

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic Ventures,
limited partnership, Plaintiff-Appellee,
v.
**Christopher S. HAVER; Deep Ocean
Expeditions, Parties in Interest-
Appellants,**
and
**The Wrecked and Abandoned Vessel, its
engines, tackle, apparel, appurtenances,
cargo, etc., located within one (1) nautical
mile of a point located at 41o 43'
32" North Latitude and 49o 56' 49" West
Longitude, believed to be the R.M.S.
Titanic, in rem, Defendant,**
**Liverpool and London Steamship
Protection and Indemnity Association
Limited,**
Claimant,
**Wildwings Worldwide Travel; Bakers
World Travel; Quark Expeditions,
Incorporated; Mike McDowell; Ralph
White; Don Walsh, Ph.D.; Alfred S.
McLaren, Ph.D.; R/V Akademik Mstislav
Keldysh; Blackhawk Television, Parties
in Interest,**
and
John A. Joslyn, Movant.
**The Explorers Club; The Advisory
Council on Underwater Archaeology;
Columbus-America Discovery Group,
Amici Curiae.**
No. 98-1934.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 29, 1998.

Decided March 24, 1999.

Salvor in possession of the wrecked vessel R.M.S. Titanic sought preliminary injunction preventing other parties from visiting the wreck site to view and photograph the wreck. A passenger of proposed expedition by another company filed separate declaratory judgment action against salvor, and salvor counterclaimed. Actions were consolidated. The United States District Court for the Eastern District of Virginia, J. Calvitt Clarke,

Jr., Senior District Judge, 9 F.Supp.2d 624, granted injunctive relief to salvor. Ocean expedition company and proposed passenger appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) expedition company was entitled to appeal, even though it was not made a party in proceedings below; (2) appeal presented a live case or controversy; (3) district court did not obtain in personam jurisdiction over expedition company through proper service of process, and thus injunction against company was not enforceable; (4) district court had in personam jurisdiction to enter preliminary injunction against passenger; (5) district court properly awarded salvage rights in ship wreck outside of United States' territorial waters; (6) district court's "constructive" in rem jurisdiction over wreck of vessel lying in international waters represented a "shared sovereignty," shared with other nations enforcing the same jus gentium; (7) court erred in extending law of salvage to vest in salvor exclusive rights to visit, observe, and photograph wreck and wreck site; and (8) in enjoining others from interfering with ongoing salvage operations, district court erred in imposing geographic restrictions.

Affirmed in part, reversed in part, and remanded with instructions.

See also, 924 F.Supp. 714.

**[1] CONSTITUTIONAL LAW ⇔ 316
92k316**

Expedition company, which was not party to proceedings in the district court, was entitled as a matter of due process and fairness to appeal district court's assertion of jurisdiction over it in enjoining company from visiting and photographing shipwreck. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 1292(a).

**[1] FEDERAL COURTS ⇔ 544
170Bk544**

Expedition company, which was not party to proceedings in the district court, was entitled as a matter of due process and fairness to appeal district court's assertion of jurisdiction over it in enjoining company from visiting and

photographing shipwreck. U.S.C.A.
Const.Amend. 5; 28 U.S.C.A. § 1292(a).

[2] FEDERAL COURTS ⇌ 541
170Bk541

Live case or controversy existed, thus enabling expedition company to appeal district court order enjoining company from visiting and photographing shipwreck, even though the expedition prompting district court's order had taken place, since conflict remained between company's intention to continue its business as advertised and scope of district court's injunction protecting salvor of the wrecked vessel. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 1292(a).

[3] ACTION ⇌ 16
13k16

Actions in rem are prosecuted to enforce a right to things, whereas actions in personam are those in which an individual is charged personally.

[4] JUDGMENT ⇌ 812(1)
228k812(1)

Because in rem actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against that property.

[5] JUDGMENT ⇌ 812(3)
228k812(3)

Judgments in in rem actions affect only the property before the court and possess and carry no in personam significance, other than to foreclose any person from later seeking rights in the property subject to the in rem action.

[6] FEDERAL COURTS ⇌ 20.1
170Bk20.1

Court's authority to exercise in rem jurisdiction does not carry with it a concomitant, derivative power to enter ancillary in personam orders.

[7] ACTION ⇌ 16
13k16

In personam actions adjudicate the rights and obligations of individual persons or entities.

[8] CONSTITUTIONAL LAW ⇌ 305(4.1)
92k305(4.1)

Due process precludes courts from adjudicating in personam the rights or obligations of persons in the absence of personal jurisdiction. U.S.C.A. Const.Amend. 5.

[9] FEDERAL CIVIL PROCEDURE ⇌ 411
170Ak411

To obtain personal jurisdiction over a defendant, court must have (1) proof of notice to defendant, (2) constitutionally sufficient relationship between defendant and forum, and (3) authorization for service of summons on defendant. U.S.C.A. Const.Amend. 5.

[10] INJUNCTION ⇌ 110
212k110

Injunctive relief can only be granted in an in personam action commenced by one party against another in accordance with established process, and, thus, a party cannot obtain injunctive relief against another without first obtaining in personam jurisdiction over that person or someone in legal privity with that person. Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

[11] INJUNCTION ⇌ 110
212k110

Injunctive relief ordered in an in rem action would be meaningless, because things or property cannot be enjoined to do anything.

[12] FEDERAL COURTS ⇌ 93
170Bk93

Personal jurisdiction need not be exercised in pure in rem proceeding, because piece of property, not a person, serves as defendant; rather, in rem actions only require that a party seeking an interest in a res bring the res into the custody of the court and provide reasonable, public notice of its intention to enable others to appear in the action to claim an interest in the res.

[13] SALVAGE ⇌ 50
344k50

Injunction against expedition company, preventing it from visiting and photographing

shipwreck, was not enforceable, since company was never made a party through proper service of process nor was it in privity with a party, and, thus, district court did not obtain in personam jurisdiction over company; while district court had subject matter jurisdiction over in rem admiralty action brought by salvor, this did not give it authority to issue process for extraterritorial service on company, and salvor did not actually file complaint against company, nor did it purport to serve company with any process. 28 U.S.C.A. § 1333.

[14] SALVAGE ⇔ 50
344k50

While district court having jurisdiction over a res is entitled to adjudicate salvage rights with respect to the res, when enforcing orders to give effect to those rights against a third party who, through conduct, challenges them, the court must obtain in personam jurisdiction over the third party through service of process.

[15] SALVAGE ⇔ 50
344k50

Expedition company's agreement to take proposed passenger on expedition to shipwreck site did not place company in privity with passenger so as to entitle salvor to rely on jurisdiction over passenger to reach company, with respect to salvor's attempts to enjoin company from visiting and photographing shipwreck, where company was not made party through proper service of process, and there was no evidence from which to infer that company conspired with or encouraged passenger to violate district court's injunction, nor evidence that passenger actually violated injunction. Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

[16] SALVAGE ⇔ 45
344k45

District court had in personam jurisdiction to enter preliminary injunction against customer of expedition company, even though customer was not made party in salvor's in rem action by which salvor sought to enjoin third parties from visiting and photographing shipwreck, where customer commenced his own in personam action against salvor, seeking

declaratory judgment that prior injunction entered in in rem action did not prevent him from entering and photographing shipwreck site, salvor filed counterclaim in customer's declaratory judgment action seeking injunction against him in that action, and in personam action was consolidated with in rem action.

[17] ADMIRALTY ⇔ 1.6
16k1.6

Maritime law was placed under national control because of its intimate relation to navigation and to interstate and foreign commerce. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333.

[18] ADMIRALTY ⇔ 1.6
16k1.6

United States Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized federal courts to draw upon and to continue development of substantive, common law of admiralty when exercising admiralty jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333.

[19] ADMIRALTY ⇔ 1(1)
16k1(1)

Although admiralty courts may adjudicate matters arising on navigable waters anywhere in the world, that recognition of subject matter jurisdiction does not imply that American courts in admiralty have the power to command that any person or any ship appear before a United States court sitting in admiralty; United States has not attempted to extend its sovereignty over persons or things beyond territorial limits of the United States. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333.

[20] SALVAGE ⇔ 1
344k1

General maritime law of nations includes a law of finds and a law of salvage, and courts of admiralty apply one to the exclusion of the other, as appropriate, to resolve claims in property discovered and recovered in navigable waters by those other than the property's owners or those taking through

them.

[21] SHIPPING ⇨ 213

354k213

Under the law of finds, a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner.

[22] SALVAGE ⇨ 1

344k1

Because the law of finds deprives true owner of a property right, courts of admiralty disfavor its application and prefer to apply the law of salvage in its stead.

[22] SHIPPING ⇨ 213

354k213

Because the law of finds deprives true owner of a property right, courts of admiralty disfavor its application and prefer to apply the law of salvage in its stead.

[23] SALVAGE ⇨ 1

344k1

Principles of salvage law are intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts.

[24] SALVAGE ⇨ 15

344k15

When providing salvage service, salvor acts on behalf of owner in saving owner's property even though owner may have made no such request or had no knowledge of the need, as law of salvage presumes that owner desires the salvage service.

[25] SALVAGE ⇨ 18

344k18

If salvor fails in his salvage efforts, he can claim no compensation or reward.

[26] SALVAGE ⇨ 1

344k1

To establish salvage claim for compensation and award, person must demonstrate (1) that he has rendered aid to distressed ship or its

cargo in navigable waters; (2) that service was voluntarily rendered without any preexisting obligation arising from contract or otherwise to distressed ship or property; and (3) that service was useful by effecting salvage of ship or its cargo, in whole or in part.

[27] SALVAGE ⇨ 39

344k39

Upon rendering salvage service, salvor obtains lien in saved property by operation of law to secure payment of compensation and award due from property owner, and this lien attaches to the property to the exclusion of all others, including property's true owner.

[28] SALVAGE ⇨ 40

344k40

To facilitate enforcement of lien that arises by operation of law upon rendering salvage service, salvor enjoys a possessory interest in saved property until salvor is compensated, and, because salvor's lien is exclusive and prior to all others, salvor's possessory interest in the res is enjoyed to the exclusion of all others, including the res' true owner.

[29] SALVAGE ⇨ 39

344k39

By rendering salvage service, salvor acquires limited property interest in the goods saved, consisting of a first lien and exclusive possession, until salvor has been paid or his right against the property has been enforced.

[30] SALVAGE ⇨ 39

344k39

To protect salvor's general salvage rights, court of admiralty will protect inchoate right of salvors in yet-to-be salvaged property for reasonable period.

[31] SALVAGE ⇨ 43

344k43

Although salvor may enforce its claim for salvage service by filing in personam action against owner, salvor may also execute on lien which attached to ship and its cargo by filing in rem action, but the lien can be enforced only through institution of an in rem action, and admiralty court exercises in rem jurisdiction only to enforce maritime lien;

thus, lien and proceeding in rem are correlative, such that where one exists, the other can be taken, and not otherwise.

[32] SALVAGE ⇨ 43
344k43

To execute on salvor's lien, court may order sale of the property, or, if sale would yield an amount insufficient to fund award to salvor, court may transfer title to property to the salvor.

[33] SALVAGE ⇨ 1
344k1

While law of salvage provides substantial protection to salvors to encourage their saving of life and property at sea, it also imposes duties of good faith, honesty, and diligence in protecting the property in salvors' care, and, thus, salvors have to exercise a trust over the property for benefit of the owner and subject to any orders of a court.

[34] SALVAGE ⇨ 21
344k21

Salvors are not entitled to remove property from ship wreck for their own use or to use the property for their own use, and, when violation of this trust occurs, salvage claim is forfeited.

[35] SALVAGE ⇨ 45
344k45

An in rem action, which is the most common process for enforcing a claim for salvage service, depends on the court's having jurisdiction over the res, the property which is named as defendant, and only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world.

[36] ADMIRALTY ⇨ 32.1
16k32.1

To exercise in rem jurisdiction over a ship or its cargo, ship or cargo must be within district in which in rem complaint is filed.

[37] ADMIRALTY ⇨ 6
16k6

While the res must be "in custodia legis," i.e.,

in the court's possession, to exercise in rem jurisdiction over ship or its cargo, this possession may be actual or constructive, with constructive possession connoting something less than physical seizure of a res by a court. See publication Words and Phrases for other judicial constructions and definitions.

[38] ADMIRALTY ⇨ 6
16k6

Propriety of exercising in rem jurisdiction over entire ship wreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the res is not divided and that therefore possession of some of it is constructively possession of all.

[39] FEDERAL COURTS ⇨ 93
170Bk93

When res is not in court's actual or constructive possession, traditional principles of in rem jurisdiction dictate that court may not adjudicate rights to the res and effectively bind others who may have possession.

[40] INTERNATIONAL LAW ⇨ 5
221k5

Sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power.

[41] INTERNATIONAL LAW ⇨ 5
221k5

Where nation has boundaries contiguous to the high seas, international law defines nation's sovereign limits by dividing navigable waters generally into three categories, distinguished by the nature of the control which the contiguous nation can exercise over them.

[42] INTERNATIONAL LAW ⇨ 5
221k5

Navigable waters that lie inland of a nation's borders are within the nation's complete control as with any real property within its borders.

[43] INTERNATIONAL LAW ⇨ 5
221k5

A nation's "territorial waters," defined as

those navigable waters lying up to 12 nautical miles beyond a nation's shoreline, are within the nation's general sovereign sphere. See publication Words and Phrases for other judicial constructions and definitions.

[44] INTERNATIONAL LAW ⇔ 7
221k7

Beyond territorial waters lie the high seas, over which no nation can exercise sovereignty.

[45] INTERNATIONAL LAW ⇔ 7
221k7

Any extension of jurisdiction into the high seas by a nation must be subject to the consent of other nations, although the law of nations sanctions limited extraterritorial exercises of jurisdiction.

[46] FEDERAL COURTS ⇔ 93
170Bk93

Because exercise of in rem jurisdiction depends on court's exercise of exclusive custody and control over the res, the limits of in rem jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty itself.

[47] FEDERAL COURTS ⇔ 93
170Bk93

In rem jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty.

[48] SALVAGE ⇔ 39
344k39

Corporation was first successful salvor of the wrecked vessel R.M.S. Titanic, thus giving corporation an inchoate lien as a matter of law in the wreck as well as the artifacts from the wreck to enforce its claim for compensation and reward, where corporation had conducted several successful research and recovery expeditions despite the fact that salvaging the wreck was extremely time consuming, dangerous, and expensive.

[49] SALVAGE ⇔ 39
344k39

Along with its lien in the wrecked vessel, first successful salvor of wrecked vessel R.M.S.

Titanic obtained right to exclusive possession, not only of the artifacts removed from the wreck, but also of the wreck itself, so that no other person was entitled lawfully to intrude as long as salvage operations were continuing.

[50] SALVAGE ⇔ 43
344k43

Because first successful salvor of wrecked vessel had necessarily acted on behalf of owners of the property even if owners did not or could not know of salvor's efforts, salvor's interest in the property was limited to an exclusive possessory right, not for its own use, but for purpose of bringing the property within jurisdiction of court in admiralty to enforce its maritime lien securing its claim for compensation and reward, but, once the property was brought in custodia legis, court could execute on salvor's lien and sell the property, or if sale of property would prove insufficient to compensate salvor fairly, court could award title in property to salvor.

[51] SALVAGE ⇔ 39
344k39

To extent district court applied shared maritime principles that would be applied similarly in other nations, it acted in accordance with the jus gentium in awarding exclusive salvage rights in wreck of the R.M.S. Titanic to the first successful salvor of the wrecked vessel.

[52] SALVAGE ⇔ 50
344k50

United States district court, sitting as court in admiralty, properly awarded salvage rights in shipwreck outside of United States' territorial waters, including right exclusively to possess the wreck for purposes of enforcing maritime lien that salvor obtained as matter of law, and, thus, district court also acted properly in entering injunction against persons over whom it had jurisdiction, prohibiting them from interfering with salvage efforts being pursued by salvor, since these aspects of district court's declaration and injunction would be recognized by all maritime nations and similarly be enforced by their courts. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333.

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[53] SALVAGE ⇌ 45
344k45

Admiralty court cannot simply assert in rem jurisdiction over wrecks lying in international waters, beyond territorial limits of the court's jurisdiction, and enter orders to enforce that jurisdiction, as any power exercised in international waters through "constructive in rem" jurisdiction could not be exclusive as to the whole world; however, despite this nonexclusive control over the res, the maritime law of nations authorizes an admiralty court to declare salvage rights to the wreck as against the world, although exclusiveness of any such order could legitimately be questioned by any other court in admiralty.

[54] SALVAGE ⇌ 45
344k45

District court had "constructive" in rem jurisdiction over wreck of vessel lying in international waters by having a portion of it within its jurisdiction, and this constructive in rem jurisdiction would continue as long as salvage operation continued; salvor presented court with wine decanter salvaged from vessel and stated that numerous other artifacts were physically within the district.

[55] SALVAGE ⇌ 45
344k45

District court's "constructive" in rem jurisdiction over wreck of vessel lying in international waters, obtained by having a portion of it within its jurisdiction, was "imperfect" or "inchoate" in rem jurisdiction which fell short of giving the court sovereignty over the wreck, but instead represented a "shared sovereignty," shared with other nations enforcing the same jus gentium; through this mechanism, internationally recognized rights could be legally declared but not finally enforced, and final enforcement would require additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation.

[56] ADMIRALTY ⇌ 4
16k4

While no nation has sovereignty through the

assertion of exclusive judicial action over international waters, the law of salvage as shared by the nations as part of the jus gentium applies to the high seas, and these rights may be enforced to the extent generally recognized on a non-exclusive basis.

[56] SALVAGE ⇌ 2
344k2

While no nation has sovereignty through the assertion of exclusive judicial action over international waters, the law of salvage as shared by the nations as part of the jus gentium applies to the high seas, and these rights may be enforced to the extent generally recognized on a non-exclusive basis.

[57] SALVAGE ⇌ 45
344k45

The R.M.S. Titanic Maritime Memorial Act of 1986 did not preclude district court from exercising jurisdiction over wreck of the Titanic with respect to salvor's efforts to enjoin third parties from visiting the wreck and interfering with its salvage operations. R.M.S. Titanic Maritime Memorial Act of 1986, § 2 et seq., 16 U.S.C.A. § 450rr et seq.

[58] SALVAGE ⇌ 45
344k45

The R.M.S. Titanic Maritime Memorial Act of 1986 did not strip the federal courts of jurisdiction over wreck of the Titanic for purposes of recognizing, consistent with the jus gentium, a particular company as the wreck's exclusive salvor. R.M.S. Titanic Maritime Memorial Act of 1986, § 8, 16 U.S.C.A. § 450rr-6.

[59] SALVAGE ⇌ 50
344k50

Power of an American court to enforce orders entered in connection with awarding and enforcing salvage rights in shipwreck outside of United States' territorial waters is effectively limited until persons and property are brought within its territorial jurisdiction.

[60] SALVAGE ⇌ 1
344k1

Law of salvage did not vest in salvor exclusive rights to visit, observe, and photograph wreck

and wreck site of the R.M.S. Titanic at its location in international waters.

[61] SALVAGE ⇌ 1

344k1

Underlying policy of salvage law is to encourage voluntary assistance to ships and their cargo in distress.

[62] SALVAGE ⇌ 1

344k1

Law of salvage does not include notion that salvor can use the property being salvaged for a commercial use to compensate salvor when property saved might have inadequate value.

[63] SALVAGE ⇌ 24

344k24

Traditionally, inducement for salvage service is limited to court's award of compensation and reward, which may be enforced in personam against owner without regard to the property saved, or in rem against the property saved.

[64] SALVAGE ⇌ 50

344k50

Although district court properly enjoined third party from interfering with salvor's ongoing salvage operations on ship wreck lying in international waters, trial court erred in prohibiting anyone from entering within a 10-mile radius of the wreck site to search, survey, or obtain any image of the wreck or wreck site, and prohibiting anyone from entering, for a similar purpose, a rectangular area around the wreck site computed to be 168-square miles, since these prohibitions would alarmingly expand salvage law and interfere with right of free navigation on the high seas.

