

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA AND STATE LANDS COMMISSION,
Petitioners v. DEEP SEA RESEARCH, INC., ET AL.

CASE NO: 96-1400 c-1

PLACE: Washington, D.C.

DATE: Monday, December 1, 1997

PAGES: 1-58

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

ORIGINAL

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'97 DEC -8 P3:02

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 CALIFORNIA AND STATE LANDS :

4 COMMISSION, :

5 Petitioners :

6 v. : No. 96-1400

7 DEEP SEA RESEARCH, INC., :

8 ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, December 1, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:53 a.m.

15 APPEARANCES:

16 JOSEPH C. RUSCONI, ESQ., Deputy Attorney General of
17 California, Oakland, California; on behalf of the
18 Petitioners.

19 DAVID C. FREDERICK, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as the Respondent
22 supporting the Petitioners in part.

23 FLETCHER C. ALFORD, ESQ., San Francisco, California; on
24 behalf of the Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JOSEPH C. RUSCONI, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
DAVID C. FREDERICK, ESQ.	
On behalf of the United States, as the	
Respondent supporting the Petitioners in part	24
ORAL ARGUMENT OF	
FLETCHER C. ALFORD, ESQ.	
On behalf of the Respondents	33

1 P R O C E E D I N G S

2 (10:53 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1400, California and State Lands
5 Commission v. the Deep Sea Research, Inc.

6 Mr. Rusconi.

7 ORAL ARGUMENT OF JOSEPH C. RUSCONI

8 ON BEHALF OF THE PETITIONERS

9 MR. RUSCONI: Mr. Chief Justice, and may it
10 please the Court:

11 The action below was one in rem by a private
12 party to try title as against all the world and for
13 exclusive salvage rights to a vessel lying upon the
14 sovereign submerged lands of the State of California.

15 In this situation, California claims title and
16 rights to salvage over that same vessel, and the Eleventh
17 Amendment prevents the adjudication of California's
18 interests in this case without its consent.

19 Under this Court's Eleventh Amendment
20 jurisprudence, the guiding principle in these cases is the
21 effect of the relief requested on the State. This
22 conclusion is not dependent upon formalisms or upon the
23 manipulation of captions or pleadings.

24 Had this suit been in personam against the State
25 under the same circumstances there is no doubt that the

1 suit would have been barred by the Eleventh Amendment, and
2 this result cannot be changed by the substitution of the
3 vessel as defendant for the State of California.

4 QUESTION: Well, there's really no such thing as
5 an in rem action, then.

6 MR. RUSCONI: No, that's --

7 QUESTION: Well, I mean, you cannot possibly
8 adjudicate the rights to a particular piece of property.
9 You always have at least 50 claimants --

10 MR. RUSCONI: Justice Scalia --

11 QUESTION: -- who can come in and say, no, it's
12 really mine, and this adjudication was for naught.

13 MR. RUSCONI: Justice Scalia, all we're asking
14 in this case is that the State be dismissed. Now, they
15 can move forward in this with an in rem judgment against
16 the rest of the world.

17 QUESTION: Then it's not an in rem judgment.
18 The whole point, historically, of an in rem judgment in
19 these admiralty actions is that it binds the world, and it
20 seems to me that the implication of what you're saying
21 here is, a State is always part of the world and,
22 therefore, in any admiralty in rem action a State could
23 come forward and say, got to dismiss it, Eleventh
24 Amendment, can't bind me.

25 MR. RUSCONI: Justice Souter, I believe that is

1 what we are saying. However, the practical effect of
2 that, States are not going to run around willy nilly and
3 make these type of claims.

4 QUESTION: And isn't the reason that they're
5 not -- isn't the reason that you're not going to file this
6 kind of an objection on, let's say, an East Coast salvage
7 case is that there is no colorable basis, in your mind or
8 anybody else's, for your doing so, for your having a claim
9 that might be cut off and therefore in fact adjudicated by
10 the in rem action?

11 MR. RUSCONI: That will be the practical effect,
12 yes.

13 QUESTION: All right. Then what would be wrong
14 with a rule, and maybe it would be a softer rule than the
15 circuit applied here, which says you have at least got to
16 come forward and make a sufficient showing that you are
17 within the class of those whose interests might, in fact,
18 be adjudicated here?

19 You've done that, in fact, in part by what
20 you've done so far. After all, in this case the original
21 in rem process describes the location, so you said, look,
22 we're within the class of those geographically that might
23 be affected, and what would be wrong with carrying that
24 one step further and simply saying, all right, make an
25 equally colorable showing that you're also within the

1 class as defined by other criteria, abandonment,
2 embeddedness, historic register?

3 It doesn't mean -- this rule would not mean that
4 you have ultimately to prove your entitlement, but it
5 would mean that you've got to make a showing that there is
6 a practical reason for stopping this in rem proceeding,
7 and the reason, the justification for that is to avoid the
8 absurd situation in which, simply by claiming that you're
9 part of the world, you could defeat any in rem proceeding.

10 What would be wrong with that rule?

11 MR. RUSCONI: Justice Souter, the problem with
12 that rule is that by inquiring into the location,
13 inquiring into the issues that you mentioned, you're
14 adjudicating the merits of the claim.

15 QUESTION: No, I'm simply -- my suggestion was
16 that you've at least got to come forward with a basis for
17 saying, yes, there is a reasonable basis for saying that
18 State interests are involved here, as distinct from the
19 case that would occur if the wreck were beyond the 3-mile
20 limit, or the wreck were in the Gulf of Mexico, or in
21 Europe.

22 And I'm not suggesting that there needs to be a
23 final adjudication, but I'm suggesting that in order to
24 preserve the value of in rem actions there at least ought
25 to be a sufficient showing for the court -- from which the

1 court could conclude that you or your State has a serious
2 interest implicated here that justifies recognizing your
3 Eleventh Amendment claim and, in effect, defeating the
4 Federal in rem action, that's all.

5 MR. RUSCONI: I understand, Justice Souter, but
6 I do not see as a practical matter how this inquiry that
7 you're talking about about preliminary matters cannot but
8 implicate a question on the merits, and this is what --

9 QUESTION: Oh, it implicates it, but it doesn't
10 determine it. In other words, you've got to come forward
11 with some evidence. That's a very different thing from
12 saying that you've got to, in effect, present a full case
13 and prevail.

14 MR. RUSCONI: We think that the -- the State of
15 California thinks that the broad concept of sovereign
16 immunity in the Eleventh Amendment means that even the
17 type of preliminary inquiry that you're asking for is
18 forbidden.

19 Now, when a State --

20 QUESTION: I think I might agree with that, and
21 then suggest that perhaps the Eleventh Amendment doesn't
22 apply at all to an in rem action where the res is not in
23 the custody, the actual custody of the State.

24 If you don't accept Justice Souter's lifeline it
25 seems to me that this shows that perhaps the in -- the

1 utility of in rem actions is substantially destroyed by
2 your position.

3 MR. RUSCONI: Well, Your Honor, we don't think
4 we're destroying the utility of in rem actions. There
5 has -- this -- there has not been a history of States
6 making unsubstantiated claims based on the Eleventh
7 Amendment, and it's certainly not the case in this case.

8 QUESTION: Well, but there is some indication,
9 isn't there, that when the Framers were drafting the
10 Constitution and when the Eleventh Amendment was adopted
11 that it was thought that certain types of suits in
12 admiralty weren't covered by the Eleventh Amendment at
13 all.

14 MR. RUSCONI: I --

15 QUESTION: The prize cases, for example -- and
16 very possibly in rem cases of this type, where the State
17 isn't in possession, as such, of the property.

18 MR. RUSCONI: Your Honor, since the early cases,
19 which we do not believe stand for the citation by the
20 other parties in this case, those cases did not involve in
21 rem actions at all, or possession was not central to the
22 holding.

