UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION
"IN ADMIRALTY"

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 92-10027 CIV-DAVIS

MELVIN A. FISHER, KANE FISHER, SALVORS, INC., a Florida corporation *in personam;* M/V BOOKMAKER, M/V DAUNTLESS, M/V TROPICAL MAGIC, their engines, apparel, tackle, appurtenances, stores and cargo, *in rem*,

Defendants.

CONSOLIDATED WITH

MOTIVATION, INC., a Delaware Corporation,

Plaintiff,

vs.

CASE NO. 95-10051 CIV-DAVIS
MAGISTRATE JUDGE GARBER

THE UNIDENTIFIED, WRECKED and ABANDONED VESSEL, her tackle, armament, apparel, and cargo, located in the Atlantic Ocean within a circle with a radius of 1,000 yards of a point located at 24 4113011 North Latitude and 080 5611811 West Longitude,

Defendant.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR NEW TRIAL

Defendants, Kane Fisher and Salvors, Inc., submit their memorandum of law in support of their Motion for New Trial as follows:

Introduction

The Court erred in its findings, conclusions, and judgment by ruling that the United States, through the National Oceanic and Atmospheric Administration ("NOAA"), met its burden of proof to show by the greater weight of the evidence that Kane Fisher and Salvors,

Inc. were liable for the alleged damage in Coffins Patch within the Florida Keys National Marine Sanctuary. The evidence at trial failed to link Kane Fisher and Salvors, Inc. to each of the alleged damage locations within the damage tract. The evidence at trial failed to refute the testimony of Dr. Harold Wanless that less than 2500 square feet of seagrass was lost in the damage tract. The evidence at trial failed to prove that mailboxes could cut through seagrass. For these reasons the Court should grant a new trial or minimally reopen the evidence for a demonstration that mailboxes cannot cut through seagrass. Once the Court reviews this demonstration, amended findings and conclusions should be entered finding that any damage caused by Defendants was negligible.

The Court should reopen the evidence for a mailbox demonstration

There is the erroneous assumption, that not only can the DAUNTLESS blowers blast through sea grass beds, but that the impact of the blowers is comparable to a bomb explosion. Neither is true as demonstration will conclusively will prove. None of the governments witnesses has ever observed a mailbox in operation. The downward force of the vertical water column directed by the mailboxes would be implosive and not explosive in effect under the law of physics. Because the inherent nature of the physical force involved, bottom conditions that my not effect bombs have a total different effect on mail box activity.

The thesis of the MacIntosh report, that was adopted by Dr. Zieman, necessarily assumes that the operation of the mailboxes is not effected by whether the bottom is sea grass or sand. MacIntosh calculated the percent of sand and the percent of sea grass in an adjoining portion of Coffins Patch and applied this ratio to the different area where Kane Fisher had dug a line of holes. The MacIntosh report made no attempt to determine the actual condition of the precise area where the holes were actually dug prior to the salvage activity. Dr. Wanless was the only witness to compare before and after aerial photos for purposes of determining the prior bottom condition and actually measure and calculate the edge of the sea grass beds that may have been disturbed. Without showing that the percent of sea grass and the percent of sand was the same in the area where Kane operated as the area where the sample was made, the MacIntosh report is clearly erroneous. The MacIntosh report would also assume that the mailboxes or blowers would

not be impeded by sea grass bottom. Indeed, the government's case and correspondingly this court's ruling depend upon one basic fact: whether DAUNTLESS blowers will go through sea grass beds or only through sand or rubble adjacent to sea grass beds.

The testimony of Kane Fisher and Stephan Sykora was unequivocal that mailboxes will not directly penetrate sea grass beds. Kane Fisher's log book records that the bottom condition of all holes was sand or rubble with the exception of three holes that indicated sand and grass conditions. The literature concerning use of mailboxes in treasure salvors activities also states the mailboxes will not go through the beds. The only direct evidence in the record shows a small portion of sea grass beds may have had sand removed from the underneath the edge of the bed causing the edge portion to slump into the depression.

There is no question that the logs reflect salvage activity by Kane Fisher. The aerial photo taken by MacIntosh reflects approximately 102 holes. The government did not match which of those holes corresponded with the log books of Kane Fisher and which of those holes had been mapped by the government witness Harold Hudson. It is undisputed that substantial salvage activity existed in Coffins Patch for the preceding 20 years or more through the use of mailboxes. Not only does the 1995 aerial not reflect any permanent evidence of previously dug holes, it is perfectly consistent with the testimony of Kane Fisher and Sigora that they dusted either in preexisting holes, either natural blow holes or holes previously dug by other salvors, or in the sand and rubble areas that naturally existed. The evidence was undisputed that even the recent holes dusted by Kane Fisher had completely filled in and were no longer discernable from aerial photos. No evidence existed even according to government witnesses of the extensive salvage activity that had been previously documented in the Coffins Patch salvage cases heard by Judge Aronovitch. The uncontested testimony indicated the Spanish galleon had tumbled in a straight line dispewing cargo and artifacts as the ship rolled. It was also undisputed that it was along this line that the extensive and continuous salvage activity had been concentrated before Kane Fisher's 1995 activities.

