

No. 97-5800

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

KANE FISHER AND SALVORS, INC., Defendants-Appellants.

MOTIVATION, INC., Plaintiff-Appellant
(United States of America-Intervenor)

v.

UNIDENTIFIED WRECKED AND
ABANDONED SAILING VESSEL, etc.

Appeals from the United States District Court for the
Southern District of Florida No. 92-10027 and No. 95-10051

**INITIAL BRIEF FOR APPELLANTS KANE FISHER,
SALVORS, INC. AND MOTIVATION, INC.**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Salvors, Inc. is a Florida corporation whose stock is owned by members of the Melvin A. and Dolores E. Fisher family and the stock is not traded.

Motivation, Inc. is a Delaware corporation whose stock is owned by members of the Melvin A. and Dolores E. Fisher family and the stock is not traded.

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UNITED STATES v. KANE FISHER AND SALVORS, INC. - MOTIVATION v.
UNIDENTIFIED WRECK - NO. 97-5800

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Stephanie Fluke

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Whitey Keevan

Wiley Wright

William VanDercreek



STATEMENT REGARDING ORAL ARGUMENT

The issues concerning: a) maritime salvage law; b) the 1997 promulgation of Sanctuary Rules and Regulations in accordance with the State of Florida request for changes to accommodate treasure salvors; c) the preliminary injunction order of this Court which only restricted salvage activities from using prop wash deflectors; and d) the retroactive application of statutory authority for determining and finding \$600,000 in damages for injury to 1.63 acres of sea grass (that under Florida law would be less than \$70,000) warrant the opportunity for oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

The Brief text is 14 point Garamond (Times Roman Serif style).

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STATEMENT OF JURISDICTION

The United States (NOAA) filed a civil action in the United States District Court for injunctive relief, damages, and possession of salvaged artifacts against Salvors, Inc., Kane Fisher, Melvin Fisher and three salvage boats under 28 U.S.C. § 1333 (admiralty), Case No. 92-10027. Motivation, Inc. filed an admiralty suit under 28 U.S.C. 1333 for adjudication of ownership of the salvaged artifacts in which the United States intervened and cross-claimed, Case No.95-10071.

The Final Judgement in the two consolidated cases, No. 92-10027 and 95-10071 was signed on September 3, 1997 and entered on September 5, 1997, granting the United States possession of the artifacts, permanent injunction, and monetary damages, and denying Motivation's claim for adjudication of title. R7-244. A timely Motion for New Trial was denied on October 15, 1997. R7-253. A timely Notice of Appeal for the two consolidated cases was filed on behalf of Defendants Kane Fisher and Salvors, Inc. on November 13, 1997. R7-255. Motivation, Inc., filed a timely Notice of Appeal in 95-10071 on December 12, 1997. R7-257. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues presented are as follows:

Kane Fisher and Salvors, Inc., and Motivation, Inc.

- I. Whether NOAA is legally entitled to take possession of articles of maritime salvage that were located, recovered, restored, and maintained by the Fisher Defendants and to recover damages for injury to sea grass caused by the 1992 salvage activity.
 - A. Whether maritime salvage rights to abandoned ship wrecks on the Outer Continental Shelf area of the Florida Keys National Marine Sanctuary were validly modified by any applicable laws or regulations during the interval from the date of the sanctuary designation (1990) to the effective date of approved regulations (1997).
 - B. Whether the right of salvage was recognized by the law of the case on the appeal from the order granting a preliminary injunction that expressly allowed salvage activity without use of prop wash deflectors.

Kane Fisher and Salvors, Inc.

- II. Whether NOAA is entitled to some \$600,000 for injury to 1.63 acres of sea grass using a retroactive application of statutes, rules, and regulations, including the Habitat Equivalency Analysis authorized for oil spills.

Kane Fisher and Salvors, Inc.

- III. Whether Fisher Defendants caused injury to 1.63 acres of sea grass.

STATEMENT OF THE CASE

(i) The Course Of Proceedings And Disposition In The Court Below

The United States filed its complaint in Case Number 92-10027 on April 21, 1992, seeking damages and an injunction against the Defendants who had been conducting maritime salvage. R1-1. The Government moved for a preliminary injunction (R1-3), and the Defendants cross-moved for an injunction to restrain the Government from interfering with their salvage activities. R1-11. The district court referred the motions to Magistrate Judge Garber who, after a hearing, recommended that the district court issue a preliminary injunction restraining the Defendants from using prop wash deflectors in conducting salvage operations in Coffins Patch but expressly allowing salvage activities using "other salvage techniques." Magistrate Judge Garber also recommended that the Court deny the Defendants' request for an injunction. R2-33. The district court adopted the Magistrate's recommendation and issued a preliminary injunction which allowed salvage to continue without the use of mailboxes (unless permit for mailboxes was obtained). R2-41. The Eleventh Circuit affirmed noting the "limited injunction prohibiting only the use of prop wash deflectors" in salvage operations. *United States v. Fisher, et al.*, 22 F.3d 262, 270 (11th Cir. 1994). R2-51.

In 1995, Motivation, Inc. filed its *in rem* action against an unidentified, wrecked, and abandoned vessel, seeking title and a salvage award for the same artifacts that the Fishers had recovered in Coffins Patch, Case Number 95-10051. R18-1. On June 18,

1996, the district court allowed the United States to intervene. R18-19. The court consolidated both cases for discovery and trial. R3-113, R18-19.

Prior to trial NOAA's *in rem* claim against the three salvage boats was dismissed. R6-213. The district court granted partial Summary Judgment for the United States, ruling under 16 U.S.C. § 1443 that maritime salvage was not an "activity authorized by federal or state law." R5-190-12. As a result of this ruling, the artifacts that had been recovered, restored and are preserved by the Fishers were awarded to the government and damages determined at the subsequent bench trial were awarded to NOAA of approximately \$600,000. At the close of the government's evidentiary case, the court granted the Motion to Dismiss Defendants Melvin A. Fisher for failure of proof. R16-235-3. The government's claim against Motivation was also dismissed. R16-235-3. The court's ruling on Summary Judgment that there was no right to salvage by the Defendants was ruled dispositive of Motivation's claim for admiralty arrest and adjudication of title. R7-39-2 and R17-236-18, 19.

(ii) *Statement Of The Facts*

The Coffin's Patch area in the Florida Keys off the coast of Marathon has historically been the subject of extensive salvage activity spawning litigation and literature (see for example *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp 311 (S.D. Fla. 1986), and Meylach, *Diving to a Flash of Gold*, Fla. Classic Lib. (1986 ed.). R8-31-241 This area is now encompassed in the Florida Keys National Marine Sanctuary initially designated by Congress in 1990 and finally

approved by Congress to take effect under 16 U.S.C. § 1434(b) in July of 1997 (after adoption of changes to proposed regulations requested by Florida that included provisions for commercial treasure salvage). 62 F.R. 32154, 32160, 32161 (June 12, 1997). At the time of the 1992 salvage operations, no rules or regulations for the Sanctuary existed. R5-185-12.

During some days in January, February, and March of 1992, Defendants Kane Fisher and Salvors, Inc. using three (3) boats engaged in maritime salvage on the Outer Continental Shelf in Coffin's Patch. R5-190-3, 4. The salvors located, recovered, restored, and maintained various artifacts. R7-239-12, 13. Stefan Sykora, who was involved in the *MDM Salvage* litigation, showed Kane Fisher a line along which it was believed a Spanish treasure ship had tumbled and broken up during a hurricane. R8-31-226, 227, 228. Fisher entered into the ship's archaeological sheets each use of "mailboxes" or prop wash deflectors and the Loran position. R13-227-159. A June 1992 aerial by Fisher's consultant depicted one hundred two (102) depressions. R13-222-216; Gov. Ex. 8; Def. Ex. 151B and 151 D. At the time of the permanent injunction hearing in 1997, the depressions had filled in and were no longer capable of recognition. R7-239-7.

In May of 1992 an evidentiary hearing for a preliminary injunction was held before the United States Magistrate who entered an Order adopted by the district court granting the Government a limited injunction against the use of "mailboxes" but allowing salvage to continue. R2-33.

Following the affirmance by this Court of the preliminary injunction (R2-51), the trial for permanent injunction and damages and for possession of the recovered artifacts held by the Fishers was consolidated with the 1995 admiralty action by Motivation, Inc., in which the United States had intervened. R3-113-18, 19. Two days prior to the May 1997 trial the district court entered its Order granting a partial Summary Judgment. R5-190; R19-60. The only remaining issue then concerned liability and damages for injury to seagrass.

Using the Habitat Equivalency Analysis designed for oil spills and various statutes and regulations, including those enacted or promulgated after the filing of the 1992 lawsuit, NOAA's witnesses testified to approximately \$600,000 in damages. The district court agreed and awarded \$351,648 for restoration, \$211,130 for response costs under 16 U.S.C. § 1432(6)(C) and (7), and \$26,533 for interest under 16 U.S.C. § 1443(a)(1)(B). R7-244-18, 19; R20-97-18, 19.