23 In this case, title is being -- is going to be
24 adjudicated against the State in this in rem action. In
25 this case, its regulatory authority has been infringed by

1 the orders of the district court, as --

2 QUESTION: Well, Mr. Rusconi, your opponents
3 cite the old Peters case from this Court as standing for
4 the proposition that a Federal court can adjudicate an
5 action so long as the property is not in the possession of
6 the State. Now, do you disagree with that reading of
7 Peters?

8 MR. RUSCONI: Yes, we do. That case was not an
9 in rem action. That case was an in personam action by
10 rival claimants against the executrices of the estate of
11 the ex State Treasurer.

12 Now, in that case, when you look at Justice
13 Marshall's quote about the State not being able to sit
14 back and then destroy this ongoing action, that makes
15 sense. Normal principles of estoppel would not bind the
16 State on a judgment in an in personam case when they're
17 not named, and so there's no problem.

18 QUESTION: What's your answer to The Davis? As
19 I recall, you said in your brief, well, Davis isn't on
20 point, or -- here because the title was not involved, but
21 the question is the Eleventh Amendment applicability, and
22 I would suppose that there's an Eleventh Amendment
23 violation or not an Eleventh Amendment violation
24 regardless.

25 MR. RUSCONI: Well, yes, title was not involved

1 in The Davis, and that involved --

2 QUESTION: Well, why should that make a
3 difference here?

4 MR. RUSCONI: Because --

5 QUESTION: Regardless of what's being
6 adjudicated you're saying we have the right to an Eleventh
7 Amendment immunity even though we weren't in possession
8 and even though it is in rem.

9 MR. RUSCONI: That's correct. In The Davis the
10 title to the cargo was not at issue, and it also involved
11 the sovereign immunity of the United States, so it's not
12 an Eleventh Amendment immunity. In this case we have --

13 QUESTION: No, but if sovereign immunity of the
14 United States would not have prevailed in that case,
15 there's at least a pretty fair argument that it's unlikely
16 that the concept of sovereign immunity recognized in the
17 Eleventh Amendment for State purposes would, in fact, be
18 somehow more powerful or broader. I mean, I don't see
19 that as a distinction.

20 MR. RUSCONI: Well, I believe that the cases
21 have diverged on the Eleventh Amendment immunity that is
22 given to the States versus the sovereign immunity of the
23 United States.

24 QUESTION: No, but do you take the position that
25 State sovereign immunity in fact is broader than Federal

1 sovereign immunity?

2 MR. RUSCONI: I believe that under the -- let
3 me -- I think the best way to answer that is, under this
4 Court's --

5 QUESTION: Well, how about a yes or no, and then
6 explain?

7 (Laughter.)

8 QUESTION: Do you take the position that State
9 sovereign immunity is, in fact, a broader concept than
10 Federal sovereign immunity?

11 MR. RUSCONI: I think it is broader in that the
12 Congress can change the immunity, sovereign immunity of
13 the United States. However, Congress cannot change the
14 Eleventh Amendment immunity, and in that way --

15 QUESTION: Well, is there any indication that
16 the concept of sovereign immunity understood at the time
17 of The Davis was in fact a weaker concept under the --

18 MR. RUSCONI: No.

19 QUESTION: Okay.

20 MR. RUSCONI: I -- but I also want to add that
21 we're talking here about a vessel that is on the sovereign
22 lands of the State of California, and whose title is being
23 tried, and whose -- the State is not making a bound -- a
24 baseless claim in this case, and the recent jurisprudence
25 of this Court --

1 QUESTION: You say it's on the --

2 QUESTION: All property in California is on the
3 sovereign land of the State of California. I mean, so any
4 in rem action against any piece of property in California
5 you could say the same thing about, right?

6 MR. RUSCONI: Perhaps I misunderstand your
7 question. Not all property within our jurisdiction is the
8 sovereign lands of the State of California. Those are --
9 these are lands that were granted according to the -- by
10 the Submerged Lands Act.

11 QUESTION: You have greater sovereignty over the
12 sea bed than you have over the dry land in California?

13 MR. RUSCONI: It is held subject to a public
14 trust, a unique trust that all sovereign lands in the
15 State of California are held that are not held, say, on
16 proprietary lands, which may be sold, whereas sovereign
17 lands, it takes a unique statutory scheme to get rid of
18 them.

19 QUESTION: I don't understand.

20 QUESTION: Well --

21 QUESTION: I don't know where the sovereign
22 lands argument takes you, because if -- to the extent that
23 you're going to rely on sovereign lands rather than
24 Eleventh Amendment immunity, period, it seems to mean
25 you're open to the argument that the reason you've got

1 those lands is that the Congress of the United States gave
2 them to you, and if you're going to take the benefit of
3 those lands, presumably it would be fair to say you ought
4 to take them subject to the burden of taking them without
5 destroying the utility of in rem actions.

6 MR. RUSCONI: This is a difficult case, Justice
7 Souter. However, just last term in the Coeur D'Alene case
8 the Court was very --

9 QUESTION: Well, is my -- I -- Coeur D'Alene is
10 fine, but I mean, is there something wrong with the, kind
11 of the equity argument that I just made that if you're
12 going to depend on sovereign lands I think you've got to
13 take the burden as well as the benefit?

14 MR. RUSCONI: I don't see what the burden is
15 here.

16 QUESTION: The burden is that you are going to
17 be subject to some incidents of in rem jurisdiction.
18 Maybe that incident is that you're going to lose your
19 title, and you don't have an Eleventh Amendment claim if
20 you're not in possession. Maybe that incident is that
21 you're going to have to make at least a colorable showing
22 that you are in a position at least to claim an interest
23 subject to Eleventh Amendment protection.

24 But whatever the burden is, the argument is that
25 you got the sovereign lands from the United States, they

1 weren't your historical entitlement, and you ought to take
2 them subject to this burden.

3 MR. RUSCONI: A couple of things. Yes, but we
4 did not get them under the equal footing doctrine, but why
5 should we be treated any differently by the fact that the
6 lands were conveyed by the Submerged Lands Act when
7 they're adjacent to lands given under the equal footing
8 doctrine?

9 QUESTION: Well, the reason is that you got this
10 boon out of Congress in 1953, and presumably Congress did
11 not intend to destroy the utility of in rem admiralty
12 actions in the course of doing it. That's the answer.

13 MR. RUSCONI: I understand your argument,
14 Justice Souter, but California believes that its title and
15 its regulatory authority transcend questions such as
16 possession.

17 QUESTION: May I interrupt you with just one
18 question there? I understand the Ninth Circuit -- because
19 they wrote the opinion, but is it not correct that the
20 issues of title and regulatory authority really are quite
21 different, that it might well be true that the in rem
22 action would bind you as to title, but not necessarily as
23 to regulatory control?

24 MR. RUSCONI: They are different actions.
25 However, both of those impact the sovereignty of the State

1 of California in that this -- the title question goes
2 right to -- it's as if our Treasury was being invaded. It
3 is that invasive. To decide that a piece of property does
4 not belong to the State --

5 QUESTION: No, but all I'm saying is, is it
6 not -- would you not agree that you might lose on the
7 title argument and still win on the regulatory argument?

8 MR. RUSCONI: Correct.

9 QUESTION: Okay. Just want to be --

10 QUESTION: I am just curious about the practical
11 effects of this. What is supposed to happen in respect to
12 all of the ships or other pieces of property that for the
13 last 200 years admiralty courts have adjudicated the title
14 of in rem? Are all of those adjudications, past, present,
15 and future, now not final because any one of 50 sovereigns
16 can say, we weren't bound?

17 And my related question is, what's supposed to
18 happen in bankruptcy proceedings, another instance, I take
19 it, where every day courts decide who owns property as of
20 against the world? Are now all those property decisions
21 up for grabs? What do title insurance companies do or
22 say?

