Extension of Express Abandonment Standard for Sovereign Shipwrecks in Sea Hunt, Inc. et al., Raises Troublesome Issues Regarding Protection of Underwater Cultural Property

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Full fathom five thy father lies;
Of his bones are coral made;
Those are pearls that were his eyes:
Nothing of him that doth fade,
But doth suffer a sea-change
Into something rich and strange.

Shakespeare, *The Tempest*

The Fourth Circuit recently ruled in *Sea Hunt, Inc. et al. v. The Unidentified Shipwrecked Vessel or Vessels*[1] that the Kingdom of Spain did not abandon its eighteenth-century shipwrecks *La Galga* and *Juno.* Applying its own precedent from *Columbus-America Discovery Group v. Atlantic Mutual Ins.*,[2] the Fourth Circuit found that where an owner appears in court and makes an assertion of ownership or possession to a shipwreck, abandonment will not be inferred from circumstantial evidence. Instead, abandonment must be proven by clear and convincing evidence of explicit renunciation of ownership.

Applying its express abandonment standard, the Fourth Circuit reversed the district court and held that the terms of the 1763 Definitive Treaty of Peace Between France, Great Britain and Spain did not constitute express abandonment by the Kingdom of Spain of *La Galga.* The Fourth Circuit affirmed the district court's ruling that *Juno* was not abandoned and added additional and significant grounds for its express abandonment standard under the 1902 Treaty of Friendship and

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General Relations between Spain and the United States and under principles of international law and comity. Included in the court's reasoning was the importance of protecting U.S. warships shipwrecked in foreign waters and the need for reciprocity on this topic with foreign nations. As such, the Fourth Circuit concluded that an implied abandonment standard would be least defensible in cases involving a sovereign's claim to its shipwreck. The court also rejected Sea Hunt, Inc.'s request for a salvage award in connection with its discovery of the vessels and recovery of various artifacts.

Resolution of disputes over ownership to historical shipwrecks often turns, as it did in this case, brought under the Abandoned Shipwreck Act[3] (ASA), on the meaning of the term "abandoned" under traditional admiralty law. The nuances of the definition of "abandonment" have been developed in fits and starts by the courts, with little clarity or uniformity emerging to guide the nations whose vessels have been lost at sea, the heirs of those in their sea graves who went down with these ships, insurers who paid claims on these wrecks and now own them, and treasure salvors.

The Fourth Circuit's rejection of an implied abandonment standard in cases where owners assert their claims of ownership has caused concern for some, including the Sixth Circuit, which remarked in *Fairport International Exploration, Inc. v. Shipwrecked Vessel known as The Captain Lawrence* that application of the Fourth Circuit's standard "would render the ASA a virtual nullity,"[4] since under this standard a finding of abandonment will be rare. A finding of abandonment is a precondition for invocation of the ASA, which vests title in qualified shipwrecks in the states in or on whose submerged lands these shipwrecks are located.

"It is estimated that the total number of shipwrecks in State waters is more than 50,000, of which some 5–10 percent may be of historical significance."[5] The Fourth Circuit's decision in *Sea Hunt* raises the issue of which standard—an express or an implied abandonment standard—best protects irreplaceable cultural property warranting archaeological standards with respect to discovery, retrieval, conservation, and preservation. Many would agree that an express abandonment standard will result in fewer shipwrecks being governed by the ASA, and thus owned, managed, and protected by the states. Who, states (under the ASA) or owners of shipwrecks, is more likely to responsibly manage and protect historical shipwrecks, when warranted?

Under the Fourth Circuit's ruling in *Sea Hunt*, if a party invests time, effort, and money, discovers the location of a long-lost wreck, and files a claim for salvage rights under the ASA, the original owner (or a successor) may then come into court, assert a claim of ownership or possession, and prevail, as long as the owner has not expressly abandoned the wreck—regardless of how much time has passed since the vessel sank and of whether the owner knew of the location of the wreck or reasonably could have ascertained its location.

The *Sea Hunt* case raises several unsettling issues. The Fourth Circuit remarked that sovereign warships can never be abandoned except by explicit renunciation. What constitutes a sovereign warship? Will historic vessels affiliated with foreign nations engaged in commercial activities be held to the express abandonment standard? Will shipwrecked sovereign vessels that once carried cargo that had been "unlawfully captured"[6] (as that term is used in the ASA's legislative history) be subject to sovereign immunity requiring express abandonment, and what does "unlawfully captured" encompass? Will silver coins, which the Kingdom of Spain mined and minted in South America, using the labor of African and Indian slaves centuries ago, be considered property that was "unlawfully captured"? Should a statute of limitations be applied to cut off claims of title or possession by owners of shipwrecks who fail to exercise reasonable due diligence in timely discovery of their shipwrecks, in light of the existence of technology to locate virtually anything on the seabed?

Peter Hess, one of Sea Hunt's legal counsel, says, "Sea Hunt spent over a million dollars on a state-of-the-art archaeological investigation, to be denied both the right to complete the work as well as any compensation for its extraordinary discoveries. The message being sent to divers and underwater explorers is clear: be secretive about your finds, take whatever valuable artifacts you can, and do so as quickly as possible. I am gravely concerned that the *Sea Hunt* decision will do precisely the opposite of what it might have intended, resulting in significant harm to historical shipwrecks rather than their protection in situ."

But James Goold, legal counsel for the Kingdom of Spain in the *Sea Hunt* dispute, remarked, "I'm always amazed at the claim that the decision is wrong because it will lead to clandestine removal and sale of artifacts. To me that's like saying that burglary shouldn't be illegal, because prohibiting it makes burglars operate at night."

1 *LA GALGA* AND *JUNO*

La Galga de Andalucia (*La Galga*), the "Greyhound," was built in 1732 by order of the King of Spain. A fifty-gun frigate, *La Galga* was commissioned into the Spanish Navy the year it was built and served initially in the Mediterranean Fleet. In 1736 she "sailed for Buenos Aires to join squadrons patrolling the Atlantic and Caribbean and for the next fourteen years *La Galga* served as a convoy escort, traveling mainly between Veracruz, Havana, and Spain's principal home naval base at Cadiz."[7]

La Galga made its last voyage on August 18, 1750, under the command of Daniel Houny, an Irishman in the service of Spain.[8] The frigate left Havana and "was charged with escorting a convoy of merchant ships across the Atlantic Ocean to

Cádiz, and carried on board the 2nd Company of the 6th Battalion of Spanish Marines."[9] After passing through the Bahamas Channel, near Bermuda, the convoy sailed into a hurricane, which separated the ships and forced them westward toward Virginia.

The storm lasted seven days, during which *La Galga* lost three masts and her rudder. The cannons on board were jettisoned in an effort to lighten the vessel's load. But on or about August 25, 1750, *La Galga* struck a shoal nearly a quarter mile offshore Assateague Island, near the Virginia coast.[10] *La Galga* carried "Spanish Royal property, approximately 50 military prisoners, including British subjects who had been arrested for various infractions in the Caribbean and were being transported to Spain for Trial."[11] Fortunately, when *La Galga* sank, all but four on board were able to reach land.

After *La Galga* sank and the storm died down, the upper deck of *La Galga* remained above water and accessible to local inhabitants, who apparently looted the items on board as well as the items that had washed ashore. For the next month Captain Huony attempted unsuccessfully to protect the ship and its contents from looters.[12] In November 1750 Captain Houny was assisted by Governor Samuel Ogle of Maryland in protecting what was left of *La Galga*, but before any salvage efforts were made, a second storm broke up what was left of the ship, ending the salvage operations.[13] For the next 250 years *La Galga* lay beneath the sea undisturbed, until Sea Hunt found her.

Juno, a thirty-four-gun frigate, was built in Spain in 1789 by order of the king. She entered the service of the Spanish navy in 1790 and sailed with a squadron of ships across the Atlantic to Cartagena, where she served Spain in the Atlantic and Caribbean for the next decade. On January 15, 1802, *Juno* departed Veracruz for Cádiz. A storm forced the vessel to San Juan for repair, where the ship remained for seven months, during which time she received new masts and major repairs. On October 1, 1802, *Juno* departed San Juan for Cádiz and was accompanied by another frigate, the *Anfiriza*. *Juno* was to transport the Third Battalion of the Regiment of Africa, along with the soldiers' families and several other civilian officials, back to Spain.[14]

On October 19, 1802, *Juno* was caught in a storm, separating it from *Anfiriza*. The storm continued, and after three days *Juno* threw her cannons overboard to lighten the ship, as she was taking on water. On October 25, 1802, an American schooner, *La Favorita*, found *Juno*, and the two ships sailed westward together in an effort to reach an American port. Because *Juno* continued to take on water, on October 27, 1802, her captain ordered the passengers and crew to transfer to *La Favorita*. But only seven people were able to make the transfer before the storm started to rage, forcing the two ships apart. By the morning of October 28, 1802, *Juno* had sunk, along with 432 sailors, soldiers, and civilians.[15]

When Spain learned of the disappearance of *Juno*, it initiated an investigation,

FIGURE 1. BEN BENSON BELIEVES THIS BELL, RECOVERED OFF THE COAST OF ASSATEAGUE ISLAND, MAY HAVE COME FROM THE WRECK OF THE *JUNO*. (STEVE EARLEY, *VIRGINIAN PILOT*)

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but neither the ship's location nor any of its survivors was found by Spain.[16] When *Juno* sank,[17] she was carrying substantial amounts of silver coinage (approximately 700,000 coins) and bullion.[18] *Juno* may have also been carrying gold. According to Sea Hunt, "Conservatively valued today, that amount of specie would be worth $83 million. . . . [This] figure is net, after expenses of sale (including auctioneer's fees). The gross value of the 700,000 coins would be $119 million."[19]

Sea Hunt, Inc., a maritime salvage company, obtained permits from the Virginia Marine Resources Commission (VMRC) to conduct salvage operations and to recover historical artifacts from two shipwrecks believed to be *La Galga* and *Juno*. Sea Hunt has spent approximately one million dollars in conducting remote sensing, survey, diving, and identification operations in its efforts to locate what remains of *La Galga* and *Juno*.[20]

