

UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF THE ADMINISTRATIVE LAW JUDGE
WASHINGTON, D.C. 20230

In the Matter of)	DOCKET NUMBERS
)	
Clifton B. Craft,)	853-091
Jack Dean Ferguson,)	853-084
Donald L. Jernigan,)	853-087
Michael Patrick King,)	853-086
Gerald E. Parrott,)	853-092
Thomas D. Stocks,)	853-085
William Lee Wilson,)	853-088
)	
Respondents)	
)	

AGENCY'S OPENING BRIEF

Theodore M. Beuttler
Linda I. Marks

NOAA Office of General Counsel

March 23, 1989

TABLE OF CONTENTS

I.	Introduction	1
II.	Jurisdiction	2
III.	Regulations	4
IV.	Description of Charges	6
V.	Penalties	6
VI.	Statement of Facts Common to All Cases	8
	A. Events of October 3, 1987 - GOLDENHORN	9
	B. Events of October 4, 1987 - WINFIELD SCOTT	12
	C. Events at the Santa Barbara Marina	13
	D. Follow-up dive on October 8, 1987 - Reference Rock	15
VII.	General Exhibit 5	18
VIII.	Historical Significance of the Shipwrecks	22
IX.	Individual Cases	
	A. Docket No. 853-085 - Thomas D. Stocks	26
	B. Docket No. 853-086 - Michael Patrick King	30
	1. The brick and coal from the GOLDENHORN	30
	2. The brick from the GOLDENHORN	33
	3. The coal from the GOLDENHORN	34
	4. Nails and metal pieces from the WINFIELD SCOTT	36
	C. Docket No. 853-087 - Donald L. Jernigan	38
	1. The coal from the GOLDENHORN	40
	2. The piece of wood	40
	3. Nails and metal pieces	40
	D. Docket No. 853-091 - Clifton B. Craft	42
	E. Docket No. 853-092 - Gerald E. Parrott	44
	F. Docket No. 853-084 - Jack Dean Ferguson	47
	G. Docket No. 853-088 - William L. Wilson	51
	1. The line and shroud from the GOLDENHORN	51
	2. The Glenboig brick	55
	3. Altering the seabed	56
X.	Conclusion	59

I. INTRODUCTION

This consolidated case involves seven Respondents charged with violations of NOAA regulations for the Channel Islands National Marine Sanctuary (CINMS).¹ The Respondents are charged with unlawfully damaging or removing historical or cultural resources from two historical shipwrecks in the Sanctuary, the GOLDENHORN and the WINFIELD SCOTT, and/or unlawfully altering the seabed.² All of the violations occurred on October 3-4, 1987, during a charter boat trip to the Channel Islands National Marine Sanctuary by a group of recreational scuba divers.

Notices of Violation and Assessment (NOVA's) were issued to the Respondents in February 1988. The consolidated case originally involved 20 individuals; 13 individuals settled their cases or had their cases dismissed against them prior to the hearing. The case against the remaining seven individuals was heard before the Honorable Hugh J. Dolan from July 19 through August 11, 1988, in Ventura, Santa Monica and Los Angeles, California.

This is a case of first impression before the Department of Commerce Office of Administrative Law Judge. The case is unusual in that the underlying NOAA regulations protect nonliving resources. No Agency cases have been heard involving protection

¹ The CINMS regulations are found at 15 CFR Part 935 and were promulgated pursuant to Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA), 16 U.S.C. §§ 1431 et seq.

² 15 CFR §§ 935.7(a)(5) and (a)(2)(iii), respectively.

of historical and cultural resources within a National Marine Sanctuary. The disposition of this case is therefore important and will shape the future regulation and management of these resources in National Marine Sanctuaries.

II. JURISDICTION

The MPRSA provides that any person found to have violated a regulation promulgated pursuant to the Act shall be liable for a civil penalty not to exceed \$50,000. 16 U.S.C. § 1437(c)(1).³ Respondents in each of the individual cases discussed herein are persons within the meaning of the MPRSA and the CINMS regulations. 33 U.S.C. § 1402(e); 15 CFR § 935.4(c).

Section 935.7(a)(5) of the Sanctuary regulations prohibits the removal or damage of any historical or cultural resource within the Sanctuary. Section 935.7(a)(2)(iii) prohibits the alteration of the seabed in any way (with two exceptions not applicable here) within 2 nautical miles of any Island. The Sanctuary includes waters seaward to a distance of 6 nautical miles from Anacapa and Santa Rosa Islands. The Sanctuary boundaries are set forth at 15 CFR § 935.3 and Appendix 1A thereto.

