

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
Western Division  
Civil Case No. 5:15-cv-627**

FREDERICK L. ALLEN and  
NAUTILUS PRODUCTIONS, LLC  
Plaintiffs

v.

PATRICK LLOYD MCCRORY, Governor of the State of North Carolina, *in his official capacity*;  
SUSAN WEAR KLUTTZ, Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
KARIN COCHRAN, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
KEVIN CHERRY, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in his official capacity*;  
CARY COX, Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
STEPHEN R. CLAGGETT, State Archaeologist, *individually and in his official capacity*;  
JOHN W. MORRIS, Deputy State Archaeologist – Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, *individually and in his official capacity*;  
JAMES W. DAVIS, North Carolina Senator, *individually and in his official capacity*;  
NORMAN W. SANDERSON, North Carolina Senator, *individually and in his official capacity*;  
NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES;  
STATE OF NORTH CAROLINA; and  
FRIENDS OF QUEEN ANNE’S REVENGE, A NON-PROFIT CORPORATION

Defendants

**COMPLAINT  
(Jury Trial Demanded)**

**INTRODUCTION**

1. This lawsuit involves a conspiracy to steal copyrights and misuse copyrighted photographs and media created by renowned documentary videographer Rick Allen and licensed to his company,

Nautilus Productions, that Mr. Allen has painstakingly created since 1998 while documenting the retrieval of *Queen Anne's Revenge*, the pirate Blackbeard's flagship.

2. After the Department of Natural and Cultural Resources effectively admitted in a written agreement signed by Secretary Kluttz that the rights to this historically important videography belonged to Plaintiffs and were not to be used except under contract, the Defendants conspired to convert Plaintiffs' copyrighted works into "public documents" that would be made available to the public without Plaintiffs' consent and without compensation, in violation of the Constitutions of the United States and of North Carolina; and used and permitted others to publicly display, copy, and otherwise use Plaintiffs' copyrighted works without Plaintiffs' consent.

3. Defendants well knew or should have known that only Congress has the right to pass laws governing copyrights, yet conspired to craft and obtain passage of a North Carolina statute, N.C. Gen. Stat. §121-25(b) that removed Plaintiffs' works, and those of similarly situated persons, from the copyright protection to which they are entitled.

4. While the motivation for this misconduct is yet to be fully understood, it appears that at least part of the reason was to create a defense to claims of infringement and breach of the Settlement Agreement.

5. It appears that another part of the motivation for this misconduct was to assist the Defendant Department, and the Defendant Friends of Queen Anne's Revenge and/or individuals associated with them, each of which would or expected to achieve considerable savings and profits from uncompensated use of Plaintiffs' work. Defendant Morris is not only an employee of the Defendant Department but also at times pertinent hereto was, and may still be, a member of the Board of Directors of the Friends of Queen Anne's Revenge, and his wife signed a contract with the Friends of Queen Anne's Revenge to produce educational and internet materials concerning the retrieval of the

*Queen Anne's Revenge*, the very subject that had been well documented by Plaintiffs since inception of the recovery efforts.

6. Further details are set out in the paragraphs below; and each paragraph of this Complaint is incorporated by reference into each Count of the Complaint.

### **PARTIES, JURISDICTION AND VENUE**

7. Plaintiff Frederick (“Rick”) L. Allen (hereafter referred to as “Mr. Allen”) is an individual citizen and resident of Cumberland County, North Carolina. Mr. Allen has been producing documentaries and shooting video since 1983. As a video producer, director and HD videographer his work has appeared on ABC, A&E, BBC, CBS, Discovery, TLC, National Geographic, 48 Hours, ESPN, Lifetime, Turner and more. He has followed SWAT teams through the door on drug busts, traveled from Cuba to Kazakhstan with the 82nd Airborne, weathered live broadcasts during hurricanes, gone nose to nose with 14 foot Great White sharks during underwater expeditions and for nearly two decades has been the project videographer on the Queen Anne’s Revenge Shipwreck Project.

8. Plaintiff Nautilus Productions, LLC (hereafter referred to as “Nautilus”), is a limited liability company organized by under the laws of the State of North Carolina and having its principal place of business in Cumberland County, North Carolina. Nautilus was organized by Mr. Allen after he had spent more than a decade in broadcast television, to be his own video production company focused on documentary production as well as providing freelance HD production and underwater video services to broadcast, corporate and government clients. Nautilus, with Mr. Allen, has produced documentaries for the National Geographic International, the Canadian History Channel, North Carolina Public Television, Texas A&M, the Louisiana State Museum and the Bureau of Ocean Energy Management (US Dept. of the Interior) among others, and for many corporate clients.

9. Defendant Patrick Lloyd McCrory (also known as “Pat McCrory” and hereafter referred to as “Mr. McCrory” or “the Governor”) is an individual North Carolina citizen, employed in Wake County, North Carolina, and on information and belief with residences in Wake County and Mecklenburg County, North Carolina and registered to vote in Mecklenburg County, North Carolina. Mr. McCrory currently serves as Governor of the State of North Carolina and has overarching control over the actions of the State and its agencies, and as a part of his official duties is responsible for those actions. He is sued in his official capacity.

10. Defendant Susan Wear Kluttz (hereafter referred to as “Ms. Kluttz” or “the Secretary”) is an individual North Carolina citizen, employed in Wake County, North Carolina and on information and belief having residences in Wake County and Rowan County, North Carolina and registered to vote in Rowan County, North Carolina. Ms. Kluttz currently serves as Secretary of the North Carolina Department of Natural and Cultural Resources and supervises and controls the actions of that agency. Ms. Kluttz signed the Settlement Agreement referenced above, a copy of which is attached as Exhibit 1 to this Complaint, and was responsible for its proper implementation. She at all times controlled or had the right and obligation to control use of the copyrighted works of Plaintiffs by the North Carolina Department of Natural and Cultural Resources. She is sued in her individual and official capacities.

11. Defendant Karin Cochran (hereafter referred to as “Ms. Cochran”) is an individual North Carolina citizen, on information and belief residing and registered to vote in Wake County, North Carolina. Ms. Cochran currently serves as Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources and is responsible for supervising the day to day operations of that agency. Ms. Cochran was present during the negotiations that led to the Settlement Agreement referenced above, and was responsible for its day to day implementation. She at all times controlled or had the right and obligation to control use of the copyrighted works of Plaintiffs by the North

Carolina Department of Natural and Cultural Resources. She is sued in her individual and official capacities.

12. Defendant Kevin Cherry (hereafter referred to as “Dr. Cherry”) is an individual North Carolina citizen, on information and belief residing and registered to vote in Cabarrus County, North Carolina. Dr. Cherry serves as the deputy secretary of the N.C. Department of Natural and Cultural Resources and director of the Office of Archives, History and Parks and oversees the operations of the divisions of State History and Maritime Museums, State Historic Sites and Properties, Archives and Records, Historical Resources (including the State Historic Preservation Office, Office of Historical Research, and the Office of State Archaeology), among others. Dr. Cherry personally participated in the negotiations that led to the Settlement Agreement. He at all times controlled or had the right and obligation to control use of the copyrighted works of Plaintiffs by those offices and divisions of the North Carolina Department of Natural and Cultural Resources supervised by him, including the posting of Plaintiffs’ materials to DNCR's YouTube channel without Plaintiffs’ consent as hereafter set out. He is sued in his individual and official capacities.

13. Defendant Cary Cox (hereafter referred to as “Ms. Cox”) is an individual North Carolina citizen, on information and belief residing and registered to vote in Cabarrus County, North Carolina. Ms. Cox currently serves as Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources and supervises and controls the actions of that agency. She at all times controlled or had the right and obligation to control use of the copyrighted works of Plaintiffs by the North Carolina Department of Natural and Cultural Resources in its marketing and communications, and controlled or had the right and obligation to control dissemination of Plaintiffs’ copyrighted works to third parties. She is sued in her individual and official capacities.

14. Defendant Stephen R. Claggett (also known as “Steve Claggett” and hereafter referred to as “Mr. Claggett”) is an individual North Carolina citizen, on information and belief residing and registered to vote in Wake County, North Carolina. Mr. Claggett currently serves as the State Archaeologist of the State of North Carolina, within the DNCR. He also during pertinent times was a member and officer of the Board of Directors of Friends of QAR and may still serve on that Board. Mr. Claggett participated in the negotiations leading to the Settlement Agreement referred to hereafter, was present when it was signed, and knew its provisions. He controlled or had the right and obligation to control use of the copyrighted works of Plaintiffs by the North Carolina Department of Natural and Cultural Resources. He is sued in his individual and official capacities.

15. Defendant John W. Morris (also known as “Billy Ray Morris” and hereafter referred to as “Mr. Morris”) is an individual North Carolina citizen, on information and belief residing and registered to vote in New Hanover County, North Carolina. Mr. Morris currently serves as the Deputy State Archaeologist – Underwater, and as Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources and he also has served during pertinent times hereto, and may continue to serve as a member (and is a past treasurer) of the Board of Directors of Defendant Friends of Queen Anne’s Revenge, A Non-Profit Corporation (hereafter “Friends of QAR”). Mr. Morris is sued in his individual and official capacities.

