

221 F.3d 634
2000 A.M.C. 2113
(Cite as: 221 F.3d 634)

United States Court of Appeals,
Fourth Circuit.

SEA HUNT, INCORPORATED, Plaintiff-Appellee,
and
Commonwealth of Virginia, Intervenor-Appellee,
v.
THE UNIDENTIFIED SHIPWRECKED VESSEL
OR VESSELS, Their Apparel, Tackle,
Appurtenances, and Cargo Located within
Coordinates 38 Degrees 01' 36" North
Latitude, 75 Degrees 14' 33" West Longitude; 37
Degrees 57' 21" North
Latitude, 75 Degrees 13' 00" West Longitude; 38
Degrees 01' 36" North
Latitude, 75 Degrees 13' 14" West Longitude; 37
Degrees 57' 33" North
Latitude, 75 Degrees 17' 44" West Longitude and/or
37 Degrees 55' 00" North
Latitude, 75 Degrees 19' 18" West Longitude; 37
Degrees 54' 09" North
Latitude, 75 Degrees 17' 00" West Longitude; 37
Degrees 51' 21" North
Latitude, 75 Degrees 18' 52" West Longitude; 37
Degrees 52' 20" North
Latitude, 75 Degrees 21' 05" West Longitude, in
rem, Defendant,
Kingdom of Spain, Claimant-Appellant,
and
Commonwealth of Virginia, ex rel William A.
Pruitt, Commissioner of Marine
Resources and Chairman of the Virginia Marine
Resources Commission; Alpha
Quest Corporation; Richard L. Cook, an individual
resident of Ocean City,
Maryland, Claimants,
and
United States of America; Columbus-America
Discovery Group; Salvors,
Incorporated; Cobb Coin Company, Incorporated;
Intersal, Incorporated;
Enterprise Marine, Incorporated; Quicksilver,
Incorporated; Deep Sea
Research, Incorporated; State of North Carolina,
Amici Curiae.
Sea Hunt, Incorporated, Plaintiff-Appellant,
and
Commonwealth of Virginia, Intervenor-Plaintiff,

v.

The Unidentified Shipwrecked Vessel or Vessels,
Their Apparel, Tackle,
Appurtenances, and Cargo Located Within
Coordinates 38 Degrees 01' 36" North
Latitude, 75 Degrees 14' 33" West Longitude; 37
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Latitude, 75 Degrees 17' 44" West Longitude and/or
37 Degrees 55' 00" North
Latitude, 75 Degrees 19' 18" West Longitude; 37
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Incorporated; Cobb Coin Company, Incorporated;
Intersal, Incorporated;
Enterprise Marine, Incorporated; Quicksilver,
Incorporated; Deep Sea
Research, Incorporated; State of North Carolina,
Amici Curiae.

Nos. 99-2035, 99-2036.

Argued May 1, 2000
Decided July 21, 2000

Maritime salvage corporation brought in rem action
against two Spanish ships that had been wrecked off
the coast of Virginia in 1750 and 1802. State of

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Virginia, which had asserted ownership over the shipwrecks pursuant to Abandoned Shipwreck Act (ASA) and had issued salvage permits to corporation, intervened. Spain filed claim asserting ownership over shipwrecks. The United States District Court for the Eastern District of Virginia, J. Calvitt Clarke, Jr., Senior District Judge, 47 F.Supp.2d 678, found that Spain had expressly abandoned 1750 shipwreck but retained title to 1802 shipwreck. The District Court subsequently denied corporation salvage award with respect to 1802 shipwreck. Spain and corporation appealed. The Court of Appeals, Wilkinson, Chief Judge, held that: (1) Spain was required to expressly, rather than impliedly, abandon shipwrecks in order for Virginia to acquire title to them under ASA, and (2) Spain did not expressly abandon 1750 shipwreck when it entered into 1763 Definitive Treaty of Peace between France, Great Britain and Spain.

Affirmed in part and reversed in part.

West Headnotes

[1] Shipping k213
354k213

Kingdom of Spain was required to expressly, rather than impliedly, abandon its ships wrecked off coast of Virginia in order for State of Virginia to acquire title to them under Abandoned Shipwreck Act (ASA), since Spain had asserted ownership claim to the shipwrecks, and since implied abandonment standard would abrogate United States' obligations to Spain under 1902 Treaty of Friendship and General Relations. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101-2106; Treaty of Friendship and General Relations between the United States of America and Spain, Art. I et seq., 33 Stat. 2105.

[2] Admiralty k2
16k2

The common law of admiralty must be developed consonant with federal statutes.

[3] Shipping k213
354k213

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts.

[4] Shipping k213
354k213

Should an owner of a shipwreck appear in court and there be no evidence of an express abandonment, title to the shipwreck remains with the owner; this principle reflects the long standing admiralty rule that when articles are lost at sea the title of the owner in them remains.

[5] Abandoned and Lost Property k4
1k4

In admiralty law, when a previous owner claims long lost property that was involuntarily taken from his or her control, the law is hesitant to find an abandonment; an inference of abandonment is permitted, but only when no owner appears.

[6] Shipping k213
354k213

[6] Treaties k8
385k8

The 1902 Treaty of Friendship and General Relations between the United States and Spain requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States. Treaty of Friendship and General Relations between the United States of America and Spain, Art. I et seq., 33 Stat. 2105.

[7] Shipping k213
354k213

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

United States vessels may only be abandoned by an express, unambiguous, and affirmative act.

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

Constitutional provision conferring on Congress the power to make rules and regulations respecting the territory or other property belonging to the United States precludes a finding of implied abandonment of federal lands and property; dispositions of federal property require some congressional action. U.S.C.A. Const. Art. 4, § 3, cl. 2.

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

The government of the United States holds its interests in its property in trust for all the people, and thus cannot relinquish its property without express acts.

[10] Shipping k213
354k213

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

One of the immunities granted to United States vessels by the Abandoned Shipwreck Act (ASA) is that they will not be considered abandoned without a clear and affirmative act by the government. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101-2106.

[11] Shipping k213
354k213

[11] Treaties k8
385k8

Under the 1902 Treaty of Friendship and General Relations between the United States and Spain, Spanish vessels in territorial waters of the United States can be abandoned only by express renunciation. Treaty of Friendship and General Relations between the United States of America and Spain, Art. I et seq., 33 Stat. 2105.

[12] Treaties k7
385k7

When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, the Court of Appeals must, absent extraordinarily strong contrary evidence, defer to that interpretation.

[13] Constitutional Law k68(1)
92k68(1)

Constitution charges the political branches with the conduct of foreign affairs.

[14] Shipping k213
354k213

[14] Treaties k13

385k13

Kingdom of Spain did not expressly abandon ship wrecked off coast of Virginia in 1802 when it entered into 1819 Treaty of Amity, Settlement and Limits, and, thus, State of Virginia did not acquire title to the shipwreck under Abandoned Shipwreck Act (ASA); nothing in treaty article transferring territory from Spain to United States implied that Spain ceded anything other than territory and structures erected on that territory. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101-2106.

[15] Shipping k213
354k213

[15] Treaties k13
385k13

Kingdom of Spain did not expressly abandon ship wrecked off coast of Virginia in 1750 when it entered into 1763 Definitive Treaty of Peace between France, Great Britain and Spain, in which Spain transferred most of its New World territories to Great Britain, and, thus, State of Virginia did not acquire title to shipwreck under Abandoned Shipwreck Act (ASA); Treaty did not mention vessels or shipwrecks, Spain and Great Britain agreed that Spain did not abandon shipwreck, and finding of abandonment would impair respect accorded by international law to Spain's claim of ownership of its shipwrecks and military grave sites they contained. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101-2106.

[16] Shipping k213
354k213

A state seeking to prove ownership of a shipwreck pursuant to the Abandoned Shipwreck Act (ASA) under the express abandonment standard must demonstrate express abandonment by clear and convincing evidence; this is a high burden and an exacting standard. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101-2106.

[17] Shipping k213
354k213

"Express," for purposes of the express abandonment standard for determining whether a shipwreck has been abandoned within the meaning of the Abandoned Shipwreck Act (ASA), is defined as

firmly and explicitly stated; particular, specific. Abandoned Shipwreck Act of 1987, §§ 2-7, 43 U.S.C.A. §§ 2101- 2106.

[18] Treaties k8
385k8

In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole.

[19] Treaties k7
385k7

Postratification understandings of the contracting parties are traditionally considered as aids to treaty interpretation.

[20] Shipping k213
354k213

The mere passage of time since a shipwreck is not enough to constitute abandonment.

[21] Salvage k15
344k15

[21] Shipping k213
354k213

Courts cannot turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner; the vessel owner has the right to refuse unwanted salvage.

*638 ARGUED: James Alexander Goold, Covington & Burling, Washington, D.C., for Appellant. Richard Alan Olderman, Civil Division, United States Department of Justice, Washington, D.C., for Amicus Curiae United States. William Henry Hurd, Office of the Attorney General of Virginia, Richmond, Virginia; David Jeremy Bederman, Atlanta, Georgia, for Appellees. ON BRIEF: Robert A. Long, Jr., Kevin C. Newsom, William C. Muffett, Covington & Burling, Washington, D.C., for Appellant. David W. Ogden, Acting Assistant Attorney General, Helen F. Fahey, United States Attorney, Robert S. Greenspan, Barbara A. O'Malley, Civil Division, United States Department of Justice, Washington, D.C., for Amicus Curiae United States. Anthony Francis Troy,

David K. Sutelan, Mays & Valentine, Richmond, Virginia; Peter E. Hess, Wilmington, Delaware, for Appellee Sea Hunt. Richard T. Robol, Columbus, Ohio, for Amicus Curiae Columbus-America. Patrick M. Brogan, Davey & Brogan, P.C., Norfolk, Virginia, for Amici Curiae Salvors, et al. Michael F. Easley, North Carolina Attorney General, Ronald M. Marquette, Special Deputy Attorney General, Charles J. Murray, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Amicus Curiae North Carolina.

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge LUTTIG and Judge MICHAEL joined.

OPINION

WILKINSON, Chief Judge:

This *in rem* admiralty action concerns the sovereign rights of the Kingdom of Spain to two of its Royal Naval vessels, LA GALGA and JUNO, which were lost off the shores of present-day Virginia in 1750 and 1802 respectively. Pursuant to the Abandoned Shipwreck Act of 1987(ASA), 43 U.S.C. § 2101-06 (1994), Virginia has asserted ownership over the shipwrecks and has issued Sea Hunt permits to conduct salvage operations and recover artifacts from the wrecks. These efforts resulted in the discovery of two wrecks believed to be LA GALGA and JUNO. Sea Hunt filed an *in rem* admiralty complaint, and the district court ordered an arrest of the shipwrecks, appointing Sea Hunt the exclusive salvor. Spain filed a verified claim asserting ownership over the shipwrecks. The district court found that Spain retained title to JUNO, but had expressly abandoned LA GALGA in the 1763 Definitive Treaty of Peace. See *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F.Supp.2d 678 (E.D.Va.1999). The district court also denied Sea Hunt a salvage award.

As sovereign vessels of Spain, LA GALGA and JUNO are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The reciprocal immunities established by this treaty are essential to protecting United States shipwrecks and military gravesites. Under the terms of this treaty, Spanish vessels, like those

belonging to the United States, may only be abandoned by express acts. Sea Hunt cannot show by clear and convincing evidence that the Kingdom of Spain has expressly abandoned these ships in either the 1763 Treaty or the 1819 Treaty of Amity, Settlement and Limits, which ended the War of 1812. We therefore reverse the judgment of the district court with regard to LA GALGA, and affirm the judgment of the district court concerning JUNO and the denial of a salvage award.

I.

LA GALGA ("The Greyhound") was a fifty-gun frigate commissioned into the Spanish Navy in 1732. LA GALGA left Havana on its last voyage on August 18, *639 1750, in order to escort a convoy of merchant ships to Spain. It carried the Second Company of the Sixth Battalion of Spanish Marines, Spanish Royal property, and English military prisoners. On August 25, 1750, the convoy encountered a hurricane near Bermuda that scattered the ships and forced them westward toward the American coast. LA GALGA eventually sank off the coast of the Maryland/Virginia border. Most of the crew and passengers reached land safely. When Captain Daniel Houny attempted to salvage items from the wreck, he found that local residents had already begun looting the vessel. He secured the assistance of Governor Ogle of Maryland, but any further salvage efforts ended when a second storm came and broke up what was left of the ship. LA GALGA remained undisturbed until the recent salvage efforts by Sea Hunt.

The JUNO, a thirty-four gun frigate, entered the service of the Spanish Navy in 1790. On January 15, 1802, JUNO set sail from Veracruz bound for Spain. On board JUNO were the soldiers of the Third Battalion of the Regiment of Africa, their families, and various civilian officials. The JUNO was beset by a ferocious storm and began taking on water. It encountered the American schooner LA FAVORITA. The two ships sailed together trying to reach an American port before JUNO succumbed to her leaks. As JUNO continued to take on water, the Captain ordered his passengers and crew to begin transferring to LA FAVORITA. But only seven persons were able to transfer before the storm picked up and JUNO was lost in a heavy fog. LA FAVORITA could come close enough only to hear the anguished cries for help as JUNO went under. At least 413 sailors, soldiers, and civilians perished

in the sinking of JUNO. Spanish authorities ordered an investigation into the sinking, but the location of the wreck was not discovered until Sea Hunt's recent efforts.

The Commonwealth of Virginia has asserted ownership over LA GALGA and JUNO pursuant to the Abandoned Shipwreck Act of 1987(ASA), 43 U.S.C. §§ 2101- 06 (1994). The ASA gives states title to shipwrecks that are abandoned and are embedded in the submerged lands of a state. *See id.* § 2105(a) & (c). Sea Hunt is a maritime salvage company based in the Eastern Shore of Virginia. The Virginia Marine Resources Commission granted Sea Hunt permits to explore for shipwrecks off the Virginia coast and conduct salvage operations. Sea Hunt began to explore for shipwrecks within its permit areas and has spent about a million dollars in conducting remote sensing, survey, diving, and identification operations. Sea Hunt claims that its efforts have resulted in finding the remains of LA GALGA and JUNO.

To avoid interference with its operations, Sea Hunt initiated an *in rem* admiralty action against the two wrecks on March 11, 1998. Sea Hunt sought a declaratory judgment that the shipwrecked vessels "have never been subject to the sovereign prerogative of the Kingdom of Spain and [are] subject to admiralty's laws of abandonment and the law of finds," that "the Commonwealth of Virginia be adjudged the true, sole and exclusive owner of the Shipwrecked Vessel(s)," and that any items salvaged therefrom by Sea Hunt be distributed pursuant to the permits issued by Virginia. In the alternative, Sea Hunt sought a liberal salvage award for its efforts. On March 12, 1998, the district court issued an order directing the arrest of the shipwrecked vessels and granting Sea Hunt exclusive rights of salvage until further notice. The court also directed Sea Hunt to send specific notice of the action to both the United States and to Spain.

In response, the United States moved to intervene and filed a verified claim on behalf of Spain. The district court found that the United States lacked authority to appear on behalf of Spain and granted Spain 90 days to refile a verified claim. *See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 22 F.Supp.2d *640 521, 526 (E.D.Va.1998). Spain's verified claim stated that the Kingdom of Spain "was and still is the true and bona fide owner of the vessels JUNO and LA GALGA ... and that

title and ownership interest in said vessels has never been abandoned or relinquished or transferred by the Kingdom of Spain." Spain put forth affidavits and exhibits showing that at the time of their sinking both ships were serving as vessels of the Royal Navy, that both vessels are currently on the register of the Spanish Navy, and that transfer or abandonment of the vessels would require formal authorization by the government of Spain.

On April 27, 1999, the district court found that the express abandonment standard applied to these shipwrecks and that Spain had abandoned its claim to LA GALGA under Article XX of the 1763 Definitive Treaty of Peace between France, Great Britain and Spain. *See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F.Supp.2d 678, 690 (E.D.Va.1999). It further found that Spain did not expressly abandon JUNO in the 1819 Treaty ending the conflict between Spain and the United States stemming from the War of 1812. *See id.* In a later decision the district court held that Sea Hunt could not rightfully claim a salvage award because Spain, as the acknowledged owner of JUNO, had expressly refused salvage services. The Kingdom of Spain now appeals the judgment concerning LA GALGA. The Commonwealth and Sea Hunt note a cross-appeal with regard to JUNO and the denial of a salvage award.

II.

[1] In order for Virginia to acquire title to the shipwrecks and to issue salvage permits to Sea Hunt, these vessels must have been abandoned by Spain. Sea Hunt and the Commonwealth argue that the Abandoned Shipwreck Act requires application of an implied abandonment standard for shipwrecks in coastal waters, and that Spain has abandoned LA GALGA and JUNO. Because Spain has asserted an ownership claim to the shipwrecks, however, express abandonment is the governing standard. *See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 464-65 (4th Cir.1992). To adopt a lesser standard would not only go beyond what the ASA requires. It would also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations.

A.

Under the ASA, the United States asserts title to any abandoned shipwreck that is on or embedded in the

submerged lands of a State. *See* 43 U.S.C. § 2105(a). Title is then automatically transferred to the State in whose submerged lands the shipwreck is located. *See id.* § 2105(c). "Submerged lands" for the purposes of the ASA includes coastal waters three miles from shore. *Id.* § 2102(f)(1), § 1301(a)(2). For a state to acquire title to a shipwreck it must be (1) abandoned and (2) on or embedded in the submerged lands of a state. *Id.* § 2105(a) & (c). It is undisputed that LA GALGA and JUNO are within Virginia's submerged lands. That, however, is not enough. We must address whether these frigates were abandoned by Spain. If the shipwrecks were abandoned, then Sea Hunt would have control over them in accordance with its state-issued permits.

The ASA does not define the critical term "abandoned." Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its vessels. The Act states in its findings that "abandoned shipwrecks" are those "to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim thus accords *641 with the statutory text. Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." H.R.Rep. No. 100-514(I), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366. An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.

The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment." H.R.Rep. No. 100-514(II), at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 381. The implications of this for other sovereign vessels is

also underscored: "[T]he same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State." *Id.* Under the ASA, then, an implied abandonment standard would seem least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks.

B.

[2] Further, courts have held that the ASA "did not affect the meaning of 'abandoned,' which serves as a precondition for the invocation of the ASA's provisions." *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel*, 177 F.3d 491, 499 (6th Cir.1999). According to the Supreme Court, "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508, 118 S.Ct. 1464, 140 L.Ed.2d 626 (1998). The Supreme Court never suggested that by conferring title to the states the ASA somehow altered the traditional admiralty definition of abandonment. While the common law of admiralty must be developed consonant with federal statutes, *see American Dredging Co. v. Miller*, 510 U.S. 443, 455, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), here the ASA has not altered the admiralty law background.

[3][4][5] Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. *See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir.1992). "[S]hould an owner appear in court and there be no evidence of an express abandonment," title to the shipwreck remains with the owner. *Id.* at 461. This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains." *The Akaba*, 54 F. 197, 200 (4th Cir.1893). When "a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment." *Columbus-America*, 974 F.2d at 467-68; *see also Fairport*, 177 F.3d at 498; *Hener v. United States*, 525 F.Supp. 350, 356- 57 (S.D.N.Y.1981). An inference of abandonment is permitted, but only when no owner appears. *See Columbus-America*, 974 F.2d at 464-65 ("Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his

ownership interest....").

Appellees point us to no case applying an implied abandonment standard where a sovereign owner has come forward to assert a claim to its property. Although *Sea Hunt* and the Commonwealth characterize the rule of *Columbus-America* as an anomaly, it reflects well-established admiralty law doctrine and existing case law. For instance, in *Fairport* the Sixth Circuit adopted a test of "inferential abandonment." It emphasized, however, that there is a "uniform concern that courts impose a high burden on those who argue that an owner abandoned property that *642 sank against his will." 177 F.3d at 499; *see also id.* at 500 ("Proof by inference still requires proof, not conjecture--a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment."). The Sixth Circuit also expressly limited its holding to "vessels formerly owned by private parties, and express[ed] no view as to the application of the express abandonment test to vessels initially owned by the United States." *Id.* at 500.

The First and Fifth Circuits have also never suggested that an implied abandonment standard would govern in a case involving a claim by an original owner to its property. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987) (emphasizing that "no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir.1981) (noting that "salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases"). Appellees' attempts to glean a broad implied abandonment standard from circuit law overlooks one salient point--none of the cases they rely upon involved an original sovereign owner's claim to its shipwrecked vessels. To adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim.

C.

[6] Finally, the express abandonment standard is required by Article X of the 1902 Treaty of

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Friendship and General Relations between the United States and Spain. Article X provides, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other ... the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, "this provision is unique" in that no other "friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity." Statement of Interest, U.S. Dep't of State, ¶ 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.

[7][8][9][10] United States vessels may only be abandoned by an express, unambiguous, and affirmative act. Article IV of the Constitution states, "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." U.S. Const. art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property--dispositions of federal property require some congressional action. "[T]he United States cannot abandon its own property except by explicit acts." See *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir.1992). The Supreme Court has emphasized that the United States cannot be precluded from asserting its ownership rights by private property "principles similar to laches, estoppel or adverse possession." *United States v. California*, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). The government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts. *Id.* at 40, 67 S.Ct. 1658. The House Report for the ASA also relates the understanding that "U.S. warships and other public vessels ... require an affirmative act of abandonment." H.R.Rep. No. 100-514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not *643 be considered abandoned without a clear and affirmative act by the government.

[11][12] Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by

express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.

Applying the express abandonment standard to sovereign vessels also respects the legitimate interests of the executive branch. While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations. Department of Interior advisory guidelines on the ASA state that a sovereign vessel that appears to have been abandoned "remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party." 55 Fed.Reg. 50116, 50121 (1990). The State Department has likewise emphasized that its policy is "to recognize claims by foreign governments--such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA--to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent *express abandonment by the sovereign* ." Statement of Interest, U.S. Dep't of State, ¶ 9 (emphasis added). Further, the State Department notes, "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." *Id.* ¶ 15.

[13] In a case such as this, it is "not for the courts to deny an immunity which our government has seen fit to allow." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (involving an *in rem* admiralty action against foreign owned merchant vessel). Our Constitution charges

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the political branches with the conduct of foreign affairs. See *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10, 68 S.Ct. 431, 92 L.Ed. 568 (1948). The express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law.

III.

[14][15] We now address whether there has been an express abandonment of LA GALGA. [FN1] The district court found that Spain had expressly abandoned LA GALGA in Article XX of the Treaty of 1763. See *Sea Hunt*, 47 F.Supp.2d at 690. This interpretation, however, contravenes the plain language of the 1763 Treaty. It also flies in the face of the understandings of *644 Spain and Great Britain, the relevant parties to Article XX. It impairs, as well the respect that international law accords Spain's claim of ownership with regard to its shipwrecks and the military grave sites that they contain.

FN1. We affirm the district court's holding that JUNO was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the district court noted, "Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory." *Sea Hunt*, 47 F.Supp.2d at 690. We agree that Spain did not expressly abandon JUNO in the 1819 Treaty for the reasons stated by the district court. See *id.* at 690-91.

A.

[16] *Sea Hunt* and Virginia must demonstrate express abandonment by "clear and convincing evidence." *Columbus-America*, 974 F.2d at 464; see also *Fairport*, 177 F.3d at 501; accord *Falgout Bros., Inc. v. SV Pangaea*, 966 F.Supp. 1143, 1145 (S.D.Ala.1997); *Hener*, 525 F.Supp. at 357. This is a high burden and an "exacting standard." *Fairport*, 177 F.3d at 501. The district court found such clear and convincing evidence of an express abandonment in the 1763 Definitive Treaty of Peace between France, Great Britain, and Spain, which ended the Seven Years War and transferred most of Spain's

territories in the new world to Great Britain. See *Sea Hunt*, 47 F.Supp.2d at 689 ("The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA").

We disagree with the district court's interpretation. Article XX of the 1763 Treaty provides:

[H]is Catholick Majesty cedes and guaranties, in full right, to his Brittanick Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, every thing that depends on said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise.... [S]o that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form.... It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, art. 20, Consol. T.S. 331-32.

[17] The plain language of this treaty provision contains no evidence of an express abandonment. First, Article XX does not include any of the common nouns that could refer to LA GALGA. Notably absent are the terms "shipwreck," "vessels," "frigates," or "warships." Other provisions of the treaty mention these terms explicitly. For instance, Article III, which provides for the restoration of prisoners, states "all the ships of war and merchant vessels which shall have been taken ... shall likewise be restored." See also Art. VIII (stating that the British may remove their belongings in "vessels"); Art. XIX (same). Further, the treaty also specifically catalogues items other than territory intended to be conveyed. For instance the treaty transfers control of "factories," Art. XI, "artillery," Art. XII, "fortresses," Art. XIX, "castles," Art. XXI, and "papers, letters, documents, and archives," Art. XXII. When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of "shipwrecks." "Express" is defined as "firmly and explicitly stated; particular, specific." *Webster's II New College*

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Dictionary 396 (1999). Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of LA GALGA.

Second, the cession of state property in Article XX is limited to all that Spain possesses "on the continent of North America." The plain meaning of this is that Spain ceded to Great Britain only what was located on land. Spain did not cede possessions in the sea or seabed. The district court focused on the fact that the "clause is a sweeping grant of territory *645 and property," yet overlooked the "on the continent" limitation. This limitation excludes wrecks like LA GALGA that were located not on the continent, but in the seabed.