***950 ARGUED:** Alex Blanton, Dyer, Ellis & Joseph, Washington, D.C., for Appellants. F. Bradford Stillman, McGuire, Woods, Battle & Boothe, L.L.P., Norfolk, Virginia, for Appellee. **ON BRIEF:** Michael Joseph, Joseph O. Click, Dyer, Ellis & Joseph, Washington, D.C., for Appellants. Mark S. Davis, Douglas E. Miller, Lee A. Handford, McGuire, Woods, Battle & Boothe, L.L.P., Norfolk, Virginia, for Appellee. David G. Concannon, Kohn, Swift & Graf, P.C., Philadelphia, Pennsylvania, for Amicus

Curiae Explorers Club. John P. McMahon, McMahon & Connell, P.C., Charlotte, North Carolina, for Amicus Curiae Advisory Council. Richard T. Robol, Columbus-America Discovery Group, Columbus,*951 Ohio, for Amicus Curiae Columbus-America.

Before ERVIN, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge ERVIN and Judge WILKINS joined.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents questions about the authority of a United States court to regulate the salvage rights in the wreck of the luxury liner, R.M.S. Titanic, which lies in international waters.

The Titanic was launched in 1912 as the "largest and finest steamship ever built" and with the claim that she was "unsinkable." On her maiden voyage from Southampton to New York, however, with 2,340 passengers on board, the Titanic collided with an iceberg in the North Atlantic and sank less than three hours later, on April 15, 1912. A nearby ship saved 745 persons and some lifeboats and took them to New York. Another ship recovered several hundred bodies and took them to Halifax, Nova Scotia.

In 1985, the wreck of the Titanic was discovered at the bottom of the North Atlantic in international waters, approximately 400 miles off the coast of Newfoundland in 12,500 feet of water. Salvage efforts began two years later. In 1994, the district court in the Eastern District of Virginia, exercising "constructive in rem jurisdiction" over the wreck and the wreck site of the Titanic, awarded exclusive salvage rights, as well as ownership of recovered artifacts, to R.M.S. Titanic, Inc., ("RMST"), a Florida corporation. Two years later, the court rejected a challenge to the exclusive salvage rights of RMST, see R.M.S.

Titanic, Inc. v. The Wrecked and Abandoned Vessel, ("Titanic I "), 924 F.Supp. 714 (E.D.Va.1996), and shortly thereafter, entered an injunction dated August 13, 1996, protecting the salvage rights of RMST against any person in the world "having notice of this Order," prohibiting any such person from "conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter" the area of the Atlantic Ocean surrounding the Titanic wreck site. On June 23, 1998, the court reaffirmed, "personalized and enforced" the 1996 injunction against new parties. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, ("Titanic II "), 9 F.Supp.2d 624, 626 (E.D.Va.1998). In that order, the court enjoined the appellants, Christopher S. Haver, an Arizona resident, and Deep Ocean Expeditions, ("DOE"), a British Virgin Islands corporation, as well as others from:

(i) interfering with the rights of [RMST], as salvor in possession of the wreck and wreck site of the R.M.S. Titanic, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Id. at 640. The district court declared that the wreck site subject to the injunction was a 168-square-mile rectangular zone in the North Atlantic bounded by the following points:

41o 46' 25" North Latitude, 050o 00' 44" West Longitude, then east to 41o 46' 25" North Latitude, 049o 42' West Longitude, then south to 41o 34' 25" North Latitude, 049o 42' West Longitude, then west to 41o 34' 25" North Latitude, 050o 00' 44" West Longitude, then returning north to the start.

Id. DOE had planned an expedition to view and to photograph the Titanic for the late summer of 1998, and Haver had planned to be a passenger.

*952 DOE, never a party to the proceedings in the district court, and Haver, who filed a

declaratory judgment action in the district court to challenge the court's jurisdiction over the wreck and over him, appealed to this court to challenge the June 1998 injunction. They claim (1) that the district court lacked jurisdiction over the wreck and wreck site, (2) that the court lacked personal jurisdiction over them, and (3) that the scope of the injunction is too broad. As they summarize their position,

No theory of "constructive in rem jurisdiction" permits a court to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that has never been within the court's territory. Nor does any such theory authorize an injunction prohibiting persons from viewing and photographing a wreck when the salvor is not actively conducting salvage operations.

For the reasons that follow, we affirm in part and reverse in part the injunctions and remand the case to the district court with instructions to modify them in accordance with this opinion.

I

A procedural history, while somewhat involved, is nonetheless necessary for an understanding of the jurisdictional discussions that follow.

In 1985, a joint American-French expedition discovered the wreck of the Titanic. Two years later, in the summer of 1987, Titanic Ventures, a Connecticut limited partnership, in conjunction with the Institute of France for the Research and Exploration of the Sea, the French government's oceanographic institution, voluntarily undertook efforts to salvage the wreck. Titanic Ventures conducted 32 dives over 60 days, recovering approximately 1,800 artifacts. It thereafter sold both its interest in the salvage operation and the artifacts it recovered to RMST. RMST recovered another 800 artifacts during a second expedition to the Titanic's wreck site in 1993.

In August 1993, RMST filed this action in the

Eastern District of Virginia, requesting, among other things, that the district court exercise in rem jurisdiction over the Titanic to award it exclusive salvage rights. In support of its request, RMST presented the court with a wine decanter salvaged from the Titanic and stated that numerous other artifacts were physically within the Eastern District of Virginia. The court issued a warrant directing the United States Marshal to arrest the wreck and all artifacts already salvaged and yet to be salvaged from the wreck and, at the same time, ordered that RMST be substituted for the Marshal as custodian of the wreck, the wreck site, and the artifacts. Formal notice of the court's order appeared in three newspapers, *The Virginian-Pilot*, *The Wall Street Journal*, and *The Journal of Commerce*.

Only one party, Liverpool and London Steamship Protection and Indemnity Association ("Liverpool & London"), filed a claim asserting an interest in the wreck. After RMST and Liverpool & London entered into a settlement agreement, the district court dismissed Liverpool & London's claim on June 7, 1994. On the same day, the court entered a separate order granting RMST not only exclusive salvage rights over the wreck and the wreck site of the Titanic, but also "true, sole and exclusive owner[ship] of any items salvaged from the wreck."

In 1996, a competing salvor, John A. Joslyn, filed a motion in the action under Federal Rule of Civil Procedure 60(b), challenging RMST's status as exclusive salvor of the Titanic and requesting that the court rescind its June 1994 order. Joslyn claimed not only that RMST had failed diligently to salvage the Titanic, but also that RMST lacked the financial capacity to undertake future salvage operations. Following a hearing, the district court denied Joslyn's motion, finding that RMST had successfully undertaken a number of *953 salvage operations and that its favorable prospects for ongoing and future salvage demonstrated that RMST deserved to remain the exclusive salvor-in-possession. See *Titanic I*, 924 F.Supp. at 722-24.

When Joslyn, nonetheless, expressed an

intention to visit the wrecksite for the sole purpose of taking photographs, the district court issued a temporary restraining order to prevent him from doing so. The court reasoned that "the need for R.M.S. Titanic, Inc. to have jurisdiction over the wreck site" brought with it a power to determine "who could enter the site for any purpose and who could photograph the ship and the locale." The district court converted the temporary restraining order to a preliminary injunction, dated August 13, 1996, enjoining Joslyn as well as "[a]ny other person having notice of this Order, actual or otherwise," from:

conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter, anything on or below the surface of the Atlantic Ocean, otherwise interfering with operations conducted by plaintiff, or entering the wreck site for any purpose not approved by R.M.S. Titanic, Inc., within a ten (10) mile radius of the following coordinates:

Longitude: 41 degrees 43 minutes North

Latitude: 49 degrees 56 minutes West

until further order of Court.

In entering the injunction, the court reasoned that "allowing another 'salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves."

In the spring of 1998, Deep Ocean Expeditions ("DOE"), a British Virgin Islands corporation headquartered on the Isle of Man, Great Britain, began marketing an expedition dubbed "Operation Titanic," planned for August 1998, that would allow members of the public to visit the wreck of the Titanic. The expedition was to be conducted with the assistance of the P.P. Shirshov Institute of Oceanology of the Russian Academy of Sciences in Moscow, using its research ship, the R/V Akademik Keldysh, and one of its two deep-sea submersibles, Mir 1 or Mir 2. The Russian submersibles had conducted numerous earlier dives to the Titanic. DOE announced the cost of participating at \$32,500 per person. One of the subscribers was Christopher S. Haver, an Arizona resident.

When RMST learned that DOE's "Operation Titanic" would result in persons' viewing and photographing the Titanic wreck, RMST filed another motion for a preliminary injunction in this action to prevent DOE, among others, from visiting and photographing the wrecksite. At the same time, Haver filed a separate action against RMST seeking a declaratory judgment that he had a right to enter the wrecksite to observe, video, and photograph the Titanic. RMST filed a counterclaim in Haver's action, requesting a preliminary injunction to prohibit him from visiting the site. The district court consolidated Haver's action with the ongoing in rem action and conducted a hearing in the consolidated action on May 27, 1998. While Haver thus appeared by filing his own action to challenge the district court's jurisdiction over the wreck and the wreck site of the Titanic, as well as the court's personal jurisdiction over him, DOE did not appear, having not been served with any process.

Following the hearing, the district court disposed of all the issues before it in an order dated June 23, 1998. On the challenge to its exercise of in rem jurisdiction over the Titanic, the district court observed that while "[i]t is undisputed that the wreck lies in international waters ... and no state may exercise sovereignty over any part of the high seas, ... these rules must be harmonized with the internationally recognized rules of salvage." *Titanic II*, 9 F.Supp.2d at 634. Observing that "internationally recognized principles governing *954 salvage on the high seas encourage the exercise of in rem jurisdiction over a wrecksite to facilitate the salvage operation itself," the court affirmed its exercise of "constructive in rem jurisdiction over the R.M.S. Titanic wreck site to facilitate RMST's salvage operations ... under international law." *Id.* In reaching this conclusion, the court explained:

It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided. The whole world is placed on notice of the action in this Court by the publication of notice of the in rem arrest. Moreover, the recognized international rights at stake are

minimally infringed upon. Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.
Id. at 634-35.

The district court also rejected Haver's claims that the court did not have personal jurisdiction over him and that a new complaint for a preliminary injunction needed to be filed and served on him. The court noted that Haver consented to the court's jurisdiction by filing a declaratory judgment action raising the same issues affirmatively asserted by RMST. See *id.* at 635.

The district court then addressed the merits of the question of whether RMST, as salvor-in-possession, had the right to exclude others from visiting the wreck site to photograph the wreck. In justifying the entry of the injunction, the court relied upon general safety concerns caused by the depth and darkness of the North Atlantic waters around the wreck site, the need to protect RMST's substantial investment to date in salvaging the Titanic, and the public's interest in preventing unorganized, piecemeal salvaging of the Titanic, a shipwreck of great historical significance. See *id.* at 635-36. The court also observed that those enjoined by its order from personally viewing the Titanic could enjoy future television broadcasts of RMST's salvage efforts. See *id.* at 638. Accordingly, the court enjoined not only DOE and Haver, but also "anyone else having notice" from obtaining any image, video or photograph of the wreck or the wreck site and from "entering or causing anyone or anything to enter the wreck or the wreck site with the intention of performing any of the foregoing enjoined acts." *Id.* at 640. The court defined the wreck site as encompassing a 168 square mile area of the North Atlantic surrounding the wreck of the Titanic. See *id.* The injunction, by its terms, was to remain in effect "[u]ntil further order of this Court." *Id.*

From the district court's June 23, 1998 order, Haver filed this appeal. While DOE was not made a party to the litigation below, it too appealed because the injunction entered by

the district court was specifically directed against it.

II

[1] We resolve first the threshold question of whether DOE, who was not a party to the proceeding in the district court, may appeal the June 23, 1998 order enjoining it from visiting and photographing the Titanic. RMST contends that because DOE was a "non-party" in the action below, its appeal should be dismissed because "[n]on-parties have no right to appeal."

In the district court, RMST requested a preliminary injunction against DOE, arguing that DOE was subject to the jurisdiction of the court. It maintained that DOE had personal notice of the motion because RMST had made telephone calls to DOE's principal at his home in Germany informing him of the motion and because RMST served a copy of the motion on DOE's counsel in Washington, D.C. Despite this notice, DOE elected not to appear at the hearing. Because of DOE's failure to appear in the district court, RMST argues that DOE now has no right to appeal.

Consistent with its position that the district court lacked personal jurisdiction *955 over it, DOE maintains that it did not appear because it was never served with process and, in any event, would not be subject to service of process. It notes, however, that because the court nevertheless granted RMST's motion and issued the June 23, 1998 preliminary injunction specifically "against Christopher Haver, Deep Ocean Operators [DOE]," and other related companies and persons, including DOE's principal, it is entitled to challenge the ruling.

This sequence of events reveals an inconsistency in RMST's position. RMST maintained that the district court had the power to enjoin DOE, and yet, after it successfully persuaded the court to do just that, it takes the position that DOE may not challenge entry of the injunction because DOE elected not to appear before the district court. We believe that this position is untenable.

Due process dictates and principles of fairness counsel that DOE be given an opportunity to challenge the district court's assertion of jurisdiction over it, particularly when the court specifically entered an injunction against DOE. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-12, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). In *Hazeltine*, the Supreme Court permitted Hazeltine, the non-party parent company of the named counter-defendant, to challenge a money judgment and an injunction entered against it by the district court even though it was not a party to the district court's proceedings. The Supreme Court had little difficulty concluding that although Hazeltine's subsidiary had entered a pretrial stipulation in the district court that Hazeltine and its subsidiary were to be considered as one entity for purposes of the litigation, "this fact cannot [now] foreclose Hazeltine, which has never had its day in court" from being heard on that issue. *Id.* at 111, 89 S.Ct. 1562. Likewise, we conclude that DOE should not be foreclosed from being heard on its jurisdictional challenge and that therefore it properly invoked 28 U.S.C. § 1292(a) to appeal the district court's jurisdiction to enter a preliminary injunction against it.

III

[2] Also as a threshold question, we must determine whether a live case or controversy within the meaning of Article III of the Constitution remains, given the parties' representation to us at oral argument that Operation Titanic, the expedition prompting the district court's June 1998 order, took place in the fall of 1998. Accordingly, we must determine whether any decision by us today will make a difference to the parties by affording meaningful relief. See *Church of Scientology of California v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it' " (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895))).

The conflict between DOE's intention to continue its business as advertised and the scope of the district court's injunction protecting RMST indicates that a live controversy between the parties remains. Both in its brief and at oral argument, DOE expressed its intention to continue to undertake expeditions to the Titanic in the near future, and we have no reason to doubt its capacity to do so. Because the district court's injunction continues to preclude DOE from making any trips "[u]ntil further order from this Court," *Titanic II*, 9 F.Supp.2d at 640, a live controversy exists.

IV

Beyond these threshold questions of justiciability, both DOE and Haver challenge the district court's personal jurisdiction over them.

The district court justified its jurisdiction to enter an injunction against DOE *956 because it had, what it called, "constructive in rem jurisdiction over the wreck itself based on the presence within the judicial district of physical items salvaged from the wreck." *Titanic II*, 9 F.Supp.2d at 632. Believing that United States district courts have jurisdiction to adjudicate salvage claims for wrecks in international waters, the district court concluded that the proper administration of a salvage claim required it to take in rem jurisdiction over the Titanic wreck in international waters and, with that jurisdiction, to "protect the salvor in possession when it is impossible to bring the entire wreck into the judicial district at a single point in time." *Id.* at 633. "Since the salvor is still performing salvage operations," the court reasoned, "the in rem case is still pending, and an injunction may properly issue pursuant to the Federal Rules of Civil Procedure." *Id.* at 635. The court thus concluded that its "constructive in rem jurisdiction" authorized it to enjoin DOE and others against interfering with the salvor's ongoing operations and that this authority extended against the "whole world." *Id.* at 634. The court explained:

If notice is provided in a newspaper of

general circulation, the whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision.

Id. (omitting internal quotation marks and citations). The court added that accordingly, "[a]ny current claim of ignorance to the in rem salvage action is necessarily foreclosed." *Id.*

In addition to the grounds advanced by the district court, RMST argues on appeal that not only does the district court have "the ability to enter orders against the whole world ... based on its quasi in rem jurisdiction [FN1] over the wreck and wreck site," it also has the authority to exercise jurisdiction over "anyone who aids and abets Haver ... in violating its orders." RMST contends that by agreeing to take Haver to the site, DOE was aiding Haver in violating the district court's injunction. Therefore, in RMST's view, because the district court had jurisdiction over Haver, it also had jurisdiction over DOE.

FN1. RMST's invocation of "quasi in rem" jurisdiction appears to be misplaced. Quasi in rem jurisdiction is invoked as an interim step to obtain in personam jurisdiction. See *Shaffer v. Heitner*, 433 U.S. 186, 196, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). To be sure, in *Shaffer*, the Court stated that in a quasi in rem action, the "only role played by the property is to provide a basis for bringing the defendant into court." *Id.* at 209, 97 S.Ct. 2569. Articulating the role of quasi in rem jurisdiction, the Federal Rules of Civil Procedure state that when a complaint names a defendant who cannot be found within the district, property of the defendant within the district may be seized either to compel the defendant's appearance or to give effect to the relief requested in the complaint. See Fed.R.Civ.P. Supp. R. E(4). This case has little to do with quasi in rem jurisdiction because the wreck of the Titanic lies outside the district court's territorial jurisdiction. The proper inquiry here is whether a court in admiralty can award salvage rights in a shipwreck outside of United States' territorial waters.

DOE maintains that the district court cannot enter an injunction against it without having personal jurisdiction over it and that in this case the court never obtained personal jurisdiction over it because: (1) a complaint

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against it was never filed as required by Federal Rule of Civil Procedure 3; (2) it was never served with a complaint and a summons or other process; and (3) such service, if made, would be ineffective because there is no authority for "worldwide service of process in admiralty cases ... even if there were a constitutionally sufficient relationship between [DOE] and the forum."

Haver also challenges the district court's personal jurisdiction over him, arguing that he was never made a party to the in rem action initiated by RMST and that his separate declaratory judgment action was improperly consolidated with the in rem action to make him a party.

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[3][4][5][6] To resolve this jurisdictional dispute, we must first emphasize the distinction between in personam jurisdiction and in rem jurisdiction. While actions based on both types of jurisdiction are grounded on the principle that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," *Pennoyer v. Neff*, 95 U.S. 714, 722, 24 L.Ed. 565 (1877), "[a]ctions in rem are prosecuted to enforce a right to things," whereas "actions in personam are those in which an individual is charged personally." *The Sabine*, 101 U.S. 384, 388, 25 L.Ed. 982 (1879) (emphasis added). Because in rem actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against that property. See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427, 18 L.Ed. 397 (1866) (describing in rem jurisdiction and stating that "[i]t is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world"); see also *Darlak v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20 (4th Cir.1995). Consequently, judgments in in rem actions affect only the property before the court and possess and carry no in personam significance, other than to foreclose any person from later seeking rights in the property subject to the in rem action. See

Pennoyer, 95 U.S. at 724. The court's authority to exercise in rem jurisdiction does not carry with it a concomitant, derivative power to enter ancillary in personam orders. See *The Sabine*, 101 U.S. at 388.

[7][8][9] In personam actions, on the other hand, adjudicate the rights and obligations of individual persons or entities. It is well established that due process precludes courts from adjudicating in personam the rights or obligations of persons in the absence of personal jurisdiction. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. Ltd.*, 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415(1987); *Zenith Corp.*, 395 U.S. at 110, 89 S.Ct. 1562; *Koehler v. Dodwell*, 152 F.3d 304, 306-07 (4th Cir.1998). To obtain personal jurisdiction over a defendant, a court must have (1) proof of "notice to the defendant," (2) "a constitutionally sufficient relationship between the defendant and the forum," and (3) "authorization for service of a summons on the defendant." *Omni Capital*, 484 U.S. at 104, 108 S.Ct. 404; *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir.1997).

[10] Injunctive relief, by its very nature, can only be granted in an in personam action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining in personam jurisdiction over that person or someone in legal privity with that person. See Fed. R. Civ. P. 65(d).

[11][12] By contrast, injunctive relief ordered in an in rem action would be meaningless because things or property cannot be enjoined to do anything. Likewise, personal jurisdiction need not be exercised in a pure in rem proceeding because, in the simplest of terms, a piece of property and not a person serves as the defendant. See *The Moses Taylor*, 71 U.S. at 431 ("The distinguishing and characteristic feature of ... [an in rem] suit is that the vessel or thing proceeded against is itself seized andimpleaded as the defendant, and is judged and sentenced accordingly"). In rem actions only require that a party seeking an interest in a res bring the res into the custody of the court

and provide reasonable, public notice of its intention to enable others to appear in the action to claim an interest in the res. See *Roller v. Holly*, 176 U.S. 398, 403-06, 20 S.Ct. 410, 44 L.Ed. 520 (1900); see also Fed.R.Civ.P. Supp. R. C(4) (requiring public notice as part of an in rem admiralty proceeding).