Defendants cannot ascertain any evidence or testimony to refute the fact that propwash deflectors or mailboxes cannot cut through seagrass. As NOAA's expert Dr. Harold Zieman clearly stated that he had "no data that says propwash deflectors shred

seagrass." Transcript, May 19, 1997,p.11,lns.13-14. Duncan Matthewson, in reviewing the book, Diving to a Flash of Gold, testified that "these mailboxes were never designed to go through a thick mat of turtle grass. These mailboxes were designed to dig deep in drifting sand." Transcript, may 21, 1997,p.57,lns.18-21; see also p.55,ln.1-p.58,ln.1 & Ex.30E. There was no evidence to show that the devices used by Kane Fisher and/or Salvors, Inc. in their salvage operations were capable of inflicting upon seagrass beds the type and amount of damage claimed. It is hoped that a demonstration will prove to the Court the erroneous nature of this assumption promoted by NOAA.

The Court erred in the scope, if any, of Kane Fisher's personal liability

The Court's findings of fact regarding the activities of the vessels and are overbroad and fail to set forth specific dates of the limited time during which the referenced vessels were actually present during the months mentioned. As such, the Court's findings and conclusions are erroneous as to the actual number of days in which the vessels were present. The Court misconstrues the application of the word "captain". The captain can only be captain of the vessel while he is on board. There was no direct evidence submitted to link Kane Fisher to the 102 holes that NOAA claimed as damage. That was the purpose of the magistrate's earlier ruling requiring NOAA to show where the damage occurred. Despite having the resources available, NOAA did not match the vessels' activities to any specific blowholes of damage. Some blowholes may have caused damage, but others did not. This Court had no evidence to show that Kane Fisher, specifically, made those holes.

Furthermore, Kane Fisher was only on the DAUNTLESS for a limited amount of days. Ex.21 The vessel logs showed that one hundred thirty-three depressions were made by the DAUNTLESS when Kane Fisher was not on board the vessel. There was no proof offered by NOAA that the 102 depressions that comprised NOAA's damage tract were made by Kane Fisher or by the DAUNTLESS with Kane Fisher aboard.

The Court failed to find an apportionment of damages for which Kane Fisher was personally liable. NOAA stipulated and the Court found that he was acting in the course and scope of his employment on behalf of Salvors, Inc. While Defendants dispute this finding, principle and agency law does not make the agent liable for the principle's tortious conduct. Kane Fisher should only be liable for the damage that he did individually, not for

all of damage for which Salvors is liable. The Court has found that the vessels were operating on behalf of Salvors. There is no evidence that those vessels were operating on behalf of Kane Fisher individually. Accordingly, he cannot be jointly liable for the damage attributable to the other vessels.

The common law of agency requires that where, as here, the damage can be apportioned, then judgment should be entered on an apportionment of the damage by each. Mitchell v. Edge, 598 So.2d 125 (Fla. 2nd DCA 1992); Sunshine Jr. Stores v. State, 556 So.2d 1177 (Fla. 1st DCA 1990). The vessel logs clearly apportion the alleged "damage" by each vessel. Therefore, the Court should grant a new trial to apportion to Kane Fisher only that damage for which he is individually responsible. NOAA acknowledged that it was not piercing the corporate veil, so Kane Fisher has no personal liability for acts of the corporation Salvors, nor of any other agents.

The Court erred in its findings that Defendants created all of the damage

The undisputed evidence was that there were other salvors using propwash deflectors and recovering treasure in Coffins Patch as recently as 1991[1]. William Causey, Duncan Matthewson, Bancroft Thorne, and Larry Murphy all testified that they were aware there were other salvors in Coffins Patch before Kane Fisher or Salvors, Inc. arrived in the area on January 29, 1992.

The testimony of Stefan Sykora at the preliminary injunction hearing has never been contradicted by any evidence or testimony. Sykora testified that when he first arrived in Coffins Patch in 1983 there were no blowholes in the area. From 1983 to 1985 he had personal knowledge of 700 to 800 blowholes made in the ocean floor of Coffins Patch, but there were others there as well. He then went on to name at least six other salvors and three other vessels working the area of Coffins Patch with blowers. Sykora testified of his personal knowledge that Bobby Jordan was conducting salvage operations with blowers in

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1. The Court errantly relied upon the testimony of Bancroft Thorne that there were no salvors in Coffins Patch from 1987 to 1992 when he claimed to see the DAUNTLESS in Coffns Patch, but he was only in the area approximately 90 times out of over 2000 days. "A I would say between '87 and '92 I ran approximately 90 trips out in that area." The manifest weight of the evidence is that other salvors were active in the area.

