

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CASE NO. 92-10027-CIV-DAVIS
CASE NO. 95-10051-CIV-DAVIS

v.

ORDER ON SUMMARY JUDGMENT

MELVIN A. FISHER, et al.,
Defendants.

FILED by *MLB*
APR 30 1997
CASSIUS J. FORTNA
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

MOTIVATION, INC.,
Plaintiff

v.

UNIDENTIFIED, WRECKED AND
ABANDONED SAILING VESSEL, etc.,
Defendant.

THIS MATTER is before the Court on the United States of America's Motion for Summary Judgment (D.E. # 146). The Defendants in Case Number 92-10027 responded (D.E. # 159). The Court held a hearing on April 14, 1997. These consolidated cases raise the issues of whether Mel Fisher and his businesses legally salvaged in the Florida Keys National Marine Sanctuary, or illegally operated there and damaged Sanctuary resources. The Government's summary judgment motion seeks damages of more than \$600,000, and an injunction preventing the companies from harming Sanctuary resources and ordering the return of artifacts.

The Court has thoroughly reviewed the extensive record, including dozens of deposition transcripts and expert reports, and considered the oral arguments of counsel. For the reasons outlined

below, the Court grants the Government's motion only on the issue of whether the Defendants in Case Number 92-10027 had any preexisting salvage rights in the Sanctuary. Otherwise, the Court denies the Government's motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Statutory Scheme

Congress enacted the Marine Protection, Research and Sanctuaries Act ("Sanctuaries Act"), codified at 16 U.S.C. §§ 1431-45, in response to a "growing concern about the increasing degradation of marine habitats." S. Rep. No. 595, 100th Cong., 2d Sess. I (1988), *reprinted in* 1988 U.S.C.C.A.N. 4387. The statute allows the Secretary of Commerce to designate and manage marine sanctuaries to protect marine resources. 16 U.S.C. §§ 1431, 1433.

The statute authorizes the Secretary to enforce the Sanctuaries Act by seeking damages from and injunctions against any person who destroys or injures sanctuary resources. 16 U.S.C. §§ 1437, 1443. Under Section 1443, any person who harms a sanctuary resource is strictly liable to the government, unless he can show that the damage (1) was caused by an act of God, an act of war, or the act or omission of a third party; (2) was caused by an activity authorized by federal or state law; or (3) was negligible. 16 U.S.C. § 1443(a)(1) and (3). The law defines a statutory resource as "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

Congress also may designate sanctuaries, as it did in 1990 when it passed the Florida Keys National Marine Sanctuary Act ("Florida Keys Act"), Pub. L. No. 101-605, 104 Stat. 3089 (1990). That Act provides that the Secretary shall manage the Florida Keys National Marine Sanctuary

("Florida Keys Sanctuary") under the aforementioned statutory scheme. Florida Keys Act, § 5(a). The Secretary of Commerce has delegated management and enforcement duties under both acts to the National Oceanic and Atmospheric Administration ("NOAA").

Among the Congressional findings in the Florida Keys Act were that "spectacular, unique, and nationally significant marine environments, including seagrass meadows," needed protection. Florida Keys Act, § 2.2. Seagrass is distributed in significant amounts along the Florida coast. Kruer Depo. at 45. It helps produce organic matter that forms an important base of the food chain. *Id.* Manatees and fish graze on it. *Id.* at 47. It provides a habitat and refuge for numerous small invertebrates and fish. *Id.* It also minimizes current effect in some areas, thereby reducing erosion. *Id.* at 48. Seagrass is a resource within the meaning of both the Florida Keys and the Sanctuaries Acts. *United States v. Fisher*, 22 F.3d 262, 265 (11th Cir. 1994).