Sea Hunt and the Commonwealth urge that "on the continent" included coastal waters, and that consequently the 1763 Treaty constitutes an express abandonment of LA GALGA. Yet in a similar provision of the treaty, the parties specifically cede both land and the coasts. Article IV cedes French Canada to Great Britain and specifically provides for cession of "in general every thing that depends on the said countries, lands, islands, and coasts" (emphasis added). It also transfers all rights held "over the said countries, lands, islands, places, coasts, and their inhabitants" (emphasis added). By contrast, Article XX states that Spain cedes to Great Britain "in general, every thing that depends on the said countries and lands," and all rights "over the said countries, lands, places, and their inhabitants." There is no mention at all of coasts in Article XX.

Moreover, in light of eighteenth century understandings, this "on the continent" language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the three-mile belt in the eighteenth century was but a "nebulous suggestion." *United States v. California*, 332 U.S. at 32, 67 S.Ct. 1658. When "in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast." Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by *United States v. Maine*, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363

(1975). Sovereign rights to the territorial sea were not established in international law until some time in the nineteenth century. See *California*, 322 U.S. at 33, 64 S.Ct. 899; *accord Maine*, 420 U.S. at 524, 95 S.Ct. 1155. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. See *Shively v. Bowlby*, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *United States v. Angcog*, 190 F.Supp. 696, 698 (D.Guam 1961).

Third, Article XX provides that Spain ceded "every thing that depends on the said countries and lands." The district court found that this included the wreck of LA GALGA. See *Sea Hunt*, 47 F.Supp.2d at 689. It is anything but clear, however, given eighteenth century understandings, that "every thing that depends" can be interpreted to include this shipwreck. When interpreting this same clause of Article XX, Chief Justice Marshall noted, "By the 20th article of the [1763] treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain." *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 584, 5 L.Ed. 681 (1823) (emphasis added). At the time, "dependencies" meant other territories that were dependent upon the sovereign country. A dependency was "a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe." *United States v. The Nancy*, 27 F. Cas. 69, 71 (C.C.D.Pa.1814) (No. 15,854); see also *Webster's II* 303 (defining "dependency" as a "territory or state under the jurisdiction of another country from which it is separated geographically"). Under the Supreme Court's relatively contemporaneous interpretation, "every thing that depends" does not include Spanish property such as the shipwrecks, but rather refers to "dependencies" such as nearby islands.

[18] Fourth, Article XX provides that "his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be *646 artillery or other things." There is no deadline for the right to take this property away. Rather the right is guaranteed irrespective of the time elapsed. By contrast, other provisions of the Treaty specifically set time limits for certain actions. For instance, Article XX itself states that Spanish subjects may "bring away their effects, as well as

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their persons ... the term limited for this emigration being fixed to the space of eighteen months." See also Art. VIII (providing four months for the demolition of fortresses); Art. XIII (eighteen months for the emigration of British subjects from Guadaloupe); Art. XXIV (providing different time periods for various "restitutions" and "evacuations"). His "Catholick Majesty," however, has no limitation whatsoever on the removal of state property. In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole. See *Kolovrat v. Oregon*, 366 U.S. 187, 195-96, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (refusing to interpret a treaty provision in isolation). Where such specific time limits were included for a variety of different actions but not included for the clause at issue here, there is a strong presumption that no time limit applies.

In sum, Article XX does not contain "clear and convincing" evidence of express abandonment. While the language of Article XX encompasses a great deal of land and property, it does not mention vessels or shipwrecks, nor does Article XX refer to Spanish property in the sea or on the seabed. Such general treaty language does not come close to an "express declaration abandoning title," *Columbus-America*, 974 F.2d at 464, and therefore cannot amount to clear and convincing evidence of an express abandonment.

B.

[19] This view of the treaty is not ours alone. Both parties to Article XX of the 1763 Treaty agree that the Kingdom of Spain did not abandon LA GALGA. Such agreement is significant. When "the parties to a treaty both agree as to the meaning of a treaty provision ... we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji*, 457 U.S. at 185, 102 S.Ct. 2374; see also *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (the terms of a treaty must be given a "meaning consistent with the shared expectations of the contracting parties" (internal quotation marks omitted)). "Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir.1996). Postratification understandings of the contracting parties are traditionally considered as aids to treaty interpretation. See *El Al Israel Airlines*, 525 U.S. at 167, 119 S.Ct. 662.

After the district court issued its judgment, the United Kingdom issued a formal Diplomatic Note clarifying that Article XX of the 1763 Treaty "cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck of 'LA GALGA.' ... [T]he intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America." Spain also issued a Diplomatic Note reaffirming its view that the 1763 Treaty "was not a cession or abandonment of H.M. Frigate 'LA GALGA' or other shipwrecked vessels of Spain." "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat*, 366 U.S. at 194, 81 S.Ct. 922. We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters. Given that their view accords with the language and structure of the Treaty itself, it can hardly be contended that Sea Hunt has put forward "extraordinarily strong contrary evidence," to rebut the parties' interpretation.

*647 C.

[20] Although we believe the standard of express abandonment controls in the circumstances of this case, it would be difficult under any test to conclude that LA GALGA was abandoned. The mere passage of time since a shipwreck is not enough to constitute abandonment. See *Columbus-America*, 974 F.2d at 461; *Fairport*, 177 F.3d at 499 (length of time "one factor among several relevant to whether a court may infer abandonment"). Spain attempted salvage after LA GALGA sank, maintained LA GALGA on its naval registry, and asserted a claim after Sea Hunt brought its admiralty action. Moreover, the shipwreck lies scattered and buried in the sand beneath the water, and technology has only recently become available for its salvage. See *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir.2000) ("[L]ack of technology is one factor to consider in determining whether inaction constitutes abandonment."). In other cases where abandonment was found for Spanish wrecks, Spain made no claim of ownership. See *Treasure Salvors, Inc. v. The*

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Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir.1978) (noting that "[t]he modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor owner"); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F.Supp. 953, 956 (M.D.Fla.1993) (finding that "no one ... asserted an interest in the alleged vessel"). By contrast, Spain has vigorously asserted its interest in the wreck of LA GALGA and wishes to maintain it as a sacred military gravesite. In light of these circumstances, even a finding of implied abandonment would be improper.

D.

The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. The United States "is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea." *Amicus Curiae Br. of U.S. at 1*. Protection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law. *See 8 Digest of U.S. Practice in International Law* 999, 1006 (1980) (noting that interference with sunken military vessels, "especially those with deceased individuals," is "improper" and that foreign governments' requests to have such views respected "should be honored").

[21] It bears repeating that matters as sensitive as

these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.

IV.

We reverse the judgment of the district court that the Kingdom of Spain abandoned the vessel LA GALGA. We affirm the judgment of the district court as to JUNO. Both vessels remain the property of Spain. [FN2] The judgment of the district court is accordingly

FN2. We affirm the district court's denial of a salvage award to Sea Hunt. The district court found, "It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award."

*648 *AFFIRMED IN PART AND REVERSED IN PART.*

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Randy L. LATHROP, Plaintiff,
v.
The UNIDENTIFIED, WRECKED & ABANDONED VESSEL, Defendant.
STATE of FLORIDA, et al., Plaintiffs,
v.
Randy L. LATHROP, Defendant.

Nos. 88-37-Civ-ORL-20, 90-605-Civ-ORL-20.

United States District Court,
M.D. Florida,

Orlando Division.

April 9, 1993.

Salvor sought preliminary injunction to prevent government from interfering with maritime right of salvage, and state sought to protect underwater national park land from damage from dredging or excavating. The District Court, Schlesinger, J., held that: (1) government could require potential salvor of alleged historical shipwreck to comply with federal law requiring permit before conducting salvage activities, and (2) even if court had in personam jurisdiction over government, salvor failed to prove likelihood of success on merits, as necessary for injunction to issue.

Motion for preliminary injunction denied.

[1] ADMIRALTY k42

16k42

In connection with in rem action to arrest alleged shipwrecked vessel, only party brought before court is alleged unidentified vessel and government appears in matter as amicus curiae and not as party.

[2] HEALTH AND ENVIRONMENT k25.15(2.1)

199k25.15(2.1)

In connection with action against vessel brought by potential salvor of alleged historical shipwreck, issuance of injunction permitting salvage operates in personam and requires same jurisdictional predicate as any other in personam action, which is basis for exercise of personal jurisdiction accompanied by adequate notice.

[3] INJUNCTION k110

212k110

Federal court may issue injunction if it has personal jurisdiction over parties and subject matter jurisdiction over claim.

[4] AMICUS CURIAE k3

27k3

Where federal government was amicus curiae to salvor's action against shipwrecked vessel in state's action against salvor, court lacked jurisdiction over government and, thus, lacked power to enjoin government, absent showing that government had been properly and timely served. Fed.Rules Civ.Proc.Rules 4(j), 65, 28 U.S.C.A.

[4] INJUNCTION k110

212k110

Where federal government was amicus curiae to salvor's action against shipwrecked vessel in state's action against salvor, court lacked jurisdiction over government and, thus, lacked power to enjoin government, absent showing that government had been properly and timely served. Fed.Rules Civ.Proc.Rules 4(j), 65, 28 U.S.C.A.

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[5] SALVAGE k1

344k1

Law of maritime salvage is concerned not with title to property, but with successful recovery of possession of lost property from oceans and waterways; "salvage" involves right to possess another's property and save it from destruction, danger or loss.

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

[6] SALVAGE k1

344k1

Once salvor is in possession of salvaged property, no other person can lawfully intrude on possession, including vessel's master or owner.

[7] SALVAGE k1

344k1

To establish claim for salvage, plaintiff must prove marine peril, service voluntarily rendered, and success, either whole or partial, in recovering imperiled property.

[8] HEALTH AND ENVIRONMENT k25.5(8)

199k25.5(8)

Rivers and Harbors Act, Antiquities Act, and United States Park Service Regulations restrict manner in which potential salvor can excavate abandoned shipwrecks located on federal lands, and, enactments restricting manner of salvaging do not conflict with underlying principles of salvage. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Abandoned Shipwreck Act of 1987, §§ 3(a), 6(a)(1), 43 U.S.C.A. §§ 2102(a), 2105(a)(1).

[8] SALVAGE k1

344k1

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[8] SHIPPING k213

354k213

Rivers and Harbors Act, Antiquities Act, and United States Park Service Regulations restrict manner in which potential salvor can excavate abandoned shipwrecks located on federal lands, and, enactments restricting manner of salvaging do not conflict with underlying principles of salvage. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Abandoned Shipwreck Act of 1987, §§ 3(a), 6(a)(1), 43 U.S.C.A. §§ 2102(a), 2105(a)(1).

[9] ADMIRALTY k1.6

16k1.6

Congress may constitutionally alter, qualify, or supplement substantive admiralty law presumed to be in existence as of writing of Constitution. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Abandoned Shipwreck Act of 1987, §§ 3(a), 6(a)(1), 43 U.S.C.A. §§ 2102(a), 2105(a)(1).

[10] HEALTH AND ENVIRONMENT k25.5(2)

199k25.5(2)

Congressional enactments restricting manner in which potential salvor excavates property located on federally owned or managed lands does not offend constitutional limitations on congressional power to supplement or alter admiralty law. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Abandoned Shipwreck Act of 1987, §§ 3(a), 6(a)(1), 43 U.S.C.A. §§ 2102(a), 2105(a)(1).

[10] SALVAGE k1

344k1

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U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Abandoned Shipwreck Act of 1987, §§ 3(a), 6(a)(1), 43 U.S.C.A. §§ 2102(a), 2105(a)(1).

[11] ADMIRALTY k6

16k6

Laws prohibiting appropriation of historic artifacts or excavation on federal lands without first obtaining permit from corps of engineers did not deprive federal court of admiralty jurisdiction and did not necessarily prohibit salvage activities, but rather statute supplemented admiralty law by providing substantive rules for lawful salvage operations on federally owned or managed lands. 16 U.S.C.A. §§ 433, 459j-2(b); 33 U.S.C.A. § 403.

[11] HEALTH AND ENVIRONMENT k25.5(8)

199k25.5(8)

Laws prohibiting appropriation of historic artifacts or excavation on federal lands without first obtaining permit from corps of engineers did not deprive federal court of admiralty jurisdiction and did not necessarily prohibit salvage activities, but rather statute supplemented admiralty law by providing substantive rules for lawful salvage operations on federally owned or managed lands. 16 U.S.C.A. §§ 433, 459j-2(b); 33 U.S.C.A. § 403.

[11] SALVAGE k1

344k1

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[12] SALVAGE k22

344k22

Requirement that salvor act lawfully while salvaging vessel was consistent with general admiralty law.

[13] SALVAGE k1

344k1

Possession of abandoned property is not sufficient to establish salvage claim; salvor must acquire possession lawfully before valid claim can be established.

[14] SALVAGE k1

344k1

Restrictions on salvage activities which were necessary to ensure safety of both salvors and public were within Congress' broad powers over all public lands; legislation supplementing admiralty jurisdiction by imposing necessary restrictions on salvage activities was important legislative function properly reserved to Congress. 16 U.S.C.A. §§ 433, 459j-2(b); 33 U.S.C.A. § 403.

[15] SALVAGE k1

344k1

Potential salvors do not have inherent right to save distressed vessels, but rather salvage award may be denied if salvor forces its services on vessel despite rejection by owner or by person with authority.

[15] SALVAGE k15

344k15

Potential salvors do not have inherent right to save distressed vessels, but rather salvage award may be denied if salvor forces its services on vessel despite rejection by owner or by person with authority.

[16] SALVAGE k15

344k15

Doctrine of rejection normally applies when master of distressed vessel directly and unequivocally rejects salvor's services; salvor who continues efforts to rescue vessel after master has communicated rejection will not be entitled to salvage award.

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[17] SALVAGE k15

344k15

Constructive rejection of salvage services bars award if rejection was reasonably understood by salvor.

[18] SALVAGE k15

344k15

Salvor, who typically acts as agent for vessel's owner, acquires right to possess abandoned shipwreck but does not acquire title; title remains with owner as does right to refuse salvage.

[18] SHIPPING k213

354k213

Salvor, who typically acts as agent for vessel's owner, acquires right to possess abandoned shipwreck but does not acquire title; title remains with owner as does right to refuse salvage.

[19] ABANDONED AND LOST PROPERTY k10

1k10

Under law of finds, title vests in person who reduces property to his or her possession unless abandoned property is embedded in soil, in which case it belongs to soil's owner, or if owner of land has constructive possession of property.

[20] SALVAGE k15

344k15

Salvor should have known that Florida, as presumed owner of submerged lands and any property embedded in soil, might refuse offer to excavate alleged vessel where state had dedicated its land to government to establish national park and government had authority to manage and protect land, marine life, and historic artifacts from damage caused by dredging or excavating; even without decision as to ownership, salvor must reasonably have known that state rejected offer of salvage services.

[21] ABANDONED AND LOST PROPERTY k10

1k10

Under maritime law, "find" assumes that property is abandoned and has returned to state of nature so that ownership is assigned to first person to reduce property to either actual or constructive possession.

[22] SHIPPING k213

354k213

Where alleged shipwreck was buried in soil, and soil belonged either to government as part of national park service dedicated to it by state of Florida or to state, salvor did not show substantial likelihood of prevailing on claim of ownership; when government acquired title to submerged lands from Florida, it also acquired title to alleged shipwreck embedded beneath soil, and, if state retained ownership, it had possession and title of alleged shipwreck.

[23] INJUNCTION k138.31

212k138.31

Any harm to public and government from allowing salvor to attempt to excavate alleged shipwreck in federal park land would outweigh any harm suffered by salvor if injunction preventing salvage were granted; at stake was continued preservation of national park dedicated to government by state.

*956 Edward W. Horan, Key West, FL, for plaintiffs.

Kendall Wherry, Asst. U.S. Atty., Orlando, FL, Eric J. Taylor, Esq., Tallahassee, FL, Caroline Zander, Washington, DC, for defendant.

ORDER

SCHLESINGER, District Judge.

This cause is before the Court on Plaintiff Randy L. Lathrop's Motion for Preliminary Injunction (Doc. No. 66) filed in Case No. 88-37 (in rem action). The United States has filed an Amicus Curiae Response in Opposition to Plaintiff's

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Motion for Preliminary Injunction (Doc. No. 81, filed on April 6, 1992).

I
PROCEDURAL BACKGROUND

These two consolidated cases involve a dispute over an alleged unidentified shipwreck located within 2,500 yards of a point with coordinates 80 degrees, 41.5' west longitude and 28 degrees, 44' north latitude. This dispute originated in November 1984, when Plaintiff was exploring the shallow coastal area north of Cape Canaveral, Florida. While diving, Plaintiff found several Spanish coins, covered in green from immersion in salt water, which he believes are part of the remains of a sunken eighteenth century Spanish galleon. These coins were minted in Mexico City, Mexico from 1777 through 1782, and they bore the bust of King Charles III.

Because the coins were all minted in Mexico City within the same time period, Plaintiff postulates that the coins were part of a larger shipment, a mint shipment, which sank before reaching its final destination. Plaintiff hypothesizes that an eighteenth century ship lay submerged in the Cape Canaveral National Seashore and off the coast of Florida for over two hundred years. [FN1] Believing this to be true, Plaintiff filed a complaint in rem in January 1988 seeking ownership of the alleged unidentified vessel or a salvage award for his services. The Court arrested the vessel on January 27, 1988, and appointed Plaintiff as substitute custodian.

FN1. For centuries, Cape Canaveral, Florida has been known for its numerous navigational hazards. Historical records indicate many ships-- possibly in the hundreds--have been lost on the Cape's treacherous shoals.

After the alleged vessel was arrested, Plaintiff published notice of this in rem action in the Florida Today, a newspaper of general circulation in Brevard County, Florida on March 10, 1988. No one either responded to this publication or asserted an interest in the alleged vessel. Plaintiff then filed a Motion for Entry of Default which the clerk entered on June 7, 1988.

Shortly thereafter, Plaintiff began to experience problems with the U.S. Park Service for conducting what he thought were legitimate salvage activities. Park rangers arrested Plaintiff's assistants for carrying metal detectors within the Cape Canaveral National Seashore. At that time, the park rangers were not aware that Plaintiff obtained an order arresting the alleged vessel. Thereafter, the charges were dismissed, and Plaintiff was allowed on the premises. For the remainder of the year, Plaintiff conducted very little salvage activities.

In August 1989, Plaintiff began organizing salvage activities. First, he employed James Sinclair, an archaeologist who specializes in historic shipwrecks and President of SAS, Inc., to document the archaeological history of the wreck. Sinclair helped to formulate a research design, produce a map of the wreckage, and verify that the magnetometer readings truly identified an historic shipwreck. Also, Plaintiff hired Shipwrecks, Inc., to assist in a preliminary magnetometer survey and excavation of the alleged vessel.

Salvage operations from August 1989 through September 1989 consisted mainly of magnetometer and remote sensing surveys of *957 the alleged vessel. During this time, Cape Canaveral was preparing for a space shuttle launch carrying sensitive Jupiter Probes which required heightened security. Under these circumstances, extensive salvage operations became nearly impossible. Thus, Plaintiff's salvage activities were limited by security concerns and involved additional magnetometer surveys.

The information obtained from these surveys indicated a pattern of magnetic anomalies (or abnormalities beneath the ocean floor) which could be the scattered remains of an historic shipwreck. To confirm this finding, Plaintiff needed to pinpoint selected areas, excavate them, and examine any objects producing the anomalies. Only then would Plaintiff know whether objects causing the anomalies were the remains of an historic shipwreck or some other objects (such as coke cans and other debris). Plaintiff recovered various objects, but none were ancient artifacts or other items belonging to an eighteenth century Spanish galleon. In addition, these objects did not prove the existence of an historical shipwreck.

Salvage activity from October 1989 through December 1989 consisted of additional magnetometer and remote sensing surveys. There were no recoveries. Similarly, salvage activities from January 1990 through March 1990 remained similarly idle, but due to poor weather conditions.

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While Plaintiff prepared to resume salvage activities in April, Plaintiff encountered a series of misfortunes. First, the State of Florida required Plaintiff to abide by its regulatory scheme and obtain a permit before conducting salvage operations. Although Plaintiff disagreed with the State's authority to impose its regulations on activity conducted within a federal domain, he applied for a state permit.

Plaintiff applied to the State of Florida Division of Historical Resources. After reviewing Plaintiff's application, James J. Miller, State Archaeologist and Chief of the Bureau of Archaeological Research, informed him (in a letter dated May 25, 1990) that a salvage contract would be inconsistent with the agreement specifying the land's proper use. Plaintiff's permit was, therefore, denied.

Plaintiff did not apply for a permit with the United States Park Service, but Plaintiff did discuss the matter with Assistant United States Attorney Gregory N. Miller. The United States Government took a similar position regarding salvage activities in the Cape Canaveral National Seashore. Miller opined (in a letter dated May 31, 1990) that the "terms of the dedication prohibit the United States of America from granting Mr. Lathrop permission to conduct salvage operations within the Canaveral National Seashore." Plaintiff's Motion for Preliminary Injunction, Exhibit C. Also, the letter stated that if the Park were used contrary to the dedication's purpose, the reverter clause would terminate the United States' interest, causing the land to revert to the State of Florida. The United States fearing that it would lose an important national park reaffirmed its adherence to park regulations requiring a permit. See 36 C.F.R. § 2.1.

One month later, Plaintiff filed a Motion for Preliminary Injunction (the first motion), seeking to invoke this Court's admiralty jurisdiction and to enjoin the United States from interfering with Plaintiff's maritime right of salvage. Plaintiff alleged that imposing a federal requirement to obtain a permit from the United States before conducting salvage activities--primarily excavation--in the Cape Canaveral National Seashore interfered with his right of salvage. The Court conducted a hearing on Plaintiff's Motion on July 23, 1990. The United States filed an amicus curiae brief opposing Plaintiff's Motion and appeared at the hearing. [FN2]

FN2. Counsel for the State of Florida and the United States appeared at the hearing, but did so as non-parties.

On August 6, 1990, Judge G. Kendall Sharp granted Plaintiff's Motion for a Preliminary Injunction, [FN3] and enjoined the United States for ninety days from interfering with the Court's continuing in rem jurisdiction over the alleged vessel and with Plaintiff's *958 ongoing salvage operations. In granting that injunction, the Court determined that the United States did not have "constructive possession" which would establish its claim of ownership and thereby defeat Plaintiff's claim. Moreover, the Court held that general admiralty law principles award ownership to a salvor or finder who locates abandoned property and then exercises dominion and control over the found property. According to the Court, applying an "embeddedness" theory would conflict with admiralty law. Therefore, federal statutes could not be construed to displace general admiralty law because those statutes conflict with established maritime principles. The Court did not address the State's claim of title.

FN3. The issue raised in that previous injunction by the United States was ownership of the alleged shipwreck.

With the injunction firmly in place, Plaintiff resumed salvage operations. Plaintiff had contracted with Cobb Coin Company, Inc. ("Cobb"), and its Operations Manager, John Brandon, to help salvage the vessel. During August 1990, Cobb conducted a preliminary magnetometer survey twenty-two miles south of Ponce de Leon Inlet. The objective of this survey was to determine the presence of ferrous or other objects within the area thought to contain a sunken shipwreck.

A seven person crew led by Kim Fisher, Captain and Vice President of Cobb, was dispatched to the alleged vessel site. This crew conducted preliminary magnetometer surveys. The crew's analysis of the preliminary survey led them to conclude that no identifiable correlation existed between the anomalies. The area, which Plaintiff believed to contain an historic shipwreck, instead, could be a natural trap for metallic debris washed in from the sea. Without acquiring additional knowledge of the depth of the sand and shell overburden covering the bedrock, it was impossible to calculate the size of the objects producing the magnetic fluctuations or anomalies.

After the surveys were completed, Plaintiff began excavating selected areas in search of the alleged vessel. Cobb's crew would anchor the boat and utilize the boat's prop-wash deflectors to steer prop-wash into the ocean floor and excavate

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a pinpoint area. Although this was an effective technique, it created large craters in the soil. These craters were examined carefully for clues that may prove the existence of a shipwrecked vessel; and should the vessel's remains be found, Plaintiff could then determine its size and location. While Plaintiff vigorously pursued the alleged vessel, his salvage activities created large craters that were damaging the Cape Canaveral National Seashore.

After Plaintiff had resumed salvage activities, and two days after Judge G. Kendall Sharp issued the preliminary injunction, the State of Florida filed a separate action in state court. In that complaint, the State of Florida sought to protect Cape Canaveral National Seashore's submerged lands from damage, trespass or unlawful use. Under Florida law, it is a violation to use state-owned lands to dredge, or to excavate and remove historic artifacts without a permit. Counsel for Florida requested a temporary restraining order to protect its claim of title and ownership to the alleged vessel embedded in submerged lands located within its territorial waters. See Fla.Stat. Ann. § 267.061 (1990). The State of Florida sought an order prohibiting Plaintiff from dredging or excavating until title could be adjudicated.