Coffins Patch in 1991. He testified that Bobby Jordan was doing the same type of activities as Kane Fisher. P.I.H., pp.218-32.

Mr. William Causey testified that he became aware of Salvors, Inc. and Kane Fisher's activities in Cofffins Patch through the newspaper articles describing their efforts in Coffins Patch. However, he seemed to have missed the Miami Herald newspaper article submitted as Defense Exhibit# 203 showing that Captain Robert Jordan had been salvaging in the very area where NOAA claimed Kane Fisher and Salvors, Inc. created the damage tract. There was no evidence to dispute a finding that there was recent salvage activities in Coffins Patch before Kane Fisher and Salvors, Inc. arrived on January 29, 1992. See also, Ex.30F & Transcript, May 12, 1997,pp.58-61[2]. Causey even admitted that those activities were no different than those of Kane Fisher. P.I.H.,p.81,lns.13-17. The Court found such to be true, but failed to find the correct scope of such activity.

The undisputed evidence was that the sand channel or damage tract as shown in Exhibit 19 preexisted the arrival of Kane Fisher and Salvors, Inc. The Court heard the testimony of Dr. Harold Wanless as he described his on site inspections, review of aerial photography, and review of video. The Court recalls the red lines he drew on Exhibit 19 showing the natural sand channel through Coffins Patch. He described this as "a very fundamental feature." Transcript, May 19, 1997,p.81,ln.22. He explained that the sand channel that NOAA claims was predominantly seagrass was always a sand channel or at least was one before Kane Fisher and Salvors, Inc. arrived in January 29, 1992. He explained that even with just February14, 1992 aerial photograph (ex.151) one could see that the sand channel already existed in areas where Kane Fisher and Salvors, Inc. had not yet been. Transcript, May 19, 1997,p.110,lns.14-22[3].

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2. William Causey admitted that he knew some salvors were using mailboxes within the sanctuary area before 1992. "Q Excuse me, sir. Again, it is just a "yes" or "no" question. Did you know that some salvors were using mailboxes? A No, I didn't say some salvors. Yes, some were. Some were not."

3. Curtis Kruer's testimony does not contradict this statement, but rather supports Dr. Wanless:

> Q If there were an aerial photo depicting a sandy line before February of 1992 when the Fishers were out on the site, would that give you an indication that there was a

This Court understood that this was indeed a fundamental feature when it questioned Dr. Wanless. "THE COURT: Let me be sure I understand this. I take it you have looked at the log when Fisher was blowing or creating the hole? THE WITNESS: I have looked at the log, sir. THE COURT: And looking at what I would call the Government photo that reflects the area, are you telling me that you can see areas where there are holes or areas of concern that the Fishers had not - their activity had not occurred in that area at that time? THE WITNESS: That is correct." Transcript, May 19, 1997,p.85,lns.4-14; see also p.77,lns.1-9. The Court's findings do not match the facts. Between January 29, 1991 and February 14, 1991, Kane Fisher and the other vessels were only in Coffins Patch for seven to eight days and only worked in two limited areas of Coffins Patch. Dr. Wanless showed this Court that the February 14, 1991, photo shows the sand channel or "damage tract" existing in areas where they had not yet been. Transcript, May 19, 1997,p.82, ln.15. It is logically impossible for one to liable for destroying something that simply does not exist. Curtis Kruer, NOAA's expert, stated it best, "If there was no seagrass where he [Kane Fisher] excavated, there would be no damage to seagrass." There simply was no 1.63 acres of seagrass in the sand channel.

When one looks at the satellite image of August 1991, it is apparent that the sand channel was present even then. Kane Fisher and Salvors, Inc. wanted to bring the best evidence to this Court of what Coffins Patch looked like before they arrived on January 29, 1992. NOAA did not want the Court to see this evidence. The best that NOAA could do to try and refute the evidence was the statement by Kruer that the sand to seagrass ratio in the area was "[a]t one time, it was possibly a 50/50 mix." The seagrass that NOAA claims covered the sand channel never existed on January 29, 1992 -- it never existed on August

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pre-existing area either by natural or manmade areas of involvement in this particular area?
A Yes.
Q And again, that is between [stations] 3 and 15?
A The aerial shows what it shows.
Q Okay.
A And I have not seen it, but if there is an aerial that shows the sandy streak in that area, it is probably a sandy streak."

21, 1991. If the sand channel represents damage, it was damage done by others well before Kane Fisher and Salvors, Inc. ever arrived in Coffins Patch.

The Court does not have evidence to support a finding that Kane Fisher and Salvors, Inc. created each of the 102 depressions which NOAA claims injured seagrass. Accordingly, the manifest weight of the evidence supports a finding that the majority of the damage in Coffins Patch alleged by NOAA was due to prior salvage activity.