2 SEA HUNT FILES *IN REM* ACTION IN DISTRICT COURT AGAINST *LA GALGA* AND *JUNO*

On March 11, 1998, Sea Hunt filed an *in rem* action in district court against the two shipwrecks *La Galga* and *Juno* alleging five counts, as follows: (1) pursuant to the Abandoned Shipwreck Act, the Commonwealth of Virginia is the rightful owner of the wrecks and Sea Hunt is entitled to the rights granted to it by the Virginia Marine Resources Commission; (2) Sea Hunt is entitled to a liberal salvage award for voluntarily recovering artifacts in marine peril; (3) Sea Hunt is entitled to an injunction prohibiting other salvors from attempting to recover artifacts from *La Galga* and *Juno*; (4) Sea Hunt is entitled to a declaratory judgment that Spain may no longer exercise sovereign prerogative over the shipwrecks believed to be *La Galga* and *Juno*; and (5) Sea Hunt is entitled to a declaratory judgment stating that no government other than the Commonwealth of Virginia has jurisdiction to regulate salvage operations over the two shipwrecks.[21]

The next day the district court issued an order directing that a warrant be issued for the arrest of *La Galga* and *Juno* and their artifacts and granting exclusive rights of salvage to Sea Hunt until further notice of the court. The district court also ordered Sea Hunt to publish a general notice of its claim and to send specific notice of the action to the United States and Spain.[22]

The United States filed a motion to intervene and a claim on behalf of Spain on March 18, 1998, alleging that Spain owned the wrecks. The United States intervened pursuant to its alleged obligations under the 1902 Treaty of Friendship and General Relations Between the United States of America and Spain. In addition, the United States filed an answer asserting its own interests in exerting regulatory authority over *La Galga* and *Juno*.[23] In May 1998 the Commonwealth of Virginia asserted its ownership of the shipwrecks under the Abandoned Shipwreck

Act and filed its claim to the vessels and an answer.[24] Virginia also asserted that its rights were being exercised through the permits issued to Sea Hunt by the VMRC. Sea Hunt answered Virginia's complaint on June 15, 1998, admitting Virginia's ownership of *La Galga* and *Juno*.[25]

On August 21, 1998, the United States filed a motion to modify the preliminary injunction of March 12, 1998, in order to allow the National Park Service to regulate the salvage operations off Assateague Island National Seashore. On the same day, Sea Hunt filed a motion to strike and dismiss the United States' motion to intervene on its own behalf, a motion in opposition to the United States' motion to intervene on behalf of Spain, and a motion for partial judgment on the pleadings dismissing Spain's claim to the wrecks.[26]

The district court granted Sea Hunt's motion to strike and dismiss the United States' motion to intervene on its own behalf on September 23, 1998[27] and two days later the court denied the United States' motion to intervene on behalf of Spain[28] holding that the United States did not have the authority to act as counsel to represent Spain's interests in this action. The court granted Spain ninety days to obtain counsel and make an appearance on its own behalf, which Spain promptly did[29] on December 23, 1998, with a motion to intervene, a verified claim, and an answer. In addition, Spain filed a motion for summary judgment, a brief in opposition to Sea Hunt's motion for partial judgment on the pleadings.[30] On the same day the United States filed a motion for authorization to file a statement of interest and an amicus brief, which was granted.

2.1 THE ABANDONED SHIPWRECK ACT

In 1988 Congress enacted the Abandoned Shipwreck Act (ASA),[31] under which title to qualified shipwrecks located in or on a state's submerged lands becomes the property of the state. The ASA was enacted, in part, out of concern that salvors were operating under unacceptable archaeological standards, causing damage to valuable underwater artifacts and their historical context, as well as causing damage to the marine environment. Granting title to the states, it was believed, would create an incentive for states to protect and conserve underwater cultural property.

Under section 2105(a) of the Abandoned Shipwreck Act the United States asserts title to three classes of shipwrecks:

(1) abandoned shipwrecks that are embedded in the submerged lands of a State;
(2) abandoned shipwrecks that are embedded in coralline formations protected by a State on its submerged lands; or
(3) abandoned shipwrecks that are not embedded, but are located on the submerged lands of a State *and* are included in or determined to be eligible for inclusion in the National Register of Historic Places (National Register).[32]

Pursuant to section 2105(c), once the United States takes title to qualified wrecks, the United States then transfers title in and to these shipwrecks to the States in or on whose submerged lands the shipwreck is located.[33] Therefore, the ASA divests the federal courts of their exclusive admiralty *in rem* jurisdiction over shipwrecks that fall within the criteria set forth by the ASA.[34] Shipwrecks that do not fall within the three classes of wrecks covered by section 2105(a) remain subject to the traditional principles of admiralty law, and the federal courts retain exclusive jurisdiction to apply the laws of admiralty to these wrecks.[35]

Although the term "abandoned" is not specifically defined in the ASA, the advisory Abandoned Shipwreck Act Guidelines state, in part, that

> *Abandoned* shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 409), an owner shows intent to give up title.[36]

The law of salvage and the law of finds do not apply to those shipwrecks governed by the ASA.[37] This is so because "admiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. Abandoned shipwrecks covered by this Act are not considered . . . to be in marine peril, necessitating their recovery by salvage companies."[38]

2.2 THE APRIL 27, 1999, DISTRICT COURT DECISION: THE KINGDOM OF SPAIN HELD TO HAVE ABANDONED *LA GALGA*, BUT NOT *JUNO*

Ruling on Sea Hunt's motion for partial judgment on the pleadings and the Kingdom of Spain's motion for summary judgment, on April 27, 1999, the district court ruled as a matter of law that Spain had not abandoned, and therefore retains ownership over, the shipwreck believed to be *Juno*. The district court also held that Spain had expressly abandoned its claim to *La Galga*, finding that title rests with Virginia pursuant to the ASA. The district court recognized that there is a factual dispute between the parties as to whether *La Galga* and *Juno* were warships, but it found that factual determination immaterial to its decision.

2.2.1 The Abandonment Standard: Rule of Express Abandonment Applied Where the Owner of a Shipwreck Asserts a Claim of Ownership

To prevail on their ASA argument, Sea Hunt and Virginia were required to prove that the shipwrecks were both (1) abandoned and (2) embedded in the submerged

lands of Virginia. It was undisputed that both *La Galga* and *Juno* meet the "on or embedded in the submerged lands of the State" language that was required by the ASA.[39] The district court found that there was no doubt that at one time both *La Galga* and *Juno* belonged to Spain. Because the ASA does not contain a definition of "abandoned," the district court relied on Fourth Circuit precedent in determining whether the shipwrecks were abandoned under the ASA. Acknowledging that *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*[40] (a non-ASA case) was binding authority, the district court held that although abandonment may be inferred for shipwrecks that have been lost and undiscovered for some time,

> where the original owner appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The *Columbus-America* case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether *Juno* and *La Galga* were warships in the service of Spain at the time of their sinking."[41]

The Fourth Circuit in *Columbus-America* explained that

> when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence.[42]

The Fourth Circuit in *Columbus-America* noted that a "lapse of time and nonuser are not sufficient, in and of themselves, to constitute abandonment"[43] and held that the insurance underwriters, who made a claim to the insured commercial shipments of gold that sank in 1857 aboard the *Central America*, had not abandoned their claim to the gold.[44] The Fourth Circuit further found that the fact that documents proving the underwriters' payment of claims could no longer be found was not enough to show an express abandonment under the "strong and convincing" standard. Unlike in the *Sea Hunt* dispute, the salvors in *Columbus-America* were granted the right to compensation under the law of salvage.[45]

Accordingly, the district court required that Sea Hunt prove by "strong and

convincing evidence" that *La Galga* and *Juno* were expressly abandoned by Spain. In the absence of such proof, the vessels would be governed not by the ASA, but by the law of salvage, under which Spain would retain its ownership interest in the wrecks.[46]

2.2.2 The District Court's Application of the Express Abandonment Standard

Sea Hunt argued that *La Galga* and *Juno* were expressly abandoned by Spain on three grounds: the 1763 Definitive Treaty of Peace Between France, Great Britain and Spain (the 1763 Treaty); the 1819 Treaty of Amity, Settlement, and Limits Between Spain and the United States (the 1819 Treaty); and the 1898 declaration of war by Spain against the United States.[47]

The district court found that the 1763 Treaty, which ended the Seven Years' War (also known as the French and Indian War), constituted a sweeping grant of territory and property from Spain to Great Britain, including Spain's rights to sunken vessels.[48] Several of Spain's territories in the New World were transferred to Great Britain under the 1763 Treaty Between Great Britain, Spain, and France. Sea Hunt relied specifically on Article XX of the 1763 Treaty, which provided in part:

> His Catholick Majesty cedes and guaranties, in full right, to his Britannick Majesty, Florida with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, everything that depends on the said countries and land, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholick King and the Crown of Spain have had till now over the said countries, lands, places, and their inhabitants; so that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form. . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.[49]

The district court pointed out that when the 1763 Treaty was entered into, both Spain and Great Britain actually knew where *La Galga* was located, since the captain and crew of *La Galga* attempted to salvage the wreck after it sank and requested assistance from the governor of the colony of Maryland as well. Although the 1763 Treaty does reserve the King of Spain's right to "cause all the effects that may belong to him, to be brought away," the district court reasoned that Spain, though it knew the location of the wreck, made no such attempt to "bring away" the remains of *La Galga* after the treaty was signed. Therefore, Spain "waived the right to maintain its ownership over *La Galga* by failing to carry it away, and it was ceded with the rest of Spain's possessions to Great Britain."[50]

The district court rejected Spain's argument that Article XX contains no deadline and that the King of Spain could remove his property at any time.[51] The court held that Article XX of the 1763 treaty constituted "strong and convincing evidence" under the *Columbus-America* standard that Spain had expressly abandoned its title to *La Galga* and that therefore the shipwreck belonged to Virginia under the terms of the ASA.[52] Accordingly, Sea Hunt would be permitted to continue its salvage operations with respect to *La Galga* under the salvage permits it had obtained from the VMRC.

The district court rejected Sea Hunt's argument that Spain had expressly abandoned the wrecks under the 1819 Treaty between Spain and the United States. The court held that *La Galga* and *Juno*, being located in Virginia and not Florida, were not affected by the 1819 Treaty, which ceded only Florida to the United States.[53] The key provision of the 1819 treaty is Article 2, which provides in relevant part:

> His Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and West Florida. The adjacent Islands dependant on said Provinces, all public lots and squares, vacant Lands, public Edifices, Fortifications, Barracks and other buildings, which are not private property.[54]

Accordingly, the district court held that neither title to *La Galga* nor to *Juno* was transferred from Spain to the United States under the 1819 Treaty. Therefore, neither wreck could be considered to have been abandoned under this theory.[55]

Sea Hunt argued that the declaration of war between Spain and the United States in 1898 gave rise to an express abandonment by Spain of its property in the United States, claiming that both merchant vessels and warships alike could be confiscated by the United States.[56] By proclamation, President William McKinley gave Spanish "merchant" vessels until May 21, 1898, to leave U.S. waters or be confiscated.[57] The parties did not dispute the fact that the president had the power to order confiscation of Spanish merchant vessels during war. They did, however, disagree regarding whether the United States had the right to confiscate Spanish warships, and whether McKinley's proclamation covered warships.