16. James W. Davis (also known as “Jim Davis” and hereafter referred to as “Mr. Davis”) is an individual North Carolina citizen, on information and belief having a residence in Macon County, North Carolina and registered to vote in Macon County, North Carolina. Mr. Davis is a Senator in the General Assembly of the State of North Carolina. He is sued in his individual and official capacities. On information and belief, based upon published admissions of codefendant Mr. Sanderson, Mr. Davis conspired and cooperated with other Defendants to cause the introduction, and contribute to the passage, of the amendment that ultimately became N.C. Gen.Stat. §121-25(b).

17. Norman Sanderson (hereafter referred to as “Mr. Sanderson”) is an individual North Carolina citizen, on information and belief having a residence in Pamlico County, North Carolina and registered to vote in Pamlico County, North Carolina. Mr. Sanderson is a Senator in the General Assembly of the State of North Carolina. He is sued in his individual and official capacities. On information and belief, based upon published admissions, Mr. Sanderson cooperated and conspired with other Defendants to cause the introduction, and contribute to the passage, of the amendment that ultimately became N.C. Gen. Stat. §121-25(b).

18. The Department of Natural and Cultural Resources (formerly known as the Department of Cultural Resources and hereafter referred to as “DNCR”) is a principal department and agency of the State of North Carolina, pursuant to Articles I and II of N.C. Gen. Stat. §143B.

19. The State of North Carolina (hereafter referred to as the “State”) is a state of the United States of America.

20. Defendant Friends of Queen Anne’s Revenge, A Non-Profit Corporation (“Friends of QAR”), is a nonprofit corporation organized under the laws of North Carolina, and currently having its registered agent and its registered office in Carteret County, North Carolina.

21. This action arises in part under the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 and the copyright laws of the United States, 17 U.S.C. §101 et seq. as well as the Constitution of the United States of America and the Constitution of the State of North Carolina, and seeks a declaration that N.C. Gen. Stat. 125-25(b) is invalid, unconstitutional, and unenforceable as pre-empted by federal law, 17 U.S.C. §301, pursuant to U.S. Const. Art. VI, cl.2. and Art. VIII, §8, Cl. 8, and as a violation of the Takings Clause and Due Process Clause of the U.S. Constitution, Amends. V and XIV; and of the Law of the Land Clause of the North Carolina Constitution, N.C. Const. Art. I, §19; and for recovery of Plaintiffs’ attorneys’ fees and costs. There exists a case and controversy that is ripe for adjudication.

22. This Court has subject matter jurisdiction over the claims arising under the Constitution and laws of the United States, including those claims hereafter set forth seeking a declaration that N.C. Gen. Stat. §121-25(b) violates the United States constitution and the federal Copyright Act; and has original or supplemental jurisdiction over all other claims set out herein. The Court's jurisdiction arising under the constitution and laws of the United States is set out in 28 U.S.C. §1331, with original jurisdiction over claims relating to copyright and infringements thereof set out in 28 U.S.C. §1338 and jurisdiction over declaratory judgment actions set out in 28 U.S.C. §§2201-02; and this Court has jurisdiction over all other claims pursuant to 28 U.S.C. §1367 (a) because they form a part of the same case or controversy.

23. This Court has personal jurisdiction and venue because all parties reside in North Carolina and most of the pertinent acts set out hereafter occurred within the Eastern District of North Carolina.

24. All state employees named as individual Defendants herein knew or should have known, as a similarly situated reasonable person would have known, that depriving Plaintiffs of their copyrights and providing the State with rights that purport to supersede Plaintiffs' copyrights constitute violations of a federal statutory and constitutional right.

25. Each state employee's actions constituting copyright infringement were and are clearly outside the scope of activity permitted by the copyright statute, including reasonable interpretations of fair use.

26. All state employees named as individual Defendants herein, in carrying out the actions hereafter set forth, acted with malice or with reckless indifference to the federally protected rights of the aggrieved Plaintiffs.

27. The acts of each state employee named as a Defendant herein violated, and caused the DCNR and the State to violate, the federal and North Carolina constitutions; and each of these



officials are thereby stripped of any otherwise-applicable immunity and are personally liable for their conduct.

28. To the extent sovereign immunity might otherwise apply, it has been waived by the State of North Carolina at least by reason of a contract entered by the State as hereafter described.

### GENERALLY APPLICABLE FACTS

29. For almost two decades, Plaintiffs have documented the finding and recovery of artifacts from the shipwreck believed to be, and known as, *Queen Anne's Revenge*, the former flagship of Edward Teach, more commonly known as the pirate Blackbeard. *Queen Anne's Revenge* was wrecked in 1718; the wreck was discovered in 1996 and Plaintiffs' documentary work commenced in approximately 1998.

30. Over the past years, Plaintiffs have produced a substantial archive of video and still images showing the underwater shipwreck and the efforts of teams of divers and archaeologists to recover various artifacts from the wreck. Plaintiffs have been involved in live educational video webcasts, producing video for public display, as well as production of materials for licensing and/or later review.

31. Plaintiff Rick Allen has faithfully performed and continues to perform his work relating to the *Queen Anne's Revenge*.

32. The copyrights in all pertinent materials filmed and photographed by Plaintiffs belong exclusively to Mr. Allen and are licensed to and commercialized by Nautilus.

33. Plaintiffs registered Mr. Allen's copyrights in his creative work with the United States Copyright Office and Mr. Allen owns, and Plaintiffs control and have the right to use the works covered by, at least the following registrations:

Reg. #	Title
PA0001694134	Queen Anne's Revenge/Blackbeard Shipwreck Underwater Footage

Reg. #	Title
PA0001846427	Queen Anne's Revenge Footage 1999
PA0001846499	Queen Anne's Revenge Footage 2000
PA0001846497	Queen Anne's Revenge Footage 2001
PA0001846494	Queen Anne's Revenge Footage 2004
PA0001846473	Queen Anne's Revenge Footage 2005
PA0001846465	Queen Anne's Revenge Footage 2006
PA0001846461	Queen Anne's Revenge Footage 2007
PA0001846457	Queen Anne's Revenge Footage 2008
PA0001846462	Queen Anne's Revenge Footage 2010
PA0001846470	Queen Anne's Revenge Footage 2012
PA0001872852	Queen Anne's Revenge Footage 2013
PA0001919638	Queen Anne's Revenge Footage 2014

34. In mid-2013, the Friends of QAR entered into an agreement to pay \$70,000 for production of various educational materials, including videos, an educational website and scholastic educational packets. Among the recipients of the funding was to be Nicole Morris, spouse of Defendant John Morris, an employee of DNCR; and Ms. Morris signed the agreement on behalf of one of the participating entities. A former employee of DNCR, Richard Lawrence, signed the agreement on behalf of the Friends of QAR.

35. Prior to October 15, 2013, the State and its DNCR infringed and contributed to infringement and induced infringement of Mr. Allen's registered copyrights by uploading video to the Internet without the consent of Plaintiffs, by publicly displaying, copying, and otherwise using the registered works, and by posting the works on the Internet, allowing and making possible copying by third parties, all without the consent of Plaintiffs.

36. In and around June and August 2013, Mr. Allen notified Secretary Kluttz of the infringements and other violations of Plaintiffs' rights.

37. On October 15, 2013, the State and its DNCR entered into a written agreement (the Settlement Agreement) with Plaintiffs that superseded all prior agreements between the parties.

38. The Settlement Agreement contained, among other things, the following Paragraph 22:

**Copyright Violations.** DCR agrees to compensate Nautilus Productions by payment of the cash sum of \$15,000 for any copyright infringements by DCR or its support groups occurring through the date of the signing of this contract, including Friends of the Maritime Museum display photograph of the pile (central portion of the QAR shipwreck), DCR's Flickr account showing anchor A1 on the pile, DCR's website showing anchor A1 on the pile, DCR's News website showing anchor A2, and Friends of the QAR website showing mapping dividers (artifact). DCR shall pay Nautilus Productions \$15,000 by 31 January 2014.

39. On or about February 3, 2014, the State and DNCR made payment to Plaintiffs of the \$15,000 required by the Settlement Agreement and, as an accommodation to the parties, Plaintiffs accepted the late payment.

40. According to the Settlement Agreement, DNCR was permitted to retain for research purposes certain materials that contained both a time stamp and Nautilus watermark, but was not given the right to use those materials for any other purpose and was required to return all other materials to Nautilus. Specifically, Paragraph 21 of the Settlement Agreement required:

**Return of Video.** DCR agrees to return to Nautilus Productions all archival footage, still photographs, and other media, produced by Nautilus Productions, which do not bear a time code stamp and a Nautilus Productions watermark (or bug). DCR may retain, for research purposes, archival footage, still photographs, and other media that contain a time code stamp and watermark (or bug), and as to such media, DCR shall provide Nautilus with a current, accurate list.

41. The Settlement Agreement expressly waived any sovereign immunity otherwise available to the State and its agencies and employees by providing (in Paragraph 32) that in the event of breach, Plaintiffs could avail themselves of "all remedies provided by law or equity."