23 MR. RUSCONI: First question, theoretically yes,
24 but again, I don't see the practical implication of --

25 QUESTION: Title companies -- I'm interested in

1 that because, of course, the title insurance companies
2 often raise rates a lot when there's just a theoretical
3 objection, so I'm quite interested. I don't want to stop
4 you. I want to encourage you to --

5 MR. RUSCONI: The -- I'm not an expert in marine
6 title insurance law. However, the practical effects of
7 the application of the rule that we're asking I think, or
8 the State thinks it will be very minimal.

9 Now, as to bankruptcy, the type of claim which
10 is made in bankruptcy under 106 is something that is
11 almost reduced to money. It's a money debt that is owed,
12 and California acknowledges that in bankruptcy if we do
13 not file a proof of claim under operation of law that debt
14 will be discharged as to the State of California, but a
15 suit to quiet title is an entirely different matter. It
16 is --

17 QUESTION: I don't understand that. What --
18 why?

19 MR. RUSCONI: Because an -- a suit to quiet
20 title is an adjudication of a State's right. Under
21 bankruptcy, there is no adjudication. It is by operation
22 of law that the claim is discharged.

23 It's not an adjudication that it's a bad --
24 it's -- that there was no debt, or that the debt exists.
25 It is just a simple congressional enactment that unless

1 you file a claim it's discharged, and that is --

2 QUESTION: We're talking here about an in rem
3 action in admiralty which I think has long had special
4 characteristics that might not carry over to bankruptcy or
5 to a quiet title action.

6 Are you agreeing that the -- whatever rule we
7 devise or apply in this particular case would carry over
8 totally unchanged into bankruptcy under quiet title
9 actions?

10 MR. RUSCONI: No, no, no. What I'm saying is
11 that they're apples and oranges, that claims to debts
12 under bankruptcy law is an apple, and a quiet title suit
13 is an orange.

14 QUESTION: Well, but are you equating a quiet
15 title action with this sort of in rem action in admiralty?

16 MR. RUSCONI: What I'm saying is -- yes, that
17 the -- the functional equivalent of the admiralty action
18 is a direct quiet title action against the State.

19 QUESTION: Yes, but the difference,
20 traditionally, is that the in rem action adjudicates title
21 against the world.

22 In a quiet title action, you have to join all
23 the possible defendants, and then you get a quiet title
24 action only as to them, unless you're dealing with some --
25 the Massachusetts title system, which doesn't prevail in

1 most places.

2 MR. RUSCONI: But what's the effect of that in
3 rem judgment that Deep Sea Research owns the Brother
4 Jonathan? The effect is that it forecloses the State of
5 California. The effect is, it's the same thing as that
6 quiet title --

7 QUESTION: Well, you can intervene in the case
8 if you want to. I mean, it's not as if you're prevented
9 from making California's claim.

10 All that you're prevented from doing is
11 saying -- is sitting back and saying you've adjudicated
12 title against all the rest of the world but not against
13 us, and you say the Eleventh Amendment entitles you to do
14 that.

15 MR. RUSCONI: Correct, we do, and as a practical
16 matter States are not going to sit back. They're going to
17 bring actions in their own courts, where these actions
18 belong. I -- we don't see it as a crippling interference
19 to require that one action against the rest of the world
20 be in Federal court and the other action against the State
21 be in the State court.

22 QUESTION: Isn't that practically the end of
23 such actions, because let's take this case. You say
24 California is out, but the admiralty court can adjudicate
25 everything else. Well, what else?

1 There's a claim by the United States, and
2 there's a claim by the salvors, but how could this Federal
3 district court adjudicate finally even those claims,
4 because the State is -- won't be bound by it?

5 MR. RUSCONI: Well, they adjudicate the claims
6 amongst the claimants that are brought into Federal court,
7 but the Eleventh Amendment --

8 QUESTION: Well, what kind of litigant would be
9 satisfied with the judgment that has a big player looming
10 out there saying, whatever this district court does, it
11 won't touch us and we can reargue the whole thing?

12 MR. RUSCONI: Well, the litigant is going to
13 have to come into State court against the State, and this
14 type of split jurisdiction is not uncommon.

15 In the Pennhurst case the --

16 QUESTION: Do you think your position is
17 entirely consistent with our Treasure Salvors decision?

18 MR. RUSCONI: Yes, we do. We think that
19 Treasure Salvors, at least eight justices there were quite
20 specific that what the court of appeal did in actually
21 adjudicating the merits of the State's claim to those
22 artifacts was prevented by the Eleventh Amendment.

23 QUESTION: No, but shouldn't -- under your view
24 shouldn't the action have been dismissed? Under your
25 view, should not the action have not survived in Federal

1 court at all?

2 MR. RUSCONI: No, the -- as to the State of
3 Florida it should have been dismissed.

4 QUESTION: Right, which it was not.

5 MR. RUSCONI: Which it was not.

6 QUESTION: Yes.

7 QUESTION: We asked you about some of the old
8 cases. Justice Washington's case on circuit, The Bright,
9 is really a very strong position for your opponents, is it
10 not?

11 MR. RUSCONI: It is, but we believe that The
12 Bright case, which purports to say that the Eleventh
13 Amendment does not apply to in rem actions, has very
14 little authority left after the New York number II case,
15 and after Treasure Salvors, which --

16 QUESTION: Well, except in the -- The Bright is
17 very much like this case, is it not, in that what we are
18 dealing with is a res that was not in the possession of
19 the Government, or is that incorrect, or of the State?

20 MR. RUSCONI: No, it was not.

21 QUESTION: You see, in New York I and II you
22 could plausibly make the argument that this was a
23 disguised or ineffective damages remedy against the State,
24 but this was the case that Justice Story relied on in his
25 commentaries. I'm not sure if it was decided subsequently

1 by our Court as authoritative.

2 MR. RUSCONI: I believe --

3 QUESTION: But it does indicate the practice at
4 the time was to recognize that admiralty in rem
5 proceedings ought to be able to proceed efficiently, and
6 that is to bind all of the probable claimants.

7 MR. RUSCONI: That may have been what Justice
8 Washington was purporting to hold, but again, I think the
9 recent jurisdiction of this Court gets -- has gotten away
10 from the type of formalistic, what pigeon hole does the
11 action fit into, and looks at the effect of the judgment
12 on the State.

13 QUESTION: But in New York, both of those cases
14 were -- they did repudiate formalism, and they said that
15 in those cases it was basically an in personam action
16 against the State, so I don't think that supports your
17 theory here, because this Court did not treat them as in
18 rem actions.

19 MR. RUSCONI: That's true, but in the --

20 QUESTION: So why do you cite them for that
21 proposition?

22 MR. RUSCONI: In the plurality decision in Welch
23 and also in --

24 QUESTION: But I'm talking to you about the two
25 Ex parte New York cases.

1 MR. RUSCONI: Yes, but the Court in both Welch
2 and in the Treasure Salvors case cites the New York number
3 II for the broad concept that the Eleventh Amendment does
4 apply in in rem actions. It has not been limited to the
5 specific holding in the cases many, as Mr. Frederick --

6 QUESTION: Why do you think -- just to move on
7 there, I mean, there's a few other issues in the case.
8 Why do you think this wreck has been abandoned?

9 MR. RUSCONI: This wreck has been abandoned
10 because under general maritime law as it's developed in
11 this country abandonment can be shown through the passage
12 of time and the failure to salvage on the part of the
13 owner.

14 In this case, we have a claimant who has alleged
15 claim to one-sixth of the cargo, five-sixths of the cargo
16 and the vessel itself having clearly been abandoned.

17 QUESTION: Well, let's assume in the old days,
18 never mind new technology, that a vessel goes down into a
19 coral reef. It's simply -- there's no way to get it up
20 from under the coral reef, and 2 years later -- so nobody
21 tries to get it up.

22 2 years later, a hurricane comes through, lifts
23 it up, and it's floated to the shore.

24 Has that been abandoned, and the people who own
25 the ship and what's in the ship have lost all claim to it?

1 MR. RUSCONI: Under general maritime law,
2 there -- as it's developed there must be objective steps
3 taken by the owner of that ship to try and salvage it.

