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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON B. CRAFT, et al., Plaintiffs, v. THE NATIONAL PARK SERVICE et al., Defendants.	CV 92 1769 SVW (Sx) ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiffs, a group of recreational salvage divers, seek review of civil penalties assessed against them by defendants for violations of Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. § 1431 et seq. (MPRSA), for their alteration of the seabed and their unlawful removal of historical artifacts from the shipwrecks located within the Channel Islands Marine Sanctuary (CINMS). Plaintiffs argue that the Court should overturn the agency decision because the regulation prohibiting alteration of the CINMS seabed is unconstitutionally vague and overbroad, the prohibition against the removal of historical

resources is ultra vires and conflicts with the MPRSA because it rescinds the plaintiffs' pre-existing rights to dive and salvage, and the penalties assessed by the agency are disproportionate to the harm caused. Defendants respond that plaintiffs' arguments are not supported by the law.

II. DISCUSSION

Plaintiffs Craft, Ferguson and Wilson were convicted of violating 15 CFR § 935.7(a)(2)(iii). The regulation at issue states:

> [2] Alteration of, or construction on, the seabed. Except in connection with the laying of any pipeline . . . . No person shall:
> (i) Construct any structure other than a navigation aid, or
> (ii) Dredge or otherwise alter the seabed in any way, other than
> [A] to anchor vessels, or
> [B] to bottom trawl from a commercial fishing vessel.

Plaintiffs' actions which gave rise to their convictions consisted of hand fanning of the bottom sediments and/or the striking of rocks with a hand-held geologist's hammer. Plaintiffs claim that the regulation is void for vagueness because the language does not give sufficient notice that it applies to their conduct. More specifically, plaintiffs explain that dredging, anchoring a vessel and bottom trawling have a much larger impact on the seabed than hand fanning or hammering by a diver.

The Court finds that the language is sufficiently clear. The regulation says "alter . . . in any way." It makes two exceptions and two exceptions only to this general

prohibition. Plaintiffs cite the rule of statutory construction that when a general term follows specific terms the general words embrace only objects similar to the specific words. However, the regulation at issue lists two specific exceptions to the prohibition on "alter[ing] the seabed in any way." Because the regulation lists two exceptions, it seems clear to the Court that if a party's actions do not fall within those explicit exceptions, then the general prohibition on "alter[ing] the seabed in any way" would apply. The language prohibiting plaintiffs' conduct is clear as applied to any alteration, including the alteration committed by plaintiffs. Therefore, the Court finds that the regulation is not unconstitutionally vague.

Plaintiffs' second argument is that the prohibition on removal of historical artifacts violates § 304(c) of the MPRSA and interferes with their salvage rights provided by admiralty law. Section 304(c) of the MPRSA provides:

> (1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access if the lease, permit, license, or right -- [existed on the date of the designation of any national marine sanctuary]. . . .
>
> (2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

16 U.S.C. § 1434(c). Plaintiffs claim that because their prior salvage activities on the CINMS shipwrecks created a pre-existing right as defined by § 304(c), the regulation prohibiting artifact recovery violates the statute.

The Court does not have to reach defendants' argument that plaintiffs' prior use does not create a right as defined in §304(c)(1), because it finds that even if defendants have a right under the statute, the Secretary acted within its authority to regulate that right in the instant case. Prohibiting removal of historical resources implements the statute's purpose to protect and preserve sanctuary resources as well as research, eduction, recreation and aesthetic value of the area. 15 C.F.R. § 935.2; 935.7; 935.9. The Secretary has implemented a permit system to ensure that anyone holding a pre-existing right apply for a permit to ensure that recovery of the shipwreck is done in an environmentally and archaeologically sound manner. 15 C.F.R. § 935.9.

If the Court were to accept plaintiffs' position that they should be able to continue taking historical resources from the CINMS because they did so in the past, the MPRSA would become meaningless. The Secretary would be prohibited from preventing any activity no matter how destructive, as long as the person engaging in the conduct had done so before the designation of the sanctuary. Such a prohibition violates the policies underlying the MPRSA. Therefore, the Court finds that the regulation prohibiting recovery of historical resources does not violate the MPRSA.

