

B.	Statute of Limitations has not run	31
V.	Plaintiff has been denied his guano mining and and ownership rights in violation of the due process/taking provisions of the Fifth Amendment of the Constitution	37

LIST OF ANNEXED EXHIBITS (exhibits provided under separate cover)

TABLE OF AUTHORITIES

	<u>Page</u>
<u>DECISIONS:</u>	
<u>American Guano Co. v. United States Guano Co.</u> , 44 Barb. 27 (1865).....	25
<u>Amoco Production Co. v. United States</u> , 619 F.2d 1383 (10th Cir.1980).....	30-31
<u>Bishop v. Wood</u> , 426 U.S. 341 (1976).....	3
<u>De Lima v. Bidwell</u> , 182 U.S. 1 (1901).....	18
<u>Dooley v. United States</u> , 182 U.S. 222 (1901).....	18
<u>Downes v. Bidwell</u> , 182 U.S. 244 (1901).....	18,38
<u>Duncan v. Navassa Phosphate Co.</u> , 137 U.S. 647 (1891).....	13,14 20,27
<u>Fletcher v. Fuller</u> , 120 U.S. 534 (1887).....	6
<u>Foster v. United States</u> , 607 F.2d 943 (Ct.Cl. 1979).....	39-40
<u>Johnson v. McIntosh</u> , 21 U.S. 543 (1823).....	24
<u>Jones v. United States</u> , 137 U.S. 202 (1890).....	4,6 9,18
<u>Michel v. United States</u> , 65 F.3d 130 (9th Cir. 1994).....	30,37
<u>Philbrook v. Glodgett</u> , 421 U.S. 707 (1975).....	14
<u>Rodgers v. Logan</u> , 503 N.Y.S.2d 36 (1986).....	7
<u>Schultz v. Department of Army, U.S.</u> , 886 F.2d 1157 (9th Cir. 1989).....	37
<u>United States v. Cansby</u> , 328 U.S. 256 (1945).....	40
<u>United States v. Diebold</u> , 369 U.S. 654 (1962).....	3
<u>United States v. Fullard-Leo</u> , 331 U.S. 256 (1947), also, 156 F.2d 756 (9th Cir. 1946) and 133 F.2d 743 (9th Cir. 1943).....	<u>passim</u>
<u>United States v. Storer</u> , 351 U.S. 192 (1956).....	14
<u>Wheeldin v. Wheeler</u> , 373 U.S. 647 (1963).....	19

<u>Yuba Goldfields, Inc. v. United States,</u> 723 F.2d 884 (Fed.Cir. 1983).....	40
<u>CONSTITUTION:</u>	
U.S. Const., Art. I.....	29
U.S. Const., Art. II.....	29
U.S. Const., Amend. V.....	2, 37-40
<u>STATUTES:</u>	
Guano Act of 1856, 11 Stat. 119.....	3
48 U.S.C. §1411.....	3, 15
48 U.S.C. §1414.....	3, 28
Guano Act.....	<u>passim</u>
Quite Title Act.....	2, 29, 31
28 U.S.C. §2409a.....	29-30
28 U.S.C. §2409(g).....	31
14 U.S.C. §1.....	35
14 U.S.C. §2.....	35
14 U.S.C. §81.....	35
14 U.S.C. §83.....	35
14 U.S.C. §84.....	35
32 U.S.C. §1458.....	28, 29
32 Stat. 224.....	4
Section 1006(b) of the Business Corporate Law, McKinney;s Consolidated Laws of New York.....	7
<u>REGULATIONS:</u>	
Federal Rule of Civil Procedure 12(b)(6).....	3
Federal Rule of Civil Procedure 56(c).....	3
<u>OTHER:</u>	
107 Cong. Globe 1697 (34th Cong., 1st Sess.) (July 23, 1856).....	26
<u>Bowett, The Legal Regime of Islands in International Law</u> , Oceana Publications, Inc. (1979).....	24

<u>Encyclopedia of Ornithology</u> , Cambridge University Press, Cambridge, England (1991).....	30
Skaggs, <u>The Great Guano Rush</u> , St. Martin's Griffin (1994).....	9, 22
Stephen E. Ambrose, <u>Undaunted Courage, Meriwether Lewis, Thomas Jefferson, and the Opening of the American West</u> , Simon & Schuster, New York (1997)..	32
U. S. Presidents, <u>Compilation</u> , VIII: 5625.....	9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
WILLIAM A. WARREN,)	
)	Civil Action No.
Plaintiff,)	97-2415 (PLF)
)	
v.)	Memorandum in
)	Support of
UNITED STATES OF AMERICA, <u>et al.</u> ,)	Opposition to Motion
)	to Dismiss or for
Defendants.)	Summary Judgment
_____)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT

SUMMARY AND INTRODUCTION

1. On this date, an Amended and Supplemental Complaint is being filed with a related motion for leave to do so. That document and this memorandum reflect Plaintiff's withdrawal of reliance on claims and arguments asking this Court to rule on (a) the political question of "sovereignty" of the United States relative to the island of Navassa (government's memorandum¹ at 15-17); (b) regarding ex post facto and malice aforethought arguments (id at 26-27); (c) regarding allegations against Members of Congress, mooted by stipulation for voluntary dismissal filed March 24, 1999, accepted by this Court on March 26, 1999 (id at 28-39); and (d) regarding matters giving rise to the discussion of administrative law at 39-44 of the government's memorandum.

2. This case involves a wide range of legal areas including the Guano Act; the Quiet Title Act; the activities and jurisdictions of the President, the State Department, the United States Coast Guard and

¹ Defendants' Memorandum in Support of Motion to Dismiss, or in the Alternative for Summary Judgment, filed November 25, 1998 (usually referred to as the "government's memorandum").

the Department of Interior; international law and constitutional law. The Plaintiff, William A. Warren, at age 53, has had a remarkable career in diverse fields including music, television, deep sea exploration and diving for sunken treasure. Declaration attached as Exhibit 1 including resume as Exhibit 1(d). It was in the last-named capacity that he came across Navassa Island involved in this lawsuit. Acting pro se, Mr. Warren has initiated and conducted the litigation with considerable skill, strong intellect and extraordinary energy. While, in dealing with a legal undertaking that would be formidable to any licensed law practitioner, at times not applying traditional legal discipline, Mr. Warren's core concerns and claims are valid and merit relief in this litigation.

3. In opposition to the government's motion, Plaintiff submits evidence and argument in support of the following:

I. Plaintiff has a current and valid claim of guano mining rights on the island of Navassa under the Guano Act.

II. Plaintiff has a current and valid claim of ownership rights regarding the island of Navassa under federal common law.

III. The Department of Interior's January 16, 1997 Order as applied to guano mining rights was beyond the power of the Executive Branch in violation of the implied separation of powers under the Constitution.

IV. Plaintiff's guano mining and ownership rights should be determined by this Court under the Quiet Title Act.

V. Plaintiff has been denied his guano mining and ownership rights in violation of the due process/taking provisions of the Fifth Amendment of the Constitution.

4. Each of these points will be discussed in turn. With regard

to the evidence detailed in the passages that follow and the annexed exhibits, the Plaintiff's factual allegations are to be accepted and all disputed matters are to be resolved in his favor. Federal Rules of Civil Procedure 12(b)(6) and 56(c); Bishop v. Wood, 426 U.S. 341 (1976); United States v. Diebold, 369 U.S. 654 (1962).

I.

Plaintiff has a current and valid claim of gauno mining rights on the island of Navassa under the Guano Act

A.

Only Congress can terminate such rights and it has never been the will of the Congress to do so

5. The Guano Act of 1856, 11 Stat. 119, as amended, provides as follows with regard to the establishment of guano mining rights:

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

48 U.S.C. §1411 [emphasis supplied]. The Guano Act provides as follows with regard to termination of guano mining rights:

The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding \$8 per ton for the best quality, or \$4 for every ton taken while in its native place of deposit.

48 U.S.C. §1414 [emphasis supplied].

6. While enacted at a time when the personnel in the Executive Branch serving the President and the Members and staff of Congress were relatively few in number and a short buggy ride apart, the clear division of power (a) in the President to grant an appertainment based

on the discovery of guano with attendant mining rights and (b) in the Congress to terminate such guano mining rights applies with full force to today's vast bureaucracy of the Executive Branch, and legislative operations of Congress and its committees.

7. The Plaintiff's claim of guano mining rights on the island of Navassa is made as an ultimate assignee dating back to the initial grant of such rights on December 8, 1859 by President Buchanan acting through the Secretary of State, who, in turn, acted on the advice of the Attorney General. Jones v. United States, 137 U.S. 202, 206 (1890); letter from John Appleton, Assistant Secretary, State Department, to C. I. M. Gwinn, counsel for Edward O. Cooper, the initial assignee of the discoverer, Peter Duncan. 51 MS. Dom. Let. 271.² The government's memorandum cites no subsequent action by Congress terminating these Navassa guano mining rights.

