

I am satisfied that "but for" defendants' intervention, plaintiff Owsley already would have been allowed to study the remains, and it is highly probable that some or all of the other plaintiffs also would have been allowed to conduct such studies. That is particularly true in view of the apparent magnitude of the discovery and the undisputed prominence of the plaintiff scientists in their field. I also am satisfied that if the court grants the requested relief it is at least "likely" that plaintiffs will be permitted to study the remains and the alleged injury will be redressed. Cf. *Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2136-37 (it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision). Indeed, there could be no doubt about "redressability" if plaintiffs ultimately prevail on their claim that they have a First Amendment right to study the remains.

Plaintiffs have adequately established that there is a genuine case or controversy between adverse parties sufficient to confer jurisdiction upon this court. Plaintiffs have *636 adequately alleged an injury in fact, that is fairly traceable to the actions of the defendants, and likely would be redressed by a favorable decision on the merits. Plaintiffs therefore satisfy the jurisdictional requirements of Article III.

c. Zone of Interests:

[3][4] Defendants next contend that plaintiffs do not fall within the "zone of interests" sought to be protected or regulated by NAGPRA. Unlike the jurisdictional requirements of Article III, the "zone of interests" test is a judicially self-imposed "prudential" limitation. *Bennett v. Spear*, — U.S. —, —, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). The "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, — U.S. at —, 117 S.Ct. at 1161. As the Court explained in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987):

The "zone of interest" test is a guide for deciding whether ... a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purposes to benefit the would-be plaintiff.

Id. at 399-400, 107 S.Ct. at 757 (emphasis added). To put it another way, the primary purpose of the "zone of interests" test is to prevent a statute or regulation from being perverted to a purpose, or used in a manner, that Congress clearly never intended. In some cases, the rule may also reflect a concern that—because of his unique interest or motives, which differ from the "typical" plaintiff that Congress had envisioned—this is not the proper plaintiff to bring the particular action and to establish a precedent that effectively could bind others who have a more direct interest in the subject matter. Cf. *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir.1995) (essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.)

[5] The present action is not barred by the zone of interests rule. The rule applies only "where the plaintiff is not itself the subject of the contested regulatory action." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757 (emphasis added). The plaintiffs in this action are directly implicated by the contested regulatory actions. They personally have been forbidden to study the remains. Nor are "the plaintiff's interests ... so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* See also *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581-83 (9th Cir.1993) (zone of interests test did not preclude Sierra Club from challenging telescope project even though statute at issue was enacted by Congress for the purpose of overriding environmental laws and facilitating construction of the telescope project; Sierra Club's lawsuit could be viewed as effort to ensure that agency complied with its responsibilities under the statute).

Defendants erroneously assume that the only persons who have standing to contest agency action relating to NAGPRA are those who seek to invoke NAGPRA to enforce a right to obtain possession of remains or cultural objects pursuant to that statute. However, there is no reason why a person would not also have standing to contest agency action that cites NAGPRA as the justification for denying that person's rights (or alleged rights) to possession of, or to study, specific

remains or cultural objects.

A person potentially may be injured by either under-enforcement or over-enforcement of a law. Cf. *Bennett*, --- U.S. at ---, 117 S.Ct at 1163. In *Bennett*, the Court held that the Endangered Species Act authorizes both actions against the Secretary asserting *637 under-enforcement of the law and also actions asserting over-enforcement, at least where the plaintiff can show a direct injury to himself as a result of the Secretary's actions that likely would be redressed by a favorable ruling in the lawsuit. The Court rejected the government's contention that only those who seek more environmental protection have standing to sue.

The language of NAGPRA, 25 U.S.C. § 3013--the district courts have "jurisdiction over any action brought by any person alleging a violation of this chapter" (emphasis added)--is broad enough to encompass such an over-enforcement claim, provided the plaintiffs allege a direct injury to themselves as a result of the misapplication of the statute and not just a general grievance or remote injury.

I conclude that that the Bonnichsen plaintiffs' claims are not barred by the "zone of interest" rule and they do have standing to maintain this action. [FN5]

FN5. Defendants also contend that plaintiffs lack standing to maintain this action because the rights they assert are non-existent. The issue of standing should not be confused with the merits of the underlying action. For purposes of determining whether plaintiffs have standing, I must assume that the court does have the capacity to grant the requested relief.

Although neither party addressed the issue in their briefs, I also have considered whether the Asatru plaintiffs have standing to maintain this action. See *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir.1997) (when in doubt, a federal court must sua sponte evaluate whether it has subject matter jurisdiction); *Mt. Graham Red Squirrel*, 986 F.2d at 1581 (court has obligation to raise issue of standing sua sponte).

[6] I conclude that the Asatru plaintiffs do have standing. The Asatru plaintiffs contend that they are entitled to possession of the remains, and that the defendants erred by not adequately considering their rights and by not allowing tests to be conducted that would support or refute their claim to the remains. The Asatru plaintiffs also have raised various issues regarding the constitutionality of NAGPRA as applied to them and to these remains. I conclude that, regardless of the ultimate merits of their claims or of the legal theories upon which those claims are based, the Asatru plaintiffs have adequately alleged an injury in fact, fairly traceable to the conduct of the defendants, that likely would be redressed by a favorable decision. Accordingly, they have standing to maintain this action.

2. Ripeness and Mootness:

Defendants have asked the court to dismiss this action on grounds it is not ripe and there is no final agency action to review. I previously denied defendants' motion to dismiss on the same grounds. In that opinion, I found that the Corps had made a number of "final" decisions, including:

- (1) that it would assert jurisdiction over and take custody of the remains;
- (2) that the remains were of Native American ancestry;
- (3) that the remain were subject to NAGPRA;
- (4) that the remains were discovered inadvertently on Federal land;
- (5) that the land on which the remains were discovered is recognized as the aboriginal land of an Indian tribe;
- (6) that there is a relationship of shared group identify which can be reasonably traced between the human remains and five Columbia River basin tribes and bands; [and]
- (7) that the remains should be turned over to a tribe for burial.

Opinion of February 19, 1997, at 969 F.Supp. at 621. On March 23, 1997, after I issued my earlier decision, defendants published a "Notice Rescinding Notice of Intent to Transfer Custody of Human Remains in the Custody of the U.S. Army Corps Engineers, Walla Walla District." According to the March 23rd notice:

Notice is hereby given that the previous Notice of Intent ... is hereby rescinded.

* * * *

[The] Corps is seeking to determine which of the claimants, if any, are the closest culturally affiliated. 25 U.S.C. *638 § 3002(a)(2)(B). The following types of evidence are used to make this determination: Geographical, kinship,

001835

biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. 43 C.F.R. § 10.14(a). The Corps will consider evidence presented on all issues related to its decision, including, but not limited to, whether a disposition under NAGPRA is appropriate.

Defendants then moved to dismiss this action on grounds that no final decision had been reached on the issues in this case. Defendants also have opposed plaintiffs' motion to study the remains, arguing that the motion is premature because the Corps has not yet decided whether to permit such studies.

[7] I question defendants' characterization of the issue as one of ripeness. Rather, the question posed is whether as a result of the March 23rd notice, this case is now moot. Plaintiffs argue that the March 23rd notice is merely a "sham" intended to deprive this court of jurisdiction over the controversy. They cite various documents as evidence that the defendants remain fully committed to the positions announced earlier.

On the surface, it would appear from the March 23rd notice that the Corps of Engineers is reconsidering its position and has withdrawn its prior decisions. [FN6] However, on April 23, 1997, the Corps filed a legal memorandum with this court which declared that:

FN6. Plaintiffs observe that the notice continues to cite NAGPRA as the authority for the actions taken, to utilize NAGPRA terminology and standards, and to focus upon cultural affiliation, a concept that has relevance only under NAGPRA. By themselves, those factors are not necessarily inconsistent with the statement in the notice that the Corps is continuing to evaluate all issues, including whether a disposition under NAGPRA is appropriate.

Because Kennewick Man is either of or related to the indigenous peoples [of America], the remains fits within the definition of Native American as provided for by NAGPRA ... Because under the plaintiffs' own scenario, the remains fit within NAGPRA's definition of Native American, the only conclusion is that they are subject to NAGPRA.

April 23rd Memorandum at page 5. On April 25, the government filed a second legal memorandum with this court, which asserted that the plaintiffs had no right to study the remains:

Because there is no provision for scientific studies under the disposition provisions of NAGPRA, there is no right to conduct scientific studies where those provisions apply. Because those provisions apply to the present case, there is no right to study here.

April 25th Memorandum at page 23.

[8] The Corps cannot publicly maintain that it has an open mind on these questions, and insist that it has not reached any decision, while simultaneously filing memoranda with this court asserting that the remains are Native American, that they are subject to NAGPRA, that the remains are subject to the disposition provisions of NAGPRA, that NAGPRA forbids scientific study, and that plaintiffs have no right to study the remains. [FN7] It would seem that notwithstanding the Notice published on March 23rd, the Corps remains firmly committed to its previously announced position on the matters in controversy. [FN8]

FN7. At oral argument, the Corps' attorney sought to distance her client from the statements in the memorandum filed on behalf of her client. (June 2 tr. at 17-18.) However, the views expressed in a legal memorandum filed with this court are presumed to fairly represent the position of the client in the matter. Likewise, I am not persuaded by defendants' argument that the statements were intended to refer only to some hypothetical scenario. The statements contain an affirmative statement of the Corps' interpretation of the controlling legal principles in this case and how those principles apply to a given set of facts.

FN8. In my prior opinion, I stated that:

In deciding whether there was a "final" decision by the Corps, usually the record must speak for itself. As a general rule, the court ordinarily will not inquire into the minds of the agency officials to determine what they actually intended, though there are some exceptions to that rule. The court may of course consider judicial admissions by a party. The converse is also true. With limited exceptions, agency officials may not offer testimony to contradict, supplement, or explain the written record. The court must assume the officials said what they meant, and meant what they said. Opinion of February 19, 1997 at 969 F.Supp. at 620-621. I remain committed to that position. The problem here is that the Corps asserted one position in its published notice, but

001836

then asserted a contrary position in two memoranda to the court filed just one month later.

*639 Plaintiffs also cite internal Corps documents to support their contention that the Corps has made a firm decision on the issues in this case. They cite an e-mail dated September 18, 1996, from Col. Bohn to Lt. Curtis, Paul Rubenstein, and others, which concludes that:

All risk to us seems to be associated with not repatriating the remains in accordance with NAGPRA and the claim by the tribes ... Now that the locals understand the law and their potential liability, they are distancing themselves from the scientist.

(COE 0650.) Another e-mail bearing the same date, from Rubenstein to Col. Bohn and others, states, "I concur completely that repatriation is the appropriate course of action." (COE 0650). The author also asks, "Is the district's position, in the opinion of counsel, legally defensible? ... Is it prudent to publicly announce a course of action prior to the DCW informing Congressional interests?" (COE 0650-651). Finally, the author acknowledges that with respect to the Corps' ultimate resolution of the issue, "tribal concerns are paramount." (COE 0651).

A memo, dated September 4, 1996, regarding "P[ublic] A[ffairs] Plan-- Discovered American Indian Human Remains," recites that:

The District needs to make clear, unequivocal demonstration of its commitment to the tribes as being a compassionate and supportive partner in restoring the remains to a condition of proper interment with dignity and respect, and full compliance with the spirit and letter of all existing laws.

(COE 0656-658) (from Duane "Dutch" Meir, chief of public affairs, to a long list of recipients.) The memo also indicated that the Corps would seek to minimize any media coverage of this story, and that the remains "should be reinterred ... and protected from further disturbance, as soon as possible." (COE 0657). The Corps "will assume the costs related to reinterment of [the] remains ..." (COE 0657). The memo was marked "approved" by several levels of Corps officials, including Ray Tracy, whose affidavit the Corps now presents to establish that no decision has been made.

In a report to the Commander of the Corps, dated October 16, 1996, Paul Rubenstein reported Dr. Owsley's offer to have the remains flown to the Smithsonian Institution for an extensive evaluation.

e. Upon learning of this offer, and having assured the coalition of [redacted] basin tribes and bands that the skeleton would not be subjected to further desecration via scientific study, the Walla Walla Commander had the remains moved to the archeology laboratory operated by the Battelle Corporation near Hanford, Washington.

* * * *

g. Throughout the implementation of the NAGPRA process, Dr. Owsley has repeatedly requested access to the skeleton for additional analysis ... He and all other members of the scientific community have been denied direct access because of the district's commitment to the tribal coalition.

(COE 0758-760) (emphasis added). Plaintiffs cite these and other documents as evidence that--notwithstanding the Corps' repeated denials that it has made a decision--the Corps in fact took a position very early in this controversy, before it had the relevant facts or understood the legal issues, and continues to adhere to that position even today.

[9] A federal court may not dismiss an action for mootness unless it concludes "with assurance" that "there is no reasonable expectation that the alleged violation will recur" and it is plain that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (internal punctuation and citations omitted). A case is moot when the issues presented are no longer "live" or the parties *640 lack a legally cognizable interest in the outcome. *Davis*, 440 U.S. at 631, 99 S.Ct. at 1383.

[10] Under the circumstances presented here, it is the defendant who bears the "heavy burden" of demonstrating that the action has now become moot. See *Davis*, 440 U.S. at 631, 99 S.Ct. at 1383; *United States v. WT Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 897-98, 97 L.Ed. 1303 (1953); *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191, 1201 (D.C.Cir.1996); *Doe v. Harris*, 696 F.2d 109, 112 (D.C.Cir.1982).

In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), the Supreme Court described the applicable legal standards:

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter

001837

relating to the exercise rather than the existence of judicial power.

* * * *

The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways. A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Id. at 289, 102 S.Ct. at 1074-75 (citations and punctuation omitted).

[11] A change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy. *Armster v. United States District Court*, 806 F.2d 1347, 1357 (9th Cir.1986) (refusing to dismiss action as moot even though agency had belatedly withdrawn directive that precipitated the action).

[12] The courts are particularly reluctant to find an action moot when the defendant voluntarily ceases the challenged conduct in the face of a pending lawsuit but continues to assert the lawfulness of the challenged conduct. See, e.g., *Armster*, 806 F.2d at 1359-60 (citing authorities); *Allende v. Shultz*, 845 F.2d 1111, 1115 n.7 (1st Cir.1988) (voluntary cessation of challenged activity did not moot controversy where the government has not revised its interpretation of the relevant statute); *City of New York v. Baker*, 878 F.2d 507, 511 (D.C.Cir.1989) (declining to find that action had been mooted where the "government has not renounced" its prior position); *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 74 F.3d 1308, 1311 (C.A.D.C. 1996) (following *Allende* and *Baker*); (*Alton & Southern Railway v. International Ass'n of Machinists*, 463 F.2d 872, 879 n.13 (C.A.D.C. 1972) ("a deliberate and persistent official interpretation is more likely to identify a 'recurring controversy' situation"); *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491-92 (D.C.Cir.1988) (agency could not moot action by belatedly acceding to specific request for information while continuing to adhere to unlawful policy or practice that makes repetition of this controversy likely)).

As the Third Circuit explained,

Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule.

Dow Chemical Co. v. USEPA, 605 F.2d 673, 678 (3d Cir.1979).

In *Dow Chemical*, the EPA withdrew the challenged rule, but only because Dow's petition raised questions regarding the EPA's compliance with the procedural requirements of the APA. However, the agency left no doubt that it did not intend to change its interpretation of the scope of its statutory authority, about which it "entertains no doubt," and would soon enact a new rule substantially similar to the one that was rescinded, but this time adhering to all procedural requirements of the APA. There was no reason to postpone review, since the underlying issue--whether the agency had the authority to enact the rule--was not moot, *641 and did not turn upon the precise language of the new rule or any new facts. The issue was all but certain to recur in the near future, it was just a matter of when, not if. Id. at 679. The challenged governmental activity had not evaporated or disappeared; by its "continuing and brooding presence" it adversely affected the interests of the petitioning parties. Id. at 679-80. [FN9]

FN9. See also *Doremus v. United States*, 793 F.Supp. 942, 944-46 (D.Idaho 1992) (challenge to revocation of special use permit was not mooted when the agency belatedly rescinded the decision, but insisted the decision had been correct, that the permit holder was in violation of the terms of the permit, and that the agency withdrew the decision only to show its good faith in cooperating with the permittee to resolve the dispute); *Doe*, 696 F.2d at 113 ("when a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition"); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir.1989) (petition for review of EPA order was not rendered moot by EPA's withdrawal of order inasmuch as EPA had not altered its position on the merits; "we cannot allow the agency to control the timing and venue of judicial review by its own procedural maneuvers"); *Southern Pacific Transport, Co. v. Public Utility Commission*, 9 F.3d 807, 809-10 (9th Cir.1993) (action was not mooted by rescission of challenged rule when agency's authority to enact such rules in the future was still at issue).

I conclude that this action has not been mooted by the March 23rd notice. There continues to be a case and controversy between adverse parties. The dispute here concerns a tangible object, whose custody remains in dispute, and also the rights of various parties to study (or to forbid the study) of that object.

001838

The "agency action" at issue here is more than just the decision to convey the remains to a particular tribe. It also includes the decision to seize the remains, and to forbid any study of those remains. Those actions have already occurred, have already deprived the plaintiffs of their (alleged) rights, and continue to this day. This is not a dispute over a proposed rule or policy, where the dispute vanishes once the proposal is withdrawn. Nor is this like a proposed construction project that, once withdrawn, ceases to exist unless and until the agency resurrects the proposal. From the standpoint of the plaintiffs in this action, maintaining the status quo will not prevent the alleged injury, it perpetuates it.

Nor am I persuaded that the Corps has entirely abandoned its earlier decision and is now objectively considering the evidence and the law without any preconceived notions concerning the outcome. After reviewing the briefs and the excerpts from the administrative record filed by the parties, I am left with the distinct impression that early in this case the defendants made a hasty decision before they had all of the facts, or even knew what facts were needed. In addition some of the "facts" upon which the Corps relied have proven to be erroneous, e.g., that the site at which the remains were discovered is recognized as the aboriginal land of an Indian tribe.

I also question whether the agency gave adequate consideration to the question of whether NAGPRA applies to these remains, or the significance for this case if NAGPRA either does (or does not) apply. Agency officials appear to have recognized that there was a problem, but were unsure how to resolve it. A memorandum dated September 3, 1996, entitled "CENPD Comments regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects," [FN10] identifies some of the issues the Corps needed to confront with respect to ancient remains:

FN10. "CENPD" is the Corps of Engineers North Pacific Division regional headquarters in Portland (in whose jurisdiction the remains were found).

2. If Native American groups claim "shared group identity" they can essentially take control of human remains, no matter how old they are. Do federal agencies and/or museums have any recourse if their research indicates otherwise? A dispute resolution mechanism, especially for unusually old remains, needs to be included in these recommendations.
* * * *

6. The NAGPRA Review Committee mentions another category of unidentifiable human remains as "generally very ancient *642 human remains," but ventures no further comment except that decisions regarding their disposition will require Congressional amendments to NAGPRA. Just as they did for consideration of claims by non-federally recognized tribes, the NAGPRA Review Committee may wish to recommend this special subcategory of culturally unidentifiable human remains for study before repatriation by tribes. In doing so they should consult with nationally recognized scientific organizations and professional societies for their recommendations for specific study, detailing procedures, time for study, and for reporting study results to tribes and the scientific community.
* * * *

A real serious issue regards the accidental finding of very ancient cultural remains as has just recently occurred in NPW. The proposed rules are silent and there is serious scientific disagreement about the disposition of such finds. Tribal interests wish to pursue repatriation generally without any scientific analysis, while the archeological community wishes to gain the extremely valuable scientific data from such a discovery prior to repatriation.
* * * *

Because many disciplines, organizations, and research interests could potentially be involved with this particular data set, it is extremely important that the NAGPRA Review Committee draw upon recommendations from the affected Indian tribes and a respected independent scientific source such as the National Academy of Sciences to jointly develop a scientific screening process for this special subcategory of human remains. This information could be the basis for a NAGPRA amendment.

7. The problem in the existing NAGPRA process for treatment of this subcategory of culturally unidentified human remains is the age of the remains. With specimens in the 9,000-10,000 year age range close affinity with any historic ethnic group would be tenuous. These kinds of remains, however, will almost always be claimed by contemporary tribes as ancestral, regardless how removed they may be. Tribes or shared groups of tribes can be expected to dutifully pursue the protection and repatriation of any ancestral human remains found on Indian lands or within their ceded territories as their stewardship responsibility, even if they cannot trace direct kinship to the find itself.

8. From a strictly scientific standpoint, the fact is that we do not really know how very ancient human remains might be related to contemporary Indian peoples. This fact alone would seem to merit some intermediate screening process that would provide for some kinds of study by qualified professionals and organizations prior to reburial by remote ancestors.... The issue here is not repatriation of the ancient human remains by the tribes, only that inadvertent

discoveries that fall into this very ancient subcategory of culturally unidentifiable human remains should be studied before they are reburied. * * * *

(COE 0663-0666) (emphasis added). I recognize that this may have been a "pre- decisional" document, and that agency officials sometimes float ideas within the walls of the agency that do not represent the agency's formal position. However, this memorandum was dated September 3, 1996--only days before the Corps issued its notice of intent to transfer the remains to the tribes. A copy of this memorandum was sent to the Commander of the Corps on or about October 16, 1996, which was several weeks after that decision was announced and the very same day that this action was filed. During this same time period the Corps was publicly asserting that the law was clear, and that there was no doubt as to the proper disposition of the remains, the application of NAGPRA, or that NAGPRA forbids scientific study of the remains. The record suggests that Corps officials harbored doubts on those points, but chose to suppress those concerns in the interests of fostering a climate of cooperation with the tribes. [FN11]

FN11. The Corps was not alone in its uncertainty regarding the treatment of "culturally unidentifiable human remains." The legislative history of NAGPRA includes a discussion of the findings and recommendations by the Panel of National Dialogue on Museum-Native American Relations. "The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate." H.R.Rep. No. 877, 101st Cong., 2d Sess. 10-11 (Oct. 15, 1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369-70. The Panel's full report was included as an exhibit to the congressional hearings on NAGPRA. Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 before the House Committee on Interior and Insular Affairs, 101st Cong., 2d Sess. 196 (1990).

During the congressional hearings on NAGPRA, several witnesses testified that the problem posed by remains that cannot be identified as culturally affiliated with any modern tribe was "the one big unanswered question" that had not yet been resolved in the course of drafting the proposed legislation. See, e.g., Native American Grave and Burial Protection Act: Hearing on S. 1021 and S.1980 before the Senate Select Committee on Indian Affairs, 101st Cong., 2d Sess. 33 (1990) (colloquy between Senator McCain and Jerry Rogers, Associate Director of Cultural Resources for the National Park Service). See also McManamon and Nordby, Implementing the Native American Graves Protection and Repatriation Act, 24 Ariz. St. L. J. 217, 225 (1992) (asking whether "properly affiliated claimants exist for human remains or cultural items excavated from archaeological sites thousands or tens-of-thousands of years ... [old], such as those assigned to Paleoindian or Archaic cultures," and observing that "NAGPRA does not address the issue of ancient cultures.")

The Secretary of Interior was expected to promulgate regulations governing the disposition of "culturally unidentifiable human remains." At this writing, however, that task has not been completed. See 43 C.F.R. § 10.11 ("Reserved").

*643 I also note that the NAGPRA Review Committee mentioned in the memorandum is a committee established by Congress as an integral part of NAGPRA and specifically charged, inter alia, with overseeing implementation of certain portions of the law and consulting with the Secretary of Interior in the development of regulations to implement NAGPRA. 25 U.S.C. § 3006. By contrast, the Corps of Engineers is just one of many federal agencies that might occasionally address NAGPRA issues when a discovery is made on real property under the jurisdiction of that particular agency. This is not a case where the agency is solely responsible for administering a particular statutory scheme, and for drafting and interpreting the regulations to implement that law. To the extent there is any special agency expertise here, it is the NAGPRA Review Committee, and the Secretary of Interior [FN12]--rather than the Corps of Engineers--that presumably possess the greater level of expertise with regard to the interpretation and implementation of NAGPRA.

FN12. Section 13 of NAGPRA directs the Secretary of Interior to promulgate regulations for the implementation of NAGPRA.

[13] With multiple agencies separately interpreting and administering the statute, depending upon the fortuity of where the remains are found, there is the potential for inconsistent interpretations. For that reason, the court is inclined to pay particular attention to the comments of the NAGPRA Review Committee, notwithstanding that it primarily functions in a consulting role, [FN13] and to be less deferential than usual to the Corps' interpretation of the statute and regulations. Cf. United States Dept. of Treasury v. Federal Labor Relations Authority, 996 F.2d 1246, 1250 (D.C.Cir.1993) (agency's

001840

interpretation of rules promulgated by a different agency is not entitled to the deference that might be accorded to an agency's interpretation of its own regulations.) See also *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984) (deference is given to agency's interpretation of statute that it administers); *1185 Avenue of the Americas Associates v. Resolution Trust Corp.*, 22 F.3d 494, 497 (2d Cir.1994) (where Congress has entrusted more than one federal agency with the administration of a statute, a reviewing court does not owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation) (citing *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir.1985)); *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir.1981) (agency's interpretation of another agency's statutes and regulations is not entitled to special deference).

FN13. The legislative history of NAGPRA indicates some initial concern that formation of the Review Committee could violate the Appointments Clause of the Constitution unless the appointees were subject to confirmation by the Senate. The House Committee on Interior and Insular Affairs and the Department of Justice eventually concluded that confirmation was not required since the Review Committee is advisory only, and NAGPRA "does not accord binding legal force to the Review Committee's actions." H.R.Rep. No. 877, 101st Cong., 2d Sess. 16, 28-29 (Oct. 15, 1990), reprinted at 1990 U.S.C.C.A.N. 4367, 4375, 4387-88 (2d Sess.) Although the NAGPRA Review Committee is advisory, its views nonetheless "will be an important consideration for any action that the Secretary [of Interior] must take." *McManamon and Nordby, Implementing NAGPRA*, 24 *Ariz. St. L. J.* at 228-29. The court observes that the United States Fish and Wildlife Service often acts in a consulting role when fulfilling its responsibilities under the Endangered Species Act and other statutes, but that does not diminish the deference given to that agency's findings and recommendations. See, e.g., *Lone Rock Timber Co. v. United States Dept. of Interior*, 842 F.Supp. 433, 437 (D.Or.1994).

It appears that the NAGPRA Review Committee recognized the problems posed by ancient remains, but could not agree on how to resolve that issue. This may be a policy question that ultimately must be resolved by Congress.

3. The Decisions Must be Vacated and the Matter Remanded:

For now, the immediate question is what to do with these remains and this lawsuit. The agency contends that it has withdrawn its prior decisions and desires to gather additional evidence and to reconsider the matter. Plaintiffs question defendants' sincerity, but the point is largely academic. If I accept defendants' representation that the decisions have been vacated, then I must remand the matter to the agency for further consideration and development of the record. If I find that the decisions have not been withdrawn, then on this record I have little choice but to vacate those decisions and remand the matter to the agency for reconsideration.

[14] Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law ..." 5 U.S.C. § 706(2)(A); *Northwest Motorcycle Ass'n v. United States Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir.1994). The court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Northwest Motorcycle*, 18 F.3d at 1471. Depending upon the circumstances, the agency's failure to gather or to consider relevant evidence may be grounds for setting aside the decision. See *Mt. Diablo Hospital v. Shalala*, 3 F.3d 1226, 1232 (9th Cir.1993) (citing *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C.Cir.1973)).

[15][16] After considering the relevant data, the agency must articulate a satisfactory explanation of its action including a rational connection between the facts found and the choice made. *Northwest Motorcycle*, 18 F.3d at 1471. An agency decision will not be upheld under the arbitrary and capricious standard unless the court finds that the evidence before the agency provided a rational and ample basis for its decision. *Id.* An agency's decision may also be set aside if the agency has relied on factors that Congress has not intended the agency to consider, has entirely failed to consider an important aspect of the problem, has offered an explanation for its decision that runs counter to the evidence before the agency, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 701 (9th Cir.1996).

[17] When the agency's decision turns at least in part upon the construction of a statute or regulation, the court must consider whether the agency correctly interpreted and applied the relevant legal standards. When Congress has

001841

unambiguously expressed its intent, that is controlling. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82. If the statute is silent or ambiguous concerning the issue in dispute, the court next inquires whether the agency is construing a statute that it administers or regulations that it has promulgated. *Id.* at 842-44, 104 S.Ct. at 2781-83. If the answer is yes, the agency's construction will be upheld if it is based upon a "permissible construction of the statute" or regulation. *Id.*; *Northwest Motorcycle*, 18 F.3d at 1471. However, similar deference is not afforded to an agency's interpretation of *645 a statute that it does not administer, or of regulations that were promulgated by other agencies. *Dept. of the Treasury*, 996 F.2d at 1250; *1185 Avenue of the Americas*, 22 F.3d at 497; *Tsosie*, 651 F.2d at 722.

[18] Here, the agency clearly failed to consider all of the relevant factors or all aspects of the problem. The agency acted before it had all of the evidence or fully appreciated the scope of the problem. The agency did not fully consider or resolve certain difficult legal questions. The agency assumed facts that proved to be erroneous. The agency failed to articulate a satisfactory explanation for its action. By the agency's own admission, any decision in this matter was premature and ought to be set aside and the matter remanded to the agency for further consideration. [FN14]

FN14. The procedural posture of this case is somewhat awkward. Plaintiffs have not moved for summary judgment and the parties have not officially briefed the question of whether the agency's decision should be set aside. Nor have defendants formally filed the full administrative record. Despite those deficiencies, over the course of the preceding eight months this court has had ample opportunity to become familiar with the case. The court has carefully reviewed the agency's decision, the excerpts of record submitted by the parties, the briefs, and the responses to discovery requests. There also have been three full oral arguments, at which the parties articulated their positions at some length. The court is satisfied that it adequately understands the case, and the positions of the parties, and that further briefing on this topic would not be beneficial. The court also is satisfied that the defects already identified in the Corps' decision making process warrant setting aside the decision and remanding the matter to the agency, and that this conclusion is unlikely to be altered by the filing of additional pages from the administrative record. Both sides agree that the matter needs further consideration by the agency. Further delay is not in the interests of any of the participants.