The rules and regulations including the statutory provision for monetary costs and interest, 16 U.S.C. §§ 1432(6)(C) and 1443(a)(1)(B) used to award damages were not published or enacted until after all salvage activity had ceased and after the complaint was filed. There was no statutory provision for retroactivity.

Kane Fisher and Salvors. Inc. contended that mailboxes could not directly penetrate sea grass beds (undermining could cause edges of beds to slump off) and that the salvage activity was done in a primarily sandy channel. R14-234-41 to 42, 77 to 79, 85, 110. The Fisher experts estimated injury at approximately 2,500 sq. ft. or

less. R14-234-109. NOAA experts, who had never observed mailboxes in operation, contended that they function like a “bomb” and that 1.63 acres of sea grass had been injured or destroyed. R13-227-20; R13-221-226. The district court did not find whether or not mailboxes could directly penetrate sea grass beds or find the percent of sea grass and sand in the precise area worked by the Fisher defendants. The district court, nevertheless, did find injury to 1.63 acres of sea grass. R7-39-8; R20-93-8.

(iii) Standard Of Review

Kane Fisher and Salvors, Inc., and Motivation, Inc.

I. Issues I., I.A., and I.B. were resolved in favor of NOAA by the Order granting partial Summary Judgement. Those issues involve questions of law that are reviewed *de novo*. Mixed questions of law and fact are reviewed *de novo*. Any disputed fact issue on summary judgement must be resolved in favor of defendants (Fishers), unless under the evidence presented NOAA would be entitled to a directed verdict.

Kane Fisher and Salvors, Inc.

II. Issue II. involves questions of law to be reviewed *de novo*.

Kane Fisher and Salvors, Inc.

III. Issue III. regarding the size of the area of the damage to sea grass found by the district court after an evidentiary hearing, is reviewed under a clearly erroneous standard.

SUMMARY OF THE ARGUMENT

Summary Judgement Was In Error

The trial court, on the eve of trial, granted partial Summary Judgment in favor of the government (NOAA) on the question of Fishers' right to salvage and liability for damages. As a result of this ruling, the artifacts of salvage which had been found, recovered, restored and preserved by the Fishers were awarded to the government, and the Fishers were found liable for the amount of damages caused to sea grass by the salvage activities that were determined in the subsequent non-jury trial.

The 1992 salvage, in the area known as Coffins Patch near Marathon, Florida and on the Outer Continental Shelf, was within the area encompassed by the Florida Keys National Marine Sanctuary that initially was designated by Congress November 16, 1990¹, and was finally approved and authorized to "take effect" July 1, 1997. 62 F.R. 32154, 32160 (June 12, 1997).

The Outer Continental Shelf location is significant because no permit was required for salvage and artifact recovery under the Archaeological Resources Protection Act, 16 U.S.C. § 470(b)(b). The district court's Summary Judgment ruling that no prior salvage rights existed relied entirely on cases where a permit was required under both this statute and existing regulations. The date is significant because no applicable statute, rule, or regulation, including the Florida Keys National

¹ Pub. L. 101-605, 104 Stat. 3089, as amended Nov. 4, 1992, 106 Stat. 5053, 5054

Marine Sanctuary and Protection Act, existed in the subject area in 1992 that would either forbid salvage or require a permit for salvage.

The district court erred in accepting NOAA's argument under 16 U.S.C. §§ 1443 and 1437 for ownership of the artifacts and for damages. 16 U.S.C. § 1443(a)(3)(B) excludes liability for damage "caused by an activity authorized by federal or state law." The district court expressly ruled that the maritime salvage was not an activity authorized by federal law. R5-190-12. This is contrary to Article III of the United States Constitution; prior and recent rulings of the Supreme Court, including *California and State Lands Commission v. Deep Sea Research, Inc.*, 118 S.Ct. 14641 (1998); and salvage statutes, 46 U.S.C. § 722.

This Court's ruling on the 1992 appeal of the preliminary injunction expressly allowed salvage to continue without a permit, providing only that prop wash deflectors (mailboxes) were not used in the salvage operation. *United States v. Fisher, et al.*, 22 F.3d 262, 266, 270 (11th Cir. 1994) (" . . . limited preliminary injunction prohibiting only the use of prop wash deflectors. . . .") If the maritime salvage *per se* was unlawful or in violation of any then existing regulations, this Court would not have allowed salvage to continue. NOAA did not object, cross-appeal, or otherwise complain about the Court's recognition of the continued right to salvage without mailboxes and the refusal to bar salvage. The district court's 1997 Summary Judgment Order ruling no right to salvage, *period*, totally ignored the Order of this Court that *only* prohibited use of mailboxes in salvage operations.

A separate and independent ground for reversal concerns the effective date of the sanctuary. At the time of the preliminary injunction, no proposed rules had been either promulgated or submitted to Congress. The Sanctuary, of course, should be considered “in effect” at time of designation, but this would be a hollow shell. This is not disputed. The rules, regulations, and laws giving the sanctuary life did not “take effect” until compliance with § 1434(b). During the interval, NOAA could obtain a **prospective** injunction restricting certain salvage methods, which is what it did.

As one basis for upholding the preliminary injunction NOAA had predicted incorrectly to this Court that the 45-day period for approval by Congress after publishing regulations required for the Sanctuary to “take effect” by 16 U.S.C. § 1434(b) and Section 7 of the Florida Keys Marine Sanctuary Act did not apply because the sanctuary was designated by Congress rather than by the Secretary of the Interior. Contrary to its representation to this Court in the prior appeal, NOAA proceeded in exactly the opposite manner (as proved by the Federal Register, see e.g., 62 F.R. 36655 (July 9, 1997)) and subsequently followed the request for congressional approval mandated by § 1434(b) and Section 7 of the Florida Keys Sanctuary Act. This final approval, including acceptance of objections proposed by Florida recognizing treasure salvage as an important activity in the Florida Keys, did not “take effect” under Federal law until July 1997, well after the 45-day period had expired. The Florida Keys Act itself did not ban salvage. Because the general Marine Sanctuary Act did not “take effect,” there would be no prior right existing under 16

U.S.C. §§ 1443 and 1437 for NOAA to claim ownership of the salvaged artifacts or damages from the salvage operation. Moreover, as previously noted, if § 1443 does apply, there would be no liability because the maritime salvage in question was an activity authorized by federal law that had not been modified or restricted in 1992.

Damages Against Kane Fisher and Salvors, Inc.

There would be no liability for damages unless this Court upholds the district court's Order on Summary Judgment. Even if so, the district court erred by retroactive application of statutes and regulations in determining approximately \$600,000 in damages as follows:

(1) \$211,130 for response and damage assessment expenses was awarded under "16 U.S.C. § 1432(6)(C) and (7)". R7-244-19. Subsection (C) to § 1432 (6), which provides for "the reasonable costs of monitoring appropriate to the injured, restored or replaced resources," was added by the November 4, 1992 amendments to the Ocean Act, 106 Stat. 5040, *after* the injury and filing of the Complaint.

(2) \$26,533 was awarded as interest to assessment costs under "16 U.S.C. § 1443(a)(1)(B)" which also was added after the injury and the filing of the Complaint (106 Stat. 5046 November 4, 1992). R7-244-19.

(3) The \$351,000 calculation to implement sea grass restoration was accomplished under the Habitat Equivalency Analysis authorized for oil spills and regulations adopted after the injury in question. The calculation also included **monitoring costs of nearly \$200,000**. R7-244-20.

The district court's retroactive application of statutory amendments is error under Supreme Court authority and requires reversal of the entire damages award. *Landgraf v. USI Film Products*, 511 U.S. 244, (1994).

The government's claim for some \$351,648 for restoration depends upon: a) proof of injury to 1.63 acres of sea grass by Kane Fisher and Salvors, Inc. salvage activity, b) use of the Habitat Equivalency Analysis (HEA) to calculate damages, and (c) entitlement to monitoring costs. The use of the HEA, developed for oil spills, was neither authorized, nor properly applied. The HEA multiplies by ten fold or more the amount of reasonable damages. The State of Florida calculates damage to sea grass at one dollar (\$1.00) per square foot. Monroe County assesses tax at the rate of one hundred dollars (\$100.00) per acre.

The salvage activity was performed in a sandy stretch by using mailboxes which can cause the edge of sea grass beds to slump or break off if supporting sand is removed but cannot directly penetrate sea grass beds. Any actual damage as depicted by NOAA's own video and Defendants aerial photos would amount to only 2,500 square feet or less, not 1.63 acres, and should be considered *de minimus*, particularly in light of NOAA's own calculations of 1,040,000 acres of sea grass in the sanctuary.

ARGUMENT

I. THE FISHERS HAD THE RIGHT TO CONDUCT MARITIME SALVAGE IN THE COFFINS PATCH AREA OF THE FLORIDA KEYS NATIONAL MARINE SANCTUARY AND ARE NOT LIABLE FOR DAMAGES.