Although the district court noted that it was "clear to the Court that it is within the bounds of the law to confiscate a warship or a merchant vessel belonging to the enemy during time of war,"[58] the court found the determination of whether the *Juno* was a warship or a merchant ship irrelevant because an enemy vessel must "actually be seized" for a forfeiture to occur.[59] Sea Hunt had made no allegation that the United States had "actual control" over the wrecks at any time during the Spanish-American War of 1898 or thereafter. Therefore, "[w]ithout such actual possession by the United States, *Juno* was not abandoned by Spain dur-

ing the Spanish-American War of 1898. Thus, Spain retains ownership over *Juno*." [60] Accordingly, Sea Hunt was ordered to cease salvage efforts regarding the *Juno* without Spain's consent.[61]

2.3 THE JUNE 25, 1999, DISTRICT COURT DECISION: REJECTION OF SEA HUNT'S REQUEST FOR A SALVAGE AWARD

After the district court ruled on April 27, 1999, that the Kingdom of Spain had not expressly abandoned *Juno* and that it retained ownership in that wreck and its remains, the parties briefed the issue of whether Sea Hunt was entitled to a salvage award, which was the subject of the district court's June 25, 1999, decision. In that ruling, the court held that Sea Hunt was not entitled to any salvage award because "Spain communicated to Sea Hunt its desire that the wreck of *Juno* should not be disturbed."[62] The district court based its ruling on both express and constructive notice concepts.

The Court found that by March 12, 1998, Sea Hunt had received an express communication from Spain of its intent to refuse salvage services. In response to Sea Hunt's verified complaint, Spain filed its answer[63] and claim of ownership in the wreck. A copy of a verbal note from the Spanish embassy in Washington, D.C., to the United States Department of State was appended to Spain's claim of ownership, which stated its position that "the remains of these vessels be treated as maritime graves and that their salvage not be authorized at this time."[64] In addition, on March 12, 1998, a letter was mailed from the National Park Service to Sea Hunt that stated:

> Pursuant to your request, NPS contacted the Government of Spain and met with members of the Embassy on November 13, 1997. On February 26, 1998, NPS received a written response from the Government of Spain. The response states that the shipwrecks are sovereign vessels, property of the Government of Spain, and may not be salvaged or disturbed without authorization.[65]

The district court also concluded that Spain had constructively rejected Sea Hunt's claim to a salvage award with respect to *Juno*. Constructive rejection of salvage operations precludes a salvage award if the rejection "was reasonably understood by a salvor."[66] In *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*,[67] relied upon by the district court, a shipwreck that was the subject of a request for a salvage award was located in the submerged land of Florida and dedicated to the United States for use as a national park. The *Lathrop* court found that the salvor was not entitled to a salvage award because the salvor "should have known that the State of Florida, the presumed owner of the submerged lands and any property embedded in the soil, might refuse [the salvor's] offer to excavate the alleged vessel."[68]

The evidence that gave rise to the district court finding of constructive rejection included the following: (1) Sea Hunt's belief that *Juno* was a Spanish vessel, possibly of a military character; (2) a statement by Sea Hunt's legal counsel before the Court that "in the event that the wreck is determined to not have been abandoned, we would like to have our salvage rights protected as of today given the fact that potentially a sovereign owner could claim that they are refusing salvage";[69] and (3) as early as September 24, 1997, over five months before Sea Hunt filed its *in rem* action, it was informed by the National Park Service that Spain might claim ownership of the wreck.[70] Based on this evidence, the district court concluded that "Sea Hunt should have known, and in fact did know, before it filed its *in rem* action that Spain might refuse any salvage efforts against *Juno*."[71]

2.4 THE JULY 29, 1999, DISTRICT COURT DECISION: THE KINGDOM OF SPAIN'S MOTION TO AMEND THE JUDGMENT WAS DENIED

After the district court entered an opinion and order on April 27, 1999, holding that, among other things, Spain had expressly abandoned its rights to *La Galga* based on Article XX of the 1763 Treaty, Spain filed a motion to amend, pursuant to Federal Rule of Civil Procedure 59 (e), seeking to amend the abandonment finding contained in the opinion and order based on a Diplomatic Note from the United Kingdom communicated to the United States and Spain *after* the court filed its opinion and order. In that Diplomatic Note, the United Kingdom expressed "its agreement with Spain's modern-day view that the signatories to the Treaty of 1763 did not intend to transfer any ownership rights in Spain's sunken ships in North America."[72]

The district court found Spain's Rule 59(e) motion untimely[73] but went on to state that Spain's motion failed on the merits because (1) there was no intervening change in controlling law; (2) there was no need to correct a clear error of law or manifest injustice; and, most important, (3) the new evidence that Spain sought to introduce was untimely because it could have been presented to the district court prior to the hearing on this issue.[74]

Although the court noted that it found the Diplomatic Note to be minimally persuasive at best, in light of the "clear language used in the treaty," the district court conveyed its distrust of this "evidence" by pointing out that "[t]he United Kingdom offers only a conclusory statement of its interpretation, without explaining the reasons behind its current interpretation or providing evidence of its intent at the time the Treaty was drafted. The Court views this modern-day interpretation of a treaty that was signed over two hundred years ago with skepticism."[75] It is interesting to note that the Fourth Circuit considered this evidence and criticized the District Court's skepticism regarding this present-day evidence of Great Britain's and Spain's intent in 1763.[76]

3 THE FOURTH CIRCUIT DECISION

Virginia and Sea Hunt appealed from the district court's judgment granting Spain title to *Juno* and the denial of a salvage award. The Kingdom of Spain appealed from the district court's ruling that it had expressly abandoned *La Galga* under the 1763 Treaty. Ruling in the Kingdom of Spain's favor, on July 21, 2000, the Fourth Circuit applied an express abandonment standard and affirmed the district court's holding that Spain had not abandoned *Juno*[77] but reversed the district court's ruling that Spain had expressly abandoned *La Galga*, giving Spain title to both shipwrecks.[78]

The Fourth Circuit also affirmed the district court's denial of a salvage award to Sea Hunt, finding that Sea Hunt knew before it filed its *in rem* proceeding that *Juno* was a Spanish ship and that Spain might make a claim to the vessel, and finding further that Sea Hunt had reason to expect Spain's refusal to agree to its salvage operations.[79]

3.1 DEFINING "ABANDONMENT"

The Fourth Circuit rejected Sea Hunt's and Virginia's argument that the ASA required application of an implied abandonment standard to the facts of the case and instead applied the express abandonment standard set forth in *Columbus-America* to determine whether the shipwrecks fell within the parameters of the ASA.[80] Acknowledging that the ASA does not define the term "abandoned" and that a finding of abandonment is a precondition for application of the ASA's provisions,[81] the court discussed its own precedent regarding traditional admiralty law for its definition of the term "abandoned."[82]

> Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts.[83] "Should an owner appear in court and there be no evidence of an express abandonment," title to the shipwreck remains with the owner.[84] [When] a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment. . . .[85] This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains."[86]

The Fourth Circuit concluded that nothing in the ASA indicates that implied abandonment is the appropriate standard in a case where a sovereign, such as the Kingdom of Spain, asserts ownership to its vessels.[87] The court remarked that "[w]hen an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show."[88] Accordingly, the Fourth Circuit reasoned that requiring express abandonment accords with the statutory text in those cases where an owner comes forward and makes a claim to a shipwreck.[89]

However, the Fourth Circuit did recognize that in some cases implied abandonment may be the appropriate standard under the ASA, quoting the ASA's legislative history, which states that abandonment may be implied "as by an owner never asserting any control over or otherwise indicated his claim of possession."[90] The court explained that "[a]n inference of abandonment is permitted, but *only when no owner appears*."[91] In contrast, as in this case, when an owner comes forward and makes clear his claim of possession, the Fourth Circuit held that abandonment could not be implied.[92]

The Fourth Circuit stressed that "[t]he mere passage of time since a shipwreck is not enough to constitute abandonment,"[93] noting Spain's attempts at salvage after *La Galga* sank, Spain's maintenance of *La Galga* on its national registry, and its assertion of its claim once Sea Hunt filed its admiralty action. The Court also relied on the alleged fact that "technology has only recently become available for its salvage."[94] The topic of technological capability is discussed more fully below.

3.2 SOVEREIGN NONCOMMERCIAL VESSELS VERSUS COMMERCIAL VESSELS

Relying on a House Report letter contained in the ASA's legislative history, the Fourth Circuit stated that "[t]he legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones."[95] The House Report letter provides:

> The U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State.[96]

Noting that appellees did not cite to any case involving an original sovereign owner's claim to its shipwrecked vessel to support their argument that an implied abandonment standard should be applied, the court remarked that "under the ASA . . . an implied abandonment standard would seem least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks."[97] The court went on to observe that "[t]o adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim."[98]

3.3 THE EXPRESS ABANDONMENT STANDARD REQUIRED UNDER THE 1902 TREATY OF FRIENDSHIP AND GENERAL RELATIONS BETWEEN THE UNITED STATES AND SPAIN

The 1902 Treaty of Friendship and General Relations between the United States and Spain (the 1902 Treaty), argued in the district court but not discussed in any of the district court's opinions, was an additional and significant basis upon which the Fourth Circuit held that an express abandonment standard was required under the facts of this case.[99] Article X of the 1902 Treaty requires that "[i]n cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases."[100] Since one of the immunities granted to U.S. vessels is that they will not be considered abandoned without express, unambiguous, and affirmative acts of government,[101] the Fourth Circuit reasoned that under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation.[102]

Finding that the U.S. Constitution precludes an implied abandonment standard under the facts of this case, the Fourth Circuit stated:

> Article IV of the Constitution states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property—dispositions of federal property require some congressional action. "The United States cannot abandon its own property except by explicit acts." *See United States v. Steinmetz*, 973 F.2d 212, 222 (3rd Cir. 1992). . . . The House Report for the ASA also relates the understanding that "U.S. warships and other public vessels . . . require an affirmative act of abandonment." H.R. Rep. No. 100-514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the government.[103]

Relying on *United States v. California*,[104] the Fourth Circuit stressed that private property principles similar to laches, estoppel, or adverse possession cannot be employed to preclude the United States from asserting its ownership rights.[105] The rationale underpinning this concept is that the government "'holds its interests here as elsewhere in trust for all the people.'"[106]

In the face of arguments by both the United States and Spain, the very parties to the 1902 Treaty, that the express abandonment standard should be applied, the Fourth Circuit deferentially remarked:

> Our Constitution charges the political branches with the conduct of foreign affairs [citation omitted]. The express abandonment standard is regularly ap-

> plied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law.[107]

In this same deferential tone, the court indicated that applying the express abandonment standard to sovereign vessels "respects the legitimate interests of the executive branch."[108] It further noted that "it is 'not for the courts to deny an immunity which our government has seen fit to allow.' . . .[109] While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations."[110]

The State Department filed a Statement of Interest, which emphasized that its policy is "to recognize claims by foreign governments—such as in this case by the Government of Spain regarding the warships *Juno* and *La Galga*—to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign."[111]

In addition, the Fourth Circuit found the mutual agreement of Spain and the United States on interpretation of the 1902 Treaty compelling and stated:

> Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong evidence to the contrary, defer to that interpretation." [Citation omitted.] We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.[112]

Focusing on the necessity for reciprocity for U.S. warships lost in foreign waters, the Fourth Circuit pointed out that "[t]he reciprocal immunities established by [the 1902] treaty are essential to protecting United States shipwrecks and military grave sites. Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts."[113] Agreeing with the argument in the United States' amicus brief, the Fourth Circuit elaborated on its concern for reciprocity:

> The United States "is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are

> treated as sovereign ships and honored graves, and are not subject to exploration or exploitation, by private parties seeking treasures at sea."[114]

As such, the Fourth Circuit concluded that the 1902 Treaty provided independent grounds for application of an express abandonment standard to *La Galga* and *Juno*.

3.4 FAILURE TO PROVE EXPRESS ABANDONMENT OF *LA GALGA*

Applying the "clear and convincing" burden of proof set forth in *Columbus-America*, the Fourth Circuit reversed the district court's ruling that Sea Hunt and Virginia had proved that Spain had expressly abandoned *La Galga* under the plain language of Article XX of the 1763 Treaty. The Fourth Circuit held that Sea Hunt and Virginia had failed to meet their burden of proving by clear and convincing evidence that Spain had expressly abandoned *La Galga* under the 1763 Treaty[115] and indicated that the district court's finding of abandonment under Article XX contravened the plain language of the 1763 Treaty, since "the plain language of this treaty provision contains no evidence of an express abandonment."[116]

The Fourth Circuit ascertained the intent of Spain and Great Britain by interpreting the structure and plain language of the 1763 Treaty as well as consideration of Diplomatic Notes issued by both Spain and Great Britain *after* the district court had issued its judgment. The Fourth Circuit sharply criticized the district court when it remarked that the lower court's interpretation of the 1763 Treaty "flies in the face of the understandings of Spain and Great Britain, the relevant parties to Article XX."[117]

The Spanish and British Diplomatic Notes considered by the court on the topic of those countries' intentions with respect to the interpretation of Article XX of the 1763 Treaty were written approximately 236 years after the 1763 Treaty was signed. The Fourth Circuit stated that "the meaning given [to treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight. [Citation omitted.]"[118] The Fourth Circuit relied, in part, on these contemporary assertions of intention for a treaty written well over two centuries ago.

The Fourth Circuit provided a detailed analysis of the plain language of Article XX as well as other portions of the 1763 Treaty in coming to its conclusion that Spain had not intended to expressly abandon *La Galga* under the 1763 Treaty. Article XX provides in relevant part:

> His Catholick Majesty cedes and guaranties, in full right, to his Britannic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses *on the continent* of North America, to the East or to the South East of the river Mississippi. And, in general, *everything that depends on said countries and lands*, with the sovereignty, property, possession, and all

> rights, acquired by treaties or otherwise. . . . So that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form. . . . It is moreover stipulated, that his Catholick Majesty shall have *power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things*.[119]

The Fourth Circuit pointed out:

> Article XX does not include any of the common nouns that could refer to *La Galga*. Notably absent are their terms "shipwreck," "vessels," "frigates," or "warships." Other provisions of the treaty mention these terms explicitly. For instance, Article III, which provides for the restoration of prisoners, states "all the ships of war and merchant vessels which shall have been taken . . . shall likewise be restored." See also Art. VIII (stating that the British may remove their belongings in "vessels"). Art. XIX (same). Further, the treaty also specifically catalogues items other than territory intended to be conveyed. For instance the treaty transfers control of "factories," Art. XI, "artillery," Art. XII, "fortresses," Art. XIX, "castles," Art. XXI, and "papers, letters, documents, and archives," Art. XXII. When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of "shipwrecks." . . . Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of *La Galga*.[120]

Criticizing the district court's finding that Article XX constituted "a sweeping grant of territory and property" that included shipwrecks such as *La Galga*, the Fourth Circuit remarked that the lower court had overlooked the "on the continent" limitation, stating that "Spain did not cede possessions in the sea or seabed."[121] The Court rejected Sea Hunt's and Virginia's argument that "on the continent" included coastal waters, noting that, in contrast to the language of Article XX, the parties specifically referred to cession by French Canada to Great Britain of "in general everything that depends on the said countries, lands, islands, and coasts" in Article IV. Article XX stated that Spain ceded to Great Britain "in general, everything that depends on the said countries and lands, places, and their inhabitants," with no reference to "coasts."[122] Moreover, the Fourth Circuit reasoned, that eighteenth-century understandings of "on the continent" language would not have included the three-mile coastal belt recognized today.[123]

In addition, the court remarked that the language of Article XX referring to "everything that depends on said countries and lands" could not be interpreted to include shipwrecks in coastal waters such as *La Galga* because at the time "dependencies" meant other "territories" that were dependent upon the sovereign country such as nearby islands, not Spanish property such as the shipwrecks.[124]

Finally, the Fourth Circuit found the phrase in Article XX, "his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things, " to contain *no deadline for Spain's right to take its property away*, in contrast to other provisions of the 1763 Treaty that specifically set time limits for certain actions. Accordingly, the court found that there was a strong presumption that no time limit applied to Spain's right to take its "effects."[125] In light of the court's analysis of the language of the 1763 Treaty, it concluded that Article XX did not contain "clear and convincing" evidence of express abandonment of *La Galga*.

In addition, the Fourth Circuit pointed out that the United States' interests in protecting its own sunken U.S. military vessels and their crew were rooted in customary international law.[126] In deference to the executive branch, the court stated that

> matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. . . . Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.[127]

3.5 IMPLIED ABANDONMENT

The Legislative History of the ASA leaves no doubt that Congress intended the term "abandonment" to include both express and implied abandonment. The House Report states, "The committee notes that the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied, or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck."[128] The Fourth Circuit's strict view of what constitutes abandonment is arguably inconsistent with precedent in the Sixth and Ninth Circuits, although, as the Fourth Circuit pointed out, the cases in the Sixth and Ninth Circuits did not involve an original sovereign owner's claim to its shipwrecked vessels.[129]

The Ninth Circuit, in *Deep Sea Research* v. *The Brother Jonathan,*[130] set out the "traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners."[131] In *Deep Sea Research,* the Ninth Circuit said of the Fourth Circuit's express abandonment standard: "In holding that abandonment could only be found on the basis of express renunciation of ownership, the Fourth Circuit introduced a significant modification into maritime law."[132]

Similarly critical of the Fourth Circuit's standard, the Sixth Circuit in *Fairport International Exploration, Inc.* v. *Shipwrecked Vessel Known as the Captain Lawrence*[133] stated that "[c]ommon sense makes readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity."[134] On remand, the Sixth Circuit, limiting its decision to vessels formerly owned by private parties and expressing no opinion as to the application of the express abandonment test to vessels initially owned by the United States, pointed out that "[r]igid adherence to a doctrine requiring express abandonment would require courts to 'stretch [] a fiction to absurd lengths,' [citation omitted] where courts encounter claims to ancient shipwrecks with long-forgotten and undiscoverable owners."[135]

The 1993 case of *Moyer v. The Wrecked and Abandoned Vessel Known as the Andrea Doria*[136] provides an example of application of an implied abandonment standard. The court indicated that implied abandonment may be inferred from circumstantial evidence such as "lapse of time, . . . nonuse by the owner, . . . the place of the shipwreck, . . . and the actions and conduct of the parties having ownership rights in the vessel."[137] In *Moyer* the owner's failure to engage in salvage operations was not excused by a lack of available technology to locate and salvage because the vessel's location was known shortly after it sank in 1956. The court remarked:

> The technology with which to salvage the vessel has been in existence since at least 1964, when the TOP CAT expedition recovered the statue of Admiral Andrea Doria. Moreover, amateur divers have conducted their own salvage operations on the *Andrea Doria* since 1966. . . . The opening of the purser's safe on international television is an indication of the open and notorious atmosphere in which the salvage operations have been conducted. . . . Only one inference with respect to the *Andrea Doria* may be drawn. The [owner] has abandoned the vessel and its contents."[138]

Unlike the *Sea Hunt* case, the owner of the *Andrea Doria* in *Moyer* never asserted any ownership claim or interest in the wreck or its cargo.[139]

It is not yet clear whether courts other than the Fourth Circuit will apply the standard of implied abandonment to a sovereign vessel when that sovereign asserts a claim to a long-lost shipwreck. What is clear is that with each year that passes, technological advances make discovery of long-lost shipwrecks more accessible to owners of shipwrecks and the general public. The argument that an intent to abandon a vessel may be inferred from an owner's failure to engage in due diligence in discovering his shipwreck is fast gaining momentum, as discussed below.

3.6 TECHNOLOGY AND THE ISSUE OF IMPLIED ABANDONMENT

In the context of ascertaining whether inaction by an owner of a shipwreck constitutes an intent to abandon the vessel and its cargo, courts generally indicate that technology has only recently become available. Therefore, owners of shipwrecks do not have the technical capability to engage in any due diligence regarding the discovery and recovery of their lost property. This argument has echoed through written decisions for years.[140] Although courts rely on evidence provided by expert witnesses on the topic of technological capability, many involved in deep-sea exploration say that the technological capability to locate shipwrecks and artifacts on the seabed is no longer beyond our capability, nor has it been for some time.

Many tools are available to locate and retrieve long-lost vessels and their cargo, including navigation satellites using radio signals and receivers, fiber optics, laser-imaging systems, magnetic remote sensing, acoustic remote sensing (such as side scan sonars and sub-bottom profilers), sophisticated underwater cameras, autonomous underwater vehicles, tethered remotely operated vehicles (some with mechanical arms for recovery of artifacts), manned submersibles, and computer-based systems that monitor, record, analyze, and display magnetic, acoustic, and positional data. "Graphic images such as maps, site plans, drawings, photographs, and even video can be linked to tabular and text data."[141] Such technology has made the possibility of a shipwreck owner's or salvor's telepresence and telepossession at a discovery site a reality.

Dana Yoerger, associate scientist at Woods Hole Oceanographic Institution in Massachusetts and the head of its Deep Submergence Laboratory, has gone to sea on over thirty oceanographic expeditions, including the 1985 *Titanic* discovery cruise (the remains of the *Titanic* rest in approximately 13,000 feet of water), and he remarked:

> Today, using cameras and a side scan sonar, we can image the sea floor in almost any kind of terrain in all but the deepest trenches. Ninety-seven percent of the ocean floor is 20,000 feet or shallower, and systems in the U.S., Japan, the United Kingdom, Russia, and Canada have a 20,000-foot capacity. Variables impacting success in locating shipwrecks and their artifacts include water depth, weather conditions on the surface, visibility, currents, and terrain. With good historical records, time, and funding, we can image well enough to find any shipwreck that has reasonable surface expression. Excavation to archaeological standards is an emerging field and research is ongoing, but at present one can excavate underwater artifacts that are not buried using remotely operated vehicles to a depth of 20,000 feet or greater."[142]

When asked how long the technical capability has existed to discover anything *on* the seabed down to 20,000 feet, Mr. Yoerger responded:

> We found the *Titanic* in 1985 in 13,000 feet of water using a system assembled from nearly all commercially available components. Others nearly found the ship a few years earlier but didn't, mostly due to bad luck; certainly their technology was sufficient. The U.S. Navy mounted far more difficult searches in the 1960s and 1970s, although these searches were costly. Similar capabilities in shallow water existed for at least a decade before that, and side scan sonar systems have been sold commercially since the late 1960s.[143]

Captain William Gaines, assistant director of the Marine Physical Laboratory at Scripps Institution of Oceanography, echoed Yoerger's comments: "We are building sophisticated sonar systems that can map the bottom; you can pick up almost anything that lies on the seabed. Using advanced tethered vehicles we can both locate and excavate down to a 20,000-foot depth capacity."[144] When asked how long such technology has existed, Gaines indicated that it has been at least ten years, probably more, but he remarked that discovery can be costly and time consuming.

On the topic of recovery and excavation, as distinguished from discovery of a shipwreck and its artifacts *on* the seabed, Yoerger explained:

> Our community has had deep water recovery capability for many years, at least back to the early 1960s. The U.S. Navy and commercial industry (oil and gas, telecommunications) have used these capabilities in the context of salvage, accident investigation, and oil and gas production. Real underwater archaeology has been practiced in shallow water with divers for over 20 years, and recently we have been doing archaeological work using deep-diving remotely operated vehicles since 1989.[145]

We are fast entering an era, if we have not already done so, where it can no longer be said that technology is a bar to discovery of long-lost shipwrecks. If the owner of a shipwreck either knows, or reasonably should have known, the *location* of his wreck and fails to engage in warranted due diligence to locate and recover the vessel and its artifacts within a reasonable period of time, then the owner's claim of title or possession should be subject to a statute of limitations. Technological capabilities play a significant role when measuring the reasonableness of the owner's conduct, or lack thereof, and to the subject of whether or not an owner of a long-lost shipwreck has impliedly abandoned her vessel and cargo.[146] The economic viability of technological investigations will necessarily be a factor in ascertaining reasonable conduct.

Concern justifiably exists among historians and archaeologists regarding proper discovery and retrieval efforts. In the past, techniques such as explosives and propeller-wash deflectors, which quickly blow holes in the seabed, have been employed by some, causing concern regarding damage to natural and cultural re-

sources, as well as contextual information contained in these shipwreck time capsules found in the underwater depths.[147] The states, under the ASA, have some control over discovery and excavation techniques through their salvage permittal process.

In the instance in which an owner of a shipwreck does not want her vessel/cargo salvaged (*e.g.,* out of concern that historical cultural property might not be adequately preserved during the salvage operations or because the submerged wreckage constitutes a marine grave site) should the owner be required to engage in efforts to discover her lost vessel or to engage in some form of public notification or recordation of her claim of ownership to avoid a finding of implied abandonment?[148] Since in some jurisdictions abandonment may be inferred from a failure to pursue salvage efforts or a lapse of time, what required conduct on the part of the owner best balances the various competing interests?

The best means to protect the interests of an owner who elects nondisturbance of the shipwreck is unsettled. Perhaps the analysis is not so different from a person who loses a fragile item on a mountaintop in a national park and decides they want to leave it where it might have been lost and also to preclude anyone else from asserting ownership of the item. Without engaging in any affirmative conduct to protect their ownership interest in the lost property, could with the passage of time one reasonably infer abandonment from such conduct? Given scientific advances in oceanographic discovery and salvage technology, one might conclude that long term inaction should not be rewarded with a finding of nonabandonment and that to do so does not serve the interests underlying the Abandoned Shipwreck Act.

The Fourth Circuit's discussion of sovereign vessels raises difficult and complex issues for future shipwreck litigation. It is unclear to what extent a sovereign's delay in discovering its shipwrecks, especially sovereign vessels engaged primarily in commercial conduct (in contrast to warships), will be a factor in determining whether a sovereign has abandoned its vessels. What can be said is that the current accessibility of technology for shipwreck discovery gives delay new meaning, in the face of reasonable means for owners to discover their lost property.

3.7 SOVEREIGN VESSELS AND THE EXPRESS ABANDONMENT STANDARD

Although the Fourth Circuit's application of the express abandonment standard was not dependent on the characterization of *La Galga* and *Juno* as sovereign "warships," the court's discussion raises serious issues regarding what standard of abandonment will be applied by courts in ASA shipwreck litigation involving government vessels that are not "warships." Although there have been inconsistencies, vessels that are undisputably U.S. warships will generally not be deemed aban-

doned except by explicit acts, as indicated by the House Report, which states that "the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of right are insufficient to establish such abandonment."[149]

The rationale underlying the need for an express abandonment standard for U.S. warships lies in the concept that the government holds property in trust for its citizens. Therefore, the United States will "not be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."[150] Whether this rationale applies to long-lost vessels affiliated with foreign governments that were engaged in commercial activities, the benefits of which may not have flowed to that sovereign's citizenry, is less certain.

The inconsistency of U.S. policy regarding treatment of its sunken vessels was noted by the Third Circuit in *Steinmetz*, when it quoted "a deputy Legal Adviser of the Department of State [who] has recognized the practice of treating warships from the 17th and 18th centuries as abandoned by implication of the long passage of time, but has taken the position that with respect to U.S. warships of the 19th and 20th centuries, that 'it should be presumed that title to such vessels remains in the U.S.'"[151]

The ASA's legislative history is far from clear when it states:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. *warships or other public vessels* (which require an affirmative act of abandonment), the act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.[152]

What is the scope of the phrase "other public vessels"?[153]

The U.S. Department of State noted that the same presumption against abandonment of U.S. warships will be accorded foreign sovereign vessels that sank within the U.S. territorial sea, as long as those vessels were engaged in *noncommercial* activities, thus raising the issue of whether a different standard of abandonment might apply to sovereign vessels engaged in commercial conduct.

> A second matter involves vessels engaged in *non-commercial service (generally, but not always, warships)*. The Department appreciates the careful manner in which S. 858 limits U.S. assertion of title to shipwrecks that are abandoned. As you know, the U.S. only abandons its sovereignty over, and title to, sunken U.S.

> warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. This fact has two implications for the application of S. 858. First, we understand that the same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the *non-commercial* service of another State. Second, S. 858 does not apply to U.S. *warships* sunk within the territorial sea, unless they have been affirmatively abandoned by the U.S. Government.[154]

The Department of the Interior (DOI) Abandoned Shipwreck Act Guidelines include an interesting discussion of what constitutes a "warship," which is worthy of sovereign immunity and requires express abandonment.

> Although a *sunken warship or other vessel entitled to sovereign immunity* often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation *unless the cargo had earlier been unlawfully captured by that nation*. In such a situation, title to the cargo remains in the nation from which it had been captured. Shipwrecks entitled to sovereign immunity are wrecks of *warships and other vessels (such as privately owned vessels chartered or otherwise appropriated by a sovereign nation for military purposes) used only on government non-commercial service at the time of sinking*. Examples of vessels entitled to sovereign immunity would include, but not be limited to, U.S. battleships and German U-boats from World War II, Confederate gunboats and Union ironclads from the Civil War, and British frigates and Colonial privateers from the Revolutionary War.[155]

One commentator has remarked that the "DOI's assertion that a 'Colonial privateer' is within the class thus protected surely must be the outer limit," noting that "[o]ne may wonder whether a privately-operated blockade runner was sufficiently engaged in Confederate service to join the class which the DOI would have excluded from abandonment by inference."[156]

In *Sea Hunt*, there is a factual dispute between the parties regarding whether *La Galga* and *Juno* were "warships" at the time of their respective sinkings, an issue the district court found unnecessary to rule on.[157] Relying in part on the ASA's legislative history, discussed above, the Fourth Circuit concluded that sovereign vessels must be treated differently from privately owned vessels.[158]

In addition, some have questioned the Kingdom of Spain's right to portions of *La Galga*'s and *Juno*'s cargo. One of the coins retrieved by Sea Hunt from what is believed to be *Juno* is stamped with a "P," indicating the coin's origin was the Po-