Regardless of whether I grant the agency's request for a remand, or the plaintiffs' request to set aside the decision, the end result essentially is the same. The matter must be remanded to the agency for further review. To the extent that defendants' inconsistent statements have created any question as to the continuing validity of the prior decisions, I now dispel those doubts by formally vacating those decisions. Since this matter concerns a res (the remains), I will retain jurisdiction to ensure that the interests of all parties are protected during the interim.

I have not determined that the Corps' decisions were "wrong." I am not deciding today who ultimately is entitled to custody of the remains, or whether the scientists should be permitted to conduct any tests upon those remains. Rather, what I have determined is that the agency's decision making procedure was flawed. As a result, I am directing the Corps of Engineers to fully reopen this matter, to gather additional evidence, to take a fresh look at the legal issues involved, and to eventually reach a decision that is based upon all of the evidence, that applies the relevant legal standards, and that provides a clear statement of what the agency has decided, and the reasons for that decision.

The court will retain jurisdiction in the interim. I will ask the parties to submit periodic status reports advising me of their progress. I will not give the Corps a specific deadline for making its decision, but I do expect the Corps to proceed expeditiously and the court has the authority to intercede if the issues are not being addressed in a timely manner.

For now, the government shall retain custody of the remains and may not dispose of them pending resolution of this controversy. To avoid inadvertently mooting this case, the remains shall continue to be stored in a manner that preserves their potential scientific value.

Plaintiffs' Motions to Study the Remains:

Also before the court are plaintiffs' motions to study the remains. This primarily is a discovery motion, but plaintiffs also have asserted an independent First Amendment right to study the remains. While legally that claim may be distinguishable from the challenged administrative action, as a practical matter the two are intertwined. The court therefore will deny plaintiffs' request to study the remains, with leave to renew that request, if necessary, after the Corps of Engineers has completed its investigation and reached a new decision. The Corps, in its *646 deliberations, should

001842

consider plaintiffs' request to study the remains.

I am concerned, however, that this remand will not be productive unless the Corps carefully scrutinizes the arguments asserted by plaintiffs. In its briefs, defendants categorically dismissed the possibility that plaintiffs might have a First Amendment right to study the remains. Although I do not decide this question today, the issue warrants greater consideration than the Corps has given to it thus far.

[19] The First Amendment is not limited to "speech" per se. It protects both the right to send and also to receive information. [FN15] Defendants acknowledge that the First Amendment limits the government's power to suppress knowledge by removing books from a library, but argue that the government has no affirmative obligation to facilitate the dissemination of knowledge by writing and publishing books. That misconstrues plaintiffs' argument.

FN15. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (right of consumers to obtain information regarding the prices of prescription drugs at area pharmacies); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576, 582-83, 100 S.Ct. 2814, 2826-27, 2830-31, 65 L.Ed.2d 973 (1980) (right to information about criminal trials); *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (to justify statute prohibiting acceptance of honoraria by government employees, government would have to overcome First Amendment rights of both speakers and their potential audience); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 775, 92 S.Ct. 2576, 2581-82, 2588, 33 L.Ed.2d 683 (1972) (acknowledging existence of right); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978) (corporate political speech); *Bell v. Wolfish*, 441 U.S. 520, 551-52, 99 S.Ct. 1861, 1880-81, 60 L.Ed.2d 447 (1979) (right of inmates to receive information); *Martin v. Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943) (invalidating ordinance forbidding distribution of circulars, on grounds it infringed both the rights of the circulator to disseminate his or her message, and also the rights of the recipient to decide whether he wishes to receive this information); *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (right to receive political publications sent from abroad); *Stanley v. Georgia*, 394 U.S. 557, 564-65, 89 S.Ct. 1243, 1247-48, 22 L.Ed.2d 542 (1969) (right to possess pornography); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806-07, 23 L.Ed.2d 371 (1969) ("the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences ... may not constitutionally be abridged either by Congress or by the FCC"); *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969) (information about the views of the Ku Klux Klan); *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965) (information about contraceptives); *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (right of students to read books deemed "vulgar" or "anti-American" by Board of Education); *Terminal-Hudson Electronics, Inc. of California v. Department of Consumer Affairs*, 407 F.Supp. 1075, 1079-80 (C.D.Cal.1975) (information regarding price of eyeglasses), vacated on other grounds, 426 U.S. 916, 96 S.Ct. 2619, 49 L.Ed.2d 370 (1976).

Plaintiffs' contention is that to the trained eye the skeletal remains are analogous to a book that they can read, a history written in bone instead of on paper, just as the history of a region may be "read" by observing layers of rock or ice, or the rings of a tree. Plaintiffs are not asking the government to conduct the tests and publish the results. Plaintiffs simply want the government to step aside and permit them to "read that book" by conducting their own tests. A closer analogy would be a lawsuit brought by scholars seeking access to the Nixon tapes or presidential papers, or the Pentagon Papers, so the scholars may conduct research and publish their own findings.

In *Griswold*, the Court observed that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." 381 U.S. at 482, 85 S.Ct. at 1680. Similarly, in *First National Bank of Boston*, the Court observed that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." 435 U.S. at 784, 98 S.Ct. at 1420. In *Richmond Newspapers*, Justice Stevens, in a concurring opinion, hailed this decision as a "watershed" because "[t]oday ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of *647 speech and of the press protected by the First Amendment." 448 U.S. at 584, 100 S.Ct. at 2831 (Stevens, J., concurring). In that same case, Justice Brennan opined that the Court's prior decisions on this topic hold "only that any privilege of access to governmental information is subject

001843

to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.... These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it." *Id.*, 448 U.S. at 586, 100 S.Ct. at 2832 (Brennan, J., concurring).

Assuming it exists, the full scope of such a constitutional right has yet to be explored. The passage of laws such as the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the various open meeting laws that guarantee access to meetings of legislative bodies, e.g., 5 U.S.C. § 552b, and their state law counterparts, has largely stunted the development of this area of constitutional law by establishing a statutory framework that governs most access claims. However, the issue still surfaces occasionally. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S.Ct. 1306, 1317-18, 55 L.Ed.2d 570 (1978) (rejecting media request for copies of tapes, in part because the contents of the tapes had already been given wide publicity by all elements of the media, and thus there was "no question of a truncated flow of information to the public"); *Nixon v. Administrator of General Services*, 433 U.S. 425, 452-53, 97 S.Ct. 2777, 2794-95, 53 L.Ed.2d 867 (1977) (acknowledging importance of preserving presidential papers in order to ensure an accurate and complete historical record, and to protect the "American people's ability to reconstruct and come to terms with their history"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (acknowledging right of access to criminal trial); *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (denying television station's request to film conditions inside prison, in part because there were adequate alternative means for gathering the same information without compelling the prison to allow television stations access to a prison) [FN16]; *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462, 1467 (9th Cir.1990) (request by newspaper for access to sealed plea agreement); *EEOC v. Erection Co., Inc.*, 900 F.2d 168 (9th Cir.1990) (request by EEOC to unseal consent decree); *Valley Broadcasting Co. v. United States District Court*, 798 F.2d 1289 (9th Cir.1986) (request by television station to copy audio and videotapes admitted into evidence in criminal trial); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir.1983) (right of access to sealed documents in criminal action); *Harding v. United States Figure Skating Ass'n*, 851 F.Supp. 1476 (D.Or.1994) (motion by intervenor newspaper to unseal exhibits filed in civil proceeding brought to halt disciplinary hearing against figure skater). [FN17]

FN16. Defendants' briefs rely heavily on dictum in *Houchins* that "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins*, 438 U.S. at 9, 98 S.Ct. at 2593-94. However, that plurality opinion had the support of only three of the nine justices (Burger, Rehnquist, and White). Three other justices vigorously dissented, declaring that "[a]n official prison policy of concealing ... knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." *Id.*, 438 U.S. at 38, 98 S.Ct. at 2609 (Stevens, Brennan, and Powell dissenting). Two justices (Marshall and Blackmun) abstained. Justice Stewart concurred only in the judgment. *Id.* at 16-17, 98 S.Ct. at 2597-98. Consequently, the dictum relied upon by defendants has little precedential value. In any event, plaintiffs do not assert a right of access "to all sources of information within government control" but only to these particular remains.

FN17. Although plaintiffs are not "media," if such a constitutional right exists it would not necessarily be limited to the press. The news media often are given access to certain proceedings because capacity is limited, and the media serve as representatives of the public who then disseminate the information to the public at large. Plaintiffs have asserted an intent to do the same. Moreover, as a practical matter, plaintiffs could simply contract to write an article for a scientific journal or newspaper and thereby qualify as "media" representatives.

*648 Assuming, *arguendo*, that there is a First Amendment right for researchers to study materials in the possession or control of the federal government, of necessity there would have to be some limits upon its exercise. Otherwise, every conspiracy buff could assert a constitutional right to exhume the graves of Presidents Kennedy and Lincoln, or to sift through President Clinton's trash. Privacy rights, property rights, and national security would be among the obvious concerns. See *Richmond Newspapers*, 448 U.S. at 586, 100 S.Ct. at 2832 (Brennan, J., concurring) ("any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.") Some courts also have expressed concern that almost any forbidden conduct potentially can be cast in the form of a First Amendment right to gather knowledge, e.g., the right to smoke marijuana to gather knowledge about its effects. Cf. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir.1996) (declining to recognize First Amendment right to travel to Cuba to gather first-hand information about

001844

conditions there in defiance of government embargo on travel.)

[20] A further concern is how such a constitutional right would interact with FOIA, NAGPRA, and other statutes. This court would be wary of recognizing a vehicle for circumventing the procedures and limitations that Congress has expressly established. Cf. *Nixon*, 435 U.S. at 603, 98 S.Ct. at 1314-15 (existence of Presidential Recordings Act, which established procedures for screening and releasing presidential tapes and documents, counseled against recognizing an independent common law or First Amendment right for media access to those items). Moreover, even assuming that plaintiffs have some First Amendment rights, the court also would have to consider any countervailing rights. In addition, Congress has "extraordinarily broad" authority with respect to legislation pertaining to Indians in general, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 98 S.Ct. 1670, 1684, 56 L.Ed.2d 106 (1978), and regarding the fulfillment of federal trust obligations to the Tribes in particular. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551-55, 94 S.Ct. 2474, 2483-85, 41 L.Ed.2d 290 (1974); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65, 105 S.Ct. 2399, 2402-03, 85 L.Ed.2d 753 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 253, 105 S.Ct. 1245, 1258, 1261, 84 L.Ed.2d 169 (1985); *United States v. Wheeler*, 435 U.S. 313, 319, 98 S.Ct. 1079, 1083-84, 55 L.Ed.2d 303 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters.") However, although "[t]he power of Congress over Indian affairs may be of a plenary nature ... it is not absolute" and such legislation may still be reviewed for compliance with the United States Constitution. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84, 97 S.Ct. 911, 918-19, 51 L.Ed.2d 173 (1977).

Again, I do not decide today that there is (or is not) a First Amendment right for scholars to have access to primary research materials that are in the possession and control of the federal government, or the parameters of such a right if it does exist. I suggest only that plaintiffs' arguments are not frivolous, and the issue merits more serious consideration on remand than it received in defendants' briefs.

Plaintiffs' Equal Protection Claims:

Both sets of plaintiffs have asserted claims regarding the constitutionality of NAGPRA, its enabling regulations, and the actions taken thereunder. If I understand their allegations correctly, the Asatru plaintiffs contend that they are being discriminated against because the NAGPRA regulations permit only an Indian tribe to file a claim for the remains, notwithstanding that non-Indians (i.e., the Asatru plaintiffs) may have a closer relationship to the remains.

[21] I have more difficulty understanding the contentions of the Bonnichsen plaintiffs on this issue. At oral argument, they claimed to have been discriminated against on account of their race, i.e., because they were not Native American. Assuming, for the moment, that for purposes of NAGPRA Native American is a "race," as opposed to a political status, cf. *Morton*, 417 U.S. at 553-54, 94 S.Ct. at 2484-85, I fail to comprehend how plaintiffs are being treated differently *649 merely because they are not Native American. There is nothing in the record to suggest that a Native American archaeologist would be permitted access to the remains, but a Caucasian archaeologist would not. The amicus tribes object to anyone studying these remains, regardless of race or tribal affiliation.

[22] To the extent the Bonnichsen plaintiffs contend that NAGPRA is unconstitutional because it applies only to Native American remains and cultural objects, I question whether the scientists can establish that Congress lacked an adequate justification for the distinction. The court is not aware of any significant market in cultural objects and remains stolen from predominantly Caucasian graveyards in the United States, or of museums exhibiting and cataloguing thousands of Caucasian skeletons, or of any parallel to the "pot-hunters" who vandalize and desecrate Indian graves. See *Trope and Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *Ariz. St. L. J.* 35 (1992) (detailing some of the abuses that led to the enactment of NAGPRA). [FN18] The legislative history of NAGPRA also contains extensive documentation of the abuses that led to the enactment of this law. See, generally, *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 before the House Committee on Interior and Insular Affairs, 101st Cong., 2d Sess. (1990); Native American Grave and Burial Protection Act: Hearing on S. 1021 and S.1980 before the Senate Select Committee on Indian Affairs, 101st Cong., 2d Sess. (1990).*

FN18. According to *Trope and Echo-Hawk*, prior to the passage of NAGPRA the Smithsonian Institute alone had approximately 18,500 Native American skeletons in its collection, *id.* at 54, the Tennessee Valley Authority possessed approximately 10,000 Native American skeletons, *id.* at 42 n. 29, and estimates of the number of

Native American skeletons in museums and private collections ranged from 100,000 up to two million. *Id.* at 39 n. 12. Trope and Echo-Hawk also describe some of the gruesome methods that were used to obtain Indian corpses and funerary items for these collections. *Id.* at 40-42.

Congress reasonably could have concluded that state and local laws against abusing a corpse, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains. *Id.* See also Hunt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, *Ariz. St. L. J.* 135 (1992). Moreover, NAGPRA applies to remains and objects discovered on federal lands, [FN19] which provides Congress with a direct interest. In addition, Congress has a special obligation to legislate for the benefit of Native Americans. See Morton, 417 U.S. at 554-55, 94 S.Ct. at 2484-85.

FN19. The statute also applies to objects held by museums that receive federal funding. 25 U.S.C. § 3001(8). In addition, the criminal provisions of NAGPRA may apply to illicit trafficking in certain Native American cultural items regardless of where the item originally was found. See Hunt, *Illegal Trafficking in Native American Human Remains and Cultural Items*, 24 *Ariz. St. L. J.* at 143 ("NAGPRA confers federal jurisdiction over certain items, wherever they are found.").

I do not make a final ruling on these claims today. Plaintiffs may pursue them on remand, if they choose, and the Corps should consider plaintiffs' arguments in that regard. However, the Bonnichsen plaintiffs will have an uphill battle to convince me that there is any merit to those contentions. At a minimum, plaintiffs must more precisely identify the alleged discrimination, how they have been injured by that discrimination, and why Congress may not enact such legislation (or why the NAGPRA regulations are unconstitutional.) Plaintiffs must also establish any record necessary to support such contentions.

A final issue is the extent to which the equal protection arguments must be addressed by the agency on remand. There is some doubt whether an administrative agency has the authority to decide the constitutionality of a statute or regulation. See, e.g., *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 *Harv. L. Rev.* 1682 (1977). It often is presumed that agencies do not have such power. *Id.* See also *Cooper v. Eugene School District No. 4J*, 301 Or. 358, 363-65, 723 P.2d 298 (1986) (reviewing authorities); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569-70 (Fed.Cir.1995). [FN20]

FN20. The issue sometimes arises in the context of whether judicial review of agency action is foreclosed entirely; the courts have held that where the claim presents constitutional issues the right to judicial review is presumed notwithstanding that the matter has otherwise been committed to an agency or there is no express right to judicial review. See *Califano v. Sanders* 430 U.S. 99, 109, 97 S.Ct. 980, 986, 51 L.Ed.2d 192 (1977) (observing that "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.")

In other cases, the issue of an agency's authority to make constitutional pronouncements arose in the context of exhaustion of remedies, i.e., whether the plaintiff had to first present his constitutional claims to the agency before seeking judicial review. *Cooper*, 301 Or. at 363, 723 P.2d 298. Typically the courts excused the failure to exhaust remedies and permitted immediate judicial review. *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir.1992) (excusing failure to exhaust remedies because "raising a constitutional challenge before the agency would have been a futile exercise because an agency has no authority to declare its governing statute unconstitutional," citing *Califano*); *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir.1985) (also relying on *Califano*, and concluding that the court should address the constitutional arguments even though they had not been raised during the administrative hearing). An alternative explanation for these decisions is that a challenge to the constitutionality of a statute typically presents a purely legal question that requires little or no factual development and does not implicate the agency's special expertise or disrupt the agency's implementation of the statutory scheme; in the typical case there may not be any compelling reason to require an initial review by the agency as opposed to direct review by a court.

In recent years, the traditional doctrine--that an agency has no authority to declare a statute or regulation unconstitutional--has come under attack. See, e.g., *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 *Harv. L. Rev.* 1682 (suggesting the rule be reconsidered.) The Oregon Supreme Court

001846

has rejected the doctrine and held that Oregon administrative agencies do have the power to declare statutes and rules unconstitutional, although it is an authority to be exercised infrequently and always with care. *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991); *Cooper*, 301 Or. at 365, 723 P.2d 298. The Oregon court reasoned that all state officials--not just the judiciary--swear an oath of allegiance to the constitution and are bound to uphold it. *Cooper*, 301 Or. at 364 n.7, 723 P.2d 298. The court also drew a distinction between requiring a litigant to present his constitutional arguments to the agency versus permitting the agency to consider those arguments if the litigant voluntarily chose to present them at this stage in the proceedings. *Id.* at 364, 723 P.2d 298.

A recent Supreme Court decision also casts some doubt upon the traditional rule. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994), the issue was whether the federal courts had jurisdiction over a pre-enforcement challenge to an order issued by the Mine Safety and Health Administration. After disposing of the other arguments, the Court observed that:

As for petitioner's constitutional claim, we agree that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." This rule is not mandatory, however

...
Id. at 215, 114 S.Ct. at 780 (internal citations and punctuation omitted). The Court did not explain how a jurisdictional rule could be "not mandatory," but the clear implication is that the rule is not the result of any inherent constitutional limitation upon the powers of administrative agencies but rather is a prudential limitation that in some circumstances may be relaxed or waived. Cf. *Warth*, 422 U.S. at 498, 95 S.Ct. at 2205 (the question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.") Indeed, the *Thunder Basin* Court noted that the Federal Mine Safety and Health Commission had "addressed constitutional questions in previous enforcement proceedings," including *651 vagueness, equal protection, and due process. *Id.* [FN21]

FN21. A recent Ninth Circuit decision also bears upon this issue. In *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir.1994), the plaintiff was arrested for demonstrating in a public park without a permit. The arresting officer argued that he was entitled to summary judgment so long as the allegedly unconstitutional action consisted solely of the enforcement of a duly enacted city ordinance. The Circuit disagreed. The panel cited the Holocaust and the My Lai massacre as examples of why a government official should not automatically be entitled to immunity simply because the official was enforcing policies or orders promulgated by those with superior authority. "Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity." *Id.* at 1209. If *Grossman* is correct, then there may be circumstances under which members of the executive branch have both the authority and a duty to refuse to enforce a law or order that is patently unconstitutional, although such authority--if it exists--must be "exercised infrequently, and always with care." *Nutbrown*, 311 Or. at 346, 811 P.2d 131.

Even if the agency cannot directly declare a statute unconstitutional, there is authority that an agency may consider constitutional issues in construing and applying a statute or regulation. See *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 629, 106 S.Ct. 2718, 2723-24, 91 L.Ed.2d 512 (1986) ("it would seem an unusual doctrine ... to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles"); *Fieger v. Thomas*, 74 F.3d 740, 746-48 (6th Cir.1996) (agency adjudicating contested case may have authority to declare disciplinary rule unconstitutional, or could refuse to enforce rule or perhaps narrowly construe it to avoid violating constitutional rights); *Riggin*, 61 F.3d at 1570 (agency is not precluded from addressing constitutional questions that arise in the course of its deliberations, such as whether the First Amendment, or the Speech or Debate Clause, provides a complete defense to an employment discrimination claim; "The fact that those defenses are constitutionally based would not disable the board from fulfilling its responsibility to decide the statutory claim presented to it"). [FN22]

FN22. In fact, agencies routinely consider constitutional issues in the course of performing their duties, e.g., whether a proposed action would constitute a "taking," or infringes upon First Amendment rights, or what steps the agency must take to provide constitutional due process to persons impacted by the proposed agency action.

On remand, I will neither require--nor forbid--the Corps to consider plaintiffs' equal protection challenges to NAGPRA and to the implementing regulations. [FN23] However, I will direct plaintiffs to present to the agency all arguments that plaintiffs intend to assert in this case, and to make any record below that is needed to support those contentions. The

001847

Corps may address the equal protection issue to the extent it believes it has the authority to do so. Even if the Corps declines to address the issue, I believe this procedure will help to simplify this case by identifying and airing all issues at one time, and by creating a single record for review instead of making a second record in this court.

FN23. Arguably, there is a difference between an agency declaring a statute unconstitutional versus voiding a regulation. The regulation was not enacted by Congress, and therefore is not entitled to as great a presumption of constitutionality as is accorded to statutes.

Issues to be Considered on Remand:

In reaching its decision on the ultimate disposition of the remains in question, and on whether to grant plaintiffs' request for permission to study the remains, the Corps should consider, inter alia, the following issues:

(a) Whether these remains are subject to NAGPRA, and why (or why not);

(b) What is meant by terms such as "Native American" and "indigenous" in the context of NAGPRA and the facts of this case; [FN24]

FN24. 25 U.S.C. § 3002 applies only to "Native American human remains." NAGPRA defines the term "Native American" to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). Perhaps Congress had a specific definition in mind. Otherwise, if we assume that Congress intended to use the ordinary meaning of the word, my dictionary defines "indigenous" as "occurring or living naturally in an area; not introduced; native." American Heritage Dictionary of the English Language (New College Ed.)

It is not easy to apply the concept of "indigenous" to remains as ancient as those at issue here, at least given the present state of knowledge regarding the origins of humanity in the Americas. Indian legends often recount that their ancestors arose from the earth, or have always occupied this continent, which truly would be "indigenous." Cf. Confederated Tribes of the Umatilla Indian Reservation, Position Paper (COE 0291-292) ("From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do.") However, even assuming the ancestors of present day Native Americans have always been here, as the amici contend, that in itself does not preclude the possibility that non-Indians could also have been present in the Americas at some earlier date. For that reason, the age of the remains is not, by itself, conclusive proof that these remains are related to contemporary Native Americans.

On the other hand, conventional scientific theory is that modern Native Americans are descended from immigrants who came to the Americas from other continents. If that is true, then were these original immigrants (who were born elsewhere) "indigenous"? Were their children (born here of immigrant parents) "indigenous"? The analysis is further complicated if there was more than one wave of ancient immigration to the Americas, or off-shoots from the primary group(s). If there were sub-populations whose members survived for a time in North America—perhaps hundreds or even thousands of years—but eventually became evolutionary "dead ends," i.e., all descendants of the group eventually died, leaving no one who today is directly descended from them, would a member of such an extinct sub-population be considered "indigenous"? Would they be considered "Native American"? It is essential to define what is meant by "indigenous" and "Native American" for purposes of NAGPRA.

The reference in § 3001(9) to a "culture that is indigenous to the United States" may provide an alternative to the task of establishing that the remains are linked to a people who are biologically "indigenous" to the United States. However, there appears to be little evidence in the record regarding the cultural affiliation of the man whose remains were found.

*652 (c) Whether, if there was more than one wave of ancient migration to the Americas, or if there were sub-populations of early Americans, NAGPRA applies to remains or cultural objects from a population that failed to survive [FN25] and is not directly related to modern Native Americans;

FN25. I am referring here to sub-populations that might have become extinct thousands of years ago. That issue must be distinguished from a separate problem regarding the disposition of remains from tribes that became

001848

extinct only recently. The latter concern was raised by Rep. Bennett during the committee hearings on NAGPRA. See Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 before the House Committee on Interior and Insular Affairs, 101st Cong., 2d Sess. 130 (1990).

(d) Whether NAGPRA requires (either expressly or implicitly) a biological connection between the remains and a contemporary Native American tribe;

(e) Whether there has to be any cultural affiliation between the remains and a contemporary Native American tribe--and if yes, how that affiliation is established if no cultural objects are found with the remains; [FN26]

FN26. A projectile point was found embedded in the remains, which may have led to the man's death. Defendants have suggested that the point was of a type formerly used by Native Americans, and cite this as proof that the man was an ancestor of today's Native Americans. They may be right. However, this also could be seen as proof that the man was not of Native American ancestry, but was part of a competing group--which might tend to explain how he ended up dead with a spear embedded in his side. His group might have lost the competition, while the projectile makers survived and gave birth to succeeding generations. I express no opinion as to which historical view, if either, is correct. My point is simply that it is not enough to take one fact out of context and use it to support a pre-determined hypothesis. On remand, the Corps must critically examine all of the evidence in the record as a whole, and make specific findings that are supported by reliable evidence. During oral argument, the Corps also asserted that the remains "were found in a known burial location for Native American remains," (June 2 tr. at 13), and cited this as evidence that the remains were Native American. Plaintiffs dispute that assertion. Either way, it is unclear from the record whether there is any evidence that the remains were intentionally buried at this location, or if the man simply died along the river bank and then was covered by sediment from the floods that were common along the Columbia River before it was dammed.

(f) The level of certainty required to establish such a biological or cultural affiliation, e.g., possible, probable, clear and convincing, etc.; [FN27]

FN27. See, e.g., 43 C.F.R. § 10.14(f).

(g) Whether any scientific studies are needed before the Corps can determine whether these particular remains are subject *653 to NAGPRA, [FN28] and if so, whether such studies are legally permissible; [FN29]

FN28. The record suggests that the preliminary tests and studies were never completed. If so, the agency may be unable to determine whether these remains are Native American without performing at least some tests and examinations. Among other things, the Corps may want to ensure that the remains really are over 9000 years old. See *Aff. of James Chatters* ¶ 6 ("The UC Riverside date has not been confirmed by testing at another laboratory.") The Corps may also want to determine whether there are any tests (e.g., DNA tests) that might establish a link (or the lack thereof) to a modern Native American tribe or to any other ethnic or cultural group. The court observes that DNA tests are now being used to either establish or to exclude paternity, and to positively identify human remains that have been badly disfigured in accidents so that the remains can be returned to the correct family for burial.

FN29. This issue was addressed at some length in *Na Iwi*, 894 F.Supp. 1397. After reviewing the text of the statute and the legislative history, the district court concluded that:

Examinations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items. *Id.* at 1415. The court concluded that Section 3003(b)(2) does not preclude the further scientific study that is required to accurately inventory the remains pursuant to NAGPRA; "Congress would not require accurate inventories under NAGPRA and then deny museums and federal agencies the necessary tools to comply effectively with that specific requirement." *Id.* at 1417.

The examinations at issue in *Na Iwi* are described as "standard physical anthropology techniques." *Id.* at 1403. No DNA analyses were performed. *Id.* "[M]ore extensive metric and nonmetric analyses" were performed on four sets of remains where "there was a definite question as to cultural affiliation/ethnicity of the remains." *Id.*

at 1403 n. 3.

The procedural posture of *Na Iwi* differs from the instant case. In *Na Iwi*, the lawsuit was filed after the museum had already performed the studies in question. The plaintiffs sought a declaration that the studies had been conducted in violation of NAGPRA, and also sought to suppress publication of the results of those studies. *Id.* at 1404. The court ruled against the plaintiffs. *Id.* at 1417-18. In addition, the remains in question were already in the custody of the museum and therefore were subject to the inventory and repatriation provisions of 25 U.S.C. § 3005. The remains at issue here were discovered after the effective date of NAGPRA. That may (or may not) be a significant distinction. In either case, the ultimate objective is to determine whether the remains are subject to NAGPRA and, if they are, to whom the remains should be repatriated.

The *Na Iwi* court also cited a report, prepared by the Congressional Budget Office ("CBO") for the committee that was drafting NAGPRA. The CBO report included an estimate of the costs to implement the bill. It assumed that "extensive studies" would be required to determine the origin of some remains. *Na Iwi*, 894 F.Supp. at 1415 (citing S.Rep. No. 473, 101st Cong., 2d Sess. 19 (1990).) The CBO report is reprinted at 1990 U.S.C.C.A.N. 4367, 4380-81. Other exhibits in NAGPRA's legislative history also explore the estimated cost of the procedures that might be required to properly identify and determine the origin of certain remains. That suggests a recognition that some examination and testing may be required to inventory museum holdings and determine the likely origins of each item and to whom it should be repatriated.

Although a broad spectrum of views were presented during the congressional hearings, it does not appear that the primary purpose of NAGPRA was to forbid scientific study entirely. Rather, the legislative history suggests that NAGPRA's primary focus was on (1) repatriating the hundreds of thousands of Native American remains and cultural items that were stored in museum and agency warehouses, or were on display as exhibits, (2) with limited exceptions, prohibiting the intentional excavation of Native American graves and cultural items, and (3) suppressing the trafficking in Native American remains and artifacts.

Although not pleased by the idea of scientific studies being conducted on remains, most witnesses who testified at the Congressional hearings on NAGPRA expressed considerably more outrage with the improper means by which those remains had been acquired, the disrespect with which the remains had been treated, the failure to consult Native Americans regarding the study or disposition of these human remains and cultural artifacts, and the fact that the remains had been stored in vast permanent collections long after any valid scientific research had been completed. See, generally, Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 before the House Committee on Interior and Insular Affairs, 101st Cong., 2d Sess. (1990); Native American Grave and Burial Protection Act: Hearing on S. 1021 and S.1980 before the Senate Select Committee on Indian Affairs, 101st Cong., 2d Sess. (1990).

(h) Whether there is evidence of a link, either biological or cultural, between the remains and a modern Native American tribe or to any other ethnic or cultural group including (but not limited to) those of Europe, Asia, and the Pacific islands;

(i) Whether the "study" provisions of 25 U.S.C. § 3005(b) are limited to objects that *654 were in the possession or control of a federal agency or museum prior to November 16, 1990; [FN30]

FN30. Cf *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir.1996) (nothing in the express language of § 3005 indicates that repatriation is limited by when or where the object subject to repatriation was found; rather, "repatriation applies to items presently in possession of federally-funded museums, including items possessed on ... NAGPRA's effective date"; "NAGPRA's express language does not limit repatriation to items found after November 16, 1990") (emphasis added).

(j) Whether there is any other law, e.g., the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa et seq., or any other section of NAGPRA such as 25 U.S.C. § 3002(c) or § 3003(b)(2), that either permits or forbids scientific study of these remains;

(k) Whether scientific study and repatriation of the remains are mutually exclusive, or if both objectives can be accommodated;

(l) What law controls if the remains are not subject to NAGPRA;

001850

- (m) What happens to the remains if no existing tribe can establish a cultural affiliation;
- (n) Whether plaintiffs have a right (under the First Amendment or otherwise) to study the remains;
- (o) Whether there is any merit to the contention of the Asatru plaintiffs that non-Indians should be permitted to file a claim to the remains, or any merit to the equal protection arguments asserted by the plaintiffs (if the Corps decides it has authority to address that issue);
- (p) What role, if any, the NAGPRA Review Committee should play in resolving the issues presented by this case; and
- (q) Whether NAGPRA is silent on important issues raised by this case, and whether Congressional action will be required to clarify the law regarding "culturally unidentifiable ancient remains." [FN31]

FN31. Arguably there are two distinct issues here: (1) the disposition of remains that clearly are Native American, but cannot be linked to any specific modern tribe, and (2) the disposition of ancient remains that may not be Native American.

CONCLUSION

Defendants' motion (# 85 in Bonnicksen) for summary judgment is DENIED. The plaintiffs have standing, and the action has not been mooted. The prior decisions by the Corps of Engineers concerning these remains are hereby VACATED (to the extent they have not already been withdrawn by the agency) and the matter is REMANDED to the Corps of Engineers for further consideration.

This action is STAYED pending completion of the administrative proceedings. The court RETAINS JURISDICTION over this matter to ensure the protection of the remains, and the parties' respective interests concerning them, and to address any related problems that may arise on remand. The parties are to provide the court with quarterly status reports (preferably a joint report, but separately if they cannot agree) with the first report due on or before October 1, 1997, and subsequent reports due every three months thereafter until this matter is resolved.

Plaintiffs' motions (# 47 in Bonnicksen, and # 23 in Asatru) for permission to study the remains while this action is pending are DENIED without prejudice. The government shall retain custody of the remains and may not dispose of them pending resolution of this controversy. The remains shall continue to be stored in a manner that preserves their potential scientific value.

001851



DEPARTMENT OF THE ARMY
WALLA WALLA DISTRICT, CORPS OF ENGINEERS
201 NORTH THIRD AVENUE
WALLA WALLA, WASHINGTON 99362-1878

Reply To
Attention Of:

5 August, 1997

Office of Counsel

Mr. Lars Hanslin, Esq
Office of the Solicitor
Department of the Interior
1849 C Street NW
Mail Stop 6558
Washington, DC 20240-0001

Subject: *Bonnischen et al v United States*, CV '96-1481 JE, (D. Oregon)

Dear Mr. Hanslin:

I understand that you have spoken with Ms. Daria Zane of the Department of Justice regarding the subject litigation. In an Opinion issued on June 27, 1997, the Court posed certain specific questions regarding the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. sec. 3001, *et seq* and implementing regulations. Thank you for offering to share with me your agency's views on the Court's questions.

Since the Department of the Interior, National Park Service, is the lead agency for NAGPRA, your agency's interpretation is entitled to a deference in court. For this reason, I accept your kind offer and forward the court's questions for your consideration:

- (a) Whether these remains are subject to NAGPRA, and why (or why not);
- (b) What is meant by terms such as "Native American" and "indigenous" in the context of NAGPRA and the facts of this case;
- (c) Whether, if there was more than one wave of ancient migration to the Americas, or if there were sub-populations of early Americans, NAGPRA applies to remains or cultural objects from a population that failed to survive and is not directly related to modern Native Americans;
- (d) Whether NAGPRA requires (either expressly or implicitly) a *biological* connection between the remains and a contemporary Native American tribe;
- (e) Whether there has to be any *cultural* affiliation between the remains and a contemporary Native American tribe-- and if yes, how that affiliation is established if no cultural objects are found with the remains;

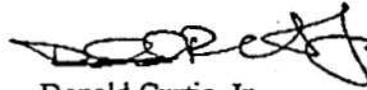
001852

- (f) The level of certainty required to establish such a biological or cultural affiliation. *e. g.* possible, probable, clear and convincing, etc.;
- (g) Whether any scientific studies are needed before the Corps can determine whether these particular remains are subject to NAGPRA, and if so, whether such studies are legally permissible;
- (h) Whether there is evidence of a link, either biological or cultural, between the remains and a modern Native American tribe or to any other ethnic or cultural group including (but not limited to) those of Europe, Asia, and the Pacific islands;
- (i) Whether the "study" provisions of 25 USC 3005(b) are limited to objects that were in the possession or control of a federal agency or museum prior to November 16, 1990;
- (j) Whether there is any other law, *e. g.*, the Archaeological Resources Protection Act ("ARPA"), 16 USC 470aa *et seq.*, or any other section of NAGPRA such as 25 USC 3002(c) or 3003(b)(2), that either permits or forbids scientific study of these remains;
- (k) Whether scientific study and repatriation of the remains are mutually exclusive, or if both objectives can be accommodated;
- (l) What law controls if the remains are not subject to NAGPRA;
- (m) What happens to the remains if no existing tribe can establish a cultural affiliation;
- (n) Whether plaintiffs have a right (under the First Amendment or otherwise) to study the remains;
- (o) Whether there is any merit to the contention of the Asatru plaintiffs that non-Indians should be permitted to file a claim to the remains, or any merit to the equal protection arguments asserted by the plaintiffs (if the Corps decides it has authority to address that issue);
- (p) What role, if any, the NAGPRA Review Committee should play in resolving the issues presented by this case; and
- (q) Whether NAGPRA is silent on important issues raised by this case, and whether Congressional action will be required to clarify the law regarding "culturally unidentifiable ancient remains."

3

When providing your agency's interpretations and/or positions regarding the above, please explain your rationale and provide citations to *e.g.*, legislative history where appropriate. The above questions include reference to a companion case: *Asatru Folk Assembly v United States*, CV '96-1516 JE (D. Oregon). If you wish additional information about it or any other matter, please do not hesitate to contact me or Ms. Linda Kirts, Esq., of my staff at 509-527-7707.

We look forward to hearing from you. Thank you for your assistance.



Donald Curtis, Jr.
Lieutenant Colonel, Corps of Engineers
District Engineer

001854



United States Department of the Interior

NATIONAL PARK SERVICE

P.O. Box 37127
Washington, D.C. 20013-7127

IN REPLY REFER TO:

W48(2275)

DEC 23 1997

Donald Curtis, Jr.
United States Army
Corps of Engineers-Walla Walla District
201 North Third Avenue
Walla Walla, Washington 99362-1976

Dear Lieutenant Colonel Curtis:

This responds to your August 5, 1997 letter requesting our views on certain matters related to the Native American Graves Protection and Repatriation Act (NAGPRA).

On June 27, 1997, United States Magistrate John Jelderks issued an opinion in connection with the consolidated cases of Bonnichsen, et al. v. United States, et al., (D. Oregon, Civil No. 96-1481-JE), and Asatru et al. v. United States, et al., (D. Oregon, Civil No. 96-1516-JE). The court directed the Corps of Engineers to consider a number of issues related to NAGPRA and the ultimate disposition of human remains recently discovered on lands owned by the Corps of Engineers within the State of Washington.

Many of the issues raised by the court are directly related to terms and procedures of NAGPRA (25 U.S.C. 3001 et seq.) and its implementing regulations (43 CFR 10). Congress directed the Secretary of the Interior to implement most aspects of the statute, including promulgation of its implementing regulations (25 U.S.C. 3011). The Secretary of the Interior has delegated responsibility for programmatic implementation of the statute to this office. In preparing the responses to your questions, I have consulted the Solicitor of the Department of the Interior. He shares the views expressed in this letter.

We have the following responses to the questions posed by your letter which, in certain instances, have been rephrased or reorganized for purposes of clarity:¹

¹ For the sake of clarity, our responses refer to Native American human remains and cultural items as separate categories of materials. Under NAGPRA, however, human remains and the several types of cultural items it describes (funerary objects, sacred objects, and objects of cultural patrimony) are referred to collectively as cultural items (25 U.S.C. 3001 (3)). In addition, although NAGPRA applies equally to Indian tribes and Native Hawaiian organizations, this memorandum does not make reference to Native Hawaiian organizations except where necessary for substantive reasons.

1. Whether these human remains are subject to NAGPRA, and why (or why not)?

At this time, this office does not have sufficient information to determine whether these remains are subject to NAGPRA. However, we consider that a Federal agency or museum has an obligation under NAGPRA to make reasonable efforts to determine whether human remains it possesses are Native American within the meaning of NAGPRA if there is a reason to consider this may be the case.

We are able to advise on the matters that should be considered in making this decision. Two questions should be addressed in this regard:

- A. Were the remains discovered or excavated from Federal or tribal lands after November 16, 1990? (43 CFR 10.2 (f)(1)). We understand this to be the case. Section 3 of NAGPRA (25 U.S.C. 3002; "section 3") governs the ownership or control of Native American human remains or cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990.
- B. Are the remains of a person of Native American ancestry? (43 CFR 10.2 (d)(1)). At this time, this office does not have sufficient information to determine whether the remains are Native American within the meaning of NAGPRA.

If the answer to both questions is yes, the remains are subject to NAGPRA and their recovery, documentation, and disposition is to be carried out under NAGPRA's implementing regulations, particularly 43 CFR 10.3 through 10.7.

2. What is meant by the terms "Native American" and "indigenous" in the context of NAGPRA and the facts of this case?

We consider that the term "Native American" as used in NAGPRA applies to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes. Cultural affiliation or biological relationship, however, as discussed below, are relevant to disposition of Native American human remains and cultural items under NAGPRA.

We base these views primarily on the statutory definition of the term "Native American," which is defined in 25 U.S.C. 3001 (9), and in the NAGPRA implementing regulations at 43 CFR 10.2 (d) as meaning "of, or relating to, a tribe, people, or culture that is indigenous to the United States, including Alaska and Hawaii." We consider this definition clear and self-explanatory. We also note that NAGPRA's legislative history contains no express amplification or clarification of the term.

The court in this matter, however, indicated in its opinion that there may be an issue as to the

meaning of the term "Native American" because of the word "indigenous" contained in this definition.²

Particularly, the court queries in footnote 24 whether the term "Native American" as defined in NAGPRA may be limited by the word "indigenous" to not include tribes, peoples, or cultures that "descended from immigrants who came to the Americas from other continents."

In our view, however, it is implausible to consider that Congress intended for the word "indigenous" to limit the term "Native American" in this manner. Rather, we consider that the term "Native American" is clearly intended by NAGPRA to encompass all tribes, peoples, and cultures that were residents of the lands comprising the United States prior to historically-documented European exploration of these lands.

In this connection, there are differences of opinion as to the origins of at least some present-day Indian tribes with respect to whether or not they are descended from peoples which immigrated to the lands now comprising the United States. (See the discussion in footnote 24 of the court's opinion.)

However, we point out that NAGPRA repeatedly applies the term "Native American" to human remains and cultural items affiliated with Native Hawaiians. For example, the statute states as follows in pertinent part:

The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains (25 U.S.C. 3001 (13), emphasis added).

As such, Native Hawaiian human remains and cultural items fall within NAGPRA's definition of "Native American," and, accordingly, Native Hawaiians are "indigenous" to the United States as that term is used in NAGPRA. However, both historical documentation and Native Hawaiian tradition consider that Native Hawaiians migrated to the Hawaiian Islands, probably arriving some time between 200 B.C. and A.D. 800.³ Native Hawaiians are not "indigenous" to lands of the United States if that term is construed to exclude peoples which descended from immigrants.

² The court in footnote 24 of its opinion queries whether Congress may have intended a dictionary definition of "indigenous," i.e., "occurring or living naturally in an area; not introduced; native." American Heritage Dictionary of the English Language (New College Edition).

³ See for example David H. Tuggle's "Hawaii" in The Prehistory of Polynesia (Harvard University Press, 1979, pages 167-199) and Patrick Vinton Kirch's The Evolution of Polynesian Chiefdoms (Cambridge University Press, 1984, pages 243-262).

Congressional understanding of the term "indigenous" as used in NAGPRA also can be found in several other statutes. The Native Hawaiian Education Act of 1994 (20 U.S.C. 7902), states as follows in pertinent part:

- (1) Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago, whose society was organized as a nation and internationally recognized as such by the United States, Britain, France, and Japan, as evidences by treaties governing friendship, commerce, and navigation.
- (2) At the time of the arrival of the first non-indigenous people in Hawaii in 1778, the Native Hawaiian people lived in a highly organized subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion (20 U.S.C. 7902, emphasis added.)⁴

These related statutory uses of the term "indigenous" provide a clear basis for our conclusion that the term as used in NAGPRA applies to all tribes, peoples and cultures that occupied the United States prior to historically documented European exploration and that the term cannot properly be construed as to exclude descendants of immigrant peoples. Such an anomalous construction would frustrate the fundamental purposes of NAGPRA with respect to Native Hawaiians and perhaps with respect to some or all Indian tribes.

Please note that, as discussed fully in the response to question 13 below, Native American human remains or cultural items that are not claimed by a lineal descendant or qualified present-day Indian tribe pursuant to section 3 (a) are to be disposed of in accordance with regulations promulgated by the Secretary of the Interior pursuant to section 3 (b).

3. Does, if there was more than one wave of ancient migration to the Americas, or if there were sub-populations of early Americans, NAGPRA apply to human remains or cultural items from a population that failed to survive and is not directly related to modern Native Americans?

Yes. The statute and regulations by their own terms apply to Native American human remains or cultural items which otherwise fall within the scope of NAGPRA. There is nothing in the statute or its implementing regulations which states or implies that NAGPRA's applicability is limited to Native American human remains and cultural items which are directly related to present-day Indian tribes. However, the matter of a direct relationship with present-day Indian tribes is of concern with respect to disposition of Native American human remains and cultural items pursuant to NAGPRA.

⁴ This use of the term "indigenous" is also found in the Native Hawaiian Health Care Act (42 U.S.C. 1170 et seq.).

In this regard, under section 3 (a) of NAGPRA (25 U.S.C. 3002 (a)), the disposition of Native American human remains and cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 is, with priority given in the order listed:

- (1) in the case of human remains and associated funerary objects, in the lineal descendant of the Native American, or
- (2) in any case in which such lineal descendant cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—
 - (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
 - (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
 - (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe –
 - (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice such tribe states a claim for such remains or objects, or
 - (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

Some of these categories require the establishment of cultural affiliation or a biological relationship. However, section 3 (a)(2)(A) Indian tribe claims to human remains and cultural items found on tribal lands and section 3 (a)(2)(C)(1) Indian tribe claims to human remains and cultural items found on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of a present-day Indian tribe do not require either a cultural or biological relationship between the claimant Indian tribe and the claimed human remains or cultural items.

4. Does NAGPRA require (either expressly or implicitly) a biological connection between human remains and a contemporary Indian tribe?

No. As discussed above, NAGPRA and its implementing regulations by their own terms apply to all Native American human remains and cultural items which otherwise fall within the scope of NAGPRA, whether or not they have a direct relationship to a present-day Indian tribe.

However, as is made clear by section 3 (a), a biological relationship may be a factor in determining disposition of Native American human remains and cultural items. This, of course, particularly may be true in circumstances regarding a section 3 (a)(1) claim based on lineal descent. However, a biological connection may also be a factor, but not the only factor, to be taken into account in determining the cultural affiliation of Native American human remains and cultural items with a present-day Indian tribe for purposes of Indian tribe rights of ownership based on cultural affiliation.

43 CFR 10.14 (e) states as follows with respect to evidence that may be considered with respect to determining cultural affiliation for purposes of disposition of Native American human remains and cultural items under NAGPRA:

(e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

5. Does there have to be any cultural affiliation between these human remains and a present-day Indian tribe for purposes of NAGPRA -- and if yes, how is that affiliation established if no cultural objects are found with the remains?

For the reasons discussed above in regard to biological connections, the right to ownership and control of Native American human remains and cultural items under section 3 (a) does not necessarily require a cultural affiliation between Native American human remains and cultural items and the Indian tribe with a right to ownership to such materials.

A determination of cultural affiliation of human remains does not require the presence of cultural objects found with the remains. 43 CFR 10.14 describes the process for determining cultural affiliation. As set forth in the response to the preceding question, many types of evidence may be considered in this regard. The determination, ultimately, should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the cultural connection between an individual or Indian tribe and the material being claimed and should not be precluded solely because of some gaps in the record (43 CFR 10.14 (d)).

6. What level of certainty is required to establish cultural affiliation between human remains and a present-day Indian tribe for purposes of NAGPRA?

Cultural affiliation between a present-day Indian tribe and Native American human remains and cultural items must be established by a preponderance of the evidence. Scientific certainty is not required (43 CFR 10.14 (f)).

- 7a. Are scientific studies needed prior to determining whether these human remains are subject to NAGPRA?

The statute only applies to Native American human remains and cultural items. If there is a concern as to whether the human remains in question are Native American within the meaning of NAGPRA and scientific study is necessary to resolve the issue, appropriate scientific studies should be conducted.

At this time, this office does not have enough information about the particular human remains in question to provide specific advice about the necessity for further scientific study to determine whether they are Native American.

- b. Are such studies legally permissible?

Yes. Nothing in NAGPRA, its implementing regulations or other Federal law precludes analysis of human remains or cultural items excavated or discovered on Federal or tribal land after November 16, 1990, for the purpose of determining whether the remains or items are Native American within the meaning of NAGPRA, and, if so, for the purposes of determining their disposition under NAGPRA. However, certain conditions may apply to the conduct of such studies, e.g., if additional archeological work is to be undertaken on Federal lands, the Archeological Resources and Protection Act ("ARPA," 16 U.S.C. 470 aa-mm) applies. If NAGPRA is determined to apply, its procedures must then be followed.

8. Is there evidence of a link, either biological or cultural, between these remains and a modern Indian tribe or to any other ethnic or cultural group including (but not limited to) those of Europe, Asia, and the Pacific islands?

This office does not have sufficient information at this time to provide advice on this question.

9. Are the "study" provisions of 25 U.S.C. 3005 (b) limited to human remains and cultural items in the possession or control of a Federal agency or museum prior to November 16, 1990?

25 U.S.C. 3005 (b), a subsection of section 7 of NAGPRA (25 U.S.C. 3005), applies to the repatriation of Native American human remains and cultural items contained in Federal agency and certain museum collections (whether or not obtained before or after November 16, 1990). This provision is not applicable to Native American human remains and cultural items subject to

NAGPRA's section 3 (excavated or discovered on Federal land after November 16, 1990) (43 CFR 10.10 (c)(1)).

10. Does any other law (e.g., ARPA) or any other section of NAGPRA such as 25 U.S.C. 3002 © or 3003 (b)(2), either permit or forbid scientific study of these remains?

As discussed in our response to question 7, no provision of NAGPRA or other law forbids scientific study of these remains to determine whether they are subject to NAGPRA, and, if so, their

NAGPRA's section 3 (excavated or discovered on Federal land after November 16, 1990) (43 CFR 10.10 (c)(1)).

10. Does any other law (e.g., ARPA) or any other section of NAGPRA such as 25 U.S.C. 3002 © or 3003 (b)(2), either permit or forbid scientific study of these remains?

As discussed in our response to question 7, no provision of NAGPRA or other law forbids scientific study of these remains to determine whether they are subject to NAGPRA, and, if so, their appropriate disposition under the statute. However, we would recommend that any additional studies be conducted in consultation with Indian tribes and other interested parties, as appropriate. In addition, if archeological work on Federal land is to be conducted, applicable ARPA permitting and consultation procedures must be followed. Finally, if ownership and control of the human remains or cultural items is determined under NAGPRA to be with an individual or Indian tribe, no further study of such materials may be conducted without the consent of that individual or Indian tribe.

11. Are scientific study and repatriation of human remains mutually exclusive or can both objectives be accommodated?

Both can be accommodated, depending on the particular circumstances of each situation. In some cases, scientific study may be necessary in order to determine whether NAGPRA is applicable and, if so, to determine appropriate disposition under the statute. Additionally, individuals or Indian tribes that exercise ownership and control of the remains under section 3 (a), insofar as Federal law is concerned, may study the remains, or authorize others to study the remains, as they see fit.

12. What law controls if the human remains are not subject to NAGPRA?

If the human remains in question do not fall under NAGPRA, there are two possibilities. The first is that they may be archeological materials subject to ARPA. At this point, this office does not have enough information to know if the remains in question would be within the scope of ARPA, if they are not within the scope of NAGPRA. If neither NAGPRA nor ARPA apply, it is likely that state or local law would dictate the treatment of the remains.

13. What happens to the remains if no present-day Indian tribe can establish cultural affiliation?

As discussed above, in certain circumstances no cultural affiliation is required for section 3 (a) Indian tribe ownership and control of Native American human remains and cultural items.

However, it is possible that no present-day Indian tribe is a qualified owner under any of the categories described in section 3 (a). This would be the case when no cultural affiliation between an Indian tribe and the human remains and cultural items in question can be demonstrated, and, in addition, when the remains and cultural items were not found on tribal land or on Federal land

that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of a present-day Indian tribe.

In these circumstances, the Native American human remains and cultural items in question would be subject to disposition under the section 3 (b) regulations to be promulgated by the Secretary of the Interior in consultation with the NAGPRA review committee, Indian tribes, and museum and scientific organizations. A regulatory section has been reserved for that purpose at 43 CFR 10.7. These regulations, when promulgated, will encompass Native American human remains and cultural items for which no qualified owner exists under section 3 (a)'s categories or for which an owner is identified under such categories, but that owner does not make a claim.

14. Do the plaintiffs have a right (under the First Amendment or otherwise) to study these human remains?

As this issue is beyond our program responsibilities and has been briefed by the United States Department of Justice in connection with this matter, we defer to the views of the Department of Justice.

- 15a. Should non-Indians be permitted to file a claim for these human remains?

Under section 3 (a), an individual who is a lineal descendant, whether or not the individual is a member of an Indian tribe, has a first right to ownership of Native American human remains. In other circumstances, section 3 (a) ownership under the current implementing regulations is limited to Indian tribes and Native Hawaiian organizations.

However, as discussed above, the Secretary of the Interior has authority to promulgate regulations which address the disposition of section 3 Native American human remains and cultural items for which no claim is made pursuant to section 3 (a) or for which no qualified claimant exists. Such regulations, when promulgated, may provide for disposition of unclaimed section 3 Native American human remains and cultural items to persons or entities that are not Indian tribes or members of an Indian tribe.

- b. Is there any merit to the equal protection arguments asserted by the plaintiffs?

As this issue is beyond our program responsibilities and has been briefed by the Department of Justice in connection with this matter, we defer to the views of the Department of Justice.

16. What role should the Native American Graves Protection and Repatriation Review Committee play in resolving the issues presented in this case?

The NAGPRA review committee is charged by NAGPRA (section 8, 25 U.S.C. 3006) with monitoring the inventory, summary, and repatriation process required by sections 5, 6, and 7 of NAGPRA applicable to Federal agency and museum collections of Native American human remains and cultural items. (25 U.S.C. 3003-3005). The NAGPRA review committee is not

charged with monitoring activities under section 3 applicable to Native American human remains and cultural items found on Federal or tribal lands after November 16, 1990, the provision of NAGPRA which applies to the human remains in question in this matter if they are determined to be Native American within the meaning of NAGPRA.

However, the Secretary of the Interior has authority under section 8 of NAGPRA to assign additional responsibilities to the review committee. 25 U.S.C. 3006 (c)(8). These responsibilities could include providing advice with respect to the human remains in question. In addition, under section 3 (b), the regulations for unclaimed human remains and cultural items as discussed above are to be promulgated by the Secretary in consultation with the review committee.

17a. Is NAGPRA silent on the important issues raised by this case?

No. For the reasons discussed above, we consider that NAGPRA and its implementing regulations provide all necessary guidance for the disposition of the human remains in question. To summarize, NAGPRA does not prohibit appropriate scientific study to determine whether the human remains at issue are Native American within the meaning of NAGPRA. If they are, NAGPRA provides for their disposition to a lineal descendant, or, in the absence of a lineal descendant, to an Indian tribe qualified under the section 3 (a) categories. If there is no lineal descendant or if there is no qualified Indian tribe under section 3 (a) categories, or, if no Indian tribe which is determined to own the remains makes a claim for the remains, section 3 (b) directs the Secretary of the Interior to provide for their disposition in accordance with published regulations.

b. Will Congressional action be required to clarify the law regarding "culturally unidentifiable ancient remains?"

The term "culturally unidentifiable" as used in NAGPRA relates to Native American human remains contained in Federal agency or museum collections (25 U.S.C. 3006 (c)(5)). Under NAGPRA's implementing regulations, the term is defined as applying to Native American human remains in Federal agency or museum collections that cannot be culturally identified or are not culturally affiliated with a present-day Indian tribe (43 CFR 10.10 (g)).

The term is not applicable to section 3 human remains (human remains discovered on Federal or tribal lands after November 16, 1990). Such unclaimed remains, if no claim is made for them by a qualified lineal descendant or present-day Indian tribe, or, if no such qualified claimant exists under section 3 (a)'s claim categories, will be subject to disposition under regulations to be promulgated by the Secretary of the Interior pursuant to section 3 (b).

Accordingly, we do not consider that Congressional action is required to clarify NAGPRA with respect to the disposition of the human remains in question. If they are Native American within the meaning of NAGPRA, they should be disposed of pursuant to section 3 (a) or 3 (b) of NAGPRA, as applicable.

I hope that these responses prove useful in your efforts to comply with NAGPRA. Please contact me, NAGPRA Team Leader C. Timothy McKeown, or Lars A. Hanslin of the Office of the Solicitor, if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "F. P. McManamon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Francis P. McManamon
Departmental Consulting Archeologist
Chief, Archeology & Ethnography Program

HATTERAS, INC., Plaintiff v. THE U.S.S. HATTERAS, HER
ENGINES, ETC., IN REM, AND UNITED STATES OF AMERICA, IN
PERSONAM, defendants.

Civil No. G-78-77

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS
(GALVESTON DIVISION)

1984 AMC 1094

February 25, 1981

HEADNOTES:

TITLE - 16. Abandonment - UNITED STATES - 11. In General - WRECK - 16.
Abandonment of Wreck.

A government official cannot abandon property subject to his control except as authorized by Congress. Held: Civil War naval vessel, sunk 20 miles off Galveston in 1863, constitutes "foreign excess property" under 40 U.S. Code, sec. 512, requiring the Secretary of the Navy to make a written determination of commercial value before declaring an abandonment. Since the Secretary failed to do so, his formal declaration of abandonment in 1976 was ineffective; the wreck remains government property and salvor acquired no title to it.

COUNSEL:

Robert Eikel (Eikel & Davey) for Plaintiff.

Jack Shepherd, Atty. in Charge, U.S. Atty's Office and Robert R. Rossi, U.S. Dept. of Justice, Torts Branch for Defendants.

OPINIONBY: GIBSON

OPINION:

HUGH GIBSON, D.J. (in part):

I. Introduction

This action arises out of a dispute between the plaintiff, Hatteras, Inc., and the United States concerning the wreck of the United States Civil War vessel, the U.S.S. Hatteras, and several artifacts which the plaintiff has recovered from the vessel. The Hatteras lies encased in mud some 60 feet below the surface of the Gulf of Mexico some 20 miles south of Galveston, Texas, and is situated wholly on the continental shelf, outside the territory of the United States. The artifacts which the plaintiff removed from the vessel are in the custody of the United States Marshal pending the disposition of this controversy. n1 The Court has jurisdiction of this action pursuant to 28 U.S. Code, sec. 1333, the Suits in Admiralty Act, 46 U.S. Code, secs. 741 et seq., and the Public Vessels Act, 46 U.S. Code, secs. 781 et seq.

001866

n1 Artifacts in the custody of the United States Marshal are:

"(a) Builder's plate, with legend 'Harlan and Hollingsworth and Co., Iron Ship and Steam Engine Builders, no. 327, Wilmington, Delaware 1861';

"(b) Two small bronze oil cups with covers;

"(c) One brass steam valve;

"(d) Two large bronze priming cups, one with attached pipe stem;

"(e) One oiling pipe stem; and

"(f) One iron ball with eye, weighing approximately 45 pounds."

The plaintiff seeks possession of and confirmation of title to the vessel and its appurtenances, or, in the alternative, a liberal salvage award in recognition of services rendered for the benefit of the government. Plaintiff first contends that the U.S.S. Hatteras is a derelict vessel abandoned by the government, and that under general principles of maritime and international law such abandonment constitutes a repudiation of ownership. Thus, plaintiff alleges that under both the maritime law of salvage and the adjunct law of finds, it is entitled to possession and ownership of the vessel through the doctrine of *animus revertendi*. If not, the plaintiff seeks a liberal salvage award consisting of either the vessel itself or a recoupment of the plaintiff's expenses. The government responds that it has never abandoned the vessel and is still its rightful owner. Further, the government contends that the plaintiff has failed to establish its right to a salvage award.