42. Each of the individual Defendants was aware of the Settlement Agreement.

43. After signing the Settlement Agreement, the State and its DNCR resumed infringing Plaintiffs' copyrights. The infringements that occurred after the Settlement Agreement included at least the following, each of which infringed at least one of the above-listed registered works:

Title Of Infringing Work	Published At	Approx. Location
David Moore On Capturing Blackbeard's 13th Cannon	<a href="https://www.youtube.com/watch?v=9KfhKYzLRJM">https://www.youtube.com/watch?v=9KfhKYzLRJM</a>	3:17 min.
Raising Blackbeard's Anchor, May 27, 2011	<a href="https://www.youtube.com/watch?v=MTeDBYzo3ps">https://www.youtube.com/watch?v=MTeDBYzo3ps</a>	4:25 min.
Blackbeard's Queen Anne's Revenge 1718	<a href="https://www.youtube.com/watch?v=DdOdDFnyemQ">https://www.youtube.com/watch?v=DdOdDFnyemQ</a>	3:05 min.
Raising Blackbeard's Cannon From A Conservators Point of View	<a href="https://www.youtube.com/watch?v=kN3PLPMUVbE">https://www.youtube.com/watch?v=kN3PLPMUVbE</a>	2:27 min.
What's New At QAR Lab	<a href="https://www.youtube.com/watch?v=RkeWj1GBx0Q">https://www.youtube.com/watch?v=RkeWj1GBx0Q</a>	4:18 min.
<i>Maritimes</i> , Winter/Spring 2013, p. 13	<a href="http://digital.ncdcr.gov/cdm/compoundobject/collection/p16062coll9/id/189990/rec/5">http://digital.ncdcr.gov/cdm/compoundobject/collection/p16062coll9/id/189990/rec/5</a>	n/a (still image in print material)

44. Thus, Defendants infringed and contributed to infringement and induced infringement of Mr. Allen's registered copyrights by uploading video to the Internet without the consent of Plaintiffs, by publicly displaying, copying, and otherwise using the registered works, and by posting the works on the Internet, allowing, encouraging and making possible copying by third parties, all without the consent of Plaintiffs.

45. As a result of these actions by Defendants, including but not limited to the State and its DNCR, and which at least Secretary Kluttz and Mr. Morris oversaw and either initiated or failed to prevent despite having a duty to do so, Mr. Allen's copyrighted work is now publicly viewable, downloadable and posted without permission or license from Plaintiffs.

46. Plaintiffs issued Takedown Notices in an effort to ameliorate the damage from these unauthorized infringements.

47. Defendants, concerned about their own liability and, on information and belief, in order to enhance the private business efforts of Friends of QAR and of Mr. Morris's wife, developed a plan to

steal Plaintiffs' copyright assets and convert them to the use of the State and of themselves, all without payment to Plaintiffs.

48. Defendants collectively wrote, caused to be introduced, lobbied for passage of, and obtained passage of an amendment to an existing North Carolina statute, so that the pertinent section of the statute, as amended, read as follows:

**§121-25. License to conduct exploration, recovery or salvage operations.**

(b) All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy.

49. The amendment was on information and belief drafted by Defendant DNCR and its employees.

50. The amendment was on information and belief introduced by Defendant Senators Sanderson and Davis. It was tacked on to a bill entitled:

An Act to Allow the Department of Cultural Resources, Office of Archives and History, to Use the Net Proceeds of the Sale of Artifacts for Maintenance or Conservation of Other Artifacts; to Clarify the Process for Transferring Title of Unclaimed or Undocumented Property Loaned to Museums and Historical Repositories to those Museums and Historical Repositories; and to Set a Time Limitation on Confidentiality of Records.”

The short title of the act, prior to amendment, was “Change DCR Process for Unclaimed Property.”

51. According to published newspaper reports, Mr. Sanderson admitted on or about July 30, 2015, prior to passage of the bill, that the amendment creating N.C. Gen. Stat. §121-25(b) was introduced by Mr. Davis and Mr. Sanderson at the request of DCNR, because of a lawsuit alleging that DCNR had breached the Settlement Agreement.

52. The amendment was passed and the bill containing the amendment was signed by Governor McCrory on August 18, 2015, thereby becoming effective as Session Law 2015-218 on August 18, 2015.

53. At the time he signed the bill, Governor McCrory was or should have been aware of the earlier Settlement Agreement, and aware that the amendment creating N.C. Gen. Stat. §121-25(b) was motivated by a desire to avoid liability on account of breaches of the Settlement Agreement and of copyright infringements.

54. The effect of N.C. Gen. Stat. §121-25(b) is to convert each of the copyrighted works of Plaintiffs that are in the possession of the State into “a public record” as to which there is now “no limitation on the use of...any such photograph, video recordings, or other documentary material.”

55. Enforcement of N.C. Gen. Stat. §121-25(b) would deprive Plaintiffs of the copyrights in their works and the benefits of those copyrights and the license to use the work to which they are entitled under the United States Copyright Act, 17 U.S.C. §101 *et seq.* and constitutes a violation of the Takings Clause of the North Carolina Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

56. The State of North Carolina, Ms. Kluttz, and DCNR already have relied on Session Law 2015-218, in response to a different lawsuit (to which Plaintiffs are not a party), alleging violations of the Settlement Agreement, pleading among other things that:

Regardless of whether the Department infringed upon Plaintiff’s alleged intellectual property rights or breached the contract, which the Department expressly denies, any relief for the alleged infringement and breach of contract should be denied because the purported contract forming the basis for Plaintiff’s action...is void, illegal and unenforceable, in its entirety or in part, as being against ... public policy... Therefore, Department is not responsible for and has no liability to Plaintiff under the alleged contract and/or its parts.

57. In October, the State of North Carolina, Ms. Kluttz, and DCNR filed a pleading in the same State Court lawsuit (Wake County Civil Action 15-CVS-009995) wherein they asserted the above-

quoted defense relying on Session Law 2015-218, alleging that Plaintiffs are necessary parties to that lawsuit. Plaintiffs have not agreed to join in the Wake County lawsuit and so far as Plaintiffs are aware, no action has been taken on that pleading and no motion has been filed to implead Plaintiffs.

58. State courts have no right to adjudicate claims of copyright infringement, and these Defendants' efforts to implead Plaintiffs in their state court litigation further evidences Defendants' attempt to prevent Plaintiffs from obtaining redress for Defendants' copyright infringements, whether by way of injunctive relief or damages; and further emphasizes the need for prompt adjudication that N.C. Gen. Stat. §121-25(b) is invalid and unenforceable.

59. On information and belief, taking advantage of their position that the Settlement Agreement is void as against public policy, Defendants have entered into, and/or attempted to fulfill, contracts purporting to allow third parties the benefits that formerly would have accrued to Plaintiffs under that agreement.

#### **COUNT I – DECLARATION OF STATUTE'S INVALIDITY**

60. N. C. Gen. Stat. §121-25(b) converts, without the permission of the author and without compensation, all photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions into public documents; and permits the unlimited use of such works by third parties without the consent of the author.

61. Congress is granted the right to legislate in the field of copyright pursuant to U.S. Const. Art. VIII, §8, Cl. 8; and is entitled to provide that its legislation has pre-emptive effect pursuant to U.S. Const. Art. VI, Cl.2.

62. N.C. Gen. Stat. §121-25(b) purports to govern rights that are equivalent to exclusive rights within the general scope of copyright as specified by 17 U.S.C. §106 in works of authorship that

are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by 17 U.S.C. §§102 and 103.

63. N. C. Gen. Stat. §121-25(b) is pre-empted by the Copyright Act of the United States of America, 17 U.S.C. §101 *et seq.*, which expressly provides, in 17 U.S.C. §301(a), that no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

64. N. C. Gen. Stat. §121-25(b) is additionally invalid, unconstitutional and unenforceable because it violates the Takings Clause and Due Process Clause of the United States Constitution, U.S. Const. Amends. V and XIV; and the Law of the Land Clause of the North Carolina Constitution, N.C. Const. Art. I, §19, by converting to public documents, without due process, without rights for notice and opportunity to be heard, and without compensation to the copyright owners, all photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions; and by permitting the uncompensated use thereof by third parties without due process and without compensation to the copyright owners.

65. N. C. Gen. Stat. §121-25(b) is void and without legal force and effect; and its enforcement would deprive Plaintiffs of their property and/or the benefit of their property without due process and without recompense.

66. An actual, justiciable case or controversy exists between the parties as to the validity and enforceability of N.C. Gen. Stat. §121-25(b).

67. Plaintiffs are entitled to a declaration from the Court that N.C. Gen. Stat. §121-25(b) is unconstitutional, pre-empted by the Copyright Act, and altogether void and without legal force and effect.



## **COUNT II. COPYRIGHT INFRINGEMENT**

68. Defendants jointly and severally have infringed the copyrights owned by Mr. Allen and damaged his licensee, Nautilus, by making or authorizing copies of Plaintiffs' works and posting or authorizing the posting and/or printing of the same in locations accessible to the public, from which further copies can and inevitably will be made by viewers.