Thus, when DOE and Haver argue that the district court lacked personal jurisdiction over them, they do not, of necessity, *958 challenge RMST's status as exclusive salvor, and their personal jurisdiction challenge has no implication for the validity of the in rem proceedings or the order entered in 1994 awarding RMST its status as exclusive salvor of the wreck Titanic. DOE's challenge aims solely at the district court's authority to enter an in personam order against it absent personal jurisdiction over it.

B

[13] Turning now to consider these requirements in the present context, it becomes readily apparent that the district court did not obtain in personam jurisdiction over DOE. While the district court had subject matter jurisdiction over this admiralty action, see 28 U.S.C. § 1333, this did not give it authority to issue process for extraterritorial service on DOE. Moreover, it is undisputed that RMST did not actually file a complaint against DOE, nor did it purport to serve DOE with any process. RMST's process consisted merely of filing a motion for preliminary injunction against DOE in the pending in rem action, to which DOE had never been made a party, and giving DOE informal notice of the motion's pendency.

DOE is a British Virgin Islands corporation with its principal place of business on the Isle of Man in Great Britain. Its principal resides in Germany where he concededly received notice by telephone of RMST's motion for preliminary injunction. DOE's counsel in Washington, D.C. also received a copy of the motion. In addition, constructive notice of the underlying in rem proceeding had been provided in 1993 through publication in *The Virginian-Pilot*, *The Wall Street Journal*, and

The Journal of Commerce. Thus, there can be no dispute that DOE had actual notice of RMST's motion for an injunction. But this does not alone meet the formal requirements for obtaining personal jurisdiction over DOE.

Because DOE did not appear in the district court either in 1994 to claim an interest in the wreck of the Titanic or in 1998 to challenge RMST's motion for a preliminary injunction, it did not voluntarily subject itself to the court's jurisdiction. Further, there is no evidence in the record at this point to suggest that DOE conducts any business in the United States. Its operations are conducted in Great Britain, and the expeditions it would be conducting to the Titanic would take place in international waters. It does, however, market its expedition in the United States through United States corporations. Indeed, it appears that through those marketing efforts, Haver learned of the expedition and subscribed to participate in it.

[14] Whether DOE's contacts with the United States would justify service of process pursuant to Federal Rule of Civil Procedure 4(k) to obtain personal jurisdiction cannot be determined on this record. But it is clear that process against DOE never issued, nor was service of process ever attempted. As we have noted, while a district court having jurisdiction over a res is entitled to adjudicate salvage rights with respect to the res, when enforcing orders to give effect to those rights against a third party who, through conduct, challenges them, the court must obtain in personam jurisdiction over the third party through the service of process. Because such process was neither issued nor served on DOE in this case, the injunction against DOE must be vacated for lack of personal jurisdiction.

[15] We also note that DOE's agreement to take Haver on an expedition to the Titanic does not place DOE in privity with Haver to entitle RMST to rely on jurisdiction over Haver to reach DOE. See Fed. R. Civ. P. 65(d). There is no evidence from which to infer that DOE conspired with or encouraged Haver to violate the district court's injunction, nor is there evidence that Haver actually

violated its injunction.

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[16] As for Haver, we find his challenges to the district court's personal jurisdiction over him without merit. It is true that process did not issue from the in rem action to make Haver a party to that action. But that would not be otherwise, because the in rem action only addressed rights to the res of the Titanic wreck. And in challenging the district court's personal jurisdiction over him, Haver has asserted no right to the res.

Significantly, however, Haver commenced his own in personam action against RMST, seeking a declaratory judgment that, notwithstanding the August 1996 injunction entered in the in rem action, he was entitled "to enter the site of, and to observe, photograph, and videotape, the wrecked vessel R.M.S. Titanic." RMST filed a counterclaim against Haver in the declaratory judgment action seeking an injunction against him in that action just as it was seeking in the in rem action. Thus, Haver was a party to an action in which injunctive relief against him was sought.

The district court consolidated Haver's declaratory judgment action with the pending in rem action by order dated May 12, 1998. In its consolidation order, the district court stated that the in personam action "will no longer exist as a separate case." This consolidation was well within the district court's discretion. See Fed.R.Civ.P. 42(a) (authorizing consolidation of "actions involving a common question of law or fact"); see also Fed.R.Civ.P. 9(h) (authorizing unified actions but preserving, within actions, the nature of maritime claims).

By filing an in personam action in the district court seeking a declaratory judgment, Haver consented to the district court's personal jurisdiction over him, and RMST's counterclaim was part of that action. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (stating that an individual submits to a court's

jurisdiction by appearance). When the district court granted RMST's motions for injunctive relief, which were filed both in the in rem action and in Haver's action and later consolidated, Haver was a party. By consolidating the cases, the court surely did not relinquish its jurisdiction over Haver.

In short, Haver was properly before the district court as a party, and the district court had in personam jurisdiction to enter a preliminary injunction against him.

V

Because the district court had personal jurisdiction over Haver, we must address his claim that the district court could not have exercised jurisdiction over the wreck and the wreck site of the Titanic because the wreck lay in international waters. Haver maintains that while the presentation of a wine decanter and other artifacts from the wreck to the district court in the Eastern District of Virginia might have enabled the district court to exercise in rem jurisdiction over those artifacts, there exists no principle that authorized the district court to exercise in rem jurisdiction over the wreck itself which is beyond the territorial waters of the United States. Without in rem jurisdiction, Haver argues, the district court had no power to adjudicate salvage rights and therefore had no power to enter an injunction giving effect to salvage rights.

Any analysis regarding the authority of a United States court to adjudicate salvage rights in shipwrecks in international waters requires inquiry first into several fundamental principles of admiralty: (1) the nature and scope of admiralty jurisdiction, (2) the applicability of salvage law as part of the common law of maritime nations, i.e., the *jus gentium*, and (3) the reach of an admiralty court's in rem jurisdiction. Only after we have explicated these principles can we address the existence and scope of authority of a United States court over the Titanic.

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[17] Article III of the Constitution extends the judicial power of federal courts to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. And Congress implemented Article III by conferring on district courts exclusive, original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction" and "[a]ny prize brought into the United States and all proceedings for the condemnation of property taken as prize." 28 U.S.C. § 1333. Maritime law was placed under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 68 L.Ed. 748 (1924).

The body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution. It was the well-known and well-developed "venerable law of the sea" which arose from the custom among "seafaring men," see *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 191, 90 S.Ct. 850, 25 L.Ed.2d 207 (1970), and which enjoyed "international comity," see *The Belgenland*, 114 U.S. 355, 363, 5 S.Ct. 860, 29 L.Ed. 152 (1885). Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles. And they all constitute a part of the continuing maritime tradition of the law of nations-- the *jus gentium*.

[18] The framers drafted Article III with this full body of maritime law clearly in view. This is not to say that the Constitution recognized an overarching maritime law that was to bind United States courts. On the contrary, the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the

development of the substantive, common law of admiralty when exercising admiralty jurisdiction. See *The Lottawanna*, 21 Wall. 558, 88 U.S. 558, 572-78, 22 L.Ed. 654 (1874); see also 1 *Benedict on Admiralty* § 105, at 7-11 (7th ed.1998). As Chief Justice Marshall observed:

A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.

The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544-45, 7 L.Ed. 242 (1828).

Since the Founding, federal courts sitting in admiralty jurisdiction have steadfastly continued to acquiesce in this *jus gentium* governing maritime affairs. Indeed, the Supreme Court has time and again admonished that "courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality." *Lauritzen v. Larsen*, 345 U.S. 571, 581, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); see also *United States v. W.M. Webb, Inc.*, 397 U.S. at 191, 90 S.Ct. 850 (1970) (observing that the "[m]aritime law ... provides an established network of rules and distinctions that are practically suited to the necessities of the sea"). This body of maritime law "has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." *Larsen*, 345 U.S. at 581-82, 73 S.Ct. 921. Thus, when we say today that a case in admiralty is governed by the general maritime law, we speak through our own national *961 sovereignty and thereby recognize and acquiesce in the time-honored principles of the common law of the seas. See *Ex Parte Western Maid*, 257 U.S. 419, 432, 42 S.Ct. 159, 66 L.Ed. 299 (1922).

The exercise of admiralty subject matter jurisdiction has never been limited to

maritime causes arising solely in the United States territorial waters. On the contrary, maritime causes arising from matters on the high seas anywhere in the world have traditionally been brought to courts of admiralty, subject only to a discretionary exercise of the doctrine of *forum non conveniens*. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218- 19, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); see also *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 2 L.Ed. 266 (1804); *The Belgenland*, 114 U.S. at 362- 63, 5 S.Ct. 860 (in rem admiralty jurisdiction proper in action arising out of collision on the high seas between two foreign vessels); *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir.1981) ("Since the admiralty jurisdiction of United States courts is not limited by the nationality of ships, sailors or seas involved and since the principles of the law of salvage are part of the *jus gentium*, i.e., the international maritime law, United States courts have long adjudicated salvage claims involving foreign vessels, alien salvors and salvage operations occurring on the high seas"); *Grant Gilmore & Charles Black, Jr., The Law of Admiralty* § 1-19, at 51-52 (2d ed.1975) (stating that "[t]he courts of the United States take jurisdiction, subject to some reservations imposed by their own application of the doctrine of *forum non conveniens*, of suits on maritime claims arising out of transactions and occurrences anywhere in the world" (footnotes omitted)).

[19] Even though admiralty courts may adjudicate matters arising on navigable waters anywhere in the world, that recognition of subject matter jurisdiction does not imply that American courts in admiralty have the power to command that any person or any ship appear before a United States court sitting in admiralty. Stated differently, Article III of the Constitution and 28 U.S.C. § 1333 do not amount to an attempt by the United States to extend its sovereignty over persons (in personam) or things (in rem) beyond the territorial limits of the United States. While we note this important distinction between a broad subject matter jurisdiction and the limitation imposed by

territorial jurisdiction, we discuss the territorial limitation in more detail, below.

B

[20][21] The general maritime law of nations includes a law of finds and a law of salvage, and courts of admiralty apply one to the exclusion of the other, as appropriate, to resolve claims in property discovered and recovered in navigable waters by those other than the property's owners or those taking through them. See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-60 (4th Cir.1992). Under the law of finds, a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner. See *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987); *Hener v. United States*, 525 F.Supp. 350, 354-57 (S.D.N.Y.1981) (cited and quoted with approval in *Columbus-America Discovery*, 974 F.2d at 460).

[22] Because the law of finds deprives the true owner of a property right, the courts of admiralty disfavor its application and prefer to apply the law of salvage in its stead. They have reasoned that the law of salvage better serves the needs of maritime commerce by encouraging the saving of property for the benefit of its owner rather than the secretive discovery of property in an effort to deprive the owner of title. See *Columbus-America *962 Discovery*, 974 F.2d at 464; *Hener*, 525 F.Supp. at 354 ("salvage law assumes that the property being salvaged is owned by another, and thus that it has not been abandoned"). Accordingly, the law of finds is most often applied in the context of long-lost shipwrecks. See, e.g., *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir.1978) (applying the law of finds to the recovery of a Spanish vessel which sunk near the Florida Keys in 1622, stating that "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were

still in existence stretches the fiction to absurd lengths"); see also 3A Benedict on Admiralty § 158, at 11-17 (7th ed. Supp.1991) (recommending "limit [ing] the doctrine of 'find' relative to marine disasters to long-lost wrecks ... or where the owners of maritime properties have publicly abandoned them" (footnote omitted)). Neither the parties nor the district court has urged the application of the law of finds in this case, leaving for application the law of salvage.

[23] The principles of salvage law are intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts. See *The Akaba*, 54 F. 197, 200 (4th Cir.1893). Absent the promise of compensation and reward, we question whether a party, even one with the capacity to save the Titanic itself, would incur the costs to do so. See *M/V JA Orgeron*, 143 F.3d at 986 n. 12 (observing that "if the costs of performing a salvage are too high or the benefits to be derived are too low, the parties might well agree to call it a day and let the sea claim its prize"); see also William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Leg. Stud. 83, 100 (1978) (arguing that the law of salvage exists to "encourage rescues in settings of high transaction costs by simulating the conditions and outcomes of a competitive market").

The policies of salvage law have existed as an important part of the general maritime law of nations as long as there has been navigation. See *M/V JA Orgeron*, 143 F.3d at 985 ("This simple rule has been an integral part of maritime commerce in the western world since the western world was civilized"). Indeed, the 3,000-year old Rhodian Code provided:

Article XLV. "If a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves."

Reprinted in 3A Benedict on Admiralty § 5, at 1-8. And as to salvage from shipwrecks, the Rhodian Code provided:

Article XLVII. "If gold, or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it up shall have one-third, and if fifteen cubits, he shall have one-half, because of the depth."

Id. The Code also provided that those illegally pillaging a wreck would be required to restore fourfold. See *id.* The same principles of salvage were included in the Law of Oleron, codified about 2,000 years after the Rhodian Law and adopted in England in the 12th century. See *id.* § 8, at 1-11. And they continue to apply as part of the *jus gentium* today. See, e.g., International Convention on Salvage, April 29, 1989, preamble (providing that international salvage law should "ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger"); see also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1326 art. 303 (providing that the Convention respects "the rights of identifiable owners, the law of salvage or other rules of admiralty"). [FN2]

FN2. Although the United States signed the United Nations Convention in 1994, the Senate has not yet provided the necessary advice and consent for ratification.

*963 [24][25] When providing salvage service, a salvor acts on behalf of the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need. The law of salvage presumes that the owner desires the salvage service. And it is the assurance of compensation and reward that provides the "inducement to seamen and others to embark in such undertakings to save life and property." *The Blackwall*, 10 Wall. 1, 77 U.S. 1, 14, 19 L.Ed. 870 (1869) (citation omitted). As the Court in *Blackwall* explained, "Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation." *Id.* (footnote omitted). If the salvor fails in his salvage efforts, however, he

can claim no compensation or reward.

[26] To establish a salvage claim for compensation and award, a person must demonstrate (1) that he has rendered aid to a distressed ship or its cargo in navigable waters; (2) that the service was voluntarily rendered without any preexisting obligation arising from contract or otherwise to the distressed ship or property; and (3) that the service was useful by effecting salvage of the ship or its cargo, in whole or in part. See *The Sabine*, 101 U.S. 384, 384, 25 L.Ed. 982 (1879); *Brown v. Johansen*, 881 F.2d 107, 109 (4th Cir.1989).

[27][28] Upon rendering salvage service, a salvor obtains a lien in the saved property by operation of law to secure payment of compensation and award due from the property owner. See *The Sabine*, 101 U.S. at 386; see also *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904, 909 (4th Cir.1981). This lien attaches to the property to the exclusion of all others, including the property's true owner. And to facilitate enforcement of the lien, the salvor enjoys a possessory interest in the property until the salvor is compensated. See *S/S Alexandros T.*, 664 F.2d at 908-09. Because the salvor's lien is exclusive and prior to all others, so too, the salvor's possessory interest in the res is enjoyed to the exclusion of all others, including the res' true owner.

[29][30] By rendering salvage service, the salvor thus acquires a limited property interest in the goods saved--a first lien and exclusive possession--until the salvor has been paid or his right against the property has been enforced. See *The Emblem*, 8 F.Cas. 611, 614 (D.Me.1840); 3A *Benedict on Admiralty* § 143, at 10-8 (quoting *The Emblem*). While this interest attaches only to saved property, to protect a salvor's general salvage rights, a court of admiralty will protect the inchoate right of salvors in yet-to-be salvaged property for a reasonable period. See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 546 F.Supp. 919, 929 (S.D.Fla.1981).

[31][32] Although a salvor may enforce its

claim for salvage service by filing an in personam action against the owner, the salvor may also execute on the lien which attached to the ship and its cargo by filing an in rem action. The lien can be enforced only through the institution of an in rem action, and the admiralty court exercises in rem jurisdiction only to enforce a maritime lien. Thus, "[t]he lien and the proceeding in rem are ... correlative--where one exists, the other can be taken, and not otherwise." *S/S Alexandros*, 664 F.2d at 909 (internal quotation marks omitted); see also *Fed.R.Civ.P. Supp. R. C(1)*. To execute on the lien, the court may order the sale of the property, or, if a sale would yield an amount insufficient to fund an award to the salvor, the court may transfer title to the property to the salvor.

[33][34] While the law of salvage provides substantial protection to salvors to encourage their saving of life and property *964 at sea, it also imposes duties of good faith, honesty, and diligence in protecting the property in salvors' care. Thus, salvors have to exercise a trust over the property for the benefit of the owner and subject to any orders of a court. See *Cromwell v. The Bark Island City*, 66 U.S. (1 Black) 121, 17 L.Ed. 70 (1861). In this vein, salvors are not entitled to remove property from the wreck for their own use or to use the property for their own use. When a violation of this trust occurs, the salvage claim is forfeited. See *Danner v. United States*, 99 F.Supp. 880 (S.D.N.Y.1951). Indeed, it has been held that even when salvors have mistakenly misunderstood their rights and have taken property for their own use, they forfeited their right to a salvage award. See, e.g., *id.*; see also *The Mabel*, 61 F.2d 537, 540 (9th Cir.1932).

C

[35][36] An in rem action, which is the most common process for enforcing a claim for salvage service, depends on the court's having jurisdiction over the res, the property which is named as defendant. See *Pennoyer*, 95 U.S. at 724. Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able

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to adjudicate rights in it that are binding against the world. See *Darлак v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20, 22-23 (4th Cir.1995). Accordingly, to exercise in rem jurisdiction over a ship or its cargo, the ship or cargo must be within the district in which the in rem complaint is filed. See *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 3 L.Ed. 734 (1815); see also *Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.1983); see also Fed. R. Civ. P. Supp. R. E(3) (providing that process in rem may only be served within the district).

[37][38] While the res must be in custodia legis (in the court's possession), this possession may be actual or constructive. See *The Brig Ann*, 13 U.S. at 291. Constructive possession connotes something less than physical seizure of a res by a court. Just last term, for instance, the Supreme Court implicitly recognized the propriety of a district court's exercise of in rem admiralty jurisdiction over a shipwreck in California's territorial waters after a salvor presented "china, a full bottle of champagne, and a brass spike from the ship's hull" to the district court. See *California v. Deep Sea Research*, 523 U.S. 491, 118 S.Ct. 1464, 1467, 149 L.Ed.2d 626 (1998). The propriety of exercising in rem jurisdiction over an entire ship wreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the res is not divided and that therefore possession of some of it is constructively possession of all. See *id.* at 1473.

[39] But when the res is not in the court's actual or constructive possession, traditional principles of in rem jurisdiction dictate that the court may not adjudicate rights to the res and effectively bind others who may have possession. See *Pennyroyer*, 95 U.S. at 724; see also Fed. R. Civ. P. Supp. R. E(3). Consequently, a court could not exercise in rem jurisdiction, as traditionally understood, so as to vest rights in property outside of its territory, such as in a shipwreck lying in international waters. This conclusion is compelled by a recognition of the sovereign limits of the United States and the open

nature of the high seas.

[40][41] The sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power. Where a nation has boundaries contiguous to the high seas, international law defines the nation's sovereign limits by dividing navigable waters generally into three categories "distinguished by the nature of the control which the contiguous nation can exercise over them." *United States v. Louisiana*, 394 U.S. 11, 22, 89 S.Ct. 773, 22 L.Ed.2d 44 (1969) (footnote omitted).