The Court erred in not concluding that Defendants had a right of subsistence use

The National Marine Sanctuaries Act and the Florida Keys National Marine Sanctuary Act, 16 U.S.C. 1431 et seq. ("NMSA" and also known as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. sec. 1437, Pub. L. No. 101-605, 104 Stat. 3089 (1990)) (hereinafter MPRSA, NMSA and FKNMSA often interchangeably) was passed in 1990 creating the Florida Keys National Marine Sanctuary (FKNMS). The right of subsistence use by members of the salvage industry was expressly recognized in the purpose of the FKNMSA. Apparently this is the only marine sanctuary created by Congress where that occurred.

The Court erred in its findings, conclusions, and in the judgment entered following NOAA's misapplication of the factual and legal application of 16 U.S.C. § 1434(c) of the National Marine Sanctuary Act concerning the "right of subsistence use". The Court erroneously concluded that "subsistence use" in '1434(c) is not appropriate to salvors in the Florida Keys who had engaged in this livelihood. Subsistence use should be defined broadly to include salvage. See United States v. Alexander, 938F2d942(9th Cir. 1991) and Alaska v. Babbitt, 73F3d 648 (9th Cir. 1995). See also dictionary definition Black's Law Dictionary, 6th Ed. 1990.

The Statute 16 U.S.C. §1434(c)(1) on the right of subsistence use provides in its entirety:

> (c) Access and valid rights
>
> (1) Nothing in this title [16 USCS " 1431 et seq.] 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 that is in existence on the date of designation of any national marine sanctuary.

The statute §1434(c)(2) is equally explicit that the right of subsistence use continues until subjected to sanctuary regulation:

> (c) Access and valid rights
>
> * * *
>
> (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.

The "right of subsistence use" under this statute was never been disputed or contested by NOAA in: a) the preliminary injunction, b) the Eleventh Circuit Appeal, c) NOAA's Motion for Summary Judgment in the present proceedings and d) the trial before this Court in May of 1997. The issue of permitting, as focused upon by the Court is separate and immaterial to whether a "right of subsistence use" exists, or whether salvaging without use of mailboxes was lawful or illegal. This Court is aware that the regulations which were subsequently published in the Federal Register are effective July 1, 1997, and do not apply retroactively. Nevertheless, the regulations expressly recognizes the right of subsistence use and the right of salvaging. Section 922.167 of 15CFR, Part 922, Federal Regulation, June 12, 1997, vol. 62, #113, pg. 321701, et seq. Salvaging was expressly recognized as an industry that should be protected by NOAA as one of the purposes of the Florida Keys National Marine Sanctuary Act.

This Court's order granting Summary Judgment to NOAA only ruled that "as a matter of law the Defendants were not engaged in an activity authorized by Federal law when they salvaged in Coffins Patch in 1992". The order did not address the "right of subsistence use" by Defendants. The Court erred in finding that NOAA met its burden of proof on this issue. Treasure salvaging was recognized as a subsistence right or "livelihood" in the Preliminary Injunction Order and in the affirmance by the Eleventh Circuit. With a pre-existing right of subsistence to salvage, such right continues without a permit until modified or conditioned by appropriate regulations.

The Court's findings, conclusions, and judgment are inconsistent with the Court's and the Eleventh Circuit's decisions allowing a continuance of salvaging without using mailboxes, These earlier decisions were more correct because no permit was required as

a prerequisite to salvage artifacts by the Defendants in Coffins Patch, an area located n the Outer Continental Shelf. No statute or regulation existed which required a permit for Salvors, Inc. or Kane Fisher to salvage artifacts. The law relied upon by the Court as argued by NOAA and incorporated into the findings and conclusions is inapposite to the facts of this case. The Lathrop v. Unidentified Wrecked and Abandoned Vessel, 817 F. Supp. 953 (M.D. Fla. 1993), Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F2d1511 (11th Cir. 1985), Craft v. National Park Services, 34F3d918 (9th Cir. 1994) cases relied upon by this Court' all involved wrecks that were subject to permit requirements under 16 U.S.C.§470bb. This, of course, is not true of the case at bar. The Archaeological Resource Protection Act does not apply to lands owned by the United States on the continental shelf. 16 U.S.C. §470 bb).

These factors involving prior use also blend together on damages. Stefan Sykora testified at the preliminary injunction that hundreds of holes had been dug in the same "precise" lines (Preliminary Injunction Hearing (P.I.H.),p. 227) where he had placed Kane Fisher. "I try keep him precisely in that very narrow line because my statement was from previous knowledge no need to go anywhere left or right. There is nothing there." (P.I.H.,p.228) Sykora testified that salvor Bobby Jordan was using a blower in 1991 and doing the same thing Kane Fisher was doing in 1992. (P.I.H.,p. 226) Prior years of others exercising their livelihood use of Coffins Patch was well described by Sykora: "And this is usually happen on a Saturday or Sunday, looks like New York City parking lot. It was 8 to 12 boat in the same line, everybody trying to copy the UFO. That is the name of my boat. On one Saturday afternoon there was 4 or 5 hundred holes blowing in that period in a line only like 8 hundred feet long." Id.