69. Defendants McCrory and Kluttz and each of the defendants employed within DNCR had the ability to prevent and halt at least many of the infringements, and collectively had the ability to prevent and halt all of the infringements, but took no steps to do so.

70. To the extent, if any, that there is no direct liability for infringement by any of Defendants, said Defendants contributed to the infringements of other Defendants and/or benefited therefrom and are vicariously liable therefor.

71. Defendants have failed to recompense Plaintiffs for use of those copyrights, including use not only directly by Defendants but also use by each third party who gained access to Plaintiffs' works and made unlawful use of them as a result of Defendants' infringements.

72. Defendants, having previously infringed the copyrights in Mr. Allen's work, for which payment was previously made to Plaintiffs, knew or should have known their misappropriations of Plaintiffs' work were unlawful, and their above-described infringements were willful.

73. Defendants' continued unlawful conduct clearly is not deterred by the prospect of monetary sanctions and injunctive relief is necessary in addition to monetary recompense because Plaintiffs have no adequate remedy at law.

## **COUNT III. VIOLATION OF 42 U.S.C. §1983**

74. Defendants have acted in concert and under color of state law to pass N.C. Gen. Stat §121-25(b), and to threaten Plaintiffs and Plaintiffs' vendors with enforcement thereof.

75. The Copyright Act was intended to benefit persons, such as Plaintiffs, who author (whether directly or as works for hire) works, who own copyrights in those works or are the licensees of copyrights, and who seek to benefit from and to enforce their rights therein.

76. Defendants attempted to deprive Plaintiffs to access to the courts for purposes of asserting Plaintiffs' legal rights.

77. Defendants' efforts to prevent Plaintiffs from enforcing rights under the Copyright Act, by passing and seeking to enforce N.C. Gen. Stat. §121-25(b), were willful and each of Defendants knew or should have known the proposed and ultimately enacted statute was unconstitutional and pre-empted by federal law, and that its passage and enforcement would harm both generally the class of persons whom the Copyright Act was intended to protect, and more specifically would harm Plaintiffs and the other private party to the Settlement Agreement (i.e., Intersal, Inc., Mr. Allen, and Nautilus), at whom the law was directed.

78. The acts complained of herein and above constitute an unconstitutional taking in violation of the Fifth Amendment of the United States Constitution. Moreover, Defendants have acted without a modicum of concern for at least the individual Plaintiff's rights for notice and opportunity to be heard, all in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

#### **COUNT IV. UNFAIR AND DECEPTIVE TRADE PRACTICES**

79. Plaintiffs license, in commerce, from their location in North Carolina, the right to copy and use Plaintiff's video documentary works; and Plaintiffs are compensated for such use.

80. Defendants' wrongful actions described hereinabove were and are calculated to benefit DNCR, the Friends of QAR, and the spouse of Defendant Morris.

81. Defendants deliberately caused an unconstitutional and pre-empted statute, that any reasonable person in their position would have known violated clearly established statutory and constitutional rights, to be introduced, passed, and sought to be enforced.

82. Defendants unfairly and deceptively sought to compete with Plaintiffs in the marketing of Plaintiffs' work, by unlawfully removing from that work the copyright protection to which it was entitled and declaring that contracts acknowledging the copyrighted status of the work were void as a matter of public policy, and by otherwise implementing the provisions of N.C. Gen. Stat. §121-25(b).

83. Defendants' actions were in and affecting North Carolina commerce.

84. Plaintiffs were harmed by Defendants' unfair and deceptive actions.

**COUNT V.  
CIVIL CONSPIRACY**

85. Defendants agreed with each other to carry out the unlawful acts hereinabove alleged, the purpose and effect of which was to injure Plaintiffs by depriving them of property that was rightfully theirs and to prevent Plaintiffs from asserting their legal rights.

86. Each of defendants committed at least one of the overt acts taken in support of, and to achieve the effects of, the conspiracy.

87. As a proximate result of the acts committed in furtherance of the agreement, Plaintiffs suffered injury, including but not limited to those injuries alleged above.

**PRAYER FOR RELIEF**

Plaintiffs demand trial by jury as to all issues so triable; and seek the following relief:

- a) Declaratory judgment that N.C. Gen. Stat. §121-25(b) is void and unenforceable.
- b) An injunction prohibiting enforcement of said statute;
- c) An award of damages to Plaintiffs from defendants, jointly and severally to the extent not prohibited by the Eleventh Amendment or other immunity, sufficient to compensate

Plaintiff pursuant to each count set out above, together with their attorneys' fees and costs.

- d) Trebling of such damages, on account of the willful nature of the conduct and, further, pursuant to statute;
- e) In the alternative and/or to the extent not duplicative, an award of punitive damages in an amount sufficient to deter conduct such as that set out hereinabove;
- f) Such other and further relief as to the Court may seem just.

Respectfully submitted this 1st day of December, 2015.

**OLIVE & OLIVE, P.A.**  
Attorneys for Plaintiffs

/s/Susan Freya Olive  
Susan Freya Olive  
NC Bar No. 7252  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
Western Division  
Civil Case No. 5:15-cv-627**

FREDERICK L. ALLEN and  
NAUTILUS PRODUCTIONS, LLC  
Plaintiffs

v.

PATRICK LLOYD MCCRORY, Governor of the State of North Carolina, *in his official capacity*;  
SUSAN WEAR KLUTTZ, Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
KARIN COCHRAN, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
KEVIN CHERRY, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, *individually and in his official capacity*;  
CARY COX, Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, *individually and in her official capacity*;  
STEPHEN R. CLAGGETT, State Archaeologist, *individually and in his official capacity*;  
JOHN W. MORRIS, Deputy State Archaeologist – Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, *individually and in his official capacity*;  
JAMES W. DAVIS, North Carolina Senator, *individually and in his official capacity*;  
NORMAN W. SANDERSON, North Carolina Senator, *individually and in his official capacity*;  
NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES;  
STATE OF NORTH CAROLINA; and  
FRIENDS OF QUEEN ANNE’S REVENGE, A NON-PROFIT CORPORATION  
Defendants

**EXHIBIT 1**

Settlement Agreement

## **Settlement Agreement**

This Settlement Agreement, made this the 15<sup>th</sup> day of October, 2013, by and between the North Carolina Department of Cultural Resources ("DCR"), Intersal, Inc. ("Intersal"), and Rick Allen and Nautilus Productions, LLC (collectively, "Nautilus"):

WHEREAS, Intersal, a private research firm, operating under a valid permit issued to it by DCR, discovered the site believed to be *Queen Anne's Revenge* ("QAR") on 21 November 1996. QAR was located near Beaufort Inlet, North Carolina, by Intersal's director of operations, Michael E. Daniel, who used historical research provided by Intersal's president, Phil Masters. Daniel now heads up Maritime Research Institute ("MRI"), the non-profit corporation formed to work on the project in cooperation with State archaeologists and historians of the North Carolina Department of Cultural Resources, Office of Archives and History; and

WHEREAS, DCR, MRI, and Intersal previously executed a Memorandum of Agreement on 1 September 1998 ("1998 Agreement"); and

WHEREAS, as a result of the 1998 Agreement, Intersal and Michael E. Daniel agreed to forego entitlement to their share of any coins and precious metals recovered from the QAR site in order that all QAR artifacts remain as one intact collection, and in order to permit DCR to determine ultimate disposition of the artifacts;

WHEREAS, Nautilus has been filming underwater and other footage of the QAR project for approximately fifteen (15) years as the project's videographer;

WHEREAS, various disputes and uncertainties have arisen between DCR, Intersal, and Nautilus regarding the terms of the 1998 Agreement and related issues; and

WHEREAS, Intersal and DCR currently are in administrative appeal litigation regarding the terms of the 1998 Agreement, and desire to fully settle such litigation and related issues; and

WHEREAS, DCR, Intersal, and Nautilus desire to resolve fully their differences and continue their mutual efforts to promote the history of Blackbeard the Pirate, and continue the archaeological recovery and conservation of his flagship, the *Queen Anne's Revenge* ("QAR").

NOW, THEREFORE, DCR, Intersal, and Nautilus contract, settle and agree as follows:

### **I. GENERAL**

1. **Prior Agreements.** This Agreement supersedes the 1998 Agreement, attached as **Attachment A**, and all prior agreements between DCR, Intersal, and Nautilus regarding the QAR project.
2. **No Admission of Liability.** DCR, Intersal, and Nautilus mutually agree that this Agreement is entered into for the purpose of compromising all disputed claims, grievances, or allegations, and is not to be construed as an admission by DCR, Intersal, or Nautilus regarding the merit or lack of merit of DCR's, Intersal's, or Nautilus's contentions, nor an admission of any wrongdoing by the same.