*965 [42][43][44] Navigable waters that lie inland of a nation's borders are within the nation's complete control as with any real property within its borders. See *id.*; see also *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812) (Marshall, C.J.) (stating that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute"). Likewise within the general sovereign sphere of a nation are its territorial waters, defined as those navigable waters lying up to 12 nautical miles beyond a nation's shoreline. See *United States v. California*, 332 U.S. 19, 35, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947) (stating that the extension of our territorial jurisdiction "is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location"). And beyond the territorial waters lie the high seas, over which no nation can exercise sovereignty. See *Louisiana*, 394 U.S. at 23, 89 S.Ct. 773; see also *United States v. Louisiana*, 363 U.S. 1, 33-34, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960) (stating that the "high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation"); *California*, 332 U.S. at 34, 67 S.Ct. 1658 (stating that the United States, "throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations"); *The Vincennes*, 20 F.2d 164, 172 (E.D.S.C.1927) (stating that the high seas "are the common property of all nations"). The mutual access to the high seas is firmly etched into the jus

gentium. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1286-87 arts. 87, 89 (providing that the high seas shall be open to all nations and that "no State may validly purport to subject any part of the high seas to its sovereignty"). [FN3]

FN3. Under the 1982 United Nations Convention, an exclusive economic zone is recognized, beginning at the outer limit of the territorial waters and extending to 200 nautical miles from the nation's shoreline. Within this economic zone, a nation may exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil, but not over navigation. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1280, arts. 56(1), 57. Even though the United States has not yet ratified this treaty, see *supra* note 2, it generally recognizes this 200-mile economic zone. See Thomas J. Schoenbaum, 1 Admiralty and Maritime Law, § 2-16, at 35 (2d ed. 1994) (collecting legislation enacted by Congress in accordance with the Law of the Sea Convention).

[45] Any extension of jurisdiction into the high seas by a nation must be "subject to the consent of other nations." See *Louisiana*, 363 U.S. at 34, 80 S.Ct. 961; see also *California*, 332 U.S. at 35, 67 S.Ct. 1658 (stating that "whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units" (footnote omitted)). We do, however, acknowledge that the law of nations sanctions limited extraterritorial exercises of jurisdiction. See, e.g., *Louisiana*, 363 U.S. at 34 n. 60, 80 S.Ct. 961 ("For example, the United States has long claimed the right to exercise jurisdiction over domestic and foreign vessels beyond the three-mile limit for purposes of customs control and for defense purposes and this practice is recognized by international law" (citations omitted)); *Hudson & Smith v. Guestier*, 10 U.S. (6 Cranch) 281, 284, 3 L.Ed. 224 (1810) (recognizing that a seizure of property on the high seas, beyond the territorial limits of all nations, for breach of a municipal revenue raising regulation is warranted by the jus

gentium).

[46] In sum, because the exercise of in rem jurisdiction depends on the court's exercise of exclusive custody and control over the res, the limits of in rem jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty itself.

*966 VI

[47] In applying these principles to a wreck lying in international waters, obvious complexities emerge. In rem jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty. See *Pennoyer*, 95 U.S. at 722 (stating "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"). Where both persons and property are beyond a nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited, but not meaningless.

When nations agree on law to apply on the high seas, they agree to an order even beyond their sovereign boundaries which, while they hope will be honored on the high seas, can only be enforced completely and effectively when the people or property are brought within a nation's zone of power--its sovereignty.

So it must be with the *Titanic*. The *jus gentium*, the law of all maritime nations, is easy to define and declare. But its enforcement must depend on persons or property involved in such a declaration coming into the zone of power of participating nations. We now turn to observe how these intersecting principles operate in this case.

A

[48] First, *Haver* presents us with no reason to upset the district court's findings that RMST (and its predecessors) represented the first party successfully to salvage the wreck of the *Titanic* and that RMST has continued and plans to continue its substantial efforts. As

the district court recognized, salvaging the wreck of the Titanic has presented a challenge of unprecedented proportion. Because the wreck lies under 2.5 miles of water, where there is virtually no light, the water is frigid, and the water pressure beyond general comprehension, only the most sophisticated oceanographic equipment can explore the site and recover property. Doing so is time consuming, expensive, and dangerous.

Since 1993, RMST has overcome these challenges, conducting research and recovery expeditions in June 1993, July 1994, and August 1996. From these expeditions, it has been able to recover over 3,600 artifacts from the wreck and to gather thousands of photographs and hundreds of hours of video footage. As the district court observed, "RMST has exhibited considerable zeal as salvor in possession despite the fact that salvaging the wreck is extremely time consuming, dangerous, and expensive." *Titanic II*, 9 F.Supp.2d at 627.

[49] As the first successful salvor, RMST obtained an inchoate lien as a matter of law in the wreck as well as the artifacts from the wreck to enforce its claim for compensation and reward. And with its lien, RMST obtained the right to exclusive possession, not only of the artifacts removed from the wreck of the Titanic, but also of the wreck itself, so that no other person is entitled lawfully to intrude as long as salvage operations continue. See *Treasure Salvors, Inc.*, 640 F.2d at 567.

[50] Because RMST has necessarily acted on behalf of the owners of the property even if the owners did not or could not know of RMST's efforts, its interest in the property is limited to an exclusive possessory right, not for its own use, but for the purpose of bringing the property within the jurisdiction of a court in admiralty to enforce its maritime lien securing its claim for compensation and reward. But once the property is brought in custodia legis, the court can execute on RMST's lien and sell the property, or if the sale of the property would prove insufficient to compensate RMST fairly, the court can award

title in the property to RMST.

[51] These conclusions reached by the district court about RMST's rights are consistent with the salvage law which is *967 part of the jus gentium, and we expect that whether RMST had returned property from the Titanic to an admiralty court in England or France or Canada, the court would, by applying the same principles, have reached the same conclusions. The need for courts of admiralty to apply the law similarly is fundamentally important to international commerce and to the policies supporting order on the high seas. It is therefore prudent for us, as one such court sitting in admiralty, to assure enforcement in harmony with these shared maritime principles. And to this end, we are satisfied that to the extent the district court applied these principles, it acted in accordance with the jus gentium in awarding RMST exclusive salvage rights in the wreck of the Titanic.

B

[52] Although the district court applied principles of the jus gentium to award RMST exclusive salvage rights in the Titanic, the question peculiar to this case remains how, if at all, can a court in admiralty enforce these salvage rights with respect to property that does not lie within its jurisdiction, nor, for that matter, within the jurisdiction of any admiralty court.

[53] RMST argues, somewhat boldly and apparently without any direct legal authority, that an admiralty court can simply assert in rem jurisdiction over wrecks lying in international waters, beyond the territorial limits of the court's jurisdiction, and enter orders to enforce that jurisdiction. But this fails to account for the limits of courts' jurisdiction and, indeed, the limits of national sovereignty.

In rem jurisdiction is traditionally justified by the presence of the res within the jurisdiction of the court. Having exclusive legal custody over the res, whether actual or constructive, enables the court to issue orders respecting the res that are exclusive as against the whole world. With in rem jurisdiction, therefore, a

court has the power, among others, to order the seizure, the sale, or the transfer of the res. It follows that when the res is outside the jurisdiction of the court, indeed, beyond the territorial limits of the United States, the court cannot exercise in rem jurisdiction over it, at least in the traditional sense.

In this case, the district court recognized this limitation and rested its authority over the wreck of the Titanic on what it called "constructive in rem" jurisdiction. Obviously, any power exercised in international waters through "constructive in rem" jurisdiction could not be exclusive as to the whole world. For example, a French court could presumably have just as well issued a similar order at the same time with no less effect. But this nonexclusive control over the res would not defeat the district court's first purpose of declaring salvage rights to the wreck as against the world. In fact, we believe that the jus gentium authorizes an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty. The ultimate resolution could only occur at such time as property is removed from the wreck and brought within the jurisdiction of an admiralty court, giving it exclusive in rem jurisdiction over the property or when the persons involved in any dispute over the property are before the court in personam.

[54][55] But this limitation on the jurisdiction exercised by the district court does not mean that its declaration with respect to the res was ineffective. We believe that the district court has a "constructive"--to use the district court's term--in rem jurisdiction over the wreck of the Titanic by having a portion of it within its jurisdiction and that this constructive in rem jurisdiction continues as long as the salvage operation continues. We hasten to add that as we use the term "constructive," we mean an "imperfect" or "inchoate" in rem jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a "shared sovereignty," shared with other nations enforcing the same jus gentium. *968 Through this mechanism, internationally recognized rights may be legally declared but

not finally enforced. Final enforcement requires the additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation.

Testing the effect of a United States court's attempt to assert exclusive jurisdictional power over property located beyond the territorial limits of the United States quickly brings a pragmatic response. When a nation seeks to exert sovereignty through exclusive judicial action in international waters, the effort prompts the obvious question of how the jurisdiction is to be enforced. But even beyond this pragmatic consideration lies the yet more significant consideration that asserting sovereignty through a claim of exclusive judicial action beyond the territorial limits of a nation would disrupt the relationship among nations that serves as the enforcement mechanism of international law and custom. What would occur if an English or French court were to exercise similar power? The necessary response to probes such as these leads to the now well-established norm of international law that no nation has sovereignty over the high seas. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, 1287 art. 89 (providing that "no state may validly purport to subject any part of the high seas to its sovereignty").

[56][57][58] This conclusion that no nation has sovereignty through the assertion of exclusive judicial action over international waters does not leave the high seas without enforceable law. The law of salvage as shared by the nations as part of the jus gentium applies to the high seas, and we are satisfied that it will do no violence to the relationship among nations to enforce these rights to the extent generally recognized on a non-exclusive basis. For this reason, we conclude that the district court was correct in declaring that RMST has salvage rights in the wreck of the Titanic and that these rights include the right exclusively to possess the wreck for purposes of enforcing the maritime lien that RMST obtained as a matter of law. It also follows that the district court acted properly in entering an injunction

against persons over whom it had jurisdiction, prohibiting them from interfering with the salvage efforts being pursued by RMST. We believe that these aspects of the district court's declaration and injunction would be recognized by all maritime nations and similarly be enforced by their courts. [FN4]

FN4. In reaching this conclusion, we reject Haver's argument that the R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. § 450rr et seq., precluded the district court from exercising jurisdiction over the wreck of the Titanic. That statute, while recognizing the "major national and international cultural and historical significance" of the Titanic, 16 U.S.C. § 450rr(a)(3), merely exists to encourage the United States (or more specifically, the President) to coordinate cooperative international efforts "for conducting research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic." 16 U.S.C. § 450rr(b)(3). The statute also specifically expresses Congress' sense that "research and limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance" pending the consummation of such international efforts. 16 U.S.C. § 450rr-5.

We also refuse to construe the language in § 450rr-6 of the statute—"By enactment of sections 450rr to 450rr-6 of this title, the United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine areas or the R.M.S. Titanic"—as stripping the federal courts of jurisdiction over the wreck for purposes of recognizing, consistent with the *jus gentium*, RMST as the wreck's exclusive salvor. Read in the context of the entire R.M.S. Titanic Memorial Act, we believe that language has no bearing in this appeal.

[59] But we hasten to point out, again, that the power of an American court to enforce such orders is effectively limited until persons and property are brought within its territorial jurisdiction. These are limits that any court faces, regardless of the nation involved. Shared rights to *969 the high seas may be exercised by all nations, and the assertion by any nation of exclusive sovereignty over a portion would interfere with those rights. This notion of "shared sovereignty" does not, however, preclude all nations from enforcing the internationally recognized laws of salvage

in courts with respect to persons and property within their jurisdiction, nor even from exercising this form of shared sovereignty for matters on the high seas.

If we were to recognize an absolute limit to the district court's power that would preclude it, or essentially any other admiralty court, from exercising judicial power over wrecks in international waters, then we would be abdicating the order created by the *jus gentium* and would return the high seas to a state of lawlessness never experienced—at least as far as recorded history reveals. We refuse to abdicate in this manner.

VII

[60] While we affirm the district court's order enjoining Haver from interfering with the ongoing salvage operations of RMST, we must still address the additional terms to which he objects: (1) whether salvage rights include the right to exclude others from visiting, observing, and photographing the wreck; and (2) whether, in enjoining others from interfering with the ongoing salvage operations, the district court could exclude others from an area within a 10-mile radius (the 314-square mile circular area protected by its August 1996 order) or a 168-square mile rectangular area (protected by its June 1998 order), both of which lie entirely within international waters.

The June 1998 injunction provided in pertinent part:

Until further order of this Court, these parties [including Haver] are ENJOINED from (i) interfering with the rights of RMST, as salvor in possession of the wreck and wreck site of the R.M.S. TITANIC, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Titanic II, 9 F.Supp.2d at 640. This

injunction was a reiteration of the court's August 1996 injunction in which it, for the first time, explicitly prohibited others from photographing the wreck or wrecksite of the Titanic. In entering the 1996 order, the court expanded traditional salvage rights to include the right to exclusive photographing of the wreck and the wreck site. The court explained: [I]f R.M.S. TITANIC is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The court finds that in a case such as this, allowing another "salvor" to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

The court pointed out that photographs could be marketed like any other physical artifact and therefore that the rights to record images of the Titanic belonged to RMST, the salvor in possession of the wreck.

[61][62][63] The district court's expansion of salvage rights to include the right exclusively to photograph or otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel. We are aware of no case in the United States or in the body of *jus gentium*, however, that has expanded salvage rights to include this type of a right. More importantly, we are not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. See, e.g., *The Sabine*, 101 U.S. 384; *Columbus-America*, 974 F.2d at 459; *The Akaba*, 54 F. at 200. And the salvage *970 service is useful to owners only when it effects a saving of the specific property at risk. The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value. Traditionally, the inducement for salvage service is limited to the court's award of compensation and reward, which may be enforced in personam against the owner without regard to the property saved, or in

rem against the property saved.

To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. Salvors would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.

Even if we were to assume that the salvors had full title to the yet to be recovered shipwreck, as would be the case if the law of finds were applied, it is doubtful that such title to property lying in international waters would include the right to exclude others from viewing and photographing it while in its public site. Exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and removing the property to a private or controllable location where it cannot be viewed or photographed except under conditions controlled by the owner. But a property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place. [FN5]

FN5. For instance, even under American copyright law, where an architect has a copyright in the design of a building, that right does not extend to prevent the viewing and photographing of the building, if it is located at a public site or is visible from a public place. See 17 U.S.C. § 120(a).

In addition, if we were now to recognize, as part of the salvage law, the right to exclude others from viewing and photographing a shipwreck in international waters, we might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently-applied body of law. This risk is heightened when it is understood that such an expansion of salvage rights might not encourage salvage and

might, additionally, discourage free movement and navigation in international waters.

For these reasons, we conclude that the district court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the Titanic at its location in international waters.

[64] The district court's August 1996 injunction also prohibited anyone from entering within a 10-mile radius of the wreck site to search, survey, or obtain any image of the wreck or wreck site, and the court's June 1998 order prohibited anyone from entering, for a similar purpose, a rectangular area around the wreck site computed to be 168-square miles. Neither prohibition is justified by the law of salvage or allowed by the law of free navigation on the high seas. For the same reasons that we gave in denying exclusive viewing and photographing rights--that to do so would alarmingly expand salvage law and interfere with the right of free navigation--we also reverse these aspects of the district court's orders. This does not mean, however, that a court may not enforce salvage rights by prohibiting a party over whom it has personal jurisdiction from conducting salvage operations or interfering with the first salvor's exclusive possession of the wreck for purposes of salvaging it.

VIII

In summary, we conclude that this appeal presents us with a case or controversy *971 as understood under Article III of the Constitution. We also consider DOE's appeal of the June 1998 injunction directed against it, even though DOE was not a party to the district court proceedings, and agree with DOE that the injunction against it is not enforceable because it was never made a party through proper service of process nor was it in privity with the party. We reject, however, Haver's personal jurisdictional challenge. With respect to Haver's challenge to the injunctions themselves, we affirm in part and reverse in part. We affirm the district court's injunctions insofar as they enjoin parties and

persons in privity with them from conducting salvage operations of the Titanic wreck and interfering with the salvage operations of RMST. We reverse them insofar as they purport to prohibit the visiting, viewing, searching, surveying, photographing, and obtaining images of the wreck or the wreck site, as long as these activities do not constitute any salvage effort or interfere with RMST's salvage rights.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.	_____
v.	:	DATE FILED:	_____
EARNEST MEDFORD	:	VIOLATION:	18 U.S.C. § 371
GEORGE CSIZMAZIA	:		(Conspiracy - 1
	:		Count)
	:		18 U.S.C. § 668(b)(1)
	:		(Theft of objects of
	:		cultural heritage - 1
	:		Count)
	:		18 U.S.C. § 668(b)(2)
	:		(Receipt of stolen
	:		objects of cultural
	:		heritage - 1 Count)
	:		18 U.S.C. § 2
	:		(Aiding and
	:		abetting)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. At all times material to this Indictment, the Historical Society of Pennsylvania ("HSP") was a museum operating at 1300 Locust Street, Philadelphia, Pennsylvania. HSP was established for educational and aesthetic purposes, has a professional staff, and owns, utilizes, and cares for antique objects and historical items that are exhibited to the public on a regular basis. These objects include items of the Colonial and Civil War eras of the United States. HSP is used by visitors across the country and its

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Colonial and Civil War eras of the United States. HSP is used by visitors across the country and its activities affect interstate commerce.

2. From on or about September 13, 1994 through on or about December 23, 1997, in the Eastern District of Pennsylvania, defendants

**EARNEST MEDFORD and
GEORGE CSIZMAZIA**

did knowingly and unlawfully conspire, combine, confederate and agree together and with each other to receive and conceal objects of cultural heritage, that is antiques and historical items from the Colonial through the American Civil War eras, worth in excess of \$5,000, that had been stolen from the care, custody and control of a museum, that is, the Historical Society of Pennsylvania, knowing that the items had been stolen, in violation of Title 18, United States Code, Section 668.

3. It was part of the conspiracy that defendant EARNEST MEDFORD, an employee of HSP, would steal antiques and historical items from HSP.

4. It was further part of the conspiracy that defendant GEORGE CSIZMAZIA would receive and purchase the stolen objects from defendant EARNEST MEDFORD and conceal the objects at his residence in Rutledge, Pennsylvania.

OVERT ACTS

In furtherance of the conspiracy, the defendants committed the following overt acts in the Eastern District of Pennsylvania:

1. Between on or about September 13, 1994 and on or about December 23, 1997, defendant GEORGE CSIZMAZIA concealed at his residence at 208 East Sylvan Avenue, Rutledge, Pennsylvania objects stolen from HSP by defendant

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EARNEST MEDFORD between in or about early 1991 and on or about September 13, 1994.

2. Between on or about September 13, 1994 and on or about December 23, 1997, defendant EARNEST MEDFORD stole antiques and historical items from a storage room and other locations at HSP.

3. Between on or about September 13, 1994 and on or about December 23, 1997, defendant GEORGE CSIZMAZIA received stolen antiques and historical items, belonging to HSP, from defendant EARNEST MEDFORD and concealed them at his residence.

4. Between in or about July, 1997 and November 4, 1997, defendant EARNEST MEDFORD took from a storage room at HSP a Revolutionary War era Pennsylvania long rifle and three Civil War presentation swords.

5. Between in or about July, 1997 and November 4, 1997, defendant GEORGE CSIZMAZIA received the long rifle and swords from defendant EARNEST MEDFORD and concealed them at his residence.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraph One of Count One of this Indictment is incorporated herein by reference.

2. Between in or about July 1997 and on or about November 4, 1997, in the Eastern District of Pennsylvania, defendants,

**EARNEST MEDFORD and
GEORGE CSIZMAZIA**

did knowingly and unlawfully steal, and induce and procure the theft, from the care, custody and control of a museum, that is, Historical Society of Pennsylvania, objects of cultural heritage, that is, antiques and historical items including an eighteenth century Pennsylvania long rifle and three Civil War presentation swords over 100 years old and worth individually in excess of \$5,000.

In violation of Title 18, United States Code, Section 668(b)(1) and Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraph One of Count One of this Indictment is incorporated herein by reference.

2. Between in or about July 1997 and on or about November 4, 1997, in the Eastern District of Pennsylvania, defendants,

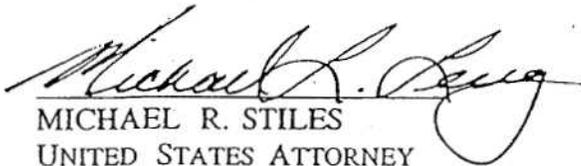
**EARNEST MEDFORD and
GEORGE CSIZMAZIA**

did knowingly and unlawfully receive and conceal, and aid and abet the receipt and concealment of, objects of cultural heritage, that is antiques and historical items including an eighteenth century Pennsylvania long rifle and three Civil War presentation swords over 100 years old and worth individually in excess of \$5,000, that had been stolen from the care, custody and control of a museum, that is, the Historical Society of Pennsylvania, knowing that the items had been stolen.

In violation of Title 18, United States Code, Section 668(b)(2) and Section 2.