Six Respondents are charged with violating § 935.7(a)(5) by removing historical or cultural resources from the shipwrecks of

³ Formerly § 1437(b)(1). References to the MPRSA are to those provisions now in effect. On November 7, 1988, the MPRSA was reauthorized and amended by P.L. 100-627. The substance of the sections cited herein was not altered by the amendments.

the WINFIELD SCOTT and/or the GOLDENHORN. The WINFIELD SCOTT lies within 6 nautical miles of Anacapa Island. Gen. Exs. 4, 8; Tr. 98, 270.⁴ The GOLDENHORN lies within 6 nautical miles of Santa Rosa Island. Gen. Ex. 5 at 2; Gen. Ex. 2; Tr. 81-2, 84, 1255, 1321.

Three Respondents have been charged with violating § 935.7(a)(2)(iii) by altering the seabed at the location of the WINFIELD SCOTT. The WINFIELD SCOTT lies well within 2 nautical miles of Anacapa Island. Gen. Ex. 4 and 8; Tr. 98, 270. The unlawful seabed alteration occurring near the wreck was therefore within 2 nautical miles of the island. Gen. Ex. 5 at 25-6, 36, 39; Gen. Ex. 12A; Tr. 2836.

There can be no dispute that Respondent's activities that are the subject matter of these cases took place well within the Sanctuary's boundaries, and in the case of the WINFIELD SCOTT, within 2 nautical miles of Anacapa Island. General Exhibits 1-4 are nautical charts published by NOAA for the area of the Channel Islands that indicate the boundaries of the Sanctuary and provide the following message conspicuously advising of the Sanctuary's protected status: "CHANNEL ISLANDS NATIONAL MARINE SANCTUARY (protected area: 15 CFR Part 935 see Coast Pilot 7)."

⁴ References to the Agency's General Exhibits are noted as "Gen. Ex."; references to the transcript are "Tr."; references to Agency exhibits involving a particular Respondent are, e.g., "Ex. 1 - Wilson".

III. REGULATIONS

Section 935.7(a)(5): No person shall remove or damage any historical or cultural resource. The evidence presented during the hearing demonstrates that the remains of both vessels constitute "historical resources" within the plain meaning of the regulation. Webster's defines "historical" as: (1) (a) of, relating to, or having the character of history; (b) based on history; (c) used in the past and reproduced in historical presentations; or (2) famous in history. "Resource" is defined as: (1) (a) a source of supply or support; and (d) a source of information or expertise. Webster's Ninth New Collegiate Dictionary (Springfield, MA: Merriam-Webster, Inc., 1986). An historical resource, then, is a source of information on history. The regulation contemplated protection of just such resources as the wrecks of the WINFIELD SCOTT and GOLDENHORN.⁵

The historical significance of both wrecks was attested to by all of the experts heard by this tribunal and is more fully discussed below. Although differences may exist among experts as to the degree of significance of the two wrecks, there is no dispute that the shipwrecks of the WINFIELD SCOTT and GOLDENHORN

⁵ The protection of cultural and historical resources has always been important to the National Marine Sanctuary Program. Indeed, the first national marine sanctuary designated by NOAA was a Sanctuary to protect and preserve a nationally important historical resource, the shipwreck of the USS MONITOR. The MONITOR was a Civil War ironclad that sank on December 31, 1862. She participated in the famous battle at Hampton Roads with the CSS VIRGINIA, formerly the USS MERRIMAC, and her construction ushered in a new era in naval warfare.

and artifacts from them are historical resources protected under § 935.7(a)(5).

Section 935.7(a)(2)(iii): Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall... [d]redge or otherwise alter the seabed in any way, other than (A) To anchor vessels, or (B) To bottom trawl from a commercial fishing vessel. Three of the seven Respondents are charged with altering the seabed in the vicinity of the WINFIELD SCOTT, and were seen digging, hammering, and chiseling in the area where the WINFIELD SCOTT rests. The regulation prohibits any alteration of the seabed, subject to limited exceptions that are not applicable here.

There is uncontroverted testimony in this case that excavating the seabed in the area of a shipwreck site can damage the wreck and that excavation and removal of seabed and any artifacts are destructive. Tr. 304. The prohibition against altering the seabed thereby serves the Sanctuary's broad purpose of protecting and preserving the extraordinary ecosystem of the Sanctuary and also protects historical and cultural resources from harm caused by treasure hunters. Clearly, hammering away at the seabed with archaeologist's hammers and other tools falls within the scope and intent of this regulation. This regulation is designed to protect the very seabed upon which the living and nonliving Sanctuary resources depend.