### **II. EL SALVADOR PERMIT**

3. **El Salvador Permit.** In consideration for Intersal's significant contributions toward the discovery of the QAR and continued cooperation and participation in the recovery, conservation, and promotion of the QAR, DCR agrees to continue to issue to Intersal an exploration and recovery

permit for the shipwreck *El Salvador* in the search area defined in the current permit dated 9 August 2013. DCR agrees to continue to issue the permit through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. Subject to the provisions of Article 3 of Chapter 121 of the North Carolina General Statutes, entitled, "Salvage of Abandoned Shipwrecks and Other Underwater Archaeological Sites," and the North Carolina Administrative Code, DCR agrees to recognize Intersal's efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permit for the *El Salvador*. DCR expects to complete recovery of the QAR shipwreck by the end of 2016. The Secretary of DCR shall have the exclusive authority to determine when recovery of QAR is complete. The Secretary shall timely notify Intersal in writing of DCR's determination that recovery is complete. If the recovery phase is complete prior to 2016, DCR agrees to renew the permit through at least the end of 2016.

### III. EXACT AND MINIATURE REPLICAS AND COLLECTIBLES

4. **Artifact Replicas.** DCR and Intersal may make, or have made, molds or otherwise reproduce, or have reproduced, replicas of QAR artifacts for educational, scientific, retail sale, or other commercial purposes. All aspects of the conservation of artifacts, including whether or not to conserve the artifact, shall be at the sole discretion of DCR.
5. **Types of Replicas.** DCR and Intersal may make two types of replicas:
  - a. Miniature or Exact Replicas. Miniature or exact replicas shall be museum or archival quality and shall be produced on a limited edition basis, be individually numbered, or otherwise uniquely identified to facilitate authentication.
  - b. Collectibles. Collectibles shall be true representations of artifacts. Collectibles do not have to be miniatures or exact replications, and may be constructed of materials that do not rise to the level of museum or archival quality, and may be mass produced without being individually identifiable.
6. **Selection of Miniature or Exact Replicas to Produce.** Up to ten (10) QAR artifacts may be in the replication process at any given time. DCR and Intersal shall select one artifact each, taking alternate turns, until each has selected up to five (5) artifacts for possible replication. DCR and Intersal must present a separate business plan for the production, marketing, and sale of each of its selected replicas. The Business Panel must review and approve the business plan. Once a prototype is made, the Business Panel must review and approve the prototype, and accompanying packaging, marketing, or audio, visual, or literary materials (e.g., booklets, DVDs, etc.) for replication quality and historical accuracy. The Business Panel will issue its decisions in writing and provide the same to Intersal and DCR. Upon approval by the Business Panel, the entity seeking to reproduce the artifact may proceed with production, marketing, sales, and distribution. If, two (2) years after the written approval of the prototype by the Business Panel, the replica has not been offered for sale or distribution, the artifact will be placed back into the available pool of artifacts to replicate. The replication, sale, or distribution of replicas (as opposed to selection) need not be on alternating bases, but may be done according to DCR's and Intersal's respective plans and schedules.

Intersal agrees that the sword hilt it currently plans to produce as a miniature or exact replica shall be Intersal's first selection and shall fall under the terms of this Agreement.

7. **Production of Subsequent Miniature or Exact Replicas.** DCR and Intersal may, individually or collectively, produce more than one artifact replica at a time. When either DCR or Intersal completes a replica and has offered it for sale or distribution, it may begin producing another

artifact according to the approval process in ¶ III.6. Once DCR or Intersal has offered an artifact for sale and distribution, it may choose another artifact from the artifact pool so that it has up to five (5) artifacts eligible for replication at any given time. If either DCR or Intersal decides to relinquish an artifact before the end of two (2) years, the artifact will be placed back into the available pool of artifacts to replicate. DCR and Intersal may enter into a written agreement as to the further selection of artifacts after the first ten (10) have been selected.

Except by written agreement, neither Intersal nor DCR may select additional artifacts until they have produced, or the Business Panel has declined, all five (5) of its initially-selected artifacts.

8. **Collectibles.** Either DCR or Intersal may propose the reproduction, marketing, sales, and distribution of collectible replicas as defined above. The reproduction, marketing, sales, and distribution of collectible artifacts shall be approved in advance by DCR and Intersal, or, if consensus cannot be reached between them, by the Business Panel.
9. **Replicas to be Used in Exhibits, Scientific Study, or Educational Tools.** Understanding that there may be times when original artifacts cannot be used, DCR may make, or have made, molds or otherwise reproduce, or have reproduced, any QAR artifacts of its choosing for use in museums or traveling exhibits, as educational props in its exhibits, museums or laboratories, as scientific tools, or for scientific study. These replicas shall not be sold.
10. **Costs.** DCR and Intersal shall each be responsible for their own costs of making miniature or exact replicas, or collectibles produced by or for them.
11. **Profits.** DCR and Intersal agree to share the profits generated by the sale of miniature or exact replicas and collectibles. The entity producing the replica shall receive 80% of the net income after taxes; the other entity shall receive the remaining 20%. Where DCR is the entity producing, selling, and distributing the replica, DCR will account for its marketing and operations in determining net income. Either DCR or Intersal may request from the other documentation regarding marketing, distribution, or other costs.
12. **Miniature or Exact Replicas Sold at Auctions or Fundraisers.** If DCR or Intersal sells a miniature or exact replica at auction or a fundraiser, the gross/net income shall be based on a fair market value and not on the price the replica was sold for at auction or a fundraiser.
13. **Termination.** After five (5) years, either DCR or Intersal may terminate, with or without cause, this Reproduction Agreement section upon ninety (90) days written notice.

#### **IV. PROMOTION OPPORTUNITIES**

14. **Commercial Documentaries.** Intersal, through Nautilus, has documented approximately fifteen (15) years of underwater and other activities related to the QAR project. For purposes of this Commercial Documentaries section, Intersal represents to DCR that Nautilus Productions shall remain Intersal's designee. Intersal shall have the exclusive right to produce a documentary film about the QAR project for licensing and sale. Intersal may partner with DCR if it chooses to do so. If Intersal chooses to partner with DCR, DCR and Intersal shall negotiate an appropriate cost-sharing agreement, and will agree about the documentary script for historical accuracy, content and story line. If DCR and Intersal do not partner to make a documentary, the Intersal documentary script shall be reviewed by DCR for historical accuracy prior to final release by Intersal or its agents.



Intersal agrees to allow DCR to use its completed documentary, free of charge, in its museums and exhibits for educational purposes. DCR agrees to recognize Intersal's participation in the making of the documentary.

**Termination.** Either DCR or Intersal may terminate this Commercial Documentaries section at any time after four (4) years have passed from the date the Secretary of DCR notifies Intersal in writing of DCR's determination that recovery is complete. Notice of termination must be given in writing six (6) months in advance.

15. **Other Commercial Narrative.** DCR and Intersal agree to collaborate in making other commercial narrative such as, but not limited to, books and e-books, mini- and full-length documentaries, and video games. Any profit-sharing agreements shall be based on the amount of work contributed by each entity. If DCR and Intersal cannot reach an agreement on the sharing and production of any such commercial ventures that they propose to undertake, DCR and Intersal will refer the issues to a mutually selected, neutral arbitrator for binding arbitration, with arbitration to be concluded within three (3) months of selection of the neutral arbitrator.

16. **Media and Access Passes.**

a. **Procedure.**

- 1) DCR agrees to establish and maintain access to a website for the issuance of Media and Access Passes to QAR-project related artifacts and activities.
- 2) DCR shall manage the issuance of Media and Access Passes after receiving access requests from third parties via the website.
- 3) The website shall be the primary means of access for requests, and shall include, at a minimum:
  - (a) An Intersal terms of use agreement, to be electronically submitted;
  - (b) The QAR media fact sheet; and
  - (c) Links to DCR, Intersal, and Nautilus Productions websites.
- 4) Upon electronic submission of requests and terms of use, if applicable, electronic notice shall be sent to DCR and Intersal or its designee showing acceptance or non-acceptance of the terms of use.
- 5) Intersal shall bear the sole responsibility for managing and enforcing its terms of use.
- 6) For requests for access that are not received through the website, DCR shall provide the requestor with substantially the same information contained on the website.

b. **Non-commercial Media.**

- 1) All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or DCR, as well as a link to DCR, Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.
- 2) DCR agrees to display non-commercial digital media only on DCR's website.

- c. **Termination.** This Media and Access Pass section shall terminate after the 5th anniversary of the signing of this Agreement. After five (5) years, DCR and Intersal may agree to extend this provision by mutual written consent.

## V. RECORDS

17. **Public Records.** Nothing in this Agreement shall prevent DCR from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records.
18. **Records Management.** During the recovery phase of the QAR project, DCR and Intersal agree to make available to each other records created or collected in relation to the QAR project. The entity requesting copies bears the cost of reproduction. Within one (1) year after the completion of the recovery phase, Intersal shall allow DCR to accession duplicate or original records that were created or collected by Intersal during the project and that are related to the site, or the recovery or conservation of the QAR materials. Such records shall include relevant field maps, notes, drawings, photographic records, and other technical, scientific and historical documentation created or collected by DCR or Intersal pursuant to the study of the site and the recovery of materials therefrom. These materials shall become public records curated by DCR. All digital media provided by Intersal under the terms of this paragraph shall include a time code stamp and watermarks (or bugs). It is expressly recognized and agreed that, to the extent Intersal possesses confidential information or documents related to its search for *El Salvador*, no such documents or information fall under the terms of this paragraph.