4 QUESTION: If it's -- even if it's not
5 salvageable?

6 MR. RUSCONI: Even if it's not salvageable.

7 QUESTION: What case do you cite for that
8 proposition?

9 MR. RUSCONI: The cases that we cite in --

10 QUESTION: You must -- the -- if I understand,
11 you're saying the law requires you to do what is obviously
12 not doable, is that it?

13 MR. RUSCONI: Yes. That is the way the it has
14 developed.

15 QUESTION: The law requires a vain act. There's
16 a new proposition of --

17 MR. RUSCONI: It's a unique aspect of
18 abandonment law because in that case --

19 QUESTION: It certainly is.

20 MR. RUSCONI: In that case a salvager could come
21 in and take that property and be entitled to a salvage
22 award up to and including the full value of the vessel,
23 and so it's possible under circum -- I'm not saying it's
24 likely in that case, but it's possible under the
25 circumstances that by the nonaction or the disappearance

1 of the owner of the vessel that you're talking about it
2 could be abandoned.

3 QUESTION: Thank you, Mr. Rusconi.

4 Mr. Frederick, we'll hear from you.

5 ORAL ARGUMENT OF DAVID C. FREDERICK
6 ON BEHALF OF THE UNITED STATES, AS RESPONDENT
7 SUPPORTING THE PETITIONER IN PART

8 MR. FREDERICK: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Although we agree with petitioners that the
11 courts below misconstrued the Abandoned Shipwreck Act, we
12 disagree with them that the Eleventh Amendment applies
13 because this is not a suit against the State. The State
14 was not a named party, and the coercive process of the
15 Federal court is not necessary to dispossess State agents
16 of property.

17 The filing of a claim by a State in an admiralty
18 in rem action does not transform that into a suit
19 commenced or prosecuted against the State within the
20 meaning of the Eleventh Amendment. Just like in a
21 bankruptcy proceeding, if a State is a creditor the filing
22 of a claim by the State does not transform a bankruptcy
23 action into a suit proscribed by the Eleventh Amendment.

24 QUESTION: Was this a case within the admiralty
25 jurisdiction of the court?

1 MR. FREDERICK: This one?

2 QUESTION: Yes.

3 MR. FREDERICK: Yes.

4 QUESTION: And the ASA does not change that?

5 MR. FREDERICK: No. The ASA --

6 QUESTION: So cases under the ASA are within the
7 admiralty jurisdiction of the --

8 MR. FREDERICK: No. What happens is in this
9 case the process, the admiralty process brought this case,
10 this vessel within the admiralty jurisdiction of the
11 court. At that point, when the court exercises in rem
12 jurisdiction it has to decide among the competing
13 claimants who owns what.

14 The Abandoned Shipwreck Act says that if the
15 statutory requisites are met, the United States assumes
16 title and transfers it to the State, and at that point the
17 ASA divests the Federal court of admiralty jurisdiction
18 with respect to that property that falls within the
19 requisites of the Abandoned Shipwreck Act.

20 So at the initiation of the proceeding the court
21 has admiralty jurisdiction, but if it is found that the
22 ASA applies to a part of the wreck, or maybe the whole
23 wreck, at that point the court no longer has admiralty
24 jurisdiction.

25 QUESTION: Does that mean the Eleventh Amendment

1 objection of the State then becomes active, whereas -- and
2 a problem, whereas before we could have displaced it by
3 saying that historically in rem admiralty jurisdiction is
4 sufficient to bind the State, but once we're in -- within
5 the Federal question jurisdiction the State then makes the
6 argument that the Eleventh Amendment sort of springs back
7 into play?

8 MR. FREDERICK: That becomes a much more
9 difficult proposition, Justice Kennedy, because what
10 happens in practical effect is that once the State owns it
11 by operation of the Abandoned Shipwreck Act there are
12 other consequences that might flow from admiralty courts'
13 orders, and it might be appropriate at that point for the
14 State to say that the perpetuation and continuation of the
15 suit is in effect an action against the State.

16 QUESTION: Mr. Frederick, do you agree that if
17 the -- if this property were in the possession of the
18 State that the Eleventh Amendment would prevent an in rem
19 adjudication of title?

20 MR. FREDERICK: Yes. This Court's precedents
21 historically with respect to foreign sovereigns, States,
22 and the United States make clear that the immunity of the
23 sovereign turns on whether its agents are in actual
24 possession or custody of the property that's being
25 adjudicated, and there were several practical reasons for

1 that.

2 The first was that courts recognized that they
3 could not issue coercive process against a sovereign's
4 agents to dispossess those agents and create a conflict
5 between the court and the sovereign's agents.

6 There was also the practical reality that if the
7 property wasn't in the possession of the sovereign's
8 agents it likely was not doing the sovereign's work, and
9 so there was a recognition that, as Chief Justice Waite
10 stated while riding on circuit, that the mere fact that a
11 sovereign claims title to property doesn't make the
12 property part of the sovereignty.

13 QUESTION: Well, under the Abandoned Shipwreck
14 Act, if it applies, if the requirements are met, does that
15 automatically then put the State in possession of the
16 wreck?

17 MR. FREDERICK: No. No, it does not. They
18 still have to have State agents who go on to the site and
19 take possession, and it would depend upon the court's
20 adjudication of that, so --

21 QUESTION: Here, I gather they don't even know
22 where it is.

23 MR. FREDERICK: That's correct, Justice Scalia.

24 QUESTION: Do -- is that true now? I mean, what
25 has happened? Is this thing being explored now by the

1 respondents, and are people going down on behalf of the
2 respondents and recovering property?

3 MR. FREDERICK: Yes, Justice O'Connor, I believe
4 that is the case. What the court did in this case was --

5 QUESTION: They're doing it at night in the
6 dark? Is that -- why doesn't the State know where these
7 people are?

8 MR. FREDERICK: Respondent's counsel is better
9 positioned to know what its officials and representatives
10 are doing than I am, but what the district court did here,
11 Justice O'Connor, was to draw a circle basically and to
12 say that the shipwreck is somewhere within that circle,
13 and allow the salvage to proceed.

14 Before turning to abandonment I do want to
15 address just one point, and that's the sovereignty
16 interests of the State here in terms of regulatory
17 authority. The State did not appeal the district court's
18 order with respect to an infringement upon its regulatory
19 authority over salvage, so that question is not properly
20 presented in the questions upon which this Court granted
21 certiorari.

22 Moreover, it's clear here that Federal interests
23 might supplant State sovereignty interests if shipwrecks
24 are in certain places. There was -- is an express
25 preservation of rights in the Abandoned Shipwreck Act so

1 that if the Brother Jonathan had sunk below the current
2 site of the Golden Gate Bridge, for instance, and the Army
3 Corps of Engineers needed to clear it out for navigation
4 and national defense purposes, there would be no question
5 that the United States could do that.

6 QUESTION: Mr. Frederick, I'm just curious about
7 where the Government saw the light, because you made a
8 rather strong argument in the Ninth Circuit that the
9 Eleventh Amendment does apply, and that -- and now you've
10 switched positions on that.

11 MR. FREDERICK: Justice Ginsburg, when the Court
12 granted certiorari in this case we carefully examined the
13 requisites of immunity and when immunity is appropriate in
14 in rem actions, and the courts since the Treasure Salvors
15 case have been in confusion over whether or not a
16 colorable claim needs to be asserted.

17 We concluded that that is not a helpful way of
18 analyzing an immunity question when the sovereign is not
19 in actual possession of the property, because this Court's
20 cases uniformly say that when the sovereign is not in
21 possession the colorable claim analysis is really out of
22 the equation.

23 QUESTION: So you say Treasure Salvors was
24 wrong?

25 MR. FREDERICK: No. What we're saying is that

1 Treasure Salvors is what Treasure Salvors is. The State
2 agents had possession of property there. They do not
3 here, and it is a much simpler case when State agents do
4 not have possession of property that is subject to the in
5 rem jurisdiction of the court.