Respondents have not demonstrated, nor could they, that their activities were conducted pursuant to a permit issued under

15 CFR § 935.9. Such a permit would allow otherwise prohibited activity if the activity is research related to Sanctuary resources, to further the educational value of the Sanctuary, or for salvage or recovery operations. Respondents therefore are liable for penalties of up to \$50,000 for each violation of the regulations. 16 U.S.C. § 1437(c)(1); 15 CFR § 935.8.

IV. DESCRIPTION OF CHARGES

The attached table (Attachment 1) indicates the charges and civil penalties assessed against the Respondents. A civil penalty of \$5,000 was assessed for each count of unlawful removal or damage of historical or cultural resources. A penalty of \$1,000 was assessed for each count of unlawful alteration of the seabed.

V. PENALTIES

The Agency recommends that penalties be assessed in accordance with those assessed to Respondents in the Notices of Violation and Assessment. These penalties were determined using the draft penalty schedule for the CINMS which was attached to the Agency's PPIP's submitted in these cases.

In support of its penalty assessments, the Agency cites the uncontroverted testimony that regulations protecting historical and cultural resources are extremely difficult to enforce. Tr. 323. The nature of the violations is such that they occur underwater normally out of view of ranger patrols at the surface.

Tr. 323. The Supervisory Park Ranger at the Channel Islands National Park testified that prior to the October 1987 undercover operation, only seven other cases involving historical and cultural resource violations had been referred for prosecution.

Tr. 322. The fact that violations such as those committed by Respondents are difficult to detect and enforce supports the penalty amounts assessed by the Agency.

The egregious nature of Respondents' actions also supports the civil penalty amounts. It is clear from the record that these Respondents were well aware of the protected status of the GOLDENHORN and the WINFIELD SCOTT. Both James Delgado and Donald Morris of the National Park Service testified that they spoke at meetings of the California Wreck Divers about the Sanctuary and, specifically, about the protected status of the two shipwrecks. Public address announcements at each wreck warned Respondents that the wreck sites were protected. Gen. Ex. 5 at 2, 6, 40-1; Tr. 85-6, 98, 170-1, 173, 178. Respondents contemptuously disregarded the protected status of the wrecks even to the extent of arranging to sound an underwater alarm if an enforcement vessel approached the VISION. Tr. 98, 178, 737, 1061-3.

Finally, there is no dispute to testimony received during the hearing that historical and cultural resources are unique and nonrenewable. Unlike stocks of fish or marine mammals, the historical and archeological information available from shipwrecks will not regenerate and any loss or damage to the wrecks is permanent. Just as coral reefs can be irreparably

damaged by the indiscriminate acts of man, so too can submerged historical resources be irresponsibly destroyed. Expert testimony showed that removal of material is inherently destructive and that excavating a site is equivalent to giving it the death penalty. Tr. 2239-40, 2519. Once removed from context, the information that could be provided by artifacts is greatly diminished; it becomes very difficult for archaeologists to analyze artifacts that have been removed from a site and for which there is no record. Tr. 2411.

These facts compound the flagrant nature of these violations and must result in an assessment of penalties that will strongly discourage these Respondents and others like them from disturbing, harming, and removing Sanctuary resources.

VI. STATEMENT OF FACTS COMMON TO ALL CASES

On October 2, 1987, the charter dive boat VISION left the Santa Barbara Marina for a 3-day recreational scuba diving trip in waters off of southern California.⁶ Gen. Ex. 5. The boat was chartered by members of the California Wreck Divers, a

⁶ The club's original destination was the military wrecks located off the California mainland near Point Pedernales. Known as the Honda Wrecks, the ships are in an area near Vandenberg Air Force Base that is subject to occasional missile launch operations. The area is designated by the Department of Defense as Danger Zone 4 and vessels are prohibited from stopping or loitering in the zone unless prior permission is obtained from the Commander of the Western Space and Missile Center at Vandenberg. 33 CFR § 334.1130; Tr. 2811-2. Because prior permission was not obtained, the VISION went instead to shipwreck sites off the northern Channel Islands. See Gen. Ex. 1; Tr. 67-8, 81, 159, 1827-32.

where several of the divers had been observed excavating and digging holes on October 4. Tr. 126; Gen. Ex. 5 at 9a, 9b. As previously described herein, on that date Menard wrote up the observations she and Senning made during their dive and incorporated them into the case report. Tr. 126.

VIII. HISTORICAL SIGNIFICANCE OF THE SHIPWRECKS

The wreck of the GOLDENHORN is scattered off the southwest end of Santa Rosa in depths varying downward to approximately 40 feet. Gen. Ex. 2; Tr. 249, 250, 2300, 2302. The GOLDENHORN was a metal hull, four-masted British sailing vessel built in 1883 at Glasgow, Scotland, by Russell and Company to respond to a boom in California grain and wheat exports in the last quarter of the 19th century. Tr. 250, 2241; Gen. Ex. 6. Described as a deep waterman or a Cape Horner, the ship engaged in trade routes to India and Australia and was carrying coal from New Castle, New South Wales, destined for San Pedro, California, at the time it wrecked in 1892. Tr. 250.