Plaintiff removed that state action to federal court on August 13, 1990, and the two cases were subsequently consolidated. Plaintiff then renewed his earlier motion for Preliminary Injunction to include the State of Florida and its agencies. The Court granted that motion, and enjoined the State of Florida from interfering with Plaintiff's ongoing salvage operations. Thereafter, the State filed a Motion to Remand the newly removed action, arguing that the Eleventh Amendment barred such a suit. The Court denied the State's motion. [FN4]

FN4. See *infra* note 9 and text accompanying note.

On October 22, 1990, Plaintiff filed a Motion to Modify the Preliminary Injunction. Plaintiff requested that the injunction remain in effect beyond the original expiration date and until October 1, 1991. Plaintiff requested this extension because he was unable to conduct salvage operations when the injunction was first issued in August 1990. One *959 reason for his inability to conduct salvage activities during this period was the meteorological conditions. Another reason was the earlier delay caused by the State of Florida. The Court denied the motion on January 11, 1991, because the 1990 salvage season had ended.

For the next six months, Plaintiff did not conduct any salvage operations. Plaintiff refrained from conducting salvage activities because the State of Florida was processing Plaintiff's application to excavate. Eric J. Taylor, an Assistant Attorney General, notified Plaintiff in December 1990 that the Florida Department of State had approved a settlement, in principle, authorizing Plaintiff to conduct salvage activities. There were two reservations: He declared that additional time was necessary to obtain final approval and prepare a written agreement. After receiving approval from Florida, Plaintiff would be required to obtain permission from the United States.

Although Plaintiff edged closer to obtaining the State's permission, a new problem emerged shortly before the 1991 salvage season began. As regulator of the Cape Canaveral National Seashore, the United States asserted its paramount role in protecting the land from further excavation. William A. Baxter, Assistant District Counsel for the Corps of Engineers, informed Plaintiff's Counsel on July 8, 1991, that the Court's admiralty jurisdiction would not preclude the United States from regulating salvage activities that occurred within their dredge-and-fill jurisdiction. Counsel for the Corps of Engineers urged that it had jurisdiction over dredging activities occurring in tidal water that extended from the mean high water line to the outer limits of the continental shelf. The Corps of Engineers did not recognize the Preliminary Injunction as affecting its jurisdiction.

Although the United States insisted that Plaintiff obtain a federal permit before resuming salvage activities, Plaintiff began operations without the Corps' approval. On September 9, 1991, Counsel for the United States, Caroline M. Zander, notified Plaintiff's Counsel that the Chief Ranger of the Canaveral National Seashore had seen a plume coming from an area where Plaintiff's ships were anchored. The presence of a plume indicated dredging, and Zander urged that Plaintiff's salvage activities were unlawful in the Cape Canaveral National Seashore without first obtaining a permit from the Army Corps of Engineers. [FN5]

FN5. The United States took the position that Plaintiff must comply with the Rivers and Harbors Act of 1899 (codified at 33 U.S.C. § 403).

A week later the Army Corps of Engineers issued a cease and desist order. In that order, the Corps of Engineers stated

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that Plaintiff must comply with the Rivers and Harbors Act before dredging in navigable waters of the United States. If Plaintiff failed to comply, the Corps of Engineers would seek legal action.

While the Corps of Engineers was asserting its jurisdiction and ordering Plaintiff to cease and desist salvage activities, there was some confusion between the United States and the State of Florida concerning each sovereign's regulatory responsibilities. To clarify each sovereign's role, Robert M. Baker, National Director of the U.S. Park Service, wrote Secretary Smith concerning his views on the problem. In a letter dated September 20, 1991, Secretary Smith, who is a member of the Board of Trustees with review authority over Plaintiff's application, responded to Baker's assertion that the dedication vested in the United States administrative and regulatory authority over the Cape Canaveral National Seashore:

I agree with your legal analysis concluding that the State's interest in the subject land is subordinate to the interest conveyed to the United States by the dedication instrument of April 1, 1980, wherein the Board of Trustees conveyed exclusive use of the lands to the United States for 'wilderness/preservation purposes' and the administration of said lands as part of the Canaveral National Seashore ... In view of the rights already conveyed to the federal government, I agree that it would be inappropriate for the Department of State to issue a contract to conduct salvage within Canaveral *960 National Seashore, and no such permission will be given.

United States Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit C (emphasis added). Secretary Smith agreed that through the dedication the United States' regulatory interest became paramount. [FN6]

FN6. See *infra* note 21.

The Court held a status conference addressing this problem on September 27, 1991. All parties were represented at the hearing. After the hearing, the Magistrate Judge issued an Order requiring the United States, a non-party to the litigation, to file a separate action requiring Plaintiff to comply with the permitting process which would be consolidated with the pending cases.

The United States never filed a separate action. During this time, the parties conducted settlement negotiations, and Plaintiff agreed to comply with the permitting procedures. From these negotiations, Plaintiff agreed, therefore, to cease all dredging and salvaging activities within the boundaries of the Canaveral National Seashore, including the use of a metal detector or magnetometer. Plaintiff refrained from any further salvage activities for the remainder of 1991, awaiting a response from the State of Florida and the Army Corps of Engineers on his permits.

By January 1992, Plaintiff had made little, if any, progress on obtaining the State of Florida's consent to use state-owned submerged lands. [FN7] Likewise, the Army Corps of Engineers notified Plaintiff on March 5, 1992, that it had denied his permit (1991-01016(IP-eb)) because the State of Florida Department of Environment Regulation had denied a similar request. On February 24, 1992, Plaintiff filed a Second Motion for Preliminary and Permanent Injunction, which is presently pending before the Court. [FN8] The State of Florida has filed no response to the request for an injunction. [FN9] On April 6, 1992, the United States of America filed an *amicus curiae* brief in opposition to Plaintiff's request for an injunction. The Court conducted a hearing on Plaintiff's request for an injunction on May 14, 1992.

FN7. There remains confusion over ownership of the submerged lands. The State of Florida maintains that the dedication did not convey title to the submerged lands. Thus, the State of Florida asserts ownership over the alleged wreck, presumably leaving the United States with exclusive authority to manage the Cape Canaveral National Seashore.

FN8. This case was reassigned to the undersigned on January 2, 1992.

FN9. The State of Florida is not a party to the *in rem* action, but argues that its removed action is an *in personam* action to adjudicate title to the alleged vessel binding only the State of Florida and Plaintiff. The State claims that the Eleventh Amendment bars this Court from adjudicating its interest in the vessel since it has not waived sovereign immunity.

This controversy presents two complex issues involving principles of jurisdiction, federalism and comity, and Congress' power to alter substantive admiralty law, namely: (1) whether the Court has *in personam* jurisdiction to issue an injunction against the United States and its agents where the United States is not a party to this litigation and has not been

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served with process and (2) whether Congress can constitutionally supplement substantive admiralty law by regulating salvage activities; and if so, whether the United States can require a potential salvor of an alleged historical shipwreck to comply with federal law requiring a permit before conducting salvage activities in a national park.

II IN PERSONAM JURISDICTION

[1] It is important to clarify the United States' status in this litigation. Plaintiff commenced an in rem action to arrest only the alleged vessel. As an in rem action, the only party brought before the Court is the alleged unidentified vessel. The United States appears in this matter as an amicus curiae. [FN10] In this capacity, the United States has filed only a brief in response to Plaintiff's motion for an injunction. Plaintiff has not, *961 however, endeavored to join the United States as a party. Nor has Plaintiff served the United States with process.

FN10. Although there is no precise rule in the Federal Rules of Civil Procedure governing amicus curiae, it is generally accepted that it is within the Court's "inherent authority" to appoint "friends of the court." Resort Timeshare Resales, Inc., 764 F.Supp. at 1501.

[2][3] Although this action began as an in rem admiralty action, the issuance of an injunction operates in personam and requires the same jurisdictional predicate as any other in personam action--a basis for exercising personal jurisdiction accompanied by adequate notice (service of a summons and a complaint). *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260 (1917). A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim. *Zepeda v. United States I.N.S.*, 753 F.2d 719 (9th Cir.1983); *Bethell v. Peace*, 441 F.2d 495 (5th Cir.1971); see generally 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2941 (1990) (stating that "the Court must have personal jurisdiction over the party against whom equitable relief is sought").

[4] As an amicus curiae, the United States is not a party to this action, but participates solely for the benefit of the court. *Resort Timeshare Resales, Inc. v. Stuart*, 764 F.Supp. 1495, 1501 (S.D.Fla.1991). Because the United States is not already a party over which the Court has acquired in personam jurisdiction, Plaintiff then was required to serve process on the United States and to provide proof of such service to the Court. Fed.R.Civ.P. 4(j), 65. If the United States has been properly served, the file lacks such timely proof. [FN11] Without jurisdiction, the Court lacks the power to enjoin the United States.

FN11. In the United States' original response filed in July 1990, the United States argued against the sufficiency of service of process; namely, that Plaintiff failed to comply with Rule 4(d)(4) which requires personal service on the United States Attorney and a copy of both the complaint and summons mailed to the Attorney General and the representative agency.

In response to the second request for an injunction, the United States objects to the issuance of an injunction, but asserts that it is not a "party." The Court interprets this argument as a renewal of the previous objection--that the Court lacks in personam jurisdiction over the United States.

III PRELIMINARY INJUNCTION

Although the Court has determined that it lacks in personam jurisdiction over the United States, and therefore is without authority to enjoin it, the Court will address the merits of Plaintiff's motion in the event the United States has been properly served.

In order for the Court to issue an injunction, a Plaintiff must establish four essential elements: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat that Plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to Plaintiff outweighs the threatened harm; and (4) that granting the preliminary injunction will not disserve the public interest. *Jupiter Wreck, Inc. v. Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1383 (S.D.Fla.1988). *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974).

SUBSTANTIAL LIKELIHOOD OF SUCCESS

[5][6] Plaintiff presents two claims in this in rem action: (1) a right of salvage and (2) ownership of the vessel. Distinguished from the law of finds, the law of maritime salvage is concerned not with title to the property, but rather with successful recovery and possession of lost property from the oceans and waterways. See *MDM Salvage v. Unidentified W & A Sail Vessel*, 631 F.Supp. 308, 312 (S.D.Fla.1986). Salvage involves the right to possess another's property and to save it from destruction, danger or loss, allowing a salvor to retain it until being compensated by the owner. *Id.* Once in possession, no other person can lawfully intrude upon that possession, including the salvaged vessel's master or owner. 3A M. Norris, *Benedict on Admiralty: The Law of Salvage* § 151 (7th ed. 1983).

1.

SALVAGE CLAIM

[7] In order to establish a claim for salvage, three elements must be proven: (1) a *962 "marine peril"; (2) service voluntarily rendered; and (3) success--either wholly or partly--in recovering the imperiled property. *Id.* The alleged historic shipwreck is in marine peril, *Treasure Salvors, Inc. v. Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir.1978), *aff'd in part and rev'd in part*, on other grounds, *sub nom. Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982). But see *Klein v. Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir.1985) (stating that vessel was not lost or suffering any marine peril), and Plaintiff has voluntarily rendered his services to rescue its remains. Plaintiff has been only slightly successful in recovering its remains. To date, he has recovered approximately eight silver coins and a nail.

[8] Although Plaintiff has established these elements of salvage (the last element in part), this case presents an additional problem: The vessel is located in a national park, and the State of Florida conveyed exclusive use of those lands to the United States for a single purpose--to preserve and protect the wildlife. As the protector of the Cape Canaveral National Seashore, the United States requires Plaintiff to obtain a permit before lawfully excavating the alleged vessel. [FN12] Simply put, the United States argues that several Congressional enactments have modified the substantive law of admiralty. By these enactments--the Rivers and Harbors Act, the Antiquities Act, and several U.S. Park Service Regulations [FN13]--Congress has restricted the manner in which a potential salvor can excavate abandoned shipwrecks located on federal lands. According to the United States, these enactments restricting Plaintiff's manner of salvaging the alleged shipwreck do not conflict with the underlying principles of salvage; namely, that the law of salvage was developed to offer economic incentives to seamen observing cargo in immediate marine peril to undertake rescue efforts. *Zych v. Wrecked and Abandoned Vessel*, 941 F.2d 525, 531 (7th Cir.1991). The Court agrees.

FN12. *Unlike Jupiter Wreck, Inc. v. Abandoned Sailing Vessel*, 691 F.Supp 1377 (S.D.Fla.1988), in which a salvor sought an injunction against state officials, Plaintiff seeks an injunction against the United States because the United States Park Rangers have threatened to arrest Plaintiff if he attempts further excavation in the Cape Canaveral National Seashore's seabed.

FN13. The Abandoned Shipwreck Act of 1987, (codified at 43 U.S.C. §§ 2102(a), 2105(a)(1)), does not apply. It only applies to actions brought prior to April 28, 1988.

[9] The Constitution has extended the judicial power to all cases of admiralty and maritime jurisdiction. See U.S. Const. Art. III, § 2. Congress has implemented statutorily the Constitutional grant of jurisdiction and made it exclusive. See 28 U.S.C. § 1333. Courts have held that Congress may constitutionally "alter, qualify, or supplement the substantive admiralty law [presumed to be in existence at the writing of the Constitution]." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924) (alteration in original). There are limits, though, to Congressional power to supplement or alter admiralty law. The Supreme Court noted these limitations:

One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that these enactment ... shall be co-extensive with and operate uniformly in the whole of the United States.

Id. at 386-87, 44 S.Ct. at 394. [FN14]

FN14. The Supreme Court has implied that the uniformity doctrine is only "properly invoked to strike down

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state legislation when it purports to regulate commercial navigation." *Zych*, 941 F.2d at 533 n. 11. (construing *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973)).

[10] Congressional enactments restricting the manner in which a potential salvor excavates property located on federally owned or managed lands does not offend these sound constitutional limitations. The State of Florida dedicated the Cape Canaveral National Seashore to the United States for a specific purpose which is "to preserve *963 and protect the outstanding natural, scenic, scientific, ecologic, and historic values of certain lands, shoreline, and waters of the State of Florida, and to provide for public outdoor recreation use and enjoyment of the [park]." 16 U.S.C. § 459j. The dedication contains a reverter clause allowing the State of Florida to reenter and reclaim possession if the land is used for an improper purpose. [FN15] To prevent against the land's reversion, Congress has enacted legislation allowing the Secretary to terminate a right of use and occupancy retained by an owner of improved property in the park if the land is being used in a manner inconsistent with its specified purpose. See 16 U.S.C. § 459j-2(b).

FN15. The reverter clause states: "Should the United States of America cease for any reason, to use these lands for the herein stated purposes, title to said lands shall revert to said Board of Trustees." United States' Amicus Curiae Opposition, Defendant's Exhibit A, at 2, ¶ 2.

[11] In order to protect national parks, such as the Cape Canaveral National Seashore from being endangered, Congress has passed various laws which prohibit the appropriation of historic artifacts, [FN16] or excavation [FN17] on federal lands without first obtaining a permit from the Corps of Engineers. The permitting process is comprehensive, but it considers the effects of the proposed activity on the public interest as well as the effect on the environment, wildlife, and historical and cultural resources. 33 C.F.R. § 320.4. See *Zable v. Tabb*, 430 F.2d 199 (5th Cir.1970), cert. denied, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). Such laws, however, do not deprive a federal court of admiralty jurisdiction. Nor do they necessarily prohibit a potential salvor from conducting salvage activities, although they might. Rather, these statutes supplement admiralty law by providing substantive rules for lawfully conducting salvage operations on federally owned or managed lands.

FN16. Antiquities Act of 1906, (codified at 16 U.S.C. § 433).

FN17. Rivers and Harbors Act of 1899, (codified at 33 U.S.C. § 403).

[12][13] The requirement that a salvor act lawfully while salvaging a vessel is consistent with general admiralty law. By itself, possession of abandoned property is not sufficient to establish a salvage claim. *Martha's Vineyard Scuba HQ. v. Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir.1987). Before a valid claim can be established, a salvor must acquire possession lawfully. Otherwise, as one court noted, "buccaneering would again flourish on the high seas." *Id.* It is for Congress--through appropriate legislation--to substantively supplement admiralty law and determine the lawfulness of certain salvage activities.

[14] In instances such as the case at bar, restrictions are necessary. Without any restrictions, Plaintiff's salvage activities could not only destroy the alleged vessel and its historic artifacts, but also could disrupt the delicate marine life living on the seabed. An example illustrates the need for such restrictions. Salvors could conceivably block an international shipping route by anchoring a salvage vessel in the channel while attempting to rescue a sunken shipwreck. See *id.* at 1067. Certainly, the United States Coast Guard could exercise its jurisdiction and prevent placement of salvage vessels that would interrupt the flow of maritime traffic. Although this restriction would interfere with salvage activities, it is a necessary restriction to ensure the safety of both salvors and the public. Legislation which supplements admiralty jurisdiction by imposing necessary restrictions on salvage activities is an important legislative function properly reserved to Congress. [FN18]

FN18. The Eleventh Circuit has recognized Congress' broad powers over "all public lands pursuant to the Property Clause of the United States Constitution." *Klein*, *supra*, at 1514 (construing *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976)).

In sum, it appears to the Court that Plaintiff would not prevail on a salvage claim because he cannot lawfully gain possession of the alleged vessel without first obtaining a permit from the United States. The United States Congress has the legislative power to regulate a national park such as the Cape Canaveral National Seashore, even though the State of

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Florida may retain ownership of the submerged lands. Thus, Plaintiff must *964 comply with the permitting process. When Plaintiff obtains a permit, Plaintiff's salvage activities and recovery of artifacts will be deemed lawful. The Court concludes, therefore, that Plaintiff has failed to demonstrate a substantial likelihood of prevailing on his salvage claim.

[15] There is another aspect of salvage law that further demonstrates Plaintiff cannot establish a substantial likelihood of prevailing on the merits. Potential salvors do not have an inherent right to save distressed vessels. *Jupiter Wreck*, 691 F.Supp. at 1377. Instead, a salvage award may be denied if a salvor forces its services on a vessel despite rejection by the owner or by a person with authority. *Platoro Ltd., Inc. v. Unidentified Remains*, 695 F.2d 893 (5th Cir.1983) (construing *The Indian*, 159 F. 20, 25 (5th Cir.1908)). The doctrine of rejection normally applies when the master of a distressed vessel directly and unequivocally rejects a salvor's services. In cases where the vessel has sunk, the master can communicate rejection of salvage services through a sign, buoy, marker or public advertisement. When the master does so, a salvor who continues efforts to rescue the vessel will not be entitled to a salvage award.

[16] There exists a similarly related doctrine--constructive rejection-- which would allow a state [FN19] to reject a salvor's services. See *Platoro*, 695 F.2d at 902. The constructive rejection of salvage services bars an award if the rejection was reasonably understood by a salvor. In this context, the United States must demonstrate that various federal laws put Plaintiff on notice that his services have been rejected. This doctrine then requires a fact finder to determine Plaintiff's understanding of relevant federal laws.

FN19. States not only have laid claim to ownership of wrecked property located within their territorial waters, but also have attempted to preclude salvage activities by potential salvors. These claims have been viewed by salvors as state interference in an area which is predominantly controlled by Federal law, and which is "essentially a Federal problem." *M. Norris, Benedict on Admiralty*, supra, at 11-14.

[17][18][19] Typically, a salvor acts as an agent for a vessel's owner. A salvor acquires the right to possess an abandoned shipwreck, but he does not acquire title. Title remains with the owner as does the right to refuse salvage. Yet in cases involving an historic shipwreck, it may be unclear to a salvor who the owner actually is. [FN20] If a salvor does not know whether it is the United States or the State of Florida which has a valid claim of ownership, a salvor will not know which sovereign's laws apply. This assumes, of course, that whichever law applies, it provides a clear statement rejecting salvage services.

FN20. The Eleventh Circuit applies the law of finds in determining ownership of an abandoned vessel. *Klein*, 758 F.2d at 1513. See also *Treasure Salvors*, 569 F.2d at 337 n. 11 (stating that "the primary difference between the two doctrines is that under the law of salvage the claim of the finder of abandoned property is satisfied by proceeds from the sale of the property paid into court"). According to the law of finds, title vests in the person who reduces the property to his or her possession. *Id.*

There are two exceptions to the law of finds. When the abandoned property is embedded in the soil, it belongs to the soil's owner. Second, the law considers the owner of the land who has "constructive possession" of the property to have never lost the property. If either exception applies, a salvor cannot prevail on his or her claim of ownership. See *Zych*, 941 F.2d at 530 n. 7 ("Embeddedness" [] is to be 'consistent with the recognized exception from the law of finds for shipwrecks embedded in the submerged lands of a state.').

Although ownership of the alleged vessel is an unresolved question, a salvor who knows that a shipwreck is submerged on federal or state lands also should know that a State has a colorable claim of ownership. As such, a salvor should investigate the State's laws to see if the sovereign has rejected salvage services. Here, Plaintiff should have examined either Florida law (if the State has retained ownership of the submerged lands), or federal law. Under *Klein*, an owner can refuse salvage services.

At this stage, the Court must determine whether Plaintiff has demonstrated a substantial likelihood of prevailing on the merits of his salvage claim. For the reasons that follow, the Court concludes Plaintiff has not demonstrated a substantial likelihood of prevailing. In this case, Plaintiff knew the alleged vessel was located on land owned by the State of Florida and dedicated to the United States for preservation as a national *965 park. It is unquestioned that the State of Florida has, by virtue of its police powers, the right to regulate the use of its land and to refuse salvage services when those services will endanger its natural and historical resources.

[20] Because the State of Florida dedicated its land to the United States to establish a national park, the United States

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has the authority to manage and protect the land, its marine life, and historic artifacts from damage caused by dredging or excavating. [FN21] Thus, Plaintiff should have known that the State of Florida, the presumed owner of the submerged lands and any property embedded in the soil, might refuse Plaintiff's offer to excavate the alleged vessel.

FN21. There remains to be resolved a question regarding the United States' authority to regulate the submerged lands. Because the State of Florida alleges that it retained ownership of the submerged lands, it is unclear whether the dedication allows the United States to exercise sole regulatory authority over the Cape Canaveral National Seashore, including the submerged lands. The Court does not decide this question, but proceeds under the assumption that State of Florida retained ownership of the submerged lands, and that the dedication allows the United States to regulate the submerged lands.

While this Court does not decide the ownership of the alleged shipwreck, the Court concludes that it is likely that Plaintiff must have reasonably known that the State of Florida—the alleged vessel's likely owner, rejected his offer of salvage services. *Jupiter Wreck, Inc. v. Abandoned Sailing Vessel*, 691 F.Supp. 1377 (S.D.Fla.1988) (denying injunctive relief because the court concluded that the State of Florida was not required to allow the property salvaged, and the State's statutory scheme reflected the owner's rejection of salvage services). The Court concludes that Plaintiff has not demonstrated a substantial likelihood of prevailing on the merits of his salvage claim.

2.

OWNERSHIP CLAIM
SUBSTANTIAL LIKELIHOOD OF SUCCESS

[21] In determining the ownership of a shipwreck, the Court applies the common law of finds. [FN22] A find in maritime law assumes that the property is abandoned and has returned to the state of nature. *M. Norris*, supra at 11-16. This principle then assigns ownership of the abandoned property to the first person to reduce such property to "possession." *Id.* This may be either actual or constructive. There are two exceptions to the general rule. First, when abandoned property is embedded in the soil, it belongs to the owner of the soil. *Klein*, 758 F.2d at 1514. Second, when the owner of the land has "constructive possession" of the property, it is not "lost," but rather belongs to the land's owner. *Id.*

FN22. This doctrine developed at common law, but is considered a maritime concept. *Zych*, 941 F.2d at 532 (stating that Congress "seems to have assumed that the law of finds was indeed an aspect of admiralty law"). See also *Klein*, 758 F.2d at 1514.

[22] In the instant case, the alleged shipwreck is buried in the soil. The soil belongs to either the United States as part of its national park system which was dedicated to it by the State of Florida or to the State of Florida. It appears, then, that if the United States acquired title to the submerged lands from Florida, it also acquired title to the alleged shipwreck embedded beneath the soil. [FN23] If the State of Florida retained ownership *966 of the submerged lands, it has possession and title of the alleged shipwreck. Therefore, Plaintiff has not demonstrated a substantial likelihood of prevailing on his claim of ownership to the alleged shipwreck.

FN23. The Court notes that the United States does not have to intervene to defeat Plaintiff's claim of ownership. As an amicus curiae, the Court can consider the United States' contention that someone other than Plaintiff has a better claim of title. In addition, the question of ownership does not entirely dispose of the matter. Even though the United States may not own the submerged lands, the State of Florida may have relinquished its regulatory authority over the submerged lands. Even without the States' consent, Congress has the legislative power to preempt state law by supplementing admiralty jurisdiction and determining the manner in which a salvor can lawfully possess an abandoned shipwreck in the navigable waters of the United States. *Klein*, 758 F.2d at 1515 (*Kravitch, J., dissenting*). See the Rivers and Harbors Act of 1899 (codified at 33 U.S.C. § 433 (Supp.1991)). The State's alleged ownership of the submerged lands alone then is not a basis for disproving the United States' authority to regulate its use.

Likewise, should the State of Florida retain ownership of the submerged lands, Plaintiff probably would not prevail under the exception to the law of finds announced in *Klein*. According to *Klein*, Plaintiff may have been the first to find the alleged shipwreck, but the abandoned property belongs to the owner of the soil. A fortiori, the sovereign owner can refuse salvage services.