6 QUESTION: Mr. Alford, I --

7 QUESTION: -- no, please.

8 QUESTION: Well, I'm trying to get him onto
9 another subject. I'd like to get him onto --

10 MR. FREDERICK: Yes, and I -- may I --

11 QUESTION: Abandonment, which --

12 MR. FREDERICK: Yes, I would like to address
13 abandonment, Justice Scalia. I think technology here has
14 been used by the courts below to displace the inferences
15 that might naturally be drawn by the passage of time. It
16 would be logical to infer that someone who did not have
17 the technological capability to recapture property has in
18 fact abandoned --

19 QUESTION: Why? I thought that abandonment was
20 a voluntary, I don't want this property any more.

21 Suppose I drop a silver dollar down a grate, and
22 I try to bring it up with a piece of gum on a stick, and I
23 can't do it, and I shrug my shoulders and walk off because
24 I have not gotten it, and then somebody comes up and lifts
25 up the grate and gets my silver dollar.

1 Is that his silver dollar? Have I abandoned it
2 just because I could not get it? I still think it's my
3 silver dollar. I haven't said, you know, I don't want it
4 any more.

5 MR. FREDERICK: Justice Scalia, if you waited
6 130 years without attempting --

7 (Laughter.)

8 MR. FREDERICK: -- to get your silver dollar, it
9 might be appropriate to infer that you have abandoned it.

10 QUESTION: You have the insurance companies who
11 paid off the money and who are still in existence.

12 MR. FREDERICK: Well --

13 QUESTION: I don't see how 130 years makes any
14 difference. If abandonment requires a voluntary -- a
15 willing cessation of claim to ownership, it seems to me
16 that is not demonstra -- and that's why I always thought
17 it was. That is certainly not demonstrated by leaving a
18 wreck where you cannot possibly bring it up.

19 MR. FREDERICK: Justice Scalia, in this case
20 respondents don't even know that it was a silver dollar
21 that they lost. They purchased something from insurance
22 companies who have no records of what property they
23 insured aboard the shipwreck, so to use your analogy,
24 they're searching for something in the grate, but they
25 don't know what it is.

1 QUESTION: Well, but that's a different issue as
2 to whether -- that's the issue of who owns it.

3 MR. FREDERICK: No.

4 QUESTION: But not the issue of whether the
5 person who owns it has abandoned it or not.

6 MR. FREDERICK: You have to know what property
7 you own before you can know whether or not you did not
8 abandon it.

9 QUESTION: But your answer, your answer to
10 Justice Scalia -- because he's saying voluntary
11 abandonment. You're arguing for two things, voluntary
12 abandonment or the passage of time.

13 Now, you said 130 years, but apparently with his
14 grate it's just 3 minutes, and you seem to make some --
15 quite a lot of that, and I want to know what the standard
16 is precisely. Is it the 2-year hurricane? Is it the 3
17 minutes at the grate? Is it 130 years?

18 Exactly, in your view, when does the passage of
19 time, in and of itself, amount to an abandonment? What's
20 the standard?

21 MR. FREDERICK: Justice Breyer, I can't give you
22 a firm time. It's all based on the --

23 QUESTION: Give me a hint. What's the legal --
24 (Laughter.)

25 QUESTION: What's the legal standard? We'll

1 have to write something. There has to be something in
2 words.

3 MR. FREDERICK: No. No, you --

4 QUESTION: What about lives in being plus 21
5 years? That sounds pretty good.

6 (Laughter.)

7 QUESTION: I don't think you need answer that
8 question.

9 (Laughter.)

10 QUESTION: Mr. Alford.

11 ORAL ARGUMENT OF FLETCHER C. ALFORD

12 ON BEHALF OF THE RESPONDENTS

13 MR. ALFORD: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 I think it's quite clear that this case is
16 properly before the admiralty jurisdiction of the Federal
17 court. Indeed, the Federal admiralty court is the only
18 court where such an action could have been brought.

19 This Court has consistently held that admiralty
20 in rem actions against shipwrecked vessels are uniquely
21 and exclusively within the jurisdiction of the Federal
22 courts, and this Court has never held that a sovereign,
23 simply by asserting the claim of ownership to the res in
24 the possession of the court divests the court of its
25 constitutionally mandated exclusive jurisdiction.

1 Rather, this -- a long line of this Court's
2 jurisprudence stands for the proposition that only where
3 the property is within the actual physical possession of
4 the sovereign is the action at that point deemed to be an
5 action against the sovereign itself.

6 Where the property is not in the actual
7 possession of the sovereign, the rule is that the case may
8 go forward and the sovereign, if it wishes to do so, may
9 enter into the suit and assert a claim and prove that
10 claim just like any other claimant in the world.

11 QUESTION: You don't want to go the whole hog
12 and say that in fact there simply is no Eleventh Amendment
13 applicability to an admiralty in rem action?

14 MR. ALFORD: Your Honor, I do not think that is
15 consistent with this Court's cases, and I certainly don't
16 think it's necessary to decide this case. I think it
17 would be appropriate to decide this case on a narrower
18 rule that --

19 QUESTION: A possession rule.

20 MR. ALFORD: A possession rule, that's right,
21 Your Honor, and the possession rule has been applied not
22 only to States but also to foreign sovereigns and to the
23 Federal Government and, you know, the question is, why
24 should any different rule apply to the States?

25 QUESTION: What does the possession rule mean,

1 strictly speaking?

2 Supposing there's a State marina with State
3 water police boats in it, and there's an admiralty action
4 brought against -- to adjudicate title in one of those
5 boats, but actually it isn't owned by the State, but it's
6 in this State-owned marina.

7 Now, would that be in the possession of the
8 State, or does it have to be actually owned by the State?

9 MR. ALFORD: Well, I don't think possession and
10 ownership necessarily have to be equated, Your Honor. I
11 think, if I understand Your Honor's hypothetical
12 correctly, this is a situation where a slip in a State-
13 owned marina is leased to a private party.

14 QUESTION: Right.

15 MR. ALFORD: Then certainly in that case the
16 private party would be deemed to be the one in possession
17 of the boat that is in the slip that it has leased from
18 the Government, but --

19 QUESTION: Well, can I just vary the Chief
20 Justice's question a little? It seems to me that under
21 your rule it would be wise, if States want to get control
22 of these abandoned vessels, or sunken vessels, as soon as
23 they hear about it, send the local police out in the
24 appropriate vessels and just take possession, and then let
25 the litigation go forward.

1 Doesn't this -- doesn't your rule encourage
2 States to use self help in these situations?

3 MR. ALFORD: Well, Your Honor, no, I don't think
4 so. I think our rule encourages States to locate these
5 wrecks if they want to exercise control over them, and I
6 think that's certainly the purpose of the Abandoned
7 Shipwreck also, which was to encourage States to locate
8 these wrecks and, indeed, the Abandoned Shipwreck Act
9 requires States to give public notice of the location of
10 wrecks to which it claims title under the ASA, so I think
11 this encourages States, if they really want to exercise
12 dominion over these wrecks, to at least locate them.
13 That's a fundamental threshold issue, and --

14 QUESTION: But if they had located them, and had
15 sent a diver down affixing a sign saying, claimed by the
16 State, that would be enough for the possession rule, would
17 it?

18 MR. ALFORD: Well, Your Honor, I think so. In
19 the Navemar, for instance, in a foreign sovereign
20 immunities context, this Court defined actual possession
21 as some act of physical dominion or control, so at a
22 threshold, certainly the State would need to know where
23 the wreck is located.

24 I mean, it's absurd to say that the State has
25 possession of something and it doesn't even know where

1 it's at, it can't find it, so that has to be a threshold
2 issue.

3 QUESTION: Well, maybe it doesn't have to send a
4 diver down. It could just go and drop a big rock. I
5 mean, get right above it and drop a big rock that says the
6 State owns this.

