

1 TERREE A. BOWERS.
 United States Attorney
 2 LEON W. WEIDMAN
 Assistant United States Attorney
 3 Chief, Civil Division
 PETER HSIAO
 4 Assistant United States Attorney
 Room 7516 Federal Building
 5 300 North Los Angeles Street
 Los Angeles, CA 90012
 6 (213) 894-6117

7 VICKI O'MEARA
 Acting Assistant Attorney General
 8 Environment and Natural Resources
 Division
 9 JAMES C. KILBOURNE
 CHRISTIANA P. PERRY
 10 Environment and Natural Resources
 Division
 11 Benjamin Franklin Station
 P.O. Box 7369
 12 Washington, D.C. 20044-7369
 (202) 272-6496

13 UNITED STATES DISTRICT COURT
 14 CENTRAL DISTRICT OF CALIFORNIA

15 _____)
 16 Clifton B. Craft, et al.,)
 17 Plaintiffs,)
 18 v.)
 19 The National Park Service,)
 National Oceanic & Atmospheric)
 20 Administration, National Marine)
 Fisheries Service, and the)
 21 United States of America,)
 22 Defendants.)
 23 _____)

C.A. No. CV 92-1769-SVW(Sx)
 FEDERAL DEFENDANTS'
 OPPOSITION TO
 PLAINTIFFS' MOTION
 FOR SUMMARY JUDGMENT
 Motion Hearing:
 October 9, 1992
 1:30 p.m.

24 OF COUNSEL:
 25 THEODORE M. BEUTTLER
 NOAA, Office of General Counsel
 Long Beach, CA 90802
 26 OLE VARMER
 27 NOAA, Office of General Counsel
 Washington, D.C. 20235
 28

REC'D OCT 1 1992

TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Authorities	ii
I. INTRODUCTION	1
II. FACTUAL AND STATUTORY BACKGROUND	2
A. Title III of the Marine Protection, Research and Sanctuaries Act	2
B. The Channel Island National Marine Sanctuary .	3
C. Background of This Case	5
III. ARGUMENT	7
A. The Regulation Prohibiting "Alteration of the Seabed" Is Not Void for Vagueness	7
B. The Regulation Prescribing the Removal or Damaging of Historical or Cultural Resources Found Within the CINMS is Authorized by the MPRSA and Not Ultra Vires	10
1. Standard of Review	10
2. The Regulation Prohibiting the Damage or Removal of Historical Resources Within the CINMS is Authorized by the MPRSA and Does Not Conflict with Section 304(c)	11
3. The Regulation Does Not Conflict with the Maritime Law of Salvage and Finds	15
C. The Penalties Imposed Upon Plaintiffs Were Justified	19
IV. CONCLUSION	21

1	<u>U.S. Dominator v. Factory Ship Robert E. Rosoff,</u>	
2	768 F.2d 1099 (9th Cir. 1985)	18
3	<u>United States v. Petrillo, 332 U.S. 1, 67 S. Ct.</u>	
4	1538, 91 L. Ed. 2d 1877 (1947)	10
5	<u>Village of Hoffman Estates v. The Flipside, 455</u>	
6	U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362	
7	(1982), <u>reh'g denied</u> , 456 U.S. 950 <u>on remand</u> ,	
8	688 F.2d 842	9

STATUTES

9	15 C.F.R. § 935.2	15
10	15 C.F.R. § 935.3	4, 10
11	15 C.F.R. § 935.6	4
12	15 C.F.R. § 935.7	4
13	15 C.F.R. § 935.7(a)(2)(iii)	7, 8
14	15 C.F.R. § 935.7(a)(5)	7
15	15 C.F.R. § 935.9	5
16	45 Fed. Reg. 65198 (October 2, 1980)	4
17	16 U.S.C. § 410ff, <u>et seq</u>	4
18	16 U.S.C. § 1341	3
19	Marine Protection, Research and Sanctuaries Act,	
20	16 U.S.C. § 1431 <u>et seq.</u>	1, 7
21	16 U.S.C. § 1431(a)(2)	2
22	16 U.S.C. § 1431(b)(5)	2, 17
23	16 U.S.C. § 1432(8)	19
24	16 U.S.C. § 1432(8) (as amended in 1988)	3
25	16 U.S.C. § 1433	3
26	16 U.S.C. § 1433(b)(1)	3
27	16 U.S.C. § 1434	3
28	16 U.S.C. § 1434(c)	13
	16 U.S.C. § 1437	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

National Environmental Policy Act, 42 U.S.C. § 4321 et seq. 11
Outer Continental Shelf Lands Act, 43 U.S.C. §
1301 et seq 19
Pub. L. No. 92-532, Title III, section 302(F) 15

MISCELLANEOUS

H.Rep. No. 92-361, 92nd Cong., 1st Sess 16
H.Rep., 98th Cong., 1st Sess., February 24, 1983 16
S. Rep. No. 595, 100th Cong., 2d Sess. 1,
reprinted in 1988 U.S. Code Cong. & Admin. News
4387 3
S. Rep. No. 95-886, 95th Cong. 2d. Sess 16
Schoenbaum, Admiralty and Maritime Law, § 517,
n.44 (West 1987) 18, 19

1 TERREE A. BOWERS
United States Attorney
2 LEON W. WEIDMAN
Assistant United States Attorney
3 Chief, Civil Division
PETER HSIAO
4 Assistant United States Attorney
Room 7516 Federal Building
5 300 North Los Angeles Street
Los Angeles, CA 90012
6 (213) 894-6117

7 VICKI O'MEARA
Acting Assistant Attorney General
8 Environment and Natural Resources
Division

9 JAMES C. KILBOURNE
10 CHRISTIANA P. PERRY
Environment and Natural Resources
11 Division
Benjamin Franklin Station
12 P.O. Box 7369
Washington, D.C. 20044-7369
13 (202) 272-6496

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 _____)
Clifton B. Craft, et al.,)
17)
Plaintiffs,)

18 v.)

19)
The National Park Service,)
20 National Oceanic & Atmospheric)
Administration, National Marine)
21 Fisheries Service, and the)
United States of America,)

22 Defendants.)
23 _____)

C.A. No. CV 92-1769-SVW(Sx)

FEDERAL DEFENDANTS'
OPPOSITION TO
PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

Motion Hearing:
October 9, 1992
1:30 p.m.

24 I. INTRODUCTION

25 Plaintiffs, a group of recreational salvage divers,
26 seek review of civil penalties assessed against them by
27 defendants for violations of Title III of the Marine Protection,
28 Research and Sanctuaries Act, 16 U.S.C. § 1431 et seq. (MPRSA),

1 for their unlawful removal of historical artifacts from
2 shipwrecks located within the Channel Islands National Marine
3 Sanctuary (CINMS). Plaintiffs allege that the agency decision
4 should be overturned because: (1) the regulation prohibiting
5 altering the CINMS seabed is unconstitutionally vague and
6 overbroad; (2) the prohibition against the removal of historical
7 resources is ultra vires and conflicts with the MPRSA because it
8 rescinded their right to salvage within the sanctuary; (3) the
9 regulations conflict with well-settled principles of admiralty
10 law; and (4) the penalties assessed by the agency are
11 disproportionate to the harm caused to the sanctuary resources as
12 a result of plaintiffs' activities.

13 Because plaintiffs' arguments are completely without
14 basis in law, and the penalty assessed by the agency is expressly
15 authorized by the MPRSA and warranted by the facts of this case,
16 plaintiffs' motion for summary judgment should be denied.

17 II. FACTUAL AND STATUTORY BACKGROUND

18 A. Title III of The Marine Protection, 19 Research and Sanctuaries Act

20 Title III of the MPRSA was enacted in recognition that
21 certain areas of the marine environment possess exceptional
22 qualities, including recreational, ecological or historical,
23 value, which give them special national significance. 16 U.S.C.
24 § 1431(a)(2). The primary purpose of Title III is the protection
25 of such marine areas and their resources. 16 U.S.C.
26 § 1431(b)(5). Specifically, the MPRSA:

27 provides for the protection of important and sensitive
28 marine areas and resources of national significance
through the establishment of marine sanctuaries. The

1 purpose of these sanctuaries is to preserve or restore
2 ecological, or aesthetic value.

3 Id.; see also MPRSA § 301, 16 U.S.C. § 1341. S. Rep. No. 595,
4 100th Cong., 2d Sess. 1, reprinted in 1988 U.S. Code Cong. &
5 Admin. News 4387.

6 The MPPSA authorizes the Secretary of Commerce to
7 designate and manage national marine sanctuaries and to
8 promulgate regulations implementing the designation.¹ 16 U.S.C.
9 §§ 1433 and 1434. The Secretary acts as trustee for sanctuary
10 resources, which are broadly defined as "any living or nonliving
11 resource of a national marine sanctuary that contributes to the
12 conservation, recreational, ecological, historical, research,
13 educational, or aesthetic value of the sanctuary." 16 U.S.C. §
14 1432(8) (as amended in 1988). Factors that the Secretary must
15 consider to determine whether an area of the marine environment
16 can be designated as a sanctuary include the area's historical,
17 cultural, or archaeological significance, as well as the
18 opportunities for recreational activities, research and
19 education. 16 U.S.C. §§ 1433(b)(1). National Marine Sanctuaries
20 regulations for the designation and implementation of individual
21 sanctuaries are set forth at 15 C.F.R. Part 922.

22 B. The Channel Islands National Marine Sanctuary

23 The Channel Islands National Marine Sanctuary (CINMS)
24 was designated on September 21, 1980. 45 Fed. Reg. 65198
25

26 ¹The Secretary has delegated her responsibilities under the
27 MPRSA to the National Oceanic and Atmospheric Administration
28 (NOAA) of the Department of Commerce. Department of Commerce
Departmental Organization Order 10-15, effective January 11,
1988; 25-5, effective March 3, 1989.

1 (October 2, 1980).² The sanctuary consists of the marine waters
2 surrounding Anacapa Island, Santa Cruz Island, Santa Rosa Island,
3 San Miguel Island, Santa Barbara Island, Richardson Rock and
4 Castle Rock, out to a distance of 6 nautical miles. 15 C.F.R.
5 § 935.3. The islands themselves form the Channel Islands
6 National Park and rangers from the park help NOAA enforce the
7 sanctuary regulations pursuant to an interagency agreement. 16
8 U.S.C. § 410ff, et seq.

9 NOAA created the sanctuary to protect what the agency
10 recognized as a marine area of exceptional value that was subject
11 to increasing development and use pressures. The area was
12 selected in large part because of the extraordinary concentration
13 of these living resources, and to a lesser extent, for its
14 archaeological and historic resources. The waters within the
15 sanctuary support a remarkable assemblage of cetaceans,
16 pinnepedes, fish and plants. Final Environmental Impact Statement
17 (FEIS), Appendix to Plaintiffs' Memorandum in Support of Motion
18 for Motion for Summary Judgment (Pl.Memo) at D-1; E-1. The CINMS
19 regulations are designed to protect the sanctuary's resources,³

20
21 ²The final rule designating the CINMS consisted of a
22 designation document and regulations implementing the
23 designation. The designation document acts as a constitution for
24 the sanctuary, establishing its boundaries, purposes, and
25 activities subject to regulation. The regulations establish
26 activities regulated within the sanctuary, the procedures by
27 which persons may obtain permits for prohibited activities and
28 penalties for committing prohibited activities.

25 ³Activities that are prohibited or regulated within the
26 marine sanctuary include hydrocarbon operations, discharging or
27 depositing any substance, dredging, constructing on or altering
28 the seabed, navigation of vessels, disturbing marine mammals or
seabirds by overflights, and removing or damaging cultural or
historical resources. 15 C.F.R. § 935.6 and § 935.7 (1980). All
activities not specifically prohibited are allowed and

1 and the Secretary may issue permits for activity otherwise
2 prohibited where such activity: (1) is research related to the
3 sanctuary resources; (2) furthers the educational value of the
4 sanctuary; or (3) is for salvage or recovery operations. 15
5 C.F.R. § 935.9.

6 Under the MPRSA, violations of the CINMS regulations
7 are subject to civil penalties of up to \$50,000 for each
8 violation. There are no criminal penalties, sanctions or
9 liabilities under Title III. 16 U.S.C. § 1437.

10 C. Background of This Case

11 On October 3-4, 1987, plaintiffs, members of a southern
12 California diving club, participated in a charter boat trip to
13 the CINMS, where they dived on four shipwrecks located therein.
14 Administrative Record in the Matter of Clifton Craft, et al., v.
15 National Park Service, et al., (A.R.), IV at 62.⁴ Several of
16 plaintiffs and other members of their diving club brought salvage
17 tools with them, such as sledge hammers, chisels, hacksaws, rock
18 picks, bags and tools to pry artifacts from the sea bottom. A.R.
19 § 231 at 86-87, 99, 179, 1000; § 201 at 5, 11.

20 recreational use of the marine sanctuary is encouraged. § 935.5.

21
22 ⁴A full copy of the Administrative Record in this case was
23 filed with the court on June 16, 1992. Defendants rely on
24 citations to the record here only by way of background for the
25 court. Moreover, since counsel for plaintiffs stated at the
26 status conference on August 6, 1992, and again in his papers in
27 support of this motion, Pl. Memo at 5, the facts have already
28 been established in the administrative proceed below and are not
at issue in this case, all statements made by plaintiffs, either
disputing those facts, Pl. Memo at 1-3, or making reference to
facts which are not supported in the record should be stricken
from the pleadings. See e.g. citations to testimony of plaintiff
Wilson (who never testified at trial before agency); Pl. Memo at
12; see also statement that park rangers could not relocate
trench dug by plaintiff Craft. Pl. Memo at 7.

1 Numerous times during the course of the dive trip, the
2 divemaster, plaintiff Jack Dean Ferguson announced to the group
3 over the public address system that the wreck sites were located
4 within a federal reserve and thus protected; A.R. § 231 at 85-86,
5 170-171; § 201 at 2, 6, 40-41.; he further advised the group that
6 removing anything from them was illegal. A.R. § 231 at 173. At
7 one of the sites he informed them that the dive boat was equipped
8 with an underwater alarm, which would sound to alert the group in
9 the event that a National Park Service patrol approached. A.R.
10 § 231 at 81, 98, 178, 737, 3934, 3947-48; § 201 at 41.

11 While at the various wreck sites, the plaintiffs,
12 including divemaster Ferguson, removed artifacts from the
13 shipwrecks or excavated the seabed with their salvage tools. A.R.
14 § 231 at 353, 751, 1418, 3934, 3947-48; § 201 at 25. These
15 activities were observed by two Park Service rangers who were
16 aboard the diveboat as part of an undercover investigation and
17 participated in the dives. Id. § 231 at 64-65, 157-158. § 201.

18 None of the plaintiffs ever applied for a permit to
19 remove artifacts from these shipwrecks. Thus, in February of
20 1988, the counsel for the defendant National Oceanic and
21 Atmospheric Administration (NOAA) charged plaintiffs with
22 multiple violations of the MPRSA, and assessed them civil
23 penalties totalling \$38,000, for unlawfully damaging or removing
24 historical resources from the shipwrecks in the sanctuary, and
25 for altering the seabed therein. A.R. § 1; 22; 49; 77; 113; 154.
26 16 U.S.C. § 1431 et seq.; 15 C.F.R. 935.7(a)(5); §
27 935.7(a)(2)(iii).
28

1 After a four week trial before an Administrative Law
2 Judge (ALJ), during which the Park Service Rangers gave their
3 eyewitness accounts of the plaintiffs' activities, the ALJ issued
4 his recommended decision⁵ holding the plaintiffs liable with
5 regard to the charges brought by the agency. A.R. § 195. The
6 ALJ imposed the same penalties that were assessed by the agency
7 with regard to all the plaintiffs but one, Jack Dean Ferguson.
8 He found Ferguson, the divemaster, to be a "special case":

9 As the divemaster he bore a special responsibility. By
10 his personal conduct in diving and his announcements to
11 the cruise participants, he mocked the law and by
12 actions and words encouraged all of the violations
13 committed. He has made submissions reflecting impaired
14 financial and psychological effects. My conclusion is
15 that he is reaping the harvest of his own misconduct,
16 which was gross.

17 A.R. II: 195 at 33. Thus, the ALJ determined that Ferguson's
18 conduct warranted the maximum civil penalty authorized by law, or
19 \$100,000. Id. at 34.

20 III. ARGUMENT

21 A. The Regulation Prohibiting "Alteration of 22 the Seabed" Is Not Void for Vagueness

23 Plaintiffs argue that the CINMS regulation prohibiting
24 the alteration of the seabed, 15 C.F.R. § 935.7(a)(2)(iii) is
25 unconstitutionally vague and overbroad because it does not give
26 fair notice that the activities in which plaintiffs were engaged

27 ⁵This initial decision was later upheld by the Administrator
28 in an order denying discretionary review, which constituted the
final agency action for purposes of this suit. A.R. § 227, 228.
Although the initial decision is found in the Administrative
Record, due to the voluminous nature of that record, a copy is
herewith provided as Exhibit 1 for the court's convenience.

1 were prohibited.⁶ Pl. Memo at 7-12. As described below, the
2 vagueness doctrine requires strict analysis only in the criminal
3 context and where constitutionally protected conduct is
4 regulated. Plaintiffs' claim fails as they present neither
5 situation.

6 The vagueness doctrine is primarily applicable in the
7 criminal context. As a rule, statutes must define criminal
8 offenses with sufficient definiteness that ordinary people can
9 understand what conduct is prohibited and that the offense be
10 defined in a manner that does not encourage arbitrary and
11 discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352,
12 357, 103 S.Ct 1855, 1857, 75 L.Ed.2d 903 (1983); Colautti v.

13

14 ⁶In making this claim, plaintiffs attempt to write a de
15 minimis exception into the sanctuary regulation at issue, to
16 argue that the activities for which they were held liable were
17 not intended to be covered by the regulations.

18 This assertion is entirely lacking in legal foundation and
19 is contradicted by the administrative record. First, the
20 language of the regulations themselves makes clear that there is
21 no such de minimis exception for impacts of the seabed. ("No
22 person shall. . dredge or otherwise alter the seabed in any
23 way.") (emphasis added). Second, the existence of
24 § 935.7(a)(2)(iii)(A), which exempts all vessel anchors from this
25 prohibition confirms that in the absence of such an explicit
26 exemption, the prohibition would apply.

27 Finally, the administrative record is replete with evidence
28 that the impacts of plaintiffs' destructive activities were
anything but de minimis. See e.g. A.R. § 231 at 353; § 201
(plaintiff craft cut a trench several inches deep and
approximately one foot across by two feet in length; see also
A.R. § 231 at 751-752; § 201 at 9(b), 25 (plaintiff Wilson's use
of a rock hammer to excavate the sanctuary seabed stirred up
large clouds of debris; see also A.R. § 231 at 3934, 3947-48; {
201 at 9(b) (divemaster Ferguson's use of rock hammer to strike
at Winfield Scott site. Plaintiffs' activities resulted in
trenches, holes and broken rock that led divemaster Ferguson to
joke that the area looked like a minefield. A.R. § 231 at 100-
101. The destruction, moreover, was clearly evident several days
later, and contrary to plaintiffs' unsupported statement (Pl.
Memo at 7), easily relocated and identified by rangers at that
time. A.R. § 231 at 3937; § 201 at 3937.

1 Franklin, 439 U.S. 379, 390, 99 S.Ct. 675, 682-83, 58 L.Ed.2d.
2 596 (1979). In general, the court has "expressed greater
3 tolerance of enactments with civil rather than criminal
4 penalties," Village of Hoffman Estates v. The Flipside, 455 U.S.
5 489, 102 S.Ct 1186, 71 L.Ed.2d 362 (1982), reh'g denied, 456 U.S.
6 950, on remand, 688 F.2d 842, such as the regulation challenged
7 by plaintiffs in this case.

8 In this case, plaintiffs do not and cannot allege that
9 the alteration of the seabed regulation infringes upon any
10 constitutionally protected conduct, and thus their argument that
11 the regulation is overbroad must fail. Hoffman at 494-495.
12 Moreover, while numerous statements in plaintiffs' memorandum in
13 support of their motion for summary judgment suggest otherwise,
14 the MPRSA has no criminal provisions, and plaintiffs were never
15 criminally charged under the MPRSA. The regulation at issue
16 therefore is subject to a less strict vagueness test. Because
17 the alteration of the seabed regulation is not vague as applied
18 to plaintiffs in the circumstances of this case, plaintiffs are
19 precluded from attacking its validity.

20 In this case, the CINMS regulations give adequate
21 notice to the plaintiffs of what conduct is prohibited. The
22 regulations by their own terms apply to activities conducted
23 within the sanctuary. The boundaries of those sanctuaries,
24 moreover, are identified in the regulations and are conspicuously
25 marked on nautical charts which advise of the Sanctuary's
26 protected status. 15 C.F.R. § 935.3; Appendix I.A. A.R. § 231
27 at 197-199. There is nothing ambiguous about the terms
28 "alteration" or "seabed." Thus, this is not a case where

1 undefined terms of uncommon usage result in different meanings to
2 different people C.f. United States v. Diaz, 144 F.2d 113, 114-
3 115 (9th Cir. 1974) (where "antiquity" referred to cultural use
4 of artifact and not age, penal statute prohibiting its
5 appropriation was unconstitutional because definition not likely
6 to be common knowledge). When measured by common understanding
7 and practice, the alteration of the seabed regulation conveys a
8 sufficiently definite warning as to the proscribed conduct, and
9 thus cannot be deemed fatally vague. United States v. Petrillo,
10 332 U.S. 1, 8, 67 S.Ct 1538, 1542, 91 L.Ed.2d 1877 (1947).

11 As applied to plaintiffs in the circumstances in this
12 case, the CINMS "alteration of the seabed" regulation cannot be
13 deemed vague for failing to give adequate notice of what conduct
14 is prohibited. Even without the repeated reminders from the
15 divemaster, plaintiffs' conduct was clearly proscribed by the
16 regulation prohibiting the removal of historical artifacts. As
17 plaintiffs have indicated in their brief, Pl. Memo at 15, the
18 diving community was on notice that they could no longer collect
19 historic sanctuary resources. See also FEIS at F-12. As the
20 Supreme Court has noted, it is not unfair to require that "one
21 who goes so perilously close to an area of proscribed conduct
22 shall take the risk that he may cross the line." Boyce Motor
23 Lines v. United States, 342 U.S. 337, 340, 96 S.Ct 329, 330, 96
24 L.Ed.2d 367 (1952).

25 B. The Regulation Proscribing the Removal or Damaging
26 of Historical or Cultural Resources Found Within the
CINMS is Authorized by the MPRSA and Not Ultra Vires

27 Plaintiffs also argue that in enacting the CINMS
28 regulation which prohibits damage or removal of historical

1 resources, NOAA unilaterally rescinded the plaintiffs' pre-
2 existing right under admiralty law to dive and salvage the
3 shipwrecks in the CINMS, in violation of Section 304 of the
4 MPRSA.⁷ This claim is without merit and misconstrues the MPRSA.

5
6
7 1. Standard of Review

8 Where the agency's construction of a statute is at
9 issue, the court's analysis is guided by Chevron U.S.A., Inc. v.
10 Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct
11 2778, 81 L.Ed.2d 694 (1984). In Chevron the Supreme Court
12 reviewed the Environmental Protection Agency's interpretation of
13 a statutory provision. The Court outlined the tests for
14 reviewing an agency's construction of a statute which it
15 administers:

16 First, always is the question whether Congress has
17 directly spoken to the precise question at issue. If
18 the intent of Congress is clear, that is the end of the
19 matter; for the court, as well as the agency, must give
20 effect to the unambiguously expressed intent of
21 Congress.

22 467 U.S. 843.

23 In determining whether Congress has so spoken, we must
24 look to "the particular statutory language at issue, as well as
25 the language and design of the statute as a whole," K-Mart v.
26 Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct 1127, 99 L.Ed.2d 287

27 ⁷Plaintiffs additionally appear to be making a claim that
28 the regulations were adopted in violation of the National
Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. Pl.
Memo at 14-15. Plaintiffs have never previously raised this
claim, and the court has never granted leave to amend their
complaint to include such a claim. Therefore, it is not properly
before this court and defendants need not address it here.

1 (1988), and "we must employ the traditional tools of statutory
2 construction, including, where appropriate, legislative history."
3 Seldona Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1341 (9th
4 Cir. 1990).

5 2. The Regulation Prohibiting the Damage or
6 Removal of Historical Resources Within the
7 CINMS Is Authorized by the MPRSA and Does Not
8 Conflict with Section 304(c)

9 Section 304(c) of the MPRSA provides:

10 (1) Nothing in this chapter shall be construed as
11 terminating or granting to the Secretary the right to
12 terminate any valid lease, permit, license, or right of
13 subsistence use or of access if the lease, permit,
14 license, or right -- [was in existence on the date of
15 designation of any national marine sanctuary]

16 * * * *

17 (2) The exercise of a lease, permit, license, or right
18 is subject to regulation by the Secretary consistent
19 with the purposes for which the sanctuary is
20 designated.

21 16 U.S.C. § 1434(c). Plaintiffs argue that their salvage
22 activities on these CINMS historic resources resulted in a "pre-
23 existing right" within the meaning of § 1434(c)(1), and that
24 plaintiffs should be able to continue to freely and openly
25 conduct traditional salvage activities, which according to their
26 own counsel, include dynamiting the site to obtain access to the
27 artifacts. Pl. Memo at 12, 13-17. Plaintiffs argue that the
28 "right" comes within the meaning of a "valid lease, permit,
license or right" under § 1434(c)(1) and that the sanctuary
regulation prohibiting unauthorized removal of historic resources
somehow violates § 1434.

Plaintiffs' position is incorrect for several reasons.

First, plaintiffs' use of the CINMS does not fall within the

1 class of activities intended to be covered by § 1434(c). Second,
2 even if plaintiffs formerly had a valid right recognized under §
3 304(c)(1) (§ 1434(c)(2)), the Secretary has the clear and
4 unequivocal authority under § 304(c)(2) to regulate such activity
5 consistent with the purposes of the sanctuary. The regulatory
6 prohibition at issue here represents a reasonable exercise of
7 that authority by providing long-term protection of historic
8 resources from looting and destructive activities so that the
9 resources are available for the research, education and non-
10 harmful viewing enjoyment of all recreational divers. The permit
11 requirement ensures that recovery of the shipwreck is done in an
12 environmentally and archaeologically sound manner so as to avoid
13 destruction of other sanctuary resources and to maximize the
14 preservation of the historic resource and associated
15 archaeological information.

16 Plaintiffs' "use" of the sanctuary prior to its
17 designation, without more, does not constitute an interest
18 recognized by the § 1434(c)(1) of the MPRSA. The interests
19 enumerated in Section 304(c)(1) refer to specific grants of
20 authority that are accompanied by a formal validation or
21 adjudication, resulting in the issuance of a lease, license or
22 permit. Similarly, rights in admiralty law require adjudication
23 before they may be recognized as valid.⁸ Plaintiffs' asserted
24 interests, by contrast, have never been formalized. Instead,
25

26 ⁸The United States Constitution and federal statutes have
27 made district courts the authority for adjudicating rights under
28 admiralty law. Thus, unless plaintiffs have obtained adjudicated
title to these wrecks from admiralty court, the rights are not
"valid".

1 they merely assert that their use of the sanctuary is
2 longstanding, open and notorious, and therefore has somehow
3 ripened into an entitlement of access. This argument is without
4 basis or merit. See also discussion supra at 16-20.

5 Adoption of plaintiff's claim as legitimate under
6 Section 304(c)(1) would render the MPRSA meaningless. The
7 Secretary would be prohibited from preventing any activity within
8 the Sanctuary no matter how destructive, so long as the person
9 engaging in such conduct asserted that he had done so prior to
10 the sanctuary's designation. This would include ocean dumping,
11 oil and gas development, discharges and traffic. Such a result
12 cannot be reconciled with the stated policies of the MPRSA.

13 Even if plaintiffs' activities constitute a valid "pre-
14 existing right" recognized under § 1434(c)(1), however, their
15 argument that the CINMS regulation unlawfully rescinds that right
16 is directly contradicted by the express terms of the MPRSA and
17 its legislative history. Section 1434(c)(2) gives the Secretary
18 the power to regulate any such right consistent with the purposes
19 for which the sanctuary is designated. § 1434(c)(2). One of the
20 express purposes for which the CINMS sanctuary was designated was
21 to ensure the protection and preservation of the sanctuary
22 resources, as well research, education, and the recreational and
23 aesthetic value of the area. 15 C.F.R. § 935.2; 935.7; 935.9.
24 The prohibition against damaging or removing historical or
25 cultural resources obviously implements and is consistent with
26 that purpose, and the requirement that anyone holding such a
27 valid right at the time of designation apply for a permit to
28

1 conduct activities after the designation is a reasonable and
2 legitimate implementation of § 1434(c)(2).

3 In addition to its support in the clear language of §
4 1434(c)((2), the Secretary's regulation prohibiting damage or
5 removal of historical resources finds authority in the
6 legislative history of the MPRSA as well. The legislative
7 history of the MPRSA shows that as originally enacted, activities
8 authorized under other laws were prohibited unless the Secretary
9 made a finding that they were consistent with other purposes of
10 designation. Pub. L. No. 92-532, Title III, section 302(F), ("no
11 permit or other authorization shall be valid unless the Secretary
12 shall certify that the permitted activity is consistent with the
13 purposes of this title and can be carried out within the
14 regulations promulgated under this section."). See also H.Rep.
15 No. 92-361, 92nd Cong., 1st Sess., July 17, 1971, pp. 15, 28.

16 This provision was later amended so that permits,
17 licenses, and other authorizations were not automatically
18 invalidated by sanctuary designation:

19 One problem with the original Title III is that in
20 designating a sanctuary the Secretary of Commerce
21 automatically and perhaps inadvertently may assume
22 authority to regulate activities within a marine
23 sanctuary: all other statutes may be superceded within
24 the designated site. While the committee believes the
25 Secretary should have the authority necessary to
26 regulate activities within a marine sanctuary, it also
27 believes the Secretary should have discretion to select
28 which activities to propose regulating under Title III
and which ones to propose exempting from this
regulation.

S.Rep. No. 95-886, 95th Cong. 2d. Sess., May 15, 1978, p. 5. See
also H.Rep. 98-187, 98th Cong. 1st Sess., May 16, 1983, p.4, 25.

When subsequent Congressional testimony by oil companies

1 indicated that these revisions still did not fully address the
2 concerns of an unconstitutional taking of property, Congress
3 amended the statute again to reflect the language currently found
4 at 1434(c). Hearings on H.R. 2063 before the Committee on
5 Merchant Marine Fisheries, House of Rep., 98th Cong., 1st Sess.,
6 February 24, 1983, statements by American Petroleum Institute,
7 pp. 96, 99.

8 The stated purpose of the MPRSA is to provide for long-
9 term protection and management of areas containing resources of
10 national significance, such as the CINMS and the historical
11 resources located therein, for education and research as well as
12 recreation. Because the primary objective is resource
13 protection, only uses compatible with such protection are to be
14 allowed. 16 U.S.C. § 1431(b)(5). CINMS regulations further that
15 purpose by prohibiting the destruction or removal of those
16 resources in the absence of a permit, and thus insure that the
17 removal will further the MPRSA goals. To allow the unfettered
18 salvage of these non-renewable public sanctuary resources, as
19 plaintiffs advocate, would conflict with this scheme of resource
20 protection embodied in the MPRSA, by precluding non-harmful,
21 public use of these resources in the present and future.

22 **3. The Regulation Does Not Conflict with the**
23 **Maritime Law of Salvage and Finds**

24 As demonstrated above, plaintiffs do not have an
25 adjudicated right to salvage the shipwrecks found within the
26 CINMS, and thus do not have a valid right of access. Even if
27 they did have adjudicated title, the salvage would be subject to
28 regulation by the Secretary under the MPRSA. On pages 16-17 of

1 their Memorandum in Support of their Motion for Summary Judgment,
2 however, plaintiffs appear to assert that independent of the
3 provisions of the MPRSA, plaintiffs had an unfettered right under
4 admiralty law to remove the artifacts from the shipwrecks within
5 the CINMS. Even under principles of admiralty law, however, the
6 Secretary had a right to exclude plaintiffs from the shipwrecks,
7 because upon designation of the sanctuary, the Secretary took
8 possession and control over historic resources within, and can
9 thereby prevent unwanted salvage claims under admiralty law.

10 Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758
11 F.2d 1511 (11th Cir. 1985); Schoenbaum, Admiralty and Maritime
12 Law, § 517, n.44 (West 1987).

13 The ancient maritime law of salvage requires the salvor
14 to demonstrate the following three elements to support a
15 successful salvage claim: 1) maritime peril from which the ship
16 or other property could not have been rescued without the
17 salvor's assistance; 2) the salvor's act must be voluntary; 3)
18 the salvor's act must be successful in saving at least a part of
19 the property at risk. U.S. Dominator v. Factory Ship Robert E.

20 Rosoff, 768 F.2d 1099, 1104 (9th Cir. 1985). A salvor who meets
21 these criteria enjoys certain rights, including the right to
22 exclude others from participating in the salvage operation.

23 Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing
24 Vessel, 640 F.2d 560, 567 (9th Cir. 1981).

25 When the property in question has been "lost or
26 abandoned for a very long period," the maritime law of finds
27 supplements the law of salvage. Id. The common law of finds
28 assigns ownership of the property to the person who reduces the

1 property to his possession without regard to where the property
2 is found. Two exceptions to this law exist where (1) the
3 abandoned property is embedded in the soil, or (2) the owner of
4 the land where the property is found (whether on or embedded in
5 the soil) has "constructive possession" of the property such that
6 the property is not "lost". Klein v. Unidentified Wrecked and
7 Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985).

8 Under circumstances very similar to those found here,
9 the Eleventh Circuit has held that the mere creation of a
10 national park or preserve in navigable waters vests possession of
11 resources beneath those waters (including abandoned vessels) in
12 the United States and precludes any recovery by potential
13 salvors. Klein, 758 F.2d 1511. Likewise in this case, the
14 creation of the CINMS vested possession of the sanctuary
15 resources, including the shipwrecks located there, in the United
16 States. See Schoenbaum, Admiralty and Maritime Law, § 517, n.44
17 (West 1987) (MPRSA provides NOAA with authority to protect
18 resources from unwanted salvage claims).

19 The comprehensive protection Congress mandated by
20 establishing the Sanctuary under the MPRSA, and the broad
21 statutory definition of sanctuary resources to include "any
22 living or nonliving resource of a national marine sanctuary that
23 contributes" to the values enumerated in the statute, 16 U.S.C. §
24 1432(8), makes clear that the United States has asserted
25 sufficient possession or ownership interest in the Sanctuary
26 resources to exclude those, like the plaintiffs, whose activities
27 flout the protections mandated by the MPRSA for the immediate
28 interests of a narrow segment of the public whose salvage is

1 incompatible with several other non-harmful uses of sanctuary
2 resources. This case is unlike those that have arisen under the
3 Outer Continental Shelf Lands Act, 43 U.S.C. § 1301 et seq.
4 (OCSLA), in which assertion of a narrower federal interest in
5 seabed natural resources has been held not to be a Congressional
6 assertion over shipwrecks and therefore did not affect title or
7 salvage rights concerning particular vessels that lie on the
8 outer continental shelf. Treasure Salvors, Inc. v. Unidentified
9 Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir.
10 1978) (construing OCSLA management authority to be limited to
11 mineral development; there was no intent under OCSLA for
12 assertion of possession and control of historic
13 shipwrecks (discussed in Klein, 758 F.2d 1511).

14 Pertinent principles of salvage applied in Klein also
15 reinforce the MPRSA regulations. First, Klein establishes that
16 upon designation the United States has possession and control of
17 sanctuary resources, and the settled rule in admiralty is that
18 those in possession may refuse services of would-be salvors like
19 the plaintiffs. Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633
20 F.2d 1304, 1306-07 (collecting authorities); see also Grant
21 Gilmore & Charles L. Black, Jr., The Law of Admiralty Ch. 8, at
22 536 (2d. ed. 1975). Moreover, the elements giving rise to
23 salvage have not been met in the context of a federal park or
24 sanctuary because, with respect to the resources of such areas,
25 the unauthorized removal of one of the oldest shipwrecks in a
26 park or sanctuary does more to create a marine peril than to
27 prevent one," Klein, 758 F.2d 1515. The court explained that the
28 law of salvage is intended to create incentives to rescue or

1 retrieve vessels and their cargo, a purpose that squarely
2 conflicts with protection of resources in areas like the
3 Sanctuary.⁹ Permitting salvage, the court reasoned, would
4 create incentives for the destructive activities Congress was
5 expressly trying to prevent by creating the park; these are
6 likewise prohibited in the Sanctuary under the MPRSA and under
7 the CINMS regulations.