8. In 1913, Congress appropriated funds to construct a lighthouse on Navassa Island. That legislation, in its entirety, provided: "LIGHTHOUSE ESTABLISHMENT...Navassa Island, W.I. Light station on Navassa Island, West Indies: For a light station on Navassa Island, in the West Indies, \$125,000." 32 Stat. 224 (copy attached as Exhibit 3). On its face, this does not terminate guano mining rights on the island. Nor can such an intent on the part of Congress reasonably be inferred. The island is approximately two miles long and one mile wide, and the lighthouse occupies only a tiny fraction of

² "Sovereignty of islands claimed under the Guano Act and of the northwestern Hawaiian islands, Midway and Wake," prepared by Legal Adviser's office of the State Department, 1932-33; Department Library, Washington, D.C., JX239.1856 (hereinafter referred to as the State Department's "sovereignty study"). Attached as Exhibit 2 are copies of pages bearing typed numbers 1-31, 167 (and machine-stamped numbers 374-404, 541) pertaining to Navassa Island. Information concerning the statement in the text above may be found at pages type-numbered 7-8 of Exhibit 2.

the land area. See map prepared by the United States General Accounting Office attached as Exhibit 4;³ see, also, video tape included in Exhibit 22. As residents of the Washington area who frequent the eastern shore can attest, the venerable Fenwick Island (Delaware) lighthouse operates without disturbing recreational, residential and business activities only a few yards away.

9. The government's memorandum, at 7-8, cites a Proclamation by President Wilson in 1916 "reserving" the island of Navassa for "lighthouse purposes." A copy of that proclamation is attached as Exhibit 5. In Section II, infra, we shall have more to say about this action in our discussion of ownership rights of the Plaintiff. Suffice it to state here that the proclamation (a) does not expressly purport to terminate the previously granted Navassa guano mining rights, (b) would have exceeded the President's authority under the Guano Act if it did, and (c) cannot be said to have been ratified by Congress (as an intended termination of such rights by virtue of its appropriation of funds for the lighthouse) since the appropriations legislation was passed three years before the proclamation was issued.

B.

Under the circumstances dating back many years, Plaintiff has demonstrated a reasonable claim to the position as the ultimate assignee of the rights

10. The Supreme Court has stated:

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not readily be found, or if found, time may have so impaired their recollection of the transactions, that they can only be imperfectly recalled, and of

³ "U.S. Insular Areas," Report to the House Committee on Resources, November 1997, at pages 46, 46-49.

course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in and by reasonable presumptions, that acts to protect one's rights, which might have been done, and in the ordinary course of things generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions; and thus gives peace and quiet to long and uninterrupted possessions.

Fletcher v. Fuller, 120 U.S. 534, 546 (1887). While that case involved a jury instruction concerning events occurring 75 years earlier regarding the ownership of land under Rhode Island law, with factual and legal differences from those present here, nonetheless the reasoning is analogous and useful in considering the status of "chain of title" to the guano and ownership rights at issue here.

1. Navassa Phosphate Company
[thru George W. Grafflin and
other former stockholders]

11. The factual mosaic regarding such rights, of necessity (due to the passage of time) obtained in part from sources that are not first hand, is this:

12. In 1857, Peter Duncan filed a claim regarding discovery of Navassa under the Guano Act and in the same year, assigned his interest to Edward O. Cooper. Jones v. United States, *supra*, 137 U.S. at 205-206; sovereignty study at pages type-numbered 2-3 (Exhibit 2).

13. In 1864, Mr. Cooper assigned his interest to the Navassa Phosphate Company, a New York corporation, which actively engaged in guano mining operations and occupancy of Navassa Island for more than 30 years thereafter. Sovereignty study at page type-numbered 19 (Exhibit 2).

14. In 1898, mining operations were discontinued because of the advent of the Spanish American War, following which representatives of

the Navassa Phosphate Company unsuccessfully sought payment from the United States for damage to its facilities on the island by Haitians during that period. Id. at pages type-numbered 20-21 (Exhibit 2).

15. In 1924, the Navassa Phosphate Company was dissolved. Letter to Plaintiff from Timothy S. Elliott, Acting Associate Solicitor, United States Department of Interior, dated March 27, 1997, at page 4 (copy attached as Exhibit 6); this has also been confirmed by the Plaintiff (Exhibit 1).

16. In 1931-32, the "conclusions" part of the sovereignty study contains the following: "According to the records in the State Department, the Navassa Phosphate Company still has the record title to the guano on the island, if any remains, under the Guano Act." Exhibit 2 at type-numbered page 167.