The case was tried before the Court, sitting without a jury, on August 13, 1980. For the reasons assigned herein, the Court finds that the U.S.S. Hatteras is the property of the United States, and that the plaintiff has failed to establish any claim to ownership of the vessel.

II. Statement of the Facts

The U.S.S. Hatteras was originally constructed for use as a river excursion vessel. The vessel was purchased by the United States Navy in 1861, converted for military operations, and assigned to blockade duty along the Gulf of Mexico. That assignment, as it turned out, was to be the vessel's only tour of duty as a naval warship.

On the 11th of January, 1863, the U.S.S. Hatteras engaged the Confederate raider, C.S.S. Alabama, in a brief, but decisive, battle. The engagement lasted but thirteen minutes; the Hatteras was heavily damaged and quickly sank. The vessel was reported to have sunk approximately 20 miles south of Galveston, but the United States Navy made no attempt to ascertain the precise location at which the Hatteras sank, nor did the Navy attempt to raise or otherwise salvage the vessel. The Government does not express any interest in such an undertaking now or in the foreseeable future. n2

001867

n2 The government contends that the Hatteras is most valuable left in place until professional archeological and survey work can be done insuring the preservation of the best and the most data possible.

Since 1972 the plaintiff has engaged in efforts to locate, salvage, and, if possible, raise the remains of the Hatteras. Plaintiff notified the Department of the Navy in February, 1976 that it had located a sunken vessel believed to be the Hatteras, and desired to salvage the vessel. In March the Naval Supplies System Command recommended to the Chief of Naval Operations that the vessel be abandoned, stating that it was of historical significance only. The Chief of Naval Operations then certified to the Secretary of the Navy that the U.S.S. Hatteras was non-essential to the defense of the United States and also recommended that the vessel be abandoned. On March 25, 1976, the Secretary of the Navy, stating that "the Department of the Navy has in fact long since abandoned such vessel," made a formal declaration of abandonment.

The government contends, however, that the Secretary's attempted abandonment of the vessel was without authority of law. The government argues that the power of a subordinate officer of the United States to dispose of public property exists solely by virtue of a valid congressional delegation of authority pursuant to Article IV, Section 3, Clause 2 of the United States Constitution (the property clause). In this instance the government submits that the Secretary's authority to abandon the vessel was derived exclusively from sec. 202(h) n3 of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S. Code, secs. 471 et seq. That statute and its implementing regulations would require a written determination that the vessel had no commercial value or that the estimated cost of continued care and handling would exceed the estimated proceeds from the sale of the vessel as a prerequisite to abandonment. There is no evidence in the record indicating that the Secretary made such a determination, in writing or otherwise. Thus, the government concludes that the attempted abandonment by the Secretary failed and that the Hatteras remains the property of the United States. n4

n3 40 U.S. Code, sec. 483(h) (1976).

n4 The government also contends that the Secretary's act is void for failure to comply with Executive Order 11593, requiring a determination whether the Hatteras was an historical site eligible for inclusion in the National Register of Historic Places. The vessel has since been entered on the Register.

The plaintiff concedes that the Secretary of the Navy failed to comply with the provisions of the Property Act and its implementing regulations, but contends that the Act is inapplicable. Essentially, the plaintiff argues that the Hatteras, admittedly the property of the United States at one time, ceased to be so when the Navy failed over an extended period of time to take action consistent with a claim of continued ownership by the government. Plaintiff relies upon the common law standard of abandonment, n5 and submits that under this standard the government relinquished all title and interest in the vessel long before congressional enactment of the statute. Implicit in this argument,

001868

however, is the assumption that the Property Act, rather than conferring upon executive agencies a power to dispose of public property otherwise reserved solely to Congress by the property clause of the Constitution, limits an extant power of executive agencies to dispose of property under their control. Unless this underlying assumption as to the power of executive agencies is correct, the plaintiff's argument that government abandonment of the Hatteras may be inferred from the Navy's inaction is fatally flawed.

n5 At common law, "abandonment" is the intentional and absolute relinquishment of property without reference to any particular person or for any particular purpose. A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property.1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property, secs. 1-42 (1962). While mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon. See *Wiggins v. 1100 Tons, More or Less of Italian Marble*, 1960 AMC 1774, 186 F.Supp. 452 (ED Va. 1960).

Since abandonment works a divestment of title and ownership, one who finds abandoned property and reduces it to possession becomes its lawful owner. *Id.* It is now settled that, under general maritime law, owners of sunken or derelict vessels may abandon them so as to divest title and ownership. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 1978 AMC 1404, 569 F.2d 330 (5 Cir. 1978). A finder and salvor of such property may become its lawful owner under the "law of finds." *Id.*

III. The Abandonment of Public Property by the United States

Article IV, Section 3, Clause 2 of the United States Constitution provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

The term "Territory and other Property belonging to the United States" includes all personal and real property rightfully belonging to the United States. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The authority granted to Congress in the property clause is plenary, and subordinate officers of the United States have no power to release or otherwise dispose of federal property, absent an express or implied delegation of Congress' power under the property clause. *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941). It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials. *United States v. California*, 332 U.S. 19, 1947 AMC 1579 (1947); *Lee Wilson & Co. v. United States*, 245 U.S. 24 (1917); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). Thus, a subordinate officer of the government cannot abandon property under his control except as authorized by

001869

the Congress, and then only in the manner prescribed by Congress. *Kern Copters, Inc. v. Allied Helicopter Service, Inc.*, 277 F.2d 308, 313 (9 Cir. 1960). In view of this well settled authority, the Court is of the opinion that the maritime (or common law) doctrine of abandonment has no application to this case. While this judicially conceived doctrine might prove dispositive of the factual questions in this case if it concerned a dispute between private citizens,

"[T]he Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40, 1947, AMC 1579, 1595 (1947).

With respect to the question of abandonment, then, the dispositive issues are (1) whether Congress delegated to the Secretary of the Navy the authority to abandon the Hatteras; and (2) whether the Secretary complied with the "needful Rules and Regulations" prescribed by Congress pursuant to any statutory delegation of its power derived from the property clause. The United States cites the Federal Property and Administrative Services Act of 1949 as the source of any delegated authority the Secretary might have had to abandon the Hatteras in this case. Specifically, the government contends that sec. 483(h) of the Property Act and its implementing regulations govern the abandonment of the vessel. Section 483(h) provides:

"(h) Abandonment, destruction or donation of property. The Administrator may authorize the abandonment, destruction, or donation to public bodies of property which has no commercial value or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale."

The Court agrees that the Property Act is the apparent source of the Secretary's authority in this instance, although such a finding is not essential to the Court's decision. n6 The Court has determined, however, that the applicable provisions of the Act are to be found at 40 U.S. Code, sec. 512 rather than 40 U.S. Code, sec. 483(h), as suggested by the government. Section 512 governs the disposal by executive agencies of "foreign excess property," as that term is defined in the Act, and by virtue of its location outside the territory of the United States, the Hatteras must be considered foreign excess property. n7

n6 Having determined that the Hatteras could not be abandoned by the Navy except as authorized by Congress and then only in the manner prescribed by Congress, the Court would reach the same result even were it to hold the Property Act inapplicable. The plaintiff bears the burden in this action of establishing that the Secretary was authorized by the Congress to abandon the Hatteras in the manner attempted. The plaintiff, however, has directed the Court's attention to no other Act of Congress which would have authorized the Secretary of the Navy to dispose of the U.S.S. Hatteras in the manner attempted

001870

in this case. Nor is the Court, on the basis of its own research, aware of any Act of Congress expressly or impliedly conferring upon the Secretary such authority.

Of its own initiative the Court draws attention to one aspect of the Federal Property and Administrative Services Act which might create some doubt whether the Act applies. Title 40 U.S. Code, sec. 472(d) excludes from the "property" subject to the Act "naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines * * *" Congressional approval is apparently required for the disposition of these vessels. See 10 U.S. Code, sec. 7307; 32 C.F.R., sec. 736 (1979). Because this exclusion seems clearly directed toward warships of more recent vintage than the Hatteras, which was classified by the Navy as a "side-wheel steamer, iron, third rate, three-masted schooner," and in view of apparent congressional intent to bring under the direction of the Property Act all government property not expressly excluded, see 40 U.S. Code, sec. 471, the Court concludes that the Hatteras is property subject to the Act. Otherwise, direct congressional approval of the proposed abandonment might have been required.

n7 The Hatteras is clearly "foreign excess property" as that term is defined in the Property Act. "Excess property" is any property under the control of any federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof. 40 U.S. Code, sec. 472(e). Such a determination was clearly made by the Secretary in this instance. As defined in sec. 472(f), the term "foreign excess property" means any excess property located outside the several states, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands. It is undisputed that the wreck of the Hatteras lies totally on the continental shelf, beyond the territory of the United States or any of the several states. See *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, supra; see also *Kern Copters v. Allied Helicopter Service*, supra.

In any event, the arguments advanced by the government with respect to sec. 483(h) apply with equal force to sec. 512. The requirements set forth in the latter provision are identical to those contained in the former:

"(a) Authority of executive agency. Foreign excess property not disposed of under subsections (b) and (c) of this section may be disposed of (1) by sale, exchange, lease or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper; * * * The head of each executive agency responsible for the disposal of foreign excess property may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property; and may authorize the abandonment, destruction, or donation of foreign excess property under his control which has no commercial value or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale."

Implicit in the statutory scheme of 40 U.S. Code, sec. 512 is the requirement that, prior to any agency action, a determination be made whether the property proposed to be abandoned has any commercial value and, if so, whether the estimated cost of care and handling would exceed the estimated proceeds from its sale. The regulations and rules promulgated pursuant to this section expressly require the head of each executive agency to make a written determination whether these two conditions exist as a prerequisite to the abandonment of foreign excess property under his control. 41 C.F.R., secs. 101-45.500 et seq. (1979). Here, the Secretary of the Navy failed to make a written determination as to the commercial value of the Hatteras prior to declaring the vessel to be abandoned by the Navy; indeed, there is no evidence in the record that the Secretary made any determination whatsoever with respect to the commercial value of the vessel. Accordingly, the Secretary's formal declaration did not constitute a lawful abandonment of the vessel by the United States.

If the Property Act applies in this instance, the plaintiff argues that the failure of the Secretary to comply with its statutory directives should not prove fatal to the efficacy of the Secretary's declaration of abandonment. While not presented as such, the plaintiff evidently relies upon the theories of apparent authority and equitable estoppel in support of its position, pointing out that it has expended in excess of \$60,000 in its efforts to locate the wreck of the Hatteras. Thus, the plaintiff urges the Court to wield its inherent equitable powers to award it title to the Hatteras, even though the Secretary did not lawfully abandon the vessel. In this instance, however, plaintiff's claim for relief draws no support from equitable principles.

Clearly, the plaintiff must rely upon some theory of apparent authority of equitable estoppel to reach the desired result. Equally clear, however, is the settled case law precluding the plaintiff from asserting these equitable doctrines to give effect to an act of the Secretary of the Navy, even if the Secretary failed to realize the limitations placed upon his authority:

"[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409; *United States v. Stewart*, 311 U.S. 60, 70, and see, generally, *The Floyd Acceptances*, 74 U.S. 666." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

A more fundamental reason exists for denying the plaintiff the equitable relief it seeks in this case, however. Plaintiff contends that it has engaged in long, diligent and expensive research since 1972 and has engaged in expensive and dangerous search, exploration and salvage in order to locate the Hatteras. Yet, the record is devoid of any evidence that the plaintiff did so in reliance upon any action of the Secretary of Navy. In fact, the record indicates that the plaintiff requested no action by the Navy relating to a determination of the plaintiff's rights in the vessel until 1976. Simply stated, there is no factual

basis to the plaintiff's claim for equitable relief. Thus, the plaintiff has established no basis in law or equity to support its claim to title of the vessel. *

* Parts IV and V of the Court's opinion were withdrawn by its later order dated February 18, 1982 -- Eds.

* * *

001873

STUART M. GERSON
Assistant Attorney General
MICHAEL CHERTOFF
United States Attorney
JANIS G. SCHULMEISTERS
Attorney in Charge
Torts Branch, Civil Division
U. S. Department of Justice
Suite 320
26 Federal Plaza
New York, New York 10278
(212) 264-0480
By: Mark E. Schaefer
Attorneys for U.S.A.

MICHAEL CHERTOFF
United States Attorney
970 Broad Street
Newark, New Jersey 07102
(201) 621-2944
By: SUSAN CASSELL
Assistant U. S. Attorney
Deputy Chief, Civil Division
Attorneys for United States
CS 8091

ORIGINAL FILED
DEC 21 1990
WILLIAM T. WALSH, CLERK

-----X
UNITED STATES OF AMERICA, : UNITED STATES DISTRICT COURT
 : DISTRICT OF NEW JERSEY
 Plaintiff, :
 :
 -against- : 90 Civ.
 :
 RICHARD STEINMETZ, : VERIFIED COMPLAINT
 :
 Defendants. :
-----X

Plaintiff, United States of America, for its complaint against Richard Steinmetz alleges, upon information and belief, as follows:

1. This is an action brought to obtain the possession of and confirm title to the Ship's Bell from CSS ALABAMA, a significant maritime artifact, and is a claim under the Admiralty and Maritime jurisdiction of this Honorable Court, as hereinafter more fully appears, within the meaning of Rule 9(h) of Fed.R.Civ.P.
2. Plaintiff, United States of America, is a sovereign nation authorized to sue by virtue of 28 U.S.C. § 1345.
3. Defendant, Richard Steinmetz, is an individual residing at 464 Lafayette Avenue, Westwood, New Jersey 07675.

4. Defendant, Richard Steinmetz, has in his possession or control, the ship's bell of CSS ALABAMA under a claim of title.

5. The ship's bell of CSS ALABAMA is a significant historical artifact retrieved from the wreck of CSS ALABAMA.

FACTS

6. CSS ALABAMA was a warship owned and operated by the de facto government of the Confederate States of America during the War between the States, also known as the Civil War. She was employed as a commerce raiding cruiser and during her brief career gained great renown.

7. On June 19, 1864, ALABAMA met and fought USS KEARSARGE off the coast of France near the Port of Cherbourg in then international waters. The battle lasted approximately one hour and ended with a badly damaged and sinking ALABAMA surrendering to KEARSARGE. CSS ALABAMA sank some time after its survivors were rescued by KEARSARGE and another vessel.

ALLEGATIONS

8. CSS ALABAMA and its appurtenant equipment is property of the United States of America as the successor to all rights and all property of the former, de facto government of the Confederate States of America.

9. As a consequence of her surrender on June 19, 1864, CSS ALABAMA and all equipment appurtenant thereto became the property of the United States of America.

10. The United States of America has never relinquished its right, title, or ownership interest in CSS ALABAMA or her appurtenant equipment.

001875

11. The said bell is the property of the United States of America.

12. At a time presently unknown to plaintiff, United States of America, and without its knowledge or permission, a person or persons unknown wrongfully removed the ship's bell from the wreck of CSS ALABAMA which lies in the now territorial waters of France.

13. The said ship's bell has been wrongfully withheld from the United States by defendant, Richard Steinmetz, who alleges title to it upon his purchase of the bell from a person or persons unknown, which sale was unauthorized by the United States of America.

14. The ship's bell of CSS ALABAMA is presently in the possession or control of defendant, Richard Steinmetz, who resides within the jurisdiction of this Court.

15. Without the permission or authority of plaintiff, United States of America, the said bell has been offered for sale, at auction, by defendant, Richard Steinmetz.

16. Plaintiff, United States of America, has advised defendant, Richard Steinmetz that said bell is the property of the United States. He has advised that he will not voluntarily relinquish possession of it to the United States.

17. On December 18, 1990, defendant, Richard Steinmetz, removed the said bell from the Harmer Rooke Galleries, 1 East 57th Street, New York, New York, and has secreted the bell to prevent its arrest by plaintiff, United States of America, pursuant to Rule D, Fed.R.Civ.P.

18. Defendant's refusal to return the bell and his removal and hiding of the bell is a refusal to recognize the Government's title and right of possession to that property, a significant maritime artifact, and is in derogation of the Government's rights.

19. Defendant has no valid defense to the Government's title and right to possession of the bell.

20. By reason of the foregoing, the United States of America is entitled to an order directing defendant to restore possession of the ship's bell of CSS ALABAMA to it.

WHEREFORE, plaintiff, United States of America, claiming title to and the right to immediate possession of said ship's bell of CSS ALABAMA prays:

1. That process in due form of law, according to the course and practice of this Court in causes of admiralty and maritime jurisdiction, may issue against the ship's bell of CSS ALABAMA;

2. That Richard Steinmetz and any other person claiming to have any interest in said ship's bell may be cited to appear before this Court and show cause why possession of said bell should not be delivered to plaintiff, United States of America, as having full title to the possession thereof; or, in the alternative,

3. That the Court order that possession of the ship's bell of CSS ALABAMA be returned to the plaintiff, United States of America, forthwith;

4. That plaintiff, United States of America, may have such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 20, 1990

STUART M. GERSON
Assistant Attorney General
MICHAEL CHERTOFF
United States Attorney
JANIS G. SCHULMEISTERS
Attorney in Charge
Torts Branch, Civil Division
U.S. Department of Justice
26 Federal Plaza, Suite 320
New York, New York 10278
(212) 264-0480
Attorneys for U.S.A.

By: Mark E. Schaefer
Mark E. Schaefer (MES 7779)

By: Susan Cassell
SUSAN CASSELL, Deputy Chief
Civil Division
SC 8081

001878

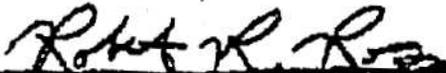
VERIFICATION

ROBERT R. ROSSI, Captain, JAGC, U.S.N. deposes and says that:

I am Admiralty counsel of the Navy and Deputy Assistant Judge Advocate General of the Navy (Admiralty) acting on behalf of the Department of the Navy, as principal agency of the United States Government in regard to preservation of the USS ALABAMA and its artifacts all of which are property of the United States. I have read the foregoing Complaint, know the contents thereof, and from information officially furnished to me believe the same to be true.

I verify under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of December 1990.



Captain Robert R. Rossi, JAGC, U.S.N.

001879

UNITED STATES of America, Plaintiff,
v.
Richard STEINMETZ, Defendant.

Civ. A. No. 90-5036.

United States District Court,
D. New Jersey.

May 13, 1991.

As Amended June 3, 1991.

United States brought action against antique dealer to recover possession of ship's bell taken from sunken confederate warship. On cross motions for summary judgment, the District Court, Debevoise, J., held that sunken wreck of confederate warship located in nonterritorial waters remained property of United States absent formal abandonment, and thus equipment recovered from such ship was owned by United States.

Judgment for United States.

[1] WAR AND NATIONAL EMERGENCY k25
402k25

Under maritime law, capture of enemy's vessel confers title and ownership upon captor.

[2] SHIPPING k213
354k213

Equipment from sunken confederate vessel was property of United States as successor to all rights and property of confederate government.

[3] UNITED STATES k58(1)
393k58(1)

Only Congress and those persons authorized by Congress may dispose of United States property pursuant to appropriate regulations. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[4] SHIPPING k213
354k213

Sunken wreck of confederate warship located in nonterritorial waters remained property of United States absent formal abandonment, and thus equipment recovered from such ship was owned by United States.

[5] SHIPPING k17.5
354k17.5

Formerly 354k171/2

Warships and their remains which are clearly identifiable as to flag state of origin are clothed with sovereign immunity and therefore entitled to presumption against abandonment of title.

[6] UNITED STATES k125(22)
393k125(22)

District court lacked jurisdiction to entertain antique dealer's claims against United States for compensation, upon determination that bell from confederate warship possessed by dealer was in fact property of United States, absent showing that United States had waived its sovereign immunity.

*1293 Michael Chertoff, U.S. Atty. by Susan Cassell, Asst. U.S. Atty., Newark, N.J., and Janis G. Schulmeisters, Mark E. Schaefer, Sp. Attys., Torts Branch, Civ. Div., U.S. Dept. of Justice, New York City, for U.S.

Antranig Aslanian, Jr., Fort Lee, N.J., for defendant.

OPINION

DEBEVOISE, District Judge.

I. THE PROCEEDINGS

In this action plaintiff, the United States of America, seeks to recover from defendant, Richard Steinmetz, a ship's bell taken *1294 from the celebrated Confederate warship, the CSS ALABAMA. In response to an order to show cause, Mr. Steinmetz delivered the bell to the Court. A hearing was held on January 4, 1991. The hearing not only developed evidence required to dispose of this case; it was also a celebrative event. The final encounter of the CSS ALABAMA was recalled. Each student in the sixth grade of Maplewood's Middle School struck the bell bringing forth once again the vibrant tone heard many times at sea during the years 1862 to 1864.

Since the bell had been deposited in Court there was no need for preliminary injunctive relief. Mr. Steinmetz answered and counterclaimed, seeking (1) a determination that the bell is his property, (2) compensation on a theory of quantum meruit and (3) compensation on a theory of unjust enrichment. I suggested to the parties that they cross-move for summary judgment and, pending a hearing on the motion, seek to arrive at a fair and reasonable disposition of the case. Unfortunately, the efforts to reach agreement failed and it thus became necessary to rule upon cross-motions for summary judgment.

II. THE FACTS

Many events preceded the arrival of the bell in Newark. These events are recounted in the Official Records of the Union and Confederate Navies in the War of the Rebellion (Government Printing Office 1896), in the works of recognized historians of the Civil War, in the testimony in this case of Naval Historian William S. Dudley and in the testimony of Mr. Steinmetz, an antique dealer who has great expertise in the field of military artifacts. These events can be summarized as follows:

In 1847, fourteen years before the start of the Civil War, the American fleet was engaged in the war with Mexico. On one of the Navy's ships two officers shared a cabin, Lt. Raphael Semmes and Lt. John Winslow. In 1864 the paths of these two officers were to cross again.

In 1861 James D. Bulloch, representing the Confederate States of America, proceeded to England. His mission was to obtain ships for the Confederacy. Among other activities, he arranged for two warships to be built in Liverpool. One was the vessel named the Florida; the other was the ALABAMA.

Thomas S. Dudley was the United States Consul in Liverpool. His most important assignment was to seek enforcement of Britain's Foreign Enlistment Act which forbade the construction and arming of warships in British territory for a belligerent power. Despite Dudley's efforts the British authorities permitted the Florida to depart from Liverpool on the technical ground that she was not a warship since her arms were shipped out separately on another vessel.

James M. McPherson in his *Battle Cry of Freedom* describes the departure of the other ship, the ALABAMA, from Liverpool and its subsequent activities:

The willingness of British officials to apply a narrow interpretation of the Foreign Enlistment Act encouraged Bulloch's efforts to get a second and larger cruiser out of Liverpool in the summer of 1862. In a contest of lawyers, spies, and double agents that would furnish material for an espionage thriller, Dudley amassed evidence of the ship's illegal purpose and Bulloch struggled to slip through the legal net closing around him by July. Once again bureaucratic negligence, legal pettifoggery, and the Confederate sympathies of the British customs collector at Liverpool gave Bulloch time to ready his ship for sea. When an agent informed him of the government's belated intention to delay the ship, Bulloch sent her out on a 'trial cruise' from which she never returned. Instead she rendezvoused at the Azores with a tender carrying guns and ammunition sent separately from Britain. Named the ALABAMA, this cruiser had as her captain Raphael Semmes, who had already proved his prowess as a salt-water guerrilla on the now defunct CSS Sumter. For the next two years Semmes and the ALABAMA roamed the seas and destroyed or captured 64 American

001881

merchant *1295 ships before meeting the USS Kearsarge off Cherbourg in June of 1864.

In June of 1864 the ALABAMA entered the harbor of Cherbourg and obtained permission from the French authorities to land prisoners, dock the ship for repairs and take on supplies. Meanwhile, the USS Kearsarge, under the command of Captain John Winslow, entered Cherbourg and then positioned herself in international waters beyond the harbor mouth.

Captain Semmes decided to do battle. By Saturday night, June 18, his preparations were complete. Between nine and ten o'clock on June 19 the ALABAMA proceeded to sea, accompanied by the French ironclad Frigate Couronne, some French pilot boats and the English steam yacht, the Deerhound. The Kearsarge awaited seven miles off shore.

John Kell, executive officer of the ALABAMA, has described the battle:

We now prepared our guns to engage the enemy on our starboard side. When within a mile and a-quarter he wheeled, presenting his starboard battery to us. We opened on him with solid shot, to which he soon replied, and the action became active. To keep our respective broadsides bearing we were obliged to fight in a circle around a common center, preserving a distance of three quarters of a mile. When within distance of shell range we opened on him with shell. The spanker gaff was shot away and our ensign came down. We replaced it immediately at the mizzen masthead. The firing now became very hot and heavy. Captain Semmes, who was watching the battle from the horse block, called out to me, "Mr. Kell, our shell strike the enemy's side, doing little damage, and fall off in the water; try solid shot." From this time we alternated shot and shell.

The battle lasted an hour and ten minutes. Captain Semmes said to me at this time (seeing the great apertures made in the side of the ship from their 11- inch shell, and the water rushing in rapidly), "Mr. Kell, as soon as our head points to the French coast in our circuit of action, shift your guns to port and make all sail for the coast." This evolution was beautifully performed; righting the helm, hauling aft the fore-trysail sheet, and pivoting to port, the action continuing all the time without cessation,--but it was useless, nothing could avail us.

Before doing this, and pivoting the gun, it became necessary to clear the deck of parts of the dead bodies that had been torn to pieces by the 11-inch shells of the enemy. The captain of our 8-inch gun and most of the gun's crew were killed. It became necessary to take the crew from young Anderson's gun to make up the vacancies, which I did, and placed him in command. Though a mere youth, he managed it like an old veteran.

Going to the hatchway, I called out to Brooks (one of our efficient engineers) to give the ship more steam, or we would be whipped.

He replied she "had every inch of steam that was safe to carry without being blown out!."

Young Matt O'Brien, assistant engineer, called out, "Let her have the steam; we had better blow her to hell than to let the Yankees whip us!"

The chief engineer now came on deck and reported, "the furnace fires put out," whereupon Captain Semmes ordered me to go below and "see how long the ship could float."

I did so, and returning said, "Perhaps ten minutes."

"Then, sir," said Captain Semmes, "cease firing, shorten sail, and haul down the colors. It will never do in this nineteenth century for us to go down and the decks covered with our gallant wounded."

This order was promptly executed, after which the Kearsarge deliberately fired into us five shots! In Captain Winslow's report to the Secretary of the Navy he admits this, saying, "Uncertain whether Captain Semmes was not making some ruse, the Kearsarge was *1296 stopped." [FN1]

FN1. Captain Semmes had acquired a reputation for resorting to ruses. Dr. Dudley testified:

"... in the early part of the Alabama's career, the Alabama attacked ... the USS Hatteras off the coast of Texas.... Semmes used a ruse, a ruse de guerre, a ruse of war where he pretended to be a British ship ... Alabama had permitted the Hatteras to overhaul her ... and Alabama says, send your boat. The Alabama people had been told reserve fire until you hear the word 'Alabama.' And Kell is told now ... announce who we are. You are now approaching the Confederate States Steamer Alabama and blast away.

Now, that was a ruse, and it was that ruse that was commonly done. You often fly the flags of a different power to try to defraud your enemies, but word of this had gotten around and Winslow warned his men, we must be careful of the crafty dealer, clever Semmes."

An account of the battle between Kearsarge and Alabama written by Arthur Sinclair IV, a lieutenant on the Alabama absolves Captain Winslow of deliberately firing upon a ship which had surrendered:

"It being now apparent that the Alabama could not float longer, the colors are hauled down, and the pipe given, 'All hands save yourself....' The Kearsarge evidently failed to discover at once our surrender, for she continued

001882

her fire after our colors were struck. Perhaps from the difficulty of noting the absence of a flag with so much white in it, in the powder smoke. But, be the reason what it may, a naval officer, a gentleman by birth and education, would certainly not be guilty of firing on a surrendered foe; hence we may dismiss the matter as an undoubted accident."

Was this a time,--when disaster, defeat and death looked us in the face,--for a ship to use a ruse, a Yankee trick? I ordered the men to "stand to their quarters," and they did it heroically; not even flinching, they stood every man to his post. As soon as we got the first of these shot I told the quarter-master to show the white flag from the stern. It was done. Captain Semmes said to me, "Dispatch an officer to the Kearsarge and ask that they send boats to save our wounded--ours are disabled." Our little dingy was not injured, so I sent Master's Mate Fulham with the request. No boats coming, I had one of our quarter boats (the least damaged one) lowered and had the wounded put in her. Dr. Galt came on deck at this time, and was put in charge of her, with orders to take the wounded to the Kearsarge. They shoved off in time to save the wounded.

When I went below to inspect the sight was appalling! Assistant Surgeon Llewellyn was at his post, but the table and the patient on it had been swept away from him by an 11-inch shell, which made an aperture that was fast filling with water. This was the last time I saw Dr. Llewellyn in life. As I passed the deck to go down below a stalwart seaman with death's signet on his brow called to me. For an instant I stood beside him. He caught my hand and kissed it with such reverence and loyalty,--the look, the act, it lingers in my memory still! I reached the deck and gave the order for "every man to save himself, to jump overboard with a spar, an oar, or a grating, and get out of the vortex of the sinking ship."