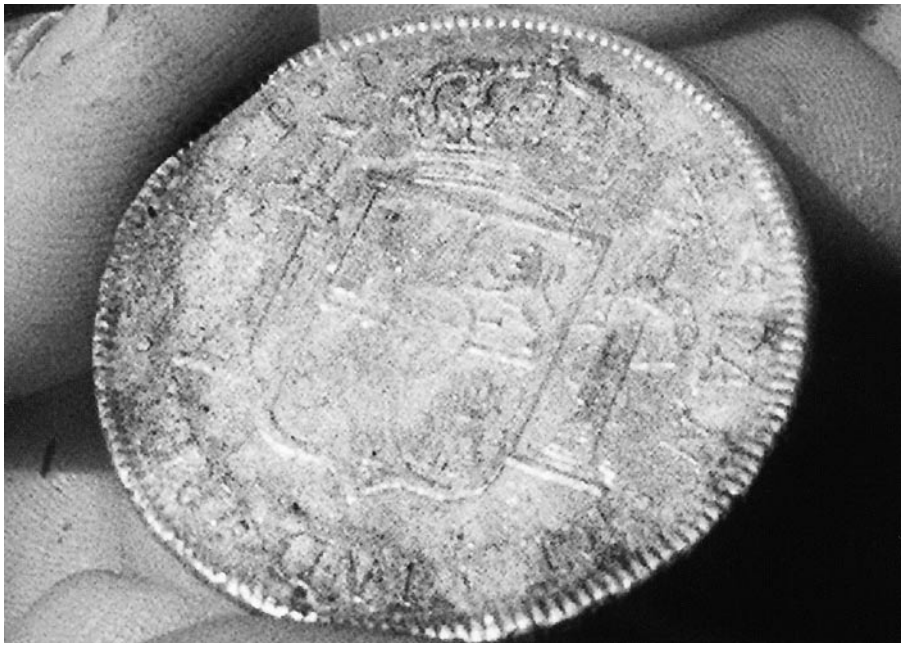

FIGURE 2. THIS IS THE PIECE-OF-EIGHT COIN THAT BEN BENSON FOUND ON THE SANDBAR THAT HE SUSPECTS COVERS PART OF THE *JUNO* WRECK OFF OF ASSATEAGUE ISLAND. (STEVE EARLEY, *VIRGINIAN PILOT*)

tosí mine, once located in Peru, now Bolivia.[159] During the Spanish colonial era, approximately two billion ounces of silver were extracted from Potosí's Cerro Rico (Rich Mountain).[160] Some would say it was at the expense of the very lives of the African and Indian slaves who worked the mines for the Kingdom of Spain. The legislative history of the Abandoned Shipwreck Act provides that "cargo aboard a vessel entitled to sovereign immunity . . . remains the property of the flag nation, unless the cargo had earlier been *unlawfully captured* by that nation."[161] Can it be said that the silver aboard *Juno* was "unlawfully captured" when it was mined, minted, and transported aboard the Spanish frigate *Juno*, bound for the Kingdom of Spain? The facts and circumstances surrounding Spain's acquisition of certain cargo is perhaps deserving of closer factual scrutiny.

> Aside from the fact that these vessels were not sunk in war, nor is it entirely certain that they were used for strictly non-commercial government service, and that no human remains have ever been found, there is the question of Spain's entitlement to ownership of artifacts that have as their country of archaeological origin and provenance decidedly non-Spanish, but rather African and native American roots,

says Professor David J. Bederman, one of Sea Hunt, Inc.'s, legal counsel in its dispute with the Kingdom of Spain.

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Regarding the issue of whether *La Galga* and *Juno* should be characterized as commercial or noncommercial, both vessels were serving vessels of the navy of Spain at the time they sank, and after they were lost at sea, they were never removed from the register of the Spanish navy.[162] Spain claimed that *Juno* was a warship that, on her last voyage, "served as a military transport, carrying back to Spain the Third Battalion of the Regiment of Africa, their families, and other civilian officials, all of whom were on their way home after long service away from Spain. The Battalion had been engaged in combat against the British and French troops in the Caribbean defending Spanish interests."[163] Spain similarly alleged that *La Galga* was also a warship that served principally as an escort of different Spanish convoys.[164]

In contrast, Sea Hunt argued that these vessels were engaged primarily in commercial enterprises.[165] Sea Hunt submitted evidence in the District Court that included cargo information suggesting that *La Galga* and *Juno* carried significant quantities of commercial goods. *La Galga* allegedly carried significant quantities of tobacco from the Royal Company, gold and silver coins, and mahogany planks for the royal palace in Madrid, as well as official documents, prisoners, and an inquisition emblem, among other things.[166] *Juno* allegedly carried *"grana* (a substance used to make paint), as well as money, silver, and official and private mails . . . a substantial amount of privately-consigned gold or silver . . . [and] a large number of passengers," who, Sea Hunt argued, would only have been permitted on a registration ship, not a warship.[167]

In the Fourth Circuit, the distinction between vessels engaged in commercial and noncommercial activities does not affect the abandonment standard where owners of the shipwreck come into court asserting their claim of title or possession, but other circuits might be less constrained to find implied abandonment of an historic vessel affiliated with a foreign government that was primarily engaged in commercial conduct. In future cases, the distinction between vessels engaged in commercial versus noncommercial activities will undoubtedly be a significant issue.

4 UNESCO

In an effort to provide an international legal framework for the protection of underwater cultural heritage, UNESCO is currently preparing an international convention aimed at protecting underwater cultural heritage called the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage. On March 26, 2001, the Fourth Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage opened at UNESCO. The Director-General of UNESCO, Koichiro Matsuura, stated:

> Protection of our underwater cultural heritage lacks an adequate universal, international legal regime. Technical progress makes it possible nowadays to

> explore to any depth and to locate any—not only cultural—property on the seabed. Underwater cultural heritage is unique as each site serves as a time capsule from the moment of its deposit beneath the sea. Legal protection is becoming an urgent necessity.[168]

The Draft Convention has its critics.[169] However, it was adopted by the Plenary Session of the 31st General Conference of UNESCO on November 2, 2001. The text may be accessed through UNESCO's Internet site at <www.UNESCO.org/culture>.

5 CONCLUSION

When the Abandoned Shipwreck Act was enacted in 1988 Congress recognized the need for management and protection of shipwrecks as part of our cultural heritage, and that technological advances had made public access to shipwrecks easier, creating multiple use demands from sport divers, underwater archaeologists, and salvors, with their respective recreational, preservation, and commercial interests. Under the ASA, States are encouraged to "carry out their responsibilities under the Act in a manner that protects natural resources and habitat areas, guarantees recreational exploration of shipwreck sites, and allows for appropriate public and private sector recovery of shipwrecks consistent with the protection of the site's historical values and environmental integrity."[170] The ASA Guidelines recommend that experts in the field of underwater archaeology and maritime history be involved in many aspects of management and protection of underwater cultural property.

Issues surrounding discovery, excavation, preservation, and conservation of underwater cultural property impacts many sectors of society, including historians and archaeologists, environmentalists, the commercial fishing industry, the diving and tourist industries, the insurance industry, mining and oil industries, treasure salvors, the U.S. and state governments, and foreign nations, whose concerns are often competing. Congress, in enacting the ASA, has sought to balance these competing interests.

The Fourth Circuit's application of an express abandonment standard to shipwrecks involved in title disputes under the ASA runs the risk of undermining the effectiveness of the ASA. This is arguably so because it will be a rare case in which owners of a shipwreck will abandon their vessel by explicit and affirmative conduct once someone else has gone to the expense and effort of discovering the wreck's whereabouts and commenced a legal proceeding seeking a salvage award under the ASA. Such concerns are not present where a finder's claim of title is sought under the law of finds for those shipwrecks outside of the parameters of the ASA. Who would be more likely to protect and conserve historical shipwrecks worthy of protection as irreplaceable cultural property, time capsules warranting preservation of contextual information, as well as fragile natural resources, habitat, and ecosys-

tems—the States under the ASA or an owner of a historical shipwreck (a successor in interest, an insurer, a foreign nation)? It will depend on the owner.

The artifacts recovered by Sea Hunt have been turned over to Spain, and the district court has ordered Sea Hunt to turn over to Spain all location information that they gathered.[171] Spain's legal counsel, James Goold, has said that Spain is now

> making arrangements for survey work to verify the locations and condition of *La Galga* and *Juno*, then it will determine what to do next, including what needs to be done to protect the sites. The fact that *Juno* was such an important gravesite will be one of the foremost considerations, but we need to get a better sense of what is there by nonintrusive means. We're working with NOAA, the National Park Service and state agencies.

The continuing role of technology will ratchet up the pressure on owners of lost shipwrecks to be vigilant in protecting their claims, since it can no longer be said that what lies on the seabed across our globe is beyond discovery. Deep sea explorer and scientist Robert Ballard points out that:

> Until recently, humans have been able to enter the realm of eternal darkness only in very small numbers, encased by expensive machines. Now we don't need those diving machines. As a result, exploration should become far more democratic. . . . Now we can cut the ultimate tether—the one that binds our questioning intellect to vulnerable human flesh. Through telepresence, a mind detaches itself from the body's restrictions and enters the abyss with ease, and with lightning-quick fiber optic nerves.[172]

A failure to engage in reasonable due diligence in locating a lost vessel may result in a finding of implied abandonment for failure to discover one's shipwreck. Discovery and retrieval are costly and time consuming and require expertise, all of which will undoubtedly play some role in a court's determination of what constitutes reasonable conduct. However, an implied abandonment finding is not likely in the Fourth Circuit, under *Sea Hunt* and *Columbus-America*, in cases where owners assert their claims of ownership.

The Fourth Circuit's decision in *Sea Hunt* raises many significant, and yet unanswered, questions. What is certain after the Fourth Circuit's important decision in *Sea Hunt* is that any sovereign or private owner who lost a vessel and its cargo in centuries past has an arsenal at hand if they assert their claim of ownership or possession in those courts governed by Fourth Circuit precedent.

NOTES

1. 221 F.3d 634 (4th Cir. 2000), *cert. denied,* 148 L. Ed. 2d 956, 121 S.Ct. 1079 (2001).

2. 974 F.2d 450 (4th Cir. 1992), *cert. denied,* 507 U.S. 1000 (1993).

3. 43 U.S.C. § 2101 *et seq.*

4. 105 F.3d 1078, 1085 (6th Cir. 1997), *vacated and remanded in light of Deep Sea Research,* 118 S.Ct. 1558 (1998), *remanded in light of Deep Sea Research,* 177 F.3d 491 (6th Cir. 1999).