7 (Laughter.)

8 MR. ALFORD: Well, Your Honor, there has to be
9 some act of physical dominion and control.

10 QUESTION: Well, I mean, the rock hits the -- it
11 lands right on the deck.

12 (Laughter.)

13 QUESTION: That's physical.

14 QUESTION: What about putting a buoy, as divers
15 often do.

16 QUESTION: Yes.

17 QUESTION: Putting a buoy on the surface, above
18 where the wreck is.

19 MR. ALFORD: Your Honor, I do think that would
20 be sufficient. If the State knew where the wreck was
21 located and marked it as State property, I think that
22 would be sufficient, but that is -- it's undisputed that
23 that has not happened here.

24 QUESTION: Well, you're not talking about
25 possession, then. You're just simply -- an assertion of

1 ownership. Is that the same thing as possession?

2 MR. ALFORD: No, Your Honor. I think --

3 QUESTION: I thought possession and an assertion
4 of ownership are two different things.

5 MR. ALFORD: They absolutely are, Your Honor,
6 but taking physical -- some act that shows physical
7 dominion over the property I think is possession.

8 QUESTION: Well, why would posting a buoy above
9 it be an act of possession?

10 MR. ALFORD: Well, Your Honor, traditionally
11 that's the way that it's indicated in the admiralty law
12 with the case of sunken property.

13 For instance, a salvor, when it locates a
14 shipwreck, often posts a buoy on the site and, in the
15 traditional Federal admiralty law, when the court arrests
16 sunken property it often puts a buoy on the site with the
17 arrest papers on the buoy, so I think by analogy, if the
18 State were to locate the wreck and mark the wreck with its
19 sign in some way, then I think that would be possession.

20 QUESTION: Are you going to talk about the
21 abandonment issue?

22 MR. ALFORD: Yes, Your Honor. The State and the
23 Federal Government suggest that there's some dispute or
24 uncertainty about the definition of abandonment. I
25 disagree. I think abandonment is a fundamental, well-

1 known concept in the common law.

2 As Justice Scalia noted, it has to be some type
3 of voluntary relinquishment of ownership to property. If
4 it's not a voluntary relinquishment, then it's a taking,
5 so there has to be some indication of a voluntary
6 relinquishment of title.

7 QUESTION: Well, can we infer a voluntary
8 relinquishment simply on the basis of insufficient
9 activity to pursue the claim?

10 In other words, I don't -- I assume I don't
11 have -- one way to abandon would be to stand there and
12 say, I wash my hands of it. I want nothing more to do
13 with it. But another way, I suppose, would be simply to
14 do nothing for too long a period of time in which the
15 relinquishment would be inferred. Do you agree there?

16 MR. ALFORD: I agree certainly, Your Honor, that
17 abandonment can be inferred from the circumstances. I do
18 not agree that simply the passage of time without any kind
19 of notice would be sufficient. I think that would be a
20 due process problem. I think it would also be a takings
21 problem.

22 For instance, in this case --

23 QUESTION: But you have it in your adverse
24 possession all the time in real estate. If somebody else
25 gets on your land and stays there whatever the period of

1 time is, you've lost it.

2 MR. ALFORD: That's true, Your Honor, but it's
3 my understanding in those cases that the possession has to
4 be open and notorious, such that it would give any
5 claimant notice that another person is occupying the
6 property, and that's certainly not the case here.

7 I think there's a fundamental distinction --

8 QUESTION: Well, except you know you've lost
9 something.

10 MR. ALFORD: You certainly know you've lost
11 something, Your Honor, that's correct.

12 QUESTION: Under your rule, I -- if there has to
13 be some voluntary act relinquishing all claim of title, I
14 suppose that no one would ever do that.

15 MR. ALFORD: Well, Your Honor --

16 QUESTION: You'd teach a child when you're 3
17 years old, don't ever abandon that dollar in the steam
18 grate, because some day it might be yours. I'm not sure
19 the law requires that.

20 MR. ALFORD: I agree with Your Honor. I do not
21 think the law requires any kind of explicit act, and I
22 think the lower courts did not interpret the law in that
23 manner, but in any event, it requires some evidence of a
24 voluntary relinquishment of ownership.

25 It doesn't require an explicit statement, but

1 some evidence of intent on the part of the original owner
2 to relinquish ownership.

3 QUESTION: What about the Park Service that they
4 quote in the amicus brief? The Park Service in the House
5 report say that you could indicate that intent in one of
6 two ways at least. There may be others. But one way is
7 that you never assert any control and, of course, there
8 they couldn't do it. The technology wasn't there. And
9 the other way was not otherwise indicating a claim, i.e.,
10 you didn't mark it.

11 And I guess, suppose 100 years passes and nobody
12 says anything. They don't have to get a submarine, but
13 they could at least announce, you know, put a buoy up or
14 do something, and if they don't have to do anything like
15 that, how would we ever decide these cases?

16 There could be a million heirs. You know, there
17 could be 10 million heirs from the year 1520, each of
18 which owns a nickel's worth of gold. I mean, why don't
19 you have to at least say that you want to keep it?

20 MR. ALFORD: Well, Your Honor, there has to be
21 some evidence that there is a relinquishment of ownership
22 or, on the converse, there has to be some evidence.

23 QUESTION: The evidence is, they never marked
24 it. The evidence is, 130 years passed, and not only
25 didn't they go there, which is understandable, but they

1 never even said to anybody, even in their annual report,
2 or even passing it down by family tradition, or even
3 putting up a buoy or a flag, they did none of that.

4 MR. ALFORD: Well, Your Honor, the problem is we
5 don't know whether that's this case. We simply don't
6 know, and --

7 QUESTION: Well, so far as the standard is
8 concerned, are you -- are we trying to find a subjective
9 state of mind, or are we trying to determine what
10 objectively is reasonable so far as ownership of ancient
11 property?

12 MR. ALFORD: Well, Your Honor, I think it's part
13 of both. I think there has to be some subjective intent
14 to relinquish ownership, but it certainly can be proven by
15 objective factors.

16 QUESTION: Well, subjective, I'm never sure --
17 I'm not sure you're ever going to be able to show it.

18 MR. ALFORD: I think you can, Your Honor. I
19 think it would be appropriate in certain circumstances to
20 infer from all the facts that the original owner had an
21 intent to abandon the property.

22 QUESTION: You don't mean subjective. You
23 wouldn't really insist that if I had a secret subjective
24 intent not to abandon ownership, but I -- all my actions
25 suggest the contrary, that I have an abandonment.

1 MR. ALFORD: Well, Your Honor, I think the
2 fundamental issue is, is the owner's intent, but certainly
3 the court can look to objective factors and --

4 QUESTION: So your answer to my question is yes.
5 If I have a secret intent, and I even -- I put a sign on
6 it that says, I don't own this any more. I don't care
7 about it. I have a sign on it. But deep in my heart, I
8 really do care.

9 (Laughter.)

10 QUESTION: My real intent is that I -- you
11 wouldn't say that, would you?

12 MR. ALFORD: No, Your Honor.

13 QUESTION: Of course not. So it isn't the
14 subjective intent that matters. It's the objective
15 manifestations.

16 MR. ALFORD: That's right. I think it's the
17 objective manifestations of a subjective intent.

18 QUESTION: Well, but that's exactly contrary to
19 the --

20 (Laughter.)

21 QUESTION: If you say that the objective
22 manifestations are useful only as a basis from which one
23 can infer subjective intent, you're saying that the basic
24 criterion remains subjective intent.

25 Now, in the light of Justice Scalia's withering

1 example do you still --

2 (Laughter.)

3 QUESTION: Do you still adhere to that?

4 MR. ALFORD: If I understand Your Honor's
5 question correctly, yes, I think it is -- ultimately that
6 subjective intent is the key issue, but it can be proven
7 by objective factors.