17. Under New York law, the stockholders of a dissolved corporation individually hold the assets of the corporation as tenants in common both for the benefit of unpaid creditors and for their own account. Section 1006(b) of the Business Corporate Law, McKinney's Consolidated Laws of New York; Rodgers v. Logan, 503 N.Y.S.2d 36 (1986) and cases cited in that opinion.

18. George W. Grafflin held 6,100 shares of stock of the Navassa Phosphate Company, believed to be the largest single stockholding in the corporation. Articles appearing in the New York Times, dated April 26, 1887, entitled "Receivers Appointed for the Navassa Phosphate Company," and dated January 26, 1888, entitled "Stormy Proceedings at an Election of Trustees," of which photocopies and conformed copies are attached to the Plaintiff's declaration as Exhibits 1(a) and 1(b).

19. While a New York corporation, the office and general place

of business of Navassa Phosphate Company were in Baltimore, Maryland. New York Times article, dated April 7, 1901, entitled "To Resell Navassa Island," provided in the government's memorandum as Exhibit 4. George W. Grafflin and descendants have lived and continue to live in the Baltimore area. The family owned and operated another guano fertilizer business there as well, i.e., the Patuxent Guano Company. The great grandson of George W. Grafflin, Richard Buck of Lutherville, Maryland, has assigned all of his inherited right, title and interest in the stock, and assets following dissolution, of the Navassa Phosphate Company to the Plaintiff. Declaration of Mr. Buck attached to the Plaintiff's declaration as Exhibit 1(c).⁴

20. The Plaintiff is securing assignments from other heirs of stockholders of Navassa Phosphate Company as well, adding to this chain of title.

2. James A. Woodward
[alternate claim]

21. What the sovereignty study cited earlier does not mention and the records in the State Department apparently do not contain, is evidence in the possession of heirs of James A. Woodward regarding an alternate claim to Navassa rights. The factual mosaic regarding Mr. Woodward's activities and interests (again subject to limits on available first hand evidence due to the passage of time) is this:

22. Mr. Woodward was an adventurer whose exploits have been the subject of discussion amongst his heirs, who have personal mementos

⁴ Mr. Buck has resided at his home in Lutherville, Maryland, for the past 47 years. He is a graduate of the University of Virginia, College and Law School, worked in the Buck family business and, at the age of 77, has served 25 years as President of the Valleys Planning Council, serving Greenspring, Caves, Worthington and Western Run Valleys northwest of the City of Baltimore. Source: Interview by undersigned counsel Gene A. Bechtel.

including two photographs bearing the date 1901, one showing Mr. Woodward on Navassa Island with guano deposits in the background, the other showing Mr. Woodward and colleagues engaged in battle with invaders, most likely Haitians; a brass "spyglass" telescope and sextant; and the knife that Mr. Woodward carried with him at all times, the last-named personally given to his great grandson, Gerald R. Patnode, whose declaration is attached as Exhibit 7.⁵

23. Mr. Woodward was in charge of mining operations from 1892 to 1898, when the Spanish American War began, and again in 1900-1901, following the conclusion of the war. Sovereignty study at pages type-numbered 17-19, 22 (Exhibit 2).

24. This period of service followed riots in 1889 on the island regarding working conditions, leading to convictions for murder and other crimes. Jones v. United States, supra, 137 U.S. at 203-204.

25. In the State-of-the-Union message in 1891, President Harrison, who reduced the death penalty for the murder convictions in the Jones case to life imprisonment, recommended:

legislation that shall place labor contracts upon this and other islands having the relation that Navassa has to the United States under the supervision of a court commissioner, and that shall provide at the expense of the owners an officer to reside on the island, with power to judge and adjust disputes and to enforce a just and humane treatment of the employees. It is inexcusable that American laborers should be left within our own jurisdiction without access to any Government officer or tribunal for their protection and the redress of their wrongs.

U. S. Presidents, Compilation, VIII: 5625, cited and quoted in Skaggs, The Great Guano Rush, St. Martin's Griffin (1994) at page 195.

26. Mr. Woodward's service on the island during the period 1892-

⁵ With degrees in business, marketing and economics, Mr. Patnode has taught at John Hopkins University, Loyola College (Baltimore) and Gettysburg College (Pennsylvania), currently heads a business and marketing consulting firm, and resides at Monkton, Maryland (resume included in Exhibit 7).