## VI. Business Panel

19. **Business Panel.** Members of the Business Panel shall include a secretary level representative from DCR, the president of Intersal, the president of Nautilus Productions, one representative from the North Carolina Department of Commerce or its successor, and one member of the academic community.

Business Panel meetings shall be subject to the open meetings laws codified at Article 33 of Chapter 143 of the North Carolina General Statutes.

## VII. NAUTILUS PRODUCTIONS

20. **Right of First Refusal.** Nautilus Productions shall have the right of first refusal on the production of all commercial and non-commercial digital media for which no time code stamp, and watermark or bug of Nautilus has been affixed. Nautilus Productions agrees that digital media produced in-house by DCR staff shall not be included in this right of first refusal.

**Termination.** This Right of First Refusal provision shall terminate after the 5th anniversary of the signing of this Agreement.

21. **Return of Video.** DCR agrees to return to Nautilus Productions all archival footage, still photographs, and other media, produced by Nautilus Productions, which do not bear a time code stamp and a Nautilus Productions watermark (or bug). DCR may retain, for research purposes, archival footage, still photographs, and other media that contain a time code stamp and watermark (or bug), and as to such media, DCR shall provide Nautilus with a current, accurate list.
22. **Copyright Violations.** DCR agrees to compensate Nautilus Productions by payment of the cash sum of \$15,000 for any copyright infringements by DCR or its support groups occurring through the date of the signing of this contract, including Friends of the Maritime Museum display photograph

of the pile (central portion of the QAR shipwreck), DCR's Flickr account showing anchor A1 on the pile, DCR's website showing anchor A1 on the pile, DCR's News website showing anchor A2, and Friends of the QAR website showing mapping dividers (artifact). DCR shall pay Nautilus Productions \$15,000 by 31 January 2014.

## VIII. MISCELLANEOUS

23. **DCR Agreement and Release.** Except as expressly provided in this Agreement, DCR and the State, their successors and assigns hereby release and forever discharge Intersal and Nautilus, including their officers, agents and employees, from any and all claims, demands, actions, causes of action, rights, damages, costs, attorney fees, expenses and compensation whatsoever, whether arising out of common law or statute, whether state or federal claim, that DCR or the State now have, or that were or could have been made relating to their rights under the 1998 Agreement or any other prior agreements related to the *Adventure, El Salvador, or Queen Anne's Revenge* shipwrecks. DCR expressly represents that it is not aware of any contracts that other State agencies have entered into that infringe upon the intellectual property rights of Nautilus Productions.
24. **Intersal Agreement and Release.** Except as expressly provided in this Agreement, Intersal and its successors and assigns hereby release and forever discharge the State, its officers, agents and employees, including DCR, from any and all claims, demands, actions, causes of action, rights, damages, costs, attorney fees, expenses and compensation whatsoever, whether arising out of common law or statute, whether state or federal claim, that Intersal now has, or that were or could have been made relating to Intersal's rights under the 1998 Agreement or any other prior agreements related to the *Adventure, El Salvador, or Queen Anne's Revenge* shipwrecks.
25. **Petition for Contested Case Hearing.** Intersal agrees to withdraw its petition for contested case hearing in *Intersal v. N.C. Dep't of Cultural Resources* (13DCR15732) within five (5) business days of the signing of this Agreement.
26. **Nautilus Productions/Rick Allen Agreement and Release.** Except as expressly provided in this Agreement, Nautilus and Rick Allen, and their heirs, successors, and assigns, hereby release and forever discharge the State, its officers, agents and employees, including DCR, whether individually or in their capacity as State employees, and its support groups, including the Friends of the Maritime Museum and the Friends of the QAR, from any and all claims, demands, actions, causes of action, rights, damages, costs, attorney fees, expenses and compensation whatsoever, whether arising out of common law or statute, whether state or federal claim, that Nautilus now has, or that were or could have been made relating to Nautilus's and Rick Allen's rights under the 1998 Agreement or any other prior agreements related to the *Queen Anne's Revenge* shipwreck or United States Copyright Act. Nautilus and Rick Allen agree that, as part of this Agreement and Release, Nautilus/Rick Allen shall withdraw the public records request it submitted to DCR on 28 August 2013, within five (5) business days of the signing of this Agreement.
27. **Binding Effect of Agreement on Successors in Interest.** This Agreement shall be binding on and inure to the benefit of the successors and assigns of DCR, Intersal, and Nautilus.
28. **Non-disparagement Clause.** DCR, Intersal, and Nautilus agree that they will not disparage one another professionally or in any public forum regarding any allegations related to this Agreement.
29. **Choice of Laws.** This Agreement is entered into in the State of North Carolina and shall be construed and interpreted in accordance with its laws.

30. **Counterparts.** This Agreement may be executed in counterparts, any of which shall be deemed to be an original and all of which together shall be deemed the same instrument.
31. **Entire Agreement.** The foregoing constitutes the entire agreement as specified by DCR, Intersal, and Nautilus, and the considerations stated herein are contractual and are not mere recitals.
32. **Effect of Breach of Agreement.** In the event DCR, Intersal, or Nautilus breaches this Agreement, DCR, Intersal, or Nautilus may avail themselves of all remedies provided by law or equity.
33. **Review and Construction.** Intersal, DCR and Nautilus have read and reviewed all of the terms of this Agreement, with the benefit of advice from legal counsel of their choosing. The terms of this Agreement have been drafted and revised with input from all of them and, thus, the terms of this Agreement shall not be construed for or against any of them as author.
34. **Notice.** Notices under this Agreement shall be provided as follows:

**To DCR:** Secretary, North Carolina Department of Cultural Resources, 109 East Jones Street, Raleigh, NC 27601

**To Intersal:** Intersal, Inc., c/o Haft Steinlauf & Co., 1200 South Pine Island Road, Plantation, Florida 33324

**To Nautilus:** Nautilus Productions, LLC, c/o Mr. Rick Allen, P.O. Box 53269, Fayetteville, NC 28305

Any of the entities named above may change its contact information as stated above by providing written notice of the new information to all other entities named above.

**[THIS SECTION INTENTIONALLY LEFT BLANK]**

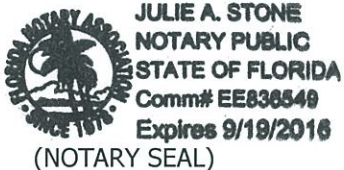
Intersal, Inc.:

BY: David J. Reeder  
David J. Reeder, President

DATE: 10.23.13

STATE OF FLORIDA  
COUNTY OF Brevard

Sworn to (or affirmed) and subscribed before me this 23 day of October, 2013, by David J. Reeder.



Julie A Stone  
Notary Public  
Julie A Stone  
Print Name

Personally Known \_\_\_\_\_ OR Produced Identification   
Type of Identification Produced Florida Drivers License

My Commission Expires:  
9/19/2016

**Nautilus Productions:**

BY: Frederick Allen  
Frederick Allen, Owner

DATE: 10/23/13

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

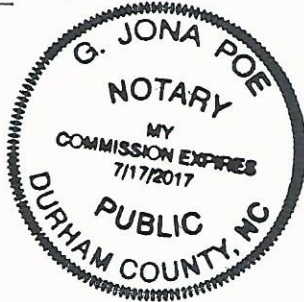
I, G. JONA POE JR., a Notary Public in and for the County of DURHAM and State aforesaid, do hereby certify that Frederick Allen, personally appeared before me this date and acknowledged the due execution by him of the foregoing instrument as for the purposes therein expressed.

WITNESS my hand and Notarial Seal, this the 23<sup>rd</sup> day of OCTOBER, 2013.

G. Jona Poe Jr.  
Notary Public

G. JONA POE JR.  
Print Name

My Commission Expires:  
7/17/2017



**North Carolina Department of Cultural Resources:**

BY: Susan W. Kluttz  
Susan W. Kluttz, Secretary

DATE: 10-24-13

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, Jennifer M. Fontes, a Notary Public in and for the County of Wake and State aforesaid, do hereby certify that Susan W. Kluttz, personally appeared before me this date and acknowledged the due execution by her of the foregoing instrument as for the purposes therein expressed.

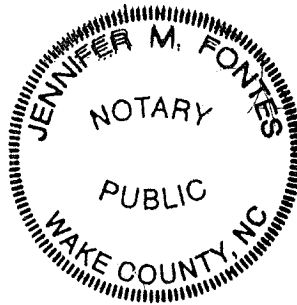
WITNESS my hand and Notarial Seal, this the 24<sup>th</sup> day of October, 2013.

Jennifer M. Fontes  
Notary Public

Jennifer M. Fontes  
Print Name

My Commission Expires:

10/21/17



STATE OF NORTH CAROLINA

COUNTY OF WAKE

AGREEMENT

THIS AGREEMENT is entered into this 1st day of Sept., 1998, by and among the State of North Carolina represented by the Department of Cultural Resources (hereinafter the "Department"), Intersal, Inc., a Florida corporation (hereinafter "Intersal"), and Maritime Research Institute, Inc., a North Carolina nonprofit corporation (hereinafter "MRI").