8 QUESTION: Well, so here, whose intent do we
9 look for? Is it the chief executive officer of the
10 various insurance companies in the year 1868, or whenever
11 it was that the Brother Jonathan went down?

12 MR. ALFORD: I think it's that, Your Honor, but
13 it's also more. It's the present claimants, and I think
14 that's one of the problems here. At this early stage in
15 the litigation I submit that the district court had no
16 choice but to --

17 QUESTION: Well, the present claimants claim
18 only by virtue of an assignment from the insurance
19 company, don't they?

20 MR. ALFORD: No. There are other claims as
21 well, Your Honor. For instance, the United States claims
22 that it had original title to the property.

23 QUESTION: Yes, but don't your clients, or at
24 least some of them, claim by virtue of assignment from the
25 insurance company?

1 MR. ALFORD: That's correct, Your Honor. They
2 also have a salvage claim which is not an ownership
3 claim --

4 QUESTION: Yes, but --

5 MR. ALFORD: -- but it's a claim based on
6 Federal law.

7 QUESTION: -- let's analyze the claim that you
8 get by assignment from the insurance company. Is it the
9 intent of some person or persons at the insurance company
10 in 1868 that we look for?

11 MR. ALFORD: I think it's the intent of the
12 company as a whole, Your Honor, and I think --

13 QUESTION: And how do we find that out?

14 MR. ALFORD: Factors that the court can
15 consider -- well, I think it would be inappropriate for
16 the Court to constrain the district court's discretion in
17 this regard, but, for example, factors the district court
18 might consider are whether the insurance company's ever
19 made any effort to locate the vessel --

20 QUESTION: Well, now we're talking about
21 objective factors.

22 MR. ALFORD: That's right.

23 QUESTION: But you say the subjective intent
24 we're looking for is the, "the intent of the company as a
25 whole"?

1 MR. ALFORD: That's correct, Your Honor, but as
2 evidenced by objective factors, and I think the objective
3 factors in this case, for instance, could include whether
4 the company ever made any effort to locate the vessel,
5 whether they -- whether it was technologically feasible
6 for them to locate the vessel, whether they wrote it off
7 as a loss on their books --

8 QUESTION: It seems to me we can almost take
9 judicial notice that no one, especially an insurance
10 company, ever wants to give up claim of ownership to
11 anything it might have.

12 (Laughter.)

13 MR. ALFORD: Well, Your Honor, I assume that's
14 true, but again I think there's a fundamental distinction
15 here between property that's lost and property that is
16 abandoned, and property that's lost is not necessarily
17 abandoned. There's no doubt this wreck was lost to the
18 original owners, but the question is, has it been
19 abandoned by them, and I think Justice --

20 QUESTION: Well now, let's talk specifically
21 about the property here. The ship contained considerable
22 property. Only part of it was property that was covered
23 by insurance, I take it.

24 MR. ALFORD: That's correct, Your Honor. That
25 was indicated in one newspaper article, but that's another

1 problem.

2 QUESTION: And so do we look at specific pieces
3 of property to determine whether that property has been
4 abandoned, or do we treat it as a whole somehow?

5 MR. ALFORD: Your Honor, I think it has to be
6 treated as a whole, particularly under the ASA.

7 QUESTION: Why? I mean, I would think if you
8 have cargo, discrete cargo and it was different types of
9 things -- you were carrying gold bullion that belonged to
10 the United States, and you were carrying something else of
11 value that belonged to other people -- conceivably you
12 might have some of it abandoned and others not.

13 MR. ALFORD: Your Honor, under the Abandoned
14 Shipwreck Act, section 2102(e), I believe, of the act, it
15 defines a shipwreck as "a vessel or wreck, its cargo and
16 other contents." A single, unified entity. It doesn't
17 parse the wreck up into separate pieces. It says that a
18 shipwreck is a single thing.

19 QUESTION: Well, which way do you treat it? You
20 say you treat it as a unit. Does that mean if some of it
21 is not abandoned, all of it is not abandoned, or does it
22 mean that if some of it is abandoned, all of it is
23 abandoned?

24 MR. ALFORD: Your Honor, I think --

25 QUESTION: Is there any reason to pick one

1 rather than the other?

2 MR. ALFORD: Well, there is, Your Honor,
3 because --

4 QUESTION: What's that?

5 MR. ALFORD: Because if the court finds that
6 because part of the property was abandoned the entire
7 property is abandoned, then you certainly have a takings
8 problem, particularly in a context like this, where no
9 notice was given to particular claimants.

10 QUESTION: I see.

11 MR. ALFORD: That's why it was essential for the
12 district court to find at this stage that the wreck was
13 not abandoned, because there was no notice to potential
14 claimants.

15 QUESTION: Was that a preliminary finding of
16 some kind? I thought the district court didn't really
17 resolve that issue.

18 MR. ALFORD: That's correct, Your Honor. The
19 district court found that it was convinced the wreck was
20 not abandoned, but it was not prepared to say that
21 specific items of property either were or were not
22 abandoned, because again the court stressed that notice
23 had not been given to potential claimants, and that once
24 notice had been given to the world by publication,
25 claimants might continue to come forward.

1 QUESTION: How do you read the Ninth Circuit
2 opinion on the abandonment issue? Did it go further than
3 the district court?

4 MR. ALFORD: I don't think the Ninth Circuit
5 did, Your Honor. I think the Ninth Circuit simply
6 affirmed the district court's finding that at that stage
7 of the litigation the district court could not say that
8 the wreck was abandoned because no notice had been given
9 to any potential claimants.

10 And in fact the district court's judgment in
11 this regard has been validated, because potential
12 claimants have continued to come forward since publication
13 of the notice, and it would have been entirely premature
14 at that stage of the litigation for the district court to
15 say that the property was abandoned and therefore cut off
16 all potential claimants.

17 QUESTION: May I ask you, under your view of
18 abandonment, was the gold in the hull of the ship that was
19 involved in the Treasure Salvors case abandoned by the
20 Spanish?

21 MR. ALFORD: Your Honor, I --

22 QUESTION: There's no evidence of affirmative,
23 you know, voluntary relinquishment of interest in all that
24 money.

25 MR. ALFORD: Right. I don't completely know the

1 facts of that case, but as I --

2 QUESTION: Well, let me give them to you, then.
3 A ship is found that went down in 14 or 1500, somewhere
4 back -- loaded with gold that everybody knew belonged to
5 Spain at the time the ship went down. Was it abandoned,
6 or not? That's all you know.

7 MR. ALFORD: I believe so, Your Honor, because
8 it's my understanding the Government did not come forward
9 after notice in that case. In other words --

10 QUESTION: The abandonment took place after the
11 finding of the vessel, then.

12 MR. ALFORD: Well, the finding of abandonment
13 was appropriate once the court issued notice to the public
14 and no claimants came forward.

15 QUESTION: No, but I don't -- the word finding
16 was bad. The time the abandonment occurred was after the
17 discovery of the vessel. Is that your view?

18 MR. ALFORD: I don't know the answer to that
19 question, Your Honor. I'm sorry.

20 QUESTION: It seems to me it's precisely the
21 same situation we have here, except instead of Spanish
22 gold it's American dollars.

23 MR. ALFORD: Well, the critical difference, Your
24 Honor, is that in Treasure Salvors notice was given to the
25 public and no one came forward claiming ownership. That

1 is perhaps --

2 QUESTION: But that's almost a default type of
3 thing rather than abandonment, isn't it?

4 MR. ALFORD: Well, Your Honor --

5 QUESTION: Default of judicial proceedings.

6 MR. ALFORD: That's true, Your Honor. I think
7 that abandonment could be found by default in that
8 circumstance.

9 QUESTION: Well, no. I'm suggesting that you
10 can have a concept of default in a judicial proceeding,
11 failure to appear and assert a claim, that may have
12 nothing to do with historical abandonment.