5. H.R. Rep. No. 100-514 (1988), *reprinted in* U.S.C.C.A.N. 365, 370.

6. ASA Guidelines, 55 Fed. Reg. 50116, 50121 (1990).

7. *Sea Hunt, Inc.* v. *The Unidentified, Shipwrecked Vessel or Vessels,* 47 F. Supp. 2d 678, 680 (E.D. Va. 1999).

8. Opening brief of Intervenor-Appellant the Kingdom of Spain, at 4.

9. *Id.*

10. *Id.* at 5.

11. Opening brief of Intervenor-Appellant the Kingdom of Spain, at 5.

12. *Id.* at 5–6.

13. *Sea Hunt, Inc.* v. *The Unidentified, Shipwrecked Vessel or Vessels,* 47 F. Supp. 2d at 681.

14. *Id.*

15. *Id.*

16. *Id.*

17. A side scan sonar image of *Juno* can be found at <marinesonic.com>.

18. See Affidavit of David Beltran Catala, Exhibit 1, Subsection B, Document 4, filed December 22, 1998, in Support of Spain's Motion for Summary Judgment.

19. Plaintiff's Memorandum in Respect to Its Claim of Entitlement to a Salvage Award for Juno, at 22 and n. 5 (May 26, 1999).

20. *Sea Hunt,* 221 F.3d at 639.

21. *Sea Hunt,* 47 F. Supp. 2d at 681–82.

22. *Id.* at 682.

23. *Id.*

24. *Id.* at 685.

25. *Id.*

26. *Id.* at 683.

27. *Id.* at 683, *citing Sea Hunt, Inc.* v. *Unidentified Vessel or Vessels,* 182 F.R.D. 206 (E.D. Va. 1998).

28. *Id. citing Sea Hunt, Inc.* v. *Unidentified Vessel or Vessels,* 22 F. Supp. 2d 521 (E.D. Va. 1998).

29. *Sea Hunt,* 47 F. Supp. 2d at 683.

30. *Id.*

31. 43 U.S.C. § 2101 *et seq.*

32. 43 U.S.C. § 2105(a) (emphasis added).

33. 43 U.S.C. § 2105(c).

34. For a discussion of federal court jurisdiction over claims under the ASA and Eleventh Amendment immunity issues, see Shapreau, *The Brother Jonathan Decision: Treasure Salvor's "Actual Possession" of Shipwreck Gives Rise to Federal Jurisdiction for Title Claim*, 7 Int'l J. Cult. Prop., 2, 475–95 (1998).

35. 43 U.S.C. § 2106.

36. ASA Guidelines, 55 Fed. Reg. at 50120.

37. 43 U.S.C. § 2106 (a). "Under the law of finds, title to property that is abandoned on or beneath the ocean vests in the first finder lawfully and fairly appropriating it and reducing it to possession with the intention of becoming its owner. However, an exception is made where the wreck is embedded in state or privately owned submerged lands, in which case, title vests in the owner of the land." *Deep Sea Research*, 102 F.3d 379, 383 n. 2 (9th Cir. 1996), *aff'd in part, vacated in part*, 118 S.Ct. 1464 (1998), *citing Zych* v. *Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SF "Seabird,"* 811 F.Supp. 1300, 1314 (N.D. Ill. 1992), *aff'd* 19 F.3d 1136 (7th Cir.), *cert. denied sub nom*, *Zych* v. *Illinois Historic Preservation Agency*, 115 S.Ct. 420, 130 L.Ed.2d 335 (1994).

"Under the law of salvage, the salvor of an imperiled vessel is entitled to a liberal salvage award from the res of the vessel. Salvage awards are intended to advance the public policy goal of encouraging those who come upon imperiled vessels to take the often costly and dangerous steps necessary to recover property in the absence of a negotiated agreement." *Deep Sea Research*, 102 F.3d at 383, n. 2, *citing Columbus-America Discovery Group* v. *Atlantic Mutual Ins. Co.*, 974 F.2d 450, 459 (4th Cir. 1992). Salvage law is applied "when ships or their cargo have been recovered from the bottom of the sea by those other than their original owners." *Columbus-America*, 974 F.2d at 459. Under salvage law, "the original owners still retain their ownership interest in such property." *Id.*

38. H.R.Rep. No. 100-514 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 377.

39. *Id.* 47 F. Supp. 2d at 686, n.10.

40. 974 F.2d 450, 461 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993).

41. *Sea Hunt,* 47 F. Supp. 2d at 688.

42. *Id.* at 687, *quoting Columbus-America*, 974 F.2d at 464–65.

43. *Columbus-America*, 974 F.2d at 461. *But see Treasure Salvors, Inc.* v. *The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978)("Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths").

44. The Fourth Circuit reversed the District Court's ruling that the underwriters had abandoned their claim to the gold on board the *Central America* because (1) the underwriters had destroyed documents pertaining to the payment of claims on the *Central America* and (2) 130 years had passed without the underwriters attempting to claim the sunken cargo. *Sea Hunt,* 47 F. Supp. at 686.

45. *Columbus-America*, 974 F.2d at 468.

46. *Sea Hunt,* 47 F. Supp. 2d at 688.

47. *Id.* at 689.

48. *Id.* The District Court held that because *Juno* did not sink until 1802, the terms of the 1763 Treaty did not apply to *Juno*. *Id.* at 688, n. 15.

49. *Id.* at 689 *quoting* 1763 Treaty, Art. XX.

50. *Id.* at 689.

51. *Id.*, n. 17.

52. *Id.* at 690.

53. *Id.*

54. *Id., quoting* 1819 Treaty, Art. II. The 1819 Treaty was the second time that Spain had ceded Florida, the first being the 1763 Treaty. Spain regained Florida during the American Revolution, when it recaptured Pensacola, and all of Florida was given back to Spain pursuant to a treaty in 1784. *Id.* at 690, n. 18.

55. *Id.* at 690.

56. *Id.* at 690–91.

57. *Id.*

58. *Id.* at 691 (citations omitted).

59. *Id.*

60. *Id.*

61. *Id.* at 691–92.

62. *Sea Hunt, Inc.* v. *The Unidentified Shipwrecked Vessel or Vessels, et al.*, 1999 US Dist. Lexis 21752, 2* (E.D. Va. 1999).

63. Although the initial answer filed by Spain was defective, the court found that Sea Hunt had nevertheless received notice of Spain's verbal note as of the date of Spain's first defective answer. *Id.* at 9*–10*, n. 4.

64. *Id.* at 9*.

65. *Id., quoting* attachment 2 to Supplemental Brief for the United States Amicus Curiae.

66. *Id., citing Lathrop* v. *Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993).

67. 817 F. Supp. 953 (M.D. Fla. 1993).

68. *Lathrop*, 817 F. Supp. at 965. *Compare Platoro Ltd., Inc.* v. *Unidentified Remains of a Vessel*, 695 F.2d 893, 901–2 (5th Cir. 1983)(Fifth Circuit recognized doctrine of constructive rejection, but granted a salvage award finding that it was not reasonable for the salvors to conclude from the owner of the vessel an intent to reject salvage services).

69. *Sea Hunt,* 1999 US Dist. Lexis at 6*, *citing* the Transcript of Proceedings, March 11, 1998, at 18, lines 14–17 (statement of Mr. Hess).

70. *Id.* at 7*, *citing* Transcript of Proceedings, September 15, 1998, at 186, lines 17–21 (testimony of Mr. Benson) and Supplemental Brief for the United States as Amicus Curiae, attachment 2, May 27, 1998.

71. *Sea Hunt,* 1999 US Dist. Lexis at 7*–8*.

72. *Sea Hunt, Inc.* v. *The Unidentified Shipwrecked Vessel or Vessels, et al.,* 191 F.R.D. 508, 510 (E.D. Va. 1999).

73. Spain's motion was not filed within the ten days of the April 27, 1999 order, which the court deemed was a final judgment as applied to *La Galga*. *Id.*

74. Spain knew in advance of the April hearing that Sea Hunt intended to argue abandonment of *La Galga* under the 1763 Treaty; Spain could have contacted officials in the United Kingdom before the hearing and obtained the Diplomatic Note at an earlier date; Spanish diplomats from the Spanish Embassy had been involved in the litigation from its inception and embassy officials were at the disposal of Spain throughout the litigation. *Id.,* 191 F.R.D. at 511.

75. *Id.*

76. *Sea Hunt,* 221 F.3d at 643–44.

77. The Fourth Circuit stated, "We affirm the district court's holding that *Juno* was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the district court noted, 'Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory.'" *Sea Hunt,* 221 F.3d at 644, n. 1.

78. *Sea Hunt,* 221 F.3d 634.

79. *Id.* at 647–48, n. 2.

80. *Id.* at 640.

81. *Id.* at 641.

82. *Id.,* 221 F.3d at 641, *quoting California* v. *Deep Sea Research, Inc.,* 523 U.S. 491, 508, 140 L.Ed. 2d 626, 118 S.Ct. 1464 (1998)(the Fourth Circuit relied on the Supreme Court's remark in *Deep Sea Research,* in which it stated that the ASA did not affect the meaning of the term "abandoned" under the ASA and that "'the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law'").

83. *Id.,* 221 F.3d at 641, *citing Columbus-America,* 974 F.2d 450.

84. *Id., quoting Columbus-America,* 974 F.2d at 461.

85. *Id., quoting Columbus-America,* 974 F.2d at 467–68.

86. *Id., quoting* AKABA, 54 F. 197, 200 (4th Cir. 1893).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id., quoting* H.R. Rep. No. 100-514 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366.

91. *Id.* (emphasis added), *citing Columbus-America,* 974 F.2d at 464–65 ("Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest").

92. *Id.,* 221 F.3d at 641.

93. *Id.* at 647, *citing Columbus-America*, 974 F.2d at 461; *Fairport*, 177 F.3d at 499 (length of time "one factor among several relevant to whether a court may infer abandonment").

94. *Id.* at 647, *citing Yukon Recovery L.L.C.* v. *Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir. 2000)("Lack of technology is one factor to consider in determining whether inaction constitutes abandonment.") *cert. denied sub nom. Yukon Recovery L.L.C.* v. *Ocean Mar, Inc.*, 148 L.Ed. 2d 28, 121 S.Ct. 62 (2000).

95. *Id.*

96. *Id.*, *quoting* H.R. Rep. No. 100-514 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 381.

97. *Id.*, 221 F.3d at 641.

98. *Id.* at 642.