001961

B
PLAINTIFF'S IRREPARABLE INJURY

The question of Plaintiff's irreparable injury is inextricably intertwined with the question of ownership and the right to refuse salvage. If the United States is declared owner and has refused Plaintiff's salvage services, Plaintiff has suffered no irreparable injury. Plaintiff alleges, however, that if the injunction is not granted, he will lose his right to pursue a salvage claim, and his employees will face arrest, and criminal and civil penalties. If Plaintiff prevails then on its claim of ownership or salvage, Plaintiff will be entitled to either take possession of the vessel [FN24] or receive a salvage award for his services. If he does not prevail, the harm Plaintiff alleges is purely theoretical.

FN24. This assumes of course that Plaintiff files for and receives a permit. A question that may conceivably arise is whether the United States could impose its regulatory scheme on Plaintiff should Plaintiff prevail as owner of the alleged wreck. Plaintiff's present status is that of a potential salvor. The Court finds that the United States may, consistent with admiralty principles, impose regulations on a potential salvor, but does not decide the extent of its regulatory authority.

C
BALANCING OF THE HARM

[23] For the reasons that follow, any harm to the public and the United States would outweigh any harm suffered by Plaintiff if the injunction were granted. At stake is the continued preservation of a national park dedicated by the State of Florida. As the dedication itself states, these lands are dedicated to preserve the waters of the State of Florida for the public's outdoor recreational use. The public's use and enjoyment is deeply rooted in the preservation of the seashore's natural, scenic, scientific, ecologic, and historic value. [FN25] Because the dedication includes a reverter clause, the land could revert to the State of Florida if the injunction were granted. The consequences of that reversion would be severe indeed.

FN25. The United States included two affidavits in support of its motion. Affiant Tyrell A. Henwood, Ph.D., a Fishery Biologist employed by the United States Department of Commerce, stated that Plaintiff's salvage operations increase the turbidity and alteration of nearshore bottom characteristics that could adversely affect turtles. Affidavit of Tyrell A. Henwood at 2.

Larry Murphy, an Archeologist with the Submerged Cultural Resources Unit, a division of the United States Department of Interior, asserts that Plaintiff's salvage activities are contrary to standard archeological procedures and unnecessarily endanger any artifacts that might exist. Affidavit of Larry Murphy at 3.

The United States and its citizens would lose a national park of unparalleled beauty and historical significance. Americans have always possessed a deep affection for America's national parks and its environment. The United States establishes national parks primarily to protect precious lands from being damaged and to promote the well-being of marine life by preserving its habitat. Yet national parks serve another important function-- their creation allows citizens to enjoy the beauty, peacefulness and uninterrupted solitude of the outdoors.

Cape Canaveral is a popular tourist attraction which is visited by thousands annually, and the National Seashore adds to the magnificence and enchantment of this well-known attraction. Similar to the environment, Americans have held a deep affection for the space program. To many, it personifies America's love for freedom, science, and adventure. As representative of those ideals, Cape Canaveral has become a well-endowed sanctuary for those who journey to Florida to watch shuttle launches or to visit the space museum. Presumably, the State of Florida dedicated this land to the United States because it would be in a better position financially to maintain the park and its shores. By granting this injunction, it appears with *967 certainty that the land comprising the national park could revert to the State of Florida, and the future of this national park would be greatly jeopardized.

D
DISSERVICE TO THE PUBLIC

The last requirement that must be satisfied is that by granting an injunction the public interest would not be disserved. In this case, Plaintiff's continued efforts to excavate the alleged shipwreck would disserve the public by bringing about

001962

two severe consequences: (1) the Cape Canaveral National Seashore would revert to the State of Florida, and (2) the marine life and artifacts would be damaged. [FN26] Many of the issues in this case depend on resolution of a critical question--ownership of the alleged vessel. Essentially, the resolution of this entire matter requires the presentation of evidence during trial. Until the Court has an opportunity to adjudicate title [FN27] to the shipwreck, the Court finds that the best way to adequately protect the rights of the salvor and the public is by denying the injunction.

FN26. See supra note 25 and text accompanying note.

FN27. The State of Florida contends that title to the alleged vessel must be adjudicated in state court. See supra note 9. Shortly after removal, the state filed a Motion to Remand which was denied on August 22, 1990. Before ruling on Removed Plaintiff's Motion for Summary Judgment, the Court may wish to reconsider the State's request for remand in order to decide the alleged vessel's ownership.

Clearly, there are two important interests to be preserved: the right to salvage and the preservation of a national park. On the one hand, Plaintiff asserts that his maritime right of salvage has been impeded. The United States asserts that it will lose the Cape Canaveral National Seashore if Plaintiff prevails. During trial, it is clear that both parties cannot prevail on their claims. For this reason--both parties cannot prevail on their claims--an injunction is an extraordinary remedy which should not be granted unless Plaintiff can establish a substantial likelihood of prevailing on the merits of his claims. Plaintiff has failed to meet his burden.

Because it is unclear that during trial Plaintiff could establish either entitlement to a salvage award or ownership of the alleged vessel, an injunction is not a proper remedy. If the Court granted an injunction improvidently, the United States could lose the Cape Canaveral National Seashore. The reason for this austere result is the dedication agreement's reverter provision. The purpose of having a reverter clause, such as the one in the dedication, is to ensure usage consistent with a specified purpose. Here, the purpose advocated by the United States is the land's preservation. Should the land be used for other purposes that endanger its preservation, the State of Florida then can reenter, oust the United States of any ownership interest, and reclaim the land. If this were to occur, the United States and its citizens would lose an important national park. Moreover, the future of the park's land, its artifacts, and its marine life also would be jeopardized. The Court concludes that Plaintiff cannot meet his burden on this element because an injunction would disserve the public.

Accordingly, it is ORDERED AND ADJUDGED that Plaintiff's Motion for Preliminary Injunction (Doc. No. 66) is DENIED.

DONE AND ORDERED.

001963

34 F.3d 918

39 ERC 1987, 1994 A.M.C. 2941, 25 Env'tl. L. Rep. 20,020

(Cite as: 34 F.3d 918)

Clifton B. CRAFT; Jack Dean Ferguson; Donald L. Jernigan; Michael Patrick King; Thomas D. Stocks; William Lee Wilson, Plaintiffs-Appellants,

v.

NATIONAL PARK SERVICE; National Oceanic and Atmospheric Administration; National Marine Fisheries Service; United States of America, Defendants-Appellees.

No. 93-55140.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 8, 1994.

Decided Sept. 12, 1994.

Divers brought action challenging National Oceanic and Atmospheric Administration's (NOAA) authority to impose civil penalties for excavating seabed of Channel Islands National Marine Sanctuary (CINMS) with hammers and chisels. The United States District Court for the Central District of California, Stephen V. Wilson, J., entered summary judgment for the government, and divers appealed. The Court of Appeals, Fletcher, J., held that: (1) divers' overbreadth challenge to NOAA regulation prohibiting dredging or otherwise altering seabed of CINMS in anyway failed because divers did not claim that any constitutional or fundamental right was prohibited by regulation, and (2) regulation was not unconstitutionally vague as applied to divers' excavation activities.

Affirmed.

[1] FEDERAL COURTS k776

170Bk776

Court of Appeals' review is de novo where legal challenge is raised involving construction of a federal law and its application to undisputed facts.

[2] CONSTITUTIONAL LAW k82(4)

92k82(4)

Overbreadth doctrine requires that enactment reach a substantial amount of constitutionally protected conduct; if it does not, then overbreadth challenge must fail.

[3] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

Overbreadth challenge to National Oceanic and Atmospheric Administration (NOAA) regulation

001964

making it unlawful to dredge or otherwise alter seabed of Channel Islands National Marine Sanctuary (CINMS) brought by divers who excavated seabed of CINMS with hammers failed because divers did not claim that any constitutional or fundamental right was prohibited by the regulation. 15 C.F.R. § 935.7(a)(2)(iii).

[4] STATUTES k47

361k47

Statute's application might violate constitutional mandate against vagueness if its terms are not sufficiently clear.

[5] STATUTES k47

361k47

Degree of vagueness tolerated by constitution depends in part on nature of the enactment and as such, statute providing for civil sanctions is reviewed for vagueness with somewhat greater tolerance than one involving criminal penalties because consequences of imprecision are less severe.

[6] STATUTES k47

361k47

Scienter requirement may mitigate vagueness of statute.

[7] CONSTITUTIONAL LAW k82(4)

92k82(4)

Most important factor affecting clarity that Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights, in which case a more stringent vagueness test applies.

[8] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

National Oceanic and Atmospheric Administration (NOAA) regulation making it unlawful to dredge or otherwise alter seabed of Channel Islands National Marine Sanctuary (CINMS) other than to anchor vessels or to bottom trawl from commercial fishing vessel was not unconstitutionally vague as applied to excavation activities of divers within CINMS; regulation provided only for civil, and not criminal, penalties and did not inhibit exercise of constitutionally protected conduct and regulation by its terms clearly prohibited divers' activities. 15 C.F.R. § 935.7(a)(2)(iii).

[9] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

Principle of statutory construction that, where general words follow specific words in a statutory enumeration, general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words was not applicable with respect to National Oceanic and Atmospheric Administration (NOAA) regulation prohibiting dredging or otherwise altering the seabed of Channel Islands National Marine Sanctuary (CINMS) in any way other than to anchor vessels or to bottom trawl from commercial fishing vessel; regulation was not merely general prohibition preceded by specific illustrative terms, regulation included two specific exceptions to the prohibition on altering, and existence of listed exceptions to the prohibition on alterations

001965

suggested that all alterations other than those that were specifically excepted were prohibited. 15 C.F.R. § 935.7(a)(2)(iii).

[10] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

National Oceanic and Atmospheric Administration (NOAA) regulation prohibiting dredging or otherwise altering the seabed of Channel Islands National Marine Sanctuary (CINMS) in anyway other than to anchor vessels or to bottom trawl from commercial fishing vessel was sufficiently broad to provide fair warning to the public that hammering at the seabed was prohibited, even though NOAA's Final Environmental Impact Statement (FEIS) discussed regulation only in the context of dredging; FEIS was not definitive agency interpretation of scope of the regulation, but rather was detailed statement of significant environmental effects of the regulation and purpose of FEIS was to provide agency with sufficiently detailed information to enable it to decide whether to proceed on project in light of potential environmental consequences and to inform public of potential environmental impacts of proposed enactment. 15 C.F.R. § 935.7(a)(2)(iii).

[11] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

Final Environmental Impact Statement (FEIS) of National Oceanic and Atmospheric Administration (NOAA) discussing NOAA's regulation prohibiting dredging or otherwise altering seabed of Channel Islands National Marine Sanctuary (CINMS) only in the context of dredging did not limit Court of Appeals' construction of regulation as prohibiting hammering at the seabed because FEIS was not intended to provide the public with definitive statement of all activities that might fall within regulation's prohibitions. 15 C.F.R. § 935.7(a)(2)(iii).

[12] HEALTH AND ENVIRONMENT k25.7(3)

199k25.7(3)

Divers who used hammers and chisels to remove artifacts from shipwrecks and to excavate seabed of Channel Islands National Marine Sanctuary (CINMS) were aware that their activities were prohibited for purposes of divers' claims that National Oceanic and Atmospheric Administration (NOAA) regulation prohibiting dredging or otherwise altering seabed of CINMS was unconstitutionally vague as applied to divers' conduct; one of the divers announced to the others that shipwrecks were located in a federal reserve and were protected and at one of the shipwrecks diver announced that removing objects from site was illegal and that underwater alarm would alert group if National Park Service Patrol approached. 15 C.F.R. § 935.7(a)(2)(iii).

*920 Peter E. Hess, Wilmington, DE, for plaintiffs-appellants.

Bradley M. Campbell, Environment and Natural Resources Div., U.S. Dept. of Justice, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, CANBY, and HALL, Circuit Judges.

FLETCHER, Circuit Judge:

001968

Clifton Craft, Jack Ferguson, and William Wilson ("appellants") appeal the district court's order affirming the assessment of civil penalties by the National Oceanic and Atmospheric Administration ("NOAA") for violations of the Marine Protection, Research, and Sanctuaries Act. NOAA assessed the penalties following a four week administrative trial, in which appellants were found to have violated NOAA regulations protecting the seabed and historic resources of the Channel Islands National Marine Sanctuary. We have jurisdiction and we affirm.

I

The Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431- 1445a, provides for the establishment of marine sanctuaries to protect important and sensitive marine areas and resources of national significance. *Id.* § 1431; S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in, 1988 U.S.C.C.A.N. 4387. Pursuant to this law, NOAA designated the Channel Islands National Marine Sanctuary ("CINMS") in 1980. The Channel Islands National Marine Sanctuary, 45 Fed.Reg. 65,198 (Oct. 2, 1980). The CINMS includes the marine waters surrounding several islands off the coast of California out to a distance of six nautical miles from the islands. 15 C.F.R. § 935.3.

To protect resources within the CINMS, NOAA has promulgated regulations which prohibit activities that might adversely affect sanctuary resources, including hydrocarbon operations, the discharge or deposit of substances, commercial vessel traffic, and the removal or damage of cultural or historical resources. 15 C.F.R. §§ 935.6 & 935.7. Activities that are not specifically prohibited are permitted. 15 C.F.R. § 935.5.

The regulations at issue in this appeal provide, in relevant part:

[T]he following activities are prohibited within the Sanctuary ...

(2) Alteration of, or construction on, the seabed. Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall:

(i) Construct any structure other than a navigation aid, or

(ii) Drill through the seabed, or

***921** (iii) Dredge or otherwise alter the seabed in any way, other than

(A) To anchor vessels, or

(B) To bottom trawl from a commercial fishing vessel.

15 C.F.R. § 935.7(a)(2) (emphasis in original and added). The statute authorizes civil penalties for the violation of these regulations; criminal penalties are not authorized. 16 U.S.C. § 1437 (Supp.1994).

Appellants are members of a diving club that took a trip on the boat "Vision" to the CINMS in October 1987. The club members participated in dives at four shipwrecks within the CINMS. Two National Park Service rangers were on board the Vision and witnessed violations of CINMS regulations by members of the diving club. Based on the rangers' testimony and other evidence, NOAA assessed civil penalties against appellants for violations of § 935.7(a)(2)(iii). [FN1]

FN1. Penalties were also assessed against appellants Ferguson and Wilson pursuant to 15 C.F.R. § 935.7(a)(5), which prohibits any person from "remov[ing] or damag[ing] any historical or cultural resource." Section 935.7(a)(5) also served as the sole basis for assessing

penalties against plaintiff-appellants Michael King, Thomas Stocks, and Donald Jernigan. Appellants do not challenge the constitutionality of § 935.7(a)(5) on appeal to this court.

Following a four week administrative trial, the ALJ concluded that appellants had violated § 935.7(a)(2)(iii) and recommended assessment of the penalties sought by NOAA. The ALJ specifically found that appellants removed artifacts from the shipwrecks and "excavated" the seabed with hammers and chisels. The ALJ found that both Craft and Wilson repeatedly hammered at the seabed and that Ferguson admitted that one site looked like a minefield due to the divers' activities. The ALJ also found that the alteration to the seabed was sufficiently extensive that the sites could be located days after the divers left the site. NOAA adopted the ALJ's findings and recommendations.

Appellants subsequently filed an action in district court, challenging NOAA's authority to impose the civil penalties on the grounds that the regulation in question is unconstitutionally overbroad and vague. [FN2] The district court rejected these contentions and granted the government's motion for summary judgment. Appellants timely appealed.

FN2. Appellants also argued that they have a pre-existing right to perform salvage activities in the CINMS and that the regulations impermissibly restrict their rights under admiralty law principles to engage in the underlying activities. These claims were rejected by the district court.

[1] Because appellants raise a legal challenge involving the construction of a federal law and its application to undisputed facts, our review is de novo. *United States v. Doremus*, 888 F.2d 630, 631 (9th Cir.1989), cert. denied, 498 U.S. 1046, 111 S.Ct. 751, 752, 112 L.Ed.2d 772 (1991).

II

[2][3] Appellants first argue that the regulation is overbroad. The overbreadth doctrine requires that the enactment reach "a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *United States v. Austin*, 902 F.2d 743, 744 (9th Cir.), cert. denied, 498 U.S. 874, 111 S.Ct. 200, 112 L.Ed.2d 161 (1990) (internal quotations omitted); see also *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Because appellants do not claim that any constitutional or fundamental right is prohibited by the regulation in question, their overbreadth challenge must fail. See *Austin*, 902 F.2d at 744-45 (no overbreadth challenge under Archaeological Resources Protection Act, which prohibits excavation of archaeological resources on public lands).

III

Appellants also argue that 15 C.F.R. § 935.7(a)(2)(iii) is unconstitutionally vague as applied to their activities. Appellants do not raise a facial challenge.

[4] "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *922 *United States v. 594,464*

001968

Pounds of Salmon, 871 F.2d 824, 829 (9th Cir.1989); see also Austin, 902 F.2d at 745. Thus, a statute's application might violate the constitutional mandate against vagueness if its terms are not sufficiently clear. 594,464 Pounds of Salmon, 871 F.2d at 829.

[5][6][7] We do not apply this standard mechanically, however. Instead, various factors affect our analysis. The degree of vagueness tolerated by the Constitution depends in part on the nature of the enactment: "[a] statute providing for civil sanctions is reviewed for vagueness with somewhat greater tolerance than one involving criminal penalties" because the consequences of imprecision are less severe. *Id.* (internal quotations omitted); see also *Hoffman Estates*, 455 U.S. at 498-99, 102 S.Ct. at 1193-94; *Big Bear Super Market No. 3 v. I.N.S.*, 913 F.2d 754, 757 (9th Cir.1990). In addition, a scienter requirement may mitigate vagueness. Finally, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights," in which case a more stringent vagueness test applies. *Hoffman Estates*, 455 U.S. at 499, 102 S.Ct. at 1193-94; *Doremus*, 888 F.2d at 635.

[8] In light of these principles, we conclude that 15 C.F.R. § 935.7(a)(2)(iii) is not unconstitutionally vague as applied to appellants' excavation activities. At the outset, we note that the regulation in question provides only for civil--and not criminal--penalties and does not inhibit the exercise of constitutionally protected conduct. Consequently, the Constitution tolerates a greater degree of vagueness in the regulation.

Even more significant, however, is our conclusion that the regulation by its terms clearly prohibits appellants' activities. With two exceptions, the regulation prohibits "dredg[ing] or otherwise alter[ing] the seabed in any way." 15 C.F.R. § 935.7(a)(2)(iii) (emphasis added). The word "alter" extends broadly to activities that "modify" the seabed, see *Webster's II New Riverside Universal Dictionary*, and the language "in any way" reinforces our understanding that the term "alter" applies to a broad range of conduct. There can be no question but that this language prohibits the excavation activities in which appellants were engaged. [FN3] E.g., *Austin*, 902 F.2d at 743-45 (criminal provision that prohibits "excavat[ing], remov[ing], damag[ing], or otherwise alter[ing] or defac[ing] any archaeological resource located on public lands or Indian lands" not unconstitutionally vague as applied to excavation of obsidian weapons and tools); *Doremus*, 888 F.2d at 635-36 (criminal provision that prohibits "[d]amaging any natural feature or other property of the United States" not unconstitutionally vague as applied to chopping down live trees on Forest Service land).

FN3. Appellants' attempts to characterize their activities as minimally harmful fanning of sediment and manual hammering are misleading. As noted above, the ALJ found that appellants' hammering and chiseling activities were "excavations" that resulted in identifiable scars on the seabed. These factual findings have not been challenged on appeal.

[9] Appellants argue that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." They suggest that because the term "altering" follows the terms "dredging," "construction," and "laying of pipeline," it must be read to proscribe only major industrial and commercial impacts on the seabed.

001969

This principle of statutory construction is inapplicable, however, because § 935.7(a)(2)(iii) is not merely a general prohibition preceded by specific illustrative terms. Instead, the regulation includes two specific exceptions to the prohibition on "altering": (1) alterations that occur when anchoring vessels; and (2) bottom trawling from a commercial fishing vessel. 15 C.F.R. § 935.7(a)(2)(iii)(A) & (B). Moreover, contrary to appellants' contentions, the existence of listed exceptions to the prohibition on alterations further suggests that all alterations other than those that are specifically excepted are prohibited.

*923 Appellants also rely on NOAA's Final Environmental Impact Statement ("FEIS") to argue that the regulations are unconstitutionally vague. They note that the FEIS discusses § 935.7(a)(2)(iii) only in the context of dredging, an activity that has a major effect on the seabed, and argue that the FEIS, as the only prior agency interpretation of the regulation in question, is entitled to substantial deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although appellants are correct that the FEIS discusses § 935.7(a)(2)(iii) only in the context of dredging, appellants' argument is unavailing. As we have previously noted, the regulatory language of § 935.7(a)(2)(iii) broadly prohibits alterations "of any kind." Even if NOAA did not originally consider whether this regulation would apply to activities such as hammering at the seabed, the regulatory language is sufficiently broad to provide fair warning to the public that such activities are prohibited. See *Hoffman Estates*, 455 U.S. at 498, 102 S.Ct. at 1193; *Doremus*, 888 F.2d at 635.

[11] Moreover, the FEIS is not a definitive agency interpretation of the scope of the regulations in question. Instead, an FEIS is intended to be a detailed statement of the significant environmental effects of the regulation. E.g., *Sierra Club v. Clark*, 774 F.2d 1406, 1411 (9th Cir.1985). Its purpose is to provide the agency with sufficiently detailed information to enable it to decide whether to proceed on a project in light of potential environmental consequences and to inform the public of the potential environmental impacts of the proposed enactment. *Id.* Because the FEIS is not intended to provide the public with a definitive statement of all activities that might fall within the regulation's prohibitions, its terms do not limit our construction of the regulation.

[12] As a final matter, there can be no doubt that appellants were aware that their activities were prohibited. The ALJ found that Ferguson announced to the group of divers that the shipwrecks were located in a federal reserve and were protected. At one of the shipwrecks Ferguson announced that removing objects from the site was illegal and that an underwater alarm would alert the group if a National Park Service patrol approached. The ALJ concluded that appellants "set out with their picks, hammers ... and other wreck raiding paraphernalia, fully intending to remove objects from these wrecks in the closed area within the Sanctuary, and that is what they did." Given these undisputed facts, appellants' claims that they lacked fair warning that their actions were prohibited ring hollow. See *United States v. Ellen*, 961 F.2d 462, 467 (4th Cir.), cert. denied, 506 U.S. 875, 113 S.Ct. 217, 121 L.Ed.2d 155 (1992); *United States v. Clinical Leasing Serv.*, 925 F.2d 120, 123 (5th Cir.), cert. denied, 502 U.S. 864, 112 S.Ct. 188, 116 L.Ed.2d 149 (1991).

We hold that § 935.7(a)(2)(iii) is neither overbroad nor unconstitutionally vague as applied to appellants' conduct. The order of the district court is AFFIRMED.

END OF DOCUMENT

001971

977 F.Supp. 1193
(Cite as: 977 F.Supp. 1193)

UNITED STATES of America, Plaintiff,

v.

Melvin A. FISHER, Kane Fisher, Salvors, Inc., a Florida corporation, M/V Bookmaker, M/V Dauntless, M/V Tropical Magic, their engines, apparel, tackle, appurtenances, stores, and cargo, in rem, Defendants.

MOTIVATION, INC., Plaintiff,

v.

UNIDENTIFIED, WRECKED AND ABANDONED SAILING VESSEL, etc., Defendant.

Nos. 92-10027-CIV, 95-10051-CIV.

United States District Court,
S.D. Florida,
Key West Division.

July 30, 1997.

United States brought action against treasure-hunting company and its operator under Marine Protection, Research and Sanctuaries Act, alleging that defendants illegally destroyed seagrass in marine sanctuary and removed artifacts. The District Court, Edward B. Davis, Chief Judge, held that: (1) defendants injured and destroyed 1.63 acres of seagrass in violation of Act; (2) defendants removed artifacts from sanctuary in violation of Act; and (3) United States was entitled to permanent injunction.

So ordered.

[1] FISH k12

176k12

Seagrass is "resource" within meaning of Keys Act and Marine Protection, Research and Sanctuaries Act. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443; Florida Keys National Marine Sanctuary and Protection Act, § 1 et seq., 104 Stat. 3089. See publication Words and Phrases for other judicial constructions and definitions.

[2] FISH k12

176k12

Treasure-hunting company and company operator injured and destroyed 1.63 acres of seagrass in marine sanctuary by using prop wash deflectors, or "mailboxes," to salvage for treasure, and were thus liable to United States for response costs and damages under Marine Protection, Research and Sanctuaries Act; evidence consisted of vessel logs and testimony concerning nature of blowholes, nonexistence of other salvagers in area, and damage to seagrass. Marine Protection, Research, and Sanctuaries Act of 1972, §§ 302(6)(A), (8), 312, as amended, 16 U.S.C.A. §§ 1432(6)(A), (8), 1443. See publication Words and Phrases for other judicial constructions and definitions.

001972

[3] FISH k12

176k12

Liability exceptions under Marine Protection, Research and Sanctuaries Act did not apply to treasure-hunting company and company operator which injured and destroyed 1.63 acres of seagrass in marine sanctuary by using prop wash deflectors, or mailboxes, to salvage for treasure, given nature of blowholes, nonexistence of other salvagers in area, and damage to seagrass. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443. See publication Words and Phrases for other judicial constructions and definitions.