A. Trial Court's Summary Judgement Ruling On Right To Salvage, Determination of Ownership, And Liability.

The district court's Summary Judgment finding liability under 16 U.S.C. § 1443 ruled the 1992 **maritime salvage** in the Coffins Patch area of the outer continental shelf was *not an activity authorized by federal laws*. The district court's ruling rests upon erroneous legal premises and assumptions: a) The failure to recognize the non-existence of Sanctuary regulations restricting salvage in the Florida Keys in 1992; b) the failure to recognize the exclusion of the salvage area from permit requirements by the Outer Continental Shelf Act, 16 U.S.C. § 470(b)(b); c) the failure to recognize the ruling of this Court in affirming the preliminary injunction which refused to ban salvage and allowed salvage activity to continue using methods other than mailboxes; d) the assumption that maritime law authorizing salvage is not a federal law because it is subject to congressional modification, and e) disregarding the recognition of the treasure salvage industry and activity by the Florida Keys Sanctuary Act and the agreement with Florida regarding salvage of submerged cultural resources.

The district court rejected the prior decision of the Southern District in *MDM Salvage*, 631 F. Supp 311 (S.D. Fla. 1986), governing salvage in the Coffins Patch area based on cases where the salvage was not on the Outer Continental Shelf and where a permit was required by *existing* regulations. The district court then ruled, on the basis of the inapplicable cases, that existing maritime salvage law had been in fact modified by federal law in 1992 to require an express permit to conduct salvage in Coffins Patch. No provision of the Florida Keys Act or any existing regulations, however, barred the 1992 maritime salvage.

The ruling, as set forth in the district court's Order on Summary Judgment, states:

All Judge Aronovitz did in *MDM Salvage* was lift an injunction preventing salvaging Coffins Patch and allow a return to the status quo. The status quo in 1986 was freedom to salvage outside state territorial waters: "the Court cannot and should not fashion injunctive relief which would unnecessarily unduly infringe on freedom of navigation and travel on the high seas . . ." *MDM Salvage*, 631 F.Supp at 312-13. The Defendants ask the Court to interpret this order as giving them a perpetual right to salvage in Coffins Patch. But to read a court order narrowly fashioned to fit the circumstances of one case as the equivalent of a law passed by Congress or regulations adopted by a federal agency vastly overstates the order's reach. The Eleventh Circuit so found in affirming the preliminary injunction in this case: "We discern no basis for the Fisher's contention that their history of prior salvage operations constitutes a defense to the violation of the Sanctuaries Act with which they are charged." *Fisher*, 22 F.3d, at 270. In keeping with that ruling, the Court finds as a matter of law that Judge Aronovitz's 1986 order was not a federal law within the meaning of the Sanctuaries Act that would enable the Defendants to plead the affirmative defense that federal law authorize their activity in Coffins Patch.

The same holds true with respect to the Defendant's claim that maritime salvage law authorized their activity. Congress has the right to modify general admiralty law, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924); *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp 953, 962 (M.D. Fla. 1993). The *Lathrop* court rejected the argument that the Defendants make here. In that case, the plaintiff was salvaging in the Cape Canaveral National Seashore. He argued that the federal law requiring him to get a salvage permit unconstitutionally infringed on preexisting maritime salvage law. In finding against that claim, the Court held that "Congressional enactments restricting the manner in which a potential salvor excavates property located on federally owned or managed lands does not offend" the Constitution. *Lathrop*, 817 F. Supp. at 962.

This Court agrees. Common law principles do not automatically bar Congress from exercising its legislative prerogative to protect federal lands from potentially damaging activity. And the requirement that a salvor act lawfully while salvaging does not offend admiralty law principles. *Id.*, at 963. Other courts have upheld challenges to laws restricting salvage activities in national parks. *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985)(holding that salvager was not entitled to award for artifacts from shipwreck in Biscayne National Park); *Craft v. National Park Serv.*, 34 F.3d 918 (9th Cir. 1994) (upholding fine against divers who used hammers and chisels to excavate a shipwreck located in a marine sanctuary). Neither maritime salvage law nor the common law of finds is a federal law within the meaning of the Sanctuaries Act. Thus, the Court finds 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 Government is entitled summary judgment on this issue.

R5-190-11, 12.

The district court further opined in footnote No. 4:

The Court notes that there may be a question of whether maritime salvage law of the common law of finds governs the Fishers' claim to salvage rights and title in the artifacts. *See, e.g. MDM Salvage*, 631 F.Supp at 312. The Court need not address that question, as the Florida Keys Act bars application of either theory in this case.

R5-190-10.

The Fishers agree with the statement the district court made: "Congress has the right to modify general admiralty law." The district court erred by misstating the issue. The question is not whether Congress could regulate maritime salvage, but rather had Congress in fact done so in reference to Fisher's activity in Coffins Patch. Congress had not. In particular, the terms of the 1990 Florida Keys Sanctuary Act did not purport to bar salvage or the application of the maritime law of finds or salvage, although such use could be subject to future regulation.² The Archeological Resources Protection Act expressly excludes the salvage area on the "Outer Continental Shelf", at issue in this case, from the requirement of a permit to engage in maritime artifact recovery.³ The "Outer Continental Shelf" is the subject of prior

² Under 6(b) mineral and hydrocarbon leasing, exploration, development and production were immediately barred. Section 6(a), 104 Stat. 3091-3092 expressly prohibited certain vessel traffic activity effective with new charts or *Other uses were subject to future regulations* that were to be recommended in the Management Plan, Section 7, 104 Stat. 3092-93 and Section 9, 104 Stat. 3094. See also Note 10, *infra*.

NOAA admitted at trial the Keys Act did not ban salvage. R16-235-39, see quote Note 12, *infra*.

³ (3) The term "public lands" means--
(A) lands which are owned and administered by the United States as part of --
(i) the national park system,
(ii) the national wildlife refuge system, or
(iii) the national forest system; and

congressional legislation that define its boundaries in the Coffins Patch (Atlantic Ocean) area seaward of the three mile limit. 16 U.S.C. § 1301(a) and (b). This is where the salvage occurred. The Florida Keys National Marine Sanctuary is jointly administered pursuant to an agreement between the State of Florida and the United States (NOAA) and is not a National Park.⁴ As a result, the court below failed to properly apply both the Florida Keys Sanctuary Act and prior case law as well as the controlling ruling of this Court on the appeal from the preliminary injunction which expressly allowed salvage, without the use of mail boxes, to continue without a permit.

At the time of the 1992 salvage activity, there was no other federal regulation or law that required a permit to salvage artifacts in the area. The cases urged the government and cited by the district court's Order (quoted p.p. 13-14, *supra.*), *Klein, Craft and Lathrop*, all involved salvage on public lands where a permit *was required* pursuant to the provisions of the Archeological Resources Protection Act, 16 U.S.C. § 470(b)(b), or published regulations or both. Indeed, in *Craft* the subject activity was expressly prohibited by federal regulations. *Craft*, at 920.

(B) all other lands the fee title to which is held by the United States, *other than lands on the Outer Continental Shelf* and lands which are under the jurisdiction of the Smithsonian Institution. [Emphasis Added].

16 U.S.C. § 470(b)(b) (1996).

⁴ See regulations quoted footnotes 9 and 10, *infra.*

Nevertheless, NOAA apparently contends that even without any rules, regulations, or final approval by Congress for the Florida Keys National Marine Sanctuary to “take effect,” that damages were mandated by §§ 1437 and 1443 of the National Marine Sanctuary Act of 1972. To the contrary, even if the sanctuary provisions were fully applicable in 1992, there would be no liability because the maritime salvage was then lawful activity that was not modified or restricted until the 1997 regulations became effective.

The district court expressly noted, but failed to properly apply, § 1443.

...The Secretary of Commerce may seek damages from and injunctions against anyone who destroys or injures sanctuary resources. 16 U.S.C. Sections 1437 and 1443. A person may avoid liability under Section 1443 only if he can show that the damage was (1) caused by an act of God, an act of war, or the act of omission of a third party, (2) *caused by an activity authorized by federal or state law*, or (3) negligible. [Emphasis Added]

R7-39-14.

The district court erred in not recognizing that the maritime salvage law is federal law. A prior right to salvage under admiralty law existed (“an activity authorized by federal ... law”). Admiralty law is part of the law of the United States. See *Romero v. International Terminal Operating Co.*, 354 U.S. 354 (1959) (Admiralty or maritime law is expressly provided under Article III of the Constitution). Admiralty jurisdiction was the cardinal reason why the Constitution provided for the existence of federal courts. With deference to the court below, there should have been no doubt that maritime law is federal law under *Romero* and earlier Supreme Court cases.

Today, there is no room for any doubt that maritime salvage law is an aspect of federal law. See *California State Lands v. Deep Sea Research*, 118 S.Ct. 1464 (1998), which involved salvage *in rem* jurisdiction and the Eleventh Amendment. Although this appeal does not involve Eleventh Amendment, it does involve whether maritime salvage law is a body of federal law.

The judicial power of federal courts extends "to all Cases of admiralty and maritime Jurisdiction." Art. III, § 2, cl. 1. The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was ... the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, *The Business of the Supreme Court* 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Ibid.* The constitutional provision was incorporated into the first Judiciary Act in 1789, and federal courts have retained "admiralty or maritime jurisdiction" since then. See 28 U.S.C. § 1333(1).

Id., at 1470.