WITNESSETH, THAT:

WHEREAS, under the provisions of the federal Abandoned Shipwreck Act of 1987 (43 U.S.C. §§ 2101-2106) and Article 3 of Chapter 121 of the General Statutes of North Carolina (N.C.G.S. §§121-22 through 121-28), the title to non-federal abandoned shipwrecks and artifacts embedded in the submerged lands of the State of North Carolina is transferred by the United States to the State of North Carolina and all such artifacts are placed under the custody and control of the Department; and

WHEREAS, working under a permit issued by the Department, Intersal, under the direction of Michael E. Daniel, located a shipwreck site believed to be that of the ship *QUEEN ANNE'S REVENGE* (hereinafter "QAR") within the State waters of North Carolina, and are to be credited with the discovery of said vessel; and

WHEREAS, QAR was the flagship of the pirate Edward Teach or Thatch (a.k.a. "Blackbeard") and was lost while attempting to enter Beaufort Inlet in 1718 and is of inestimable historical and archaeological value; and



WHEREAS, Intersal has been searching for QAR and other 18th Century shipwrecks at Beaufort Inlet under permits issued by the Department since 1987, and has expended a considerable amount of personnel and financial assets in that effort; and

WHEREAS, paragraph L of the QAR Permit (BUI 585) issued to Intersal states that “Any material recovered during Phase Five [the salvage phase] of the project shall be divided between the Department and the Permittee, according to a system to be developed, with 25% of all coins and precious metals retained by the Department, and 75% of the material awarded to the Permittee. The Department and the Permittee agree that the most appropriate disposition of other artifacts, such as vessel structure, ship’s fittings, weapons, personal effects, and non-precious cargo shall be a suitable facility, possibly in the Beaufort area [the North Carolina Maritime Museum], where the material can be curated for scientific study and public display;” and,

WHEREAS, Intersal and Michael E. Daniel are willing to forego entitlement to any coins and precious metals recovered from the QAR site in order that all QAR artifacts remain as one intact collection and in order to permit the Department to determine ultimate disposition of the artifacts; and,

WHEREAS, the Department recognizes MRI, as a partner in the project for the life of this Agreement; and,

WHEREAS, in order to facilitate this Agreement, the Department recognizes Intersal and MRI as partners, to work in partnership with the Department to research, survey, search, recover, preserve, protect, conserve, curate, and promote the collection for the life of this Agreement; and,

WHEREAS, Intersal, MRI, and the Department, in a spirit of partnership, are willing to establish a five-member project Advisory Committee with the responsibilities set out in

paragraph 12 of this Agreement; and,

WHEREAS, Intersal has shown in the past, and continues to evidence, a strong awareness of and commitment to the historical significance of QAR through the quantity and quality of Intersal's historical research, its willingness to employ state of the art equipment in its underwater search and recovery efforts, and the prompt reporting of its activities to the Department; and,

WHEREAS, all of the Parties to this Agreement are desirous that all aspects of the project be accomplished in a manner that will preserve and protect the QAR and its artifacts and will provide the highest degree of historical and archaeological knowledge both to the general public and to serious scholastic study; and

WHEREAS, the Department is responsible for the protection of the public heritage of North Carolina; and

WHEREAS, the officers of Intersal, aware of their responsibility to protect the interests of their stockholders, are also aware of the importance of the QAR site to the public heritage of North Carolina; and

WHEREAS, Intersal and MRI agree that title and ownership of the QAR and its artifacts shall be as set out in paragraph 14 of this Agreement; and

WHEREAS, the Parties believe that the terms of this document will create a relationship that will facilitate and finance the project in an appropriate manner;

NOW, THEREFORE, the Parties to this Agreement hereby agree as follows:

**ARTICLE I- PARTIES**

1. The Department is an agency of the State of North Carolina;

2. MRI is a North Carolina non-profit corporation incorporated under the provisions of Chapter 55A of the General Statutes of North Carolina. MRI shall be fully qualified under State and Federal law to engage in fund raising and to receive philanthropic tax exempt contributions as project funds.

3. Intersal is a corporation incorporated under the laws of the State of Florida.

4. By entering into this Agreement, the Parties named above certify that they are legally constituted entities with full authority to perform the terms of the agreement. The laws of North Carolina will be applied to interpreting and enforcing the terms of this document.

#### ARTICLE II - DEFINITIONS

5. The term "Parties" means the parties to this Agreement, i.e. the Department, MRI and Intersal.

6. The term "Recovery" means the location, identification, and retrieval of any portion of the shipwreck of the QAR, or artifact from the site area.

7. The term "Artifact" means those materials showing human workmanship or modification or having been used or intended to be used or consumed by humans, including relics, monuments, tools and fittings, utensils, instruments, weapons, ammunition, and treasure trove and precious materials including gold, silver, bullion, jewelry, pottery, ceramics, and similar or related materials from QAR.

8. The term "Preservation" means the protection of the shipwreck of QAR and artifacts while on the site area.

9. The term "Conservation" means the protection, treatment and long term curation of any portion of the shipwreck of QAR or any artifacts after recovery from the site area.

10. The term "Site Area" means the area located within 300 yards of a point at coordinates 76 degrees 40.972 minutes West Longitude and 34 degrees 40.513 minutes North Latitude, the area surrounding the shipwreck, and this may be further defined by the Parties in the event artifacts or debris from the shipwreck are discovered outside of this area.

11. The term "Project" means all survey, documentation, recovery, preservation, conservation, interpretation and exhibition activities related to any portion of the shipwreck of QAR or its artifacts.

### ARTICLE III - GENERAL PROVISIONS

12. The primary responsibility for the planning and accomplishment of the preservation, recovery and conservation of the shipwreck of the QAR and the artifacts and all operations, including security operations, and any determinations as to priority of operations, is that of the Secretary of the Department. The State Archaeologist, the Supervisor of the Underwater Archaeology Unit, a representative of MRI, a representative of Intersal, and a representative selected by the Secretary of the Department from outside the Division of Archives and History shall form the Advisory Committee on Archaeological Operations ("Advisory Committee") having planning and oversight responsibility for the recovery and preservation of the shipwreck of the QAR and its artifacts, however, the final decisions with regard to such matters rest with the Secretary of the Department.

13. Any and all funds raised by MRI shall be used as directed by MRI to cover costs associated with the project, which shall include the payment of MRI's employees and operating expenses. Any MRI funds remaining after the payment of such costs may be used by MRI in the furtherance of its non-profit purpose of maritime research consistent with its charter and bylaws.

14. Subject to their rights under this Agreement, Intersal and MRI hereby assign to the Department, and the Department hereby accepts, on behalf of the People of North Carolina, the interests of Intersal and MRI in the title and ownership of QAR and its artifacts.

15. The Parties agree that MRI shall conduct research, documentation, search, survey, recovery, preservation, conservation and curation, in conjunction with the Department. In addition, MRI may on its own conduct fund raising activities related to the project regarding the QAR site (except as noted in paragraphs 16 and 17).

16. Except as provided in paragraph 20 and this paragraph, Intersal shall have the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties. Intersal (or its designee) will be responsible for its own costs related to the making and marketing of such narrative accounts, and may participate in operations in the course of making such accounts. All Parties agree to cooperate to a reasonable degree in the making of a film and/or video documentary, or group of documentaries, that Intersal will produce (or contract to be produced) with regard to project activities.

17. All Parties agree to cooperate in the making of a non commercial educational video and/or film documentary, or series of such documentaries, as long as there is no broadcast originating outside of North Carolina, and there is no distribution or dissemination for sale of the said educational documentary without Intersal's written permission. Intersal shall have the rights to reasonable access and usage, subject to actual costs of duplication, of all video and/or film footage generated in the making of said educational documentary.

The Parties agree to reasonably cooperate with all legitimate news media inquiries

regarding the project, using guidelines described in this paragraph and paragraph 35.

18. Subject to Intersal establishing compliance with standard museum practices relating to the preservation and conservation of artifacts, Intersal shall have the exclusive rights to make (or have made) molds or otherwise reproduce (or have reproduced) any QAR artifacts of its choosing for the purpose of marketing exact or miniature replicas. Intersal will be responsible for all costs related to its making and marketing of such replicas. All such replicas will be approved by the Advisory Committee, be made on a limited edition basis, and be individually numbered or otherwise uniquely identified to facilitate authentication. The Advisory Committee shall have the right to veto the reproduction, marketing or sale of a replica when the quality of the replica is deemed to be inappropriate. The Department shall have the right to sell such replicas at any state owned or state sponsored shop. Furthermore, the Department may make (or have made) molds or otherwise reproduce (or have reproduced) any QAR artifacts of its choosing for non-commercial educational purposes. The Department will be responsible for all costs related to its making and use of such replicas.

19. MRI shall have the right to designate other entities as official sponsors of the project, or other similar designations with the approval of the Advisory Committee.

20. The Department shall have the right to authorize access to, and publish accounts and other research documents relating to, the artifacts, site area, and project operations for non commercial educational or historical purposes. Nothing in this document shall infringe to any extent the public's right to access public records in accordance with Chapters 121 and 132 of the General Statutes of North Carolina.