98 and 1900-1901 was as the result of an appointment either by the Navassa Phosphate Company or by the United States government. He held the title of either Supervisor or Governor. Sovereignty study at pages type-numbered 17-19 (Exhibit 2); The Great Guano Rush at pages 195-197.⁶

27. Thereafter, Mr. Woodward continued to be of service to the government in the matter, in 1908 providing a report concerning vessels that had carried expeditions from Spain to Cuba prior to the outbreak of the Spanish American War. J. A. Woodward letter to President of U.S., January 11, 1908, 739 MS. Numerical File 10640 (Exhibit 9; see, also, sovereignty study at page type-numbered 17, Exhibit 2).

28. It is the belief of the heirs of Mr. Woodward that he became the successor to the Navassa Phosphate Company's interest in Navassa as the sole surviving partner of a partnership formed to assume that interest or as the sole party who undertook to carry on the venture when funding was no longer provided by the Navassa Phosphate Company or by other would-be financiers. Exhibit 7.

29. The New York Times article, dated May 31, 1901, entitled "To be Rescued from Navassa Island" (Exhibit 5 of the government's memorandum), contains the following statement:

This company [Navassa Phosphate Company] went into the hands of a receiver during the Spanish-American war, and all its rights were purchased by John B. H. Jefferson and Capt. Wyatt Owen of Baltimore. In the early part of December last the new owners of the phosphate mines sent the four men [including Mr. Woodward] to the island again to look after the mines. Within a few weeks there was a disagreement between the partners, which resulted in a dissolution of the partnership. Under this dissolution

⁶ In light of the citation to this reference work in this and the preceding paragraph, a copy of the entire passage from which the citations are taken, i.e., pages 171-97 comprising a chapter entitled "Navassa Island," is reproduced in Exhibit 8.

agreement, Mr. Woodward was to pay the return expenses of the men to the United States. He arranged to carry out this part of the agreement, when another dispute arose between himself and Capt. Owen, which frustrated all plans to aid the men [emphasis supplied].

There is no evidence or reason to believe Messrs. Jefferson and Owen contributed anything further to the venture, having reneged on their financial commitments, leaving Mr. Woodward as the sole survivor of the partnership.

30. Mr. Woodward devoted nine years of his life to occupancy of Navassa Island and directing the affairs there in a more humane manner as desired by President Harrison and the United States government. When the Navassa Phosphate Company went into receivership, he made arrangements to pay the cost of a return to the island under the aegis of the partnership referred to above. The possessions of the heirs include a handwritten note of Mr. Woodward regarding failure to receive payment for back wages. Copy attached as Exhibit 7(f).

31. Whether for one or more of these reasons, or for other good and sufficient reasons, Mr. Woodward acted as the successor-in-interest to rights relative to Navassa Island, conducting negotiations for the sale of his interests to the government. It is fair to presume that the government, having knowledge of the facts and circumstances at that time which cannot now be replicated in detail, had good and sufficient reason to accept Mr. Woodward's credentials as the private party in the position to negotiate in that capacity.

32. The possessions of the heirs include a letter, dated March 14, 1914, to Mr. Woodward from Maryland Congressman J. Charles Lithicum, a member of the House Committee on Foreign Affairs, reflecting continuing negotiations with Mr. Woodward, then expected to be concluded shortly, for the sale of Navassa to the government

(Exhibit 10).⁷ The possessions of the heirs also include a letter, dated April 14, 1915, from E. S. Sweet, Assistant Secretary, Department of Commerce, to Mr. Woodward, in response to the latter's letter, dated March 10, 1915, to President Wilson (Exhibit 11).⁸

33. The letter from Assistant Secretary Sweet advises that no appropriation has been made for the purchase of the island; instead funds were appropriated to construct a lighthouse there. This letter asserts that "ownership" of the island was held by the United States - - inconsistently with positions the government has taken on other occasions, about which we will have more to say in Part II regarding the private ownership interest of the Plaintiff. The point here is that, in the negotiations with Mr. Woodward extending over more than a year (at least from early 1914 to April 1915), and perhaps a number of years previously, the government entertained Mr. Woodward's efforts to sell the island and ultimately asserted public ownership for construction of a lighthouse as its reason for terminating negotiations, rather than asserting any position that Mr. Woodward was not the appropriate private party with whom such negotiations should be conducted.

34. The declaration of Mr. Patnode (Exhibit 7) details the succession of Mr. Woodward's interest to his mother and himself. Mr. Woodward passed away in Baltimore in or about 1951. A daughter, Mary

⁷ This document refers to a letter "of recent date" to the Congressman from Mr. Woodward. The original of the letter bears the handwritten notes of Mr. Woodward, indicating that he wrote back to the Congressman ("Ans. May 26th 1914"), and on the reverse side, that he may have employed a Baltimore attorney to assist him in the matter.