B. The Facts

This case has a lengthy factual and procedural history. In Case Number 92-10027, the Defendants are Mel and Kane Fisher, Salvors, Inc., and three boats. Mel Fisher is president of Salvors, Inc., a marine salvage company. M. Fisher Depo. of Jan. 9, 1997, at 48. Kane Fisher, Mel Fisher's son, is operations manager of Salvors, Inc. K. Fisher Depo. of May 2, 1995, at 4. He is also captain of the *Damless*, one of the three Defendant boats. *Id.* at 8. The three boats were either owned by or working under subcontract for Salvors, Inc., during January, February and March of 1992. *Id.* at 22; Def. Answer in Case Number 92-10027 ("Answer") at ¶ 25. The Plaintiff in Case Number 95-10051, Motivation, Inc., is another marine salvage company that the Fishers operate. M. Fisher Depo. of Jan. 9, 1997, at 49. Mel Fisher is president. *Id.* The Court will use the term Defendants to refer collectively to the Fishers, Salvors, Inc., and the three boats.

The Fishers are well-known treasure hunters and maritime salvors who have achieved fame and fortune salvaging sunken 17th- and 18th-century Spanish sailing ships off the coast of Florida. Govt. Corrected Memo. of Law Supporting Summary Judgement Motion ("Govt. Memo") at 3. See also, e.g., *MDM Salvage, Inc., v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986); *Treasure Salvors, Inc., v. Unidentified Wrecked and Abandoned Sailing Vessel*, 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd* 569 F.2d 330 (5th Cir. 1978).

The instant case involves the Fishers' activities in an area known as Coffins Patch, located a few miles off the coast of Marathon, Florida, in the Florida Keys Sanctuary. Ex. A and C to Govt. Memo. The Defendants argue that the case really began in 1986 in an unrelated lawsuit. In *MDM Salvage*, 631 F. Supp. 308, two competing companies sought exclusive salvage rights in Coffins Patch. This was four years before Congress passed the Florida Keys Act, so there were no legal bars to salvaging in the area. *Id.* at 314. The *MDM Salvage* court at first temporarily enjoined all parties from salvaging in Coffins Patch. *Id.* at 310. After determining that no one had established a right to exclusive operations there, the Court lifted the injunction and allowed the parties to resume normal salvage operations. *Id.* at 314.

From January through March of 1992, the three Defendant boats searched for treasure in Coffins Patch. Ex. C to Govt. Memo; K. Fisher Depo. of May 2, 1995, at 22; Answer at ¶ 25; Def. Answer to Plaintiff's First Set of Interrogatories at 2(c). Mel Fisher only went to Coffins Patch once during this period. M. Fisher Depo. of Jan. 8, 1997, at 57-58. Fisher also had little to do with deciding to salvage in Coffins Patch, as he is a "figurehead" president who signs checks and autographs and poses for pictures with tourists. *Id.* at 57-63; M. Fisher Depo. of Jan. 9, 1997, at 48. The Fishers believed they had a right to salvage in Coffins Patch due to the court order lifting the injunction in *MDM Salvage*. M. Fisher Depo. of Jan. 8, 1997, at 8. Mel Fisher claims that two

different federal government officials verbally gave him permission to salvage in the area. M. Fisher Depo. of Jan. 9, 1997, at 16, 22.

Kane Fisher participated more directly in the 1992 salvage operations. K. Fisher Depo. of May 2, 1995, at 29-30, 50, 69, 77, 81. As captain of the *Damless*, he directed the expedition. *Id.* at 28. Kane Fisher and other crew members searched for buried treasure in Coffins Patch primarily by using "prop wash deflectors" or "mailboxes." *Id.* at 29-49. These are devices used to direct the boat's propeller wash downward into the water instead of away from the boat. M. Fisher Depo. of Jan. 8, 1997, at 66. The resulting stream slowly forces a large column of clear water down to the bottom of the ocean and displaces sediment so that salvagers can unearth buried items. *Id.*

