



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 10, 2003

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You state that the Hunley Commission recently received a request from Ralph Wilbanks, one of the discoverers of the H. L. Hunley submarine, to return a note that he left at the Hunley site. By way of background, you indicate that

[t]he note that reads, "Veni, Vidi, Vici, Dude" and gives the date of discovery is currently in the custody of the South Carolina Institute of Archaeology and Anthropology at the request of the Hunley Commission. The note, as well as scientific evidence, conclusively determined that the NUMA group was at the site and as such has great historic significance to the Hunley project relating to the discovery of the Hunley.

As you are probably aware, Section 54-7-100 gives the Hunley Commission all of the powers of the South Carolina Underwater Antiquities Act, Article 5, Chapter 7 of Title 54 as they relate to the Hunley, to the Hunley Commission. Before the Commission makes a determination as to whether to return the note to Mr. Wilbanks or keep it, we wanted your office's opinion on the propriety of either action. There are several issues that need to be addressed regarding this issue before this historically important document is returned by the State of South Carolina to Mr. Wilbanks.

You further enumerate the specific questions which you wish answered, as follows:

1. Whether the State of South Carolina has jurisdiction over the note so that the State would "be the appropriate entity to make the determination as to whether to return the note." In this regard, you state that, pursuant to the Programmatic Agreement entered into by the U.S. government and the state of South Carolina, Section III provides that "the United States of America

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shall retain title to the Hunley, and the State of South Carolina shall [have] custody of the Hunley in perpetuity." Thus, you wish to know "whether the United States of America or the State of South Carolina would have jurisdiction over Mr. Wilbank's note."

2. If it is determined that the State of South Carolina, through the Hunley Commission, is the appropriate entity to make such a determination, the question is then whether the note should be returned by the State to Mr. Wilbanks. You indicate that, in your judgment, the note "evidences the Hunley's discovery, who found the Hunley, and on what date the Hunley was discovered. It is an important piece in the history of the Hunley." You reference S.C. Code Ann. Sec. 54-7-630(A) which provides that "[a]ll submerged historic property and artifacts ... located on or recovered from submerged lands over which the State has sovereign control, are declared to be the property of the State." Moreover, § 54-7-620 (17) defines "historic property" as a "district, site, building, structure or object significant in the prehistory, history, upland and underwater archaeology ... and culture of the State, including artifacts, records, and remains related to the district, site, building, structure or object."

You thus wish to know whether the note left by Mr. Wilbanks is a "record" relating to the Hunley for purposes of § 54-7-630(A). Further, you inquire whether Mr. Wilbanks could be deemed to have "abandoned" the note by leaving it behind.

Law / Analysis

We begin our analysis with an examination of the powers and duties of the Hunley Commission. By virtue of Act No. 247 of 1996, the General Assembly enacted comprehensive legislation regarding the sunken submarine H.L. Hunley. The Legislature created the Hunley Commission to coordinate the State's effort in locating, raising, restoring and exhibiting the Hunley. The applicable statute, § 54-7-100, provides in pertinent part as follows:

[a] committee of nine members ("Hunley Commission") shall be appointed, three of whom must be members of the House of Representatives, to be appointed by the Speaker, three of whom must be members of the Senate to be appointed by the President Pro Tempore, and three members to be appointed by the Governor. The committee shall make a study of the law regarding the rights of salvage of the Hunley and any claims that a person or entity may assert with regard to ownership or control of the vessel. The committee is authorized to negotiate with appropriate representatives of the United States government concerning the recovery, curation, siting and exhibition of the H. L. Hunley. ... provided further, that with respect to the Hunley project, as described herein, the applicable duties and responsibilities

contained in Article 5, Chapter 7 of this title shall be vested in the Hunley Commission.

The committee shall make recommendations regarding the appropriate method of preservation of this historic vessel and is also authorized to direct the Attorney General on behalf of South Carolina to take appropriate steps to enforce and protect the rights of the State of South Carolina to the salvage of the Hunley and to defend the State against claims regarding this vessel. The committee shall submit a recommendation for an appropriate site in South Carolina for the permanent display and exhibition of the H.L. Hunley to the General Assembly for its review and approval.

In an earlier opinion, we concluded that in enacting § 54-7-100, "the General Assembly created the Hunley Commission to 'take the lead' in the State's effort regarding the salvage, rescue, restoration and display of the Hunley." Op. S.C. Atty. Gen., April 16, 1996. Moreover, that same opinion concluded that "[m]ost specifically, it is the [Hunley] Commission which is delegated by the Legislature to perform and carry out with respect to the Hunley all the applicable duties and responsibilities which are normally given the [South Carolina Institute of Archaeology and Anthropology] pursuant to the Underwater Antiquities Act, S.C. Code Ann. Section 54-7-620 et seq."