[4] FISH k12

176k12

Where destroyed seagrass in marine sanctuary could not be replaced, public was required to be compensated under Marine Protection, Research and Sanctuaries Act by acquisition of equivalent sanctuary resource. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443.

[5] FISH k12

176k12

"Habitat equivalency analysis" (HEA), which quantifies total resource services lost due to injury and determines quantity of equivalent habitat necessary to be restored and/or created so that total resource services gained through restoration equals total resource services lost, was appropriate methodology to scale compensatory restoration project chosen by National Oceanic and Atmospheric Administration (NOAA), in case involving treasure-hunting company's destruction of 1.63 acres of seagrass in marine sanctuary in violation of Marine Protection, Research and Sanctuaries Act. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443. See publication Words and Phrases for other judicial constructions and definitions.

[6] HEALTH AND ENVIRONMENT k25.5(8)

199k25.5(8)

Artifacts that treasure-hunting company removed from marine sanctuary were "sanctuary resource" within meaning of Marine Protection, Research and Sanctuaries Act, as they were nonliving resources that contributed to historical value of sanctuary. Marine Protection, Research, and Sanctuaries Act of 1972, § 302(8), as amended, 16 U.S.C.A. § 1432(8). See publication Words and Phrases for other judicial constructions and definitions.

[7] HEALTH AND ENVIRONMENT k25.5(8)

199k25.5(8)

United States could recover artifacts removed from marine sanctuary in violation of Marine Protection, Research and Sanctuaries Act, but could not receive compensation to professionally evaluate or curate artifacts. Marine Protection, Research, and Sanctuaries Act of 1972, §§ 302(8), 312, as amended, 16 U.S.C.A. §§ 1432(8), 1443.

[8] INJUNCTION k9

212k9

To obtain permanent injunction, plaintiff must show actual success on merits and prove that it will

suffer irreparable harm if injunction is not granted, that threatened injury outweighs harm that granting injunction would inflict on defendant, and that public interest will not be adversely affected if injunction is granted.

[9] FISH k12

176k12

United States was entitled to permanent injunction prohibiting treasure-hunting company and company operator from using prop wash deflectors to salvage for treasure in marine sanctuary and from removing artifacts from sanctuary without permit issued by National Oceanic and Atmospheric Administration (NOAA); defendants destroyed and lost sanctuary resources in violation of Marine Protection, Research and Sanctuaries Act, United States would suffer irreparable harm if injunction was not granted, scale and significance of harm of defendants' treasure-hunting activities outweighed any burden placed on defendants, and public interest would be served by protection of sanctuary resources. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443.

[9] HEALTH AND ENVIRONMENT k25.15(2.1)

199k25.15(2.1)

United States was entitled to permanent injunction prohibiting treasure-hunting company and company operator from using prop wash deflectors to salvage for treasure in marine sanctuary and from removing artifacts from sanctuary without permit issued by National Oceanic and Atmospheric Administration (NOAA); defendants destroyed and lost sanctuary resources in violation of Marine Protection, Research and Sanctuaries Act, United States would suffer irreparable harm if injunction was not granted, scale and significance of harm of defendants' treasure-hunting activities outweighed any burden placed on defendants, and public interest would be served by protection of sanctuary resources. Marine Protection, Research, and Sanctuaries Act of 1972, § 312, as amended, 16 U.S.C.A. § 1443.

*1195 James A. Lofton, Jon A. Mueller, U.S. Dept. of Justice, Environmental Enforcement Section, Washington, DC, Caroline M. Zander, U.S. Dept. of Justice, Gen. Litigation Section, Washington, DC, Lisa B. Hogan, Asst. U.S. Atty., Southern Dist. of Florida, Miami, FL, for Plaintiff.

William Vandercreek, Dallas, TX, for Mel Fisher.

Michael R. Barnes, Key West, FL, for Kane Fisher.

Richard G. Rumrell, Jacksonville, FL, for Motivation, Inc., Salvors, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

EDWARD B. DAVIS, Chief Judge.

This action stems from Defendants' 1992 treasure-hunting activities in the Florida Keys National Marine Sanctuary (the Keys Sanctuary). In Case Number 92-10027-CIV-DAVIS, the United States alleges that the Defendants illegally destroyed seagrass in the Keys Sanctuary and removed artifacts. The government seeks damages and an injunction under the Marine Protection, Research and

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Sanctuaries Act (the Sanctuaries Act). In 1995, Motivation, Inc., [FN1] filed a separate action, seeking title to the same artifacts and a salvage award. See Case Number 95-10051-CIV-DAVIS.

FN1. Salvors, Inc., and Motivation, Inc., are related treasure-hunting companies that Defendants Melvin and Kane Fisher operate.

On May 9, 1997, the Court dismissed the three vessels, the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker, as Defendants in Case Number 92- 10027. The Court then tried this matter without a jury on May 12-13 and 19-21, 1997. At trial, the Court dismissed Melvin A. Fisher as a Defendant in Case Number 92-10027, then dismissed Case Number 95-10051 entirely. Therefore, the only remaining Defendants are Kane Fisher and Salvors, Inc. (collectively referred to below as "the Defendants").

Based on the evidence adduced at trial and pursuant to Federal Rule of Civil Procedure 52(a), the court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT [FN2]

FN2. To the extent that any Findings of Fact represent legal conclusions, they are adopted as Conclusions of Law.

A. Seagrass Damage

1. From January through March 1992, the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker conducted treasure-hunting operations in Atlantic Ocean waters off Grassy Key, Florida, known as Coffins Patch.

2. Coffins Patch is located within the boundaries of the Keys Sanctuary, a Congressionally-designated National Marine Sanctuary. The Keys Sanctuary is comprised of 2,800 square nautical miles of coral reef, seagrass, mangrove fringe shoreline and hard-bottom habitats that Congress designated for special protection in passing the *1196 Florida Keys National Marine Sanctuary Act (the Keys Act) in 1990.

3. Kane Fisher, an employee of Salvors, Inc., was captain of the M/V Dauntless and directed its treasure-hunting activities in Coffins Patch from January through March 1992. Fisher also directed the activities of the M/V Tropical Magic and the M/V Bookmaker during those three months. All three boats were in some capacity working for Salvors, Inc.

4. The three vessels were equipped with prop wash deflectors, also known as mailboxes, while operating in Coffins Patch. The mailboxes assisted in treasure hunting.

5. Mailboxes consist of a pair of large, angular pipes mounted on the transom of a vessel. Once lowered from the transom, one end of each pipe fits directly over each of the vessel's propellers. The pipe turns at a ninety-degree angle and then aims straight down, directing the thrust of the ship's engines towards the sea bottom. The goal is to displace sediment and unearth buried items.

6. Mailboxes are powerful devices that can displace five feet of hard-packed mud in thirty-five feet of water. They also can excavate up to twenty-five feet of sand from the ocean bottom. They can make a hole in sand thirty feet across and three to four feet deep in fifteen seconds.

7. The water in Coffins Patch is very shallow, in many places only fifteen feet deep.

8. Using mailboxes, the Defendants made more than 600 holes in the Coffins Patch sea bottom during the first three months of 1992 while attempting to unearth artifacts. These holes are commonly referred to as blowholes. The mailboxes on the M/V Dauntless made 395 blowholes, and Kane Fisher personally ordered at least 300 of them to be dug.

9. The blowholes averaged twenty to thirty feet in diameter and three to five feet in depth, and extended along a line for more than a mile.

10. Bancroft Thorne is a Marathon dive boat operator who led ninety dive trips to Coffins Patch from 1987 through 1992. Thorne observed the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker using mailboxes in Coffins Patch on several occasions in January, February and March 1992. Neither he nor Kane Fisher saw any other boats salvaging in Coffins Patch during those three months. [FN3]

FN3. Kane Fisher testified he observed several old blowholes in Coffins Patch when he first began digging there in January 1992, but saw no more than 10 on the first day and less than 100 during the entire time he salvaged there.

11. The three vessels salvaged about 150 yards from where Thorne and his clients were diving. On several occasions, the mailboxes caused a large cloud of silt to wash over Thorne and his clients, reducing visibility to zero and forcing them to move dive locations.

12. On at least one occasion after this happened, and after the three vessels had left, Thorne and other divers swam over to the area where the boats had been working. Thorne saw numerous blowholes that he had not previously seen.

13. Kane Fisher placed spar buoys on the ocean surface to mark the site in Coffins Patch where he had salvaged for treasure. On March 23, 1992, Billy Causey, the Keys Sanctuary Superintendent, dove beneath one of the buoys in response to unconfirmed reports of damage to the ocean bottom. Causey counted nine blowholes on the sea bottom, all containing extensive seagrass damage.

14. Causey returned to the area on March 29, 1992, with video camera. He documented twenty-five blowholes up to nine feet deep. Causey believed the blowholes were made in the middle of seagrass beds because (1) all had dead seagrass in them, and (2) he found long seagrass blades exposed at the edges of the blowholes--the type of blades normally found in the middle of seagrass beds. Causey believed the holes were made during the previous month because rubble in and around them was stark white--the normal color of freshly exposed rubble. There was no algae growth that he would have expected to see on older rubble.

*1197 15. Harold Hudson, a Keys Sanctuary marine biologist, videotaped blowholes in Coffins Patch on April 4 and May 5-6, 1992. In May, Hudson and nine other divers video-taped seagrass damage in forty-one blowholes. Hudson documented large chunks of seagrass, some up to two feet thick, that had been ripped out and had fallen into the blowholes. He saw rubble and sediment on top of dead seagrass. Hudson believed the damage had occurred in the previous two months because fine sediment had settled on seagrass blades. If the damage had been older, that sediment would have washed off. Hudson described the seagrass damage as massive.

16. On April 25, 1992, Curtis Kruer, an environmental biologist, photographed about twenty-five blowholes in Coffins Patch, some up to six feet deep. Kruer observed hay-bale-sized chunks of seagrass lying in the blowholes, and up to three feet of sediment on top of dead seagrass.

17. Kruer believed the blowholes had been made no more than two months earlier because (1) sediment was still sitting on seagrass blades and (2) the coral rubble he observed was stark white. In addition, he believed the holes were man-made, rather than caused by tides and currents, because naturally caused craters are much shallower and not as steep as the blowholes he observed in Coffins Patch. There also had been no major storms in the area that would have caused such severe natural erosion. The only similar damage that Kruer had seen was caused by bombs dropped from airplanes onto a bombing test range in waters near Puerto Rico.

18. Dr. Joseph Zieman is an environmental science professor at the University of Virginia who has spent his career studying seagrass. Zieman visited Coffins Patch in May 1992. He observed blowholes up to forty feet wide and ten feet deep, many of which contained an "incredible amount" of dead seagrass. He also saw hay-bale-sized chunks of dead seagrass. In thirty years of working with seagrass, Zieman had never seen such extensive damage.

19. Like other scientists, Zieman thought the holes had been made within the previous two months because the exposed coral rubble was still white. Like Kruer, he believed the holes were man-made, rather than natural, because of their symmetrical shape, depth, and steepness.

20. The March 1993 "Storm of the Century" brought gale force winds to the Florida Keys for thirty-six hours. The storm moved substantial material on the ocean bottom and filled in the Coffins Patch blowholes. Neither of the defense experts who testified at trial, Harold Wanless and Anitra Thorhaug, saw the Coffins Patch blowholes before the storm filled them in.

21. The blowholes that Defendants made damaged at least 1.63 acres of seagrass. This figure is based on Zieman's review of photographs taken of the damaged areas by McIntosh Marine in 1992, and a McIntosh Marine report calculating the damage based on (1) the number of holes and (2) the percentage of sand to seagrass throughout the area. Using the same photos, Zieman independently calculated the damage and came up with the same figure as McIntosh Marine. Zieman did other damage calculations based on different sets of photographs, and concluded that the damage could have been as high as 3.3 acres. However, he concluded that based on the quality of the McIntosh Marine photos, 1.63 acres was an accurate, albeit conservative, damage estimate.

22. The Coffins Patch area is swept by high-energy waves that keep bare sand areas in motion. This inhibits or limits seagrass recolonization in the area.

23. Natural recolonization in sandy areas of Coffins Patch is very slow. A full recovery of seagrass in the area where blowholes were made will take between 50 and 100 years.

24. The National Oceanic and Atmospheric Administration (NOAA) conducted a pilot project to determine if it could restore seagrass in the Coffins Patch damage tract by transplanting it. However, none of NOAA's seagrass transplants survived. There have been no successful transplants in *1198 other areas with wave energy similar to that in Coffins Patch.

25. The seagrass Defendants destroyed cannot be restored or replanted in the area of the blowholes.

26. In December 1996, NOAA conducted a survey to identify potential seagrass restoration projects in the Keys Sanctuary that would be similar in scale and nature to the seagrass injuries in Coffins Patch. NOAA determined that the most viable off-site restoration project would be to transplant seagrass into boat-impacted areas which had later become no-motor zones (Prop Scar Restoration Project)

27. NOAA selected boat-impacted areas because they 1) are among natural seagrass beds, 2) represent a human-induced injury, 3) can be found in hydrodynamically protected areas, 4) present large-scale scarring that is not recovering, 5) have been restored in this geographic area and elsewhere, 6) occur in sufficient acreage, and 7) constitute an injury not unlike that found in Coffins Patch.

28. NOAA developed a restoration plan to implement the chosen project. The primary components of this plan include identifying methods of site marking, planting techniques, monitoring, and evaluating success.

29. NOAA determined the appropriate scale of the compensatory seagrass restoration project using an assessment methodology known as the Habitat Equivalency Analysis (HEA). The HEA quantifies the total resource services lost due to an injury. The HEA determines the quantity of equivalent habitat necessary to be restored and/or created, so that total resource services gained through restoration equals total resource services lost due to the injury. "Services" refers to functions that a resource performs for other resources or humans.

30. The HEA is appropriate to determine the scale of compensatory restoration projects when 1) the primary category of lost on-site services pertains to the ecological/biological function of an area; 2) feasible restoration projects are available that provide services of the same type, quality, and comparable value to those that were lost; and 3) sufficient data on the required HEA input parameters exist and are cost effective to collect.

31. Since these three criteria were met in this case, the HFA is the most technically appropriate and cost-effective method to quantify the natural resource damage.

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32. Based on an estimated 1.63 acres of damaged seagrass in Coffins Patch, NOAA calculated the total services lost due to the seagrass injury, the total services provided by the Prop Scar Restoration Project, and the total acreage of compensatory habitat required, so that total resource services gained were equivalent to total resource services lost.

33. An acre-year represents the total level of ecological services provided by one acre of seagrass over a single year. Using the HEA, NOAA calculated that 44.08 acre-years of services were lost due to the injury in Coffins Patch.

34. NOAA also used the HEA to calculate the scale of compensatory habitat necessary to compensate for the 44.08 acre-years of lost seagrass services. NOAA determined that 1.55 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the lost seagrass services.

35. NOAA has estimated the cost of implementing the 1.55-acre Prop Scar Restoration Project. The estimate includes the costs necessary to obtain aerial photographs of selected sites, perform on-site "groundtruthing," collect and install seagrass planting units, obtain necessary permits, and monitor the project. The estimate includes expected labor, materials, and travel costs for each of these steps.

36. The total cost of implementing the Prop Scar Restoration Project is \$351,648.

37. NOAA has incurred certain costs to respond and assess damage to sanctuary resources in this case. Those costs total \$211,130. As of January 1997, \$26,533 in interest had accrued on these costs. [FN4]

FN4. The parties have stipulated to the amount of response costs, damage assessment costs, and interest.

*1199 C. Artifacts

38. Contextual information is the relationship between artifacts and materials in an archeological site that provides patterns through which archeologists may make inferences about the past.

39. In widely scattered shallow water shipwrecks, a distinction may be drawn between primary cultural deposits, secondary scatter, and tertiary scatter.

40. The primary cultural deposit is the location where the ship itself has sunk to the bottom of the sea. In this area, a homogenous assemblage of artifacts remain closely associated to each other and contextual information is more likely to be found.

41. The secondary scatter of a site has less contextual information. It provides a good indication of where to look for the primary cultural deposit, as well as the rest of the site.

42. The tertiary scatter has even less contextual information to offer. Artifacts are scattered over a wide area. The tertiary site may be miles away from the primary cultural deposit.

43. The Defendants excavated and recovered a number of artifacts from the sea bottom in Coffins Patch in the course of their treasure-hunting activities. These artifacts were recorded on a Conservation Lab Artifact Report.

44. Based on the vessel logs completed during the excavation and recovery, Defendants' activities took place within a tertiary scatter, as Defendants were trying to identify whether a site existed in a particular area of Coffins Patch.

45. Accordingly, the Court concludes that little, if any, contextual information was lost in the course of Defendants' treasure-hunting activities in Coffins Patch. [FN5]

FN5. The United States argues contextual information was lost because Defendants did not record sufficient information about the artifacts during their treasure-hunting activities. The United States contends it is entitled to \$68,445 to conduct a scientifically performed analysis of the impacted site and restore part of the lost contextual information.

CONCLUSIONS OF LAW [FN6]

FN6. To the extent that any Conclusions of Law represent factual findings, they are adopted as Findings of Fact.

A. The Statutory Scheme

1. Congress enacted the Sanctuaries Act in response to "a growing concern about the increasing degradation of marine habitats." S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387.

2. The Sanctuaries Act provides for the protection of important and sensitive marine areas through the establishment of marine sanctuaries. The purpose of the sanctuaries is to preserve sensitive areas for their conservation, recreational, ecological, or aesthetic value. *Id.*; 16 U.S.C. § 1431. Under the Act, the Secretary of Commerce may designate and manage marine sanctuaries. 16 U.S.C. § 1433. The Secretary has delegated those responsibilities to NOAA.

3. The Sanctuaries Act imposes strict liability on "any person who destroys, causes the loss of, or injures any sanctuary resource." 16 U.S.C. § 1443; *United States v. M/V. Miss Beholden*, 856 F.Supp. 668, 670 (S.D.Fla.1994). The Secretary of Commerce may seek damages from and injunctions against anyone who destroys or injures sanctuary resources. 16 U.S.C. §§ 1437 and 1443. A person may avoid liability under Section 1443 only if he can show that the damage was (1) caused by an act of God, an act of war, or the act or omission of a third party, (2) caused by an activity authorized by federal or state law, or (3) negligible. 16 U.S.C. § 1443(a)(1) and (3).

4. The Sanctuaries Act broadly defines "sanctuary resource" as "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

5. Congress also may designate sanctuaries, as it did in 1990 when it passed the Keys Act. Pub.L. No. 101-605, 104 Stat. 3089 (1990). The Keys Act provides that the Secretary *1200 of Commerce shall manage and police the Keys Sanctuary under the Sanctuaries Act. Keys Act § 5(a). Hence, anyone damaging Keys Sanctuary resources is liable to the government in the manner described in 16 U.S.C. § 1443. Id.

B. Seagrass Damage

6. Among the Congressional findings in the Keys Act were that "spectacular, unique and nationally significant marine environments, including seagrass meadows," need protection through establishment of a marine sanctuary. Id. at § 2(2).

7. Seagrass is distributed in significant amounts along the Florida coast, and, in particular, the Florida Keys. It stabilizes the sea bottom and helps prevent erosion. It provides a habitat and a refuge for numerous small invertebrates, fish, and other organisms. It serves as an important base in the food chain. It helps recycle nutrients into ocean water.

[1] 8. The Court finds that seagrass is a resource within the meaning of both the Keys Act and the Sanctuaries Act. See *United States v. Fisher*, 22 F.3d 262, 265-66 (11th Cir.1994). Therefore, anyone who destroys or harms seagrass is strictly liable to the United States for damages unless that person has a defense under 16 U.S.C. § 1443(a)(1) or (3).

[2] 9. The Court also finds that Defendants injured and destroyed 1.63 acres of seagrass by using mailboxes to salvage for treasure in Coffins Patch in January, February, and March 1992. The evidence that supports this finding is:

- a. Testimony from Kane Fisher and vessel logs indicating that mailboxes on the three boats made more than 600 blowholes in Coffins Patch during the first three months of 1992.
- b. Testimony from Kane Fisher and Bancroft Thorne that no other salvagers were digging for treasure in Coffins Patch during that time.
- c. Testimony from Bancroft Thorne that despite consistently running dive operations in Coffins Patch from 1987 through 1992, he never saw blowholes of the type at issue in this case until after Kane Fisher and the three boats left the area.
- d. Testimony from Billy Causey that on March 23, 1992, he discovered blowholes with seagrass damage directly below a surface buoy left by Kane Fisher to mark the spot where he had salvaged in Coffins Patch.
- e. Testimony from Billy Causey, Harold Hudson, Curtis Kruer, and Joseph Ziemann that the blowholes they saw in Coffins Patch in March, April, and May 1992 had been made within the previous two months because (1) the exposed coral rubble was white and not fouled by algae, and (2) sediment remained on seagrass blades.
- f. Testimony from Billy Causey, Harold Hudson, Curtis Kruer, and Joseph Ziemann that the freshly made blowholes they observed had been made in the middle of seagrass beds because of the amount of displaced seagrass and the length of the blades of the remaining seagrass.
- g. Testimony from Curtis Kruer and Joseph Ziemann that the blowholes they observed had not been caused by nature because the holes were more symmetrical, steep, and deep than naturally caused craters.

h. Testimony from Joseph Zieman and the report of McIntosh Marine indicating that the blowholes damaged at least 1.63 acres of seagrass.

i. Testimony from Harold Wanless and Anitra Thorhaug that they did not view the area in question until after the March 1993 "Storm of the Century" had filled in the blowholes. Because the government's expert witnesses had an opportunity to view the damage before that storm, the Court finds their testimony on the nature and scope of the damage more credible than that of Wanless or Thorhaug.

[3] 10. For the same reasons as listed in Paragraph 9, the Court finds that the damage in question was not (1) caused by an act of God, an act of war, or the act or omission of a third party, [FN7] (2) caused by an *1201 activity authorized by federal or state law, [FN8] or (3) negligible. As a result, none of the liability exceptions listed in 16 U.S.C. § 1443 apply here.

FN7. Specifically, the Court rejects the Defendants' arguments that either prior salvage operations or nature made the blowholes and caused the seagrass damage.

FN8. The Court ruled on this issue in its Summary Judgment Order of April 30, 1997.

11. Therefore, the Court finds that Defendants are liable to the United States under 16 U.S.C. § 1443(a)(1) for response costs and damages resulting from the destruction, loss, or injury of a Keys Sanctuary resource.

C. Seagrass Restoration

12. Specifically, the United States is entitled to compensation for (1) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource, and (2) the value of the lost use of a sanctuary resource pending its restoration or replacement, or the acquisition of an equivalent sanctuary resource. 16 U.S.C. § 1432(6)(A).

[4] 13. Because the destroyed seagrass at Coffins Patch cannot be restored or replaced, the public must be compensated by the acquisition of an equivalent sanctuary resource. In order to compensate for the seagrass losses at Coffins Patch, a seagrass restoration project must be performed at another suitable location within the Sanctuary.

14. The Prop Scar Restoration Project developed by NOAA will provide seagrass services equivalent to those lost due to the injuries Defendants caused.

[5] 15. The HEA is an appropriate methodology to scale the compensatory restoration project chosen by NOAA in this case.

16. According to the HEA, 1.55 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the interim services that will be lost at Coffins Patch as a result of Defendants' actions.

17. The estimated cost of implementing the Prop Scar Restoration Project-- totaling \$351,648--is

reasonable and appropriate. Accordingly, the United States is entitled to \$351,648 from Defendants to implement the Prop Scar Restoration Project.

18. Under the Sanctuaries Act, the United States is also entitled to recover the cost of response and damage assessment. 16 U.S.C. §§ 1432(6)(C) & (7). Therefore, the United States shall recover assessment and response costs in the amount of \$211,130 from the Defendants.

19. The United States is also entitled to recover interest on these assessment and response costs. 16 U.S.C. § 1443(a)(1)(B). Accordingly, the United States shall recover \$26,533 in interest accrued on NOAA's assessment and response costs.

D. Removal of Artifacts

[6] 20. The Court finds that the artifacts Defendants recovered from Coffins Patch in 1992 are a sanctuary resource within the meaning of § 1432(8), as they are nonliving resources that contribute to the historical value of the sanctuary.

21. By removing these artifacts from the Sanctuary, Defendants caused the loss of sanctuary resources. 16 U.S.C. § 1443(a)(1)(A)

[7] 22. Therefore, under the Sanctuaries Act, the United States is entitled to recover these artifacts. 16 U.S.C. § 1432(6).

23. This Court finds, however, that the United States is not entitled to receive compensation to professionally evaluate or curate the artifacts. [FN9]

FN9. The United States argues that, but for Defendants' activities, NOAA would not be forced to incur these costs. Accordingly, the United States contends it is entitled to \$6,385 under 16 U.S.C. § 1432(6)(A)(i)(I). The Court is not persuaded that the statute entitles the United States to this relief.

24. The Court also concludes that the amount of archeological contextual information lost during Defendants' treasure-hunting activities was negligible. 16 U.S.C. § 1443(a)(3)(C). Accordingly, the Court also declines to award compensation for loss of contextual archeological information.