As soon as all were overboard but Captain Semmes and I, his steward, Bartelli, and two of the men--the sailmaker, Alcott, and Michael Mars--we began to strip off all superfluous clothing for our battle with the waves for our lives. Poor, faithful-hearted Bartelli, we did not know he could not swim, or he might have been sent to shore--he was drowned. The men disrobed us, I to my shirt and drawers, but Captain Semmes kept on his heavy pants and vest. We together gave our swords to the briny deep and the ship we loved so well! The sad farewell look at the ship would have wrung the stoutest heart! The dead were lying on her decks, the surging, roaring waters rising through the death-wound in her side. The ship agonizing like a living thing and going down in her brave beauty, settling lower and lower, she sank fathoms deep--lost to all save love, and fame, and memory! ...

Captain Semmes, Lt. Kell and certain others of the ALABAMA's crew were picked up by the English yacht Deerhound. The Deerhound, despite assurances to Captain Winslow that she was merely assisting him in picking up the prisoners, took her *1297 new passengers to England. For allowing this to happen Captain Winslow was later officially reprimanded by Secretary of the Navy Gideon Welles.

It goes without saying that the ship's bell, which is the subject of this case, accompanied the ALABAMA as "she sank fathoms deep." The ALABAMA still rests where she sank, but the bell was salvaged. Mr. Steinmetz traced its separate history.

In 1979 Mr. Steinmetz participated in an antique gun show in London. A dealer informed him that he knew where the bell of the CSS ALABAMA was located, and Mr. Steinmetz asked to see it. The dealer took Mr. Steinmetz to Hastings on the English coast where an antique dealer, a Mr. Walker, showed him the bell and documentation concerning it. It purportedly came from the Isle of Guernsey off the French coast.

Mr. Steinmetz was skeptical, but he paid a deposit, took possession of the bell and proceeded to Guernsey to check it out.

Guernsey fishermen have a sideline--wreck stripping. Mr. Steinmetz visited a Guernsey friend and the friend introduced him to various persons who dealt in shipwrecks and salvage. When these persons were shown the bell they identified it as a bell which had hung in a Guernsey bar. It developed that a diver, William Lawson, had salvaged the bell in about 1936 and most likely had traded it at the bar for drinks. There it hung until World War II. The Germans captured Guernsey from the British. Thereafter, the bar was destroyed in a British bombing raid.

After the destruction of the bar the bell passed from hand to hand until it was acquired in 1978 by the Hastings antique dealer.

Satisfied with the authenticity of the bell, Mr. Steinmetz completed the purchase and brought it to the United States. He had given the dealer other antique items having a value of approximately \$12,000 in exchange for the bell.

In 1979, after returning to the United States, Mr. Steinmetz offered the bell to the Naval Academy. The Academy was unwilling or unable to trade or purchase it. Mr. Steinmetz put the bell on a shelf until December 1990, at which time he placed it in the Harmer Rooke Gallery for auction.

The Bell was advertised in the Gallery's catalogue. Alert Naval authorities noticed the advertisement and claimed entitlement to the bell. Mr. Steinmetz resisted the claim, and this action ensued.

III. DISPOSITION OF SUMMARY JUDGMENT MOTIONS

Each party either has, or by direction of the court is deemed to have, moved for summary judgment. Judgment shall be rendered if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). There are no genuine issues as to any material facts and I conclude that as a matter of law the United States is entitled to a judgment in its favor.

A. Right of Capture. The bell is the property of the United States both by the right of capture and by virtue of the fact that the United States is successor to the rights and property of the Confederate States of America. Salvage rights cannot be asserted against the United States in this case under 46 U.S.C.App. § 781, because the two year limitation period has expired, 46 U.S.C.App. § 745, and the United States has not abandoned the CSS ALABAMA or any of its equipment.

[1] Maritime law historically recognizes that the capture of an enemy's vessel confers title and ownership upon the captor. *The Adventurer*, 12 U.S. (8 Cranch) 221, 226, 3 L.Ed. 542 (1814); *The Alexander*, 1 Gall. 532, 1 Fed.Cas. 357, No. 164 (1813), (Story, J.), *aff'd*, 12 U.S. (8 Cranch) 168, 3 L.Ed. 524 (1814). As observed by the United States Supreme Court in *The Florida*, 101 U.S. 37, 25 L.Ed. 898 (1879):

The title to captured property always vests primarily in the government of the captors.
Id. 101 U.S. at 42.

Prior to its sinking, Captain Semmes of the CSS ALABAMA surrendered his vessel *1298 to USS KEARSARGE. Captain Semmes' act of surrender conferred upon the United States title and possession of CSS ALABAMA and all of her appurtenant equipment prior to its sinking. The undisputed historical record establishes that USS KEARSARGE captured CSS ALABAMA before the latter sank on June 19, 1864. KEARSARGE was in constructive possession of ALABAMA, positioned across ALABAMA's bow thwarting escape and able to deliver unanswerable raking fire.

[2] B. Right of Succession. Also CSS ALABAMA is the property of the United States as the successor to all the rights and property of the Confederate Government. See J.B. Moore's *Digest of International Law* (1906), Vol. 1, Section 26. This principle was recognized by the English Courts in litigation following the Civil War in such cases as *The Rappahannock* (1866), 36 L.J.Adm. 9 and *U.S. v. Prioleau* (1865), 35 L.J. Chancery N.S. 7. Moore cites Prioleau in Section 26 on Succession in Case of Unsuccessful Revolt.

The Confederate Government having been dissolved, and the Confederate states having submitted to the authority of the United States Government, the latter government filed a bill praying to have the cotton, which had arrived at Liverpool, delivered up to them, and for an injunction and receiver.... Upon motion for an injunction receiver, held that the property in question was now the property of the United States Government, but that they must take it subject to the obligations entered into respecting it by the de facto Confederate Government.

Moore's *Digest* at Section 26, p. 64. Moore also cites several instances where Confederate warships were surrendered to United States agents as property of the United States. *Id.* at 64, 65; see *United States, Lyon, et al. v. Huckabee*, 83 U.S. (16 Wall.) 414, 434-35, 21 L.Ed. 457 (1872).

C. Lack of Abandonment. Article IV, Section 3, Clause 2 of the United States Constitution provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[3] Thus, under the above clause only Congress and those persons authorized by Congress may dispose of United States property pursuant to appropriate regulations.

001884

In the similar case of *Hatteras, Inc. v. USS HATTERAS, her engines, etc., in rem, and United States of America*, in personam, 1984 AMC 1094, 1096 (1981), aff'd without opinion, 698 F.2d 1215 (5th Cir.1983) involving a claim to the wreck of USS HATTERAS and artifacts from it, the District Court for the Southern District of Texas held that although the wreck had lain untouched since the Civil War, title and ownership of the wreck remained with the United States.

Citing numerous cases, the Court observed:

It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials.

Id. at 1098.

Relying on *United States v. California*, 332 U.S. 19, 40, 67 S.Ct. 1658, 1669, 91 L.Ed. 1889, 1947 AMC 1579, 1595 (1947), the Court held that neither the maritime nor common law doctrine of abandonment was applicable to that case.

While this traditionally conceived doctrine might prove dispositive of the factual questions in this case if it concerned a dispute between private citizens,

[T]he Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of government property cannot by their conduct cause the Government to lose its valuable *1299 rights by their acquiescence, laches, or failure to act. *United States v. California*, 332 U.S. 19, 40 [67 S.Ct. 1658, 1669, 91 L.Ed. 1889], 1947 AMC 1579, 1595 (1947).

1984 AMC at 1098.

The Court determined that the HATTERAS wreck came under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471, et seq. and that it was "foreign excess property" within the meaning of 40 U.S.C. § 512.

Implicit in the statutory scheme of 40 U.S.Code, Section 512, is the requirement that, prior to any agency action, a determination be made whether the property proposed to be abandoned has any commercial value and, if so, whether the estimated cost of care and handling would exceed the estimated proceeds from its sale.

1984 AMC at 1100.

[4] The United States has never formally abandoned the wreck of CSS ALABAMA. It is, therefore, in all respects similar to USS HATTERAS. It is a sunken wreck located in non-territorial waters. In view of this, the wreck, and by extension, the ship's bell, remain the property of the United States.

[5] Moreover, the claim of the United States to title and ownership of the bell of CSS ALABAMA and its right to possess it are consistent with International Law regarding warships sunk during armed conflict. It is the position of the United States Department of State that warships and their remains which are clearly identifiable as to the flag State of origin are clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title. *Digest of United States Practice in International Law*, pp. 999-1006 (Dept. of State 1980).

After an extensive analysis of treaty law, commentaries, United States caselaw and foreign caselaw (See particularly pp. 1004-1005), the State Department concluded:

Consequently, it is clear that under well-established State practice, States generally do not lose legal title over sunken warships through the mere passage of time in the absence of abandonment. They do not lose title during combat in the absence of an actual capture of the warships. Although abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence of express consent from the United States Government.

Id. at 1005.

Moreover, the legislative history of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106, effective April 28, 1988 supports the view of the State Department. House Report 100-514(I) (p. 366), U.S.Code Cong. & Admin.News 365- 385. The House Committee noted at pp. 366-68:

the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of rights are insufficient to establish such abandonment.

Later, in part II at page 374, discussing abandonment in general, warships are again excluded thusly:

Except in the case of U.S. Warships or other public vessels (which requires an affirmative act of abandonment), the

001885

act of abandonment may be implied from the circumstances of the shipwreck.... [Emphasis supplied].
Clearly, warships are to be treated uniquely.

Thus, the lapse of time between the sinking of CSS ALABAMA and Mr. Steinmetz's acquisition of the ship's bell did not result in abandonment or the United States' loss of title to the ship and its equipment.

D. The Counterclaim. Mr. Steinmetz, by way of counterclaim, seeks the following alternative relief: a determination (1) that the bell is his property and that he is entitled to be paid its market value; (2) that he is otherwise entitled to compensation on a theory of quantum meruit; and (3) that he is entitled to compensation on the theory that the United States would be otherwise unjustly enriched.

*1300 To the extent that Mr. Steinmetz's first claim interposes his own claim of ownership in derogation of the claim of the United States, he may properly assert it. For the reasons set forth above, however, I have concluded that Mr. Steinmetz's claim to ownership cannot be sustained.

[6] I lack jurisdiction to entertain Mr. Steinmetz's second and third claims seeking compensation from the United States based on the theories of quantum meruit and unjust enrichment. Affirmative relief is sought without a showing that the United States has waived its sovereign immunity.

In *United States v. Gregory Park, Section II, Inc.*, 373 F.Supp. 317 (D.N.J.1974), the Court held with respect to counterclaims against the United States:

[T]he institution of suit by the United States [does not] comprise an implied waiver of sovereign immunity to afford affirmative relief. A specific waiver is required. (Citations omitted). Such provisions are not diluted by Fed.R.Civ.P. 13 permitting counterclaims to come within the court's ancillary jurisdiction, as Rule 13(d) specifically provides: Counterclaim Against the United States. These rules shall not enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

However, notwithstanding plaintiff's sovereign immunity and Rule 13(d), defendant may assert a claim arising out of the same transaction or occurrence as the original claim by way of recoupment to reduce or defeat the Government's recovery. But such bases will not permit an affirmative recovery, which still requires an independent waiver of immunity. (Citations omitted) (Emphasis supplied).

Id. at 351. See also *Frederick v. United States*, 386 F.2d 481 (5th Cir.1967) and *United States v. Timmons*, 672 F.2d 1373 (11th Cir.1982).

In the instant action, the United States seeks a declaration of its title and ownership of the ship's bell of CSS ALABAMA and possession of the bell. Mr. Steinmetz in his first counterclaim seeks analogous relief. However, in his second and third counterclaims, he seeks affirmative relief against the United States in the form of monetary compensation without setting forth a statutory predicate of waiver of immunity which would permit him to receive such compensation. The Court, therefore, lacks jurisdiction to entertain Mr. Steinmetz's second and third counterclaims.

For these reasons, the United States is entitled to summary judgment on Mr. Steinmetz's first counterclaim and to a judgment of dismissal of his second and third counterclaims.

For the foregoing reasons the United States' motion for summary judgment must be granted and Mr. Steinmetz's motion for summary judgment must be denied. The United States is entitled to ownership and possession of the bell. I shall prepare and file an appropriate order. [FN2]

FN2. I expressed my view at the hearing that fairness and equity suggest that, regardless of the legal merits of the case, the United States should at least reimburse Mr. Steinmetz for his expenses in acquiring, shipping and preserving the bell, since through these efforts the bell has been returned to the American people.

The Navy notes that a sunken naval vessel is not only a repository of our nation's naval heritage, it is also a sacred place, a watery grave containing the bodies of the officers and men who went down with their ship. These vessels, though government property, are subject to disturbance from both amateur and professional divers and from fortune and souvenir hunters. To discourage this kind of desecration and to preserve these vessels for historical and public use, the Navy, as a matter of policy, refuses to pay for artifacts taken from its sunken vessels.

001886

The Navy's concerns are both understandable and laudable. One would think, however, that in the unusual circumstances of this case some way could have been devised to make Mr. Steinmetz whole. But that, apparently, was more than the bureaucratic mind could accomplish.

001887

973 F.2d 212 (3rd Cir. 1992)

UNITED STATES of America
v.
Richard STEINMETZ, Appellant.

No. 91-5582.

United States Court of Appeals,
Third Circuit.

Argued April 7, 1992.

Decided Aug. 21, 1992.
Rehearing Denied Sept. 18, 1992.

The United States brought action to obtain possession of bell from the Confederate raider C.S.S. ALABAMA. The United States District Court for the District of New Jersey, Dickinson R. Debevoise, J., entered judgment in favor of the United States, and claimant appealed. The Court of Appeals, Sloviter, Chief Judge, held that: (1) the ALABAMA was owned by the Confederacy and was not a piratical ship; (2) upon the close of the war, the United States succeeded to title to all property of the Confederacy; and (3) the United States did not abandon the vessel.

Affirmed.

[1] FEDERAL COURTS k893
170Bk893

Any possible influence arising out of the fact that, before hearing on ownership of bell taken from sunken ship, another judge of the district participated in ceremony attended by school children and recounted the history of the bell and stated that the vessel in question had been captured by another was harmless where court on appeal resolved issue of ownership on a basis other than whether there had been a capture.

[2] STATES k18
360k18

De facto government of the Confederacy could acquire title to real and personal property.

[3] CRIMINAL LAW k45.50
110k45.50

Government of the Confederate states owned the vessel C.S.S. ALABAMA when it sank in 1864 and the vessel was not a piratical vessel.

[3] STATES k18
360k18

Government of the Confederate states owned the vessel C.S.S. ALABAMA when it sank in 1864 and the vessel was not a piratical vessel.

[4] STATES k18
360k18

After the Civil War, United States succeeded to ownership of vessel which had been owned by the Confederacy.

[5] STATES k18
360k18

After the Civil War, public property of the Confederacy passed to the United States, and the United States did not have to physically possess the property in order to have succeeded to its ownership.

[6] WAR AND NATIONAL EMERGENCY k12

001888

402k12

If nation is entirely subdued or is destroyed and ceases to exist, rights of the conqueror are not limited to mere occupation of what he has taken into his physical possession, but they extend to all property and rights of the conquered state, including even debts as well as personal and real property.

[7] UNITED STATES k55

393k55

If vessel was impressed into service of the Confederate government and was burnt and sunk while in that service, and a full compensation for the vessel's loss was paid by that government, the property thereafter belonged to it and, at the close of the war, became the property of the government of the United States which thereupon acquired the right to dispose of it as it saw fit.

[8] SHIPPING k213

354k213

Vessels sunk during the Civil War are covered by United States government policy that it is presumed that title to vessels sunk during the 19th and 20th century remains in the United States.

[8] WAR AND NATIONAL EMERGENCY k12

402k12

Vessels sunk during the Civil War are covered by United States government policy that it is presumed that title to vessels sunk during the 19th and 20th century remains in the United States.

[9] UNITED STATES k58(7)

393k58(7)

United States did not abandon title, which it acquired at the close of the Civil War, to the Confederate raider C.S.S. ALABAMA which was sunk off the coast of France. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[10] STATES k18

360k18

Confederacy retained its property interest in the C.S.S. ALABAMA between the time that that vessel sank on June 19, 1864, and the time the war ended, either on April 9, 1865, or April 2, 1866.

*213 Peter E. Hess (argued), Wilmington, Del., David J. Bederman (argued), Emory University School of Law, Atlanta, Ga., for appellant.

Stuart M. Gerson, Asst. Atty. Gen., Michael Chertoff, U.S. Atty., Janis G. Schulmeisters, Mark E. Schaefer (argued), U.S. Dept. of Justice, New York City, for appellee.

Paul N. Keller, Park Ridge, Ill., for amicus-appellants American Sport Divers Assn., Federation of Metal Detector & Archeological Clubs, Alliance for Maritime Heritage Conservation, International Scuba Ass'n, Eastern Dive Boat Ass'n, and North-South Trader Civil War Magazine.

David A. Doheny, Gen. Counsel, Thompson M. Mayes, Asst. Gen. Counsel, Elizabeth S. Merritt, Paul W. Edmondson, National Trust for Historic Preservation, Washington, D.C., for amicus-appellees National Trust for Historic Preservation in the U.S., Society of Professional Archeologists, Society for Historical Archaeology, Advisory Council on Underwater Archaeology, Society for American Archaeology and Council of American Maritime Museums.

Before: SLOVITER, Chief Judge, SCIRICA and NYGAARD, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Chief Judge.

The circumstances out of which this appeal arises are more suited to an epic poem *214 than a legal opinion. They include a marauding vessel of the Confederacy, a Union man-of-war secretly outfitted with iron chain mail covering its hull concealed by planking, a maritime duel challenged and accepted, combat between the vessels in international waters

001889

off the coasts of England and France, the white flag of surrender, the sinking of the Confederate ship to its watery grave, the escape of its captain, the recovery of its bell by a British diver 72 years later, and the bell's odyssey [FN1] spanning from a local pub, through World War II bombing and a succession of antique dealers, to its temporary docking on the floor of a federal courtroom in New Jersey, and its current display at the Naval Historical Center at the Washington D.C. Navy Yard.

FN1. In contrast, Odysseus spent merely ten years fighting the Trojans and ten years fighting assorted other dangers and temptations until his return to Ithaca. See *The Odyssey of Homer* (Richmond Lattimore trans. 1967).

We will never know all of the historical facts of the naval battle. The eyewitnesses are no longer alive, and we are left with the possibility that their written accounts are skewed by unspent passions. However tempting the incursion into the detours of unanswered historical questions, we are convened for another purpose. The legal issue presented is whether the bell from the C.S.S. ALABAMA, a Confederate commerce raider sunk by the Union Navy off the coast of Cherbourg, France in 1864, is the property of the United States, either by right of succession or by right of capture. Appellant Richard Steinmetz bought the bell in England in 1979 and brought it back to the United States. When he put it up for auction in 1990, the United States Navy claimed that the bell was its property. The district court agreed with the Navy and Steinmetz appeals.

I. Facts [FN2]

FN2. The nature of this dispute requires us to consult historical documents included in the parties' appendices and admitted into evidence pursuant to Fed.R.Evid. 803(16) (hearsay exception for statements in ancient documents), historical texts cited by the parties in their briefs or relied on by the district court, and a standard reference work, 2 Alexander H. Stephens, *A Constitutional View of the Late War between the States* (1870), because it contains direct quotations from original sources and provides a contemporaneous view.

In 1861, Captain James D. Bulloch, an agent of the Confederate Navy, went to Liverpool, England to contract for warships. His task was complicated by Britain's neutrality, proclaimed by Queen Victoria in May 1861, and its Foreign Enlistment Act of 1819, which forbade the construction and arming of warships in British territory for a belligerent power. The British circumvented these requirements by allowing private parties to build ships but not arm them. For example, despite the efforts of Thomas S. Dudley, the United States Consul in Liverpool, the Confederate cruiser FLORIDA departed from Liverpool in March of 1862 only to be armed later with weapons shipped out separately.

In July 1862, the steamship ALABAMA, despite similar attempts to detain her, also departed from Liverpool and proceeded to the Azores, where she picked up guns and ammunition. In August 1862, she was put into commission as a Confederate cruiser by Captain Raphael Semmes, a native of the state of Alabama and a former officer in the United States Navy who had resigned to join the Confederate Navy soon after Alabama seceded from the Union. Semmes and the ALABAMA roamed the Atlantic Ocean, the Gulf Coast, the African Cape, and the China Sea for two years destroying or capturing at least 62 American merchant and whaling ships. According to one source, the work of the Confederate cruisers and privateers, in addition to their effect on individual ships, raised insurance rates, caused hundreds of American vessels to fly under the British flag to avoid capture, and generally "gave the American merchant marine a setback from which it did not recover till the time of the first World War." J.G. Randall & David Donald, *The Civil War and Reconstruction* 451 (2d ed. 1969).

In June 1864, while the ALABAMA was docked in Cherbourg, France for repairs, *215 Captain Semmes learned that the U.S.S. KEARSARGE, a Union ship under the command of Captain John Winslow, [FN3] was positioned in international waters outside the harbor of Cherbourg. On June 19, 1864, the ALABAMA went to sea to meet the KEARSARGE, accompanied by the DEERHOUND, an English yacht out on a leisure cruise, and under the gaze of crowds of people who came from as far as Paris and lined the harbor to watch the battle. [FN4] After a little over an hour, the ALABAMA, having been badly hit and sinking fast, struck its colors and ran up a white flag. Semmes sent an officer in a boat to the KEARSARGE to request assistance saving the men from their sinking ship. After boats of wounded were sent to the KEARSARGE, Captain Semmes and the rest of the surviving crew jumped overboard just before the ALABAMA sank. Some of the crew were picked up by the KEARSARGE and taken as prisoners, but many crewmen

died. Captain Semmes along with the remainder of his officers and crew were picked up by the DEERHOUND and taken to England, where they were set free.

FN3. Coincidentally, Semmes and Winslow were cabinmates when they served together in the United States Navy during the war with Mexico.

FN4. The battle has also been celebrated in the fine arts. Edouard Manet's famous painting of the battle is in the permanent collection of the Philadelphia Museum of Art.

The exploits of the ALABAMA and other Confederate raiders were the subject of an international dispute between the United States and England which became known as the "Alabama Claims." After the war, the United States sought indemnity from England for the havoc wreaked upon its interests by the Confederate warships that were built, outfitted, and generally assisted by the English. These claims were settled by an international arbitration tribunal, convened pursuant to the Treaty of Washington of 1871, that met in Geneva and awarded \$15.5 million to be paid by Great Britain to the United States. See Randall & Donald, *The Civil War and Reconstruction* 671-77.

In 1936, William Lawson, a British diver from the Isle of Guernsey, retrieved the brass bell from the ALABAMA, inscribed with the letters "C.S.S. Alabama," [FN5] and sold it to a local bar, apparently for drinking privileges. App. at 88. That bar was destroyed by British bombing during World War II, Guernsey having fallen into German hands. The bell was dug out of the rubble after the war and exchanged hands until it wound up with an antique dealer in Hastings, England. In 1979, appellant Steinmetz, a New Jersey resident and an antique dealer for 40 years, heard about the bell while at an antique gun show in London. Steinmetz flew to Guernsey, spent a week and a half researching its authenticity, and then purchased the bell by trading approximately \$12,000 worth of antique guns and pistols.

FN5. Steinmetz suggested that this inscription was hand cut rather than cast because there were Union agents in the bell foundries in England, on the lookout for equipment being built for the Confederacy. App. at 91.

Steinmetz took the bell back to his home in Westwood, New Jersey. Within a week after his arrival back in the United States, he offered to sell or trade the bell to the United States Naval Academy. The Academy apparently wanted to display the bell but would not purchase it, so Steinmetz put it on his shelf for 11 years.

[1] In December 1990, Steinmetz put the bell up for auction with the Harmer Rooke Galleries in New York. After the Naval Historical Center learned of the auction, the United States claimed that the bell was its property, and filed a complaint in admiralty in the United States District Court in New Jersey and a motion to show cause why Steinmetz should not deliver the bell to the United States. In response, Steinmetz delivered the bell to the district court, and filed an answer and counterclaim for a determination that the bell was his property, for payment of full market value for the bell or, in the alternative, compensation under the theories of quantum meruit and/or unjust enrichment on *216 the part of the United States. After a hearing [FN6] in the district court on the motion to show cause, both parties moved for summary judgment.

FN6. There was yet an additional unexpected twist to the saga of the bell. Coincidentally, one of the district judges of New Jersey, John Winslow Bissell, is a descendant of the KEARSARGE's Captain Winslow. On the date fixed for the hearing on the order to show cause, there was a ceremony attended by school children at which Judge Bissell participated and recounted the history of the bell, reading primarily from the account of the ALABAMA's executive officer, Lieutenant Kell. Steinmetz contends that Judge Bissell's "testimony" may have unfairly influenced the district court into ruling that the ALABAMA had been captured by the KEARSARGE. It is unlikely that the parties present deemed Judge Bissell's presentation to have been "testimony." He did not appear to have been sworn in and he apparently left after his presentation. App. at 42. Had he in fact testified it might have raised questions of the appearance of impropriety. It is evident that the district court did not regard the ceremony, designed to excite the interest of 6th graders in one phase of American history, as part of the case record because the court stated, after thanking its colleague Judge Bissell, "[w]e will now proceed with the more formal part of the case. We'll start with the evidence which the government may wish to put on the record." App. at 42. In any event, we do not reach the issue of capture in our disposition of this case, and thus any possible influence arising out of Judge Bissell's participation must necessarily be harmless.

The district court granted the United States' motion for summary judgment, finding in the government's favor on both theories put forth by it. *United States v. Steinmetz*, 763 F.Supp. 1293 (D.N.J.1991). The court found that the ALABAMA had been captured by the KEARSARGE and therefore became United States property at the time of the battle in 1864. *Id.* at 1298. In the alternative, the court found that because the United States succeeded to the public property of the Confederacy after the Civil War, the ALABAMA became the property of the United States when the war was over. *Id.*

The court also found that by virtue of Article IV, Section 3, Clause 2 of the United States Constitution and statutory law, the United States did not abandon the ship because no congressionally authorized person formally abandoned the wreck of the ALABAMA. *Id.* at 1299. Finally the district court found that it lacked jurisdiction to hear Steinmetz's counterclaims seeking compensation for the bell on the theories of quantum meruit and unjust enrichment because the United States had not affirmatively waived its immunity to such claims. *Id.* at 1300. Steinmetz does not appeal the counterclaim issue, since he does not assert it in his brief. See Fed.R.App.P. 28(a). [FN7]

FN7. This court's request that the parties brief the question whether Steinmetz should have asserted his claim for quantum meruit and/or unjust enrichment in the Claims Court does not relieve Steinmetz from the effect of his failure to preserve the issue. *Winston v. Children & Youth Servs.*, 948 F.2d 1380, 1385 (3d Cir.1991).

Although the district court granted summary judgment, a procedure that does not contemplate oral testimony, the court based its judgment in part on the earlier testimony of Naval Historian William S. Dudley and Steinmetz given in connection with the court's order to Steinmetz to show cause why he should not deliver the bell to the United States.

We have in the past, when faced with a similar situation, determined that if there was no additional evidence presented to the trial court that would aid the adjudication of the case, we would review the court's findings of fact under a "clearly erroneous" standard. See *Donovan v. DialAmerica Mktg.*, 757 F.2d 1376, 1382 (3d Cir.), cert. denied, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985). This would be awkward here because there were some disputed issues of fact presented to the district court, particularly concerning the capture issue, which the district court resolved after taking testimony. Because we do not decide the capture issue, those disputed facts are essentially irrelevant and we rely for our disposition only on the undisputed facts upon which the court based its summary judgment. It is the legal conclusions reached by the trial court that are at issue and they are subject to plenary review.

*217 II. Discussion

The legal issues raised by this case appear to be of substantial interest to numerous persons beyond the United States and Steinmetz. Thus, we have received a brief from Amici Curiae American Sport Divers Association, Federation of Metal Detector & Archeological Clubs, Alliance for Maritime Heritage Conservation, International Scuba Association, Eastern Dive Boat Association, and North-South Trader Civil War Magazine, who represent "thousands of individuals who, either as a hobby or as a business, have a financial interest in Confederate military equipment, and other historically significant military artifacts," and who argue that their potential loss of ownership rights to these artifacts to the government under the theory of succession "would have a significant 'chilling effect' on their efforts to expand our knowledge of Civil War history through discovery and preservation of its physical relics."

Arrayed against them are Amici Curiae National Trust for Historic Preservation in the United States, Society of Professional Archeologists, Society for Historical Archaeology, Advisory Council on Underwater Archaeology, Society for American Archaeology and Council of American Maritime Museums. These Amici argue that "[r]ecognition of United States ownership of Confederate property.... will ensure that the United States maintains the right and ability to protect and preserve historic artifacts and archaeological artifacts ... which would otherwise be subject to damage or loss through inappropriate retrieval and disposition," and will remove the economic incentives for individuals to remove artifacts from their historical contexts for personal financial gain. We cannot base a ruling on either of these grounds which are more appropriately directed to Congress than to a court. Instead, we must attempt to steer our course on the basis of legal doctrine applied to the known historic facts.

A. Capture

001892

In support of his argument that the district court erred in holding that the government is entitled to the ALABAMA's bell by virtue of capture, Steinmetz argues that the prerequisites for establishing that the KEARSARGE captured the ALABAMA were not satisfied. It is uncontroverted that the ALABAMA, despite its having struck its colors and raised the white flag of surrender, never came within the physical possession of the KEARSARGE. Indeed, Semmes wrote that cannons were fired from the KEARSARGE even after the ALABAMA's intention to surrender was communicated. See Admiral Raphael Semmes, CSN, *Memoirs of Service Afloat During the War Between the States* 757 (The Blue & Grey Press 1987). In any event, the ship sank before the KEARSARGE could exercise any control over it.