In addition to general maritime law regarding salvage, Congress has provided by 46 U.S.C. § 722 specific recognition of salvage off the Florida coast.:

All property, of any description whatsoever, which shall be taken from any wreck, from the sea, or from any of the keys and shoals within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

The Florida admiralty courts even have promulgated special standards for arrest and salvage of ancient wrecks. See *Cobb Coin Company v. Unidentified Wreck*, 549 F.Supp 540 (S.D. Fla. 1982).

Under 16 U.S.C. § 1443(a)(3)(B), there is no liability for damages "caused by an

activity authorized by federal . . . law”, i.e. maritime salvage. This should have ended the matter and NOAA’s claim should have been dismissed. The district court and NOAA would rewrite the statute to read: there is no liability for damages *only if* the activity was expressly authorized by NOAA. The text of the statute is plain, clear, and unambiguous. No regulations existed at the time (1992) prohibiting maritime salvage. Indeed, the very 1997 regulations provide procedures to now obtain a permit to *continue* to engage in such activity based on rights and usage prior to July 1, 1997, not 1990 the date the Keys Act was signed.⁵

This Court in the preliminary injunction hearing did not assert that maritime salvage law is not federal law under 16 U.S.C. § 1443(a)(3). This Court simply ruled the statutory provision did not preclude NOAA from seeking a prospective injunction to prohibit use of mail boxes in salvage operations to protect resources. *United States v. Fisher*, 22 F.3d 262, 268-269 (1994).

The controlling question concerns proper application of the Sanctuary Acts, which the district court claims barred the 1992 salvage. This analysis involves a two step inquiry: First, whether prior to the sanctuary designation, maritime salvage rights existed in the subject areas; Second, if salvage previously was lawful, whether the general Marine Sanctuary Act of 1972 as amended⁶ and the Florida Keys Marine

⁵ 15 C.F.R § 922.167 quoted footnote 10, *infra*.; See also footnote 9, *infra*.

⁶ The Oceans Act of 1992 made several amendments to the Marine Sanctuary Act 16 U.S.C. §

Sanctuary Act of 1990 required a salvage permit in 1992. The Florida Keys regulations, which recognized treasure salvage activity, became effective on July 1, 1997 and recognized rights existing prior to that date. 15 C.F.R. § 922.167.

On the first issue, Judge Aronovitz's decision in *MDM Salvage* upheld the existence of prior salvors' rights. The record below establishes on-going salvage activities in Coffins Patch that had continued in compliance with this Order.⁷ The Fishers cited and relied upon *MDM Salvage* for precisely what it held: prior to designation of Florida Keys National Marine Sanctuary, there were preexisting rights of salvage being exercised. The Fishers do not claim that the case gave a perpetual right that could not be subject to future changes. The Fishers contended, and correctly contended, it was an existing right at the time of the Sanctuary designation. Historically, as this Court well knows, there is controlling and binding case authority (in which the United States submitted to *in personam* jurisdiction) on the right to salvage on the Outer Continental Shelf, as involved here, without a permit and over

1431 et seq. This law, PL 102-587 was enacted on November 4, 1992 *after* the salvage activities at Coffins Patch had ceased.

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Q: All right. Now, you also testified in reference to salvage activity out there, didn't you testify on direct – excuse me, at the preliminary injunction, that you were aware of intensive salvage activity in the Coffins Patch area for over 20 or 25 years?

A. I have been aware of that for at least that long. Again, I said that earlier.

R12-226-113.

the Federal Government's objections. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). This is not disputed or contested.

In the prior appeal, this Court did not question the validity of the holding of *MDM Salvage*. The Eleventh Circuit simply ruled the case would not prevent Congress from enacting subsequent legislation that could effect salvage rights or prevent NOAA from seeking a prospective injunction to restrict future use of certain salvage methods (mailboxes) without a permit in order to protect sea grass. *Fisher*, 22 F.3d at 269. The issues of liability for pre-injunctive damages or for ownership of the salvage artifacts in the possession of the Fishers were not presented to this Court.

The significance of the initial issue of preexisting rights is that such rights dovetail into rights under the Marine Sanctuary Act when the Florida Keys Sanctuary Act actually does become effective. Prior rights are not automatically terminated or suspended by the sanctuary designation. Such rights are expressly recognized to continue subject to future regulation.⁸

⁸

16 U.S.C. § 1431(b). The purposes and policies of this chapter are --

...
(5) to facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.

See 15 C.F.R. § 922.42, allowed activity, 62 F.R. 32154 (June 12, 1997): "All activities (e.g. fishing, boating, diving, research and education) [all involved in maritime salvage] may be conducted unless prohibited or otherwise regulated...." This is further recognized in the 1997 regulations for

With reference to the second key step, whether the general Marine Sanctuary Act of 1972 or the Florida Keys Marine Sanctuary Act of 1990 barred salvage in 1992, no regulations were published until 1997 which did not become effective to regulate salvage activities until after July 1, 1997. The State of Florida's approval of the Sanctuary was expressly conditioned on allowing the past maritime salvage activities to continue under new regulations approved by Florida. The Governor of Florida's objections and requested changes were made because of the need to protect the treasure salvors industry in the Florida Keys, were agreed to by NOAA, and apply "throughout the Sanctuary."⁹ These regulations now provide for issuance of salvage permits for new salvage activities as well as recognizing preexisting salvage rights.¹⁰

Florida Keys National Marine Sanctuary quoted in footnote 9 and 10, *infra*. In 1992, however, no regulations existed.

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National Marine Sanctuaries Act

Section 304 of the National Marine Sanctuaries Act provides that Congress and the Governor have forty-five days of continuous session of Congress beginning on the day on which the final regulations were published to review the terms of designation (i.e., regulations and management plan). After forty-five days, the regulations would become final and take effect, except that any term or terms of designation the Governor certified to the Secretary of Commerce as unacceptable would not take effect in the State waters portion of the Sanctuary. The forty-five day review period began on January 30, 1997, the date the final regulations were published in the Federal Register, and concluded on April 16, 1997. During that period the Governor submitted to the Secretary a certification that the management plan and certain regulations were unacceptable unless specific amendments were made to such regulations. NOAA amended those regulations certified as unacceptable by incorporating the Governor's changes. Consequently, upon their effective date the regulations, as revised by this Federal Register notice, and management plan, in their entirety, will apply throughout the Sanctuary, including within State waters of the Sanctuary.

Regulatory Flexibility Act

The January 30, 1997 Federal Register notice stated:

...
... In response to the [Final Regulatory Flexibility Analysis] (FRFA) FRFA, the Office of the Chief Counsel for Advocacy of the Small Business Administration (SBA) *received several comments critical of certain portions of the FRFA, specifically as regards the treatment of submerged cultural resources and the impacts to treasure salvors.* . . . Because of the time provided by the forty-five day review period under the National Marine Sanctuaries Act, NOAA is supplementing the FRFA to address the comments received by the SBA. The final supplemental FRFA will be *completed prior to the effective date of these regulations.* Upon its completion, NOAA will publish a Federal Register notice summarizing the supplemental FRFA and announcing its availability, and, if appropriate, making any changes to the regulations NOAA determines are necessary as a result of the supplemental FRFA. [Emphasis Added]

62 F.R. 32161, June 12, 1997.

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15 C.F.R. § 922.167 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

(a) A person may conduct an activity prohibited by §§ 922.163 or 922.164 if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval or other authorization in existence on July 1, 1997, or by any valid right of subsistence use or access in existence on July 1, 1997, provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of July 1, 1997, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of this § 922.167; and

(3) The holder complies with any terms and conditions on the exercise of such authorization or right imposed as a condition of certification, by the Director, to achieve the purposes for which the Sanctuary was designated.

(b) The holder of an authorization or right described in paragraph (a) of this section authorizing an activity prohibited by §§ 922.163 or 922.164 may conduct the activity without being in violation of applicable provisions of §§ 922.163 or 922.164, pending final agency action on his or her certification request, provided the holder is in compliance with this Section 922.167.

(c) Any holder of an authorization or right described in paragraph (a) of

As noted, the provisions of the Marine Sanctuary Act of 1972 and of the Florida Keys National Marine Sanctuary and Protection Act of 1990 allow all lawful activity to continue subject to regulation and does not preclude any preexisting lawful activity by its express terms, except for certain designated activities.¹¹ At the time of the 1992 salvage activity in question, the government admitted at trial that the Florida Keys Sanctuary Act did not bar salvage, and acknowledged that no regulations in the Florida Keys National Marine Sanctuary existed for purposes of preventing or regulating salvage.¹²

this section may request the Director to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited.

62 F.R. 32169 (June 12, 1997).

¹¹ See Notes 2 and 8, *supra*.

¹² Ole Vermer, the designated representative of NOAA, testified at trial:

Q: And I think you've already stipulated no regulation prohibited the prior lawful activity of salvaging?

A: I said the Florida Marine Sanctuary Protection Act did not expressly prohibit commercial salvage.

R16-235-39 ; *See also* testimony of Bill Causey the sanctuary manager.

Q: You say that N.O.A.A. wouldn't give verbal permissions, correct, under direct examination?

A: That's correct.

Q: Isn't it true in January of 1992 there were no written procedures in effect for issuing permits?