⁸ Family members recall Mr. Woodward often talking about his relationships with three Presidents, McKinley, Wilson and Theodore Roosevelt. Exhibit 7.

Alexander, was born in Baltimore in 1905 and passed away there in 1973 (birth and death certificates included in Exhibit 7). Mary Alexander had a daughter, Mary June, who was born in Baltimore in 1925 (birth certificate included in Exhibit 7). Mary June has a son, also born in Baltimore, who is Mr. Patnode, the affiant in Exhibit 7. Mary June (Patnode) and Gerald R. Patnode, the granddaughter and great grandson of Mr. Woodward, respectively, claim direct succession to Mr. Woodward's interest in Navassa by virtue of the laws of intestacy in the State of Maryland. (To their knowledge, neither Mr. Woodward nor his daughter, Mary Alexander, had a will.) Each has sold and assigned her or his right, title and interest therein to the Plaintiff (instruments of assignment are included in Exhibit 7).

3. Title to Navassa rights can be transmitted through heirs

35. The decision in Duncan v. Navassa Phosphate Co., 137 U.S. 647 (1891), does not negate the ability of heirs of Mr. Grafflin or Mr. Woodward to accept and pass along his interest in Navassa rights. The issue in that case was whether the widow of the original discoverer of Navassa Island possessed a dower interest, and the Court addressed a provision of the Guano Act which expressly gave rights to the widow, heirs, executors and administrators of the discoverer if he died prior to perfecting his registration of discovery with the government. Mr. Duncan's discovery had long since been perfected and assigned to other parties, and, with the focus on that provision of the Guano Act, the Court held that dower did not attach.

36. Duncan, thus, did not disturb the ongoing holding of mining rights and did not require the Court to consider another provision of the Guano Act, that such rights are held subject to termination only by Congress. The instant case involves the transmission of long-ago

perfected rights by will or intestacy, rather than by an intervivos assignment. If the death of an individual owner of the rights cuts off the ability to transmit them to heirs, then a new limitation is engrafted onto the statute, i.e., the rights are subject only to termination by Congress (if held by a corporation) and they are subject to (a) termination by Congress and (b) expiration by operation of law on the death of the holder (if held by an individual).

37. Statutes are to be read in a way to give meaning to all of the provisions unless there is an irreconcilable conflict. United States v. Storer, 351 U.S. 192, 203-04 (1956); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). No conflict exists here. The provision of the Guano Act regarding the rights of widows and heirs to perfect inchoate discovery claims speaks to one issue (involved in Duncan but not present here), and the provision of the Guano Act regarding continuation of rights until terminated by Congress speaks to a different issue (not present in Duncan but directly involved here). If Duncan were to rule out passage of rights to heirs in the instant setting, then the statute would be read, sans any evidence of Congressional intent, to grant indeterminate rights only to corporations, not to mortal human beings. While in an appropriate case, the Congress conceivably might want to make such a distinction as a matter of legislative policy, that wish on the part of Congress needs to be explicit, not drawn from unfounded and irrational inference. Congress surely didn't do so in the Guano Act, enacted during a period in the nation's life when individual ownership was the norm and corporate ownership was a relatively new and developing concept.

II.

Plaintiff has a current and valid claim
of ownership of the island of Navassa
under federal common law

38. As parties residing in the United States who own their own home can attest, while the United States has "sovereignty" over their affairs and property as local residents and citizens, their home is "privately owned" property, and these two concepts are not inconsistent or mutually exclusive. The government's memorandum, at 42, employs wording that "title [to Navassa] vests in the United States," which creates the impression that the government's interest in Navassa is inconsistent and mutually exclusive with any "private ownership" interest in the island. To dispell that erroneous notion, we shall comment first on the "sovereignty" aspect of the nation's interest in Navassa Island, as distinguished from applicable law within the jurisdiction of the courts, and then examine the facts and precedent in support of private ownership by the Plaintiff.

A.

Sovereignty over island territories as distinguished from
laws within the jurisdiction of the courts

39. The Guano Act provides for the President to determine that Navassa Island be considered as "appertaining" to the United States. 48 U.S.C. §1411. The State Department has characterized this concept as follows: "The use of the word 'appertain' is deft, since it carries no exact meaning and lends itself readily to circumstances and the wishes of those using it." Sovereignty study, pages type-numbered 145-147 (machine stamped numbers 317-329), attached as Exhibit 12.⁹

⁹ These passages relate to guano islands other than Navassa (for which passages were previously attached as Exhibit 2), but the references to the meaning of "appertaining" in the Guano Act apply equally here. The quotation in the text above may be found in Exhibit 12 at type-numbered page 145.