The Court erred in its April 30, 1997 summary judgment and subsequent bench ruling at trial that Kane Fisher and Salvors, Inc. had no right to be salvaging in Coffins Patch. This ruling is unsupported in the law. Kane Fisher and Salvors, Inc. had a preexisting subsistence use of salvage in the Coffins Patch area before the creation of the FKNMS. MDM Salvage, 631 F.Supp. at 314; Depo. of K.Fisher '97, p. 57, lns.10-16; Depo. of M.Fisher, 1/9/97, p.8, ln.10 - p.9. ln.8, p.95, ln.7 - p.96, ln.9; pp.13-18.). Prior to the enactment of the FKNMSA, salvage was a legal industry in Coffins Patch. Salvage has long been recognized as a

property right under federal general maritime law. Great Lakes Towing Co. v. St. Joseph-Chicago S.S. Co., 253 F. 635 (7th Cir. 1918). Then in 1990, Congress enacted the FKNMSA and designated the sanctuary. Ole Varmer testified that this was the first time that the subsistence use by salvors within the sanctuary was expressly recognized in a marine sanctuary. Transcript, May 21, 1997,p.37,lns.22-24.

At the time of Kane Fisher and Salvors, Inc.'s alleged activities in Coffins Patch, there were no regulations prohibiting salvage and Mr. Varmer clearly stated that the FKNMSA "did not expressly prohibit commercial salvage". Transcript, May 21, 1997,p.39,lns.9-10. There were no regulations authorizing or requiring permits. The FKNMSA specifically allowed for subsistence uses of sanctuary resources. 16 U.S.C. 1434(c). The salvage efforts by Kane Fisher and Salvors, Inc. are an exercise of their livelihoods are designed to protect artifacts from the peril of continued exposure to the forces of nature. Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 557 (S.D.Fla.1982). Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985) and Lathrop v. Unidentified Wrecked & Abandoned Vessel, 817 F.Supp. 953 (M.D. Fla. 1993) are both distinguishable to the case at hand. Those cases involved the Antiquities Act and its application in National Parks. The FKNMS is not a national park and the Antiquities Act does not apply.

The preliminary injunction issued by the magistrate in this case only prohibited the use of mailboxes and not all salvage by the defendants. The Eleventh Circuit opinion upheld the ban on mailboxes, but noted that the livelihood of salvage was not precluded. U.S. v. Fisher, 22 F.3d 262 (11th Cir. 1994). The artifacts were recovered in 1992 and pursuant to the Motivation, Inc. complaint, a warrant for in rem arrest was issued for the artifacts in 1996. Finally in 1997, NOAA publishes regulations for the first time authorizing salvage, but with a permit. Therefore, at the time of Kane Fisher and Salvors, Inc. alleged activities in Coffins Patch there was no law prohibiting the salvage of artifacts from within the FKNMS and NOAA can claim no damage to the artifacts or any contextual or archeological information, even if this Court were to somehow find that such a loss occurred.

Recent regulations, 15 C.F.R. 922.167, provide for certification of pre-existing rights of subsistence use as asserted by Kane Fisher and Salvors, Inc. The regulations provide that a person:

a. May conduct a prohibited activity by a valid right of subsistence use or access in existence on July 1, 1997, provided that :

1. Notifies and requests certification of the right within 90 days of July 1, 1997.

* * *

b. May conduct the activity without being in violation . . . pending final agency action on his or her request.

15 C.F.R. 922.167

It is apparent that such language supports the preexisting right of subsistence use of the sanctuary resources claimed by Kane Fisher and Salvors, Inc. They should be allowed to continue salvage operations unmolested until a final determination has been made as to the certification that will likely be filed. The activities are clearly permitted under the FKNMSA and there is now a method for such recognition under the regulations.

The possession of the artifacts by Salvors, Inc. and Kane Fisher was lawfully acquired under the subsistence use provisions of 16 U.S.C.§ 1434(c) and under 16 U.S.C. § 470bb, recognizing that salvaging, without the use of mailboxes, could continue, and the prior orders of this Court and the Eleventh Circuit. The Court erred by finding and concluding that NOAA had a superior right or entitlement of possession to those artifacts that were recovered through subsistence use and not proscribed by 16 U.S.C. §470bb or any regulation.