13 MR. ALFORD: That's correct, Your Honor, but I
14 think the issues are related in at least one respect and
15 that is, in a sense, if notice was given to the public and
16 no one comes forward claiming the property, that is, I
17 think, powerful evidence that the property is abandoned.
18 It's not only a legal default, but I think it also goes to
19 evidence of intent to relinquish ownership of the
20 property. No one's come forward to claim it.

21 QUESTION: But if we have a rule like the Ninth
22 Circuit rule, which is bothering me, what we do about the
23 Ninth Circuit's statement?

24 Their statement seems to be that if a long time
25 passes, hundreds of years, and nobody does anything, it's

1 not abandoned.

2 Now, if that's the rule, then I guess once we
3 announce it you won't have problems with people coming
4 forward. Maybe I have a claim. Who knows? There may be
5 thousands of people who have little bits of claims, and
6 they'll all come forward.

7 Why do we think any bit of this was abandoned?
8 And so why do we think there's parts that wasn't
9 abandoned? They just don't know they have a right to it
10 yet, but they'll know.

11 Now, my question is, am I right in that worry,
12 and if so, what do you think we should do about it?

13 MR. ALFORD: No, Your Honor, I do not think
14 you're right in that worry. Again, claimants have to come
15 forward and prove their claims. It's not enough for them
16 to come forward and say, I understand that property is
17 never abandoned, therefore I own a piece of it. They
18 would be required to prove that they --

19 QUESTION: No, no, somebody's great-great-
20 grandmother had some cargo and she left a will, and those
21 things can be traced. I overstated hundreds. It's only
22 130, 135 years ago, whatever, and those things can be
23 traced through wills and so forth. It's those thousands
24 of people now, perhaps divided as property passed
25 intestate. It's those, not millions of people but

1 hundreds or thousands that might come forward. That's my
2 worry.

3 MR. ALFORD: Well, Your Honor, I think the
4 passage of time in itself, without anything more, is not
5 sufficient to infer abandonment where claimants actually
6 come forward. The loss should not start with a
7 presumption that the property is abandoned.

8 California speaks in its brief about a
9 presumption of abandonment. There's absolutely no
10 authority for that position. I think that if claimants
11 come forward they ought to be allowed to prove their
12 claim, and --

13 QUESTION: That's consistent with what I take it
14 to be your answer to Justice Stevens. I just infer this,
15 that if the Spanish Government had come forward that would
16 have been sufficient, even though they had done nothing
17 for 500 years.

18 MR. ALFORD: No, Your Honor.

19 QUESTION: And that seems to me a very
20 extraordinary position.

21 MR. ALFORD: No, Your Honor. The fact that they
22 simply come forward is not enough in itself to prove not
23 abandoned -- nonabandonment. My point, however,
24 inartfully made, perhaps, was that before we even give
25 notice --

1 QUESTION: Would it be fair to say that it's
2 your point that the Spanish are not foreclosed unless it
3 has been shown that they affirmatively took some act to
4 abandon?

5 MR. ALFORD: No, Your Honor. I don't think
6 abandonment needs to be proven by some affirmative act.
7 It can be proven by inference from the circumstances, and
8 that was certainly recognized by the lower courts here.

9 QUESTION: Now, if, in fact, this shipwreck was
10 abandoned, if at the bottom line that's the finding, then
11 your clients are just out, I take it.

12 They get no salvage rights because the Federal
13 act eliminates that. They get no finder's law, because it
14 eliminates that. They're just out. They will have done
15 all of this work, made all of this effort, and they will
16 get nothing. Is that the bottom line if the wreck is
17 determined to be abandoned?

18 MR. ALFORD: That's exactly correct, Your Honor,
19 because of the operation of the Abandoned Shipwreck Act.

20 QUESTION: May I ask just one other question?
21 Or, I guess, two parts to this. One, is it perfectly
22 clear that the term abandoned in this statute has the same
23 meaning it had at admiralty law before the statute was
24 enacted? That's my first question.

25 My second question is, is it not likely that

1 Congress assumed that this statute would apply to a lot of
2 sunken vessels, and if we adopt your view of abandonment,
3 it won't apply to any?

4 MR. ALFORD: Well, Your Honor, on the first
5 question, I think we have to start from the presumption
6 that Congress did not intend to change the fundamental
7 concept of abandonment that has been applied for years
8 both in the common law and in the general maritime law,
9 and indeed that Congress is not free to define abandonment
10 in some way other than as a voluntary process, and there's
11 no evidence, certainly, in the legislative record that
12 Congress intended to depart from the traditional standard
13 of abandonment. Certainly --

14 QUESTION: But there is evidence that they
15 thought the statute would apply to a large number of
16 vessels.

17 MR. ALFORD: That's correct, Your Honor.

18 QUESTION: And I don't think, under your view,
19 it would apply to any.

20 MR. ALFORD: Well, I respectfully disagree, Your
21 Honor. Again, if no claimants come forward, then
22 certainly the court would be justified in finding, both as
23 a matter of default and as a matter of evidence, that the
24 property is abandoned.

25 QUESTION: But that's the line that you draw --

1 for example, the United States. The United States didn't
2 do anything to get the gold. All it did was, when it
3 found out it was there, it filed a claim.

4 MR. ALFORD: Well, we don't know yet, Your
5 Honor, and that's the problem. That's the essential
6 feature here.

7 QUESTION: But suppose that's the case. Suppose
8 the United States was just sitting there doing nothing
9 about this, thinking that ship would never be found, but
10 the moment it was found, put in a claim, would you say
11 that the United States, because it had done absolutely
12 nothing, is not claiming that it's done anything -- it
13 abandoned it because it didn't step forward until someone
14 else found the vessel, and then it said, we have stuff on
15 it.

16 MR. ALFORD: Your Honor, an inference of
17 abandonment might well be appropriate in those
18 circumstances.

19 QUESTION: Well, not against a sovereign.
20 Sovereigns have covered this, haven't they?

21 MR. ALFORD: Well, that's true. The United
22 States says that it has --

23 QUESTION: Abandonment never applies against a
24 sovereign.

25 MR. ALFORD: That's right, but barring that,

1 that complication, I think an inference of abandonment
2 would be appropriate.

3 QUESTION: The United States might well be on
4 the other side of this issue if there were not that
5 convenient rule.

6 MR. ALFORD: That's correct, Your Honor.

7 (Laughter.)

8 QUESTION: But you say it's all or nothing, that
9 the fact that the Federal Government hasn't abandoned the
10 gold under legal theory means nothing, because we're going
11 to look at this as one unit.

12 MR. ALFORD: Well, Your Honor --

13 QUESTION: And it's just too bad for the United
14 States.

15 MR. ALFORD: No, to the contrary, Your Honor,
16 the United States claim is preserved. They have a claim
17 here, and they are certainly capable of proving that.

18 QUESTION: But your position was that it
19 can't -- it isn't severable, that the abandonment is of
20 the wreck and all it's contents, or nothing.

21 MR. ALFORD: Well, Your Honor.

22 QUESTION: It's all or nothing. That was what
23 you told me.

24 MR. ALFORD: It's all or nothing if one --

25 QUESTION: Can't parcel it out. Can't determine

1 that the gold bars belong to the Federal Government and
2 it's still theirs. Can't do that.

3 MR. ALFORD: Your Honor, I partly agree with
4 that, and I say partly because it would be inappropriate
5 for this Court to say that because part of the property on
6 the wreck is abandoned the whole thing is abandoned. That
7 would constitute a relinquishment of the rights of the
8 owners.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Alford.

10 MR. ALFORD: Thank you.

11 CHIEF JUSTICE REHNQUIST: The case is submitted.

12 (Whereupon, at 11:53 a.m., the case in the
13 above-entitled matter was submitted.)
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CALIFORNIA AND STATE LANDS COMMISSION, Petitioners v. DEEP SEA RESEARCH, INC., ET AL.
CASE NO: 96-1400

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna M. Fedrico

(REPORTER)