21. MRI and the State of North Carolina jointly shall have the exclusive right to

nationally and internationally tour and exhibit a representative cross section of the artifacts, if MRI establishes its compliance with standard museum practices with regard to a proposed tour and exhibit. Either entity may initiate and administer such a tour, and either entity may participate in a tour initiated and administered by the other. Each entity shall be responsible for the costs incurred by their participation in such a tour and funds generated by each entity on such a tour may be used to cover that entity's costs.

Nothing in this paragraph shall affect the Department's responsibility and authority with regard to the curation of the artifacts and their display for non commercial purposes.

22. The Parties agree to cooperate with each other and with any law enforcement or other government agency to protect the site area from unauthorized visitation, diving and unauthorized collection of Artifacts.

23. The Parties will neither knowingly solicit nor accept gifts from third parties when such gifts may involve conflict of interest or an appearance of a conflict of interest.

#### ARTICLE IV - REIMBURSEMENT TO INTERSAL: EXCESS PROCEEDS

24. All net profits (as certified by Intersal to the reasonable satisfaction of the Department) from Intersal's sale of media rights and replicas shall be entirely due to Intersal, up to an amount which represents Intersal's costs to date which have been expended in connection with the search and recovery of artifacts from the QAR. Any further funds received by Intersal from these sources shall be divided 75% (seventy five percent) of the net profits (as certified by Intersal to the satisfaction of the Department) to Intersal, and 25% (twenty-five percent) to be donated by Intersal to MRI to be used by MRI as directed by the Advisory Committee for the purposes enumerated in this Agreement. The Advisory Committee shall take into account the

goal of ensuring that the heritage of the QAR is available to all of the citizens of the State of North Carolina.

#### ARTICLE V - PLANS, REPORTS AND RECORDS

25. The Department, Intersal, and MRI shall provide the Advisory Committee with copies of their plans, status reports, records of fund raising activities and expenditures relating to the project. If the Advisory Committee determines that it needs additional or different information, it may establish a system for receiving the same. The provisions of this paragraph are in addition to the requirement of paragraph 30.

#### ARTICLE VI - CHARITABLE FUND RAISING ACTIVITIES BY MRI

26. The Advisory Committee, the Department, Intersal, and MRI will all make available to each other such information and data as may reasonably be required and are generally available to inform potential donors and others about the project.

27. All Parties recognize that MRI is an independent entity with authority to solicit both funds and equipment for the purposes enumerated in this agreement.

28. All funds raised by MRI shall be used as directed by MRI, according to the provisions of paragraph 12 herein.

#### ARTICLE VII - ACCESSION OF RECORDS

29. Subject to the provisions of G.S. § 70-18, for the purposes of maintaining pertinent project records, MRI, Intersal and the Department agree to make available for duplication by each other, or, when appropriate, to provide the Department with, relevant field maps, notes, drawings, photographic records and other such technical, scientific and historical documentation created or collected by MRI, Intersal or the Department pursuant to the study of



the site and the recovery of materials therefrom. These materials shall become public records curated by the Department.

ARTICLE VIII - MAINTENANCE OF FINANCIAL RECORDS AND AUDIT

30. The parties to the Agreement shall develop procedures for keeping records pertaining to costs and funds associated with the project. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, at 32 CFR Section 33.20.

ARTICLE IX - NOTICES

31. Any notice, request, demand or other communication required or permitted to be given under this document shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first class, registered, or certified mail, as follows:

If to the Department: 109 East Jones Street, Raleigh, NC 27601-2807;

If to MRI: P. O. Box 8681, Jupiter, FL 33468;

If to Intersal: 104 Stanton Road, Beaufort, NC 28516.

A Party can change the address to which such communications are to be sent by giving written notice to the other party in the manner provided in this paragraph.

ARTICLE X - OBLIGATIONS OF APPROPRIATIONS

32. Nothing herein shall constitute, nor be deemed to constitute, an obligation of current or future appropriations by the General Assembly of North Carolina.

ARTICLE XI - ADDITIONAL PROVISIONS

33. The Department recognizes that Intersal's efforts and cooperation with regard to the QAR permit have had, and will continue to have, a significant impact on its compliance with the performance standards agreed to with regard to Intersal's permit to search for the *El Salvador*. The Department believes that the cooperation and continued effort of Intersal with regard to both its QAR permit and its *El Salvador* permit are of benefit to the historical heritage of the State. The Department believes that the cooperation and effort of MRI with regard to this project and the search for the *Adventure* are of benefit to the historical heritage of the State. Subject to the provisions of Article 3 of Chapter 121 of the General Statutes of North Carolina and subchapter .04R of Title 7 of the North Carolina Administrative Code, the Department agrees to recognize Intersal's and MRI's efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permits for either *El Salvador* or *Adventure*, and for the life of this Agreement, renewal of said permits cannot be denied without just cause.

34. In the event that it is determined that the shipwreck site which is the subject of this Agreement is not the QAR, Intersal and the State shall enter into a contract along the terms of the permit issued to Intersal for the exploration and recovery of the QAR. In the event that the ship *El Salvador* is discovered as a result of project operations, the terms of Intersal's *El Salvador* permit (BUI 584) shall apply.

35. All press releases concerning the project shall contain the following information, when appropriate: "Intersal, Inc., a private research firm, discovered the site believed to be *Queen Anne's Revenge* on November 21, 1996. QAR was located near Beaufort Inlet, NC by Intersal's director of operations, Mike Daniel, who used historical research provided by Intersal's

president, Phil Masters. Daniel now heads up Maritime Research Institute, the non-profit corporation formed to work on the project in cooperation with State archaeologists and historians of the North Carolina Department of Cultural Resources, Division of Archives and History.”

The Parties agree that their spokespersons and employees will be instructed, when being interviewed by legitimate news media, to endeavor to give appropriate credit where due for the discovery of QAR, and mention the continuing participation of each of the Parties in the project.

36. This document shall become effective when signed by all the Parties and shall be effective for a period of fifteen (15) years, unless sooner terminated by written consent of all Parties. The Parties shall have the option to renew this agreement for an additional period of ten years. The option must be exercised in writing to the Department or its successors on or before the expiration of this Agreement.

37. This Agreement shall be governed by the law of North Carolina.



IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, this the 1st day of Sept., 1998.

Maritime Research Institute, Inc.

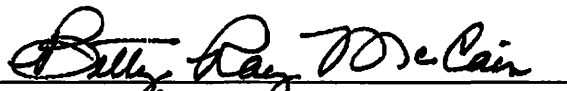
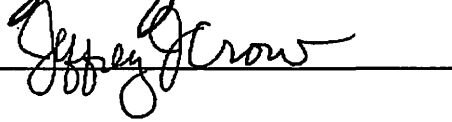
By: Michael Daniel

Witness: Sylvia M. Cook

Intersal, Inc.

By:   
Witness: 

The State of North Carolina

By:   
Witness: 

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

AMENDMENT TO AGREEMENT

WHEREAS , on the 1<sup>st</sup> day of September, 1998, the State of North Carolina represented by the Department of Cultural Resources (hereinafter the "Department"), Intersal, Inc., a Florida corporation (hereinafter "Intersal"), and Maritime Research Institute, Inc., a North Carolina non-profit corporation (hereinafter "MRI") entered into an Agreement pertaining to the shipwreck site believed to be that of the ship QUEEN ANNE'S REVENGE (hereinafter "QAR"), which is located within the state waters of North Carolina.; and

WHEREAS, the parties to said Agreement desire to amend said Agreement in order to expand the Advisory Committee on Archaeological Operations ("Advisory Committee") in order to include additional persons involved in said project on the "Advisory Committee" including the QAR Project Director, the Director of the North Carolina Maritime Museum, an additional member from MRI and an additional member from Intersal;

THEREFORE, Article III, Paragraph 12 of the Agreement between the Department, Intersal, and MRI entered into on the 1<sup>st</sup> day of September, 1998 is amended as follows:

12. The primary responsibility for the planning and accomplishment of the preservation, recovery and conservation of the shipwreck of the QAR and the artifacts and all operations, including security operations, and any determinations as to priority of operations, is that of the Secretary of the Department. The State Archaeologist, the Supervisor of the Underwater Archaeology Unit, the QAR Project Director, the Director of the North Carolina Maritime Museum, two representatives of MRI, two representatives of Intersal, and a representative selected by the Secretary of the Department from outside the Division of Archives and History shall form the Advisory Committee on Archaeological Operations ("Advisory Committee") having planning and oversight responsibility for the recovery and preservation of the shipwreck of the QAR and its artifacts, however, the final decisions with regard to such matters rest with the Secretary of the Department.

IN WITNESS WHEREOF, parties hereunto have executed this Amendment to Agreement this the \_\_\_ day of \_\_\_\_\_, 2001.

Maritime Research Institute, Inc.

By: 

Witness: 

Interpal, Inc.  
By: *Richard [unclear]*

Witness: *George W. Shannon, Jr. Ph.D.*

The State of North Carolina

By: *Laurel Egan*

Witness: *Jeffrey [unclear]*