A reasonable sea grass damage compensation must be viewed in the context that the Defendants were engaged in a lawful activity, thus requiring damages to be carefully proven and assessed on the basis of actual injury and not speculations that inflict unreasonable punitive and confiscatory amounts. The prior use is directly related to the damage issues as the prior salvage was done in the same area in a straight line as Kane Fisher, as an employee of Salvors, Inc., worked. This Court should amend its findings to reflect that the damage to seagrass was negligible based upon Defendants' right of subsistence use and the history of salvage in the area.

The Court erred in its findings of the extent of seagrass damage

The Court concluded that all of the depressions allegedly created by the Defendants have been filled in with sand. Since these areas have been filled in by sand, then by the Court's findings and conclusions, there is no impediment to the regrowth of sea grass in the areas. Specifically, any slumping sea grass that may have existed will now have a bed of sand within which to set its rhizomes and roots thus giving it a stable substrate for regrowth and colonization. Notwithstanding the area's "high-energy" characterization by NOAA, with a sandy substrate the sea grass will be able to establish its roots and withstand any wave or current stresses that it may be exposed to. As shown by the testimony of Dr. Harold Wanless, this is in fact what has occurred.

The amount of damage to which Defendants "stipulated" was at most 2500 sq. ft. not 1.63 acres as found by the Court. There was no credible evidence to support any estimate of sea grass loss approaching 1.63 acres. All such evidence was based upon unproven assumptions and contradicts the manifest weight of the evidence that nature is restoring the area on its own. Natural forces refilled the preexisting depressions in Coffins Patch with sand and seagrass has begun to regrow in the area.

The Court's findings and conclusions as to the extent of damage are contrary to the evidence. Dr. Thorhaug's testimony on Transcript, May 21, 1997, p. 144, ln.4 through p.146, ln. 18, shows why Dr. Zieman is wrong when he says that the injury was the worst he had seen and would never recover. Dr. Zieman himself testified that while a high energy environment may inhibit the initial regrowth of seagrass in an area, once the seagrass has been established, the high energy environment brings fresh and replenished supply of nutrients to the seagrass and actually assists in the regrowth and colonization. The sea grass has a fresh sand substrate to attach itself so the high-energy will be beneficial to it regrowth.

The Court erroneously failed to consider the evidence that the aerial photography taken over the past 20 years in the Coffins Patch area shows that there has in fact been an increase in the sea grass in the area. The area has added over two and one-half acres of sea grass. In fact, Dr. Thorhaug testified that there had been "substantial recolonization" of the sea grass in Coffins Patch (Transcript, May 21, 1997, p. 152, ln. 21 through p.153,

ln.4) and that these beds had great vitality based upon the presence of transitional algae growth. Transcript, May 21, 1997, p. 158, ln. 25 through p. 159, ln.18

The reasonableness of the damages awarded by the Court is refuted by the testimony of Dr. Anitra Thorhaug as to the viability of other more suitable restorations plans that would be equally effective to compensate for the negligible damage which may have been caused by Salvors' activities. Furthermore, the project adopted by the Court is based upon the improper and unscientific estimation of sea grass destruction pursuant to NOAA's expert, Dr. Zieman.

The evidence and testimony at trial by Dr. Harold Wanless showed that much of what NOAA claimed as damage to seagrass was simply not based upon fact. Dr. Wanless showed in his ground truthing of the Harold Hudson video and with the aerial photography that many of the escarpments were natural events (Transcript, May 19, 1997,p.91,ln.22 - p.92,ln.9 & Ex.153) and that margin of rubble surrounding most of the depressions allegedly made by Kane Fisher and Salvors, Inc. were not of sufficient depth or composition to kill the seagrass. In describing the video of the alleged damage and exhibit 153E, Dr. Wanless stated his opinion best when he said, "I think it is important ¥ you can see they [the seagrass] are green and alive. They may not be happy, but they are not dead." Transcript, May 19, 1997,p.96,lns.12-14. Even under cross-examination, Dr. Wanless conceded that some of the depressions shown in NOAA's videos appeared to be "young" or "fresh", indicating they could have been made by the defendants. However, he pointed out a crucial piece missing from the NOAA videos, the NOAA testimony and all of NOAA's case. There is no evidence of chunks of seagrass that were uprooted and destroyed. Transcript, May 19, 1997,p.138,ln.4-p.139,ln.8. This Court has no credible evidence to support a finding that there were 1.66 acres of dead seagrass[4].

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4. The Court found that no severe storms had occurred during or immediately after the period of excavation by the defendants. Therefore there is no argument that the chunks were blown or washed away. Even viewing this evidence in the most favorable light to NOAA the Court must presume that the 'chunks' (described more accurately by Dr. Wanless as the size of a FedEx package) shown in NOAA's videos and photographs are the largest there were. Adding those pieces and any covered margins of seagrass around depressions only totals under 2500 square feet of lost seagrass - an undisputed negligible amount.