*1202 E. Injunctive Relief

25. The Sanctuaries Act empowers district courts to enjoin violations of the Act. 16 U.S.C. § 1437(i).

26. On July 23, 1992, this Court granted a preliminary injunction restraining the Defendants from using prop wash deflectors in the Keys Sanctuary. The Eleventh Circuit affirmed this Order. *United States v. Fisher*, 22 F.3d 262 (11th Cir.1994).

[8] 27. The standard for entry of a permanent injunction essentially mirrors that of a preliminary

injunction, except the plaintiff must show actual success on the merits rather than likelihood of success. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12, 94 L.Ed.2d 542 (1987). In addition to success on the merits, a plaintiff must prove that it will suffer irreparable harm if the injunction is not granted, that the threatened injury outweighs the harm that granting the injunction would inflict on the defendant, and that the public interest will not be adversely affected if an injunction is granted. *In re Daytona Beach Gen. Hosp.*, 153 B.R. 947, 950 (Bkrcty.M.D.Fla.1993).

28. By proving that the Defendants destroyed and lost sanctuary resources, the United States has established success on the merits.

29. The United States has also established that it will suffer irreparable harm if the injunction is not granted. The Court has found that Defendants' treasure-hunting activities in Coffins Patch in 1992, in particular their use of mailboxes, resulted in damage to and loss of Keys Sanctuary resources. Evidence at trial established that regrowth of seagrass damaged and destroyed by mailboxes will take 50 to 100 years. Allowing Defendants to continue to use mailboxes and remove artifacts would likely cause further, irreparable damage to Sanctuary resources. [FN10]

FN10. This activity is now regulated by NOAA through the issuance of permits. See 15 C.F.R. §§ 922.163 and 922.166.

30. The scale and significance of the harm Defendants' treasure-hunting activities caused outweighs any burden placed on the Defendants.

31. The public interest will not be adversely affected if this injunction is granted. Rather, the public interest will be served by the protection of Sanctuary resources.

[9] 32. Accordingly, Defendants are permanently enjoined from using mailboxes and removing artifacts from the Keys Sanctuary without a permit issued by NOAA. [FN11]

FN11. The Court reminds Defendants that, in addition to complying with this Court order, they are required to follow the law as stated in the Sanctuaries Act and its regulations.

33. The United States shall file a proposed final judgment within ten days from the date stamped on this Order.

END OF DOCUMENT

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PEOPLE of the State of Michigan,
Plaintiff-Appellant,
and
Attorney General, Intervenor-Appellant,
v.
Mark Alan MASSEY, Defendant-Appellee.

Docket No. 68736.

Court of Appeals of Michigan.

Submitted March 14, 1984.

Decided Sept. 17, 1984.

Released for Publication Nov. 9, 1984.

Defendant was convicted by a jury of receiving and concealing state-owned stolen property valued at over \$500. The Circuit Court, Cheboygan County, Robert C. Livo, J., entered order setting aside defendant's conviction and granting his motion to quash. People's application for leave to appeal and Attorney General's motion to intervene as plaintiff were granted. The Court of Appeals, Shepherd, P.J., held that: (1) statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is constitutional and does not interfere with federal maritime or admiralty law, since passage of such law did not intrude or otherwise impermissibly interfere with uniformity or purpose of admiralty and maritime law, but rather, supplemented state's control over Great Lakes bottomlands granted to it by the Great Lakes Submerged Lands Act and the federal Submerged Lands Act so as to include items of historical and recreational value located on bottom or contained therein, and (2) since statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property was a valid establishment of state ownership of historic or recreational property, and since defendant did not dispute allegation that anchors he recovered from Great Lakes fell within such classification, jury could properly find that he received and concealed state-owned property.

Information and conviction reinstated.

[1] ADMIRALTY ⇔ 1(1)

16k1(1)

Maritime and admiralty are within jurisdiction of federal government. U.S.C.A. Const. Art. 3, § 2.

[2] ADMIRALTY ⇔ 7

16k7

Right to salvage is a matter governed by maritime or admiralty law.

[3] NAVIGABLE WATERS ⇔ 36(1)

270k36(1)

Title and dominion over actual lands which are covered by waters of the Great Lakes and which are within state boundaries belong to each state within which such lands are located.

[4] NAVIGABLE WATERS ⇔ 36(1)

270k36(1)

Actual land covered by waters of the Great Lakes upon which submerged ships or other property lie or are partially embedded belongs to state within which such lands are located, subject to trust for benefit of public. M.C.L.A. § 322.701 et seq.

[5] NAVIGABLE WATERS ⇔ 36(1)

270k36(1)

Although federal government, by virtue of its jurisdiction over maritime and admiralty matters, retains authority as to matters and issues relevant to navigation through the Great Lakes, the United States Constitution gives federal government no such specific authority over beds or bottomlands of navigable waters.

[6] CONSTITUTIONAL LAW ⇔ 48(3)

92k48(3)

In general, statutes are presumed to be constitutional unless the contrary clearly appears.

[7] CONSTITUTIONAL LAW ⇔ 48(3)

92k48(3)

Where there is doubt as to a statute's

constitutionality, every possible construction not clearly inconsistent with language of statute and its subject matter is to be interpreted in favor of its constitutionality.

[8] STATES ⇔ 18.57

360k18.57

Formerly 360k4.10

Although federal government retains jurisdiction over maritime and admiralty matters, states retain significant autonomy, and in unpreempted areas, federal government has traditionally deferred to historic police power of states.

[9] STATES ⇔ 18.13

360k18.13

Formerly 360k4.10

Federal preemption of historic police power of states will not be dictated unless it was the clear and manifest purpose of Congress.

[10] STATES ⇔ 18.13

360k18.13

Formerly 360k4.10

In exercise of its police power, or presumably in other related areas in which it has retained autonomy, state may act in maritime and admiralty matters concurrently with federal government.

[11] STATES ⇔ 18.3

360k18.3

Formerly 360k4.13, 360k4.10

Only where federal and state laws inevitably collide or where Congress has unmistakably expressed its intent to occupy field does federal preemption occur.

[12] ABANDONED AND LOST PROPERTY ⇔ 5

1k5

Statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is constitutional and does not impermissibly interfere with federal maritime or admiralty law, since passage of such law did not intrude or otherwise impermissibly interfere with uniformity or purpose of admiralty and maritime law, but rather, supplemented state's control over Great Lakes bottomlands

granted to it by the Great Lakes Submerged Lands Act and the federal Submerged Lands Act so as to include items of historical and recreational value located on or contained therein. M.C.L.A. §§ 299.51, 322.701 et seq.; Submerged Lands Act, § 2 et seq., 43 U.S.C.A. § 1301 et seq.

[12] STATES ⇔ 18.57

360k18.57

Formerly 360k4.12

Statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is constitutional and does not impermissibly interfere with federal maritime or admiralty law, since passage of such law did not intrude or otherwise impermissibly interfere with uniformity or purpose of admiralty and maritime law, but rather, supplemented state's control over Great Lakes bottomlands granted to it by the Great Lakes Submerged Lands Act and the federal Submerged Lands Act so as to include items of historical and recreational value located on or contained therein. M.C.L.A. §§ 299.51, 322.701 et seq.; Submerged Lands Act, § 2 et seq., 43 U.S.C.A. § 1301 et seq.

[12] STATES ⇔ 85

360k85

Statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is constitutional and does not impermissibly interfere with federal maritime or admiralty law, since passage of such law did not intrude or otherwise impermissibly interfere with uniformity or purpose of admiralty and maritime law, but rather, supplemented state's control over Great Lakes bottomlands granted to it by the Great Lakes Submerged Lands Act and the federal Submerged Lands Act so as to include items of historical and recreational value located on or contained therein. M.C.L.A. §§ 299.51, 322.701 et seq.; Submerged Lands Act, § 2 et seq., 43 U.S.C.A. § 1301 et seq.

[13] ABANDONED AND LOST PROPERTY ⇔ 5

1k5

As to maritime property which has been abandoned, government generally may proclaim itself owner of abandoned property within its jurisdiction, but without a clear legislative statement to such effect, courts should adhere to traditional maritime law principles of finder and salvor.

[14] SALVAGE ⇨ 19

344k19

Traditionally, maritime law protects right of a salvor who undertakes a project to carry it to completion without interference from others who seek to share in enterprise and reward; due diligence must be exercised, however, and salvor must seek to be successful.

[15] STATES ⇨ 18.57

360k18.57

Formerly 360k4.12

Statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property does not interfere with federal maritime law, but rather, simply controls reservation of historical, cultural or recreational articles, a matter traditionally within competence of state and within concept of state's police power.

[16] ABANDONED AND LOST PROPERTY ⇨ 5

1k5

Statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property in statute requiring permits for their salvage are not contrary to traditional purpose of allowing salvage under admiralty law, since they in no way interfere with return of items to their rightful owners, nor do they limit vigorous exploration by salvors, but rather, simply protect state's interest in preserving its heritage for use and enjoyment of its citizens. M.C.L.A. §§ 299.51 et seq., 570.402.

[17] ABANDONED AND LOST PROPERTY ⇨ 5

1k5

Since statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is a

valid establishment of state ownership of historic or recreational property, and since defendant did not dispute allegation that anchors he recovered from Great Lakes fell within such classification, jury could properly find that he received and concealed state-owned property. M.C.L.A. §§ 299.51, 750.535.

[17] RECEIVING STOLEN GOODS ⇨ 2

324k2

Since statute declaring abandoned property of historical or recreational value found on bottom of Great Lakes to be state property is a valid establishment of state ownership of historic or recreational property, and since defendant did not dispute allegation that anchors he recovered from Great Lakes fell within such classification, jury could properly find that he received and concealed state-owned property. M.C.L.A. §§ 299.51, 750.535. **617 *483 Joseph P. Kwiatkowski, Pros. Atty., and Robert J. Butts, Asst. Pros. Atty., Cheboygan, for the people.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., and Terrence P. Grady and Russell E. Prins, Asst. Attys. Gen., for intervening plaintiff.

Gillard, Bauer, Mazrum & Florip by Roger C. Bauer, Alpena, for defendant on appeal.

Before SHEPHERD, P.J., and ALLEN and KEYES, [FN*] JJ.

FN* Allen E. Keyes, 24th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

SHEPHERD, Presiding Judge.

Defendant was convicted by a jury of receiving and concealing state-owned stolen property valued at over \$100, M.C.L. § 750.535; M.S.A. § 28.803. He was sentenced to pay a fine of \$1,000 and ordered to pay costs of \$1,276.83. Later the trial court entered an order setting aside defendant's conviction and granting his motion to quash. The prosecutor, and the Attorney General, as intervenor, appeal by leave granted. We reverse and reinstate the conviction. In so doing, we hold

(Cite as: 137 Mich.App. 480, *483, 358 N.W.2d 615, **617)

that the statute declaring abandoned property of historical or recreational value found on the bottom of the Great Lakes to be state property is *484 constitutional and does not interfere with federal maritime or admiralty law.

On August 24, 1981, defendant was observed proceeding through the Straits of Mackinac in a tugboat, apparently in possession of two wood stock anchors. At trial, defendant admitted taking a wood stock anchor from the bottom of Lake Michigan and claimed that he was salvaging the anchor for a friend as a favor for past services. The anchor was identified as a wood stock anchor believed to be off the sunken wreck, The Richard Winslow, which sank in the late 1800's and which was the first four-masted sailing vessel on the Great Lakes.

At defendant's jury trial, the jury was requested to make a determination under M.C.L. § 299.51; M.S.A. § 13.21 whether the anchor in question had significant historical or recreational value since, under that statute, the State of Michigan had reserved to itself a possessory right to property found on the bottom of the Great Lakes which had either significant recreational or historical value. The anchor was valued at approximately \$1,800, unrestored. On May 12, 1982, the jury returned tis verdict finding defendant guilty.

On October 28, 1982, after defendant was sentenced, the trial court set aside defendant's conviction and granted his motion to quash, finding that M.C.L. § 299.51 et seq.; M.S.A. § 13.21 et seq. was unconstitutional as it applied to marine salvage **618 and that the anchor, therefore, was not the property of the State. The trial court found the statute unconstitutional "not per se but as applied to marine salvage in the Great Lakes under the facts of this case, which salvage is governed and preempted by [federal] admiralty law * * *".

[1][2] Maritime and admiralty matters are within the *485 jurisdiction of the federal government. Article III, § 2 of the United States Constitution provides that the judicial power of the United States "shall extend * * *

to all Cases of admiralty and maritime jurisdiction * * * ". Where the constitution assigns jurisdiction to the federal government, federal law is supreme, "any thing in the Constitution or Laws of any State to the Contrary notwithstanding". U.S. Const., art. VI, clause 2. The right to salvage is a matter governed by maritime or admiralty law. *Mason v. The Blaireau*, 6 U.S. (2 Cranch) 240, 2 L.Ed. 266 (1804); *Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed to be the Nuestra Senora De Atocha*, 408 F.Supp. 907 (S.D. Fla., 1976), aff'd. with modification 569 F.2d 330 (CA 5, 1978).

[3][4][5] Title and dominion over the actual lands which are covered by the waters of the Great Lakes and which are within state boundries belong to each state within which those lands are located. In Michigan, the title to such lands is held in trust for the public pursuant to the Great Lakes Submerged Lands Act, M.C.L. § 322.701 et seq. M.S.A. § 13.700(1) et seq. It is clear, therefore, that the actual land upon which submerged ships or other property lie or are partially embedded belongs to the State of Michigan subject to a trust for the benefit of the public. Although the federal government, by virtue of its jurisdiction over maritime and admiralty matters, retains authority as to matters and issues relevant to navigation through the Great Lakes, the United States Constitution gives the federal government no such specific authority over the beds or bottomlands of navigable waters. *Nedtweg v. Wallace*, 237 Mich. 14, 16, 208 N.W. 51 (1927). See also *Hilt v. Weber*, 252 Mich. 198, 202-203, 233 N.W. 159 (1930).

*486 By virtue of its 1980 amendment of the aboriginal records and antiquities act, M.C.L. § 299.51 et seq.; M.S.A. § 13.21 et seq., the Michigan Legislature proclaimed state ownership and authority over property of historical or recreational value found on the "state owned bottomlands of the great lakes". The state declared its interest to be superior to that of a finder of such abandoned property. [FN1] The critical question in the instant case is whether the state may declare its ownership of submerged property or whether such

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(Cite as: 137 Mich.App. 480, *486, 358 N.W.2d 615, **618)

assertion of ownership is in conflict with federal preemption of maritime and admiralty matters.

FN1. The pertinent statutory provision provides as follows:

"(2) The state reserves to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on the state owned bottomlands of the great lakes. This property shall belong to this state with the administration and protection vested in the department of natural resources and the secretary of state." M.C.L. § 299.51(2); M.S.A. § 13.21(2).

[6][7] In general, statutes are presumed to be constitutional unless the contrary clearly appears. Where there is doubt, every possible construction not clearly inconsistent with the language of the statute and its subject matter is to be interpreted in favor of the statute's constitutionality. *Royal Auto Parts v. Michigan*, 118 Mich.App. 284, 324 N.W.2d 607 (1982); *Nunn v. George A. Cantrick Co., Inc.*, 113 Mich.App. 486, 317 N.W.2d 331 (1982).

[8][9][10][11] Although the federal government retains jurisdiction over maritime and admiralty matters, states retain significant autonomy, and in unpreempted areas, the federal government has traditionally deferred to the historic police power of the states. Federal preemption of that power will not be dictated "unless that was the clear and manifest purpose of Congress". *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 **619 (1947). In the exercise of its police powers, *487 or presumably in other related areas in which it has retained autonomy, Michigan may act in maritime and admiralty matters concurrently with the federal government. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Only where federal and state laws inevitably collide, or where congress has unmistakably expressed its intent to occupy the field, does federal preemption occur. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

[12] While in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574, 22 L.Ed. 654 (1874), the Supreme Court found that federal jurisdiction extended to "all cases of admiralty and maritime jurisdiction", we find that, with passage of M.C.L. § 299.51, the State of Michigan has not intruded or otherwise impermissibly interfered with the uniformity or purpose of admiralty and maritime law. Rather, the state has supplemented the control over Great Lakes bottomlands granted to it by the Great Lakes Submerged Lands Act and the federal Submerged Lands Act, 43 USC 1301 et seq., so as to include items of historical and recreational value located on or contained therein.

[13][14][15] As generally defined, at least in terms of federal maritime or admiralty law, salvage is "the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture". *The Blackwall*, 77 U.S. (10 Wall.) 1, 12, 19 L.Ed. 870 (1870). As to marine property which has been abandoned, it appears generally that a government may proclaim itself owner of abandoned property within its jurisdiction, but without a clear legislative *488 statement to that effect, the courts should adhere to traditional maritime law principles of finder and salvor. *United States v. Tyndale*, 116 F. 820, 823 (CA 1, 1902); *Murphy v. Dunham*, 38 F. 503, 510 (E.D.Mich., 1889). Defendant relies on a federal court decision in *Cobb Coin Co., Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F.Supp. 186 (S.D.Fla., 1981), in support of his argument that the state's statutory claim to submerged articles impermissibly interferes with federal maritime jurisdiction. We do not read the decision in *Cobb*, even were we to find its holding persuasive, to preclude the state's exercise of authority in the instant case. *Cobb* is significantly distinguishable. In that case, the court did not rule that a state could not, by legislation, lay claim to submerged property. Rather, it determined that the Florida statutory scheme conflicted with federal maritime principles. The first conflict found

by the court was the limitation upon exploration imposed by the statute. Only licensees who were granted licenses by the state to explore particular areas could investigate those areas for possible salvagable goods. In Michigan, however, permits are required only to bring up specific items, and exploration of particular areas is in no way limited to holders of permits. In conformity with maritime law PRINCIPLES, therefore, potential salvors in Michigan are free to explore the open waters. The second objectionable ground found by the federal court in Cobb was the Florida statute's lack of regard for a licensee's diligence or success. Traditionally, maritime law protects the right of a salvor who undertakes a project to carry it to completion without interference from others who seek to share in the enterprise and the reward. Due diligence must be exercised, however, and the salvor must seek to be successful. The Michigan statute, unlike the contested *489 Florida statute, conforms to traditional maritime principles in that it does not purport to limit exploration itself to certain licensees without regard to their diligence or success. Rather, the waters of the Great Lakes remain open to preliminary exploration by all, and permits must be sought only by those who seek to bring up particular items already discovered. Finally, in Cobb, the federal court objected to Florida's system of fixed salvor compensation as provided by statute. The Michigan statute, however, has no such fixed compensation **620 rule, but allows for potential compensation by the state or for retention of the recovered property by the salvor. The federal court noted that the Supreme Court had "recognized historic preservation as a valid state concern", but simply ruled in Cobb that "a state may not enact legislation in that area in such a way as to interfere, as do portions of Florida's licensing statute, with the uniformity required by maritime law". Cobb, p. 212. We find that the Michigan statute under consideration in the instant case does not interfere with federal maritime law, but simply controls the preservation of historical, cultural or recreational articles, a matter traditionally within the competence of the state and within the concept of the state's police power. See

Cobb, supra, p. 212.

[16] The Michigan Legislature has recognized general principles of admiralty with regard to salvage. M.C.L. § 570.402; M.S.A. § 26.342. It has, however, passed specific legislation which complements that law while protecting a valid public interest, i.e., the public trust of articles possessing historic and recreational value which are located on the bottom of the Great Lakes. The Michigan statutes proclaiming state ownership of such items and requiring permits for their salvage are not contrary to *490 the traditional purpose of allowing salvage under admiralty law. They in no way interfere with the return of items to their rightful owners, nor do they limit vigorous exploration by salvors. They simply protect the state's interest in preserving its heritage for the use and enjoyment of its citizens.

[17] In the instant case, we find no impermissible state interference with federal admiralty or maritime law so as to make the statutes construed here invalid. Since M.C.L. § 299.51 is a valid establishment of state ownership of historic or recreational property, and defendant does not dispute the allegation that the anchors involved here fall within that classification, the jury could properly find that defendant had received and concealed state-owned property. The trial judge therefore erred in finding the statute unconstitutional and in setting aside defendant's conviction.

The information and defendant's conviction are reinstated.

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118 S.Ct. 1464

149 L.Ed.2d 626, 98 Cal. Daily Op. Serv. 3000, 98 Daily Journal D.A.R. 4083,
98 CJ C.A.R. 1919, 11 Fla. L. Weekly Fed. S 460

(Cite as: 118 S.Ct. 1464)

CALIFORNIA and State Lands Commission, Petitioners,

v.

DEEP SEA RESEARCH, INC., et al.

No. 96-1400.

Supreme Court of the United States

Argued Dec. 1, 1997.

Decided April 22, 1998.

Salvor brought in rem admiralty action seeking salvage rights and title to wreck which sank in 1865 off the coast of California. State of California intervened to assert colorable claim of ownership to wreck under the Abandoned Shipwreck Act (ASA), contending that adjudication of claim was therefore barred by the Eleventh Amendment. The United States District Court for the Northern District of California, Louis Charles Bechtle, J., 883 F.Supp. 1343, denied state's motion to dismiss, holding that state did not establish colorable claim to wreck under the ASA. State appealed. The Court of Appeals, 102 F.3d 379, affirmed. State petitioned for writ of certiorari. The Supreme Court, Justice O'Connor, held that Eleventh Amendment does not bar the jurisdiction of a federal court over an in rem admiralty action where the res is not within the state's possession.

Affirmed in part, vacated in part, and remanded.

Justice Stevens filed concurring opinion.

Justice Kennedy filed a concurring opinion in which Justices Ginsburg and Breyer joined.

FEDERAL COURTS k265

170Bk265

Eleventh Amendment does not bar the jurisdiction of a federal court over an in rem admiralty action where the res is not within the state's possession. U.S.C.A. Const.Amend. 11.

***1465 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The S.S. Brother Jonathan and its cargo sank off the coast of California in 1865. Shortly after the

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disaster, five insurance companies paid claims for the loss of certain cargo, but it is unclear whether the ship and the remaining cargo were insured. There is no evidence that either the State or the insurance companies have attempted to locate or recover the wreckage. In this action, respondent Deep Sea Research, Inc. (DSR), which has located the wreck, seeks rights to the vessel and cargo under the Federal District Court's in rem admiralty jurisdiction. California moved to dismiss, claiming that it possesses title to the wreck either under the Abandoned Shipwreck Act of 1987(ASA)--which provides that the Federal Government asserts and transfers title to a State of any "abandoned shipwreck" embedded in the State's submerged lands or on a State's submerged lands and included, or eligible for inclusion, in the National Register--or under Cal. Pub. Res.Code Ann. § 6313--which vests title in the State to all abandoned shipwrecks on or in the State's tide and submerged lands--and therefore DSR's in rem action is an action against the State in violation of the Eleventh Amendment. DSR countered that the ASA could not divest the federal courts of the exclusive admiralty and maritime jurisdiction conferred by Article III, § 2, of the Constitution and requested a warrant for the arrest of the vessel and its cargo. The District Court concluded that the State failed to demonstrate a "colorable claim" to the wreck under the ASA; found that the ASA pre-empts § 6313; issued a warrant for the vessel's arrest; appointed DSR the vessel's custodian and made it the exclusive salvor; and decided that it would defer adjudication of title until after DSR completed the salvage operation. The Ninth Circuit affirmed, agreeing that the ASA pre-empts § 6313; that the Eleventh Amendment does not bar the federal court's jurisdiction over the in rem proceeding as to the application of the ASA; that the State did not prove that the Brother Jonathan is abandoned under the ASA; and that the wreck's uninsured portion should not be treated as abandoned.

Held:

1. The Eleventh Amendment does not bar a federal court's jurisdiction over an in rem admiralty action where the res is not within the State's possession. Pp. 1470-1473.

(a) The federal courts have a unique role in admiralty cases as conferred by Article III, § 2, cl. 1, of the Constitution. That jurisdiction encompasses proceedings in rem. The jurisdiction of federal courts is also constrained, however, by the Eleventh Amendment. Early cases appear to have assumed the federal courts' jurisdiction over admiralty in rem actions despite the Eleventh Amendment. Subsequent decisions altered the role of federal courts by explaining that admiralty and maritime jurisdiction is not wholly exempt from the Eleventh Amendment. *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (New York I). Thus, this Court held that the federal courts lacked *1466 jurisdiction over an in rem action against a tugboat operated by New York State, *Ex parte New York*, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (New York II), and that Florida could not invoke the Eleventh Amendment to block the arrest of maritime artifacts in the State's possession where that possession was unlawful, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (plurality opinion). However, those opinions did not address situations comparable to this case, in which DSR asserts rights to a res not in the State's possession. The action in *New York I*, although styled as an in rem action, was actually, as the Court explained in that decision, an in personam action against a state official; and the action in *New York II* was an in rem suit against a vessel that was property of the State, in its possession and employed for governmental use. Assertions in the opinions in *Treasure Salvors*, which might be read to suggest that a federal court may not undertake in rem adjudication of the State's interest in property without the

State's consent, regardless of the status of the res, should not be divorced from the context of that case and reflexively applied to the very different circumstances presented by this case. Also, because *Treasure Salvors* addressed only the District Court's authority to issue a warrant to arrest artifacts, any references to what the lower courts could have done if adjudicating the artifacts' title do not control the outcome here. Nor does the fact that *Treasure Salvors* has been cited for the general proposition that federal courts cannot adjudicate a State's claim of title to property prevent a more nuanced application of that decision in the context of the federal courts' in rem admiralty jurisdiction. Pp. 1470-1472.