The ship is historically significant for several reasons. The GOLDENHORN was associated with the California grain trade, which was as great an economic boom to California as the Gold Rush had been decades earlier. The trade had tremendous impact on the economic, agricultural and maritime history of the State and intensified trade between California and Great Britain. The trade was important to California not only for the grain that was

exported but also for the cargoes that were imported into the State by ships such as the GOLDENHORN. Tr. 251-2.

Today, there are only three floating vessels in the United States from that trade and all of them have been designated as national landmarks. As a result, wrecks of this type of vessel are very much like ruins of standing historic structures. The GOLDENHORN is historically significant because it evidences a type or characteristics of the type of British ship that played such an important and active role in late 19th century California. Tr. 252. The remains of the GOLDENHORN, although broken up, still readily evidence her form, her construction and her type.¹¹ Tr. 252. The GOLDENHORN qualifies for listing on the National Register of Historic Places and is being considered by the National Park Service for nomination.¹² Tr. 251-2, 254, 2463, 2468-9.

¹¹ The wreckage of the GOLDENHORN is broken up and wrapped around a reef which probably claimed the ship when she wrecked. The vessel is broken into discreet areas that include an assemblage of stern material including the steering gear, rudder, tiller and part of the stern post and counter. Large sections of hull, the ship's bow, including the capstan, anchor mounts and a significant amount of masts, yards and wire rope or rigging are also still present. At least one of the ship's anchors and a large amount of studding chain or anchor cable are also present. Tr. 253-4; Att. B to Gen. Ex. 5.

¹² The National Historic Preservation Act of 1966 authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology and culture. See 16 U.S.C. §§ 470 et seq. Procedures and criteria for nomination to the Register are found at 36 CFR Part 60. See also Tr. 246-7.

The wreck of the WINFIELD SCOTT sits in approximately 15-30 feet of water off the north side of middle Anacapa Island. Gen. Ex. 4, Gen. Ex. 8; Tr. 270, 2303-4. Built in the New York shipyards of Westervelt and MacKay, the WINFIELD SCOTT was launched in late 1850 for the New York-to-New Orleans run. The wooden-hulled ship was driven by two steam engines that each turned an iron and wood paddle wheel on either side of the vessel. By 1852 a new owner pressed the ship into service between Panama and San Francisco where it carried thousands of fortune seekers to the gold fields of California. On December 2, 1853, the ship's career ended when it ran aground off Anacapa Island. Gen. Ex. 7.

The WINFIELD SCOTT is the oldest verified shipwreck in the Channel Islands.¹³ Tr. 272. It is historically significant as being one of a handful of pioneer steamships to initiate and sustain steam passenger service between Panama and San Francisco and thereby served an important role in the development of both regions. She carried mail, passengers and baggage, all important

¹³ Wreckage of the WINFIELD SCOTT lies in water very close to the shoreline of middle Anacapa Island down to a maximum depth of approximately 30 feet. The wreck is considerably more fragmented than the GOLDENHORN; the largest fragment is a 15-foot portion of the paddlewheel shaft which is 5-6 feet in diameter. Nearby is a section of hull planking still held together with bronze drifts and still retaining copper plating on its exterior. There are also large fragmented pieces of the propulsion machinery, the side lever, the paddle wheel engines and both paddle wheels. Small fragments of copper plating extend outward from the wreck scatter. The area where these pieces are located comprises only 10-15 percent of the site. There are substantial portions of the wreckage that are for the most part buried under sand in the immediate area. Tr. 2303-4, 275.

to the development of the region as well as to the development of coastal maritime trade, which was the principal economic activity on the Pacific coast for almost a century after the Gold Rush. Gen. Ex. 8.

The WINFIELD SCOTT is one of a few located and accessible wrecks of steamships built in the earliest years of regular steam navigation in the United States. Tr. 281. Valuable evidence unavailable in documentary form can be recovered by studying the remaining portions of hull and steam propulsion machinery. The remains of the ship, her machinery and the assemblage of material cultural items associated with the site can offer valuable information about her construction as well as shipboard life and the role of ocean-going steamers on a principal American frontier. Gen. Ex. 8. For these reasons, the WINFIELD SCOTT was nominated to the National Register of Historic Places. Gen. Ex. 9. The wreck was officially listed on the Register on September 8, 1988. See Attachment 2 at Block 12.