In a second opinion, dated October 20, 1995, we expressed the view that in any negotiations with the United States of America regarding title to and custody of the Hunley, "the Hunley Commission would take the lead and be the primary party in the negotiation of any agreement." This, in fact, occurred and the Hunley Commission, led by yourself, along with the able assistance of Senator Thurmond and many others, negotiated the Programmatic Agreement with the U.S. Navy, GSA et al. The Agreement was executed on July 17, 1996. As you note, pursuant to Part III of the Agreement, "[t]he United States of America shall retain title to the Hunley, and the State of South Carolina shall have custody of the Hunley in perpetuity."

Thus, the Programmatic Agreement distinguishes between legal "title" to the Hunley, which lies with the United States, and its "custody" which the Agreement cedes to the State of South Carolina "in perpetuity." In ordinary terminology the word "custody" is deemed to mean "[t]he care and control of a thing or person." Black's Law Dictionary, Fifth Edition. "Custody" ordinarily is viewed as

[t]he keeping, guarding, care, watch, inspection, preservation or security of a thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody.

Id. The term "custody" generally connotes "[c]are, supervision and control exerted by one in charge." American Heritage College Dictionary, Third Edition.

Accordingly, while actual legal title to the Hunley is retained by the United States pursuant to the Programmatic Agreement, such legal title is not determinative of your question. For purposes of the issue presented by you, the operative word in the Agreement is the "custody" of the Hunley – its charge and control, in other words. The Agreement makes it clear that such decisions and determinations are made by the State of South Carolina through the Hunley Commission which negotiated the Agreement on behalf of the State. In short, as between the United States and the State of South Carolina, it is the State of South Carolina, acting through the Hunley Commission, which has jurisdiction over the note in question and is the appropriate entity to determine the disposition of that note.

Our conclusion herein is supported by the common law relating to the jurisdiction of the sovereign over personalty discovered at the bottom of the sea within the State's three mile limit. As a coastal state, South Carolina's jurisdiction is extended outward to a three mile limit pursuant to the federal Submerged Lands Act. See, 43 U.S.C.A. § 1312. Because the Programmatic Agreement appears to relate only to the "Hunley and its artifacts," rather than objects which might document or relate to the discovery thereof, the general law concerning ownership of abandoned objects found embedded in the sea floor may well be applicable.

In an opinion dated April 10, 1996, we discussed at length the common law rules in this area, noting that "when personalty is found embedded in land, title to that personalty rests with the owner of the land." Quoting 1 Am.Jur.2d, Abandoned, Lost, etc. Property, § 29. In that opinion, we cited a number of cases which applied this general rule in a variety of contexts, including the applicability of abandoned property at the bottom of the sea. See, Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985); Lathrop v. Unidentified, Wrecked and Abandoned Vessel, 817 F.Supp. 953 (M.D. Fla. 1993); Chance v. Certain Artifacts, 606 F.Supp. 801 (S.D. Ga. 1984), affd. without opinion, 775 F.2d 302 (11th Cir. 1985). In each of these cases, it was held that abandoned property found at the bottom of the sea – either embedded or partially embedded in the soil – belongs to the sovereign. The Court in Lathrop concluded that "[i]f the State of Florida retained ownership of the submerged lands, it has possession and title to the alleged shipwreck." 817 F.Supp. at 965.

Other cases are in accord. In State of North Carolina v. Flying "W" Enterprises, 273 N.C. 399, 160 S.E.2d 482 (1968), the State of North Carolina claimed ownership of several Confederate blockade runners sunk during the Civil War within the territorial waters of North Carolina. Salvors and divers had made off with a number of artifacts from the vessels. The State of North Carolina sought an injunction and an order returning all property taken.

The Court recognized that pursuant to the Submerged Lands Act, the lands beneath the ocean where the vessels were located belonged to the State of North Carolina. Moreover, the Court noted

that "[i]t is well-settled law that the owners of sunken or derelict vessels or their contents may abandon them so effectively as to divest title and ownership." 160 S.E.2d at 482. Applying the common law, the Court concluded that title to the vessels and their artifacts lay in the State of North Carolina, reasoning as follows:

[w]e conclude that the hulks or vessels and their cargoes therein involved in the instant case were "derelicts" which, at common law, would belong to the Crown in its Office of Admiralty at the end of a year and a day The North Carolina statutes which we have quoted above declaring the common law to be in force in this State since 1776 show the intention of the State to pre-empt for itself those fiscal perquisites which, at common law, had been the prerogative right of the Crown. Consequently, since these hulks or vessels and the cargoes therein were resting in the territorial waters of the State of North Carolina and within the boundaries of the State of North Carolina, they are within the purview of the common law and belong to the State in its sovereign capacity.

160 S.E.2d at 492.

A number of other cases have also recognized the rule that by virtue of the Submerged Lands Act, a state possesses title to shipwrecks within the three mile limit. Subaqueous Explorations & Archaeology Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F.Supp. 597 (D. Md. 1983); Marx v. Govt. of Guam, 866 F.2d 294 (9th Cir. 1989); Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983). See also, Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2103, 2105; S.C. Code Ann., Sec. 54-7-620 *et seq.*, [South Carolina Underwaters Antiquities Act of 1991]. Thus, it can be seen that even though the Programmatic Agreement places title to the H.L. Hunley and its artifacts in the United States, while granting custody thereof "in perpetuity" to the State of South Carolina, the referenced note relating to the Hunley's discovery is clearly within the jurisdiction and authority of the State of South Carolina to determine the disposition thereof.

We turn now to your second question. You wish to know whether the note left behind by Mr. Wilbanks is a "record" for purposes of the South Carolina Underwater Antiquities Act and, additionally, whether Mr. Wilbanks may be deemed to have "abandoned" the note.

As stated above, § 54-7-100 delegates to the Hunley Commission the applicable duties and responsibilities contained in the South Carolina Underwater Antiquities Act, S.C. Code Ann. § 54-7-620 *et seq.* with regard "to the Hunley project." This Act, in effect, codifies the common law, discussed above, with respect to title to underwater antiquities found within the territory of South Carolina (to the 3 mile limit). Section 54-7-630(A) provides that "[a]ll submerged historic property and artifacts ... located on or recovered from submerged lands over which the State has sovereign control, are declared to be the property of the State." Section 54-7-620 (17) defines "historic property" as a "district, site, building, structure or object significant in the prehistory, history, upland

and underwater archaeology ... and culture of the State, including artifacts, records, and remains related to the district, site, building, structure or object." (emphasis added).

While the note in question would most likely not be deemed an artifact because of its recent origin, a court would likely ascribe to the note the characterization of a "record" for purposes of the Underwater Antiquities Act. The term "record" is not defined by the Act. Ordinarily, the word "record" possesses the meaning of "a written account of some act." Black's Law Dictionary, Fifth Edition. In terms of underwater archaeology, the note would most likely constitute important "provenance data" which is a term used in that field to define the "exact location, depth and proximity of each item found with respect to other items." Marex Intl., Inc. v. The Unidentified, Wrecked and Abandoned Vessel, 952 F.Supp. 825 (S.D. Ga. 1997), quoting, Cobb Coin Company, Inc. v. The Unidentified, Wreck and Abandoned Sailing Vessel, Inc., 549 F.Supp. 540 (S.D. Fla. 1982). Your letter states that the note in question "evidences the Hunley's discovery, who found the Hunley and on what date the Hunley was discovered." You indicate that this note helped conclusively to determine that the NUMA group, of which Mr. Wilbanks was part, was present at the Hunley site. Accordingly, as "historical property" pursuant to § 54-7-630, title to the note in question would belong to the State and jurisdiction over such property would be in the Hunley Commission.

Moreover, based also upon the aforementioned common law principles, a court would likely conclude that the note belongs to the State. As discussed above, ownership of the soil beneath the sea is in the State of South Carolina. Any object or, in this instance, "record" which is found either embedded or partially embedded on the ocean floor is presumed to have been "abandoned" by the original owner and title thereto passes to the sovereign. See Jupiter Wreck, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F.Supp. 1377 (S.C. Fla. 1988) [under common law of finds, where sail or where owner of land has constructive possession of property, abandoned property belongs to owner of land.] It is our opinion that a court would likely conclude that title to the note in question would reside in the State of South Carolina with authority, custody and control over such note in the Hunley Commission.

It is also important to note that state law prohibits a public agency, such as the Hunley Commission, from removing records belonging to the State. The South Carolina Public Records Act, § 30-1-10 et seq., makes it a misdemeanor for any person who unlawfully removes a public record where it is usually kept. § 30-1-30. A "record" is defined in § 30-1-10 as having the meaning set forth in the Freedom of Information Act, § 30-4-20(c) which is quite broad. Because we conclude that the note in question is a "record" in the custody and control of the Hunley Commission, state law would not authorize its removal from the custody and control of the Hunley Commission.

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Conclusion

Based upon the reasons set forth above, it is our opinion that a court would likely conclude that the State of South Carolina, acting through the Hunley Commission, rather than the United States, is the appropriate entity to make a determination as to whether to return the note in question. Moreover, we are of the opinion that a court would likely find that the note in question is a "record" documenting the discovery of the H. L. Hunley for purposes of the South Carolina Underwater Antiquities Act. As such, the note is thus under the jurisdiction of the Hunley Commission as the entity delegated by the General Assembly to execute the duties and responsibilities of the Underwater Antiquities Act for purposes of the Hunley project. As discussed above, the common law which gives the State jurisdiction over the note in question provides additional support for this conclusion. State law would not authorize the removal of the note in question from the custody and control of the Hunley Commission.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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