(b) In considering whether the Eleventh Amendment applies where the State asserts claim in an admiralty action to a res not in its possession, this Court's decisions involving the Federal Government's sovereign immunity in in rem admiralty actions provide guidance, for the Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government. Based on the longstanding precedent that the federal courts' in rem admiralty jurisdiction is barred only where the Federal Government actually possesses the disputed res, e.g., *The Davis*, 10 Wall. 15, 19 L.Ed. 875, the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan*, and the District Court may adjudicate DSR's and the State's claims to the shipwreck. Pp. 1472-1473.

2. Because the lower courts' conclusion that the *Brother Jonathan* was not abandoned for ASA purposes was influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry, the case is remanded for reconsideration of the abandonment issue, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law. The District Court's full consideration of the ASA's application on remand might negate the need to address the issue whether the ASA pre-empts § 6313, and, thus, this Court declines to undertake that analysis. Pp. 1473- 1474.

102 F.3d 379, affirmed in part, vacated in part, and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion. KENNEDY, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined.

Joseph C. Rusconi, Oakland CA, for petitioners.

David C. Frederick, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Fletcher C. Alford, San Francisco, CA, for respondent.

For U.S. Supreme Court Briefs See:

1997 WL 473386 (Resp.Brief)

1997 WL 473388 (Pet.Brief)

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1997 WL 606688 (Resp.Brief)

1997 WL 685307 (Reply.Brief)

1997 WL 687924 (Reply.Brief)

1997 WL 473344 (Amicus.Brief)

1997 WL 473346 (Amicus.Brief)

1997 WL 583471 (Amicus.Brief)

1997 WL 606710 (Amicus.Brief)

1997 WL 606722 (Amicus.Brief)

1997 WL 610593 (Amicus.Brief)

For Transcript of Oral Argument See:

1997 WL 751917 (U.S.Oral.Arg.)

***1467** Justice O'CONNOR delivered the opinion of the Court.

This action, involving the adjudication of various claims to a historic shipwreck, requires us to address the interaction between the Eleventh Amendment and the in rem admiralty jurisdiction of the federal courts. Respondent Deep Sea Research, Inc. (DSR), located the ship, known as the S.S. Brother Jonathan, in California's territorial waters. When DSR turned to the federal courts for resolution of its claims to the vessel, California contended that the Eleventh Amendment precluded a federal court from considering DSR's claims in light of the State's asserted rights to the Brother Jonathan under federal and state law. We conclude that the Eleventh Amendment does not bar the jurisdiction of a federal court over an in rem admiralty action where the res is not within the State's possession.

I

The dispute before us arises out of respondent DSR's assertion of rights to both the vessel and cargo of the Brother Jonathan, a 220-foot, wooden-hulled, double side-wheeled steamship that struck a submerged rock in July 1865 during a voyage between San Francisco and Vancouver. It took less than an hour for the Brother Jonathan to sink, and most of the ship's passengers and crew perished. The ship's cargo, also lost in the accident, included a shipment of up to \$2 million in gold and a United States Army payroll that some estimates place at \$250,000. See Nolte, Shipwreck: Brother Jonathan Discovered, San Francisco Chronicle, Feb. 25, 1994, p. 1, reprinted in App. 127-131. One of few parts of the ship recovered was the wheel, which was later displayed in a saloon in Crescent City, California. R. Phelan, *The Gold Chain* 242 (1987).

Shortly after the disaster, five insurance companies paid claims totaling \$48,490 for the loss of certain cargo. It is unclear whether the remaining cargo and the ship itself were insured. See *Wreck of the Steamship Brother Jonathan*, *New York Times*, Aug. 26, 1865, reprinted in App. 140-147. Prior to DSR's location of the vessel, the only recovery of cargo from the shipwreck may have occurred in the 1930's, when a fisherman found 22 pounds of gold bars minted in 1865 and believed to have come from the Brother Jonathan. The fisherman died, however, without revealing the source of his treasure. Nolte, *supra*, App. 130. There appears to be no evidence that either the State of California or the insurance companies that paid claims have attempted to locate or recover the wreckage.

In 1991, DSR filed an action in the United States District Court for the Northern District of California seeking rights to the wreck of the Brother Jonathan and its cargo under that court's in rem admiralty jurisdiction. California intervened, asserting an interest in the Brother Jonathan based on the Abandoned Shipwreck Act of 1987(ASA), 102 Stat. 432, 43 U.S.C. §§ 2101-2106, which provides that the Federal Government asserts and transfers title to a State of any "abandoned shipwreck" that either is embedded in submerged lands of a State or is on a State's submerged lands "and is included in or determined eligible for inclusion in the National Register," § 2105(a)(3). According to California, the ASA applies because the Brother Jonathan is abandoned and is both embedded on state land and eligible for inclusion in the National Register of Historic Places (National Register). California also laid claim to the Brother Jonathan under Cal. Pub. Res.Code Ann. § 6313 (West Supp.1998) (hereinafter § 6313), which vests title in the State "to all abandoned shipwrecks ... on or in the tide and submerged lands of California."

The District Court initially dismissed DSR's action without prejudice at DSR's initiative. The case was reinstated in 1994 after DSR actually located the Brother Jonathan four and one-half miles off the coast of Crescent City, where it apparently rests upright on the sea floor under more than 200 feet of water. Based on its possession of several artifacts from the Brother Jonathan, including china, a full bottle of champagne, and a brass spike from the ship's hull, DSR sought either an award of title to the ship and its cargo or a salvage award for its efforts in recovering the ship. DSR also claimed a right of ownership based on its *1468 purchase of subrogation interests from some of the insurance companies that had paid claims on the ship's cargo.

In response, the State of California entered an appearance for the limited purpose of filing a motion to dismiss DSR's in rem complaint for lack of jurisdiction. According to the State, it possesses title to the Brother Jonathan under either the ASA or § 6313, and therefore, DSR's in rem action against the vessel is an action against the State in violation of the Eleventh Amendment. DSR disputed both of the State's statutory ownership claims, and argued that the ASA could not divest the federal courts of the exclusive admiralty and maritime jurisdiction conferred by Article III, § 2, of the United States Constitution. DSR also filed a motion requesting that the District Court issue a warrant for the arrest of the Brother Jonathan and its cargo, as well as an order appointing DSR the exclusive salvor of the shipwreck.

The District Court held two hearings on the motions. The first focused on whether the wreck is located within California's territorial waters, and the second concerned the possible abandonment, embeddedness, and historical significance of the shipwreck, issues relevant to California's claims to

the res. For purposes of the pending motions, DSR stipulated that the Brother Jonathan is located upon submerged lands belonging to California.

After the hearings, the District Court concluded that the State failed to demonstrate a "colorable claim" to the Brother Jonathan under federal law, reasoning that the State had not established by a preponderance of the evidence that the ship is abandoned, embedded in the sea floor, or eligible for listing in the National Register as is required to establish title under the ASA. 883 F.Supp. 1343, 1357 (N.D.Cal.1995). As for California's state law claim, the court determined that the ASA pre-empts § 6313. Accordingly, the court issued a warrant for the arrest of the Brother Jonathan, appointed DSR custodian of the shipwreck subject to further order of the court, and ordered DSR to take possession of the shipwreck as its exclusive salvor pending the court's determination of "the manner in which the wreck and its cargo, or the proceeds therefrom, should be distributed." 883 F.Supp., at 1364.

The District Court stated that it was not deciding whether "any individual items of cargo or personal property have been abandoned," explaining that "[a]t this stage in the litigation, DSR is not asking the court to award it salvage fees from the res of the wreck, or to otherwise make any order regarding title to or distribution of the wreck or its contents." *Id.*, at 1354. The District Court thought that the most prudent course would be to adjudicate title after DSR completes the salvage operation. Following the District Court's ruling, the United States asserted a claim to any property on the Brother Jonathan belonging to the Federal Government.

The State appealed, arguing that its immunity from suit under the Eleventh Amendment does not hinge upon the demonstration by a preponderance of the evidence that the ASA applies to the Brother Jonathan. 102 F.3d 379, 383 (C.A.9 1996). According to the State, it had established sufficient claim to the shipwreck under state law by "assert[ing] that the Brother Jonathan is on its submerged lands and that ... § 6313 vests title in the State to abandoned shipwrecks on its submerged lands." *Id.*, at 385. Underlying the State's argument was a challenge to the District Court's ruling that the ASA pre-empts the California statute. The State also maintained that it had a colorable claim to the Brother Jonathan under the ASA, arguing that it presented ample evidence of both abandonment and embeddedness, and that the District Court applied the wrong test by "requir[ing] that abandonment be shown by an affirmative act on the part of the original owner demonstrating intent to renounce ownership." *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed the District Court's orders. The court first concluded that § 6313 is pre-empted by the ASA because the state statute "takes title to shipwrecks that do not meet the requirements of the ASA and which are therefore within the exclusive admiralty jurisdiction of the federal courts." *Id.*, at 384. *1469 With respect to the State's claim under the ASA, the court presumed that "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction," and concluded that "it was appropriate for the district court to require the State to present evidence that the ASA applied to the Brother Jonathan, i.e., that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case." *Id.*, at 386. According to the court's reasoning, "in addressing the questions of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights," because the ASA establishes the Federal Government's

title to a qualifying shipwreck, which is then transferred to a State. *Id.*, at 387. Consequently, in the court's view, "a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment." *Ibid.*

As to the specifics of the State's claim under the ASA, the court held that the District Court did not err in concluding that the State failed to prove that the Brother Jonathan is abandoned within the meaning of the statute. The court reasoned that, in the absence of a definition of abandonment in the ASA, "Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law." *Ibid.* In maritime law, the court explained, abandonment occurs either when title to a vessel has been affirmatively renounced or when circumstances give rise to an inference of abandonment. Here, the Court of Appeals concluded, the District Court's "failure to infer abandonment from the evidence presented by the State was not clearly erroneous," given the insurance companies' claims to the ship's insured cargo and undisputed evidence presented by DSR that the technology required to salvage the Brother Jonathan has been developed only recently. *Id.*, at 388. The court also rejected the State's bid to treat the uninsured portion of the wreck as abandoned, explaining that the District Court did not address the status of individual items of cargo or personal property, and that "divid[ing] the wreck of the Brother Jonathan into abandoned and unabandoned portions for the purposes of the ASA" would lead to both federal and state courts adjudicating the wreck's fate, which, in the court's view, would be "confusing and inefficient," and also "inconsistent with the general rule in maritime law of treating wrecks as a legally unified res." *Id.*, at 389.

Summarizing its reasoning, the court stated that, "[b]ecause the law is reluctant to find abandonment, and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum, we hold that the Brother Jonathan is not abandoned." *Ibid.* (internal citation omitted). The court reserved the question whether there might be some point at which the insured portion of a shipwreck "becomes so negligible" that the entire wreck would be abandoned under the ASA. *Ibid.* The court also declined to take judicial notice of evidence that, during pendency of the appeal, the Brother Jonathan was determined eligible for inclusion in the National Register.

By concluding that the State must prove its claim to the Brother Jonathan by a preponderance of the evidence in order to invoke the immunity afforded by the Eleventh Amendment, the Ninth Circuit diverged from other Courts of Appeals that have held that a State need only make a bare assertion to ownership of a res. See *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 670 (C.A.7), cert. denied, 506 U.S. 985, 113 S.Ct. 491, 121 L.Ed.2d 430 (1992); *Maritime Underwater Surveys, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (C.A.1 1983). [FN*] We granted certiorari to address whether a State's Eleventh Amendment immunity in an in rem admiralty action depends upon evidence of the State's ownership of the res, and *1470 to consider the related questions whether the Brother Jonathan is subject to the ASA and whether the ASA pre-empts § 6313. 520 U.S. ----, 117 S.Ct. 2430, 138 L.Ed.2d 192 (1997).

FN* While the petition for certiorari in this case was pending, the United States Court of Appeals for the Sixth Circuit adopted the reasoning of the Ninth Circuit. See *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as The Captain Lawrence*, 105 F.3d 1078

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II

The judicial power of federal courts extends "to all Cases of admiralty and maritime Jurisdiction." Art. III, § 2, cl. 1. The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was ... the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, *The Business of the Supreme Court* 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Ibid.* The constitutional provision was incorporated into the first Judiciary Act in 1789, and federal courts have retained "admiralty or maritime jurisdiction" since then. See 28 U.S.C. § 1333(1). That jurisdiction encompasses "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 560, 74 S.Ct. 298, 301, 98 L.Ed. 290 (1954).

The jurisdiction of the federal courts is constrained, however, by the Eleventh Amendment, under which "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the Amendment, by its terms, "would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252 (1996), the Court has interpreted the Amendment more broadly. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). According to this Court's precedents, a State may not be sued in federal court by one of its own citizens, see *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), and a state official is immune from suit in federal court for actions taken in an official capacity, see *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900).

The Court has not always charted a clear path in explaining the interaction between the Eleventh Amendment and the federal courts' in rem admiralty jurisdiction. Early cases involving the disposition of "prize" vessels captured during wartime appear to have assumed that federal courts could adjudicate the in rem disposition of the bounty even when state officials raised an objection. See *United States v. Peters*, 5 Cranch 115, 139-141, 3 L.Ed. 53 (1809). As Justice Story explained, in admiralty actions in rem,

"the jurisdiction of the [federal] court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the [Eleventh] [A]mendment is, that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity.' But a suit in the admiralty is not, correctly speaking, a suit in law or in equity; but is often spoken of in contradistinction to both." 2 J. Story, *Commentaries on the Constitution of the United States* § 1689, pp. 491-492 (5th ed. 1891).

Justice Washington, riding Circuit, expressed the same view in *United States v. Bright*, 24 F. Cas. 1232, 1236, No. 14,647 (CC Pa. 1809), where he reasoned:

"[I]n cases of admiralty and maritime jurisdiction the property in dispute is generally in the

possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are in rem. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot *1471 lie by, and, after the decree is passed say that she was a party, and therefore not bound, for want of jurisdiction in the court."

Although those statements might suggest that the Eleventh Amendment has little application in in rem admiralty proceedings, subsequent decisions have altered that understanding of the federal courts' role. In *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) (New York I), the Court explained that admiralty and maritime jurisdiction is not wholly exempt from the operation of the Eleventh Amendment, thereby rejecting the views of Justices Story and Washington. *Id.*, at 497-498, 41 S.Ct., at 589-590. On the same day, in its opinion in *Ex parte New York*, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063 (1921) (New York II), the Court likewise concluded that the federal courts lacked jurisdiction over a wrongful death action brought in rem against a tugboat operated by the State of New York on the Erie Canal, although the Court did not specifically rely on the Eleventh Amendment in its holding.

The Court's most recent case involving an in rem admiralty action, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), addressed whether the Eleventh Amendment "bars an in rem admiralty action seeking to recover property owned by a state." *Id.*, at 682, 102 S.Ct., at 3313 (internal quotation marks omitted). A plurality of the Court suggested that *New York II* could be distinguished on the ground that, in *Treasure Salvors*, the State's possession of maritime artifacts was unauthorized, and the State therefore could not invoke the Eleventh Amendment to block their arrest. *Id.*, at 695-699, 102 S.Ct., at 3320-3322 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and *Tindal v. Wesley*, 167 U.S. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897)). As the plurality explained, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." 458 U.S., at 697, 102 S.Ct., at 3321.

That reference to a "colorable claim" is at the crux of this case. Both the District Court and the Ninth Circuit interpreted the "colorable claim" requirement as imposing a burden on the State to demonstrate by a preponderance of the evidence that the Brother Jonathan meets the criteria set forth in the ASA. See 102 F.3d, at 386, 883 F.Supp., at 1349. Other Courts of Appeals have concluded that a State need only make a bare assertion to ownership of a res in order to establish its sovereign immunity in an in rem admiralty action. See, e.g., *Zych*, 960 F.2d, at 670.

By our reasoning, however, either approach glosses over an important distinction present here. In this case, unlike in *Treasure Salvors*, DSR asserts rights to a res that is not in the possession of the State. The Eleventh Amendment's role in that type of dispute was not decided by the plurality opinion in *Treasure Salvors*, which decided "whether a federal court exercising admiralty in rem jurisdiction may seize property held by state officials under a claim that the property belongs to the State." 458 U.S., at 683, 102 S.Ct., at 3314; see also *id.*, at 697, 102 S.Ct., at 3321 ("In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to

which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res").

Nor did the opinions in New York I or New York II address a situation comparable to this case. The holding in New York I explained that, although the suit at issue was styled as an in rem libel action seeking recovery of damages against tugboats chartered by the State, the proceedings were actually "in the nature of an action in personam against [the Superintendent of Public Works of the State of New York], not individually, but in his [official] capacity." 256 U.S., at 501, 41 S.Ct., at 591. The action in New York II was an in rem suit against a vessel described as being "at all times mentioned in the libel and at present ... the absolute property of the State of New York, *1472 in its possession and control, and employed in the public service of the State for governmental uses and purposes...." 256 U.S., at 508, 41 S.Ct., at 592. As Justice White explained in his opinion in *Treasure Salvors*:

"The *In re New York* cases ... reflect the special concern in admiralty that maritime property of the sovereign is not to be seized... [They] are but the most apposite examples of the line of cases concerning in rem actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a res in its possession, to dismiss the suit or modify its judgment accordingly." 458 U.S., at 709-710, 102 S.Ct., at 3327 (opinion concurring in judgment in part and dissenting in part) (emphasis added).

It is true that statements in the fractured opinions in *Treasure Salvors* might be read to suggest that a federal court may not undertake in rem adjudication of the State's interest in property without the State's consent, regardless of the status of the res. See, e.g., *id.*, at 682, 102 S.Ct., at 3313 (plurality opinion) ("The court did not have power ... to adjudicate the State's interest in the property without the State's consent"); *id.*, at 711, 102 S.Ct., at 3328 (White, J., concurring in judgment in part and dissenting in part) ("It is ... beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents"). Those assertions, however, should not be divorced from the context of *Treasure Salvors* and reflexively applied to the very different circumstances presented by this case. In *Treasure Salvors*, the State had possession--albeit unlawfully--of the artifacts at issue. Also, the opinion addressed the District Court's authority to issue a warrant to arrest the artifacts, not the disposition of title to them. As the plurality explained, "[t]he proper resolution of [the Eleventh Amendment] issue ... does not require--or permit--a determination of the State's ownership of the artifacts." *Id.*, at 699, 102 S.Ct., at 3322 (emphasis added); see also *id.*, at 700, 102 S.Ct., at 3322 (noting that while adjudication of the State's right to the artifacts "would be justified if the State voluntarily advanced a claim to [them], it may not be justified as part of the Eleventh Amendment analysis, the only issue before us"). Thus, any references in *Treasure Salvors* to what the lower courts could have done if they had solely adjudicated title to the artifacts, rather than issued a warrant to arrest the res, do not control the outcome of this case, particularly given that it comes before us in a very different posture, i.e., in an admiralty action in rem where the State makes no claim of actual possession of the res.

Nor does the fact that *Treasure Salvors* has been cited for the general proposition that federal courts cannot adjudicate a State's claim of title to property, see, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*,

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521 U.S. ----, ---- - ----, 117 S.Ct. 2028, 2043-2045, 138 L.Ed.2d 438 (1997) (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at ---- - ----, 117 S.Ct. at 2043-2045 (SOUTER, J., dissenting), prevent a more nuanced application of Treasure Salvors in the context of the federal courts' in rem admiralty jurisdiction. Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests, it does not necessarily follow that it applies to in rem admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.

In considering whether the Eleventh Amendment applies where the State asserts a claim in admiralty to a res not in its possession, this Court's decisions in cases involving the sovereign immunity of the Federal Government in in rem admiralty actions provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government. See *Tindal v. Wesley*, 167 U.S., at 213, 17 S.Ct., at 773-774; see also *Treasure Salvors*, *supra*, at 710, 102 *1473 S.Ct., at 3327 (White, J., concurring in judgment in part and dissenting in part) (discussing analogy between immunity in "in rem actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res"). In one such case, *The Davis*, 10 Wall. 15, 19 L.Ed. 875 (1869), the Court explained that "proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." *Id.*, 77 U.S. at 20. The possession referred to was "an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." *Id.*, at 21; see also *The Siren*, 7 Wall. 152, 159, 19 L.Ed. 129 (1868) (describing "exemption of the government from a direct proceeding in rem against the vessel whilst in its custody"). The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the res at issue. See, e.g., *The Pesaro*, 255 U.S. 216, 219, 41 S.Ct. 308, 309, 65 L.Ed. 592 (1921) (federal court's in rem jurisdiction not barred by mere suggestion of foreign government's ownership of vessel).

While this Court's decision in *The Davis* was issued over a century ago, its fundamental premise remains valid in in rem admiralty actions, in light of the federal courts' constitutionally established jurisdiction in that area and the fact that a requirement that a State possess the disputed res in such cases is "consistent with the principle which exempts the [State] from suit and its possession from disturbance by virtue of judicial process." *The Davis*, *supra*, at 21. Based on longstanding precedent respecting the federal courts' assumption of in rem admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the Brother Jonathan and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck. We have no occasion in this case to consider any other circumstances under which an in rem admiralty action might proceed in federal court despite the Eleventh Amendment.

III

There remains the issue whether the courts below properly concluded that the Brother Jonathan was not abandoned for purposes of the ASA. That conclusion was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry. The Court of Appeals'

determination that the wreck and its contents are not abandoned for purposes of the ASA was affected by concerns that if "the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the Brother Jonathan." 102 F.3d, at 389. Moreover, the District Court's inquiry was a preliminary one, based on the concern that it was premature "for the court to find that any individual items of cargo or personal property have been abandoned." 883 F.Supp., at 1354. In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the Brother Jonathan in federal court, the application of the ASA must be reevaluated. Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.

Our grant of certiorari also encompassed the question whether the courts below properly concluded that the ASA pre-empts § 6313, which apparently operates to transfer title to abandoned shipwrecks not covered by the ASA to the State. Because the District Court's full consideration of the application of the ASA on remand might negate the need to address the pre-emption issue, we decline to undertake that analysis.

Accordingly, the judgment of the Court of Appeals assuming jurisdiction over this case is affirmed, its judgment in all other respects is vacated, and the case is remanded for *1474 further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

In *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), both the four Members of the plurality and the four dissenters agreed that the District Court "did not have power ... to adjudicate the State's interest in the property without the State's consent." *Id.*, at 682, 102 S.Ct., at 3313; see also *id.*, at 699-700, 102 S.Ct., at 3322; *id.*, at 703, 102 S.Ct., at 3324, (White, J., concurring in judgment in part and dissenting in part). Our reasons for reaching that common conclusion were different, but I am now persuaded that all of us might well have reached a different conclusion if the position of Justices Story and Washington (that the Eleventh Amendment is no bar to any in rem admiralty action) had been brought to our attention. I believe that both opinions made the mistake of assuming that the Eleventh Amendment has the same application to an in rem admiralty action as to any other action seeking possession of property in the control of state officers.

My error, in writing for the plurality, was the assumption that the reasoning in *Tindal v. Wesley*, 167 U.S. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897), and *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), which supported our holding that *Treasure Salvors* was entitled to possession of the artifacts, also precluded a binding determination of the State's interest in the property. Under the reasoning of those cases, the fact that the state officials were acting without lawful authority meant that a judgment against them would not bind the State. See 458 U.S., at 687-688, 102 S.Ct., at 3316 ("In holding that the action was not barred by the Eleventh Amendment, the Court in *Tindal*

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emphasized that any judgment awarding possession to the plaintiff would not subsequently bind the State"). That reasoning would have been sound if we were deciding an ejectment action in which the right to possession of a parcel of real estate was in dispute; moreover, it seemed appropriate in *Treasure Salvors* because we were focusing on the validity of the arrest warrant.

Having given further consideration to the special characteristics of in rem admiralty actions, and more particularly to the statements by Justice Story and Justice Washington quoted at pages 9 and 10 of the Court's opinion, [FN*] I am now convinced that we should have affirmed the *Treasure Salvors* judgment in its entirety. Accordingly, I agree with the Court's holding that the State of California may be bound by a federal court's in rem adjudication of rights to the *Brother Jonathan* and its cargo.

FN* See also Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 *Stan. L.Rev.* 1033, 1078-1083 (1983) (discussing the historical basis for this interpretation).

Justice KENNEDY, with whom Justice GINSBURG and Justice BREYER join, concurring.

I join the opinion of the Court. In my view, the opinion's discussion of *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982), does not embed in our law the distinction between a State's possession or nonpossession for purposes of Eleventh Amendment analysis in admiralty cases. In light of the subsisting doubts surrounding that case and Justice STEVENS' concurring opinion today, it ought to be evident that the issue is open to reconsideration.

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710 N.E.2d 820
186 Ill.2d 267, 238 Ill.Dec. 23
(Cite as: 710 N.E.2d 820)

The PEOPLE of the State of Illinois ex rel.
ILLINOIS HISTORIC PRESERVATION
AGENCY et al., Appellees,
v.
Harry ZYCH, d/b/a American Diving & Salvage
Company, et al., Appellants.

No. 84514.

Supreme Court of Illinois.

April 15, 1999.