Five examples of actions taken and communications regarding Navassa Island to suit the wishes of the user are given:

(a) During the period 1904-1907, the State Department, for reasons best known to it, declined an offer by one W. S. Carter to purchase Navassa Island from the United States, stating "...this Government possesses no territorial sovereignty over the Island of Navassa." Exhibit 13; see, also, sovereignty study at typed-number pages 22-23 (Exhibit 2) [emphasis supplied].

(b) However, also during the period commencing in 1904, the State Department contemporaneously determined that Navassa Island was a "territory appertenant" to the United States when asked by the Commerce Department if a lighthouse could be built there. Sovereignty study at type-numbered page 24 (Exhibit 2).

(c) Adding to these inconsistencies, in 1915, the Department of Commerce, for reasons best known to it, terminated negotiations regarding the purchase of Navassa Island from Mr. Woodward, stating that funds had been appropriated for a lighthouse and not for the purchase of the island. Not ending with that, however, in a passage that would have astonished Mr. Carter in example (a) above, as it no doubt astonished Mr. Woodward, the letter added the statement "...as the title to the island is in the United States it is considered unnecessary to take any measures looking to the purchase of the island in connection with the establishment of a light station thereon." Letter from Assistant Secretary Sweet (Exhibit 11) discussed in ¶32, supra.

(d) While there exists in the government's files an opinion letter in 1911 to the effect that the United States held title to the

island as public land¹⁰, that is not mentioned in the State Department's sovereignty study in 1931-32. Moreover, in 1932, in dialogue with Haiti, which proposed an amendment of its constitution that would designate Navassa Island as a Haitian territory, the State Department, in expressing the contrary position of the United States, for reasons best known to it, said "...the Island is now actually occupied by the United States for the purpose of maintaining a lighthouse there" (sovereignty study at type-numbered page 31, Exhibit 2), without also stating that the United States held the actual title to the island, which obviously would have been an enhancement of the statement of position vis-a-vis Haiti, if the State Department really believed it.

(e) In 1992 in response to an inquiry regarding the position of the Haiti government concerning "ownership" of Navassa Island from Professor Skaggs, whose book has been referred to earlier, T. Michael Peay, Assistant Legal Adviser for Inter-American Affairs at the State Department replied that Haiti "continues to lay claim to" the island, but the island remains "an unincorporated territory administered by the United States Coast Guard." Exhibit 14. Again, there is no mention of public ownership of the land by the United States, if that were, in fact, the position of the State Department.

40. The foregoing examples of uses of the statute to suit the wishes of the user are reconcilable and make sense only if consigned to the milieu of political judgments of diplomacy that are beyond the jurisdiction of this or any court.

¹⁰ Letter dated July 1, 1911 to Secretary of Commerce and Labor from J. A. Fowler, Assistant to the Attorney General, not available generally, cited in the government's memorandum at 4, n. 2, copy provided to Plaintiff's counsel and for the record by Defendants' Notice of Filing dated March 31, 1999.

41. On the other hand, under the Guano Act and in other territorial acquisitions by the United States, there are matters of law within the jurisdiction of the courts. For example, in Jones v. United States, supra, the Supreme Court's holding that the President's judgment that Navassa Island was considered "appertaining" to the United States, together with the President's further determination that the island was not within the jurisdiction of any other nation, was ground for jurisdiction in United States courts over crimes committed on the island. 137 U.S. at 221-24.

42. For another example, in the Insular Cases in which the Supreme Court reviewed laws applicable to unincorporated territories such as Navassa Island, the Supreme Court held that the constitutional protections of life, liberty and property apply to such territories. Downes v. Bidwell, 182 U.S. 244, 282-283 (1901), De Lima v. Bidwell, 182 U.S. 1 (1901) and Dooley v. United States, 182 U.S. 222 (1901).

43. For still another example, in United States v. Fullard-Leo, 331 U.S. 256 (1947), involving an effort by the United States government to establish quiet title in itself in a remote island in the Pacific, the Supreme Court upheld and established a federal common law right to private ownership of the island -- a subject to which we now turn our attention.

B.

Federal common law of private ownership of a territorial island applies to Plaintiff's claim

44. The Fullard-Leo case involved a five-to-four division of the Supreme Court (favoring private ownership), 331 U.S. 256, affirming a decision of the 9th Circuit by a four-to-two division of the circuit judges, 156 F.2d 756 (1946), overturning an earlier decision of the 9th Circuit, involving a two-to-one division (favoring government

ownership), 133 F.2d 743 (1943). In a case that turned substantially on the facts, this, in and of itself, suggests that it is not appropriate to grant a peremptory dismissal of the instant case, which similarly seeks an adjudication of private ownership of a territorial island, on the premise that there can be no room for consideration of proofs at trial. When the factual details are considered, such a conclusion becomes clear.