A TRUE BILL:

FOREPERSON


MICHAEL R. STILES
UNITED STATES ATTORNEY

First Assistant U.S. Attorney

STATEMENT OF THE CASE

On January 29, 1998, a grand jury in the Eastern District of Pennsylvania returned a 3 count indictment charging defendants/appellants George Csizmazia and Ernest Medford for their involvement in the theft of approximately 200 historical objects during an eight year period from the Historical Society of Pennsylvania ("HSP"), a museum founded in 1824 and located in Philadelphia. The defendants were charged with conspiracy, in violation of 18 U.S.C. § 371; theft of objects of cultural heritage, in violation of 18 U.S.C. § 668(b)(1); and receipt of objects of cultural heritage that had been stolen from a museum, in violation of 18 U.S.C. § 668(b)(2).

On April 8, 1998, Medford and Csizmazia entered pleas of guilty to the indictment.

On July 16, 1998, the defendants were sentenced to 48 months incarceration. The sentence was an upward departure from the sentencing guidelines as determined by the district court. This appeal followed.

STATEMENT OF THE FACTS

This case is a prosecution brought under 18 U.S.C. § 668, a statute enacted in 1994 which proscribes the theft of objects of cultural heritage from museums, and the receipt or concealment of objects of cultural heritage that had been so taken.

The indictment charged that Medford, an employee of the Historical Society of Pennsylvania ("HSP"), stole during an eight year period antiques and historical objects from HSP. The indictment further charged that Medford sold the stolen objects to Csizmazia who

concealed them at his residence. (See App. 1-5). The government established that approximately 200 objects were stolen during the term of the conspiracy.¹ (See App. 18a-19a). There is no dispute by the parties that the value of these objects exceeds \$2 million and approximates \$2.5 million.²

The investigation by the government began in November, 1997 when HSP discovered that three Civil War presentation swords and an 18th century Lancaster County long rifle were missing from its inventory. (See App. 18a). Following leads, the FBI confronted Csizmazia, an electrical contractor who had previously performed work at HSP. Csizmazia acknowledged having the swords and rifle at his residence and that he received them from Medford, a custodian at HSP. (See App. 19a). At Csizmazia's residence, the FBI discovered the missing swords and long rifle, and close to 200 other stolen HSP items that Csizmazia had not mentioned to the FBI. (See App. 19a, 82a). HSP was unaware at that time that these items that had been in storage were missing. Csizmazia, at the request of the FBI, made a consensually recorded telephone call to Medford during which Medford implicated himself in the criminal activity. (See App. 19a). As the FBI gathered the items from Csizmazia's residence, Csizmazia falsely claimed that many of the objects were his, obtained from other sources. (See App. 82a).

On December 24, 1997, the FBI confronted Medford who then acknowledged his role in stealing the objects from HSP and selling them to Csizmazia. (See App. 19a).

¹ At defendants' change of plea hearings, the government read into the record the facts set forth in the Government's Change of Plea Memorandum (See App. 15a-20a). Defendants did not contest these facts.

² Medford places the loss at \$2,452,471 (br. at 16). Csizmazia at between \$2,357,471 and \$2,470,985.50 (br. at 9-12).

The stolen items, numbering approximately 200, included objects owned and presented to leading figures in national, state, and Philadelphia history. (See App. 32a-57a; G App. 1-7). The stolen objects included a sword presented to Civil War General George Meade by the citizens of Philadelphia for his successful defense of the nation at Gettysburg; presentation swords to Civil War Generals David Birney and Andrew Humphreys; and a 1735 gold presentation snuff box presented to Philadelphia lawyer Andrew Hamilton by the City of New York for his successful pro bono defense of newspaper editor J. Peter Zenger charged with libel by the British crown. The latter award recognized Hamilton in the landmark case for freedom of press in the American colonies.

Also stolen was a ring containing the hair of George Washington presented by Washington to Navy Lieutenant Richard Somers in recognition of his sterling character and daring courage. The lock of Washington's hair is one of only four verified samples known to exist. Somers later died in the Battle of Tripoli during an effort to defeat the pirate fleet in North Africa.

The defendants took George Washington's ivory tea caddy. They also stole a telescope used by Arctic explorer and Philadelphia physician Elisha Kent Kane during his 1853 exploration of the arctic region. With this telescope, Kane discovered the North Polar Sea during an exploration that proceeded further north than any prior expedition. His health broken beyond recovery, Kane died two years after his return.

The thieves also took a locket with John Brown's hair cut after his hanging; a locket with the hair of Andrew Jackson; a wedding band of the wife of Patrick Henry; a silver pitcher presented to a Philadelphia physician for his efforts during the 1848 smallpox epidemic in

Philadelphia; an 1822 silver pitcher presented to Fairmount Water Works Chief Engineer and Superintendent Frederick Graff; and a bronze medallion presented in 1967 to Philadelphia Mayor Richardson Dilworth.

The bounty included an 18th century Lancaster County long rifle crafted by Isaac Haines. According to Rifles of Colonial America by George Shumway, "it would be difficult to find a better example of the Lancaster rifle in its fully-evolved post-Revolutionary form than this one." It is the "product of a master craftsman and is in original perfect condition." The Pennsylvania Kentucky Rifle, Henry J. Kaufman.³

The government entered plea agreements with Csizmazia and Medford and at sentencing filed motions pursuant to § 5K1.1 to allow the district court to depart from the sentencing guidelines. The government recommended, however, that the court not depart. The government presented to the district court prior to sentencing a sentencing memorandum (See App. 1-7) which explained the government's sentencing position.

At sentencing, the government introduced photographs of the objects taken by the defendants (See App. 8-11), and presented victim impact testimony from the President of HSP (See App. 106a-108a). Appraisals concerning the value of the stolen objects were introduced (See App. 32a-57a).

At the conclusion of the sentencing hearing, the district court denied the government's 5K motion and departed upwards from the determined sentencing guidelines (See App. 108a-110a).

³A further listing of the items stolen can be found in the appraisals of loss found at See App. 32a-57a.

sentencing hearing. The government does not take issue with defendants' assertion that this did not provide the defense with sufficient advance notice of the district court's intention to upwardly depart from the guidelines. The government, therefore, agrees to a remand for resentencing, defendants now on notice of the potential ground for upward departure.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DEPARTING UPWARDS FROM SENTENCING GUIDELINE § 2B1.1 WHERE MONETARY LOSS DID NOT ADEQUATELY REFLECT THE SERIOUSNESS OF THE OFFENSE AND THE IMPACT OF THE CRIME ON THE VICTIM. THE DISTRICT COURT PROPERLY EXPLAINED ON THE RECORD ITS BASIS FOR DEPARTURE.

At sentencing, the parties agreed that § 2B1.1 was the most applicable sentencing guideline for an 18 U.S.C. § 668 violation. The district court made factual determinations concerning the monetary loss, setting the loss in excess of \$2.5 million. The court then departed upwards from the sentencing guidelines calculation. The district court explained its basis on the record (See App. 108a-110a) and in the Judgment and Commitment Order (See App. 61-62a; See App. 14a).

This Court's review is plenary as to whether the departure was permissible; clearly erroneous as to whether the facts support the grounds relied upon for departure; and deferential as to the reasonableness. United States v. MacLeod, 80 F.3d 860, 865(3d Cir. 1996),(citing United States v. Kikumura, 918 F.2d 1084, 1098 (3d Cir.1990)).

Even if the matter is remanded, the Court may now consider the legal basis of the departure in order to guide further proceedings. United States v. Marcello, 13 F.3d 752, 753 (3d Cir. 1994).

The Sentencing Guidelines contemplate the departure granted in this case. "In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted." Application note 15 to § 2B1.1, effective November 1, 1997.⁴

Even if the Application Notes were silent as to the possibility of upward departure, the sentencing court acted within its discretion. A district court is allowed to depart from the prescribed sentencing range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines...." 18 U.S.C. § 3553(b). Guideline § 2B1.1 was formulated prior to the enactment of the theft of cultural objects statute, 18 U.S.C. § 668. The typical case that is applied to this guideline varies greatly from the instant case.

Defendants argue that the district court under § 2B1.1 is limited in any theft-related case to determining financial loss in setting the appropriate sentencing guideline range. They contend that the sentencing court has no discretion to depart upwards from a range calculated on the basis of the monetary value of the objects stolen. The government counters that theft of objects of our cultural heritage may in appropriate cases be considered outside the heartland of § 2B1.1 cases. The issue presented by defendants, therefore, is whether a sentencing court is limited to viewing stolen objects of cultural heritage solely in sterile financial terms or whether such objects may be recognized for what they represent to a city, a state, and a nation. Defendants in essence urge this Court to limit a sentencing court to examining important objects

⁴ Defendants' criminal conduct continued at least to December 24, 1997. 18 U.S.C. § 668(b)(2) prohibits the concealment of objects of cultural heritage that had been stolen from a museum.

of our cultural heritage in terms made famous by PBS's Traveling Antiques Road Show, "what did you pay for it" and "what do you think it's worth?"

The government submits that the district court should not be so restrained.

Objects significant to our national heritage have an intrinsic value beyond the monetary worth set in the commercial market. Preservation of objects representing our cultural past enables a nation to maintain important bonds with past generations and ensures that future generations will have available to them objects which symbolize common threads which bind the nation. Such objects permit scholars and citizens to gain the knowledge and appreciation of historical events which can only come through examination of the very artifacts with which that history was made.

An examination of one of the stolen objects, the Meade presentation sword, crystallizes the issue. At the end of June 1863, the army of Northern Virginia led by Robert E. Lee crossed the Pennsylvania border to inflict a crushing blow on Union troops in their own backyard, capture the state capital, and draw General Ulysses S. Grant's forces out of the South. McPherson, Battle Cry of Freedom 647, 653 (1988). Aware of the invasion, citizens in Philadelphia drilled on Chestnut Street with the expectation that they would soon be called to battle. Whiteman, Gentlemen In Crisis: The First Century of the Union League of Philadelphia 43, 45 (1977). The southern advance resulted in the Battle of Gettysburg, described by historians as the greatest battle ever fought on the North American continent. Burns, The Civil War 216 (1990). By July 2, 65,000 thousand Confederate troops faced 85,000 thousand Union troops headed by General George Meade, who had been promoted to lead the Army of the Potomac only four days earlier. A southern victory was expected to result in the repudiation of Lincoln's war effort and a negotiated peace. McPherson, Battle Cry of Freedom 647 (1988). The northern

forces, however, emerged victorious.

Victory came at great cost to both armies. Gettysburg was the bloodiest battle of the war. Almost one-third of all troops engaged, 51,000 men, were killed, wounded, or missing. Burns, The Civil War 236 (1990). By July 4, 1863, the Army of Northern Virginia retreated back to Virginia and Philadelphians celebrated at Independence Square. Whiteman, Gentlemen in Crisis 45 (1977).

Gettysburg marked the high tide of the Confederacy and the turning point of the war. In recognition of this great victory, citizens of Philadelphia presented Meade with the presentation sword stolen by defendants. Its inscription reads, "In grateful acknowledgment of the deliverance of Pennsylvania from Rebel invasion by the matchless valor of the Army which helped to signal victory on the memorable field of Gettysburg, July 3, 1863."⁵

Defendants submit that the sentencing court must be constrained to viewing this stolen object solely as a scabbard and blade valued only by the auction block price paid by a collector. The court, however, must be permitted to consider that the value of cultural objects transcends the dollar sign. To our nation and historians, the Meade sword represents self-sacrifice, defense of the nation, courage, and commitment. As such, this object and other historic treasures stolen by defendants assist historians to reflect on the past and educate future generations. The task of a true historian, Theodore Roosevelt noted, is to

bring the past before our eyes as if
it were present. He will make us see
as living men the hard-faced archers

⁵ Each of the items stolen by defendants has its peculiar historical background and relevance. The government summarized a few of these in its sentencing memorandum (See App. 1-7).

of Agincourt, and the war-worn
spearmen who followed Alexander down
beyond the rim of the known world....
We shall also see the supreme
righteousness of the wars for freedom
and justice, and know that the men who
fell in those wars made all mankind
their debtors.

Speech to the American Historical Association, December 17, 1912.

The artifacts maintained by HSP and stolen by defendants are, simply put, the history of our Nation. These tangible objects help make real to the citizenry and historian the accomplishments and failures of the past. Cultural artifacts, archived, protected, and exhibited by our public institutions, literally help us to see, feel, and touch the past.

In the only reported case found by the government dealing with this issue, a district court, departing upwards five levels from the sentencing guidelines, sentenced a defendant who stole \$1.5 million worth of rare books from a university to five years imprisonment. The court rationale is appropriate here:

There is no denying that the "heartland of Section 2B1.1 is garden variety theft --theft of money or fungible property-- which causes only economic harm and impacts only the immediate victim. This case manifestly is exceptional by virtue of the substantial and unquantifiable harm risked and caused to Columbia and others. It is outside the heartland almost by definition.

United States v. Spiegelman, 4 F. Supp. 2d 275, 291 (S.D.N.Y. 1998). That district court recognized that thefts from museums and public institutions affect all society, for it is history that is being stolen and lost.

In the present case, defendants over an eight year period looted treasures donated by Pennsylvania families to HSP, an independent nonprofit organization founded in 1824. Certainly, monetary loss cannot capture the severity of these crimes. If that is recognized, then it follows that the district court has the discretion to consider factors other than monetary loss in appropriate museum theft cases. Where objects of cultural heritage are clearly not fungible goods easily replaceable, the sentencing court must have discretion to upwardly depart.

As a further basis for upward departure, the impact on the victim, HSP, was properly considered by the district court. As stated by Susan Stitt at sentencing, "publicizing our loss ... seriously damaged our reputation as a responsible steward...The theft has left lingering doubts in the public's mind about our ability to protect the treasures entrusted to us....It will take us years to overcome those doubts...Our collection your Honor, belongs to all Americans and we all lose if materials like these important to our cit[y's] and our nation's history are not preserved for the public...In short, our reputation is one of our most important assets and that asset has been undeniably damaged in ways that cannot be quantified but [are] very real." (See App. 58-59).

The district court properly considered the eight year looting of hundreds of national treasures by Csizmazia and Medford as being a case that warranted an upward departure and articulated sufficient grounds for that departure. The district court's decision should be affirmed. Should the Court remand this case for sentencing as discussed in Section I. above, defendants' argument that the court failed to adequately state reasons for the departure is moot.

III. THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION OF THE AMOUNT OF MONETARY LOSS

United States Court of Appeals,
Third Circuit.

UNITED STATES of America
v.
Ernest MEDFORD, Appellant in 98-1647
United States of America
v.
George Csizmazia, Appellant in 98-1648

Nos. 98-1647, 98-1648.

Submitted Under Third Circuit LAR 34.1(a) May
25, 1999
Opinion Filed: July 2, 1999

Defendants pleaded guilty in the United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., to conspiracy, theft of objects of cultural heritage, and receipt and concealment of stolen objects of cultural heritage. Defendants appealed. The Court of Appeals, Alito, Circuit Judge, held that: (1) government satisfied its obligation under plea agreement; (2) government did not act in bad faith; (3) selection of midpoint between high and low estimates of stolen items' fair market value, as measure of loss, was arbitrary; (4) upward departure was improper absent notice to defendants; and (5) upward departure based on cultural, nonmonetary value of stolen items was proper.

Vacated and remanded for resentencing.

West Headnotes

[1] Criminal Law Ⓒ273.1(2)
110k273.1(2)

Government did not violate plea agreement by requesting court to impose heaviest sentence possible on defendants, notwithstanding its agreement to make motion allowing court to depart downward based on defendants' substantial assistance, where, in plea agreement, government reserved the right to make whatever sentencing recommendation it deemed appropriate. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

[2] Criminal Law Ⓒ1139
110k1139

Whether the government violated a plea agreement is a question of law subject to de novo review.

[3] Criminal Law Ⓒ273.1(2)
110k273.1(2)

Plea agreement requiring government to make motion allowing court to depart from the sentencing guidelines based on defendants' substantial assistance did not require government to recommend downward departure at sentencing hearing and did not prohibit government from stating at sentencing hearing that it did not recommend departure, but merely required government to file motion in order to give court the power to depart downward on that basis. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

[4] Criminal Law Ⓒ273.1(2)
110k273.1(2)

Government's failure to make "more concerted" motion for downward departure based on defendants' substantial assistance did not amount to bad faith, despite government's agreement, in plea agreement, to make motion allowing such departure, as government complied with its obligation under plea agreement by filing motion that allowed departure. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

[5] Sentencing and Punishment Ⓒ736
350Hk736
(Formerly 234k88, 91k51)

[5] Receiving Stolen Goods Ⓒ10
324k10

District court's selection of midpoint between high and low estimates of stolen items' fair market value, as measure of loss in enhancing defendants' base offense levels for offenses of conspiracy, theft of objects of cultural heritage, and receipt and concealment of stolen objects of cultural heritage, was arbitrary, where court did not assess reliability of higher estimate and did not articulate an adequate evidentiary basis for selecting the middle value of the two estimates, as opposed to selecting the low end of the range. 18 U.S.C.A. § 668; U.S.S.G. § 2B1.1, 18 U.S.C.A.

[6] Larceny Ⓒ88
234k88

Sentencing court may rely on higher of two estimates of fair market value of stolen items, where such value ranges between two estimates, if there is evidence to support the higher end of an estimated range, but such other evidence must be supported by sufficient indicia of reliability, and the court must explain on the record why it relied on the estimate at the higher end.

[7] Sentencing and Punishment ⇨934
350Hk934
(Formerly 110k1306)

Upward departure from sentencing guidelines was improper where court provided no advance notice to the defendants of its intention to upwardly depart. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[8] Sentencing and Punishment ⇨820
350Hk820
(Formerly 324k10, 234k88)

Upward departure from sentencing guidelines based on cultural, nonmonetary value of items stolen by defendants, who were convicted of theft of objects of cultural heritage and receipt and concealment of stolen objects of cultural heritage, was not improper, despite claim that cultural value of stolen objects was element of offenses, where prices set by commercial market for those objects, which was measure of loss under guidelines, was insufficient to fully capture harmfulness of defendants' conduct. 18 U.S.C.A. § 668; U.S.S.G. §§ 2B1.1, 2B1.1, comment. (n. 15), 18 U.S.C.A.

[9] Criminal Law ⇨1139
110k1139

[9] Criminal Law ⇨1158(1)
110k1158(1)

Court of Appeals reviews the district court's findings of fact for clear error and its legal conclusions de novo.

*420 Michael R. Stiles, United States Attorney, Walter S. Batty, Jr., Chief of Appeals, Robert E. Goldman, Assistant U.S. Attorney, U.S. Attorney's Office, Philadelphia, PA, Counsel for Appellee.

George Henry Newman, Esq., Newman & McGlaughlin, Philadelphia, PA, Counsel for

Appellant Ernest Medford.

Donald M. Moser, Esq., Philadelphia, PA, Counsel for Appellant George Csizmazia.

Before: GREENBERG and ALITO, Circuit Judges, ACKERMAN, District Judge. [FN1]

FN1. The Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

ALITO, Circuit Judge:

Ernest Medford and George Csizmazia ("defendants") appeal their sentences after pleading guilty to conspiracy, theft, and receipt of cultural objects from a museum in Philadelphia. On appeal, defendants *421 contend that the government violated the plea agreement and that the District Court misapplied the United States Sentencing Guidelines. For the reasons explained below, we conclude that the government satisfied its obligations under the plea agreement but that the District Court erred in applying the sentencing guidelines. We therefore vacate defendants' sentences and remand for further proceedings.

I.

The Historical Society of Pennsylvania ("HSP"), founded in 1824 and located in Philadelphia, exhibits antiques and other historical items to the public. Defendant Medford worked as a custodian at the HSP for approximately 18 years. During that time, he met defendant Csizmazia, a collector of antiques, who was working as a contractor at the HSP. The defendants agreed that Medford would steal items from the museum and sell them to Csizmazia.

Over a ten-year period, Medford pilfered approximately 200 valuable items from the museum, including a sword presented to George G. Meade for his military accomplishments during the Civil War, a 1735 gold snuff box presented to Andrew Hamilton for successfully defending J. Peter Zenger in his libel trial, a ring containing a lock of George Washington's hair, an ivory tea caddy that belonged to George Washington, a telescope used by Elisha Kent Kane during his 1853 exploration of the arctic

region, lockets containing the hair of John Brown and Andrew Jackson, the wedding band of Patrick Henry's wife, a silver pitcher presented to a physician for his efforts during the 1848 smallpox epidemic in Philadelphia, and a Lancaster County long rifle crafted in 1785 by Isaac Haines, one of Philadelphia's finest gunsmiths. For a paltry sum, Medford sold these items to Csizmazia, who concealed them at his residence. All of the items have been recovered.