This is the key point of the issue as to how much was damaged. Dr. Wanless carefully presented his analysis of the videos and photos and his comparisons of each in reaching his conclusion that the most area of seagrass that could have been damaged in the damage tract was 2500 square feet. Transcript, May 19, 1997,p.107,ln.23-p.109,ln.15. He described how even some of the seagrass that sloughed of has recolonized within the depressions and on the areas of disturbed substrate. Transcript, May 19, 1997,p.97,ln.15-p.98,ln.6. NOAA expert, Dr. Zieman, admitted that he did not even compare the June 11, 1992, photograph with the May 14, 1997, photograph. T.p.34,lns.11-15. Dr. Wanless testified how he studied and compared all the available aerial photographs and videos in concluding that the damage tract claimed by NOAA was in fact a preexisting natural sand channel within Coffins Patch. The Court cannot reject this undisputed testimony.

Dr. Wanless showed that from 1975 to the present, the sand channel had in fact shrunk, i.e. there is more seagrass in the area now than there was in 1975 or 1982. Transcript, May 19, 1997,p.79,ln.5-p.81,ln.21; p.86,ln.7-p.88,ln.15. In fact, the area has increased from 37.4 percent seagrass coverage in 1992 to 50.1 percent coverage in 1996, or roughly two and one-half acres. Transcript, May 19, 1997,p.113,ln.16-p.114,ln.10 Dr. Wanless' testimony involving Exhibit 156 offered the best explanation of exactly how much seagrass could have been damaged by the activities of Kane Fisher and Salvors, Inc. He testified that he superimposed the damage tract and locations claimed by NOAA from Harold Hudson to Dr. Zieman with aerial photographs and the known seagrass topography of the area in Coffins Patch. Transcript, May 19, 1997,p.107,ln.2-p.109,ln.15. Dr. Wanless marked the areas where there could have been seagrass as red on the exhibit and then drew a square of one acre and a square of 1.66 acres to show that all of the red areas do not fill the 1 or 1.66 acre squares. "[Y]ou can put all of these [red areas] inside one of those [squares] and rattle them around and they don't total 1.63 acres." Transcript, May 19, 1997,p.109,lns.13-15. The only way to get that number is to make the errant assumption that the entire area was covered with seagrass. The vessel logs themselves refute this position. In only one small area is there a mention of dusting with mailboxes near the edge of seagrass.

Dr. Wanless explained why NOAA's method of determining the extent of seagrass damaged was unworkable. Transcript, May 19, 1997,p.76,lns.4-14; p.86,ln.7-p.88,ln.25. He explained that based upon the earlier photography, the Coffins Patch area consisted of linear and patchy seagrass colonies. Based upon this assessment, "[t]he only proper way to answer what damage may have been done is to look within the sand tract itself." Transcript, May 19, 1997,p.88,lns.21-22. The Court's assessment of the amount of seagrass damage is speculative and inconclusive. It relies upon unproven assumptions as to the homogeneity of the seagrass colonies. The evidence is that to the extent any seagrass was damaged, such damage was negligible. Transcript, May 19, 1997,p.111,ln.25-p.102,ln.2.

The Court erred in finding the Habitat Equivalency Analysis to be proper

NOAA's Habitat (HEA), adopted by the Court as the proper method of calculating monetary damages is a faulty model that is inapplicable to such small areas of alleged damage. The HEA model has only been used twice to analyze damage to seagrass. The only case, other than this one, where the HEA model has been used involves damages as a result of a massive oil spill in Tampa Bay, not a limited and isolated damage area such as in this case. It is important for this Court to note that no Court of law has upheld the application of the HEA model to any type of seagrass injury. Furthermore, this is the first case where the model has been used for a seagrass impact injury. Transcript, May 20, 1997,p.97,ln.7-p.98,ln.12. Therefore, this Court has made an unsupported ruling as to damages for seagrass impact injuries.

The HEA is simply not designed for small scale sea grass impact injuries. Indeed, Mr. Fonseca testified that in all of the restoration projects in which he was involved, none used the HEA model. Transcript, May 20, 1997, p.9, ln.17 through p.10, ln.7. The model is not appropriate for use in this case primarily based upon the area of damage and the recovery horizon in this case. Transcript, May 20, 1997, p.172, ln.14 through p.175, ln.5. These factors are beyond the expertise of the NOAA economist, Brian Julius, who made the ultimate decision to use the model. Transcript, May 20, 1997, p.7, lns. 15-18. The more reasoned and accepted model was that proposed by Drs. Thorhaug and Wanless related to the maximum estimate of provable sea grass injury of 2500 sq. ft.. With this criteria, the restoration project described by Dr. Thorhaug, based upon the same criteria espoused by

NOAA but for amount of injury, would be substantially less expensive, $37,500.00. Transcript, May 20, 1997, p.176, ln.14 through p.184, ln.1. This is further supported by the recalculation made by Brian Julius that if one-tenth of an acre were inputted into the HEA model, using a 25 year recovery period, the compensatory acreage would be five one hundredths (.05) of an acre. Transcript, May 20, 1997, p.136, ln.21 through p.137, ln.3. Accordingly, it was error for the Court to use the HEA model in calculating damages.