The district court, apparently in recognition of the absence of a factual basis to support the traditional view of capture, stated that before the ALABAMA sank, the KEARSARGE was "positioned across ALABAMA's bow thwarting escape and able to deliver unanswerable raking fire," thereby establishing it was in the "constructive possession" of the ALABAMA. [FN8] Steinmetz, 763 F.Supp. at 1298. Steinmetz argues that such a doctrine has never been accepted in law. The government responds by citing to an allusion to constructive possession in the early decision of *The Alexander*, 1 F.Cas. 357, 360 (C.C.D.Mass.1813) (No. 164), *aff'd*, 12 U.S. (8 Cranch) 169, 3 L.Ed. 524 (1814). No case has been cited that based a decision on constructive possession without there having been some actual control over the "captured" ship's movements by the captor. However, we need not decide the viability of a constructive capture doctrine on this appeal, because we conclude that there is ample basis to support the judgment of the district *218 court on its alternative theory of succession. This permits us to avoid the conundrum presented by the differing accounts of the battle from long-since-unavailable eyewitnesses.

FN8. Captain Semmes maintained that the KEARSARGE never came within 400 yards of the ALABAMA. Semmes, *Memoirs* 759.

B. Succession

In his argument that the district court erred in holding that the United States succeeded to the ownership of the ALABAMA as the successor to the property of the Confederacy, Steinmetz offers two theories. First he argues that inasmuch as the law of succession only applies to public property, the United States could not succeed to the ownership of the ALABAMA because it was not owned by the Confederacy but was privately owned as a pirate ship. Alternatively, Steinmetz contends that even if the ALABAMA was the property of the Confederacy, the United States never adopted the succession doctrine as it was understood in international law and, to the extent that it did, it would have been required to perfect its title to the ALABAMA long ago.

1. Pirate Ship

[2] Steinmetz concedes that the de facto government of the Confederacy could acquire title to real and personal property, a principle established in Supreme Court cases. See, e.g., *Whitfield v. United States*, 92 U.S. 165, 166, 23 L.Ed. 705 (1876) ("[w]e have thus decided that the Confederate States Government could acquire title to real property by purchase; and it is not easy to see why a different rule should be applied to personal property"). Steinmetz's argument that the ALABAMA was not public property is really based on a form of estoppel: during the war, Union officials described the ALABAMA and its crew as "pirates" and therefore the United States cannot now claim that the Alabama was publicly owned.

Historical materials do show that the Confederate privateers and commerce raiders were referred to as "pirates." In announcing the Union blockade of the South on April 19, 1861, President Lincoln threatened to punish under the laws relating to piracy those acting under the "pretended authority" of the Confederacy who "molest a vessel of the United States." 12 Stat. 1258, 1259 (1861). The Secretary of the Navy, Gideon Welles, in a dispatch to Captain Winslow after the sinking of the ALABAMA, made reference to the prisoners taken by Winslow as "foreign pirates." App. at 152.

There were even trials of Confederate privateers for piracy. For example, in 1861, members of the Confederate schooner SAVANNAH went on trial for piracy in federal court in New York, but the trial ended in a hung jury and the defendants were eventually exchanged as prisoners of war. See John D. Gordan, III, *The Trial of the Officers and Crew of the Schooner "Savannah"*, 1983 Yearbook-Supreme Court Historical Society 31; *Trial of the Officers and Crew of*

the Schooner Savannah, on the Charge of Piracy, United States Circuit Court for the Southern District of New York, October 23, 1861 (trial transcript). This incident gave rise to a letter, dated Richmond, July 6, 1861, written to President Lincoln from Jefferson Davis, threatening that,

"this Government will deal out to the prisoners held by it, the same treatment and the same fate as shall be experienced by those captured on the Savannah; and if driven to the terrible necessity of retaliation, by your execution of any of the officers or crew of the Savannah, that retaliation will be extended so far as shall be requisite to secure the abandonment of a practice unknown to the warfare of civilized man, and so barbarous, as to disgrace the nation which shall be guilty of inaugurating it."

² Alexander H. Stephens, *A Constitutional View of the Late War Between the States* 432-33 (1870) [hereinafter Stephens, *A Constitutional View*] (quoting letter of Jefferson Davis).

Nevertheless, all of the historical evidence suggests that the references to piracy were more rhetorical than legal. The Confederacy was recognized by the United States as possessing "belligerent rights," *Williams v. Bruffy*, 96 U.S. 176, 186-87, 24 *219 L.Ed. 716 (1878) (captives treated as prisoners of war, exchange of prisoners, recognition of flags of truce, and "other arrangements having a tendency to mitigate the evils of the contest"); 1 John Bassett Moore, *A Digest of International Law* 184-86 (1906) [hereinafter Moore, *International Law*] (noting recognition of belligerency by England, France, Spain, the Netherlands, and Brazil). There is every indication that the ALABAMA sailed under the Confederate flag. See *United States v. Smith*, 27 F.Cas. 1134, 1135 (C.C.E.D.Pa.1861) (No. 16318) (defining piracy as " 'depredation on or near the sea without authority from any prince or state' ").

Death was the recognized penalty for piracy yet no Confederate was ever executed for the crime. Those suspected and/or convicted of piracy during the war were either released or treated as prisoners of war. See J.G. Randall, *Constitutional Problems Under Lincoln* 66 (University of Illinois Press 1951) [hereinafter Randall, *Constitutional Problems*]; 2 Moore, *International Law* 1079 (noting *Smith*, 27 F.Cas. at 1134, in which convicted prisoners were delivered to military custody); 2 Stephens, *A Constitutional View* 434 ("Whether the authorities at Washington were induced to change their policy and purpose in this particular, by a recognition of the laws of war, or from a sense of humanity, or from fears excited in another quarter, will, perhaps, be left forever to conjecture; for no explanation of it has ever been given to the public, as far as I am aware.").

In fact, there appears to have been a conscious decision not to prosecute Captain Semmes for piracy after the war. In August, 1872, Bolles, the Solicitor of the Navy Department, discussed this issue in the *Atlantic Monthly*, stating:

"By establishing a blockade of Confederate ports, our Government had recognized the Confederates as belligerents, if not as a belligerent state, and had thus confessed that Confederate officers and men, military or naval, could not be treated as pirates or guerrillas, so long as they obeyed the laws of war."

² Moore, *International Law* 1082-83 (quoting *Atlantic Monthly* for July & Aug. 1872).

The discrepancy between what the Union said and what it did with regard to the piracy issue has been summarized by one historian as follows:

[F]rom every standpoint it was found impolitic and indeed impossible to carry out this policy of punishing for piracy those who were in the Confederate service. It is thoroughly recognized in international law that those who operate at sea under the authority of an organized responsible government observing the rules of war may not be treated as pirates. Internationally, the Confederacy was a recognized belligerent, and to have its ships deemed piratical under the *ius gentium* was entirely out of the question. To treat them as pirates under the municipal law was practically equivalent to treating them as traitors.... Besides, when it became known that Southern privateersmen were being held for piracy, retaliation was at once threatened, and certain Union captives were selected as hostages, on whom the Richmond Government intended to retaliate in case the Federals should actually prosecute the piracy charge.

Randall, *Constitutional Problems* 65-66 (footnote omitted).

There was ample evidence in the record that the ALABAMA was owned by the Confederacy. All accounts of the ALABAMA presented to the district court stated that the ALABAMA was built in Liverpool under contract with the Confederacy. See *Steinmetz*, 763 F.Supp. at 1294; App. at 89 (*Steinmetz's* testimony). There was no evidence presented that the Confederacy transferred ownership of the ALABAMA to its crew, or that Captain Semmes or a member of his crew paid for the ALABAMA or captured it from the Confederacy.

[3] Without some facts to contradict the clear evidence that the Confederacy owned the ALABAMA and that Captain

Semmes, although obviously given considerable autonomy on the high seas, was *220 understood by the United States and the Confederate government to be an agent of the Confederacy, there is no material question of fact as to whether the Confederacy owned the ALABAMA when it sank in 1864. Thus, we conclude that the ALABAMA was not a piratical vessel.

2. Property of the Confederacy

[4] Having established that the Confederacy owned the ALABAMA, we are faced with the question whether the United States succeeded to its ownership after the Civil War.

State succession is not a well-defined legal doctrine. One commentator, noting the different treatment given to the law of state succession by different writers, has suggested that it be treated in "specialized contexts" because the "concepts of 'succession' and 'continuity' of states ... are levels of abstraction unfitted to deal with specific issues." See Ian Brownlie, *Principles of Public International Law* 635 (1966).

Amici Curiae American Sport Divers Association, et al. contend that succession can only occur between sovereign governments, and that the recognition of the Confederacy as a belligerent did not amount to recognition of it as a sovereign. They cite the following:

The transfer of territory from one State to another takes place in at least five ways, namely, (a) cession, (b) annexation, (c) emancipation, (d) formation of a union, and (e) federation. The common factor in all five situations is that one sovereign substitutes itself for another.

1 D.P. O'Connell, *International Law* 365 (2d ed.1970) (footnote omitted).

This definition of succession is not exclusive, however. O'Connell makes a distinction between succession of states and succession of governments. See *id.* at 394 ("the property acquired by rival political organisations is attributed to the State to whose government they pretend, so that the assets of the defeated may be claimed by the victor but subject to the liabilities of the defeated respecting it" (footnote omitted)); see also Charles G. Fenwick, *International Law* 172 (4th ed. 1965).

[5] The Supreme Court has stated both that after the Civil War the public property of the Confederacy passed to the United States and that the United States did not have to physically possess the property in order to have succeeded to its ownership. In *Williams v. Bruffy*, the Court stated:

[The Confederacy] claimed to represent an independent nation and to possess sovereign powers; and as such to displace the jurisdiction and authority of the United States from nearly half of their territory and, instead of their laws, to substitute and enforce those of its own enactment. Its pretensions being resisted, they were submitted to the arbitrament of war. In that contest the Confederacy failed; and in its failure its pretensions were dissipated, its armies scattered, and the whole fabric of its government broken in pieces. The very property it had amassed passed to the nation. The United States, during the whole contest, never for one moment renounced their claim to supreme jurisdiction over the whole country....

96 U.S. at 188 (emphasis added).

[6] In *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 21 L.Ed. 457 (1873), the Court found it had no jurisdiction to entertain a claim by Huckabee who had sold his iron works company to the Confederacy. The property was captured by Union forces in 1865 and then sold to Lyon soon thereafter. The Court found it lacked jurisdiction for a number of reasons, one of which was that Lyon's title was valid because it was acquired from the United States which had captured the iron works. The Court then elaborated on this point, stating that "as the confederation having been utterly destroyed no treaty of peace was or could be made," and that "if the nation is entirely subdued, or in case it be destroyed and ceases to exist ... [the rights of the conqueror] are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property." *Id.* at 434-45 (emphasis added).

[7] *221 In *Leathers v. Salvor Wrecking Co.*, 15 F.Cas. 116 (C.C.S.D.Miss.1875) (No. 8,164), the United States had contracted with a salvage company to salvage the steamer *Natchez*, a private boat used by the Confederate government which was burnt and sunk during the war. The court determined that since the Confederacy had fully compensated the owner for the boat, the United States became its rightful owner after the war:

If the steamer Natchez was impressed into the service of the Confederate States government, and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libellant by that government, the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit.

Id.

The English courts took a similar view. Thus, for example, in *United States v. McRae*, 8 L.R.-Eq. 69 (Court of Chancery 1869), the United States claimed ownership to goods and money held by McRae, an agent of the Confederacy who had been an intermediary in England for the sale of Confederate goods. McRae claimed that he was owed money by the Confederacy but the United States refused to agree to settle with McRae upon receiving the goods. The court held that without such an agreement, the United States could not succeed to the Confederate property in McRae's possession. The court stated:

[T]his right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.

Id.; see also *United States v. Prioleau*, 35 L.J. Chancery N.S. 7, 11 (1865) (cotton owned by the Confederacy with a lien held by members of an English firm is property of the United States, subject to all the conditions and liabilities to which the property is subject).

Steinmetz and the Amici contend that the succession doctrine is inapplicable to the Confederacy's property because under that doctrine the successor government taking the assets of the conquered government must also take on its debts, which the United States did not do with respect to the Confederacy. Indeed, section 4 of the Fourteenth Amendment explicitly provides:

[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, ... but all such debts, obligations and claims shall be held illegal and void.

U.S. Const. amend. XIV, § 4.

As Steinmetz notes, the English courts that addressed this issue assumed that when the United States succeeded to the property of the Confederacy, it also succeeded to the debts and obligations attached to that property. Thus, those courts would not allow the United States to succeed to Confederate property without assuming the outstanding obligations as to that property. See *McRae*, 8 L.R.-Eq. at 69; *Prioleau*, 35 L.J. Chancery N.S. at 11. We are unable to find a United States case that so held. But even the English courts did not interpret the succession doctrine to require the United States to succeed to the Confederacy's debts unrelated to the particular property at issue.

Even though there may be some question as to the exact contours of the succession doctrine as applied by the United States after the Civil War, in the case of the ALABAMA there were no outstanding liabilities for which the United States might have been responsible had it asserted its title to the ALABAMA right after the war. Steinmetz does not allege that the ALABAMA was not fully paid for by the Confederacy.

It follows that whether or not historians would regard the international law of succession *222 as applicable here, [FN9] the succession doctrine, as explicated and applied by the United States Supreme Court with respect to the Civil War, entitled the United States to all property acquired by the Confederacy. Therefore, we hold that, as a matter of law, the United States acquired title to the ALABAMA after the Civil War ended.

FN9. Randall makes the argument that it is inappropriate to consider the United States' actions after the war as acts of a successor per se:

[T]o argue that the United States should have taken over the Confederate debt would be to assume that the Confederate States had existed before the war as an established international person, and had then been conquered and absorbed by the United States. Even then, prevailing international practice would have suggested that Confederate debts incurred for the war itself should not be assumed.... The defeat of such a rival government did not amount to the overthrow or absorption of an existing 'state' in the international sense. As to the principle of state-continuity, it was preserved in the fact that the United States was not supplanted in its control over the South.

Randall, *Constitutional Problems* 238 n. 51.

3. Abandonment

Steinmetz offers one final argument to defeat the United States' claim that it owns the ALABAMA's bell. He claims that even if the United States did succeed to ownership of the ALABAMA after the war, the United States abandoned the ship in the depths of the briny sea because it never asserted ownership of it and never showed any interest in its salvage. [FN10]

FN10. Abandonment is defined as the "surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all rights, title, claim and possession, with the intention of not reclaiming it." Black's Law Dictionary 2 (5th ed. 1979).

Article IV, Section 3, Clause 2 of the Constitution states:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This clause has been interpreted to mean that the United States cannot abandon its own property except by explicit acts. As the Court stated in *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947):

The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Id. at 40. See generally 91 C.J.S. *United States* §§ 75-76 (1955).

[8] Steinmetz correctly points out that the policy of the United States concerning abandonment of its sunken vessels has not always been consistent. In recent times, a Deputy Legal Adviser of the Department of State has recognized the practice of treating warships from the 17th and 18th centuries as abandoned by implication of the long passage of time, but has taken the position that with respect to U.S. warships of the 19th and 20th centuries, that " 'it should be presumed that title to such vessels remains in the U.S.' " Marian Nash Leich, *Digest of United States Practice in International Law* 1004 (1980) (quoting Legal Adviser's Memorandum). The same document concluded that "[a]lthough abandonment may be implied under some circumstances, United States warships that were sunk during military hostilities are presumed not to be abandoned and are considered not subject to salvage in the absence of express consent from the United States Government." *Id.* at 1005. [FN11] It is clear that vessels sunk during the Civil War are covered by the policy asserting United States title to them.

FN11. This policy stems not only from concern about preservation of American history but from sensitivity to the fact that wrecks of warships "are the watery graves of American war dead." Brief for Appellee at 7.

[9][10] *223 In *Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094 (S.D.Tex.), vacated in part on other grounds, 1984 A.M.C. 1102 (S.D.Tex.1981), the court held that the U.S.S. HATTERAS, which was sunk by the ALABAMA in 1863 in international waters south of Galveston, Texas, remained the property of the United States despite over one hundred years of neglect. The court distinguished abandoned public property from private property, noting that although an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress. *Id.* at 1098; cf. *United States v. Pennsylvania & Lake Erie Dock Co.*, 272 F. 839, 843 (6th Cir.1921) (distinguishing abandonment by the United States of temporary easement, which is possible without an Act of Congress, from abandonment of property whose title the government has acquired, which is not). [FN12]

FN12. As to the legal status of the ALABAMA between its sinking and the Union's victory, some question could be raised as to whether the Confederacy abandoned the ALABAMA after it sank and before the end of the war. However, in the Constitution of the Confederate States of America, adopted unanimously by the Confederate Congress on March 11, 1861, and modelled on the United States Constitution, there was a clause analogous to Article IV, Section 3, Clause 2 of the United States Constitution. It stated:

The Congress shall have power to dispose of and make all needful rules and regulations concerning the property of the Confederate States, including the lands thereof.

Confederate States of America Const., art. IV, § 3, cl. 2. Had the Confederacy won the Civil War, this clause

presumably would have preserved its property interest in the ALABAMA and prevented the ship from becoming abandoned property. Thus, the Confederacy retained its property interest in the ALABAMA between the time it sank on June 19, 1864 and the time the war ended, on April 9, 1865 (Appomatox) or April 2, 1866. See *Freeborn v. The Ship Protector*, 79 U.S. (12 Wall.) 700, 702, 20 L.Ed. 463 (1872).

We find unpersuasive Steinmetz's attempt to distinguish *Hatteras* on the ground that that ship was in international waters whereas the ALABAMA, which was originally in international waters, is now in French waters because France extended its territorial seas in 1971. The bell was taken from the wreck before France extended its territory. See J. Ashley Roach, *France Concedes United States Has Title to the CSS ALABAMA*, 85 Am.J.Int'l L. 381, 382 n. 2 (1991). Thus, there is no basis for Steinmetz's abandonment theory. [FN13]

FN13. Because the United States did not officially abandon the ALABAMA, we need not address the contention that the ALABAMA and its bell are subject to the law of finds.

III. Conclusion

We conclude that as a matter of law the ALABAMA's bell is the property of the United States by right of succession and that the district court was correct in so holding. It is not lost on us that this leaves uncompensated Steinmetz's considerable energy and creativity in retrieving and returning to the United States an irreplaceable artifact from its history. The district court noted that "[o]ne would think ... that in the unusual circumstances of this case some way could have been devised to make Mr. Steinmetz whole. But that, apparently was more than the bureaucratic mind could accomplish." *Steinmetz*, 763 F.Supp. at 1300 n. 2. It may be that the United States' position to deny compensation even to those whose title traces from the original diver rather than their own expedition is in line with its policy "to discourage disturbing these wrecks except for professional, non-invasive archeological research." Brief for Appellee at 7. [FN14]

FN14. The Navy could compensate Steinmetz pursuant to 10 U.S.C.A. § 2572(b) (West Supp.1992), which allows the Secretary of the Navy to trade items held by the Navy for similar items held by an individual "which directly benefit the historical collection of the armed forces." Steinmetz's counsel has indicated that Steinmetz might agree to such a trade.

Steinmetz, of course, is free to present his case to a sympathetic congressional representative who may introduce a private bill. As we noted at the outset, our function is to decide the law, and thus decide for whom the ALABAMA's bell tolls after 128 years: it tolls for the United States.

***224** For the foregoing reasons we will affirm the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.,
A Nevada Limited Company,

Plaintiff-Counter-Defendant-Appellee

v.

THE UNIDENTIFIED, WRECKED AND ABANDONED AIRCRAFT,
her armament, apparel, and cargo located within one marine league
of a point located at 25-00043'34" N latitued and 80-2'8" W
longitude,

Defendant,

UNITED STATES OF AMERICA,

Intervenor-Defendant-
Counter-Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANT UNITED STATES

DAVID W. OGDEN
Assistant Attorney General
THOMAS E. SCOTT
United States Attorney
ROBERT S. GREENSPAN
(202) 514-5428
JEFFREY CLAIR
(202) 514-4028
Attorneys, Department of Justice
Room 9536
601 "D" St., NW,
Washington, D.C. 20530-0001

001899

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Appellant respectfully requests oral argument. Oral argument will illuminate the position of the parties and aid the Court in reaching a decision.

No. 99-13117-A

International Aircraft Recovery

v.

The Unidentified, Wrecked, and Abandoned Aircraft, etc.

RULE 26.1-1 CERTIFICATE OF INTERESTED PERSONS

1. The trial court judge was the Honorable James Lawrence King, Senior U.S. District Court Judge, U.S. District Court for the Southern District of Florida.
2. The plaintiff-appellee is International Aircraft Recovery, LLC, a Nevada Limited Company.
3. Plaintiff-Appellee's counsel is:
David Paul Horan
Horan and Horan
608 Whitehead St.
Key West, Fla. 33040-6549
(305) 294-4582
4. The Defendant-Intervenor is the United States.

(continued)

C-1

No. 99-13117-A

International Aircraft Recovery

v.

The Unidentified, Wrecked, and Abandoned Aircraft, etc.

5. Counsel for the United States are:

David W. Ogden, Assistant Attorney General

Thomas E. Scott, United States Attorney

001901

Robert J. Bondi
Robert S. Greenspan
Jeffrey Clair
David Hutchinson
Tierney Carlos

C-2

001902

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13177-A

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.,

Plaintiff-Appellee,

v.

THE UNIDENTIFIED, WRECKED AND ABANDONED AIRCRAFT, ETC.,

Defendant-Appellant,

and

UNITED STATES,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANT UNITED STATES

STATEMENT OF JURISDICTION

1. Plaintiff filed this case as an *in rem* action against the defendant aircraft on July 10, 1998, and the district court issued a warrant of arrest for the aircraft on July 21, 1999. Clerk's Notation of Record ("NR.") 1& 5. On December 30, 1998, the United moved to intervene in the action, to vacate prior court orders pertaining to the *in rem* arrest, and to enjoin the plaintiff from conducting salvage operations. NR. 12. The district court had subject matter jurisdiction over the United States' motion for

001903

injunctive relief under 28 U.S.C. 1333, conferring jurisdiction over admiralty cases, and under 28 U.S.C. 1345, conferring jurisdiction over "civil actions, suits or proceedings" commenced by the United States.⁴

2. On July 12, 1999, the district court entered an order denying the government's request for injunctive relief but retaining jurisdiction for the purpose of determining the right to a salvage award or ownership. NR. 33. Although the district court's order is styled as a "final judgment," it does not resolve several claims pressed by the plaintiff, including plaintiff's claims for title to the aircraft and/or a salvage award. Cf. NR. 1, Complaint ¶ 9 with slip op. 22. Thus, notwithstanding the court's

⁴The district court's jurisdiction over the claims pressed by the plaintiff is questionable, but not directly at issue in the government's appeal. The plaintiff's complaint was filed as an *in rem* action against property that we assert belongs to the United States. The court's authority to maintain an *in rem* action against maritime property belonging to the United States, however, is highly doubtful. First, Congress, through the Suits in Admiralty Act and Public Vessels Act has barred the arrest of and assertion of *in rem* jurisdiction over public vessels and other government-owned, maritime property. See 46 U.S.C. 741. Litigants seeking to advance a salvage claim pertaining to governmental maritime property are instead remitted to an *in personam* claim for compensatory redress filed against the United States. See 46 U.S.C. §§ 742, 781. Second, even if *in rem* jurisdiction over public vessels were otherwise permitted, the court's power to arrest maritime property that, as the court found below (see slip op. at 4), lies outside the district court's territorial jurisdiction is also open to question. See *American Bank of Wages Claims v. Registry, etc.*, 431 F.2d 1215, 1218 (9th Cir. 1970) (*in rem* admiralty actions require that the vessel or other res at issue be within the judicial district at some point during the litigation); Wright, Miller and Cooper, 12 *Federal Practice and Procedure* §3222 (same); but cf. *RMS Titanic Inc. v. United States*, 171 F.3d 943, 967 (4th Cir. 1999) (discussing court's power to determine salvage rights to property submerged beneath the high seas). In any event, although these principles cast doubt on the district court's authority to exercise *in rem* jurisdiction over all the claims at issue in the litigation, the United States' affirmative claims for injunctive relief only concern the respective rights to the property as between the government and the plaintiff. These claims sound *in personam*, not *in rem*, and were properly within the district court's subject matter jurisdiction under 28 U.S.C. 1333 and 28 U.S.C. 1345. Cf. *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, etc. ("Treasure Salvors III")*, 640 F.2d 560, 567 (5th Cir. March 9, 1981) (court has power to determine rights of competing salvors who are otherwise subject to court's *in personam* jurisdiction).

characterization of its holding, the order is not a final judgment appealable under 28 U.S.C. 1291.

The interlocutory order, however, is appealable under both 28 U.S.C. 1292(a)(1), which grants appellate jurisdiction over orders granting or denying an injunction, and 28 U.S.C. 1292(a)(3), which grants appellate jurisdiction over interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases."

First, the government sought an injunction barring the plaintiff from conducting salvage operations on the aircraft. The court's denial of our motion for injunctive relief is appealable as of right under 28 U.S.C. 1292(a)(1). *See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, etc. ("Treasure Salvors III")*, 640 F.2d 560, 564-65 (5th Cir. March 9, 1981) (holding that 28 U.S.C. 1292(a)(1) applies to admiralty cases).²

Second, the decision below resolves the government's right to bar salvage services on the aircraft and, as such, is an interlocutory order that conclusively determines one of the specific rights at issue between the parties. It is therefore appealable under 28 U.S.C. 1292(a)(3) as well. *Cf. Martha's Vineyard Scuba HQ v. Unidentified Vessel*, 833 F.2d 10591062-64 (1st Cir. 1987) (order resolving dispute among competing salvors over right to conduct salvage operations is appealable under 28 U.S.C. 1292(a)(3)).

3. The district court's order was entered on the docket on July 12, 1999. NR. 33. The United States filed a timely notice of appeal on August 26, 1999. NR. 39. This Court therefore has appellate jurisdiction.

²This Court has adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

STATEMENT OF THE ISSUE

Whether the United States may bar private, marine salvage of a historically valuable, military aircraft where the government concludes that salvage will harm its interests in preserving the property, and where the government expressly directs the would-be salvor to cease and desist.

STATEMENT OF THE CASE

This is an admiralty case concerning the United States' right to bar private, marine salvage of a rare, historically valuable military aircraft. Plaintiff, a corporation headed by a private collector of vintage fighter aircraft, purchased the aircraft's location from the original finders and then filed an *in rem* action in the United States District Court for the Southern District of Florida. The complaint sought an order affording plaintiff the exclusive right to salvage the aircraft and other relief. The United States intervened in the action and sought preliminary and permanent injunctions enjoining plaintiff's salvage operations. The district court, ruling on cross motions for summary judgment, entered judgment for plaintiff on July 12, 1999. The court, however, retained jurisdiction "for the purpose of awarding title or a salvage award." Slip op. 22.

STATEMENT OF FACTS

1. This case involves a private party's right to salvage a rare and historically valuable U.S. naval aircraft that crashed approximately eight miles off the coast of Florida in 1943. The aircraft is a United States Navy "Devastator" TBD-1 torpedo bomber manufactured by the Douglas Aircraft Company and delivered to the Navy in 1938. It was assigned to the Aircraft Carrier Yorktown and flew combat missions in both the Battle of Midway and the Battle of the Coral Sea. After its combat tour, the aircraft was reassigned to the Atlantic Training Squadron at the Naval Air Station in Miami, Florida. It crashed into the Atlantic Ocean on July 1, 1943 while on a torpedo attack instruction flight. The pilot and his crew all escaped without injury. Slip op.

3-4. The government did not at that time know the specific location of the wreck and did not attempt to find and salvage it. The aircraft was accordingly "stricken" from the inventory of active naval aircraft on September 8, 1943. Slip op. 4-5.

In 1990, a group of salvors searching for Spanish galleons located the wreck site and made an undersea video of the wreckage. The plane is a unique find and of great historical interest. No aircraft of this type has yet been preserved for study or display. There is only one other aircraft of this type known to be in existence, and it too lies submerged in deep water. Moreover, naval records indicate that this particular aircraft flew combat missions in two crucial naval battles: the Battle of Midway and the Battle of the Coral Sea. Thus, the aircraft, in addition to being quite rare, is closely associated with key historical events and may therefore be eligible for inclusion in the National Register of Historic Places. Slip op. 7, U.S. Exhibit 1, Affidavit of William S. Dudley.

The original finders offered to sell their videotape and the wreck location to the government's National Museum of Naval Aviation for \$25,000. Although the naval museum expressed interest in the aircraft, it concluded that it did not have a budget for the acquisition and refused the salvors' offer. The finders then sold the tape and the wreck's location for \$75,000 to Windward Aviation, Inc, an Oklahoma Corporation controlled by Douglas Champlin, a private collector of fighter aircraft. Slip op. 5.

Champlin offered to enter into an agreement with the naval museum under which he would raise or salvage the aircraft and turn it over to the museum in exchange for other surplus aircraft under the museum's control. The government again expressed its interest in the aircraft and entered into negotiations with the Champlin. Slip op. 5-7. No agreement was reached, however, principally because the Navy believed the proposed terms of the in-kind trade were not advantageous (U.S. Exh. 6, Rasmussen-Champlin Letter of January 24, 1992), because it did not have budget authority to make a cash offer of purchase and to undertake a conservation

program (Slip op. 7), and because it had reservations about the adequacy of the salvor's ability to insure that the aircraft would not be damaged by the salvage operation and subsequent exposure to the air (U.S. Exh. 8, Murphy-Slahor Letter of June 25, 1993). During the course of these negotiations, the government expressly asserted that the United States retained ownership of the aircraft, and that Champlin had no authority to salvage or otherwise exercise any control over the aircraft wreckage. In 1993 correspondence with plaintiff's counsel, for example, the government expressly stated that: (1) the aircraft remained U.S. government property, (2) that Champlin did not have permission to salvage the wreck, (3) that any intrusion on the wreck could subject Champlin to a civil or criminal suit, and (4) that recovery of the aircraft in absence of an appropriate plan for recovery and conservation would harm the government's interests in preserving a fragile and historic artifact. *See* U.S. Exh. 8.