A: That's true.

Q: Okay. Didn't you also tell Mel Fisher that N.O.A.A. was not writing permits at that time?

A: That's correct.

R12-226-130, 131.

Indeed no regulations existed *period*. As a result of its failure to recognize maritime salvage as a lawful activity prior to the date of the Florida Keys Sanctuary Act, the district court failed to properly apply the Act. It even failed to properly apply its own prior ruling and that of the Eleventh Circuit on the preliminary injunction in determining ownership of the recovered artifacts and liability for any damages.

The Fishers' right following the Sanctuary designation to conduct maritime salvage in the Coffins Patch area was recognized by the prior ruling of the district court in granting the preliminary injunction and again by this Court in its ruling affirming the preliminary injunction. The injunction expressly allowed maritime salvage to continue. The injunction only prevented use of mailboxes, without a permit, that threatened to cause harm to sea grass.

The district court's prior Order on Preliminary Injunction, as quoted by the Eleventh Circuit, stated:

The Magistrate Judge held that irreparable injury would result if the Fisher activities were not preliminarily enjoined and that a preliminary injunction would serve the public interest. The magistrate judge concluded, however, that "(t)he injunction sought by the government, barring the defendants from all salvage activities in the Sanctuary, is over-broad and unsupported by the evidence." Since the "government has only shown damage to the Sanctuary from the Defendant's use of prop wash deflectors...an injunction barring the defendants from employing prop wash deflectors would be sufficient to ensure that that sanctuary is not further damaged. This injunction should not bar the defendants from pursuing their livelihood by using other salvage techniques in the Sanctuary area."

United States v. Fisher, R2-51.

The Eleventh Circuit's opinion provided at its conclusion:

Considering all the circumstances, the district court justifiably concluded that the government had shown a substantial likelihood of success on the merits and did not abuse its discretion in granting the limited preliminary injunction, *prohibiting only the use of prop wash deflectors*. [Emphasis Added]

Id., at 270.

The Fishers submit the salvage activities were lawful and indeed authorized before and after the designation of the Florida Keys National Marine Sanctuary by the preliminary injunction order of this Court as well as the precedent cited, *supra*.

The preliminary injunction permitting salvors to continue to pursue their prior right of salvage was not careless drafting by the trial court or haphazard affirmation by this Court. This construction of sanctuary law would now be in accord with the new 1997 regulations. Prior rights and usage, including treasure salvage, are expressly recognized the regulations for the Florida Keys National Marine Sanctuary that became effective on July 1, 1997.¹³ It would also be consistent with the November 1992 amendment to 16 U.S.C. § 1443(c) that provided:

(c) Access and valid rights

(1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.

¹³

See notes 8, 9, 10, and 12, *supra*. See also July 9, 1997 supplemental information referring to treasure salvors and commercial treasure salvors. 62 F.R. 36655.

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

16 U.S.C. § 1443(c).

The final aspect of liability for injury caused by salvage needs to be addressed. Although artifacts from shipwrecks and sea grass, along with other categories, may be considered to be sanctuary resources, there is a legal and cultural distinction. For purposes of the maritime or admiralty law, recovery of shipwrecks and recovery of sea grass are not identical or interchangeable terms. No one was harvesting sea grass which is regarded as a nuisance when it washes ashore. There was a preexisting legal right of maritime salvage of shipwrecks. There also was a recognized livelihood and subsistence right to continue salvage. The Florida Keys National Marine Sanctuary is the only sanctuary that recognized treasure salvage activities as rights that should be protected and allowed. The statements to the House Committee by Congressman Fascel of Florida, the bills co-author, urging his bill to be passed by Congress¹⁴ are

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. . . The Management Plan that is implemented should enable those who make their livelihood from the reefs *to continue to be able to do so*. While the reefs as an ecological treasure, they are also a valuable economic recreational resource. For various cultural, historic and economic needs, activities such as commercial and recreational fishing and *treasure salvaging must be allowed to continue* responsibly where they will not cause damage to the reef itself. The consideration of the *continuation of these activities* must be a factor in the formulation of the management plan in a manner which is consistent with the NMSP's mission.

Hearing, Committee On Merchant Marine And Fisheries, May 10, 1990, H.R. 3719, Serial No. 101-94, admitted Ex. 4, R8-31-149 [Emphasis Added]

embodied in the aforementioned 1997 regulations of the Florida Keys National Marine Sanctuary.

B. No Damage Liability For Salvage Activity That Preceded The Injunction And The Approval Of Sanctuary Rules By Congress In 1997.

In the prior preliminary injunction appeal, the major contention between the Fishers and NOAA was whether the provisions of 16 U.S.C. § 1434(b) applied to a marine sanctuary designated by Congress instead of by the Secretary of the Interior. If § 1434(b) applied, the designation of the sanctuary would not “take effect” and become final until approved by Congress following the expiration 45 day period from publication of the rules and regulations. NOAA would not be able to claim prior damages under § 1443. While NOAA’s right to a prospective injunction would not be precluded by the application of § 1434(b), the right to the artifacts and damages would be precluded, as § 1443 then could not be used by NOAA.

NOAA’s argument in the prior appeal to this Court stated § 1434(b) did not apply and that Fishers’ position was wrong. Fishers contended that the designation by Congress instead of the Secretary, still required under the very wording of the Florida Keys Sanctuary Act subsequent approval by Congress after the expiration of the 45-day waiting period following publication of the proposed regulations by the Secretary and the acceptance or rejection of changes requested by the State of Florida. Section 7(a) of the Florida Keys Sanctuary Act, 104 Stat 3089, 3092, provided:

SEC. 7(a) PREPARATION OF PLAN. -- . . . The Secretary of Commerce shall complete such comprehensive management plan and final regulations for the Sanctuary not later than 30 months after the date of enactment of this Act. In developing the plan and regulations, the Secretary of Commerce **shall follow** the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1433 and 1434**Error! Bookmark not defined.**), **except** those procedures requiring the delineation of Sanctuary boundaries and development of a resource assessment report. [Emphasis Added]

Florida Keys National Marine Sanctuary and Protection Act, 104 Stat 3089, 3092 (1990).

Under Section 7(a), the difference between designation by Congress and by the Secretary was recognized by the Secretary for a Sanctuary by Congress, delineation of Sanctuary boundaries and assessment report was not required to be submitted. NOAA argued, notwithstanding the express language of Section 7(a), making § 1434 applicable (Section 304 of the Act of 1972), that its interpretation of the Act was entitled to special deference.¹⁵ Unfortunately, this Court in an opinion by Judge Friedman accepted NOAA's prediction and rejected Fisher's argument:

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The structure of the statute also confirms that Congress intended to authorize MPRSA enforcement immediately upon enactment of the statute.

The language and legislative history of the Sanctuary Act establish that Congress authorized immediate MPRSA enforcement in the Sanctuary. However, even if the Fishers had been able to identify some ambiguity in the Sanctuary Act or the MPRSA on this point, NOAA's interpretation of the statute is entitled to deference as a reasonable interpretation by the agency responsible for administering the pertinent statutes.

These designations would be empty gestures if, as the Fishers argue, congressional designation is tantamount to an administrative proposal [designated by Secretary of Interior].

See Brief of the United States (Appellee), No. 92-4799 at 30, 32.

These provisions show that the Florida Keys Act itself established the Florida Keys Sanctuary and did not require any further action by the Administration for the sanctuary to come into existence.

...
Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved that right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

Fisher, 22 F.3d, at 267 and 268.

The Federal law as now promulgated in the Federal Register proves that NOAA's prediction was wrong and that Fishers' contention was correct. The Federal Regulations were submitted by NOAA to Congress after complying with the other provisions of the Florida Keys Sanctuary Act referred to *supra* and quoted in footnotes 9 and 10, *supra*. The Federal Regulations as duly promulgated are now federal law, including the modifications made after the objection by the State of Florida and acceptance by NOAA relating to the protection of salvage rights.¹⁶

When Congress "designated" the Florida Keys sanctuary, the sanctuary was "in effect" for purposes of developing a management plan and proposing rules and

¹⁶

62 F.R. 32154, 32160, 32161 (June 12, 1997), quoted in Notes 9 and 10, *supra*.

regulations, but it had no substance – no rules, regulations or applicable laws. This is not disputed by the parties – it is stipulated. The sanctuary cannot fully “take effect” until compliance with § 1434(b) as required by Section 7(a) of Florida Keys Sanctuary Act. Like the premature report of Mark Twain’s death, NOAA prognostication that § 1434(b) did not apply for the Sanctuary to “take effect” was greatly exaggerated. If § 1434(b) applies, NOAA has no basis to claim damages or ownership of the artifacts of the Sanctuary under 16 U.S.C. §§. 1443 and 1437.