State sued salvor and insurer of vessel which had sunk in Lake Michigan in 1860, seeking declaratory judgment that it owned remains of shipwreck under Abandoned Shipwreck Act of 1987. The Circuit Court, Cook County, Margaret Stanton McBride, J., awarded title to salvor and insurer, and state appealed. The Appellate Court, 292 Ill.App.3d 1084, 227 Ill.Dec. 218, 687 N.E.2d 141, reversed, declaring that insurer had abandoned interest in wreck. Salvor and insurer sought leave to appeal. The Supreme Court, Freeman, C.J., held that: (1) insurer acquired title to wreck when it paid claim for vessel's total loss in 1960, and (2) evidence supported finding that insurer did not abandon its rights by failing to attempt salvage over ensuing 129 years.

Judgment of Appellate Court reversed; circuit court judgment affirmed.

[1] SHIPPING ⇨213

354k213

Title passes automatically to the marine insurer upon payment of the loss for vessel lost at sea, unless the insurer affirmatively rejects such title.

[2] INSURANCE ⇨2237

217k2237

By paying \$11,993.20 to owner of vessel in 1860 after vessel sank and became total loss, insurer of vessel accepted abandonment of vessel and accordingly became owner of it under Federal Abandoned Shipwreck Act of 1987 even though insurer's agent had recommended that insurer not accept abandonment shortly before insurer made payment. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

[2] SHIPPING ⇨213

354k213

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[3] ADMIRALTY ⇨118.7(4)

16k118.7(4)

Finding of abandonment of sunken vessel is a factual determination which will not be disturbed unless against manifest weight of evidence. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

[4] APPEAL AND ERROR ⇨996

30k996

Where there are different ways to view evidence, or alternative inferences to be drawn from it, reviewing court will accept view of trier of fact as long as it is reasonable; it is not the function of reviewing court to reweigh evidence.

[4] APPEAL AND ERROR ⇨1012.1(2)

30k1012.1(2)

Where there are different ways to view evidence, or alternative inferences to be drawn from it, reviewing court will accept view of trier of fact as long as it is reasonable; it is not the function of reviewing court to reweigh evidence.

[5] ABANDONED AND LOST PROPERTY ⇨

1.1

1k1.1

Maritime law characterizes abandonment as the act of leaving or deserting property without the hope of ever recovering it or the intention of returning to it.

[6] SHIPPING ⇨213

354k213

In order to prove abandonment of sunken vessel, a party must show (1) an intent to abandon, and (2) acts carrying that intent into effect. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

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[7] SHIPPING ⇨213

354k213

Burden of proving an abandonment of sunken vessel lies with the party who relies on it. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

[8] SHIPPING ⇨213

354k213

It is incumbent upon party seeking to prove abandonment of sunken vessel to show, by strong, convincing and unequivocal evidence, that the owner freely intended to relinquish ownership. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

[9] SALVAGE ⇨1

344k1

Title to articles lost at sea remains in the owner, and a salvor does not gain ownership merely by finding the property.

[9] SHIPPING ⇨213

354k213

Title to articles lost at sea remains in the owner, and a salvor does not gain ownership merely by finding the property.

[10] SHIPPING ⇨213

354k213

Abandonment of sunken vessel can be either express or implied, and may be determined based upon circumstantial evidence of intent.

[11] SHIPPING ⇨213

354k213

Lapse of time and nonuse may give rise to an inference of abandonment of sunken vessel, particularly when coupled with a failure to come forward in an action to claim ownership rights or a disinterest in pursuing salvage efforts.

[12] SHIPPING ⇨213

354k213

In light of the strong policy against abandonment of sunken vessels, an owner is not required to undertake a search for the vessel where the lack of technology would make the search infeasible or futile.

[13] SHIPPING ⇨213

354k213

Evidence, including insurer's prompt assertion of title upon vessel's discovery, supported finding that vessel's insurer, which had acquired ownership of vessel as matter of law under Federal Abandoned Shipwreck Act of 1987 by making payment to owner of vessel in 1860 after vessel sank and became total loss, did not abandon ownership by failing to undertake salvage for 129 years at time when existing technology made recovery efforts highly impracticable. Abandoned Shipwreck Act of 1987, § 2 et seq., 43 U.S.C.A. § 2101 et seq.

*821 Paul N. Keller, Park Ridge, David J. Bederman, Atlanta, GA, for Harry Zych.

John P. Schmidt, Assistant Attorney General, Chicago, for People ex rel. Illinois Historic Preservation Agency, Dept. of Transportation.

Peter E. Hess, Wilmington, DE, for Amicus Curiae, Marex International, Inc.

Richard T. Robol, Columbus-America Discovery Group, Columbus, OH, for Amicus Curiae, Columbus-America Discovery Group.

James E. Mann, National Trust for Historic Preservation, Chicago, for Amicus Curiae, National Trust for Historic Preservation.

Chief Justice FREEMAN delivered the opinion of the court:

Plaintiff, the State of Illinois ex rel. Illinois Historic Preservation Agency and Department of Transportation (State), brought this declaratory judgment action seeking a determination that it owned the remains of the shipwrecked Lady Elgin under the Abandoned Shipwreck Act of 1987 (Act) (43 U.S.C. § 2101 et seq. (1988)). The trial court found that title to the wreck belonged to defendant, CIGNA Property and Casualty Insurance, as the successor in interest to the ship's original insurer, Aetna Insurance Company, which had acquired ownership after the ship sank in 1860. The appellate court reversed, concluding that CIGNA had abandoned any interest in the ship and that ownership of the wreck thus vested in the State. 292 Ill.App.3d 1084, 227 Ill.Dec. 218, 687 N.E.2d 141. We granted defendants' petition for leave to appeal (166 Ill.2d R. 315) and now reverse the appellate court and affirm the circuit court. We note that two amicus curiae briefs have been

submitted in support of the State: one by Columbus-America Discovery Group, and another jointly by the following organizations: National Trust for Historic Preservation; Advisory Council on Underwater Archaeology; Association for Great Lakes Maritime History; Council of American Maritime Museums; Institute of Nautical Archaeology; Landmarks Preservation Council of Illinois, Inc.; National Conference of State Historic Preservation Officers; *822 North American Society for Oceanic History; Society for American Archaeology; and Society for Historical Archaeology.

BACKGROUND

As the facts of this case were sufficiently set forth by the appellate court, we reiterate only those essential to our determination. The Lady Elgin met her demise in September 1860 as a result of a collision with the lumber schooner Augusta during inclement weather. Aetna Insurance Company paid the Lady Elgin's owner, Gurdon S. Hubbard, \$11,993.20 on the loss in full satisfaction of its obligations under a policy covering the ship and her cargo. Thereafter, the wreckage remained submerged and undiscovered until 1989, when defendant, Harry Zych, a professional salvage diver, located it off the coast of Highland Park. Zych first participated in an unsuccessful search for the Lady Elgin in 1969, with local divers. In 1971 or 1972, after extensively researching the shipwreck and its potential location, Zych began his own search for the vessel. Gradually updating and improving his search equipment, Zych ultimately located the ship using a "sidescan sonar." Although Zych acknowledged that his search was not full time, it was nonetheless arduous. The vessel had broken into pieces and was scattered over several miles, and proved to be some distance from the area originally reported. After the shipwreck, the vessel retained very little salvage value; its primary value today derives from its historical significance.

Shortly after locating the wreck Zych notified Ivan Avery, an officer of a CIGNA company, regarding his discovery, prompting Avery to search CIGNA's archives for documentation concerning the ship. In April 1990, Zych formed defendant, the Lady Elgin Foundation (Foundation). The Foundation and CIGNA executed an agreement under which CIGNA transferred its interest in the wreckage to the

Foundation in exchange for 20% of the gross proceeds from any sale of property or artifacts subsequently recovered from the vessel.

Following the disposition of Zych's in rem admiralty case (see 292 Ill.App.3d at 1087, 227 Ill.Dec. 218, 687 N.E.2d 141 (discussing federal litigation)), the State commenced the instant action for declaratory and injunctive relief under the Act. The complaint alleged that the Lady Elgin was an "abandoned shipwreck" under the Act and that the State was thus vested with title. See 43 U.S.C. § 2105(c) (1994). At the ensuing bench trial, the State attempted to prove that (1) Aetna had never obtained title to the shipwreck in the first instance, because it had refused to accept "abandonment," or ownership of, the wreck; and (2) even if Aetna had taken title, CIGNA subsequently abandoned any claim or interest it may have held by failing to make any effort to recover the ship until it was discovered by Zych in 1989. The evidence presented consisted of the testimony of several expert witnesses and six pieces of correspondence pertaining to the ship which were recovered from CIGNA's archives. When questioned as to why CIGNA did not have additional documentation, Avery testified that it was Aetna's practice at that time to keep policy and claim information at the field office handling the particular claim. Avery believed it was quite likely that additional documents pertaining to the claim of the Lady Elgin had been retained at Aetna's Chicago office; however, that office had been completely destroyed in the Chicago Fire of 1871.

Each of the six letters retrieved were drafted in 1860, either by Aetna's vice-president, Thomas Alexander, or its president, E.G. Ripley. In the first letter, Alexander informed agents in Aetna's Chicago office, Hunt and Hubbard (also the ship's owner), that he had been notified of the loss and that Aetna "hope[d to] escape any claims on * * * cargo." The second letter was from Alexander to Captain E.P. Dorr, an Aetna agent in Buffalo, New York, noting that the Augusta had "been libelled for \$42,000" and inquiring whether this had been done at the instance of the owners of the Lady Elgin. The next letter, to an agent in Cincinnati, noted that policies covering the Lady Elgin were \$5,000 for the hull and \$2,500 for the cargo. In the subsequent letter, Ripley notified Hubbard and Hunt that Aetna wished to pay the claims on the ship as soon as they could be proved, and instructed the agents to prepare

*823 the claims and pay them. On October 10, 1860, Alexander again wrote to Hubbard and Hunt, stating, in relevant part:

"We regret that Mr. Hubbard declines to allow us the legal interest? [sic] off his claim because we should prefer to pay it at that rate-and because we think the circumstances would justify his concession of the legal interests in this case-however, we shall not discuss the point and permit the claim to layover until its maturity. Permit us to confirm Capt. Dorr instructions not to accept an abandonment of the vessel, for the reason which he informs us he gave you on his recent visit to Chicago." (Emphasis added.)

The final letter of November 15, 1860, from Alexander to Hubbard and Hunt notes the payment of \$11,993.20 "in full of policy on Lady Elgin."

Evidence of Aetna's Initial Acquisition of Ownership

The Lady Elgin was a total loss, and Aetna's payment to Hubbard on the claim considerably exceeded that provided under the policy for the ship. After an insurer pays a claim on a total loss, it has the prerogative either to reject or accept "abandonment" of the remains of the insured vessel. An acceptance of abandonment means that the underwriter is vested with complete title to the wreckage including any rights or liabilities that may attach. The expert testimony of Ivan Avery and George Stellwag established that once the insurer pays on the loss, ownership of the wreckage passes automatically to that insurer, and it is unnecessary for the claimant to make an express tender of abandonment. Avery testified that in 1860, in the vast majority of cases of total loss, the practice of underwriters was to accept ownership of the insured wreckage. Avery further testified that he had "no question" that Aetna had accepted abandonment of the Lady Elgin. This opinion was partially based upon the notation in one of the letters that the Augusta had been "libelled for \$42,000." According to Avery, this fact played a very important role in Aetna's decision to accept title, because it represented the amount that Augusta was likely going to have to pay in damages to the owners of the Lady Elgin. If Aetna accepted abandonment, it would obtain the right to these damages through subrogation.

The State called Victor Simone as a marine

insurance expert. Simone testified that an insurance company's determination of whether to accept or reject abandonment is unrelated to its decision to pay a claim, because the latter decision merely turns upon whether the claim falls within coverage. Simone testified that it was common for insurance companies to refuse abandonment, and that he believed Aetna never acquired title to the Lady Elgin because (1) in response to a request to admit promulgated by the State, Aetna conceded that "on October 10, 1860," it had "not accepted" abandonment of the ship; (2) there was no evidence that Aetna acquired title; and (3) common sense dictated rejection of the wreckage because it would be difficult to salvage and had little salvage value. Addressing the statement in the letter of October 10, 1860, regarding Captain Dorr's instruction not to accept abandonment, Simone testified that this clearly showed that Aetna would not accept ownership of the vessel. Stellwag gave a contrary opinion, however, testifying that Captain Dorr's "instruction" was merely a recommendation, and that it was too early for a final decision by Aetna because the claim on the loss had not yet been paid.

Evidence of CIGNA's Alleged Abandonment of Ownership

It was undisputed that neither Aetna nor CIGNA had attempted to salvage the Lady Elgin until Zych discovered the wreck and entered into the agreement with CIGNA. However, testimony of the parties' experts proved that until relatively recently, such efforts would have been extremely painstaking and economically impractical. The State's expert, Robert Kutzleb, described various methods available in 1860 by which the lake could be "dragged," and then, when an item was "snagged," divers dispatched to retrieve it. Defense experts, however, dismissed this method as impractical in this case because the Lady Elgin had broken into many pieces and the bottom of Lake Michigan was replete with rocks and debris.

*824 Defense expert Martin Klein testified that, as late as 1960, salvage technology was still "very rudimentary." Klein acknowledged that the sidescan sonar ultimately used to discover the ship was available in 1967; however, it was still in its infancy and very costly. In Klein's opinion, given the existent salvage and navigational technology, the chances of the Lady Elgin having been discovered

prior to 1989 were "almost negligible." This was primarily because the wreckage was scattered and proved to be miles away from the location commonly reported. This was substantially corroborated by Zych, who also testified as a defense expert.

In ruling in favor of defendants, the trial court first rejected the State's contention that Aetna had refused abandonment, and concluded that the company had accepted title to the wreckage in 1860 when it paid the claim under the policy. The court then went on to find that the State had failed to prove that CIGNA subsequently abandoned its interest. The court was persuaded by the fact that CIGNA had preserved for 129 years the six pieces of correspondence evidencing its coverage of the ship, certain details of the claim, and its payment on the loss. The court further found that CIGNA's failure to search for the wreckage was justified by the fact that the necessary equipment to conduct such a search was unavailable until the 1970s.

On appeal, the court agreed with the trial court that Aetna had acquired title to the shipwreck in 1860; however, with one justice dissenting, the court reversed the determination that CIGNA had not subsequently abandoned its interest. The court accepted the State's argument that, "as a matter of law, Aetna abandoned any interest when it made no effort to recover the wreckage, did not explore the possibility of recovering the wreckage, and displayed no interest in the ship for a period of 129 years." 292 Ill.App.3d at 1094, 227 Ill.Dec. 218, 687 N.E.2d 141. The appellate court placed particular emphasis on CIGNA's failure to attempt to locate the shipwreck even after the technology to do so became available in the late 1960s or 1970s.

ANALYSIS

The Act provides that states have management responsibilities over a broad range of resources, including "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. §§ 2101(a), (b) (1994). Under the Act, a state is vested with title to any such shipwreck which is, in relevant part, (1) embedded in the submerged lands of that state; or (2) on the state's submerged lands and included in or determined eligible for inclusion in the National Register. 43 U.S.C. §§

2105(a), (c) (1994). The Act itself does not define the term "abandoned"; however, the Supreme Court recently directed that the meaning of "abandoned" under the Act be determined in accordance with its meaning under admiralty law. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, ---, 118 S.Ct. 1464, 1473, 149 L.Ed.2d 626, 640 (1998).

We first consider the State's contention that Aetna never accepted title to the shipwreck in the first instance. The courts below concluded that Aetna had succeeded to ownership in 1860 when it paid insurance on the loss. In support of its argument that Aetna had rejected such ownership, the State again points to the evidence upon which it relied in the trial and appellate courts: (1) the letter of October 10, 1860, from Alexander to agents Hubbard and Hunt, noting Captain Dorr's "instructions not to accept an abandonment of the vessel"; and (2) the alleged concession by CIGNA in its response to the State's request to admit facts.

[1][2] We disagree with the State's argument. First, it was undisputed that shortly after the October 10, 1860, letter was written, Aetna paid Hubbard \$11,933.20 on the loss. The expert testimony showed that under established maritime law, title passes automatically to the insurer upon payment of the loss, unless the insurer affirmatively rejects such title. This principle is recognized in the regulations promulgated under the Act, which state:

"When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered *825 to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed.Reg. 50116, 50120-21 (1990).

See also *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F.Supp. 1343, 1351 (N.D.Cal.1995). We find no evidence that Aetna rejected such a passage of title. In fact, Avery testified that most insurers in Aetna's position did accept abandonment, and that he had no doubt that Aetna had done so in this case. As to Alexander's statement in the October 10 letter, we agree with the opinion of defense expert Stellwag that it appeared to reflect merely Captain Dorr's opinion or recommendation rather than any final decision by Aetna to reject abandonment.

The State also points to one of its requests to admit

facts, which sought an admission that "Aetna refused or declined to accept abandonment of the Lady Elgin." CIGNA responded: "Admitted that on October 10, 1860, an abandonment of the Lady Elgin was not accepted by Aetna." (Emphasis added.) We agree with the appellate court that this statement does not mean that ownership was conclusively refused by Aetna or that it was not later accepted. This is especially so in light of CIGNA's response to a subsequent request to admit by the State, which provided that "[a]t no time did Aetna or CIGNA accept an abandonment of the Lady Elgin," and to which CIGNA replied, "DENIED."

Defendants next argue that the appellate court invaded the province of the trier of fact when it reversed the determination that CIGNA had not abandoned its interest in the ship. In response, the State argues that Aetna and CIGNA's "complete disinterest" in the ship for 129 years, and, in particular, CIGNA's failure to undertake salvage efforts after technology made it possible in the 1970s, requires a conclusion that CIGNA had abandoned its interest.

[3][4] In general, a finding of abandonment is considered a factual determination (*Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir.1989); *Friedman v. United States*, 347 F.2d 697, 704 (8th Cir.1965)), which this court will not disturb unless it is against the manifest weight of the evidence (*In re Application of the County Treasurer*, 131 Ill.2d 541, 549, 137 Ill.Dec. 561, 546 N.E.2d 506 (1989)). Where there are different ways to view the evidence, or alternative inferences to be drawn from it, we accept the view of the trier of fact as long as it is reasonable. See *Application of the County Treasurer*, 131 Ill.2d at 549, 137 Ill.Dec. 561, 546 N.E.2d 506; *Commercial Mortgage & Finance Co. v. Life Savings of America*, 129 Ill.2d 42, 49, 133 Ill.Dec. 450, 541 N.E.2d 661 (1989); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). It is irrelevant whether we may have reached a different result were we the trier of fact; it is not the function of this or any other reviewing court to reweigh evidence.

[5][6][7][8] As the Act fails to define abandonment, we look for guidance to the regulations promulgated under the Act and the definition of the term under

admiralty law. The regulations define "abandoned shipwreck" as "any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person." (Emphasis added.) 55 Fed.Reg. 50116, 50120 (1990). This definition generally comports with long-recognized maritime law which characterizes abandonment as the act of leaving or deserting property without the hope of ever recovering it or the intention of returning to it. 3A *Benedict on Admiralty* § 134 (7th ed.1980); *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin"*, 755 F.Supp. 213, 214 (N.D.Ill.1991). In order to prove abandonment, a party must show (1) an intent to abandon, and (2) acts carrying that intent into effect. *Zych*, 755 F.Supp. at 214. As always, the burden of proving an abandonment lies with the party who relies on it. See generally *Brunotte v. DeWitt*, 360 Ill. 518, 533, 196 N.E. 489 (1935); *Burns v. Curran*, 275 Ill. 448, 114 N.E. 166 (1916). It is incumbent upon that party to prove, by strong, convincing and unequivocal evidence, that the owner freely intended to relinquish ownership. *Zych*, 755 F.Supp. at 214; see also *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461 (4th Cir.1992); see generally *Brunotte*, *826 360 Ill. at 533, 196 N.E. 489; *People v. Dorney*, 17 Ill.App.3d 785, 787-88, 308 N.E.2d 646 (1974).

[9] Generally, admiralty law is reluctant to find a repudiation of ownership. Title to articles lost at sea remains in the owner, and a salvor does not gain ownership merely by finding the property. 3A *Benedict on Admiralty* § 150, at 11-1 through 11-2 (7th ed.1980), citing *The Akaba*, 54 F. 197 (4th Cir.1893). With these principles in mind, courts have recognized that when articles are lost at sea, "lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment." See *Columbus-America*, 974 F.2d at 461, quoting *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. 452, 456 (E.D.Va.1960) (requires proof of a "clear and unmistakable affirmative act" indicating purpose to repudiate ownership).

[10][11][12] Nonetheless, it is well established that abandonment can be either express or implied, and may, and often must, be determined based upon

circumstantial evidence of intent. *Moyer v. Wrecked & Abandoned Vessel Known As the Andrea Doria*, 836 F.Supp. 1099, 1105 (D.N.J.1993), citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. 452, 456 (E.D.Va.1960); see also *Zych*, 755 F.Supp. at 214. Lapse of time and nonuse may give rise to an inference of abandonment, particularly when coupled with a failure to come forward in an action to claim ownership rights (*Bemis v. RMS Lusitania*, 884 F.Supp. 1042, 1049 (E.D.Va.1995), citing *Columbus-America*, 974 F.2d at 461) or a disinterest in pursuing salvage efforts (see, e.g., *Moyer*, 836 F.Supp. at 1105). However, in light of the strong policy against abandonment, an owner is not required to undertake a search for the vessel where the lack of technology would make the search infeasible or futile. *Moyer*, 836 F.Supp. at 1105, citing *Zych*, 755 F.Supp. at 216; *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 388 (9th Cir.1996), vacated on other grounds, 143 F.3d 1299 (9th Cir.1998).

In this case, the appellate court's reversal was based upon its conclusion that, as a matter of law, CIGNA had shown complete disinterest in the ship even after technology existed to find the vessel. Although that court cast its decision as reduced to a question of law, we believe it was, instead, an improper reevaluation of disputed facts.

[13] First, the trial court found it significant that for over a century, Aetna and CIGNA had preserved the six letters which evidenced Aetna's coverage and ultimate ownership of the *Lady Elgin*. The appellate court dismissed this fact by saying that the rationale for such continued preservation "cannot be known for certain" (292 Ill.App.3d at 1098, 227 Ill.Dec. 218, 687 N.E.2d 141); however, experts *Avery* and *Stellwag* indicated that this manifested the insurers' interest in the ship. *Avery* further indicated that there most likely had been additional documentation concerning the *Lady Elgin* stored in CIGNA's Chicago office, but that this office was completely destroyed in the Chicago Fire. This was appreciable evidence of an intent not to abandon, and the appellate court erred in disregarding it.

Second, the appellate court focused upon CIGNA's failure to search for the ship. Expert testimony showed nearly conclusively, however, that efforts to locate the wreckage prior to the 1970s would have

been highly impractical to virtually impossible. CIGNA was not required to embark upon an impracticable salvage excursion in order to escape a finding of abandonment. Indeed, defense expert *Klein* gave the opinion that, even in the 1970s, the sidescan sonar was "still in its infancy," and that in light of the existent salvage and navigational technology, and the broken condition of the wreckage, any efforts to locate the ship prior to 1989 would have proved "almost negligible." Under the facts of this case, a failure to pursue salvage efforts did not equate to a "complete disinterest" in the ship. It is significant that as soon as CIGNA learned of *Zych's* discovery of the shipwreck, it immediately entered into an agreement with the Foundation and then came forward to assert its rights in court. Such circumstances have been held persuasive proof of an intent not to abandon. Cf., *Columbus-America*, 974 F.2d at 462; *Martha's Vineyard Scuba Headquarters, Inc. v. *827 Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987). This is consistent with the Act's regulations, which state that abandonment requires an intent of "never claiming a right or interest in the future." The evidence sufficiently showed that CIGNA lacked any intent to relinquish its rights. Accordingly, the appellate court erred in substituting its judgment for that of the trial court.

The State and amici assert that the trial court applied an improper legal standard in considering whether CIGNA abandoned its interest in the *Lady Elgin*; specifically, they maintain that the court required proof that CIGNA have made an express renunciation of ownership, rather than accepting circumstantial evidence of abandonment. The requirement of "express renunciation" was supposedly imposed by the Fourth Circuit's holding in *Columbus-America* (see 974 F.2d at 472 (*Widener, J., dissenting*)), and was specifically rejected by the court in *Fairport International Exploration, Inc. v. Shipwrecked Vessel Known As The Captain Lawrence*, 105 F.3d 1078 (6th Cir.1997), vacated & remanded on other grounds, --- U.S. ---, 118 S.Ct. 1558, 140 L.Ed.2d 790 (1998); see also *Brother Jonathan*, 102 F.3d at 388.

We note in passing that the Supreme Court denied certiorari in the *Columbus-America* case. However, even assuming, without deciding, that the *Columbus-America* case was wrongly decided, this

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does not require reversal of the trial court in this case. We are not convinced that the trial court here applied the wrong standard, because it specifically observed that abandonment could be proved by inference. In any event, we need not accept the trial court's legal conclusion, as long as its factual determinations are supported by the record. As stated above, the relevant findings were amply supported in this case. Thus, there is no basis for any finding of error.

In light of our result, we do not reach defendants'

remaining contentions.

CONCLUSION

For the foregoing reasons, the appellate court's decision is reversed, and the judgment of the circuit court is affirmed.

Appellate court judgment reversed; circuit court judgment affirmed.

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