This "mailboxing" method created depressions known as blowholes along the sandy ocean bottom. K. Fisher Depo. of May 2, 1995, at 29-49. When Kane Fisher began salvaging in Coffins Patch, he noticed a number of blowholes already there, probably from previous salvagers. *Id.* at 29, 77-79; K. Fisher Depo. of Jan. 8, 1997, at 49-51. Several people told Fisher that they had salvaged in the area and used mailboxes in 1990 and 1991. K. Fisher Depo. of May 2, 1995, at 77-79. However, no one else was working in the area at the same time as the Fishers. *Id.* at 76. Kane Fisher testified that he used mailboxes only where there was sand or rubble at the ocean bottom, not seagrass. *Id.* at 72-73. He believes he may have displaced a very slight amount of seagrass, but that any damage was minimal. *Id.* at 76.

The Fishers stopped salvaging in Coffins Patch in mid-March of 1992 due to mechanical problems. *Id.* at 71. Before stopping, they made between 100 and 600 blowholes, and found about 200 artifacts in 210 of the holes. Ex. 4 to Murphy Depo. at 4-9; Ex. A to Govt. Memo. The artifacts they recovered included an iron cannon, an iron anchor, silver forks and plates, pillar dollars, silver coins, ships' rigging, ballast, cannon and musket balls, spikes, silver patties, and bronze religious

medallions. Ex. A to Govt. Memo. Both sides agree that these artifacts have historical significance, as they likely came from two Spanish vessels known to have sunk in the area in the mid-1700s. *Id.*

Beyond having historical significance in and of themselves, the artifacts have archeological significance because of their location and condition. Ex. 4 to Murphy Depo.; Murphy Depo. To maximize artifacts' archeological value, experts suggest that treasure hunters should have a specific plan that includes conducting initial research of a salvage site, generating a comprehensive research design, conducting a systematic remote sensing survey, mapping the accurate location of the artifacts, recording the stratigraphic and environmental data, doing test excavations, then conserving the artifacts once they are recovered. Ex. 4 to Murphy Depo. at 2-7; Ex. R to Govt. Memo. The Fishers had a specific plan for recovering artifacts in Coffins Patch that encompassed some, but not all, of these elements. Mathewson Depo. at 105-08. This plan, however, was not written; it was in Kane Fisher's head. K. Fisher Depo. of Jan. 8, 1997, at 32.

Following the Defendants' departure from Coffins Patch, scientists found displaced and damaged seagrass. Ex. F, L, and N to Govt. Memo. Scientists dispute the amount of damage, as well as who caused it and how. *Id.*; Depos. of Zieman, Krucz, Fonseca, Wanless and Thorhaug. Using aerial photography, maps and estimates, a marine consulting firm hired by the Fishers in the spring of 1992 estimated that the Defendants had made 597 blowholes that damaged 1.63 acres of seagrass. Ex. F to Def. Motion. For purposes of the 1992 preliminary injunction hearing in this case, the Fishers stipulated that their salvaging had damaged 1.63 acres of seagrass.¹

¹The Government argues that it is entitled to summary judgment on the issue of liability because of this stipulation, and the fact that the Sanctuaries Act imposes strict liability on anyone who damages seagrass. 16 U.S.C. § 1443(a)(1). Since the stipulation was for purposes of the preliminary injunction hearing only, the Court is unwilling to grant summary judgment on those grounds. However, the Court cannot ignore the fact that the Fishers entered into this stipulation.

Another expert, who visited the sites and reviewed aerial and underwater photography in 1992, found "severe and extensive" damage to Coffins Patch seagrass beds. Ex. L to Govt. Memo at 3. Joseph Zieman found a number of large holes several meters deep, ranging in diameter from six to seventeen meters. *Id.* at 4. Seagrass beds had been ripped out. *Id.* The holes were markedly different from naturally-caused depressions, and the only similar damage that Zieman had ever seen came from 1,000- to 2,000-pound bombs inadvertently dropped from naval aircraft onto seagrass beds. *Id.* at 3-4. Zieman estimated the damage at close to two acres. He also estimated that "when I was on the sites in '92, it was clear to me that the holes I was seeing there were done days to weeks to a month or so before I was there . . . incredibly fresh." Zieman Depo. of February 28, 1997, at 150.

A third expert who examined the damage found holes up to nine feet deep and thirty-six to forty-six feet in length and width. Ex. N to Govt. Memo. Curtis Kruer also found the damage "severe and extensive," and indicated that "no natural disturbances" could create the type of irregular, deep holes he found in Coffins Patch. *Id.* Kruer estimated that the damage had been done in the two months prior to his April 1992 inspection. *Id.*; Kruer Depo. at 122-24. Kruer visited the area again in August 1996 and found "not much regrowth." Kruer Depo. at 122-24.

Government scientists estimate that it would take 50 to 100 years for the damaged seagrass beds to completely recover. Ex. L to Govt. Memo at 8. However, scientists say they cannot replant seagrass in the damaged areas because Coffins Patch is swept with high energy waves that keep bare sand areas in motion. This, in turn, inhibits recolonization of seagrass. Ex. J and K to Govt. Memo; Ex. L to Govt. Memo at 9. By 1996, none of the Government's attempts to plant seagrass in Coffins Patch had succeeded. Ex. J to Govt. Memo.

The Government commissioned expert studies to identify potential seagrass restoration projects in the Florida Keys Sanctuary similar in scale to the damaged areas in Coffins Patch. Ex.

J, N, and O to Govt. Memo. Using what is known as a Habitat Equivalency Analysis, Government scientists determined it would cost \$351,648 to compensate for the Coffins Patch damage by restoring 1.55 acres of seagrass in another damaged area. *Id.* In addition, Government scientists estimated that it cost \$211,130 to respond to and assess the damage the Defendants caused. Ex. P to Govt. Memo.

Scientists whom the Defendants hired also visited Coffins Patch and viewed pictures of it. They dispute the amount and type of seagrass damage. Depos. of Wanless, Thorhaug, Harold Wanless visited the site in 1996, and reviewed pictures of it taken in the 1970s and 1990s. He concluded that none of the holes in Coffins Patch previously had seagrass in them. Wanless Depo. at 68-70. Wanless also said it was difficult to tell whether the holes were man-made or natural. *Id.* at 86-93. He estimated that recovery from the damage described by Government scientists would take only fifteen to twenty-five years. *Id.* at 161-62.

Anita Thorhaug, who visited the site in 1994, found no holes of the type Government scientists described. Thorhaug Depo. of May 25, 1995, at 148-55. She reported seeing only natural depressions and escarpments in the sand. Thorhaug Depo. of February 14, 1997, at 69-76. In fact, she saw no abnormal conditions anywhere in the area the Government claims was damaged. *Id.* at 85-91. The only evidence of any seagrass damage she saw was "some blades here and some blades there and some blades over there . . ." *Id.* at 91. She also agreed with Wanless that recovery of the type the government described would take only fifteen to twenty-five years.²

²This section only summarizes the myriad opinions in this case. To fully recount the thousands of pages of reports and deposition testimony of the experts would take much longer.

C. Procedural History

The United States filed its complaint in Case Number 92-10027 on April 21, 1992, seeking damages and an injunction. The Government moved for a preliminary injunction, and the Defendants cross-moved for an injunction to restrain the Government from interfering with their salvage activities. This Court referred the motions to Magistrate Judge Garber, who after hearing extensive testimony recommended that the Court issue a preliminary injunction restraining the Defendants from using prop wash deflectors in Coffins Patch in violation of the Sanctuaries and Florida Keys Acts. Magistrate Judge Garber also recommended that the Court deny the Defendants' request for an injunction. The Court adopted the Magistrate's recommendations and issued a preliminary injunction. The Eleventh Circuit affirmed. *United States v. Fisher*, 22 F.3d 262 (11th Cir. 1994).