The Court also rejects plaintiffs' argument that admiralty law gives them the right to remove the artifacts from the shipwrecks. Plaintiffs argue that they have a "fundamental

right" as salvors arising out of federal admiralty law. Plaintiffs' Brief at 17. The maritime law of salvage requires the salvor to demonstrate three elements to support a successful salvage claim: maritime peril from which the ship or other property could not have been rescued without the salvor's assistance; the salvor's act must be voluntary; the salvor's act must be successful in saving at least a part of the property at risk. U.S. Dominator v. Factory Ship Robert E. Rosoff, 768 F.2d 1099, 1104 (9th Cir. 1985). When the property in question has been "lost or abandoned for a very long period," the maritime law of finds supplements the law of salvage. Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (9th Cir. 1981). The common law of finds assigns ownership of the property to the person who reduces the property in his possession without regard to where the property is found. Exceptions to the law exist where the abandoned property is embedded in the soil, or when the owner of the land where the property is found has "constructive possession" of the property such that the property is not lost. Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985).

In Klein, the Eleventh Circuit found that when the federal government creates a national park in navigable waters, possession of resources beneath those waters vests in the United States. Klein, 758 F.2d at 1514. Although that case involved a designation as a national park, the analysis is the same. In

passing the MPRSA Congress asserted its possession of the CINMS. As the Ninth Circuit has explained, under admiralty law principles, someone in possession may refuse services of would-be salvors like the plaintiffs. Tidewater Salvage, Inc. v. Weyerhauser Co., 633 F.2d 1304, 1306-7 (9th Cir. 1980). Through the comprehensive preservation and conservation scheme set out in the MPRSA and its regulations, the owner of the CINMS has refused these services. Any contrary result would "encourage persons to enter [the CINMS] and to continue the unauthorized removal of articles form the various shipwrecks there located which were sought to be protected by the creation of that [sanctuary]." Klein, 758 F.2d at 1515. Therefore, the Court finds that the regulations prohibiting recovery of historical artifacts do not violate the MPRSA nor plaintiffs' admiralty rights.

The plaintiffs' final argument is that the penalties imposed by the Administrative Law Judge ("ALJ") were disproportionate to the violations. Although the plaintiffs' contention relates to the fines imposed on each of the plaintiffs, the focus is on the $100,000 penalty imposed on Plaintiff Jack Ferguson.

This Court's review of administrative sanctions is limited to determining whether the imposition of such sanctions constitutes an abuse of discretion. Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 185, 93 S. Ct. 1455 (1973). The ALJ's determination cannot be overturned unless it is unwarranted in law or without justification in fact. Id at 185-6 (cite

omitted). The Court finds that each penalty set by the ALJ was warranted in law and justified in fact. 16 U.S.C. § 1437(c)(1) provides that any person who violates the regulations promulgated to implement the MPRSA "shall be liable to the United States for a civil penalty of not more than $50,000 for each violation, to be assessed by the Secretary." The ALJ found that each of the plaintiffs violated those regulations and fined each of them in an amount within the penalties allowed by § 1437(c)(1). Hence, each fine is warranted by law and fact.

As for the penalties imposed on plaintiff Jack Ferguson, the Court also finds sufficient evidence to support the ALJ's decision. The ALJ found that Ferguson's announcements to the rest of the divers that they were not to take anything from the wrecks were made in "mocking derision" of the law. See ALJ's Initial Decision, Exhibit 1 to Defendant's Brief at 48. In addition, Ferguson told the divers that he would sound an alarm if any park rangers were spotted, signalling to the divers that they should stop their activities in order to avoid getting caught breaking the law. Id. The ALJ found that Ferguson flagrantly disregarded the CINMS regulations and that through his announcements he encouraged other divers to break the law. Id. at 56. Although plaintiffs argue that the ALJ was wrong in finding that Ferguson was responsible for the group's actions, this Court finds that the ALJ based his decision on Ferguson's actions rather than on his status as divemaster. Given these findings, the Court cannot find that the ALJ abused his

discretion in imposing the maximum penalty. Therefore, the Court finds that the penalties imposed on all plaintiffs were warranted.

III. CONCLUSION

For all of the foregoing reasons, the Court hereby DENIES Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: 10/22/92

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE