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6 ATTORNEY FOR
7 PLAINTIFFS

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 CLIFTON B. CRAFT
11 JACK DEAN FERGUSON
12 DONALD L. JERNIGAN
13 MICHAEL PATRICK KING
14 THOMAS D. STOCKS and
15 WILLIAM LEE WILSON,
16 Plaintiffs

17 -vs.-

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

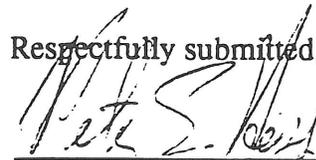
18 THE NATIONAL PARK SERVICE,
19 THE NATIONAL OCEANIC AND ATMOSPHERIC
20 ADMINISTRATION,
21 THE NATIONAL MARINE FISHERIES SERVICE and
22 THE UNITED STATES OF AMERICA,
23 Defendants.

24 NOTICE OF MOTION

25 Please be advised that the attached Motion for Summary Judgment will
26 be heard on Friday, October 9, 1992, at 1:30 p.m. in the Courtroom of the Honorable
27 Stephen V. Wilson.

28 Dated: September 9, 1992

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CLIFTON B. CRAFT
JACK DEAN FERGUSON
DONALD L. JERNIGAN
MICHAEL PATRICK KING
THOMAS D. STOCKS and
WILLIAM LEE WILSON,

Plaintiffs

-vs.-

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

THE NATIONAL PARK SERVICE,
THE NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION,
THE NATIONAL MARINE FISHERIES SERVICE and
THE UNITED STATES OF AMERICA,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now, PETER E. HESS, Esq., attorney for Plaintiffs in the above-captioned litigation and pursuant to Federal Rule of Civil Procedure 56, moves for Summary Judgment, stating more fully that:

1) In a Status Conference held in Chambers on August 17, 1992, the parties and this Court agreed that the facts of the case have been fully developed in an administrative proceeding below, and that all that remains for legal adjudication

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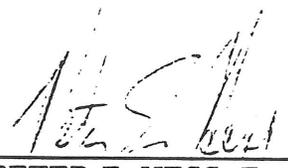
are strictly questions of law.

2) A Motion for Summary Judgement pursuant to FRCP 56 is the appropriate means of disposition of an action such as the instant case, which arises under the Administrative Procedures Act, 5 U.S.C. §701 *et seq.*

WHEREFOR the Plaintiffs hereby move for the entry of Summary Judgment in their favor.

Respectfully submitted,

Dated: September 9, 1992



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ATTORNEYS FOR
PLAINTIFFS

This regulation will contribute to the protection of natural, undisturbed behavior patterns of marine mammals and seabirds concentrating and breeding along island shorelines. Necessary and reasonable uses of the area's air space, such as Coast Guard surveillance, kelp bed surveys, landing at island airstrips, and military operations, would be exempted. Since no commercial airlines (other than the above mentioned charters) fly regular routes over the islands at these low altitudes, this regulation should pose no burden on other commercial airline carriers.

Although the charter planes often fly as low as 75-100 feet (23-30m) and private planes on occasion as low as 50 feet (15m) (Glendinning, 1979, personal communication), marine mammals can still be seen from altitudes of 1000 ft. (305m) or above.

6. Removing or Damaging Historical or Cultural Resources

No person shall remove or damage any historical or cultural resource.

This regulation is aimed at protecting archaeological or paleontological resources from damage and/or removal. Additionally, NOAA will seek listing of identified resources on the National Register of the National Historic Preservation Act. Listing in the National Register would make possible grant and survey funds from the Secretary of the Department of the Interior (DOI) (Heritage Conservation and Recreation Service) to study the artifacts and identify their distribution. Listing on the National Register also insures that proposed Federal activities which could affect the resource are carefully reviewed. This regulation should not significantly affect activities within the sanctuary, except the

collection of historical artifacts by recreational divers.

d. Other Regulations

--Amendments

California's Coastal Zone Management Program has been approved under Section 306 of the Federal Coastal Zone Management Act. Consequently, any activity conducted or supported by a Federal agency which directly affects California's coastal zone must be consistent with this program to the maximum extent practicable.

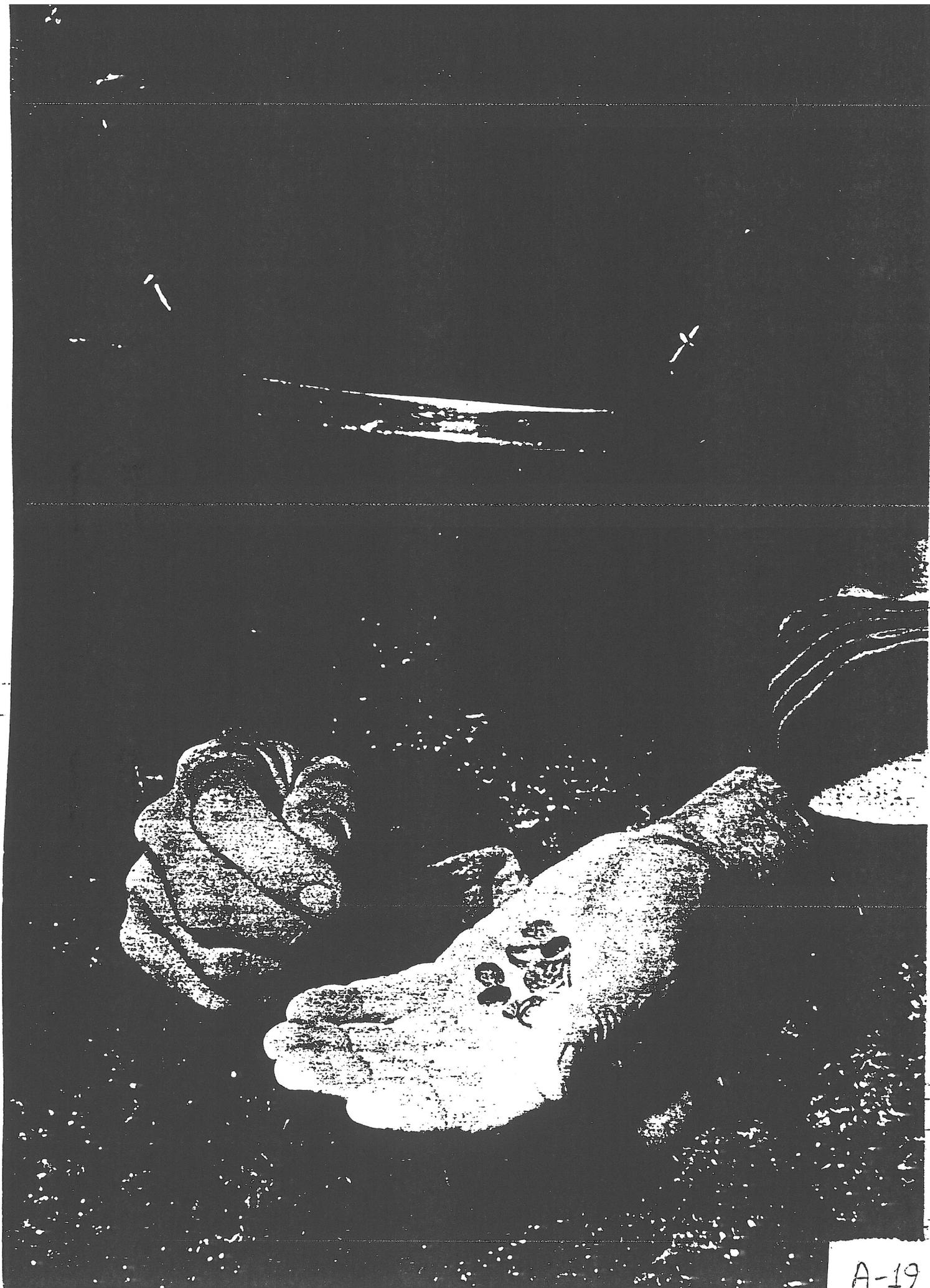
The proposed regulations provide that any significant change in the extent to which various activities are prohibited within the sanctuary automatically will be considered to have a direct effect on the coastal zone and will require NOAA to provide the State with a consistency determination.

In addition, should California determine that certain activities no longer need to be prohibited (for example, that technology has progressed to the point where hydrocarbon production no longer poses unacceptable risks even in nearshore areas) and propose to relax the restrictions on activities within State waters imposed by State law, NOAA will propose similar changes to the sanctuary regulations unless it determines such changes would be clearly inconsistent with the sanctuary. Of course, there would be no guarantee that such a change would be adopted as proposed after the rulemaking procedures were completed. In addition, California can always impose stricter requirements on activities in State waters than provided by the sanctuary. Thus California is pro-

event, sanctuary restrictions do not presently appear necessary. Should future data support reconsideration of this matter, regulatory changes can be proposed and subjected to public review and comment.

The regulation prohibiting seabed alteration and construction throughout the sanctuary would provide little protection beyond the preferred alternative to marine birds and mammals and intertidal and nearshore subtidal organisms. These resources are most vulnerable to disturbance in the nearshore areas close to breeding and haulout sites. Known concentrations of special benthic and intertidal organisms also occur primarily close to the Islands. Although there may be important benthic resources beyond 2 nmi from the Islands which could be smothered or otherwise damaged by seabed alteration, there is not enough evidence of resource concentration to justify a blanket prohibition on seabed alteration dredging, and construction beyond 2 nmi from the Islands. Existing authorities (the California Coastal Commission and the Corps of Engineers) already provide case-by-case review of such activities.

The regulation prohibiting most commercial vessels from the waters within one nautical mile of the Islands is identical to the regulation in the preferred alternative. Vessel traffic beyond one nautical mile from the Islands is considerably less likely to disrupt critical bird and mammal behavior, and since most vessels observe the TSS anyway, additional regulation requiring vessels to stay within the shipping lanes does not seem necessary. Furthermore, of course, such a requirement could be applied to foreign flag vessels only to the extent consistent with international law, which may limit its impacts in an area like the Channel where foreign flag traffic is substantial. Most importantly, the U.S.



A-19

You may recall that in the March 1967 issue of *SKIN DIVER* there was an article by Glenn Miller entitled "Ghostly Gold." It concerned finding '49er gold on the sunken remains of the *WINFIELD SCOTT*. Well, I'm not extra skeptical, or even what you'd call a doubting Thomas, and I would never suggest that Glenn Miller was a liar, but sometimes I feel that he takes liberties with the truth.

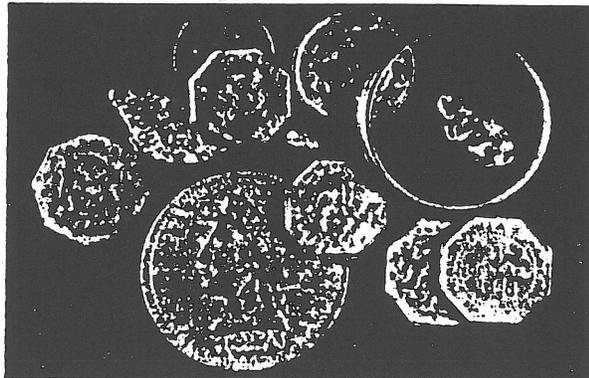
There's nothing in the world that sets my blood boiling like the mention of gold. I should have been a '49er instead of a '69er. If there was gold on the *WINFIELD SCOTT*, I wanted my share of it, but I needed more substantiating proof that the treasure did exist. At the local library I leafed through newspapers over 100 years old, and came up with the following disclosures:

Los Angeles Star, December 10, 1853—"Oregon apples selling for \$1.50 each in San Francisco." Now that was something Glenn Miller didn't know about.

Another item: "Steamer Winfield Scott Wrecked—Another of the P.M.S. Mail Company's ships is a wreck on our coast. The *WINFIELD SCOTT*, Capt. Blunt, left San Francisco on the 1st. Inst. bound for Panama with 450 passengers and \$800,000 treasure. The same night, there being a dense fog, the captain, put off, as he supposed, into the clear sea and was only aware of his danger when the ship struck her bows upon a sharp point of rocks shelving out upon the north side of the island of Anacapa which lies north of Santa Rosa and about 30 miles west of Santa Barbara. The next day signals were made for the Steamer California on her way up, which steamer hove to and took off the ladies and treasure, the balance of the passengers remaining with the wreck, where, if not soon relieved, they must endure se-



COLOR PHOTOS BY JACK McKENNEY/PAUL TZIMOULIS



THERE IS GOLD ON THE WINFIELD SCOTT

BY DICK ANDERSON

vere privations. From the exposed situation of the ship, it was expected she would go to pieces in the first swell of the sea. The baggage of the passengers, together with the mails and express matter is said to be a total loss." So, there was \$800,000.00 treasure on the *WINFIELD SCOTT*, but it had all been recovered, according to the Los Angeles Star. I had to dig further.

News traveled a little slower in those days due to the lack of adequate T.V. coverage, and twelve days after the wreck, the Panama Herald, Thursday, December 15, 1853, had this optimistic announcement entitled "The Mails."

"The *WINFIELD SCOTT*, with the California mail of the 1st, was expected last night, may be looked for during the day."

The people of Panama who looked for the *WINFIELD SCOTT* during the day didn't see anything.

The first news of the distressed ship was presented in the Panama Herald December 27, 1853:

"Arrival of the CALIFORNIA on Saturday afternoon. The anxiety for many days past prevalent about the overdue mail steamer from San Francisco, was dispatched by the arrival of the CALIFORNIA, Capt. LeRoy, which came to anchor in our bay about 4 o'clock and brought the intelligence of the *WINFIELD SCOTT*, on the 2nd inst.; wrecked on the Island of Anacapa in the Santa-Barbara channel. The following memorandum kindly furnished to us by Purser Davis, gives the particulars: P.M.S. steamer CALIFORNIA from San Francisco, Dec. 7, arrived at Panama 24th, inst.; at 4 o'clock p.m. The 4th, on the upward trip, saw steamer *WINFIELD SCOTT* ashore at Anacapa Island, in the Santa Barbara Channel, about 25 miles from the mainland. Immediately ran in towards her, and finding nothing could be done to

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save the steamer, received on board the gold dust, (which had already been landed) and also ladies and children. She went ashore about midnight, Dec. 3d, in the midst of a dense fog and will prove a total loss. All the passengers were landed without confusion or accident, owing to the cool conduct of Capt. Blunt, aided by his officers and some more experienced among the passengers. Immediately after the CALIFORNIA arrived at San Francisco with the intelligence, preparations were made for her to return to the wreck, and thence to Panama. She sailed from San Francisco at 4 p.m. Dec. 7, 29 hours from the date of arrival, and reached the island at daybreak on the 9th. Capt. LeRoy approached the shore as near as was prudent, and all the boats of each steamer were put in requisition for the conveyance of passengers, mails, baggage and express matter from shore. In seven hours this was effected, and the CALIFORNIA sailed for Panama, perfectly prepared for sea in less than five days from the time she left the same spot on the upward trip. Passengers all in excellent health. Shipment of treasure: per WINFIELD SCOTT for New York, \$746,000.54; per WINFIELD SCOTT for England, \$138,860.96."

The WINFIELD SCOTT's treasure, totaling \$884,861.50, had never even gotten damp in the shipwreck. As I looked over those old accounts, the thought struck me that if Glenn Miller found gold on the WINFIELD SCOTT, the ship must have wrecked itself on the richest gold lode discovered in 100 years. I doubted that possibility. My enthusiasm and dreams of riches diminished considerably.

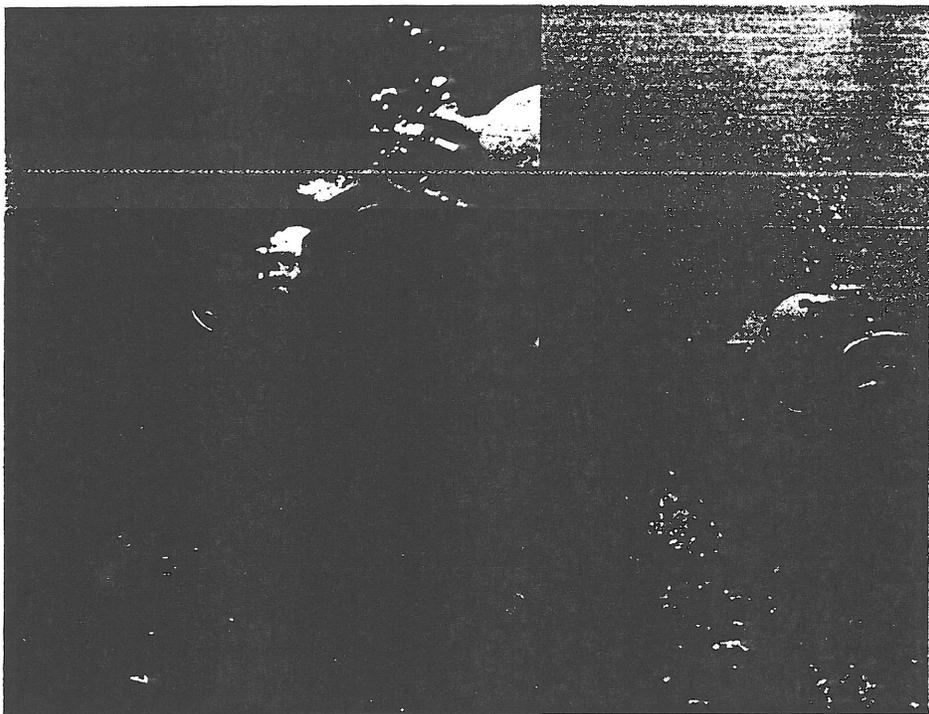
It was Memorial Day, 1969, before I got the opportunity to make a modest gold-seeking assault on the wreck of the WINFIELD SCOTT. It wasn't intended to be a treasure hunt. SKIN DIVER had chartered Glenn Miller's 65-foot EMERALD for a weekend outing of flipped fun and wine tasting. It would be a great trip for Glenn's dog Mac, too, because it gave him the rare opportunity to lift his leg on expensive camera gear instead of the usual divers' gear bags. I suggested that we take the opportunity to visit the WINFIELD SCOTT, and Paul Tzimoulis, wreck diver ad infinitum, seconded the motion. Glenn Miller aimed the EMERALD toward Anacapa Island and set the automatic pilot while mumbling barely audible mumbles of gold. He sure sticks to his story.

A normal dive on the WINFIELD SCOTT is anything but thrilling. Casual observation discloses nothing but miscellaneous, unidentifiable chunks of iron wreckage, blended into the shal-

low rocky bottom. Occasionally a glimpse of sand-polished brass highlights the searching. Fanning away the sand covering reveals century-old shipboard fittings such as door knobs, faucets, hinges, hatches and 10-inch copper spikes. Paul Tzimoulis, Jack McKenney and Art Smith invaded the wreck with such an armament of camera gear that each one looked like a display rack from the American Camera Exchange. The eminent Dr. Joe Mac Innis donned his gear and dived for the wreck with the methodic cool of a doctor about to examine a patient. The others on board contented themselves with the recovery of small brass

able glistening glimmer of gold. A GOLD COIN! It was an octagonal gold dollar, and the inscription was plainly visible, "1 dollar California Gold, 1853". The thrill I felt with that find is nearly indescribable, but I'll try: it was an indescribable thrill.

I was beginning to pull a vacuum in my tank, but I fanned frantically for a few moments more. It was a worthwhile effort; not six inches away were two other gold coins—one octagonal 50-cent piece and one United States gold dollar. I burst to the surface gasping for air, gratefully mouthed my snorkel and returned to the EMERALD with my prize. Most of the other divers had



souvenirs. I wanted gold.

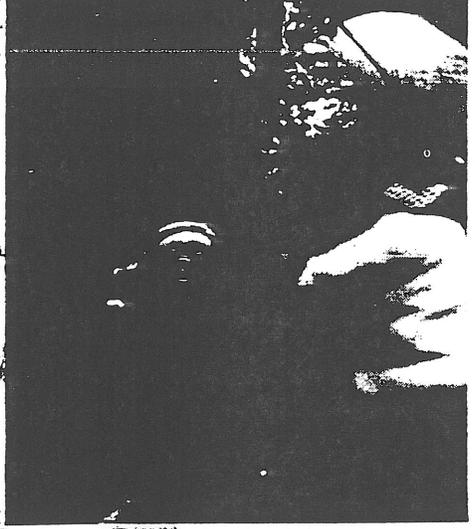
I cornered Glenn Miller to get more specific information as to the exact location of his gold find. The specific information he gave me was quite general. I jumped in to see for myself.

At least part of the WINFIELD SCOTT had rested on a shelf of solid bedrock, and the surface of the bedrock was covered with small sand-filled pot-holes and crevices. I have been mining in the rivers of the Mother Lode long enough to know that this is an ideal condition for catching and retaining gold.

With my hand I began fanning the sand out of a crevice. The bottom was lined with copper nails (used to attach the copper sheeting to the WINFIELD SCOTT's plank hull) and bits of lead. About three feet of the crevice was uncovered when I spotted the unmistak-

already returned from their first foray with enough brass to clutter their houses for a decade. Paul Tzimoulis had abandoned his camera-clicking long enough to fan out one pot-hole and recover a long gold-nugget stickpin. Unfortunately, the nugget was missing. He would have made an extensive search for the nugget, but at that moment he had been "attacked" by a Harbor seal which seemed intent on making a meal of his swim fins.

Every diver on board was thrilled with his individual find, and as I climbed up the boarding ladder, the voices rang out in near unison, "Whaddja find, whaddja find?" I've got a lousy poker face, and I must have been beaming because as I dumped out my glove, I could sense that those on board expected to see gold. They weren't dis-

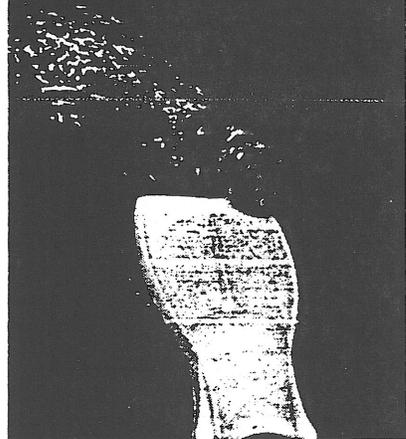


STAFF PHOTOS BY PAUL TZIMOULIS, JACK MCKENNEY, ART SMITH

appointed. The rush was on. Lunch was forgotten. Half-drunk cans of beer lined the rails as 15 divers frantically scrambled over the sides. I switched tanks and prepared to go in again. Jack McKenney and Paul Tzimoulis each abandoned 30 or 40 pounds of photo gadgets so they could prospect unhampered. They intended to follow me closely, figuring that I knew just where to look. My super-deluxe wife, Hillary, excitedly geared up and we four entered the water. It took a full five minutes for me to ditch Paul and Jack. Then Hillary and I proceeded to my secret treasure-trove site. I began fanning in one bedrock depression that looked like a rich hiding place. It must have looked rich to Hillary, too, because she immediately swam in and began fanning in the opposite direction.

She stirred up such a cloud of dust that I couldn't see, so I moved to a different spot—a very shallow crevice covered with a sprinkling of sand and shell. I thought Paul had made up that story about the seal chewing his fins, but as I concentrated on my new crevice the same seal nearly threw me into a state of shock by sneaking up in back of me and sitting its soft belly on my head. I reached up and felt something soft, and with the poise of a practiced diver, almost jumped out of my wet suit. The 40-pound seal decided I wasn't much fun and finned slowly over to Hillary's cloudy work site where he bounced on her head a few times. Hillary's eyes were glued hopefully to the bottom of the crevice and she ignored the first nudging. This apparently wasn't

(Continued on Page 65)



Most of the divers returned from their first foray with enough brass to cluster their homes for the next decade . . . but the author brought back gold and Capt. Glenn Miller, center right photo, wore a benevolent look of a great benefactor.

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Winfield Scott Gold

(Continued from Page 31)

the reaction the seal wanted because he gave her a resounding smack on the top of the head with his tail flippers as he finned away to find new sport. She looked up, expecting to see me, but instead she stared wide-eyed after the disappearing seal.

I proceeded for one foot along my crevice when I again saw gold. It was a gold coin standing upright in a narrow crack, and it looked as big as a silver dollar. But it wasn't. It was an 1850 California Gold five-dollar piece. I rugged on Hillary's flailing fins and pulled her over to look at it. Her thrill knew no bounds. In fact, she aced me right out of my own crevice with frantic fanning and clouds of sediment. A sea-going claim jumper! I contemplated cutting her air hose or stabbing her with my dull diving knife, but the laws covering such transgressions were vague to me, so I begrudgingly returned to the original spot she had previously elbowed me out of. A few fans of the hand, and VOILA! Another California gold dollar. Hillary didn't know which way to turn. I did.

After ditching her, I presently came across another happy hunting ground. A bonanza! As the sand flew away from another crevice at the urge of my swishing hand, I spotted a gold ring — a plain semi-oval band without inscription. Besides the ring, a three-foot length of crevice yielded three nuggets, another California gold octagonal dollar, a round California gold 50-cent piece, an octagonal 50-cent piece, dated 1853.

I surfaced and boarded the EMERALD, and with appropriate ceremony I displayed the gold. Paul Tzimoulis said, "Where'd you go?" followed by Jack McKenney who said "Where'd you go?" followed by Hillary, who said, "Where'd you go?" Glenn Miller didn't say anything. He just wore the benevolent look of a great benefactor.

THERE IS GOLD ON THE WINFIELD SCOTT! Glenn Miller wasn't kidding. Even though the newspapers of the day announced that all treasures, baggage, and express material were recovered, an unknown-amount of gold still remains. The current worth of these coins is many times the face value. For example, the ten coins that I recovered from the WINFIELD SCOTT have a face value totaling a modest \$12. The appraised value at today's prices kicks that figure up to a glamorous \$550.

It took about two days for news of our gold find to reach every diver in Southern California. Charter-boat loads of scuba divers are heading to Anacapa Island by the score. Perhaps one of those lucky divers will strike it rich in a pot-hole full of century-old gold coins, but I hope not. I'd like it to be me.

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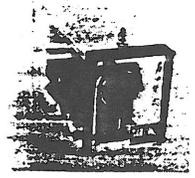
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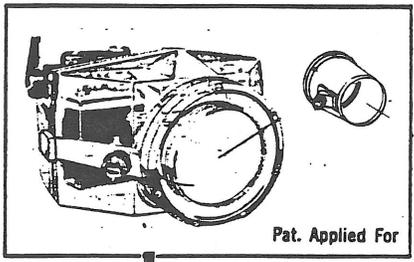
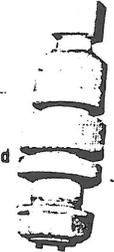


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