2. Shortly thereafter, Champlin learned that another group of salvors intended to assert claims to the wreckage. In August, 1994, he filed, as President of Windward Aviation, Inc., an *in rem* action intended to establish his exclusive salvage rights to the aircraft. Slip op. 7-8. In an effort to perfect the court's jurisdiction, plaintiff conducted a salvage operation in December 1994, recovered a portion of the aircraft's canopy, and brought the canopy within the territorial jurisdiction of the court. Plaintiff represented to the court that this salvage operation had been conducted pursuant to an agreement with the government. *See* NR. 12, U.S. Memorandum in Support of Motion To Intervene, Attachment 2, Plaintiff's Notice of Filing of Amended Complaint. No such agreement was or ever has been reached, however. U.S. Exh. 2 Check, Affidavit of Robert L. Rasmussen, February 1999.

Government counsel learned of the *in rem* action and of the salvage of the canopy in February of 1995. We thereafter again advised plaintiff that the government retained ownership of the aircraft, and that plaintiff had no authority or permission to

salvage artifacts from the wreck site.. See NR. 19, Pl. Response, Exh. C, Miller-Horan Correspondence, February 9, 1995. Government counsel asked that plaintiff turn over any salvaged artifacts to the naval museum and to dismiss the *in rem* complaint. *Ibid.* Champlin voluntarily dismissed the *in rem* action without prejudice on March 2, 1995. Slip op. 8. He then turned the canopy over to the naval museum, and began a new round of negotiations with the government. No agreement was concluded, however.

3. On July 10, 1998, Champlin filed a second *in rem* action against the aircraft in the United States District Court for the Southern District of Florida. The complaint was filed by International Aircraft Recovery, LLC, a Nevada corporation controlled by Champlin and the successor-in-interest to the corporate plaintiff in the prior *in rem* action. It sought an injunction barring all persons from interfering with plaintiff's "exclusive salvage rights on the aircraft" and either a "full and liberal salvage award" or "title under the American Law of Finds." NR. 1, Complaint p.4. The court issued a warrant of arrest of the aircraft and appointed plaintiff the substitute custodian. NR. 6 & 7. Champlin then conducted a second salvage operation in December of 1998. He recovered the aircraft's radio mast and filmed additional video tape of the wreckage. Slip op. 8-9.

The United States intervened in the *in rem* action on December 30, 1998. NR. 12. We moved to vacate the orders pertaining to the arrest of the aircraft. We also requested an injunction barring plaintiff from salvage operations and ordering plaintiff to return any salvaged parts to the United States. Plaintiff stipulated to the government's intervention and moved for summary judgment. The government filed a response and cross-moved for summary judgment. Slip op. 8-9. During the pendency of these motions, the government, through conversations with plaintiff's counsel, learned that plaintiff intended to commence salvage operations within several weeks. In response, the government filed a motion for a temporary restraining order

and a preliminary injunction to bar salvage during the pendency of the litigation. Plaintiff later agreed to refrain from salvage operations until the court ruled on the government's motions for preliminary relief. Slip op. 9.

The court held a hearing on the government's motions for preliminary relief on June 4, 1999. At the hearing, the government adduced testimony from a salvage expert who opined that plaintiff's salvage plan was inadequate and would result in the destruction of the aircraft. *See* Hearing of June 4, 1999, Tr. 26-47. The court did not rule on the government's motion for preliminary relief at that time, however, but rather indicated that it would dispose of the entire case on the parties' cross-motions for summary judgment.

4. The court granted judgment for the plaintiff on July 8, 1999. First, it concluded that it had subject matter jurisdiction. It reasoned that the claims sounded in admiralty because they implicate questions concerning the salvage of property from navigable water. Slip op. at 11. It also reasoned that, under California v. Deep Sea Research, 523 U.S. 491 (1998), it could exercise *in rem* jurisdiction to adjudicate the government's interests in property subject to salvage where the property is not in the government's actual possession. Slip op. at 11-14.

Second, the court held that the government had "abandoned" the aircraft and that the wreck could therefore be salvaged by the plaintiff. The court reasoned that disposition of the aircraft was governed by the now-expired Surplus Property Act of 1944, Pub L. No. 78-457, 58 Stat. 765 (1944). In the court's view, this statute and its implementing regulations imposed on the government a mandatory duty to dispose of all non-flyable, commercially unsalable aircraft. Slip op. at 18. The government, the court concluded, had abandoned the aircraft under these provisions of law when the aircraft was "stricken" from the inventory of naval aircraft (slip op. at 18-19), and when the government failed to undertake any efforts to locate and salvage the wreckage (slip op. at 15-18). The court stopped short of holding that the plaintiff was entitled

to title of the wreckage under the law of finds. *See* slip op. at 17, 22. It found, however, that in light of the government's failure to undertake any recovery efforts, plaintiff should be allowed to go forward with the salvage operation.

Third, the court concluded that the government had no right to refuse plaintiff's salvage services. The court reasoned that the aircraft is in maritime peril, that the government has no present means of rescuing the aircraft, and that a "prudent man" would accept salvage services in such circumstances. The court explained that: By the late 1800's, however, the right of an owner or Captain to refuse salvage assistance to a vessel in maritime peril was relegated to instances where the vessel was not then in any maritime peril. The Intervenor United States has no adequate measures or funding by which rescue can be provided to the In Rem Defendant (i.e. the aircraft). Therefore, even if the Court were to hold that the United States owns the aircraft, refusal of salvage could not be allowed. The services of a voluntary salvor will be allowed * * * 'if a prudent man would have accepted.'" Slip op. at 17 (citations omitted).

Fourth, the court held that to state a claim for a salvage award on a historic aircraft, the salvor must establish to the court's satisfaction that the salvage recovery will be conducted in such a way as to minimize further damage to the property, and that the salvor has made adequate provisions for the stabilization and preservation of the remains of the historic aircraft after recovery.³

Fifth, the court retained jurisdiction for the purposes of awarding title or determining an appropriate salvage award. Slip op. at 22. The court noted that the United States may intervene at a later time and request the aircraft be awarded to the National Museum of Naval Aviation. It further indicated that it would determine a

³ The court, however, did not make a finding that the salvor's plan for recovery was in fact adequate, nor did it explain why it was entering summary judgment permitting the salvage to go forward despite the government's testimony that the plaintiff's operation was likely to result in the destruction of the aircraft.

salvage award or other compensation at a later time, based on the labor expended, the risks incurred, the salvors skill and other factors traditionally employed in setting a salvage award. Slip. op. at 21.

Finally, the court held that the plaintiff is entitled to recover attorneys fees and costs from the United States. The court did not set any specific compensation but instead directed plaintiff to file an affidavit detailing the legal services expended on the case. Slip op. at 21.

6. The government appealed to this Court and, on August 30, 1999, moved for an injunction pending appeal to preserve the status quo and bar salvage operations until the Court adjudicated the merits. The Court issued an injunction pending appeal on September 3, 1999.

STATEMENT OF THE STANDARD OF REVIEW

The scope of the United States' remaining property interests in the airplane and plaintiff's authority to conduct salvage operations over the objection of the United States present questions of law subject to this Court's *de novo* review.

SUMMARY OF THE ARGUMENT

The United States has a clear and unequivocal right to bar salvage of military property lost at sea when the government determines that the proposed salvage operation will harm its continuing interest in preserving the historic value of the property and expressly directs the would-be salvor to cease and desist. It is undisputed that aircraft at issue here is unique part of the nation's heritage and of great historical interest. The district court, however, has held that the government has no power to protect its interests in the property because it had assertedly abandoned the aircraft, and because a more "prudent" owner would accept plaintiff's salvage services in the circumstances presented here.

Each element of this holding is incorrect. First, the government has not "abandoned" its ownership interests in the aircraft. It is well settled that the United

States, as sovereign, cannot be deemed to abandon property absent evidence of an express, duly authorized action relinquishing all claims of ownership. *United States v. California*, 332 U.S. 19, 39-40 (1947). Nothing in the record reflects any such intent with respect to this aircraft.

The district court purports to find such an act of abandonment in the Navy's decision to "strike" the aircraft from its inventory of aircraft, and in provisions implementing the Surplus Property Act of 1944. The record and case law, however, make clear that "striking" an aircraft from the inventory of Navy aircraft merely denotes the plane's removal from active military service and in no way reflects an intent to abandon all claims of ownership in the property. See *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221-22 (1913) (United States remains the owner of a vessel, notwithstanding the fact that vessel has been "stricken" from the register of active naval vessels).

The court also erred in concluding that the Surplus Property Act of 1944 and its implementing regulations directed abandonment of all crashed, military aircraft. This statutory and regulatory scheme instead affirmatively barred abandonment absent an individualized case-by-case determination that salvage or some other disposition would not be in the government's interests.

No such act of affirmative abandonment was ever undertaken here. The government has never renounced its ownership interests in this aircraft, and it cannot be deemed to have abandoned its right to control disposition of the property merely because it has not yet undertaken salvage efforts of its own.

Second, the court's conclusion that a salvor can force its services on an unwilling owner is unsupported by any recognized principle of admiralty law. The right to refuse salvage is, like other matters concerning the use or disposition of property, a well-established incident of ownership. It cannot be defeated merely because some other party believes the owner is acting imprudently. *The Indian*, 159

001913

F.2d 20, 24-25 (5th Cir. 1908); *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir. 1983).

In any event, the record in this case demonstrates that the government's refusal to allow plaintiff to salvage the aircraft is based, not on some arbitrary exercise of dominion over the property, but on the definite and firm conviction that plaintiff will irreparably harm a unique historical artifact if permitted to go forward. In particular, government experts in the salvage and restoration of historic military aircraft have concluded that plaintiff's salvage plan is likely to break the aircraft into pieces, and that, even if the plane is successfully raised, plaintiff has no viable plan for protecting the aircraft from highly accelerated corrosion upon sudden exposure to the air. For these reasons, the government expressly and repeatedly instructed plaintiff to refrain from salvage operations.

The district court reasoned that these instructions were of no moment because it found that a "reasonable" owner would accept salvage services in the circumstances presented here. But nothing in the case law suggests that a would-be salvor or the reviewing court have authority to substitute their judgment for that of the owner on matters concerning the "prudent" disposition of the owner's property. The precedent instead makes clear that salvage must be barred whenever the owner makes an express and timely refusal of salvage services. The district court erred in failing to vindicate this fundamental power of ownership, and the judgment below should therefore be reversed.

ARGUMENT

I. The Government Has Not Abandoned Its Property Interests In The Aircraft.

Under admiralty law, the mere fact that the owner has left sunken property at sea does not mean that he must be deemed to have relinquished all property interests in the wreckage. Admiralty law instead draws a distinction between property that is subject to the the "law of finds" and property that is subject to the the "law of

salvage." If the owner of the wreckage has "abandoned" the property, in the sense that the owner has relinquished any and all interests in it, the wreckage is deemed to have no owner at all. Thus, upon discovery of the "ownerless" wreckage, a salvor may be entitled to title to the wreckage under the law of finds — a finders, keepers principle. Admiralty, however, as a matter of policy, presumes that property lost at sea is *not* abandoned in this sense by the owner. This presumption may be overcome by either an affirmative action relinquishing all property interests or, at least with respect to private property, circumstances (such as the failure to assert any ownership interest over a long period of time) that give rise to an inference of abandonment. But absent such evidence, the presumption is that the property lost at sea is not "abandoned," that the law of finds does *not* apply, and that rights to the wreckage are instead determined under admiralty's law of salvage. The law of salvage in turn assumes that the property *has* an owner who has not abandoned it, and that the salvor, though entitled to compensation for his efforts in some circumstances, may not act in derogation of the remaining property interests of the owner. *See generally* *Treasure Salvors III*, 640 F.2d at 567; *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, etc.*, 177 F.3d 491 (6th Cir. 1999); *Columbus America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-465 (4th Cir. 1991); *RMS Titanic Inc. v. United States*, 171 F.3d 943, 962-64 (4th Cir. 1999).

The presumption that property lost at sea is not "abandoned" applies with added force to property owned by the sovereign. Well settled doctrine rooted in the property clause of the Constitution⁴ holds that the federal government's interests in property may not be implied but can *only* be relinquished by an express, affirmative

⁴ The property clause, Article IV, Section 3, Clause 2 of the Constitution, states that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice and Claims of the United States, or of any particular State."

renunciation of property rights that is duly authorized by Congress. *United States v. California*, 332 U.S. 19, 39-40 (1947); *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *United States v. Stenmetz*, 973 F.2d 212, 222-23 (3d Cir. 1992). This principle is clearly illustrated by *Hatteras, Inc. v. USS Hatteras, etc.*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd* 698 F.2d 212 (5th Cir. 1983). At issue there were the rights to salvage a U.S. naval vessel that had sunk in 1863. The Navy had made no contemporaneous or subsequent effort to find or raise the wreckage. Private salvors located the wreck site many years later, in 1972. They informed the the Navy of their find and sought permission to recover the vessel and its artifacts. The Secretary of the Navy purported to make a formal declaration of abandonment of the wreckage that would relinquish any and all governmental interests in the property and permit the salvors to go forward. *Id.* at 1096. The court, however, found that even this formal declaration had not been authorized by Congress, and that the government therefore could not be deemed to have abandoned the vessel:

The authority granted to Congress in the property clause is plenary, and subordinate officers of the United States have no power to release or otherwise dispose of federal property, absent an express or implied delegation of Congress' power under the property clause. It is well settled that title property of the United States cannot be divested by negligence, delay, laches, mistake or unauthorized actions by subordinate officials. Thus, a subordinate officer of the government cannot abandon property under his control except as authorized by Congress. In view of this well settled authority, the Court is of the opinion that maritime (or common law) doctrine of abandonment has no application to this case. *Id.* at 1098 (citations omitted).

Thus, as the *USS Hatteras* and other precedent make clear, government property lost at sea cannot be deemed "abandoned" absent clear evidence that the government has expressly and validly renounced its rights.

The district court purports to find such an affirmative renunciation of property rights in: (1) the government's failure to undertake any effort to locate and raise the wreckage (slip op. at 15-16), (2) the Navy's decision to "strike" the aircraft from the inventory of active naval aircraft (slip op. at 15), and (3) implementation of the Surplus Property Act of 1944, Pub L. No. 78-457, 58 Stat. 765 (1944) (slip op. at 18-19). None of these actions, however, demonstrates that the government affirmatively abandoned all its property interests in the aircraft.

First, as we have explained above, the mere fact that an owner leaves sunken property at sea does *not* constitute an abandonment of all rights in the property. Admiralty case law does recognize that when property has been *physically* "abandoned" by the owner, it may be subject to salvage if the owner has not expressly barred salvage services, and if emergent circumstances do not afford the salvor an opportunity to obtain the owner's consent. *See, e.g. The Laura*, 81 U.S. 336 (1871). These cases, however, do not stand for the proposition that the owner is *legally* abandoning the property in the sense of relinquishing all his ownership interests in the property. Nor do they support the proposition that the physical abandonment of the property entitles the salvor to act without regard to the express wishes of the owner.

Second, the Navy's decision to "strike" the aircraft from its active inventory did not relinquish all the government's interests in the property. In the military context, a decision to "strike" vessels or aircraft from active service has never been understood as an abandonment of ownership. *See, e.g. United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221-22 (1913) (United States remains the owner of a vessel, notwithstanding the fact that vessel has been "stricken" from the register of active naval vessels) (construing forerunner to provisions now codified at 10 U.S.C. 7304-7306). Rather, as we advised the district court, "The term 'stricken' refers to the administrative action which removes an aircraft from active service and the related maintenance and reporting requirements for such service, but it does not denote or

imply a final disposition of such aircraft." *See* U.S. Exh. 1 CHECK, Affidavit of William S. Dudley, ¶ 11. Thus, contrary to the holding below, nothing in the decision to remove an aircraft from the inventory of aircraft in active service suggests an intent to abandon all interests in the property. Indeed, the 1944 aircraft circular on which the district court relied required the Navy to commence efforts to *salvage* all crashed or otherwise unflyable aircraft that had been "stricken" from active service — a directive that reflects an on-going interest in the property, and one that is manifestly inconsistent with the notion that striking an aircraft is tantamount to abandonment. *See* Aviation Circular Letter No. 72-44, ¶¶ 2, 4 (1944).²

Third, the Surplus Property Act of 1944 does not reflect a congressional directive to abandon all property interests in crashed and abandoned aircraft. The Surplus Property Act generally provided for the orderly disposition of World War II era, surplus property by: (1) directing government agencies to determine whether property under their control was needed to carry out the agency mission (P.L. 78-457, § 11, 58 Stat. 769), (2) authorizing, in appropriate circumstances, "surplus" property to be transferred to other governmental agencies, donated to charitable organizations, or sold in the marketplace (*id.* §§ 12, 13, 15, 58 Stat. 770-73), and (3) authorizing the pertinent agency to "destroy or otherwise dispose of" property that has no commercial value or whose maintenance costs would be excessive where transfer or donation of the property is not feasible (*Id.* § 13(b), 58 Stat. 771).

The district court reads these provisions and their implementing regulations as mandating the abandonment of crashed aircraft, without any further evaluation or affirmative determination that outright abandonment would be in the interests United States. On its face, that attributes to Congress a surprising intent that makes little sense in the context of the times. The Surplus Property Act was enacted while World

² The Aviation Circular and other pertinent regulations are reprinted in the addendum to this brief.

War II was still in progress. Given the obvious security interests in safeguarding information on the design, armaments, and capabilities of what were then "modern" military aircraft, along with the possibility that some crashed aircraft might still contain the remains of soldiers lost in action, it would be quite odd for Congress or the Surplus Property Board to direct the Navy simply to "abandon" any right to assert ownership over military aircraft without first making an express, case-by-case determination that abandonment would not harm the interests of the United States.

Implementing regulations make clear that such wholesale abandonment of crashed or otherwise unusable military aircraft was never contemplated. As part of the statutory scheme, Congress created a new agency, the Surplus Property Board, that was authorized to administer the statute and vested with broad powers to prescribe implementing regulations. *See* P.L. 78-455, § 9, 58 Stat. 769. The Board issued several regulations dealing with abandoning surplus property. It issued a set of general regulations that permitted abandonment of surplus property *only* in instances where the pertinent agency made written findings that the property had no commercial value or that the costs of maintenance and handling would exceed the proceeds of any sale. Surplus Property Board Regulation § 8319.3-83196. The Board also promulgated additional regulations specifically covering the disposition of aircraft that were no longer suitable for active service. These regulations stated that "[n]on-flyable aircraft determined to be commercially unsalable shall be disposed of as salvage or scrap unless other disposition is directed by the disposal agency * * *." Surplus Property Board Regulation, § 8304.15(a), 11 Fed. Reg. 180 (1946) (emphasis added). The Board's regulations thus contemplated that the abandonment or other disposal of the government's property interests in a non-flyable aircraft would only be effectuated after a "determination" of the aircraft's value and condition and an express, affirmative disposition by the pertinent agency. Consequently, a non-flyable aircraft could only be abandoned under the 1944 statute after a determination that it was commercially

valueless, and that salvage or some other disposition would not be appropriate. No such determination was ever made with respect to the aircraft at issue here. Rather, as the government noted below, "[t]here is no record that the United States of America has ever formally abandoned or relinquished its rights, title, ownership, and interest in the aircraft or its appurtenant equipment." U.S. Exh. 1, Affidavit of William S. Dudley, ¶ 12. ⁶

II. The Government Has A Clear Right To Bar Salvage Of Military Property Lost At Sea.

As a general rule, the law accords heightened protection to the property rights of the federal government. It thus recognizes that the government holds property in trust for all the people, and that it cannot be "deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *United States v. California*, 332 U.S. 19, 40 (1947). Such considerations apply with particular force to military property lost at sea. Control of the property may implicate the government's power to protect military secrets, to preserve the dignity of a soldier's final resting place, or, as in this case, to determine the appropriate disposition of artifacts that are a part of our history and national heritage. For all of these reasons, the government has a compelling interest in maintaining control of military property like that at issue here.

⁶The Surplus Property Act of 1944 was repealed and replaced by the Federal Property and Administrative Services Act of 1949. Act of June 30, 1949, 81st Congress, 1st Session c. 288, 63 Stat. 377 (1949), 40 U.S.C. 421 *et seq.* The district court confined its analysis to governmental actions taken under the 1944 statute and did not determine whether the government might be deemed to have abandoned the aircraft under a subsequent statutory scheme. It bears noting, however, that current property regulations continue to impose similar limitations on disposition of government property and preclude abandonment absent an express, written determination that the property has no commercial value, or that the estimated cost of maintaining the property would not be economical. *See* 41 CFR 101-45.901 (1998).

The court below nonetheless concluded that under admiralty's law of salvage, the government has no authority to bar a private party from salvaging military property if the government has no present ability or budgetary authority to salvage the property itself. In practical effect, the court held that a government agency cannot bar private salvage in the hope that it may later acquire sufficient funds and resources to undertake salvage itself. Nor can the agency stop a salvor from going forward on the basis of a conclusion that the particular salvor's plan of operation is woefully deficient and likely to destroy the remaining value of the property. Rather, in the court's view, if the government fails to "rescue" the property itself, a private party has the right to force its services on the government, to take control of the property over the government's timely, express, and explicit objection, to preclude the government from selecting a different, more competent salvor, and to demand compensation for its unwanted services through a court-imposed salvage award, thereby judicially compelling expenditures that would not otherwise be funded by Congress or voluntarily incurred by the agency.

This extraordinary interference with the sovereign's power to control disposition of its property is utterly unsupported by admiralty's law of salvage. First, it is well established that an owner may refuse salvage of its property for any reason or no reason. *See, e.g. The Indian*, 159 F.2d 20, 24-25 (5th Cir. 1908); *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir. 1983); *see generally* Norris, *The Law of Salvage* in 3A *Benedict on Admiralty*, §§ 114-16 (collecting cases).

Indeed, as one court noted:

If a master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him: he may not be assisted against his will.

New Harbor Protection Co. v. The Chouteau, 5 F.463, 464 (D. La. 1881). Thus,

001921

"potential salvors' do not have an inherent right to save distressed vessels. Their activities must be subject to the owner's acquiescence." *Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988).

Second, the principle that an owner may refuse salvage extends to wrecked vessels and other property lost at sea, even if the property has been lost for many years. In *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel, etc.*, No. 98-281 (E.D. Va. June 25, 1999), *appeal pending*, No. 99- , (4th Cir.), for example, treasure hunters discovered a Spanish frigate that sank off the coast of Virginia in 1802 and sought an *in rem* order awarding them salvage rights in the vessel. Spain learned of the discovery and asked the salvors to leave the wreckage undisturbed. The court held that, despite the passage of nearly two hundred years, Spain had not abandoned its ownership of the vessel, that Spain had expressly communicated its refusal of salvage services, and that the salvors therefore could not go forward over the owner's objection. The court explained that it is the right of the vessel owner to refuse unwanted salvage, and that to permit a salvage award where the salvors are aware of the owner's intent would not be in harmony with the purposes of the salvage law. *Accord Lathrop v. Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 964-64 (M.D. Fla. 1993) (government, as owner of shipwreck embedded in governmental land, may refuse salvage services where salvage operation would interfere with government's management of natural and historic resources); *Jupiter Wreck, Inc. v. Unidentified Sailing Vessel*, 691 F. Supp. 1377, 1388-89 (S.D. Fla. 1988) (same).

Third, the cases on which the district court relied (slip op. at 15-18) do not support the proposition that a salvor may proceed over the owner's express rejection of salvage services. Some of the cases cited by the district court involve instances where the owner's refusal of salvage was not or, in light of emergent circumstances, could

not be effectively communicated to the salvor. See *The Laura, supra*; *Platoro Limited, Inc. v. Unidentified Remains of a Vessel, etc*, 695 F.2d 893 (5th Cir. 1983); *Tidewater Salvage Inc. v. Weyerhauser Co.*, 633 F.2d 1304 (9th Cir. 1980); *Merritt and Chapmen Derrick and Wrecking Co. v. United States*, 274 U.S. 611 (1927). Some hold, not that a salvor can force services on an unwilling owner, but that a salvor who renders services and is then dismissed is entitled to a salvage award to the extent his services are accepted. *The Manchester Brigade v. The United States*, 276 F.2d 410 (E.D. Va. 1921); *Spreckels v. California*, 45 F.647 (N.D. Cal. 1890). And one cited case dealt with the readily distinguishable circumstance of whether the German owner of a vessel subject to requisition by the United States government at the advent of World War II had the authority to "refuse" salvage by attempting to sink his vessel before it could be seized by the government. *Hamburg-American Line v. United States*, 168 F.2d 47 (1st Cir. 1948). None of these case supports the district court's conclusion that owner lacks the power to refuse salvage services. Rather, the case law makes clear that the right to refuse salvage is an incident of ownership and an integral part of the owner's right to control the disposition of his property.

III.. Policy Considerations Weigh Heavily Against Salvage Where The Owner Concludes That Salvage Will Damage His Remaining Interests In The Property And Promptly Instructs The Salvor To Cease And Desist.

Finally, the policy considerations underlying the law of salvage militate strongly in favor of vindicating an owner's right to prevent an unwanted salvor from undertaking actions that, in the owner's judgment, are apt to harm the property. Salvage awards are intended to provide an economic inducement for seaman and others to save lives and property. The theory of the award, however, is that the salvor acts for the benefit of the owner and thus has a duty of care and good faith with respect to the owner's property. *See generally The Sabine*, 101 U.S. 384 (1879); *RMS Titanic*, 171 F.2d at 963-64; Norris, *The Law of Salvage in 3A Benedict on Admiralty*, §§98-99; *cf. The Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 292 F.2d 437 (5th Cir. 1961) (salvor may be liable to owner for distinguishable injury to salvaged property). It follows that where, as in this case, the owner concludes that a salvage operation will *harm* his interests in the property and so informs the salvor, there is no policy justification for permitting the salvor to go forward over the owner's objections.

Here, the government's opposition to plaintiff's salvage venture is rooted in the firm conviction that plaintiff's operation is quite likely to irreparably harm the government's remaining interests in this rare and very fragile aircraft. First, plaintiff's plan for raising the aircraft from the ocean floor is woefully inadequate and quite likely to break the airframe into pieces. At the district court hearing on preliminary relief, the government adduced testimony on this point from Steve Wright, an expert in the deep water recovery of crashed aircraft. *See* Hearing of June 4, 1999, Tr. 26-47. Wright has recovered between 20-25 aircraft from deep water and, among other experience, was project manager of the recently successful effort to recover Gus Grissom's Liberty Bell space capsule from the ocean floor. Tr. 28-30. He testified that he had reviewed plaintiff's salvage plan and found it deficient in several crucial respects. Tr. 28. Specifically, he noted that the plaintiff had not accounted for the

stresses that would be placed on the salvage operation by the weight of the aircraft, the water entrained within the aircraft fuselage, and dynamic changes in the load borne by the proposed lift system. He explained that "positive buoyancy lift system" plaintiff intended to employ is notoriously difficult to control and, for that reason, rarely if ever used for deep water salvage operations. Tr. 32-33. He reviewed the "cradle" plaintiff intended to use in lifting the aircraft and explained that the design failed to account for the substantial possibility that the center of gravity of the aircraft might shift during the operation — a contingency that would twist the airframe against the lifting cables and "probably cut the wings off of the airplane." Tr. 34-35. He concluded that plaintiff's plan had a "very very minimal, perhaps ten percent" likelihood of successfully recovering the aircraft intact. Tr. 39.

Second, even if the plane is raised successfully, plaintiff has made no adequate provision to stabilize and conserve the aircraft once it is exposed to the air. The government, in instructing plaintiff to refrain from salvage operations, specifically noted that the long-term submersion of the aircraft in a highly corrosive saltwater environment would present uniquely difficult problems of conservation if the aircraft were raised to the surface:

[W]ithout a defensible conservation plan, funding, and facility for conserving and restoring this very fragile artifact, the Navy would be derelict in its duties by authorizing its recovery. *What has survived nearly fifty years in a marine environment would rapidly deteriorate in air.* There are very few aircraft conservators to do this work, and almost none experienced with an airframe of this age submerged for such a length of time in a marine environment.

See U.S. Exh. 8, Murphy-Slahor Letter of June 25, 1993 (emphasis added). The government thus concluded that "until the issues of safe recovery, conservation, and curation have been addressed, recovery of this historic aircraft would not be a responsible course of action." *Ibid.* Plaintiff, however, put forward no plan and offered no resources for undertaking any of the specialized conservation measures that

would become necessary once the aircraft is exposed to sunlight and air.

Finally, this is not a case in which salvage should be permitted in order to vindicate a policy of affording would-be salvors an economic inducement to aid owners by finding and rescuing property lost at sea. The owner of long lost property derives no benefit from a salvor who first discovers the whereabouts of the property and then raises it up in a manner that, in the owner's view, is likely to destroy its value. Moreover, this is not a case of emergent circumstances where, if the property is to be rescued, the salvor must act immediately, before consulting with the owner. To the contrary, the plane has survived largely intact for decades and, although it remains exposed to corrosion and other maritime hazards, those perils have never been so imminent as to compel the plaintiff or any other would-be salvor to act without first obtaining the government's consent.

The plaintiff may argue that salvage law should be construed so as to afford compensation for the costs it incurred in conducting initial salvage visits to the wreck and in preparing for further salvage operations.⁷ But plaintiff incurred these costs to further its own pecuniary interests, and despite the government's express, timely, and repeated disapproval of salvage operations. Indeed, in purchasing the wreck location from the original finders, plaintiff's predecessor in interest recognized that the United States might claim ownership (U.S. Exh. 10, Deposition of Douglas Champlin, p. 19) and accordingly agreed to hold the original finders harmless "in respect of any action taken by the U.S. Government * * * which challenges [plaintiff's] claim of title." *Id.*,

⁷ It might also be argued that salvage law should be construed so as to reward treasure hunters who benefit the owner of sunken property by discovering the location of long lost property. Whatever the merits of these policy considerations may be, however, they have no bearing on this case. Plaintiff is *not* the original finder of the aircraft wreckage. Plaintiff instead purchased the salvage rights from the original finders, who, by selling the site location and an undersea video of the wreckage for \$75,000 (see slip op. at 5), did in fact realize a significant economic reward for their discovery.