99. *Id.*

100. *Id.*, 221 F.3d at 642, *quoting* the 1902 Treaty between Spain and the U.S., July 3, 1902, 33 Stat. 2105. The United States Department of State has stated that "this provision is unique" in that no other "friendship, commerce and navigation treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity." *Id.*, 221 F.3d at 642, *quoting* Statement of Interest, U.S. Dep't of State, 13 (Dec. 18, 1998).

101. *Id.*, 221 F.3d at 642.

102. *Id.* at 642–43.

103. *Id.*

104. 332 U.S. 19, 39–40, 91 L.Ed. 1889, 67 S.Ct. 1658 (1947).

105. *Sea Hunt*, 221 F.3d at 642.

106. *Id.*, *quoting U.S.* v. *California*, 332 U.S. at 39–40.

107. *Id.*, 221 F.3d at 643. The state department also emphasized that "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Statement of Interest, U.S. Dep't of State, at 15.

108. *Id.*

109. *Id.*, *quoting Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945)(involving an *in rem* admiralty action against a foreign-owned merchant vessel).

110. *Id.*

111. *Id.*, *quoting* Statement of Interest, U.S. Dep't of State, 9.

112. *Id.* at 643.

113. *Id.* at 634.

114. *Id.* at 647, *quoting Amicus Curiae* Br., of U.S., at 1.

115. *Id.* at 644–47.

116. *Id.* at 644.

117. *Id.* at 643–44.

118. *Id.* at 646. "We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters." *Compare id.* at 645 ("Nineteenth century and present day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended" (citation omitted)).

119. *Id.* at 644 (emphasis added), *quoting* Article XX, Definitive Treaty of Peace between France, Great Britain, and Spain, February 10, 1763.

120. *Id.* at 644.

121. *Id.* at 644–45.

122. *Id.* at 645.

123. *Id., citing United States* v. *California*, 332 U.S. at 32, and Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by *United States* v. *Maine*, 40 U.S. 515, 43 L.Ed. 2d 363, 95 S.Ct. 1155 (1975)("When in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast.").

124. 221 F. 3d at 645, *citing Johnson and Graham's Lessee* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 584, 5 L.Ed. 681 (1823), and *United States* v. *The Nancy*, 3 Wash. C.C. 281, 27 F.Cas. 69, 71 (C.C.D.Pa. 1814)(No. 15,854).

125. 221 F. 3d at 645–46.

126. *Id.* at 647, *citing* 8 Digest of U.S. Practice in International Law 999, 1006 (1980).

127. *Id.* at 647.

128. U.S.C.C.A.N. at 366.

129. *Sea Hunt*, 221 F.3d at 642.

130. 102 F.3d 379 (9th Cir. 1996), *aff'd in part, vacated sub nom.*, 523 U.S. 491, 140 L.Ed. 2d 626, 118 S.Ct. 1464 (1998).

131. *Deep Sea Research*, 102 F.3d at 388. *See also Fairport Int'l Exploration, Inc.* v. *Shipwrecked Vessel, known as the Captain Lawrence*, 177 F.3d 491, 499 (6th Cir. 1999)(wherein the Sixth Circuit adopted a test of "inferential abandonment"). Several courts have discussed the inference of abandonment by lapse of time or a failure to discover and salvage. *See, e.g., Zych* v. *Unidentified, Wrecked and Abandoned Vessel*, 755 F. Supp. 2133 (N.D. Ill. 1991), *rev'd on other grounds*, 960 F.2d 665 (7th Cir. 1992); *Wiggins* v. *110 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960) ("While lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon"); *Yukon Recovery* v. *Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir. 2000)("The district court properly acknowledged that lack of technology is one factor to consider in determining whether inaction constitutes abandonment").

132. *Id.* at 388. The Fourth Circuit pointed out that neither the First nor the Fifth Circuit has ever suggested that "an implied abandonment standard would govern in a case involving a claim by an original owner to its property." *Sea Hunt*, 221 F.3d at 643, *citing Martha's Vineyard Scuba Headquarters, Inc.* v. *Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987)("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981)("salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original

owner of title or grant ownership rights to the salvor, except in extraordinary cases"). *Id.* at 642.

133. 105 F.3d 1078 (6th Cir. 1997), *vacated and remanded in light of Deep Sea Research,* 118 S.Ct. 1558 (1998), *remanded in light of Deep Sea Research,* 177 F.3d 491 (6th Cir. 1999).

134. *Id.* at 1085; *accord Fairport Int'l.,* 177 F.3d at 499.

135. *Id.* 177 F.3d at 500.

136. 836 F. Supp. 1099 (D. N.J. 1993).

137. *Id.* at 1105.

138. *Id.* at 1106.

139. *Id.* at 1108.

140. *See, e.g.,* Sea *Hunt,* 221 F.3d at 647; *Yukon Recovery* v. *Certain Abandoned Property,* 205 F.3d 1189, 1194 (9th Cir. 2000)("It is only by virtue of modern technological advances that the current salvage attempt is within the realm of possibility. . . . [L]ack of technology is one factor to consider in determining whether inaction constitutes abandonment"); *Deep Sea Research,* 102 F.3d at 388 ("When the technology to conduct salvage operations has been developed recently, failure on the part of an owner to attempt to salvage the wreck does not give rise to an inference that the owner has abandoned title to the vessel"); *Zych* v. *Unidentified, Wrecked and Abandoned Vessel, Believed to Be the SB "Lady Elgin,"* 755 F. Supp. 213, 216 (N.D. Ill.1990), *amended* 1991 WL 2536 (1991).

141. Roderick Mather, *Technology and the Search for Shipwrecks,* 30 Journal of Maritime Law and Commerce 2, 181 (Apr. 1999).

142. Telephone interview with Dana Yoerger, Woods Hole Oceanographic Institution, June 14, 2001. *See also* Mather, *supra* note 129.

143. *Id.*

144. Telephone interview with Captain William A. Gaines, Scripps Institution of Oceanography, June 14, 2001.

145. *Id.*

146. *See* David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal,* 30 Journal of Maritime Law and Commerce 2, 331, 350 (Apr. 1999).

147. *See* Ole Varmer, *The Case Against the "Salvage" of the Cultural Heritage,* 30 Journal of Maritime Law and Commerce 2, 279, 295 (Apr. 1999).

148. Clearly, if an owner of a shipwreck had made an insurance claim for losses incurred in connection with the wreck, an owner could not credibly argue that others should be precluded from salvage efforts or that she did not intend to abandon the wreck. Moreover, to the extent the insurer paid on the claim, title in some or all of the property may vest in the insurer by operation of subrogation.

149. H.R.Rep. No. 100-514 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 367–68. *See also U.S.* v. *Steinmetz,* 763 F. Supp. 1293, 1299 (D.N.J. 1991) ("warships and their remains which are clearly identifiable as to the flag State of origin are clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title (citation omitted) . . . Clearly, warships are to be treated uniquely."), *aff'd,* 973 F.2d 212, 222–23 (3rd Cir. 1992), ("although an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress (citation omitted),") *cert.*

denied, 507 U.S. 984 (1993); *Hatteras, Inc.* v. *The U.S.S. Hatteras,* 1984 A.M.C. 1094, 1098 (S.D.Tex.), *vacated in part on other grounds,* 1984 A.M.C. 1102 (S.D. Tex. 1981).

150. *Steinmetz,* 973 F.2d at 222.

151. *Id.* at 222, *quoting* Marian Nash Leich, Digest of United States Practice in International Law 1004 (1980)(quoting Legal Adviser's Memorandum).

152. H.R. Rep No. 100-514 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 373–74 (emphasis added).

153. One of Sea Hunt's legal counsel, David J. Bederman, poses the question: "What is a sovereign warship? Spain now contends that any vessel flying its flag and carrying a gun is a warship. This is intended to lay claim to all the commercial vessels that were convoying gold and silver back from the New World. But that can't be a sensible definition." E-mail communication with David J. Bederman, May 17, 2001. *See also* David J. Bederman, *Rethinking the Legal Status of Sunken Warships,* 31 Ocean Dev. & Int'l L. 97, 98–99 (2000); Jerry E. Walker, *A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations,* 12 Univ. of S.F. Maritime Law Journal 2, 311–58 (2000).

154. H.R. Rep. No. 100–514, at 381 (1988), *reprinted in* U.S.C.C.A.N. (emphasis added).

155. ASA Guidelines, 55 Fed. Reg., at 50121 (1990)(emphasis added).

156. John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining after Brother Jonathan,* 30 Journal of Maritime Law and Commerce 2, 205, 218, n. 56 (Apr. 1999). Privateers operated under Letters of Marque, which were issued by nations "to an individual or group authorizing the recipient to arm a privately owned vessel for the purpose of making war on the commerce of an enemy. . . . Once a Letter of Marque had been issued, the government had no control over the quality of the crew, or the movements of the vessel." *Id., quoting* W. Tidwell, *April '65: Confederate Covert Action in the Civil War* 83–84 (1995).

157. *Sea Hunt,* 47 F. Supp. 2d at 685 ("The *Columbus-America* case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether *Juno* or *La Galga* were warships in the service of Spain at the time of their sinking") and *id.* at 691.

158. *Id.*

159. Telephone interview with Peter Hess, legal counsel for Sea Hunt, Inc., June 13, 2001.

160. Amalia Barron, "Potosí's Silver Tears," <www.unesco.org/courier/2000_03/uk/dici/txt1.htm>.

161. ASA Guidelines, 44 Fed. Reg at 50121 (emphasis added).

162. Affidavit of David Beltran Catala, Counselor for Juridicial Affairs, Embassy of Spain to the United States of America, Dec. 22, 1998, Action No.: 2:98cv281 (E.D. Va.), at para. 16.

163. *Id.* at para. 9.

164. *Id.* at para. 12.

165. Affidavit of Ben D. Benson, Mar. 11, 1999, Action No.: 2:98cv281, (E.D. Va), at paras. IV–V and Attachment A attached thereto and Affidavit of Horacio Pardo, Mar. 10, 1999, Action No.: 2:98cv281v (E.D.Va.), at paras. 3–9.

166. *Id.*

167. *Id.*

168. <http://www.imac.digest.com/unescopress.html>.

169. *See, e.g.*, David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 Journal of Maritime Law and Commerce 2, 331–354 (April 1999) and <http://www.imacdigest.com>.

170. ASA Guidelines, 55 Fed. Reg. at 50122.

171. E-mail correspondence with James Goold, June 11, 2001.

172. Robert D. Ballard, *The Eternal Darkness: A Personal History of Deep Sea Exploration* 310–11 (Princeton University Press, Princeton 2000).