NOAA arguments to this Court in the prior appeal were made to mislead the Court into making predictions that NOAA knew were incorrect. NOAA’s counsel argued one position to this Court – even contending Fisher’s argument was absurd,¹⁷ and then NOAA turned around and in the federal regulations and did exactly the opposite with Congress. NOAA apparently was fully aware that § 1434(b) required approval by Congress and Florida and was not candid with this Court. NOAA using its professed expertise at statutory construction enticed this Court to go out on a limb

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NOAA argued:

The absurdity of the Fishers’ argument is illustrated by their contention that upon promulgation of the management plan, the designation of the Florida Keys National Marine Sanctuary must be resubmitted to Congress for forty-five legislative days before taking effect. First, the forty-five day period required in 16 U.S.C. § 1443 begins from the notice of designation: even if Congress had intended the Sanctuary Act to be a mere “notice of designation,” this period already has passed. Second the statutory delay is intended to provide Congress with an opportunity to review, and possibly veto, an administrative designation; Congress had no need for a “waiting period” to review a law passed by both Houses and signed by the President.

NOAA’s Brief, No. 92-4799, at 39.

and then sawed it off. Unfortunately, the limb fell and hit the Fishers killing their argument to this Court. NOAA does a better job in predicting the weather than in interpreting statutes.

NOAA could have sought a preliminary injunction to protect rights and status during the interval between the designation by Congress and the final approval by Congress and Florida after the promulgation of rules and regulations. In essence, this is really what the limited preliminary injunction granted. NOAA eschewed this rational approach because it wanted ownership of the artifacts that were found, recovered, restored, and maintained by the Fishers and damages to boot. This Court's preliminary injunction Order is more consistent with the interval protection rationale than NOAA's contention of the inapplicability of § 1434(b) as the Order expressly allowed maritime salvage to continue. At most, the preliminary injunction recognized NOAA was within its rights to protect sea grass from further injury during this interval by restricting the continued use of mail boxes, until or unless a permit to use mailboxes was secured.

In 1991-92 NOAA had been planning interim regulations to prohibit salvage, pending completion of the management plan and regulations, but was precluded to do so by Presidential proclamation placing a moratorium on new regulations. R8-31-73, 75, 76. NOAA then shifted tactics and obtained a preliminary injunction that restricted certain salvage methods until final regulations were issued. Even if the limited preliminary injunction prospectively enjoining the Fishers for using mailboxes

in Coffins Patch was correct, it is now manifest that there is no basis for contending any past violation of then existing regulations and thus no basis for any claims by NOAA of ownership or for damages.

To summarize, if the procedure mandated by Section 7 of the Florida Keys National Marine Sanctuary Act that requires submission to Congress under 16 U.S.C. § 1434(b) for the Sanctuary to “take effect” and for damages to be authorized by § 1443 is followed, there is no liability. If § 1434(b) is not followed, there is no liability under § 1443 because the 1992 maritime salvage was an activity authorized by federal law that had not been modified by any existing law or regulation. In either event, there is no liability.

II. TRIAL COURT IMPROPERLY AND RETROACTIVELY APPLIED STATUTES IN THE DETERMINING DAMAGE

A. Preface – Vastly Unreasonable Amount - Retroactivity

The trial court determined almost \$600,000 in damage for 1.63 acres of sea grass. By comparison, under § 376.121(5)(a), Florida Statutes, the State of Florida calculates sea grass damage at one dollar (\$1.00) per square foot while the assessed property tax value is one hundred dollars (\$100.00) per acre. The difference is \$600,000 versus \$70,000 for 1.63 acres (Florida Statute per acre) or \$163 (assessed value of sea grass).

The district court damage award was in three increments: \$351,648 for restoration and monitoring under the Habitat Equivalency Analysis; \$211,130 for

response and monitoring under 16 U.S.C. §§ 1432 (6)(C) and (7); and \$26,533 for interest under 16 U.S.C. § 1443 (a)(1)(B). R7-39-18, 19. The statutes allowing monitoring cost, § 1432(6)(C), and allowing interest, § 1443(a)(1)(B) were enacted after the salvage had been completed and after suit had been filed. The Habitat Equivalency analysis was authorized for oil spills and was improperly determined even under retroactive application of the rules. Because of violations of retroactivity, the entire damage award must be vacated and set aside.

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 US 244, 265 (1994); See also *Hughes Aircraft Company v. Unites States*, 117 S.Ct. 1871, 1876 (1997).

B. The Court Erred In Finding The Habitat Equivalency Analysis To Be Authorized, Proper And Reasonable.

NOAA's Habitat Equivalency Analysis adopted by the district court is a faulty and unauthorized model for calculating monetary damages and inapplicable to such small areas of alleged damage. As noted, the use of HEA to prove damage for 1.63 acres drastically overstates the amount.

The \$351,648 restoration cost figure included almost \$200,000 (\$194,082) in monitoring costs which were not allowed at the time of the injury or filing of the suit. Of equal importance there were no regulations authorizing the use of the HEA at the time of the injury or the filing of suit. Def. Ex. 59, 59a. It was derived from the Oil Pollution Act of 1990. The final rules published by NOAA for its use were not effective until February 5, 1996. The HEA rules require certain conditions precedent including consultation and coordination with responsible parties for to “ensure assessment costs are reasonable.” 61 F.R. No. 4, 443, January 5, 1996; quoted in Note 18, *infra*. The Rules, of course, were not followed. See discussion p. 39, *infra*

The HEA model has only been used twice to analyze damage to sea grass. The only incident, 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 limited and isolated damage area such as in this case. No other court decision has upheld the application of the HEA model to any type of sea grass injury. Furthermore, this is the first case where the model has been used for a sea grass impact injury. R14-234-97, 98. Indeed, Mr. Fonseca testified that in all of the restoration projects in which he was involved, none used the HEA model. R14-234-9, 10. The model is not appropriate for use in this case primarily because of the area of damage and the recovery horizon. R14-234-172 to 175. The recalculation made by Brian Julius showed 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. R14-234-136, 137.

The appropriate size limitation on HEA for sea grass injury is beyond the expertise of the NOAA economist, Brian Julius, who made the ultimate decision to use the model. R14-234-7. The restoration project described by Dr. Thorhaug, based upon the same area as NOAA's project, would be substantially less expensive, \$37,500.00. R14-234-176 to 184.

The court erred in a finding that the HEA was an authorized, appropriate and reasonable estimate of damages.

C. NOAA Not Entitled To Response Cost Under 16 U.S.C. §§ 1432(6)(C) and (7) Or Interest Under 16 U.S.C. § 1443.

1. Government Failed to prove Prima Facie Case for Response and Assessment Damages.

The trial court found Kane Fisher and Salvors, Inc., liable for "response and damage assessments costs incurred by the government in the amount of \$211,130 under 16 U.S.C. § 1432(6)(C) & (7)." R7-39-19. [Emphasis Added] Any damages as a matter of law must be awarded only under § 1432(7), as § 1432(6)(C) which provides for monitoring costs was **not enacted until November of 1992.** 106 Stat. 5040.

The trial court apparently relied exclusively upon part of a stipulated fact taken out of context that the NOAA expended \$211,130 in "response and damage

assessment costs.” R7-39-12, at n. 4. The actual stipulation reads:

NOAA has incurred \$211,130 in assessment and response costs in the matter. *However*, the Defendants *do not* stipulate that the United States may recover assessment and response costs in this matter. [Emphasis Added]

R5-185-11.

The Fishers never agreed to the necessity of reasonableness of such expenditures. Nor did the trial court make any findings regarding the reasonableness or necessity of the government’s actions in “responding to” or assessing the damage to sea grass in Coffins Patch.

The statute under which the court assessed “response costs” defines such costs as:

[T]he costs of actions taken or authorized by the Secretary to minimize destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss or injury.

16 U.S.C. § 1432(7).

Likewise, the statute imposing liability for the costs for “response actions” contemplates that such actions are:

[T]o prevent or minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risk of such destruction, loss, or injury.

16 U.S.C. § 1443(b)(1).

The government submitted no evidence that any action it took fulfilled the objective contemplated by Congress in defining “response costs” and authorizing

“response actions.” Nor could it, as the government expert admitted “reasonableness” as to response costs was not considered:

BY MR. VANDERCREEK:

Q. Does it make any difference as to whether or not the NRD cost of \$200,000 [211,130] is considered reasonable or not?

A. [NOAA Witness Brian Julius] I’m not sure I understand the question.

Q. Well, does it make any difference as to whether the \$200,000 is reasonable

MR. MUELLER: Your Honor, again, he said he did prepare the \$211,000 figure. It was provided to him. What opinion he has is irrelevant.

THE COURT: Counsel, unless I’m misunderstanding, and I may be, these costs are just costs they have given him, not that he has determined based on whatever the figures were.

MR. MUELLER: In fact, it’s been stipulated to.

BY MR. VANDERCREEK:

Q. You are not testifying as to being offered as an expert as to the reasonableness of the costs; is that correct?

No, I’m not making any claims about the nature of those costs other than those represent damage assessment costs that have incurred in the past.

MR. VANDERCREEK: I believe there was a no to my question?

THE COURT: I believe it was.

R15-238-93, 94.

2. **NOAA Is Not Entitled to Presumption of Reasonableness or Necessity.**

In assessing the “response and damage assessment” costs of \$211,130, the court apparently found, *sub silentio*, that the government is entitled to a presumption of the claimed amount of “response and damage assessment” expenditures, regardless of the necessity or reasonableness. However, the statutory authority for the imposition of such costs is silent as to any presumption created in favor of the government for such expenditures that relieves it from presenting evidence that its actions and expenditures were authorized, necessary and reasonable. 16 U.S.C. § 1443.