8 **C. The Penalties Imposed Upon Plaintiffs Were**
9 **Justified**

10 Judicial review of administrative sanctions is limited
11 to determining whether the imposition of such sanctions
12 constitutes an abuse of discretion. Butz v. Glover Livestock
13 Commission Co., Inc., 411 U.S. 185, 93 S.Ct 1455, 36 L.Ed.2d 142
14 (1973). This standard reflects the fundamental principle that
15 "where Congress has entrusted an administrative agency with the
16 responsibility of selecting means of achieving a statutory
17 policy, the relation of remedy to policy is peculiarly a matter
18 for administrative competence." American Power Co. v. SEC, 329
19 U.S. 90, 67 S.Ct 133, 91 L.Ed.2d 103 (1946) (citations omitted).

20 _____
21 ⁹Indian Recovery Co. v. The China, 645 F.Supp. 141 (D. Del.
22 1986), cited by plaintiffs, is fully consistent with the
23 foregoing principles. That case involved litigation under
24 admiralty between private salvors with competing claims, and did
25 not concern a shipwreck located in a federal park or sanctuary.
26 However, the analysis applied by the court in that case is
27 instructive here. In recognizing the superior rights of Ocean
28 Watch, the district court for the district of Delaware explicitly
recognized their "ability to salvage the wreck in a manner that
provides substantial recreational enjoyment and commercial
success. It has every intention to use and possess the wreck as
it has in the past, and to salvage it in a way that benefits the
sport-diving and fishing communities." Indian River at 144-145.
Principles of resource protection thus factor into the
adjudication of admiralty claims even where, unlike here, there
has been no statutory circumscription of a public resource.

1 Accordingly, the choice of sanction is not to be overturned
2 unless it is unwarranted in law or without justification in
3 fact.¹⁰ Id., cited in Butz at 185-186.

4 The ALJ's determination that plaintiff Ferguson should
5 be assessed a \$100,000 fine is justified under both the MPRSA and
6 the facts of this case and must be upheld. The MPRSA explicitly
7 provides for fines of \$50,000 for each violation of a sanctuary
8 regulation. Ferguson was charged with, and found liable for two
9 such violations. Thus, his penalty was within that amount
10 allowed by the statute. The fact that this penalty was greater
11 than that sought by the agency is not determinative. Lovgren v.
12 Byrne, 787 F.2d 857 (3rd Cir. 1986). Similarly, it is not
13 rendered invalid because it is more severe than sanctions imposed
14 in other cases. Butz at 187; Sartain v. Securities & Exchange
15 Comm'n, 601 F.2d 1366, 1375 (9th Cir. 1979); Spencer Livestock
16 Co. v Department of Agriculture, 841 F.2d 1451, 1456-57 (9th Cir.
17 1988).

18 In imposing Ferguson's fine, the ALJ expressly noted
19 that as divemaster, Ferguson bore a "special responsibility" for
20 his violations. He found that Ferguson's actions, including his
21 participation in those activities, encouraged MPRSA violations on
22

23 ¹⁰Plaintiffs argue that the penalties assessed in this case
24 should be considered excessive in light of the deteriorated
25 status of the object of their plunder. As discussed above, this
26 consideration is irrelevant as a matter of law as to whether the
27 ALJ's penalty was warranted. However, this court should consider
28 this argument as yet another exhibit to plaintiffs' utter
disrespect for the dictates of the MPRSA (which specifically
provide for up to \$50,000 for each violation of sanctuary
regulations), as well as take note of its inaccuracy. See A.R.
§ 231 at 249-250, 270-272, 281, 2300-2304; § 205 (documenting
historical significance of shipwrecks in CINMS).

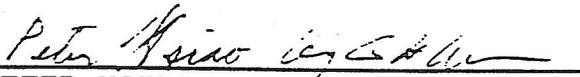
1 the part of others. Moreover, he actually benefitted by
2 perpetuating these violations. Where, as here, the ALJ's
3 imposition of the penalty is intended to deter violations of the
4 MPRSA and achieve its objectives, the amount of that penalty does
5 not render it unwarranted by law, or an abuse of discretion.
6 Butz at 187-88.

7 IV. CONCLUSION

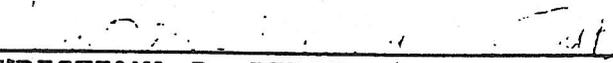
8 For all the foregoing reasons, plaintiffs' motion for
9 summary judgment should be denied.

10 Respectfully submitted,

11
12 TERREE A. BOWERS
13 United States Attorney
14 LEON W. WEIDMAN
15 Assistant United States Attorney
16 Chief, Civil Division

17
18 
19 PETER HSIAO
20 Assistant United States Attorney
21 Central District of California

22
23 VICKI A. O'MEARA
24 Acting Assistant Attorney General
25 Environment and Natural Resources
26 Division

27
28 
CHRISTIANA P. PERRY
JAMES C. KILBOURNE
Environment and Natural Resources
Division
Benjamin Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369
(202) 272-6496

1 OF COUNSEL:

2 THEODORE M. BEUTTNER
3 NOAA, Office of General Counsel
4 Long Beach, CA 90802

5 OLE VARMER
6 NOAA, Office of General Counsel
7 Washington, D.C. 20235

8 Date: September 25, 1992

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28