Defendants entered into a plea agreement under which the government promised to "[m]ake a motion to allow the District Court to depart from the Sentencing Guidelines pursuant to Sentencing Guidelines § 5K1.1, if the government in its sole discretion, determines that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense...." Csizmazia App. at 24-25; Medford App. at 9-10. Defendants pleaded guilty to conspiracy, in violation of 18 U.S.C. § 371; theft of objects of cultural heritage, in violation of 18 U.S.C. § 668(b)(1); and receipt and concealment of stolen objects of cultural heritage, in violation of 18 U.S.C. § 668(b)(2). [FN2]

FN2. 18 U.S.C. § 668(b) provides, in pertinent part:

Any person who-

(1) steals or obtains by fraud from the care, custody, or control of a museum any object of cultural heritage; or

(2) knowing that an object of cultural heritage has been stolen or obtained by fraud, if in fact the object was stolen or obtained from the care, custody, or control of a museum (whether or not that fact is known to the person), receives, conceals, exhibits, or disposes of the object,

shall be fined under this title, imprisoned not more than 10 years, or both. 18 U.S.C. § 668(b)(1), (2).

At sentencing, the District Court applied U.S.S.G. § 2B1.1, which provides a base offense level of four for a variety of larceny offenses, including offenses committed under 18 U.S.C. § 668. The Court then enhanced defendants' base offense levels 15 points because the amount of loss sustained by the HSP exceeded \$2.5 million. See U.S.S.G. § 2B1.1(b)(1)(P). In arriving at that figure, the District Court considered the appraisals proffered by the government. The experts who made the appraisals had determined that the total monetary

value of the stolen items ranged between \$2,452,471 and \$2,579,500. Over the defendants' objection, the District Court selected the midpoint of the two estimates for a total loss of \$2,515,985.50. *422 The Court reasoned: "[I]t is entirely appropriate for the Court to accept a valuation ... which is based upon two expert appraisals ... and to utiliz[e] the midpoint range." Csizmazia App. at 72a; Medford App. at 24.

The Court next considered the government's section 5K1.1 motion for a downward departure. The government declared that its section 5K1.1 motion merely granted the District Court "permission" to depart downward, but that the government "certainly [did not] recommend a downward departure." See Csizmazia App. at 81a; Medford App. at 33. Specifically, the government stated:

[T]he motion for downward departure ... permits the Court to depart downward.... [T]hat's what the Government is saying, you're permitted, I'm not granting you permission, but under the rules it provides that I'm giving you discretion [to depart downward based on defendants' substantial assistance].... [W]e told both counsel that we would file a weak 5K. And a weak 5K in our opinion is [one that] grants discretion to depart downwards, but we certainly don't recommend a downward departure.

Csizmazia App. at 83a; Medford App. at 35. The District Court denied the motion.

The District Court heard victim impact testimony from the President of the HSP, Susan Stiff ("Stiff"). See Csizmazia App. at 106a-108a; Medford App. at 58-60. Stiff explained that defendants' actions had damaged one of the museum's most important assets--its reputation as a responsible steward of important national treasures--"in ways that cannot be quantified." Csizmazia App. at 107a; Medford App. at 59. Stiff noted that the damage caused by defendants could decrease financial contributions, reduce donations of valuable historical objects, and diminish the HSP's ability to attract qualified individuals to serve as trustees and staff members. See Csizmazia App. at 106a 107a; Medford App. at 58-59. Because of the harm caused to the HSP and the public, Stiff implored the District Court to "to impose the heaviest possible sentence on both defendants." Csizmazia App. at 107a-108a; Medford App. at 59-60. The government concurred. Csizmazia App. at 108a;

Medford App. at 60.

Finding that the defendants' sentencing range of 27 to 33 months did not "sufficiently encompass[] the egregiousness of the offenses that were involved," the District Court departed upward four levels from the guidelines. *Csizmazia App.* at 109a; *Medford App.* at 61. However, the Court did not advise the defendants prior to the sentencing hearing that it intended to depart upward.

The District Court sentenced the defendants to 48 months of imprisonment, and the defendants took this appeal. Defendants claim that the government (1) violated the plea agreement by filing a motion for downward departure and then stating at the sentencing hearing that it did not recommend departure and (2) acted in bad faith by failing to make "a more concerted 5K1.1 downward departure motion at the time of sentencing." *Csizmazia Br.* at 15. Defendants also contend that the District Court misapplied the Sentencing Guidelines by (1) arbitrarily selecting the middle value of the high and low estimates of the fair market value of the stolen items as the amount of loss sustained by the HSP; (2) departing upward without providing sufficient advance notice of its intentions; (3) departing upward on a ground that had already been taken into consideration by the Guidelines; and (4) departing upward four levels without articulating its reason for the extent of the departure. We address each argument in turn.

II.

[1][2] Defendants contend that the government violated the plea agreement by filing a downward departure motion and then stating at the sentencing hearing that it did not recommend a downward departure. *423 Defendants also claim that the government acted in bad faith by failing to make "a more concerted 5K1.1 downward departure motion at the time of sentencing." *Csizmazia Br.* at 15. [FN3] As a remedy, defendants seek a remand for resentencing before a different judge. "Whether the Government violated a plea agreement is a question of law subject to de novo review." See *United States v. Huang*, 178 F.3d 184, 187 (3d Cir.1999) (citing *United States v. Roman*, 121 F.3d 136, 142 (3d Cir.1997), cert. denied, 522 U.S. 1061, 118 S.Ct. 722, 139 L.Ed.2d 662 (1998)). We reject defendants' claims.

FN3. Defendants' contention that the government violated the plea agreement by requesting the court to impose the heaviest sentence possible on the defendants is frivolous. In the plea agreement, the government reserved the right to "[m]ake whatever sentencing recommendation the government deems appropriate...." *Csizmazia App.* at 25; *Medford App.* at 10.

Section 5K1.1 of the Guidelines provides:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

U.S.S.G. § 5K1.1. We have held that, in the absence of two circumstances not present here, a District Court may not depart below the guideline range based on a defendant's substantial assistance unless the government makes a motion to permit such a departure. See *United States v. Abuhouran*, 161 F.3d 206, 211-212 (3d Cir.1998), cert. denied, 526 U.S. 1077, 119 S.Ct. 1479, 143 L.Ed.2d 562 (1999).

[3] In this case, the plea agreement required the government "to mak[e] a motion to allow the Court to depart from the Sentencing Guidelines pursuant to Sentencing Guidelines § 5K1.1, if the government, in its sole discretion, determines that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense...." *Csizmazia App.* at 24-25 (emphasis added); *Medford App.* at 9-10. We interpret the plain terms of the plea agreement to require only that the government file a § 5K1.1 motion in order to give the District Court the power ("to allow the Court") to depart downward under that provision. Contrary to defendants' suggestions, the plea agreement did not require the government to recommend a downward departure at the sentencing hearing; nor did it prohibit the government from stating at the sentencing hearing that it did not recommend departure. Therefore, when the government filed the 5K1.1 motion, it complied with the terms of the plea agreement. [FN4]

FN4. It is true that the plea agreement could have been more explicit in stating that, while the government was obligated to make a § 5K1.1 motion, the government was reserving the right to

take whatever recommendation it chose as to whether a downward departure should be granted. In future cases, it would be advisable for the government to make this point explicit.

[4] In addition, we find no basis for the defendants' contention that the government acted in bad faith by failing to make "a more concerted 5K1.1 downward departure motion at the time of sentencing." *Csizmazia Br.* at 15. In making this contention, defendants cite *United States v. Isaac*, 141 F.3d 477 (3d Cir.1998), in which we held that the government's failure to file a 5K1.1 motion as required under the plea agreement must not result from bad faith. Defendants' reliance on *Isaac*, however, is misplaced. Here, the government filed a § 5K1.1 motion and in so doing complied with its obligation under the plea agreement. Accordingly, we fail to perceive any bad faith on the government's part.

For these reasons, we conclude that the government satisfied its obligation under the plea agreement and that the government's actions were not in bad faith. We therefore deny defendants' request for resentencing before a different judge.

*424 III.

[5] Defendants also contend that the District Court erred in enhancing their base offense levels because it arbitrarily selected the midpoint between the high and low estimates of the stolen items' fair market value as the amount of loss sustained by the HSP and stated, without further explanation, that doing so is "entirely appropriate." [FN5] We review the District Court's findings for clear error. See *United States v. Miele*, 989 F.2d 659, 663 (3d Cir.1993). We agree with defendants.

FN5. Had the District Court selected the lower estimate, the defendants would have received a 14-level increase in their base offense levels, rather than the 15-level increase that they received.

[6] U.S.S.G. § 2B1.1 establishes a defendant's base offense level for offenses involving theft of property. See U.S.S.G. § 2B1.1 (1997). For offenses under 18 U.S.C. § 668, the defendant's base offense level begins at four and is increased depending on the amount of the loss sustained as a result of the illegal conduct. See U.S.S.G. § 2B1.1(a), (b)(1). In determining the amount of loss

sustained, courts are instructed to ascertain the fair market value of the stolen items. See U.S.S.G. § 2B1.1, commentary n. 2. We have held that in cases in which the fair market value ranges between two estimates and either end of the range is equally plausible, courts generally should adopt the lower end of the estimated range. See *Miele*, 989 F.2d at 665-66 (citing *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir.1990)). However, "where there is other evidence to support the higher end of an estimated range, the court may certainly rely on the higher estimate." *Miele*, 989 F.2d at 665-66. Such other evidence must be supported by "sufficient indicia of reliability," and the court must explain on the record why it relied on the estimate at the higher end. *Id.* at 668 ("We require that the district court articulate more than a conclusory finding.... The district court may not rest its decision upon facts until it determines that the fact or facts have sufficient indicia of reliability to support a conclusion that they are probably accurate.").

The decision of the District Court violates *Miele*. In determining that the fair market value of the stolen items exceeded \$2.5 million, the District Court selected the middle value of the high and low estimates without assessing the reliability of the higher estimate. In addition, the District Court did not articulate an adequate evidentiary basis for selecting the middle value of the two estimates, as opposed to selecting the low end of the range. Accordingly, as the government requests, we vacate the defendants' sentences and remand for resentencing in accordance with *Miele*.

IV.

[7] Defendants further maintain that remand is required under *Burns v. United States*, 501 U.S. 129, 138, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), because the District Court departed upward without providing advance notice to the defendants of its intention to upwardly depart. We agree. In *Burns*, the Supreme Court held:

Before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 [of the Federal Rules of Criminal Procedure] requires that the district court give the parties reasonable notice that it is contemplating such a

ruling.

Id.; see also *United States v. Barr*, 963 F.2d 641, 655 (3d Cir.1992). The government recognizes that the District Court "did not provide the defense with sufficient advance notice of [its] intention to upwardly depart from the guidelines," and therefore it concedes that the District Court committed plain error. Appellee's Br. at 9. In light of *Burns* and the position *425 taken by the government, we vacate the sentences imposed by the District Court and remand for resentencing.

[8][9] Although we are remanding to the District Court, we will address one further issue relating to the upward departure that was briefed to us here and that no doubt will be raised on remand. Defendants contend that the District Court's upward departure was improper because the cultural value of the stolen objects is an element of 18 U.S.C. § 668 already taken into consideration by the Sentencing Guidelines. We review the District Court's findings of fact for clear error and its legal conclusions *de novo*. See *United States v. Hillstrom*, 988 F.2d 448, 450 (3d Cir.1993). We reject defendants' argument.

As noted above, § 2B1.1 provides for increases in the defendants' sentence depending upon the amount of loss sustained by the victim of the offense. See U.S.S.G. § 2B1.1, background commentary ("The value of property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant."). In making this determination, the Guidelines instruct the courts to ascertain the fair market value of the stolen items. See U.S.S.G. § 2B1.1, commentary n. 2. The application notes recognize, however, that in some cases, the monetary loss will not "fully capture the harmfulness of the conduct." See U.S.S.G. § 2B1.1, commentary n. 15. In those cases, the application notes provide that "an upward departure may be warranted." *Id.*

In this case, after enhancing the defendants' offense level by 15 based on the fair market value of the stolen items, the District Court departed upward four levels because the applicable sentencing range did not "sufficiently encompass the egregiousness of the offenses that were involved here." *Csizmazia App.* at 109a; *Medford App.* at 61. The Court

explained:

[T]he conduct that [the defendants] engaged in is an assault and affront to our culture, to our society, and ... must be dealt with accordingly. [T]he intangibles ... involved ... and the effects that they have ... had upon the institution itself--both here in Philadelphia and ... throughout the country--mandate that the court ... issue an upward departure in this case.

Csizmazia App. at 109a-110a; *Medford App.* at 61-62.

We agree with the District Court. The price set by the commercial market is insufficient to "fully capture the harmfulness of the [defendants'] conduct." The antiques stolen in this case unquestionably have historical and cultural importance. Moreover, the thefts affected the HSP in ways different in kind from a loss of money or other easily replaceable property, for these thefts damaged the HSP's reputation. In addition, the monetary value of these objects does not adequately take into consideration the real but intangible harm inflicted upon all of the other victims of the offense, including the City of Philadelphia and the general public. Because section 2B1.1 applies to thefts that cause financial harm to the immediate victim of the offense, the non-monetary damage caused here and the harm inflicted upon the public at large justify the District Court's upward departure.

The defendants contend that the upward departure was impermissible because "the Sentencing Commission, in setting the offense level ... for theft of objects of cultural heritage, took into account the very fact that the items stolen were items of cultural heritage." *Medford Br.* at 13. This argument, however, fails to take Application Note 15 into account and overlooks the fact that U.S.S.G. § 2B1.1 applies to a variety of theft offenses that do not involve objects of cultural heritage. To take just one example, U.S.S.G. § 2B1.1 applies to the offense of transporting stolen motor vehicles in interstate or foreign commerce, in violation of 18 U.S.C. *426 § 2312. Thus, under U.S.S.G. § 2B1.1, a defendant who transports stolen motor vehicles valued at \$x across state lines is treated the same as a defendant who steals objects of cultural heritage having the same fair market value. Because U.S.S.G. § 2B1.1 does not take into account the non-monetary significance of objects of cultural heritage, a departure may be warranted, as

Application Note 15 suggests.

Finally, defendants contend that the District Court erred in failing to explain its reason for a four-level upward departure. Because we are remanding to the District Court, we note only that the District Court should state on the record its reason for the extent of the departure. See *United States v. Kikumura*, 918 F.2d 1084 (3d Cir.1990).

V.

Accordingly, we vacate the defendants' sentences and remand for resentencing in accordance with this opinion.

END OF DOCUMENT

Memorandum

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400quino Subject <u>U.S. v. THOMAS MARCIANO LEIGHTON DEMING</u>	Date January 3, 2000
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To
MICHAEL R. STILES
United States Attorney

From
ROBERT E. GOLDMAN
Assistant United States Attorney

I. Date and Nature of Offense

This memorandum recommends that a one count Information charging a misdemeanor offense be filed charging defendants with selling golden eagle feathers. The case involves the selling of Geronimo's headdress containing golden eagle feathers in the Philadelphia area. The case began by complaint and warrant. It must be filed by January 9, 2000. DOJ and Department of Interior are in agreement with misdemeanor disposition which is customary in pleas in these cases.

II. Background of the Defendants

Defendant Thomas Marciano, art broker, currently resides at 1051 Canton Road, Marietta, Georgia. His DOB is 12/04/56 and has no prior convictions. He is currently out on \$50,000 bail.

Defendant Leighton Deming, Georgia lawyer, currently resides at 3260 Peace Lane, Suwanee, GA. His DOB is 9/10/43 and has no prior convictions. He is currently out on \$50,000 bail.

III. Evidence In Support of the Case

Summary

See attached affidavit to complaint and warrant.

IV. Probable Trial or Plea

Plea.

V. Significant Issues/Problems

None.

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VI. Forfeiture

Defendants have agreed to forfeit the headdress to the United States.

VII. Maximum Sentence

The maximum penalty for a violation of 16 U.S.C. § 703 and 707(a) in Count One is 6 months imprisonment, \$15,000 fine, and \$10 special assessment.

AFFIDAVIT

I, ROBERT K. WITTMAN, being duly sworn, depose and state the following:

1. Your affiant is a Special Agent with the Federal Bureau of Investigation and has been so employed for approximately 12 years. I am presently assigned to a property crime squad and have been investigating art, antique and historical property crimes since 1991.
2. On September 3, 1999, your affiant and Special Agent Jay Heine received an e-mail message which had been received from an internet chat room which stated that a Geronimo autograph was for sale for \$22,000. The message further stated that his headdress war bonnet was also for sale for \$1 million but that only serious international inquiries were wanted because it is illegal to sell eagle feathers in the United States. The e-mail address was to GOURMETCOOK.
3. On September 7, 1999, your affiant, acting in an undercover capacity, sent an e-mail message to GOURMETCOOK expressing interest in the war bonnet and relayed a contact telephone number if the eagle feather war bonnet was for sale.
4. On September 8, 1999, THOMAS MARCIANO telephonically contacted your affiant to advise that the eagle feather war bonnet was still available and that the new selling price was \$1.2 million because at least two other buyers were interested. MARCIANO stated that he was acting as a broker for the owner of the Geronimo headdress and that he was already working with another broker in Arizona who was attempting to sell the piece to a Japanese buyer. Your affiant then instructed MARCIANO that he should send a package containing copies of any pictures of the war bonnet as well as any information regarding the authenticity of the piece. MARCIANO also stated that the eagle feathers were illegal to sell in the United States.
5. On September 10, 1999, your affiant received a Federal Express delivery package containing 10 pictures in both far away and close up form of the war bonnet. The package also contained numerous letters from the C.W. Deming family referring to the history of the acquisition of the war bonnet. A copy of the law 16USC668 THE BALD EAGLE PROTECTION ACT was attached.
6. On September 10, 1999, your affiant e-mailed the photographs of the war bonnet to United States Fish and Wildlife Service Agent Lucinda Shroeder. Agent Shroeder positively identified the feathers in the photograph as eagle.
7. Between September 10 and September 23, 1999, your affiant engaged in at least six telephone contacts with MARCIANO discussing the provenance of the war bonnet. He advised that the war bonnet was worn by Geronimo in 1907 to mark the occasion of the last Pow-Wow in Collinsville, Indian Territory from October 14-19 before Collinsville became the state of Oklahoma. MARCIANO stated that Geronimo was a prisoner of war being held in Fort Sill, and had to receive permission from the War Department to go to

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the last Pow-Wow. As a condition of his travel he was assigned an escort named Jack Moore who was a friend of the Deming family in Oklahoma. After doing the last dance, Geronimo gave his last costume, moccasins and headdress to Moore in appreciation for his loyalty. Moore gave the headdress and costume to the Deming family. MARCIANO advised that the current owner of the headdress is LEIGHTON DEMING, an attorney. MARCIANO stated that DEMING knows that it is illegal to sell the eagle feathers, but that he wants to structure the deal to give the false appearance that the war bonnet is on loan as the result of an overpayment for other items to disguise the unlawful activity.

8. On September 23, 1999 MARCIANO mailed a second package to Philadelphia containing two other letters and a short story. One of the letters was from LEIGHTON DEMING describing how he acquired the war bonnet from his grandmother.
9. Between September 23 and October 12, 1999, numerous telephone calls took place between THOMAS MARCIANO and your affiant. It was finally decided that MARCIANO and DEMING would bring the war bonnet and a number of paintings to Philadelphia to be sold to your affiant for \$1.2 million. DEMING would be told that the selling price of the material was \$1 million. The war bonnet would go to your affiant and the paintings would then be sent back to MARCIANO for a separate sale. MARCIANO would receive \$500,000 for his part of the headdress sale, and DEMING would receive \$700,000.
10. On October 12, 1999, MARCIANO and DEMING appeared in Philadelphia where they met your affiant in a local hotel. They discussed the sale of the war bonnet with your affiant and made the sale of the eagle feathered war bonnet for \$1 million. The men were then placed under arrest.
11. United States Fish and Wildlife Service Agent Lucinda Schroeder has examined the war bonnet and determined that the war bonnet is composed of golden eagle feathers. Agent Schroeder has been trained in the identification of eagle feathers and has 25 years experience in enforcing federal wildlife conservation laws. The sale of eagle feathers, including those of the golden eagle is prohibited in the United States pursuant to the Bald Eagle Protection Act, the Migratory Bird Protection Act, and the Lacey Act as set forth in the attached complaint.