Exh. C, ¶6. Plaintiff, in short, took a business risk. It made voluntary expenditures in the hope of later gaining the government's approval of salvage services and realizing a return on its investment. The government expressly and repeatedly rejected plaintiff's salvage services after concluding that plaintiff sought to extract too high a price for the aircraft, and that plaintiff was unwilling to take the measures necessary to protect the aircraft's historic value. None of the policies underlying salvage law requires that plaintiff be permitted to act in derogation of the government's express and timely refusal of salvage services merely to compensate plaintiff for private investment risks voluntarily undertaken.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and case should be remanded with instructions to enter an order enjoining plaintiff from salvaging the defendant aircraft.

218 F.3d 1255
2000 A.M.C. 2345, 13 Fla. L. Weekly Fed. C 859
(Cite as: 218 F.3d 1255)

United States Court of Appeals,
Eleventh Circuit.

INTERNATIONAL AIRCRAFT RECOVERY,
L.L.C., a Nevada Limited Liability Company,
Plaintiff-Counter-Defendant-Appellee,

v.

The UNIDENTIFIED, WRECKED AND
ABANDONED AIRCRAFT, her armament, apparel,
and
cargo located within one marine league of a point
located at 25-00043'34" N
Latitude and 80-2'8" W Longitude, Defendant,
United States of America,
Intervenor-Defendant-Counter-Claimant-Appellant.

No. 99-13117.

July 17, 2000.

Salvor filed in rem action seeking salvage rights with respect to Navy torpedo bomber that had crashed in international waters during World War II. United States government intervened. The United States District Court for the Southern District of Florida, No. 98-01637-CV-JLK, James Lawrence King, J., 54 F.Supp.2d 1172, entered summary judgment for salvor, and United States appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) United States, as owner of the aircraft, could prohibit salvage efforts, and salvage company had no right to continue salvage operations over the express objections of the plane's owner, but (2) company could potentially be eligible for salvage award for past efforts, depending on when the United States rejected salvage efforts.

Reversed and remanded.

West Headnotes

[1] Salvage k1
344k1

[1] Shipping k213
354k213

Law of salvage generally governs efforts to save

vessels in distress, but vessel without owner is subject to the law of finds, summed up succinctly as "finders keepers."

[2] Salvage k27
344k27

Under the law of salvage, rescuers take possession of, but not title to, the distressed vessel and its contents, and court then fashions appropriate award for salvors' services.

[3] Salvage k3
344k3

[3] Shipping k213
354k213

Admiralty law presumes that owners do not give up title to ships and cargo in marine peril, even if cargo is swept overboard or a crew has to leave its vessel on the open water, but the law does recognize that owners can "abandon" all interests in their vessels.

[4] United States k58(2)
393k58(2)

Federal government cannot abandon property absent an affirmative act authorized by Congress. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[5] Salvage k3
344k3

[5] United States k58(7)
393k58(7)

United States Navy did not abandon all interests in Navy torpedo bomber, so as to warrant application of the law of finds rather than the law of salvage, when Navy struck the bomber from its inventory of active planes after the bomber crashed in international waters during World War II. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[6] United States k58(7)
393k58(7)

Common law of admiralty did not supercede the Property Clause of the United States Constitution, for purposes of determining whether federal government had lost title to military aircraft via abandonment after aircraft had crashed in international waters. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[7] Salvage k15
344k15

[7] United States k58(7)
393k58(7)

United States, as owner of Navy torpedo bomber that had crashed in international waters during World War II, could prohibit salvage efforts, and salvage company had no right to continue salvage operations over the express objections of the plane's owner, even if rejecting salvage services would not be prudent, even if government had not made alternative plans to recover the aircraft, and even if bomber, which was submerged in a corrosive environment and slowly disintegrating, was in a state of marine peril.

[8] Salvage k1
344k1

Law of salvage is intended to encourage rescue.

[9] Salvage k4
344k4

When ship is in distress and has been deserted by its crew, anyone can attempt salvage without prior assent of the ship's owner or master; in other words, when salvor comes upon a vessel in distress, he can assume the owner would want assistance.

[10] Salvage k4
344k4

Owner of derelict vessel cannot contest salvor's right to attempt a rescue by claiming after the fact that the assistance was unwanted.

[11] Salvage k15
344k15

Though salvor can attempt salvage of vessel in distress without the prior assent of the ship's owner or master, this does not mean that an owner cannot reject salvage assistance in a timely manner.

[12] Salvage k15
344k15

The law of salvage permits the owner of a vessel in marine peril to decline the assistance of others so long as only the owner's property interests are at stake.

[13] Salvage k15
344k15

[13] Salvage k18
344k18

Although salvage company had no right to continue salvage operations with respect to military aircraft that crashed in international waters in 1943, over the express objection of the United States which owned the plane, the company could potentially be eligible for salvage award for past salvage efforts, depending on when the United States rejected salvage efforts, where plane had been in state of marine peril since company's owner learned of its location, company owner's efforts to recover the plane were not based on a legal duty or contractual obligation, and he had taken constructive steps toward the ultimate preservation of the aircraft.

[14] Salvage k8
344k8

Party states valid claim for a salvage award if it renders voluntary assistance that contributes to the rescue of a vessel in marine peril.

*1256 Jeffrey A. Clair, Dept. of Justice, Civil Appellate Div., Washington, DC, for U.S.

David Paul Horan, Horan & Horan, Key West, FL, Anne R. Schultz, Miami, FL, for Plaintiff-Counter-Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, BARKETT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The United States appeals a district court order upholding the right of International Aircraft Recovery ("IAR") to salvage, over the objection of

001929

the federal government, a Navy torpedo bomber that crashed in the Atlantic Ocean during World War II. We hold that the United States, as owner of the plane, can prohibit IAR's salvage efforts; accordingly, we reverse.

I. BACKGROUND AND PROCEDURAL HISTORY

This lawsuit involves a Navy "Devastator" TBD-1 torpedo bomber that crashed off the Florida coast during a training flight in 1943. Built in 1938, the plane flew "neutrality patrol" in the central Atlantic until it was assigned in mid-1941 to the aircraft carrier Yorktown operating in *1257 the Pacific. In 1942, the plane participated in the Battles of Midway and the Coral Sea. During the Battle of the Coral Sea, TBD-1 torpedo bombers sank the Japanese aircraft carrier Shoho and badly damaged the carrier Shokaku. The Yorktown suffered substantial damage itself during the battle, but the carrier was able to recover many of her aircraft, including the subject of this suit.

After overhauling the TBD-1, the Navy used the plane for training in Miami, Florida. During a torpedo attack instruction flight on July 1, 1943, the TBD-1 experienced mechanical difficulties. The pilot and crew parachuted safely from the plane, which crashed in deep international waters approximately eight miles east of Miami Beach.

The Navy did not know exactly where the TBD-1 crashed, and it "struck" the plane from the inventory of active aircraft in September 1943. Since that time, the Navy has taken no steps to locate or salvage the plane.

In 1990, a group searching for Spanish galleons located the TBD-1 and offered to sell the location to the National Museum of Naval Aviation. The museum declined because it did not have a budget for new acquisitions. The discoverers then sold the plane's location to Windward Aviation, a corporation controlled by Douglas Champlin, a private collector of fighter planes. Champlin negotiated to salvage the plane and turn it over to the Museum of Naval Aviation in exchange for other aircraft, but the parties never reached an agreement.

Since purchasing the location of the TBD-1, Champlin has conducted two brief salvage operations. In 1994, salvors filmed the wreck site

and recovered a portion of the torpedo bomber's canopy. In 1998, Champlin made another videotape and recovered the plane's radio mast. Champlin and the companies he controls, including IAR, have invested over \$130,000 in the salvage of the TBD-1.

Worried that other salvors would assert claims to the wreckage, Champlin, as President of Windward Aviation, Inc., filed an *in rem* action in 1994 to secure his exclusive salvage rights. After the federal government expressed its objections to Champlin's salvage efforts, he voluntarily dismissed the lawsuit and turned the canopy over to the National Museum of Naval Aviation.

After more unsuccessful negotiations with the Navy, Champlin filed this second *in rem* action through IAR. The action sought an injunction barring any interference with the plaintiff's exclusive salvage rights, and either a full and liberal salvage award or title to the aircraft under the law of finds. The government intervened and both parties filed motions for summary judgment. The district court, holding that IAR had the right to continue its salvage efforts and that it would be entitled to a salvage award, granted IAR's motion and entered final judgment. The court retained jurisdiction to determine the salvage award later, and granted the United States permission to intervene in those proceedings.

IAR claims it is not interested in keeping the TBD-1 itself, but still believes that the plane belongs on display at the National Museum of Naval Aviation. In its final order, the court intimated that during salvage proceedings it might award the TBD-1 to the museum and calculate appropriate compensation for IAR. Both parties agree that the *in rem* defendant aircraft is of substantial historical value, both because of its participation in the Battles of Midway and the Coral Sea, and because no TBD-1 planes have been preserved for display or study. In fact, the only other known TBD-1 also lies submerged in deep water.

II. DISCUSSION

In its final order, the district court granted IAR permission to proceed with salvage operations over the objection of the United States. The United States argues that it is the owner of the crashed *1258 TBD-1, and that as such, it can reject salvage efforts by third parties.

001930

A. Abandonment

[1][2][3] The law of salvage generally governs efforts to save vessels in distress. Under the law of salvage, rescuers take possession of, but not title to, the distressed vessel and its contents. See *Columbus- America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459 (4th Cir.1992); Martin J. Norris, *The Law of Salvage*, in 3A *Benedict on Admiralty* § 150 (rev. 7th ed.1999). A court then fashions an appropriate award for the salvors' services. A vessel without owner, however, is subject to the law of finds, summed up succinctly as "finders keepers," rather than the law of salvage. See *id.* at 459-60; Norris, *supra*, § 158. Admiralty law presumes that owners do not give up title to ships and cargo in marine peril, even if cargo is swept overboard or a crew has to leave its vessel on the open water. See *Columbus-America*, 974 F.2d at 460 (quoting *Hener v. United States*, 525 F.Supp. 350, 356-57 (S.D.N.Y.1981)); Norris, *supra*, § 150. The law recognizes, however, that owners can "abandon" all interests in their vessels. See *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel*, 177 F.3d 491, 498 (6th Cir.1999); *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir.1978). [FN1]

FN1. Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

IAR argues that the district court made a factual finding, which we would review for clear error, that the Navy had abandoned all interest in the wrecked TBD-1. A careful reading of the court's opinion, however, reveals that it contains no such finding. Although the district court discussed in its opinion whether the United States retained ownership of the TBD-1 or had abandoned the plane, it did not resolve the matter. "[T]he issue of abandonment and ownership are [sic] secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights as to the *In Rem* Defendant aircraft," wrote the court. [FN2] Consistent with this focus on salvage rights rather than title under the law of finds, the court retained jurisdiction and clearly envisioned conducting salvage award proceedings in the future. Had IAR acquired title to the TBD-1 through the law of finds, there would be

no basis for salvage award proceedings because courts do not supervise the efforts of owners to preserve their own property.

FN2. Op. at 17, *in* R1, Tab 32.

[4] Although the court's opinion strongly suggests that the court believed the United States had abandoned the TBD-1, it was correct to avoid such a holding based on the evidence before it. The Constitution gives Congress the power to dispose of all property, real and personal, belonging to the United States. See U.S. Const. art. IV, § 3, cl. 2 ("the Property Clause"). As courts consistently have recognized, the federal government cannot abandon property absent an affirmative act authorized by Congress. See *Royal Indem. Co. v. United States*, 313 U.S. 289, 294, 61 S.Ct. 995, 997, 85 L.Ed. 1361 (1941).

The Government, which holds its interests ... in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable property rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 40, 67 S.Ct. 1658, 1669, 91 L.Ed. 1889 (1947). In the realm of admiralty law, courts have held that the United States *1259 has not abandoned its interests in ships sunk over a century ago during the Civil War. See *United States v. Steinmetz*, 973 F.2d 212, 222-23 (3d Cir.1992); *Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097-1101 (S.D.Tex.1981).

[5] IAR argues that the Navy abandoned all interests in the TBD-1 when it struck the bomber from its inventory of active planes. This argument relies heavily on the response of Dr. William Dudley, the Director of Naval History for the U.S. Navy, to a hypothetical question during his deposition. Asked how an aircraft carrier captain who destroyed excess planes at sea before returning to port at the end of World War II would indicate the "final disposition of those aircraft" to a new captain taking over command of the carrier, Dr. Dudley speculated that "[i]f there is an inventory, I would expect to see some kind of an inventory," and that "[t]he term usually used [on such an inventory] is stricken." [FN3]

001931

FN3. Dudley Dep. at 61, *in* R1, Tab 28, Ex. A.

Dr. Dudley qualified his answer as conjectural, and expressed the need to research the question. [FN4] Moreover, Dr. Dudley's answer does not address how the Navy would officially divest itself of all property interests in those destroyed planes. Later during the deposition, Dr. Dudley clarified that the Navy could abandon title to an aircraft only by asking Congress to pass specific legislation. [FN5] In an earlier affidavit, Dr. Dudley testified that "[t]he term 'stricken' refers to the administrative action which removes an aircraft from active service and the related maintenance and reporting requirements for such service, but it does not denote or imply a final disposition of such aircraft." [FN6] This interpretation is consistent with a Navy circular distributed in 1944 recommending the "striking" of all aircraft that had crashed or were heavily damaged, *to be followed by salvage operations*. [FN7] IAR did not cite, and we could not find, any statute in effect in 1943 authorizing the Navy to abandon planes by simply "striking" them from the inventory of active aircraft.

FN4. *See id.* at 60.

FN5. *See id.* at 71.

FN6. Dudley Aff. at para. 11, *in* R1, Tab 20, Ex. 1.

FN7. *See* J.S. McCain, Deputy Chief of Naval Operations, Aviation Circular Letter No. 72-44, Aircraft--Striking and Disposition Of, at para. 2 (July 24, 1944), *in* R1, Tab 28, Ex. B. The analogous case of *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.*, 277 F.2d 308 (9th Cir.1960), also is consistent with this interpretation. In *Kern*, the Ninth Circuit concluded that the Army did not abandon a helicopter that had crashed in Guatemala by "dropping [it] from accountability records." *Id.* at 312-13.

The district court suggested that the Navy may have abandoned the TBD-1 pursuant to the Surplus Property Act of 1944, which directed that "[s]urplus property shall be disposed of." Pub.L. No. 78-457, § 4, 58 Stat. 765, 768 (1945). Far from a rigid decree, however, the Act mandated only that the disposal of surplus property occur "to such extent, at such times,

in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act." *Id.* The Act did not mention the abandonment of property; its focus instead was on the *sale* of surplus of World War II materiel, including salvage and scrap. *See id.* §§ 2 & 15, 58 Stat. at 766, 772-73. [FN8]

FN8. The Act also permitted the donation of surplus supplies in certain circumstances. *See* Pub.L. No. 78-457 § 13(b), 58 Stat. at 768, 771.

The Act established a Surplus Property Board to regulate and facilitate the disposal of excess military supplies, *see id.* at § 5, 58 Stat. at 768, and subsequent legislation renamed the Board as the Surplus Property Administration, *see* Pub.L. No. 79-181, 59 Stat. 533, 533 (1945). It was the Surplus Property Administration that first adopted regulations permitting agencies to abandon war materiel. *See* Surplus Property Administration Regulation *1260 § 8319, 10 Fed.Reg. 14966 (1945). [FN9] Even in the most permissive scenario, according to these regulations, agencies could only abandon property after an affirmative finding made by a "responsible officer, approved by a reviewing authority," and reduced to writing. *See id.* § 8319.7, 10 Fed.Reg. at 14967. [FN10] The Navy neither made such findings nor compiled the written report required to abandon property pursuant to the Surplus Property Administration's regulations. [FN11]

FN9. *See also* Surplus Property Administration Regulation § 8304.13, 11 Fed.Reg. 180 (1946) (dictating that the "abandonment of surplus aeronautical property shall be governed by the provisions of Part 8319").

FN10. Typically, the process for abandoning property was more onerous, requiring not only written factual findings about the property's value or the cost of maintenance and handling, but also publication of a notice for thirty days offering to sell or donate the property. *See id.* § 8319.3 & 8319.6, 10 Fed.Reg. at 14967.

FN11. IAR points out that these regulations

001932

only apply to property in "the continental United States, its territories and possessions." Surplus Property Administration Regulations §§ 8304.2 & 8319.2. Even assuming that these regulations would not cover an airplane that was based in the continental United States but that crashed in international waters, however, does not lead to the conclusion that the United States has abandoned the *in rem* defendant TBD-1. As explained in the text, the primary method for disposing of surplus property under the 1944 Act was by sale. This holds true for aircraft beyond the United States' territorial limits. See Surplus War Property Administration Regulation § 4, 9 Fed.Reg. 11727 (1944) (establishing a pricing policy for surplus aircraft both within the United States and abroad). Before Regulation § 8304, the Surplus Property Board or Administration apparently had to consider requests to dispose of surplus property in an extraordinary manner (such as by abandonment) on a case-by-case basis. See, e.g., Surplus Property Board Special Order 18, 10 Fed.Reg. 11039 (1945) (permitting the abandonment of surplus submarine and torpedo netting by the Navy). There is no indication in the record that the Surplus Property Board or Administration granted permission to abandon crashed Navy planes.

[6] As an alternative argument, IAR claims that the Property Clause does not apply in the admiralty context and that we instead should apply the common law test for abandonment to determine whether the federal government has lost title to the TBD-1. In support of its position, IAR cites the Supreme Court's statement in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508, 118 S.Ct. 1464, 1473, 140 L.Ed.2d 626 (1998), that "the meaning of 'abandoned' under the [Abandoned Shipwreck Act] conforms with its meaning under admiralty law." *Deep Sea Research* is inapposite, however, for we have no cause to interpret the Abandoned Shipwreck Act in this case. [FN12] Furthermore, *Deep Sea Research* involved a privately-owned steamship with privately-insured cargo. See *id.* at 495, 118 S.Ct. at 1467. IAR cites no other cases for the proposition that the common law of admiralty supercedes the Constitution, and we do not find the argument convincing.

FN12. The Abandoned Shipwreck Act asserts title to abandoned shipwrecks "embedded in submerged lands of a State" on behalf of the federal government, and then transfers that title "to the State in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105 (2000). Neither party has argued that the Act applies in this case, perhaps because the *in rem* defendant is not a shipwreck and is not "embedded in the submerged lands of a State."

B. Salvage

[7] In ruling that the United States could not prevent IAR's efforts to raise the *in rem* defendant TBD-1, the district court concluded that the law of salvage gives salvors the absolute right to aid any vessel that is in a state of marine peril if a prudent owner would have accepted the assistance. No one disputes that the TBD-1 torpedo bomber, submerged in a corrosive environment and slowly disintegrating, is in a state of marine peril. [FN13] The *1261 district court, however, under-appreciated the authority of a vessel's owner to prevent others from interfering with its property.

FN13. Nor do the parties dispute that the law of salvage can apply to submerged airplanes. Although the archetypical case of salvage may involve a damaged ship in danger of sinking, "[i]t is settled that all manner of objects other than vessels and their cargo are subject to salvage." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-2 (2d ed.1994). Raising sunken craft and property is a recognized salvage service, see Norris, *supra*, § 31, and courts have allowed salvage claims for long-submerged wrecks, see, e.g., *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 695 F.2d 893, 901-02 (5th Cir.1983).

[8][9][10] The law of salvage is intended to encourage rescue, see *Columbus-America*, 974 F.2d at 460 (quoting *Hener*, 525 F.Supp. at 356), and often aid must be administered quickly when ships are in peril. Therefore, when a ship is in distress and has been deserted by its crew, anyone can attempt salvage without the prior assent of the ship's owner

001933

or master. See *The Laura*, 81 U.S. (14 Wall.) 336, 344-45, 20 L.Ed. 813 (1871); *The Bark Island City*, 66 U.S. (1 Black) 121, 128, 17 L.Ed. 70 (1861); Norris, *supra*, § 136. Put another way, when a salvor comes upon a vessel in distress, he can assume the owner would want assistance. The owner of the derelict vessel cannot contest the salvor's right to attempt a rescue by claiming after the fact that the assistance was unwanted. See, e.g., *The Laura*, 81 U.S. (14 Wall.) at 344-45.

[11] This rule of law, however, does not mean that an owner cannot reject salvage assistance in a timely manner. It is useful to quote the full passage in the Supreme Court opinion cited by the district court for its "prudent owner" proposition: "While salvage cannot be exacted for assistance forced upon a ship, her request for or express acceptance of the service is not always essential to the validity of the claim. It is enough if, under the circumstances, any prudent man would have accepted." *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613, 47 S.Ct. 663, 664, 71 L.Ed. 1232 (1927) (citation omitted).

In support of its order, the district court cited one relatively recent opinion in which the Ninth Circuit suggested that an owner could only reject salvage services if doing so were prudent. See *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304, 1307 (9th Cir.1980) ("An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any time before the act of salvage."). The court authorized a salvage award, however, because it determined that the Weyerhaeuser lumber company had not rejected effectively the assistance of the salvors. [FN14] The caveat in *Tidewater Salvage* about the "prudent owner" is therefore dicta, and it appears never to have been put to the test; we could find no decision based on the prudence of rejecting salvage services.

FN14. The salvors in *Tidewater Salvage* retrieved logs in Coos Bay that had drifted away from lumber mills. The court determined that Weyerhaeuser's blanket policy rejecting such assistance did not put the salvors on notice to ignore particular logs, because the salvors could not determine a log's owner until they had already recovered the drifting lumber. See 633 F.2d at 1307.

A related basis for the district court's holding was

the theory that owners can only reject salvage services if they have made alternative plans to recover their vessels. The court cited *Spreckels v. The State of California*, 45 F. 647, 649 (N.D.Cal.1890), which reads, "where the owners of a vessel in peril have taken all measures in their judgment necessary to insure her safety, and those measures are adequate, and all that prudence requires, other parties have no right to obtrude their services." The *Spreckels* court later stated that "[t]he owner of a vessel disabled or in distress does not thereby lose the control of his property. He has the right to refuse or accept any offers of assistance that may be made, or to adopt his own measures for the preservation of his vessel." *Id.* at 650 (emphasis added). The equivocation is understandable, for both of the statements quoted above are dicta, unconnected to the resolution of the case. The *Spreckels* court, like the Ninth Circuit in *Tidewater Salvage*, granted a *1262 salvage award because the owner of the distressed vessel had not rejected the salvors' services. [FN15] See *id.* at 651.

FN15. The court cited two other cases, but neither supports either the proposition that owners can reject aid only if it would be "prudent" or the notion that owners can reject aid only if they have made arrangements to save their vessels on their own. *Manchester Brigade v. United States*, 276 F. 410, 413 (E.D.Va.1921) simply holds that a salvage award is available when a vessel calls for and accepts assistance, but dismisses the responding vessel before its mission is accomplished. In *Hamburg-American Line v. United States*, 168 F.2d 47, 56 (1st Cir.1948), the First Circuit held that the Navy was entitled to a salvage award for saving a German freighter scuttled and abandoned by its crew. The First Circuit concluded that the freighter's master had never rejected the offer of salvage assistance. The court also considered the "dictates of equity": the ship's owner could not claim both that it wanted the freighter to sink and that the ship should be returned to its possession. *Id.* at 55-56.

[12] We reject the district court's reasoning and instead interpret the law of salvage to permit the owner of a vessel in marine peril to decline the assistance of others so long as only the owner's

001934

property interests are at stake. This view is consistent with the Supreme Court's statement in *Merritt & Chapman* that "salvage cannot be exacted for assistance forced upon a ship." 274 U.S. at 613, 47 S.Ct. at 664.

Other cases strongly support this interpretation of salvage law as well. In an oft-cited case, a district court in Louisiana stated the rule in forceful language: "If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him: he should not be assisted against his will." *New Harbor Protection Co. v. Steamer Charles P. Chouteau*, 5 F. 463, 464 (D.La.1881); accord *The Indian*, 159 F. 20, 25 (5th Cir.1908) ("Under nearly all supposable circumstances when the master is in command and control of his own ship he may refuse and reject salvage services, and no volunteer salvor can force on him, and be rewarded for, services which he forbids."); cf. *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 672 (5th Cir.1974) ("So long as the services ... are not rejected by those in authority a bystander or interloper is eligible for [a] salvage award in proportion to the value of his contributory efforts."). [FN16] We have no occasion in this case to consider whether an owner could refuse salvage assistance if anything other than its own property interests were at stake. [FN17] Cf. *Ramsey v. The Pohatcong*, 77 F. 996, 997 (S.D.N.Y.1896) (holding that a tug boat was "bound to respect the master's decision [refusing salvage assistance], and had no legal right to impose [its] services upon him," at least as long as the refusal did not injure, among other things, the property interests of others).

FN16. The authors of admiralty treatises agree that owners can reject salvage assistance. According to Martin J. Norris, "Salvage services should not be thrust upon the unwilling.... It is the privilege of the master to accept proffered salvage services or not, so long as the vessel in distress is then in a position where nothing but ordinary property interests are involved." Norris, *supra*, § 114 (footnote omitted). Another treatise expresses the same view: "Salvage cannot be forced upon an owner or his agent in possession of the vessel; a salvor who acts without the express or implied consent of the owner is a 'gratuitous intermeddler,' who is not entitled to any

salvage award." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 16-1 (2d ed.1994). Addressing the more specific issue of historic wrecks, the treatise author reasons that "[o]nly in a rare case where the governmental owner gives express or implied consent to salvage, should an award be given because the government has full power to reject or prohibit the services." *Id.* at § 16-7 (footnote omitted).

FN17. IAR suggests that as a matter of policy, we should permit the salvage of the TBD-1 because its condition is deteriorating and time for recovering the plane is running short. We have no occasion to consider this policy argument, however, because it does not implicate any rights or legally cognizable interests—beyond that of the United States in its own property—that could affect our interpretation of the law of salvage.

*1263 In the context of salvage claims pertaining to historic wrecks, numerous courts have held that title holders can prevent salvors from raising long submerged vessels. The Fifth Circuit noted that "[a] salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel," but held that the titleholder to an historic ship submerged off its shores had not rejected the plaintiff's salvage services. See *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 695 F.2d 893, 901-02 (5th Cir.1983). A Virginia district court held that a plaintiff could not continue salvage operations on an 1802 Spanish shipwreck without the permission of Spain, which retained title to the submerged vessel. See *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F.Supp.2d 678, 692 (E.D.Va.1999); see also *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F.Supp. 953, 964 (M.D.Fla.1993); *Jupiter Wreck, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F.Supp. 1377, 1389 (S.D.Fla.1988) ("[P]otential salvors' do not have any inherent right to save distressed vessels. Their activities must be subject to the owner's acquiescence."). Finally, this circuit considered the case of an eighteenth century ship sunk in the waters of Biscayne National Park and, after holding that the plaintiff was not entitled to a salvage award because the vessel was not in marine peril, noted that "the

owner of the property [the United States] may not even have desired for the property to be 'rescued.' " See *Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir.1985).

[13][14] Based on this review of the law of salvage, we conclude that IAR has no right to continue salvage operations over the express objections of the TBD-1's owner. On the other hand, IAR may be eligible for a salvage award for Champlin's past efforts. A party states a valid claim for a salvage award if it renders voluntary assistance that contributes to the rescue of a vessel in marine peril. See *id.* at 1515 (describing elements of a salvage award claim); Norris, *supra*, § 2. Champlin's past endeavors appear to satisfy these general criteria; the TBD-1 has been in a state of marine peril since he learned of its location, Champlin's efforts to recover the plane have not been based on a legal duty or contractual obligation, and Champlin has taken constructive steps toward the ultimate preservation of the aircraft.

Whether IAR is eligible for a salvage award for Champlin's efforts obtaining the location of the submerged TBD-1, videotaping the wreck, and returning the plane's canopy and radio mast to dry land depends on when the United States rejected the salvage efforts of Champlin and his companies. The record contains evidence of objections by the United States to Champlin's efforts stretching back to at least 1993. [FN18] Furthermore, some courts have entertained the possibility that laws regulating the use of public property could provide a "constructive rejection" of salvage of publicly owned vessels. See *Lathrop*, 817 F.Supp. at 964; *cf. Platoro*, 695 F.2d at 902. On the other hand, IAR maintains that Champlin negotiated with the Navy

about trading the TBD-1 torpedo bomber for vintage aircraft already in the government's possession, and some evidence in the record might indicate that the Navy at times acquiesced to Champlin's salvage efforts. [FN19] We remand for the district court to consider when the United *1264 States effectively rejected the salvage efforts of IAR and its predecessors-in-interest, and to calculate a salvage award, if appropriate, for their past efforts.

FN18. See Letter from W.S. Dudley, Director of Naval History, United States Navy, to Douglas L. Champlin, President, Historic Aircraft Recovery, Inc. (Nov. 17, 1998), *in R1*, Tab 12, Ex. 6; Letter from Damon Miller, Trial Attorney, Department of Justice, to David Paul Horan (Feb. 9, 1995), *in R1*, Tab 12, Ex. 8; Letter from J. Bernard Murphy, Federal Preservation Officer, United States Navy, to Milan G.W. Slahor (June 25, 1993), *in R1*, Tab 12, Ex. 7.

FN19. See Facsimile from Douglas L. Champlin to Capt. R.L. Rasmussen, Director, National Museum of Naval Aviation (July 26, 1995), *in R1*, Tab 18, Ex. G.

III. CONCLUSION.

We REVERSE the district court order permitting IAR to continue salvage operations on the *in rem* defendant aircraft, the TBD-1, and we REMAND for further proceedings consistent with this decision.

END OF DOCUMENT