Had Congress desired to enact an evidentiary presumption for recovery of response and damage assessment costs, it could and would have done so. Congress has enacted a specific presumption in the National Marine Sanctuaries Act for articles found aboard vessels. See 16 U.S.C. § 1437(d)(4). Congress has enacted a specific statutory presumption for damage assessment costs in other areas. Compare 16 U.S.C. § 1443 with 33 U.S.C. § 2706 (e)(2) which applies to Oil Spills pursuant to 33 U.S.C. § 2702(b)(2)(A). Even this rebuttal presumption requires compliance with procedural rules (which NOAA did not do here)¹⁸ or there is no presumption.¹⁹

18

A. General

Coordination among all parties affected by an incident is crucial to an efficient and effective assessment. Coordination, in pre-incident planning and throughout the assessment. Coordination, in pre-incident planning and throughout the assessment, can reduce time until restoration is implemented and ensure that assessment costs are reasonable. More detailed discussion of some

In contrast, the statutory provisions authorizing award of response and damage assessment costs in this case contain no specific or implied language creating any presumption. If NOAA had allowed the Defendants to participate in Dr. Hudson's survey in 1992 mutually accessible assessment measurements could have occurred. Although NOAA cannot pick and choose which regulations apply, it nevertheless has consistently done so. The failure to include Fisher representatives in the initial assessment was highly prejudicial. The trial court found NOAA's experts more credible because they viewed the alleged damage sites in early 1992. R7-39-17. NOAA did not specifically identify and give the exact location of holes where they claimed damage occurred until ordered by the magistrate court to do so just before the May 1997 trial. R5-189; R5-201.

The damage assessment is facially unreasonable. The incident occurred in the early part of 1992. In 1992, the report of Brian Julius, NOAA, economic expert testified the NRDA damages assessment costs as of April 1, 1995 were \$68,000. The

aspects of coordination appears in Appendix A at the end of this preamble.

...
D. Coordination

With Responsible Parties Active and early involvement of responsible parties may eliminate some of the problems trustees have encountered immediately following an incident, such as lack of funding, personnel and equipment. In addition, a joint trustee-responsible party assessment may be more cost effective and avoid duplicate studies. *Thus, the rule requires the trustees to invite the responsible parties to participate in the assessment.* [Emphasis Added]

61 F.R. No. 4, 443, January 5, 1996.

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61 F.R. No. 4, Part IV, 443, January 5, 1996.

figure is now \$211,130 even though there has been no salvage activity since 1992. The governments own reports show the arbitrariness and unreasonableness of the figures claimed. Adding a column of figures is not proof of a prima facie case. The issue is not whether the addition is accurate, the issue is whether the proper figures were added. See R15-238-63 to 68; Defendant's Ex. 59 and 59(a).

3. The Court Improperly Added Interest On Response And Assessment Costs.

The trial court also improperly added interest in the amount of \$26,533 that supposedly accrued on NOAA's assessment and response costs, relying upon 16 U.S.C. § 1443(a)(1)(B). R7-39-19. This was error.

Sub-paragraph (B) of 16 U.S.C. § 1443(a)(1), which authorizes interest on response costs and damage assessments, was not enacted until November 4, 1992, the effective date of the Oceans Act of 1992, Pub. L. 102-587, § 2110(a), 106 Stat. 5046 (hereinafter "Oceans Act"). Under the Supreme Court cases of *Landgraf*, 511 U.S. 244 (1994), and *Hughes Aircraft*, 117 S.Ct. 1871 (1997), the district court in the case at bar erred.

There is nothing in the Oceans Act that explicitly or implicitly expresses congressional intent to retroactively impose interest on response and damage assessment costs under 16 U.S.C. § 1443(a)(1)(B). The conduct giving rise to this action occurred in February and March 1992, months before passage of the Oceans Act. The newly enacted 16 U.S.C. § 1443(a)(1)(B) imposed an obligation on

appellants that did not exist at the time they committed the allegedly violative conduct. As the Supreme Court has noted, “At common law judgments do not bear interest; interest rests solely upon statutory provision.” *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 840, 110 S.Ct. 1570, 1578 (1990) quoting *Pierce v. United States*, 255 U.S. 398, 406, 41 S.Ct. 365, 368, (1921) (*Post-judgment interest* statute did not apply retroactive to pending action).

The trial court improperly retroactively assessed interest on response and damage assessment costs. Not only was the statute improperly applied retroactively, the government even failed to follow the statutes directives that are a condition precedent to obtaining interest.

The statute authorizes “interest on [response costs] calculated in the manner under section 2705 of Title 33.” This latter statute provides that “the period for which interest shall be paid is the period beginning on the 30th day following the date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.” 33 U.S.C. § 2705(b)(1). Because there was no evidence that the government presented a claim to Kane Fisher or Salvors, Inc. for the asserted amount of response and assessment costs, the government is not entitled to interest, even if the statute were retroactively applied.

III. NO SIGNIFICANT PERMANENT INJURY TO SEA GRASS BEDS FROM SALVAGE ACTIVITIES

A. No Stipulation 1.63 Acres Of Sea Grass Injury – McIntosh Report

Contrary to the district court's findings, the Fishers never stipulated the 1.63 acres at issue. R5-190-6. The Fisher's had sought reconsideration and rehearing in reference to the 1992 order that granted the Preliminary Injunction on the basis that any injury to sea grass would be *de minimis*. In support of this request for rehearing, a preliminary study by the McIntosh group was proffered. This study was based upon a preliminary analysis of an aerial photograph showing 103 depressions or holes, but with no determination or plotting that the holes matched the logs and had in fact been dug by Fisher and Salvors, Inc., during the first three months of 1992. The report further acknowledged that it had not been ground-proofed. R2-35.

The government objection to consideration of the McIntosh report was sustained by the district court in denying the request for rehearing of the preliminary injunction. R2-41. The government now argues the exact opposite contending that the report to which they successfully objected, should be considered as a stipulated measure of damages by the Fisher group.

The calculation of 1.63 acres under the McIntosh Report and the subsequent government expert's report supporting the McIntosh Report was based upon two assumptions. First, that mailboxes or prop wash deflectors would "blast" directly through sea grass beds, and second, that the percentage of sand to sea grass in the

area where Kane Fisher and Salvors, Inc., used mailboxes was in the same proportion as other areas of Coffins Patch where Fisher had not operated. No determination was made by the government as to whether sea grass previously existed in the exact area of the depressions by Fisher's mailboxes. The government's expert, Professor Zieman based his opinion of the 1.63 acres calculation on the McIntosh approach of comparing the area of the holes with the general percentage of sea grass. This 1.63 acres was the figure found by the court. See R7-39-16. The expert for the Fisher group, Dr. Wanless, said that the preliminary McIntosh report was not acceptable science because it had not been compared with the actual ground conditions prior to the Fisher's salvage activity in the Coffins Patch area. Dr. Wanless' opinion of approximately 2,500 square feet was based upon a comparison of before and after aerial photographs, log books, and ground-proofing. Gov. Ex. 19; Def. Ex. 33B and 33C; See pages 50-53, *infra*.

The trial court failed to make factual findings regarding either the ability of mailboxes to actually penetrate sea grass beds or the percent of sea grass to sand in the precise area of Coffins Patch actually worked. The finding of the court below is dependent upon two undetermined assumptions: a) that the mailbox functioned like an explosive bomb and b) that the percent of sea grass and sand in the area actually salvaged by Kane Fisher was proportional to other areas of Coffins Patch. Neither assumption is record based, and, hence, the conclusion of the court below is clearly erroneous.

B. Prop Deflectors Or Mailboxes Are Not Bombs And Will Not Dig Through Sea Grass Beds.

None of the government's experts have ever witnessed a mailbox in operation. Others who had witnessed a mailbox in operation testified that it will not pass through sea grass.²⁰ No witness testified to the contrary. This is in accord with the evidence from contemporary literature in reference to salvage operations in the use of mailboxes.²¹ In loose sand the downward thrust of the prop wash through deflectors (or mailboxes) can dust a depression 10 feet in depth and 20 or more feet in diameter in less than a minute. The low pressure vertical water column will not penetrate the thalassia beds which have a 2 to 3 feet thick interwoven mat-like root structure. If the mailbox depression is at the edge of thalassia bed, the removal of sand can cause a portion of grass to "undercut and slump off" into the depression. R8-31-190.

The hyperbole of 2,000 pound bomb caters equating to mailbox operations is clever, catchy and quotable. It is also false and repudiates basic laws of physics. The prop wash must pass through existing water and counter existing water currents

²⁰ R13-227-171; R17-236-57.

²¹ Meylach, *Diving To A Flash Of Gold*, admitted:

"The blower will not cut through thick grass and, in fact, is useless where grass is encountered. But it is especially effective where large areas are involved and speed is therefore essential.