Sworn to before me this 12 day of
October, 1999.


United States Magistrate Judge


ROBERT K. WITTMAN
Special Agent, FBI

002064

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : DATE FILED: _____
v. : CRIMINAL NO. _____
THOMAS MARCIANO : VIOLATIONS 16 U.S.C. §§ 703 and
LEIGHTON DEMING : 707(a) (Migratory Bird
Protection Act - 1
count)
18 U.S.C. § 2 (Aiding &
Abetting)

INFORMATION

COUNT ONE

THE UNITED STATES ATTORNEY CHARGES THAT:

On or about October 12, 1999, in the Eastern District of Pennsylvania and elsewhere, the defendants

**THOMAS MARCIANO and
LEIGHTON DEMING**

did knowingly and unlawfully offer for sale, sell, and aid and abet in the sale of, parts of, and a product composed in part of, a migratory bird, that is, a headdress containing golden and bald eagle feathers.

In violation of Title 16, United States Code, Sections 703 and 707(a) and Title 18, United States Code, Section 2.

Ronald H. Levine
for MICHAEL R. STILES
United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. 99-871-M
LEIGHTON DEMING :

GUILTY PLEA AGREEMENT

Under Rule 11 of the Federal Rules of Criminal Procedure, the government, the defendant, and the defendant's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania.

1. The defendant agrees to plead guilty to a one count Information, waiving prosecution by Indictment, charging him with violation of the Migratory Bird Protection Act, Title 16, United States Code, Section 703, arising from the attempted sale of bald and golden eagle feathers .
2. The defendant agrees to pay the special victims/witness assessment in the amount of \$10 before the time of sentencing and shall provide a receipt from the Clerk to the government before sentencing as proof of this payment.
3. The government understands that the defendant will not contest the civil forfeiture to the government of "the Geronimo Headress" seized from defendant on October 12, 1999 that is the subject of forfeiture action at Civil Complaint No. *CV-599*, pursuant to the Bald

and Golden Eagle Protection Act, Title 16, United States Code, Section 668.

a. Defendant agrees that he is the owner of the Geronimo headress and that he will cooperate with the government by taking whatever steps are necessary to pass clear title to the United States of this asset including, but not limited to, completing any legal documents required for the transfer of the asset to the United States, and taking whatever steps are necessary to ensure that the asset subject to forfeiture is not sold, disbursed, wasted, hidden or otherwise made unavailable for forfeiture.

b. The defendant agrees to waive any claims, defenses or challenges arising under the Double Jeopardy or Excessive Fines Clauses of the Eighth Amendment resulting from the forfeiture imposed as a result of this information and/or any pending or completed administrative or civil forfeiture actions and stipulates that such forfeiture is not grossly disproportionate to his criminal conduct.

4. The defendant agrees to cooperate fully and truthfully with the government as follows:

- a. Defendant agrees to provide truthful, complete and accurate information and testimony. The defendant understands that if he/she testifies untruthfully in any material way he/she can be prosecuted for perjury.
- b. Defendant agrees to provide all information concerning his/her knowledge of, and participation in, the offense alleged in the information and any other crimes about which he/she has knowledge. The defendant further understands and agrees that: (i)

all information and cooperation provided pursuant to this agreement is on the record; and (ii) all information provided under any prior off-the-record proffer letter shall be on the record as of the date of the defendant's entry of a guilty plea.

- c. Defendant agrees that he/she will not falsely implicate any person or entity and he/she will not protect any person or entity through false information or omission.
- d. Defendant agrees to testify truthfully as a witness before any grand jury, hearing, or trial when called upon to do so by the government.
- e. Defendant agrees to hold himself/herself reasonably available for any interviews as the government may require.
- f. Defendant agrees to provide all documents or other items under his/her control or which may come under his/her control which may pertain to any crime.
- g. Defendant understands that his/her cooperation shall be provided to any federal or other law enforcement agency as requested by the government.
- h. To enable the Court to have the benefit of all relevant sentencing information, the defendant waives any rights to a prompt sentencing, and will join any request by the government to postpone sentencing until after his/her cooperation is complete.
- i. Defendant agrees and understands that this agreement requires that

his/her cooperation may continue even after the time that the defendant is sentenced. Failure to continue to cooperate after sentence is imposed shall be grounds for the government to void this agreement.

- j. Defendant understands that it is a condition and obligation of this cooperation agreement that the defendant not commit any additional crimes after the date of this agreement.
- k. Defendant agrees that if the government determines that the defendant has not provided full and truthful cooperation, or has not provided full and truthful information about the defendant's assets, income and financial status, or has committed any federal, state or local crime between the date of this agreement and his/her sentencing, or has otherwise violated any other provision of this agreement, the agreement may be voided by the government and the defendant shall be subject to prosecution for any federal crime of which the government has knowledge including, but not limited to, perjury, obstruction of justice, and the substantive offenses arising from this investigation. This prosecution may be based on any information provided by the defendant during the course of his/her cooperation, and this information may be used as evidence against him/her. Moreover, the defendant's previously entered guilty pleas will stand and cannot be withdrawn by him/her.

5. If the government in its sole discretion determines that the defendant has fulfilled all of his/her obligations of cooperation as set forth above, at the time of sentencing, the government will:

- a. Make the nature and extent of the defendant's cooperation known to the Court.
- b. Make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the government deems appropriate.
- c. Comment on the evidence and circumstances of the case; bring to the Court's attention all facts relevant to sentencing including evidence relating to dismissed counts, if any, and to the character and any criminal conduct of the defendant; address the Court regarding the nature and seriousness of the offense; respond factually to questions raised by the Court; correct factual inaccuracies in the presentence report or sentencing record; and rebut any statement of facts made by or on behalf of the defendant at sentencing.

6. Nothing in this agreement shall limit the government in its comments in, and responses to, any post-sentencing matters.

7. The defendant understands, agrees and has had explained to him/her by counsel that the Court may impose the following statutory maximum sentence: 6 months imprisonment, a \$15,000 fine, and a \$10 special assessment.

8. The defendant may not withdraw his/her plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement. No one has promised or guaranteed to the defendant what sentence the Court will impose.

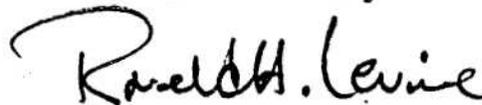
9. The defendant's rights under this agreement shall in no way be dependent upon or affected by the outcome of any case in which he/she may testify.

10. The defendant is satisfied with the legal representation provided by the defendant's lawyer; the defendant and this lawyer have fully discussed this plea agreement; and the defendant is agreeing to plead guilty because the defendant admits that he/she is guilty.

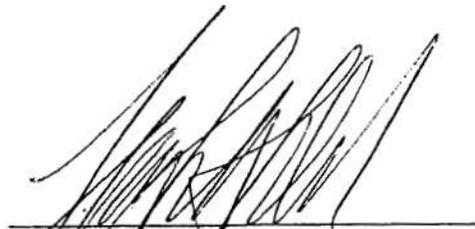
11. It is agreed that no additional promises, agreements or conditions have been entered into other than those set forth in this document, and none will be entered into unless in writing and signed by all parties.

Respectfully submitted,

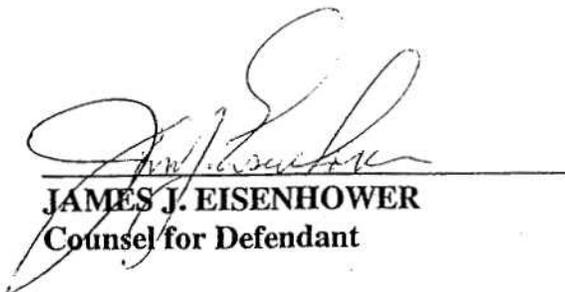
MICHAEL R. STILES
United States Attorney



RONALD H. LEVINE
Chief, Criminal Division
Assistant United States Attorney



LEIGHTON DEMING
Defendant



JAMES J. EISENHOWER
Counsel for Defendant



ROBERT E. GOLDMAN
Assistant United States Attorney

Date: January 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :

v. : CRIMINAL NO.

LEIGHTON DEMING :

PRELIMINARY ORDER OF FORFEITURE

WHEREAS, the defendant entered a guilty plea to a violation of the Migratory Bird Protection Act in violation of 16 U.S.C. §§ 703 and 707(a), and was sentenced by this Court;

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED THAT:

1. All right, title and interest of defendant, LEIGHTON DEMING, with respect to the following property, is hereby forfeited to the United States of America;

ONE EAGLE-FEATHERED WAR BONNET

2. Any third party claims shall be litigated in connection with the United States v. ONE EAGLE-FEATHERED WAR BONNET, Civil Action No. 00-599.

Dated this day of , 2000.

BY THE COURT:

Note: (Signed order in Court's file)

JAMES R. MELINSON
Chief United States Magistrate Judge

3. Wherefore, the government requests that this Court enter an Order of Forfeiture, of the following property, pursuant to Title 16 U.S.C. § 706: *ONE EAGLE-FEATHERED WAR BONNET.*

Respectfully submitted,

MICHAEL R. STILES
United States Attorney



ROBERT GOLDMAN
Assistant United States Attorney

DATE: 2-16-00

002074

History of Artifacts
as provided by the defendant

002075

War Bonnet and Blanket

The head dress, or War Bonnet shown in the photos were the property of the famous Apache Chief Geronimo until his death a short time ago, a United States Prisoner of War, at the United States Army Camp at Fort Sill, Oklahoma.

Geronimo was known as the most blood thirsty Chief of the cruel Apaches and was chased for years by United States Army officers and Indian Scouts. He made a specialty of scalping women and at the time of his capture was said to have had over two hundred women scalps in his possession.

After his capture and confinement for life as a prisoner of war, he was allowed to make a trip to Washington to intercede in his own behalf with the President for release, but this trip failed to secure his release.

One time after that, only, was he allowed to go from the Fort Sill reservation and that was during the time that he wore the War Bonnet and Blanket shown in this picture.

It was in 1907, just after the old Indian Territory became a part of Oklahoma, and at Collinsville, Oklahoma, there was a great Pow Wow of Indians arranged to commemorate the passing of the Indian Territory into statehood.

Several tribes of Indians were gathered and as this was to be the last great gathering of Indians before their territory passed out of their hands, (in name only), to be swallowed up by merging into what is now the State of Oklahoma, the United States War Department, with the approval of the President, granted Geronimos' appeal that he be allowed to participate for the last time with his own people in commemorating the event.

The appeal being granted Geronimo, in charge of Jack Moore, a Cherokee half-breed and noted Indian Scout (known as Mustang Jack in the cow boy world, and as Chief Gray Eagle in the Indian world) went to Collinsville. Advance news of the old Indians coming was heralded far and wide and the trip was made amidst great crowds of people who gathered at every station along the way to see one of the greatest Indian warriors ever known. At Collinsville the Pow Wow lasted several days and was attended by thousands from all over the country and at the war dances in the evenings, Geronimo, who at that time, was very old and feeble, would appear for a few minutes and execute a few steps of his Apache war dance. All other dances would stop when he appeared for he was the greatest Chieftain of them all and had their greatest attention during the few minutes he appeared before the camp fires. When the Pow Wow ended Geronimo was returned to Fort Sill where he lived for about three years longer and then peacefully died. When the Pow Wow at Collinsville ended he gave to his guard and friend, Jack Moore, the United States Indian

1026

chaps and moccasins that he danced his last dance in, and it was from Jack Moore, who is an old time personal friend of the writers that they were secured, being a present, made solely on account of personal friendship existing between the two.

002077

Tulsa, Okla. July 25th. - 1916

A few days ago, Jack Moore, known to the Western country as "Mustang Jack" and to the Indians as "Chief Grey Eagle", came into the office on his way back from the Dewey Annual Roundup, to the Texas border, where he is doing duty with the Texas State Rangers.

We first met Jack in 1907 when we was on his way to the last Pow Wow of the Indian tribes around this country, at Collinsville, in what was then the old Territory, the Pow Wow being held to mark the passing of the old Territory into Statehood, with the then thriving western half of Oklahoma. At that time he was Government Scout in charge of the old Apache Chief Geronimo, who had been granted permission from Washington to attend the last celebration of the Indians. Since that time Moore has been active in scouting work for the Rangers his particular field being along the border when smugglers abound.

The view marked X gives a birds eye of the C2 Ranch headquarters, near the scene of the fight with Francisco Dominguez, who was killed on June 1st. by the Rangers. At the fight were Jack and his partner Fuller, also Bobby Carter and Glynn Beard. View marked XX shows the village of Alpine, Texas, 76 miles from the top of Twin Mountain, with the valley showing five thousand feet below.

Other views show Jack and his partners at various points on the border.

Jack was wearing a heavy belt taken from one of the Mexicans at the fight, having sent two of their hats to Major Billie (Pawnee Bill) some days ago.

In explaining the styles along the border, he gave a detail the way guns should be worn, his preference being for the forty five to so hang from the belt that when in towns like Tulsa, where coats are worn the gun should swing from the hips in a way that would produce a gentle undulating movement of the coat - disclosing just enough movement to show that there was something there, yet in such a way that when walking the grade of the movement would not be affected. His illustration of the crass way in which the Mexican wear their guns showed that the Mexican styles in gun wearing made a bulge on the hip that was displeasing to the eye also it was harder to get to in a draw, being slower, to get to and this slowness often time resulting fatally, to the slow man. As style is as important on the border, as in the cities, Jacks illustrations were enlightening to one who has not been in Texas.

002078

Brunswick, Georgia
April 17, 1939

This is a sworn statement as to the authenticity of the war bonnet, chaps, moccasins and blanket, owned and worn by the old Apache chief Geronimo, at his last pow wow in Collinsville, Indian Territory October 14-19, 1907, and my possession of same.

A prisoner of war at Fort Sill, he was granted permission by the United States War Department to be present and take part in the last great gathering of Indians in celebration of the passing of Indian Territory into the statehood of Oklahoma. He was in charge of a Cherokee half breed Scout known among the Indians as John Gray Eagle, among the cowboys as Mustang Jack, and among the white men as Jack Moore. Between the Scout and the old chief a great friendship existed, and after his last Great Stomp Dance in which he led a band of feathered and painted Apaches, Geronimo, a sad old man, gave to Jack Moore his war bonnet, chaps, moccasins and blanket. A friend of my husband's and mine, and a frequent visitor in our home, Jack Moore, with whom we had been present at Geronimo's last dance, with characteristic Indian gratitude, immediately made us a present of the war bonnet, chaps, moccasins and blanket.

Mary B. Deming
Mary B. Deming
Mrs. C. W. Deming

Signed in my presence at
Brunswick, Georgia, this
17th day of April, 1939

M. A. Deming

Notary Public, Glynn County, Georgia
My Commission Expires September 15, 1940



002079

TO THOMAS MARCIANO:

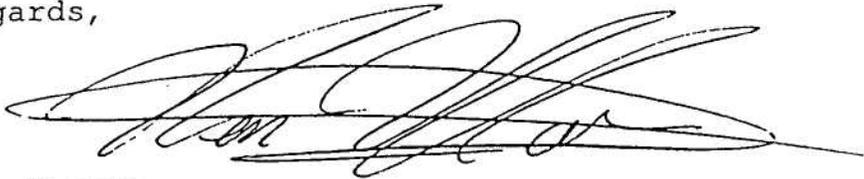
The Geronimo Indian Headdress owned by your client is a one of a kind artifact, along with the priceless original sketches and supporting documentation.

The Cherokee Indian Nation would be pleased to have such a priceless item in its museums.

As a spokesman for many of the Indian Associations, I have personally viewed the items and would value them a national treasure.

The ownership of this very valuable artifact is indeed an honor and rarity.

Regards,

A handwritten signature in black ink, appearing to read 'Ken Klaudt', written in a cursive style with several loops and flourishes.

Ken Klaudt
Indian Association

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EAGLE-FEATHERED
WAR BONNET,

Defendant.

Civil Action No. 00-CV-599

CLAIM TO PROPERTY

AND NOW APPEARS the Apache Tribe of the Mescalero Reservation intervening for itself as owner of the "eagle-feathered war bonnet," and makes claim to the "eagle-feathered war bonnet" as the same is arrested at the instance of the United States of America, the plaintiff, and the claimant avers, upon information and belief that it was at the time of the filing of the complaint herein, and still is, the true and bona fide owner of the "eagle-feathered war bonnet." and that no other person is the owner thereof.

WHEREFORE the Apache Tribe of the Mescalero Reservation prays to defend accordingly.

Apache Tribe of the Mescalero Reservation

By: Sara Misquez
Sara Misquez, President

James M. Burson

James M. Burson
Attorney for Claimant
Fettinger, Bloom & Quinlan, P.C.
P.O. Box 600
Alamogordo, NM 88311
505-437-6620

COPY

002081

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EAGLE-FEATHERED
WAR BONNET,
Defendant.

Civil Action No. 00-CV-599

ANSWER

The Claimant herein, the Apache Tribe of the Mescalero Reservation, by and through its attorneys of record, Fettinger, Bloom & Quinlan, P.C. (by James M. Burson) and its Pennsylvania associate counsel of record, Cynthia Boyer Blakeslee, as Intervenor on behalf of Defendant War Bonnet, respectfully presents to this court, the following in response to the Plaintiff's Complaint for Forfeiture:

1. Claimant admits the jurisdiction and venue alleged in Paragraph 1, 2, and 3 of the complaint.
2. Claimant admits, upon information and belief, the allegation in Paragraph 4 of the complaint that the United States Department of Justice, Federal Bureau of Investigation, is in possession of the subject property, one eagle-feathered war bonnet.
3. Claimant admits the allegations contained in Paragraphs 5 and 6 of the complaint.

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4. Claimant is without information or belief sufficient to enable it to answer the allegations contained in Paragraphs 7, 8, 9, 10, 11, and 12 of the complaint.
5. Claimant admits, upon information and belief, the allegation in Paragraph 13 that defendant war bonnet is composed of genuine eagle feathers. However, Claimant is without information or belief sufficient to enable it to answer as to the training and experience of U.S. Fish and Wildlife Agent Lucinda Schroeder.
6. Claimant admits, upon information and belief, the allegations contained in Paragraph 14 of the complaint contained in Paragraph 7 of the Affidavit of Special Agent Robert K. Wittman, attached as *Exhibit "A"* to the complaint, that the defendant war bonnet was in the possession of and worn by War Chief Geronimo of the Apache Tribe in 1907 at a Pow Wow Ceremonial in Collinsville, Oklahoma Indian Territory, and that War Chief Geronimo was held as a prisoner of war at Fort Sill in Oklahoma Indian Territory during 1907. However, Claimant is without information or belief sufficient to enable it to answer the balance of the allegations contained in the aforesaid Affidavit or Paragraph 14.
7. Claimant is without information or belief sufficient to enable it to answer the allegations contained in Paragraphs 15 and 16 of the complaint.

FURTHERMORE, Claimant declares for its answer the following:

8. The Claimant, Apache Tribe of the Mescalero Reservation, an Indian Tribe organized under the Indian Reorganization Act of June 18, 1934 (48

Stat. 984) and under its Revised Constitution, has the power and authority to act for said tribe.

9. The Claimant asserts its ownership or possessory interest, or right of repatriation, of the eagle-feathered war bonnet as an object of cultural patrimony pursuant to the Native American Graves Protection and Repatriation Act, Title 25, United States Code, Sections 3001-3013 (NAGPRA).
10. This court has jurisdiction over the action under Title 25, United States Code, Section 3013.
11. Section 3005 of Title 25, United States Code NAGPRA requires that federal agencies to expeditiously return objects of cultural patrimony presently in their possession upon request of the tribe who can show ownership or control.
12. Claimant declares that Geronimo was a legendary and undisputed War Chief of the Apache Tribe. The several bands of the Apache Tribe bestowed this title of honor and respect upon him in 1859 and continuously recognized this distinction for fifty years until Geronimo's death. The United States recognized Geronimo's leadership position throughout the 1880's, and specifically, by negotiating peace treaties with him in 1886. Moreover, other Indian tribes recognized Geronimo's position as an honored leader of the Apache nation of tribes throughout the last half of the 19th Century until his death in 1909.