The Court erred in a finding of reasonableness of damages

The Court erred by an implied finding or by assuming that NOAA's damage assessment, response costs, and remediation program were reasonable. If the Court were to find that only 2500 square feet of seagrass were all that was damaged, and that this some how was not negligible, then NOAA's damages are thus disproportionate and inapplicable to the loss. Even if NOAA's assessments were applicable, NOAA failed to offer any proof that the amounts spent were reasonable and necessary and failed to offer any proof that the amounts proposed for remediation were reasonable and necessary. NOAA's damages expert, Brian Julius, specifically said that he could not testify as to the reasonableness of the assessment costs incurred by NOAA. Transcript, May 20, 1997,p.94.lns.10-14. The FKNMSA only authorizes reasonable and necessary activities. No proof was offered to the reasonableness of the $211,000.00 assessment costs. It was error to assess them against Defendants.

The Court erred in issuing the permanent injunction

The Court's erroneous issuance of a permanent injunction ignores the fact that NOAA has actually brought nothing new to this Court than what was offered at the preliminary injunction hearing five years ago. Accordingly, if this Court were to rule that NOAA is somehow entitled to an injunction, it should be of no greater scope than originally granted to NOAA. That injunction only prohibited the use of mailboxes within the Coffins Patch area and expressly allowed Defendants to continue their livelihood of salvage, nothing has been brought before this Court that would permit an increase in the scope of that original injunction that applied to activities within Coffins Patch. Furthermore, to the extent the Court has awarded monetary damages, it is error for the Court to find that the

damage is irreparable, since a monetary amount has been placed on the damage found by the Court.

The Court erred in its consideration of the McIntosh Marine Report

The Court improperly used the proffer of new evidence submitted at the preliminary injunction hearing, Exhibit 25, to support its finding by ruling that same was an admission of the area of acreage of sea grass destroyed in Coffins Patch. NOAA was errantly allowed to use this evidence from the preliminary injunction hearing, notwithstanding that it successfully objected to the use of evidence from the same hearing. The proffer of Exhibit 25 was made at the preliminary injunction hearing for the purposes of obtaining a rehearing and was denied by the Trial Court. Defendants objected to its use at trial. It is based on unproven assumptions and by its own terms was estimation with no ground truthing. The report was made to show that the alleged injury to sea grass beds in Coffins Patch was negligible and substantially less than what NOAA originally stated.

The report was made without the knowledge or request of Salvors, was not paid for by Salvors, and most importantly, the report was based upon the incorrect assumption that Salvors made all of the depressions found, when this was clearly not the case. McIntosh is in the business of planting seagrass so the focus was to look at the area where there could be the most seagrass lost. The report did not consider that others had used various types of salvage equipment, other than mailboxes, in seagrass areas. No one has ever given eyewitness testimony that Defendants destroyed seagrass. It simply never happened. This Court has no direct evidence to support a conclusion otherwise.

Conclusion

WHEREFORE, Defendants, Kane Fisher and Salvors, Inc., herein request the Court grant their Motion for New Trial and/or to reopen the evidence for a demonstration that mailboxes cannot cut through seagrass.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by over night mail to: **James A. Lofton**, U.S. Department of Justice, Environmental and Natural Resources Division, Environmental Section, 1425 New York Ave., N.W., Washington, D.C. 20005; and to **Caroline M. Zander**, United States Department of Justice, Environment & Natural Resources Division, 601 Pennsylvania Avenue, N.W., Room 5614, Washington, D.C. 20004, this 16 day of September, 1997.

Respectfully Submitted,

RUMRELL, COSTABEL & TURK

Richard G. Rumrell, Esquire
Florida Bar No. 132410
Lindsey C. Brock III
Florida Bar No. 971669
10151 Deerwood Park Blvd
One Hundred Building, Suite 250
P. O. Box 550668
Jacksonville, Florida 32255-0668
Phone: (904) 996-1100
Fax: (904) 996-1120

MICHAEL R. BARNES, P.A.
Michael R. Barnes, Esquire
Florida Bar No. 906585
513 Whitehead Street
Key West, FL 33040
Telephone: (305) 296-5297
Facsimile: (305) 296-5254

WILLIAM VANDERCREEK, ESQUIRE
Texas Bar No. 20442000
5956 Sherry Ln. Ste.1251
Lock Box 1055
Dallas, Texas 75225
Telephone: (214) 720-0380
Facsimile: (214) 720-0380