R8-31-241, Def. Ex. 15 at 342

which slows its effect. A common illustration of the effect of water on pressure would be a Jacuzzi jet after the tub or pool is filled with water. The low pressure impact physically is of an entirely different quality from the explosive high pressure effect of a bomb. Bombs kill fish and would kill any diver in the water. Mailboxes do not and would not. The bomb's explosive force expands outwardly from a common nucleus at a rate of speed as measured in terms of a thousandth of a second at the center point with enormous pressure per square inch. The prop wash deflector works in loose sand and mud; a bomb destroys reinforced concrete bunkers and submarines.

This error was perhaps best manifest in the testimony of Mr. Henry Hudson who led a team to measure and video record sea grass damage in the depressions or holes where Kane Fisher was believed to have worked just a few weeks earlier. Mr. Hudson was asked, where is all the sea grass? His explanation expressly relied upon the explosive bomb or blown up fallacy.

“I thought we discussed that yesterday, sir. It is impossible to – the sea grass was destroyed by the effect of the mailbox device, and the evidence is clearly in the video that the sea grass was destroyed, and parts of that sea grass is there.”

R13-227-20.

“So when you have an explosion from a bomb, you don't have a picture left of the house. You have a picture left of the hole and what remains of the house around the perimeter of the hole.”

R13-227-20.

The Mr. Hudson's video tracks of the depressions were mapped by Dr.

Wanless, which enabled the video viewer to determine whether the picture of thalassia sea grass in the depression is the same sea grass bed except for taken at a different angle. Any portion of the sea grass bed that would have slumped off, fallen off, or edges undercut by removal of sand underlying the root mass, would be visible at the side of the depression or in the bottom of the depression. This was the crucial piece missing from the NOAA videos, the NOAA testimony, and all of NOAA's case - namely the absence of chunks of uprooted sea grass. R14-234-138, 139. NOAA has not and cannot demonstrate 1.63 acres of damaged sea grass, because it did not happen.²² Without Mr. Hudson's house-being-blown-up theory (i.e. sea grass being vaporized or disintegrated by use of mailboxes), the absence of 70,000 plus square feet of sea grass clumps, etc. from Mr. Hudson's nearly contemporaneous video cannot be explained. The videos do show a few clumps, a couple of bales and some slumping, which, whether caused naturally or by Kane Fisher should set the parameters of any provable injury. The videos show substantially no more than 5%

²²

The court found that no severe storms had occurred during or immediately after the 1992 salvage period. R7-239-7. Therefore any argument that the chunks were blown or washed away is nonsense. 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 sea grass around depressions only totals under 2500 square feet of lost sea grass - an undisputed negligible amount. R14-234-109.

of the claimed 70,000+ square feet. These videos are the best evidence of the damage and this evidence totally disproves NOAA's estimate. This is the key point of contention between the parties as to how much was damaged. Dr. Wanless carefully walked everyone through his analysis of the videos and photos in reaching his conclusion that, at most, the area of sea grass that could have been damaged was 2,500 square feet. R14-234-107, 109. NOAA expert, Dr. Zieman admitted that he did not even compare the June 11, 1992, photograph with the May 14, 1992, photograph. R14-234-34.

The NOAA's own witness repudiated its "bomb" theory when, as the Government's archaeological expert, he was asked how he would recover artifacts from Coffins Patch and said, "By using mailboxes." The mailbox has been the archeological tool most used to recover scattered artifacts from shallow wreck sites disturbed by storm and natural events. The district court witnessed and examined fragile artifacts recovered by Kane Fisher's operation. The force is efficient to dust away loose sand to reveal and recover artifacts without destruction to the artifacts. The very reason the mailbox is used by commercial salvors is because artifacts can be found and recovered without injury. Intact artifacts have far greater value which provides significant economic motivation for a salvor to use tools that do not result in harm.

C. Area Where Kane Fisher Worked Using Mailboxes Was Sand

Stefen Sykoras' (who was a party to the 1986 *MDM Salvage* case) testimony at the Preliminary Injunction hearing (and thus a part of this record) was not challenged by NOAA, but has been almost entirely overlooked by the district court's ruling. The precise area where Kane Fisher worked and where NOAA contends the damage occurred in Exhibit 151-D was a sandy tract and had been worked extensively in the past²³. Sykoras' earlier testimony also proves that the narrow corridor in which the holes are shown were sand prior to 1992, as was depicted on the earlier aerial photos.²⁴

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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.”

R12-226-113; see also Footnote 7, *supra*.

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Stefan Sykora testified at the preliminary injunction that hundreds of holes had been dug in the same “precise” lines 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.”

R8-31-227, 228.

Sykora testified that salvor Bobby Jordan was using a blower in 1991 and doing the same thing Kane Fisher was doing in 1992. R8-31-226. Prior years of others exercising their livelihood

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. Dr. Harold Wanless from his on site inspection, review of aerial photography, and review of video described the red lines he drew on Exhibit 19 showing the natural sand channel through Coffins Patch as "a very fundamental feature." R14-234-87. The sand channel that NOAA claims was predominantly sea grass was always a sand channel or at least was one before Kane Fisher and Salvors, Inc. arrived in January 29, 1992. Viewing only the February 14, 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. R14-234-110.²⁵

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."

R8-31-223

25

Curtis Krueer'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 pre-existing area either by natural or manmade areas of involvement in this particular area?

A: Yes.

Q: And again, that it between [stations] 3 and 15?

A: The aerial shows what it shows.

Q: Okay.

The district 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.

R14-234-77, 85.

The district court's findings are contrary to these facts. Between January 29, 1992 and February 14, 1992, 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 the court that the February 14, 1992, photo shows the sand channel or "damage tract" existing in the very area subsequently worked by Fisher. R14-234-82. It is logically impossible for one to be liable for destroying something that simply did not exist. Curtis Krueer, NOAA's expert, stated it best, "If there was no sea grass where he [Kane Fisher] excavated, there would be no damage to sea

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."

R13-227-118.

grass.” R13-227-138. There simply was not 1.63 acres of damaged sea grass in the area of the sand channel that the Fishers worked.

The satellite image of August 25, 1991, Def. Ex. 33B and 33C, depicts the presence of the sand channel. R14-234-41 to 42, 76 to 79, 85.. The best that NOAA could do to try and refute the evidence was Krueer’s statement that the sand to sea grass ratio in the general area was “[a]t one time, it was possibly a 50/50 mix.” The sea grass that NOAA claims covered the sand channel where the holes were subsequently done never existed on January 29, 1992 – it never existed on August 21, 1991. From 1975 to the present, the sand channel had in fact shrunk, i.e. there is more sea grass in the area now than there was in 1975 or 1982. R14-234, 79, 82, 88. In fact, the area bordering the sand channel has increased from 37.4 percent sea grass coverage in 1982 to 50.1 percent coverage in 1992, or roughly two and one-half acres. R14-234-79, 82, and 88. This was during the period of extensive salvage activities.

Dr. Wanless’ testimony involving Exhibit 156 offered the only scientific explanation of exactly how much sea grass could have been damaged by the activities of Kane Fisher and Salvors, Inc. The damage tract and locations claimed by NOAA’s experts were superimposed with aerial photographs and the known sea grass topography of the area in Coffins Patch. R14-234-107, 109.. Dr. Wanless marked the areas where there could have been sea grass as red on the exhibit and then drew a square of one (1) acre and a square of 1.63 acres to show that all of the red areas do not cover even one (1) acre, let alone 1.63 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." R14-234-109.

NOAA's method of determining the extent of sea grass damage was unworkable because it failed to consider that the line of salvage activity was a sandy tract. R14-234-76, 86, and 88. The Coffins patch area consisted of linear and patchy sea grass colonies. From this assessment, "[t]he only proper way to answer what damage may have been done is to look within the sand tract itself." R14-234-88. To the extent any sea grass was damaged such damage was *de minimis*. R14-234-102, 111.

NOAA had the burden to introduce competent evidence of damages. NOAA failed because (1) it relied on the fallacy that a prop wash deflector is a bomb solely because it dug a large hole in loose sand and (2) it ignored direct evidence that the precise area worked was in a sandy channel or tract clearly discernable on aerial photos.

There is only one explanation that is 100% consistent with NOAA's argument, Mr. Hudson's videos, mailbox operations, the recovery of artifacts, and the laws of physics. That explanation is very simple: Kane Fisher was using mailboxes in sandy areas. This is also 100% consistent with all of the aerial photos, as well as Kane Fisher's logs and the testimony of persons like Sykoras who were actually involved in the salvage operation.

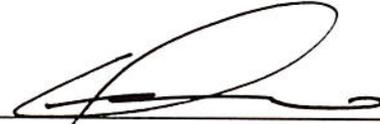
CONCLUSION

The case should be reversed and remanded with direction to enter judgment in favor of the Appellant-Defendants, Kane Fisher, Salvors INC., and Motivation.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on this 18 day of July, 1998, a copy of the foregoing has been furnished by U.S. Mail to **John T. Stahr**, Esquire, Department of Justice, Appellate Division, P.O. Box 23795, L'Enfant Plaza Station, Washington, DC 20026 and **Barbara Bisno**, Esquire, United States Attorney, 99 Northeast 4th Street, Miami, 33132.



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