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13. Claimant declares that Geronimo, even though held in captivity as a prisoner of war of the United States, was still recognized as an honored leader of the Apache Tribe by the United States government and people of the United States by being allowed to travel to numerous national ceremonies. For instance, Geronimo was personally invited by President Theodore Roosevelt to attend his own 1905 Presidential Inauguration in Washington, D.C. While there, Geronimo held personal audience with President Roosevelt to plead for the release of the nearly 400 of his people, then held in captivity at Fort Sill, Oklahoma Indian Territory, to return to their homeland in New Mexico and Arizona.
14. Claimant declares that it has been, and still is, the historically-based custom of the Apache Tribe that its leaders wear eagle feathers as emblems of wisdom, justice, and power. Indeed, the custom of utilizing eagle feathers as emblems such leadership characteristics had been mirrored and so recognized in many other Indian cultures in 1907. Furthermore, the United States government and its people has held the eagle in high regard as evidenced by utilizing the eagle as an emblem of wisdom, justice, and power and as a symbol of this great country on coin and official seals. The United States continues to hold high regard for the eagle as an important symbol by protecting the eagle through the Bald Eagle Protection Act and associated conservation efforts.

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15. Claimant declares that it has been, and remains, the historically-based custom of the Apache Tribe that sacred emblems and symbols of leadership belong to the tribe, not the individual.
16. Claimant declares that Geronimo was invited to attend a special multi-tribal Indian Ceremonial Pow-Wow held in Collinsville, Oklahoma Territory in October 1907. Geronimo was invited to attend precisely because he was a famous and respected leader of the Apache Tribe.
17. Claimant asserts that Geronimo attended the Ceremonial Pow-Wow in Collinsville only after obtaining permission from the United States government and that United States military guard from Fort Sill accompanied Geronimo as a condition of his attendance.
18. Claimant avers that it was not unusual for Geronimo to receive honorary and emblematic clothing to wear in recognition of his office as a leader for the Apache Tribe while attending ceremonial functions. Apaches believe that once worn by Geronimo, his power as a great War Chief would imbue these honorary adornments and emblems of his tribal office. Therefore, any gifts of honorary and emblematic clothing would accrue to the Apache Tribe by custom as an object of cultural patrimony and would not have been capable of being given or sold by any individual.
19. In contrast, Claimant states that Geronimo would often be paid money to cover his expenses and to compensate him personally for attending any ceremonies. In addition, Geronimo routinely sold his autographed photographs to other ceremonial attendees and crowds that would flock

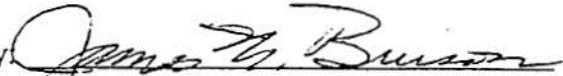
around him during transport to any functions for 25 cents to 50 cents each. Moreover, Geronimo often had to share the compensation received for selling his autograph with his guards. Hence, it is, and would have been, the custom of the Apache Tribe that this kind of compensation would have belonged to Geronimo personally to dispose of as he desired

20. Claimant asserts that Geronimo's condition of captivity as a prisoner of war under military guard distorts any alleged freedom of Geronimo to make a gift of the Defendant War Bonnet to one of his guards. Furthermore, at the time of this Ceremonial in 1907, Geronimo and his people had been held captive as prisoners of war for nineteen years in three different locations. Therefore, Geronimo's long separation from the larger body of Apaches then living in New Mexico and Arizona operated as a form of cultural genocide, thereby making any gift or sale of the honorary Defendant War Bonnet to his guard ineffective and void as a product of duress, misrepresentation, or fraud as well as a violation of tribal custom.

WHEREFORE, Claimant prays, for the reasons set forth above, the Court:

1. Find the Defendant Eagle-Feathered War Bonnet an object of cultural patrimony of the Apache Tribe.
2. Find any other claimant's right to the Defendant Eagle-Feathered War Bonnet inferior to that of Claimant herein.
3. Adjudge and decree the release of the Defendant Eagle-Feathered War Bonnet to be repatriated to the Claimant herein as provided by law.

Respectfully Submitted,

By: 
James M. Burson, Attorney for Claimant
FETTINGER, BLOOM & QUINLAN, P.C.
P.O. Box 600
Alamogordo, NM 88311
505-437-6620

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA)
 Plaintiff)
)
 v.)
)
ONE EAGLE-FEATHERED)
WAR BONNET)
 Defendant)

Civil Action No. 00-CV-599

VERIFIED CLAIM OF COMANCHE TRIBE OF OKLAHOMA

Claimant, Comanche Tribe of Oklahoma ("Comanche Tribe"), through undersigned counsel, files this verified claim praying for the release and return of the Comanche Eagle-Feathered War Bonnet ("War Bonnet"). As grounds for this claim claimant states the following:

1. The Comanche Tribe is the rightful owner of the War Bonnet, which was seized by the United States of America. The War Bonnet is an object of cultural patrimony to the Tribe and meets the definition of cultural patrimony which is defined in 25 U.S.C. § 3001(3) as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group."

2. Repatriation and return of the War Bonnet is being sought pursuant to 25 U.S.C. §§ 3004 and 3005, which specifically address repatriation of objects in possession or control of a federal agency (the FBI is a federal agency under 25 U.S.C. § 3005 which states that federal agency means "any department, agency, or instrumentality of the United States"). 25 U.S.C. § 3005(a) entitled "Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums" provides: "If pursuant to § 3004 of this title, the cultural affiliation with a particular Indian tribe... is shown with respect to ... objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe ... and pursuant to subsections (b) (c) and (e) of this section, shall expeditiously return such objects." 25 U.S.C. § 3005(a)(2) (1990).

3. The Comanche Tribe thereby demands return of the War Bonnet and claims the right to defend this action.

VERIFICATION

I, Craig Jacobson, do hereby verify that I have read the foregoing Claim and declare under penalty of perjury that the allegations therein are true and correct.

Executed on this 19th day of April, 2000.

/s/ William R. Norman

William R. Norman *CDG*
Hobbs, Straus, Dean & Walker LLP
Executive Suites Building
3750 West Main
Norman, OK 73072
Attorney for Comanche Tribe

Craig A. Jacobson

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851 SW Sixth Ave.
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Portland, OR 97204
Attorney for Comanche Tribe

002091

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
 Plaintiff)
)
 v.)
)
ONE EAGLE-FEATHERED)
WAR BONNET)
Defendant)

Civil Action No. 00-CV-599

ANSWER TO COMPLAINT FOR FORFEITURE IN REM

Claimant, Comanche Tribe of Oklahoma ("Comanche Tribe"), through undersigned counsel and contemporaneous with its Claim, answers the Complaint for Forfeiture In Rem of the Comanche Eagle-Feathered War Bonnet ("War Bonnet") as follows:

1. Claimant does not dispute the allegations of jurisdiction and venue in paragraphs one and two.
2. Claimant does not dispute the legal contentions in paragraph two that the United States Government has the capacity to seize this property under 16 U.S.C. § 668, et seq.
3. Claimant does dispute whether the forfeiture procedures utilized under the aforementioned authorities are the appropriate procedures to be utilized by the United States with respect to disposition of this War Bonnet. The War Bonnet is an object of cultural patrimony to the Tribe and meets the definition of "cultural patrimony" under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001, et seq. Affidavit of Dr. Nahwooks, at 3-4. Cultural patrimony is defined at 25 U.S.C. § 3001(3)(D) as

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

4. Because the War Bonnet falls under NAGPRA, the repatriation provisions of NAGPRA apply which specifically address repatriation of objects in possession or control of a federal agency (the FBI is a federal agency under 25 U.S.C. § 3005 which states that federal agency means "any department, agency, or instrumentality of the United States"). This court is an instrumentality of the United States. As such, the determination of the final disposition of this War Bonnet can only properly be made in adherence to the provisions of NAGPRA.

5. Repatriation and return of the War Bonnet is being sought pursuant to 25 U.S.C. §§ 3004 and 3005, which specifically address repatriation of objects in possession or control of a federal agency (the FBI is a federal agency under 25 U.S.C. § 3005 which states that federal agency means "any department, agency, or instrumentality of the United States"). 25 U.S.C. § 3005(a) entitled "Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums" provides: "If pursuant to § 3004 of this title, the cultural affiliation with a particular Indian tribe is ...shown with respect to...objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe...and pursuant to subsections (b) (c) and (e) of this section, shall expeditiously return such objects." 25 U.S.C. § 3005(a)(2) (1990).

6. The Comanche Tribe requests the return of the War Bonnet currently possessed by the FBI based on its cultural affiliation with the War Bonnet and pursuant to sections 3004 and 3005 of NAGPRA. As discussed more fully in the attached Affidavit of Dr. Nahwooks, the War Bonnet was of such central significance to the religion and culture of the Comanche Tribe, an individual on whom it was bestowed had very limited rights with respect to its use, and was punished for any conduct to the contrary. Affidavit of Dr. Nahwooks, at 3-4. As such, any conveyance of a Comanche War Bonnet by a Comanche tribal member to the member of another tribe would be considered improper and was, therefore, invalid: "The effectiveness of a gift . . . depends upon whether the donor had some legal or equitable interest to give. If the donor lacks title to the property which is the subject of the gift, the gift is ineffective because the title of the donee cannot rise higher than the title of the donor." 38 Am.Jur. Gifts §13, *citing Smith v. Barrick*, 151 Ohio St. 201, 39 Ohio Op. 31, 85 N.E.2d 101 (1949) & *Spinks v. E.E. Forbes & Sons Piano Co.*, 247 Ala. 20, 22 So. 2d 334 (1945). The Comanche Tribe is entitled to return of the War Bonnet since it was never validly conveyed out of tribal ownership, notwithstanding any claim made by another tribe or tribal organization. It is our firm understanding through interviews with Comanche tribal elders, Chiricahua Apaches (Geronimo's Tribe), as well as a variety of Indian museum personnel and Indian history authors, that the seized War Bonnet is not of traditional Apache origin and would not have been worn or used by an Apache, such as Geronimo or another member of his tribe.

7. As noted in the aforementioned section, the eagle feather headdress continues to have ongoing historical, cultural and traditional importance. Furthermore the eagle feather headdress is considered inalienable by the tribe to an individual outside the tribe due to the object's importance to the Comanche tribal culture. Affidavit of Dr. Nahwooks, at 3-4.

8. Not only does NAGPRA compel the return of the eagle feather headdress, but there is NAGPRA case law supporting the return of the headdress as cultural patrimony as well. In Pueblo Of San Ildefonso v. Ridlon, 103 F.3d 936, (1996), the U.S. Court of Appeals for the Tenth Circuit held that a piece of pottery was an item of cultural patrimony that should be repatriated under 25 U.S.C. §§ 3004 and 3005. The court further noted that "where statutory language is clear and unambiguous, that language is controlling" Ridlon at 938.

9. Both the United States Attorney's office and the FBI have an obligation to adhere to the Department of Justice (DOJ) Policy on Indian Sovereignty and Government-To-Government Relations With Indian Tribes, signed by Attorney General Janet Reno on June 1, 1995. That policy mandates that:

Decisions regarding the activities of the Department that have the potential to substantially interfere with the exercise of Indian religions will be guided by the First Amendment of the United States Constitution, as well as by statutes which protect the exercise of religion such as the...Native American Graves Protection and Repatriation Act...

The Department also recognizes the significant federal interest in aiding tribes in the preservation of their tribal customs and traditions. In performing its duties in Indian country, the Department will respect and seek to preserve tribal cultures.

This Policy, by its very terms, requires that the government's disposition of the Comanche War Bonnet adhere to the strictures of NAGPRA. Any decision by the Court that permanently disposes of the War Bonnet without consideration of the applicability of NAGPRA, and the impact on the exercise of religion for the Comanche Tribe, will contradict the Congressional intent of NAGPRA, and the Policy that guides DOJ's relationship with tribal governments.

First Defense

10. The complaint fails to state a claim upon which relief may be granted.

Second Defense

11. The Comanche Tribe received inadequate notice of the nature of the subject of this dispute, the War Bonnet, thereby limiting its capacity to submit this claim until April 19, 2000. *U.S. v. \$38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) (allowing for an exception in meeting deadline where the government's service of process was defective). The Tribe received notice of the forfeiture on March 10, 2000, but the actual notice was not received by the Chairman until March 16, 2000. This notice did not include the instruction sheet that lays out the requirements for filing a claim in a forfeiture action, and also did not include sufficient information to identify the tribal origin of the War Bonnet. Because of the historic nature of the War Bonnet, it was necessary for a tribal elder to view a picture of the War Bonnet to determine whether it was of Comanche origin prior to filing a good faith claim for its return.

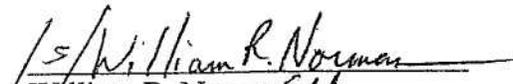
The Tribe attempted to identify the origin of the War Bonnet, but was unable to without more than vague news stories and black and white photocopies of photographs of the War Bonnet. In order to be certain that the headdress was in fact of Comanche origin so that a good faith claim could be made, the Tribe requested photographs from the United States Attorney on April 6, 2000. The Tribe was certain that the War Bonnet was not a traditional Apache "skull cap," but these photographs were not received until April 11, 2000. After verifying the tribal origin of the War Bonnet through review by tribal elders and experts, the Tribe prepared its claim for submittal.

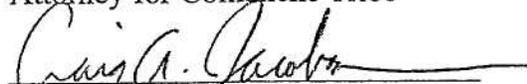
12. To the extent that the claim of the Comanche Tribe is time-barred, the United States has a trust responsibility to the Comanche Tribe to petition this Court to forfeit the War Bonnet to the United States so that it can be returned properly under the provisions of NAGPRA. Joint

Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)(government ordered to file suit on tribe's behalf due to trust relationship). Given the DOJ's Native American Policy statement, the DOJ has a responsibility to pursue acquisition of the War Bonnet so that it can then dispose of it in accordance with NAGPRA, thereby assessing all Indian claims to it in accordance with NAGPRA.

WHEREFORE, claimant prays:

1. That this action be dismissed for lack of subject matter jurisdiction;
2. That the subject War Bonnet be ordered released to claimant immediately;
3. That claimant be awarded attorney's fees; and
4. For such other and further relief as may be deemed just and equitable.


William R. Norman
Hobbs, Straus, Dean & Walker LLP
Executive Suites Building
3750 West Main
Norman, OK 73072
Attorney for Comanche Tribe


Craig A. Jacobson
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851 SW Sixth Ave.
Suite 1650
Portland, OR 97204
Attorney for Comanche Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)	
Plaintiff)	
)	
v.)	Civil Action No. 00-CV-599
ONE EAGLE-FEATHERED)	
WAR BONNET)	
Defendant)	

AFFIDAVIT OF REAVES F. NAHWOOKS

Reaves F. Nahwooks hereby states and declares as follows:

1. I am an enrolled member of the Comanche Indian Tribe of Oklahoma, a federally-recognized Indian tribe, and reside at P.O. Box 477, Cache, Oklahoma 73527. I received Bachelor and Master of Education degrees from the University of Oklahoma, Norman, Oklahoma, in 1955 and 1960 respectively. I also received a Master of Divinity and Doctor of Ministry from the Colgate Rochester Divinity School, Rochester, New York, in 1989 and 1991, respectively. I served honorably in the United States Army from 1950 to 1952, with tours of duty in Korea and Japan. I am retired from thirty-four years of Federal Government employment with the former Department of Health, Education, and Welfare, the Department of Housing and Urban Development, and the Department of the Interior, Bureau of Indian Affairs.

2. In addition to my Federal Government service, I have served and been employed in a number of elected, academic, and religious positions, including namely: the Comanche Business Committee, the legislative arm of the Tribe, on two occasions (1959 and 1981);

the National Congress of American Indians (Housing Committee 1970, Resolutions Committee 1971); University of New Mexico, Professor of Public Administration; Wesleyan University Lincoln, Nebraska, Professor of American Indian History, Pete Coffey Mennonite Brethren Church, Cache, OK, Pastor; Lincoln an Omaha Indian Community Churches, Nebraska, Pastor; Oklahoma American Indian Baptist Association, Chairperson of Christian Education and Leadership Development; American Indian Ministries in Reform Churches in America, Interim Director.

3. I was born in 1930 and was raised by my Comanche grandparents in the language, customs, and traditions of the Comanche people. Throughout my childhood, I spent a substantial amount of time among the elders of the Comanche Tribe with whom my grandparents were in continual contact. Thus, the knowledge and information I gained from my grandparents regarding my heritage was continuously reinforced and supplemented with the knowledge and guidance of other Comanche elders.

4. During a considerable period of my employment with the Federal Government, I resided in Washington, D.C. and my wife worked for the Smithsonian Institute. This gave me more and more exposure to the collection and documentation of historical artifacts and led me to engage in an ongoing study to build on my personal knowledge of Comanche culture.

5. As a result of my personal heritage and upbringing, my study related to my tribe's culture and ways, and a lifetime involvement with Indian communities across the United

States, I have had many occasions to observe, study, and identify the traditional headdresses of a number of Indian tribes, including the materials used and method of construction for a variety of Northern and Southern Plains tribes. I am particularly knowledgeable regarding traditional Comanche headdresses. In fact, I have been asked previously to assist in the identification of headdresses in the possession of the American Indian Museum in New York for the purpose of determining whether or not the headdresses were of Comanche origin.

7. The traditional Comanche eagle-feathered headdress possesses tremendous religious and cultural significance for the Comanche Tribe and its people. The eagle is the most important winged creature to the Tribe as it soars highest among the heavens of any other bird and therefore, is believed to possess great power. As a result, there are strict rules among the Comanche people regarding the reverence to be paid to eagle feathers, as well as the proper manner and method for possessing and handling them. The mistreatment of an eagle feather dilutes its power and the power of the one who possesses it.

8. Historically, the spiritual leaders of the Comanche Tribe, its medicine men, collectively determined the worthiness of an individual to receive an eagle-feathered headdress because of the great spiritual power that it possesses. To be deemed worthy, an individual must have accomplished one or several heroic feats of sacrifice for which the whole Tribe, not just the individual, benefited. The power of the headdress when properly cared for, and the individual's faith therein would be transformed into greater spiritual

strength and will for the individual to confront important issues and difficult circumstances on behalf of the Tribe. Because of its religious and cultural significance to the individual and the Tribe, it was taboo for a headdress to be permanently given to a member of another tribe whom, of course, would not have the knowledge or share in the belief to properly care for it. Spiritual leaders and other tribal members attempted to constrain improper use of the headdress through such cultural means against the individual as public disgrace and ridicule, as well as a reduction in the individual's leadership role for his abuse of power. Accordingly, it is my opinion that a traditional eagle-feathered headdress of Comanche origin is an item of "cultural patrimony" as defined in the Native American Graves Protection and Repatriation Act.

9. On April 12, 2000, Comanche Tribal Attorney William Norman asked me to review a color photograph of a headdress which he stated was in the possession of a United States Attorney. Mr. Norman requested that I view the photograph carefully and attempt to determine whether or not the headdress was of Comanche origin.

10. Upon careful examination of the photograph, it is my conclusive opinion for a number of reasons that the headdress in the photograph is of Comanche origin. First, the overall simplicity and natural state in which the headdress has been constructed reflects the style and construction of a Comanche headdress. The eagle feathers do not appear to be trimmed, no horse hair has been added to the tips of the feathers, and the only foreign or unnatural elements to the headdress are the beadwork and cloth. The wrapping of the feathers and cloth of the trailer are equally simplistic, avoiding the use of other colors,

materials, or designs. Second, the beadwork around the head band is of geometric-abstract design which, in my opinion, is clearly Comanche-style beadwork. Third, the predominance of red in the color scheme throughout the wrapping, beadwork, and trailer, is a traditional Comanche headdress trait. Finally, there appear to be small "pin" feathers at the at the point where the cloth wrapping ends and the plume of the front feathers begin. The use of such "pin" feathers in the design would be yet another basis for concluding that this is a headdress of Comanche origin.

11. Upon the basis of the examination of the photo, it is my opinion to the level of certainty that the headdress therein is of Comanche origin and, accordingly, is "cultural patrimony" of the Comanche Tribe.

I hereby certify that the foregoing declarations are true and correct to the best of my knowledge, information, belief, subject to penalty of perjury.

Reaves F. Nahwooks
Reaves F. Nahwooks

4-15-2000
DATE

State of: Oklahoma
County of: Comanche

Signed and sworn (or affirmed) before me this 15 day of April, 2000.

Larrie Ann Carrawe
Notary Public signature

[affix official seal]