45. In part, the Fullard-Leo case deals with the established law of Hawaii and the terms and conditions of annexation of that territory by the United States, which are not pertinent here. However, bottom line, the ultimate decision rested on federal common law, 331 U.S. at 269.¹¹ That said, the decisional similarities between the Fullard-Leo case and the case at bar are striking.

46. Initial authorization did not establish private ownership. In Fullard-Leo, the initial authorization was to take possession "for the purpose of increasing the trade and commerce of the Kingdom [of the Hawaii Islands] as well as offering protection to the interests of its subjects," and, thusly, the island would be "considered and respected as a part of the Domain of the King of the Hawaiian Islands." 331 U.S. at 260-61. In the case at bar, the initial authorization was to take possession of Navassa Island with right to occupy the island for the commercial purpose of obtaining and selling guano, advancing the interest of the United States (selling only to citizens of the United States at specified prices), and, thusly, permitting the President to declare the island as "appertaining" to the United States. In neither case did the authorizing documents

¹¹ Fullard-Leo and other decisions establishing federal common law are collected in Wheeldin v. Wheeler, 373 U.S. 647, 663-64, n. 12 (1963).

expressly grant fee simple ownership.

47. No other party has ever sought to establish private ownership. In Fullard-Leo, during the 77-year period commencing with the initial authorization (in 1862) and ending with the filing of the case to quiet title (1939), no party other than the parties in the chain of title traced back to the initial authorization ever sought to establish conflicting private ownership. 331 U.S. at 281. In the case at bar, during the 138-year period commencing with the initial authorization (in 1859) and ending with the filing of the case to quiet title (1997), no party other than the parties in the chain of title traced back to the initial authorization has ever sought to establish conflicting private ownership.¹²

48. Activity on the island was understandably quiescent for many years and the issue of ownership arose when a current development brought it to the surface. In Fullard-Leo, efforts at commercial development were unavailing and the ownership issue came to light when the United States wished to use Palmyra island for a naval air base in the late 1930's. 331 U.S. at 259-260, 280. In the case at bar, the period of quiescence commenced when the use of guano fell off because of the advent of mineral and organic fertilizers more readily obtained on the mainland and there subsequently developed popular use of chemical fertilizers as well. By virtue of increased environmental concerns, many of these harmful products have been discontinued and the renewed attractiveness of the pure guano product in recent years motivated the Plaintiff to acquire rights to Navassa Island, leading to the instant litigation. Exhibit 1.

¹² In the Duncan case discussed at ¶¶35-37, supra, the claim was by the widow, under dower principles, of the original discoverer in the chain of title, not an outside party.

49. Comparison of periods of actual occupancy relative to constructive occupancy. In Fullard-Leo, of the 77 years in question, actual occupancy was less than two and one-half years (about 3% of the total), and constructive occupancy was approximately 74 and one-half years (about 97% of the total). 331 U.S. at 283. In the case at bar, of the 138 years in question, actual occupancy was approximately 44 years¹³ (about 30% of the total), and constructive occupancy was approximately 94 years (about 70% of the total). On this score, the Fullard-Leo majority had no problem with the substantial amount of constructive ownership for the reason equally applicable to the case at bar, i.e., "[t]he sufficiency of actual and open possession of property is to be judged in the light of its character and location [footnote omitted]. It is hard to conceive of a more isolated piece of land than Palymyra, one of which possession need be less continuous to form the basis of a claim." 331 U.S. at 279-280.

50. The vast majority of the years of occupancy was that of the Navassa Phosphate Company, from the time of acquisition of the rights in 1864 until the outbreak of the Spanish American war in 1898, totalling 34 years. The Plaintiff stands in the shoes of that legacy by virtue of the assignment from Navassa shareholder heir, Mr. Buck. Additionally, some eight or nine years of occupancy (approximately 1892-98 and 1900-1901) were by Mr. Woodward, who is shown in the 1901 photograph included in Exhibit 7 in battle with invading parties believed to be Haitians. A close examination of the original of that photograph in the possession of Mr. Woodward's heir, Mr. Patnode, shows the body of a slain invader on the ground in the foreground. This action took place without the benefit of any United States

¹³ From 1857 to 1898 and 1900-1901. See ¶¶12-14, 23, supra.