In 1995, Motivation, Inc., filed its *in rem* action against an unidentified, wrecked, and abandoned vessel, seeking title and a salvage award for the artifacts that the Fishers had recovered in Coffins Patch. See Case Number 95-10051.¹ On June 18, 1996, the Court allowed the United States to intervene in the second case. The Court has consolidated both cases for discovery and trial.

DISCUSSION

I. THE STANDARD OF REVIEW

A moving party is entitled to summary judgment only where no genuine issue of material facts exists and the party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). On a motion for summary judgment, a court must view all the evidence in a light most favorable to the non-moving party. *Samples ex rel. Samples v. City of Atlanta*,² 846 F.2d

¹The Fishers have stipulated that the artifacts they seek in the later action are the same ones the Government seeks in the earlier-filed case.

1328, 1330 (11th Cir. 1988). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). The moving party bears the burden of establishing that there is no genuine issue of material fact. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

II. THE DEFENDANTS HAD NO PREEXISTING SALVAGE RIGHTS

The Defendants contend that as a matter of law Judge Aronovitz granted them an ongoing right to salvage in the Florida Keys Sanctuary when he lifted the injunction in *MDM Salvage*, 631 F. Supp. 308. As an extension of that argument, the Defendants argue that the Florida Keys Act did not supplant maritime salvage law, which allows them to salvage in the Florida Keys Sanctuary and take title to artifacts they discover there.⁴ Both arguments are pertinent because the Sanctuaries Act provides that a party shall not be liable for damaging sanctuary resources if federal law authorized the activity causing the damage. 16 U.S.C. § 1443(a)(3)(B). The Defendants' reliance on Judge Aronovitz' decision and maritime salvage law to establish this affirmative defense is misplaced. Neither maritime salvage law or the *MDM Salvage* decision constitute a "federal law" authorizing the Defendants to salvage in the Florida Keys Sanctuary.

⁴The Court notes that there may be a question of whether maritime salvage law or 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.

All Judge Aronovitz did in *MDM Salvage* was lift an injunction preventing salvaging in 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 Fishers' 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 authorized their activity in Coffins Patch.

The same holds true with respect to the Defendants' 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 & 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.⁵ 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 recovered 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.

III. THE REMAINING ISSUES

The Government is not entitled to summary judgment on any other issue, as the Defendants have raised genuine issues of material fact on the amount of damage caused to seagrass in Coffins Patch, how much it will cost to repair any damage, who caused the damage, and whether removal of the artifacts damaged the historical value of the Florida Keys Sanctuary.

A. The Amount of Damage

The Government has provided reports and depositions from a number of scientists

⁵See the Antiquities Act of 1906, prohibiting the appropriation of historic artifacts on federal land without a permit; the Rivers and Harbors Act of 1899, prohibiting excavation on federal land without a permit; and the Property Clause of the U.S. Constitution. U.S. Const., art. 4, § 3, cl. 2.

establishing that (1) "mailboxing" in Coffins Patch early in 1992 created several hundred blowholes and damaged at least 1.63 acres of seagrass; (2) it cost the Government \$211,130 to respond to and assess this damage; (3) it would take 50 to 100 years to replace this seagrass; (4) the Government cannot replant seagrass in the damaged areas; and (5) it will cost \$351,648 to compensate for the Coffins Patch loss by restoring seagrass in a separate area of the Florida Keys Sanctuary. See Reports and Deposition Transcripts of Zieman, Kruer, McIntosh, Julius, Wright, and Fonseca.

The Defendants have provided reports and depositions from two scientists establishing that (1) damage to seagrass in Coffins Patch was minimal – far less than an acre; (2) blowholes in Coffins Patch could have been made prior to 1992; (3) there did not appear to be blowholes in areas where seagrass grows; (4) damage that Government scientists describe would take a maximum of twenty-five years to repair; and (5) it might be possible to replant seagrass in Coffins Patch. See Reports and Deposition Transcripts of Wanless and Thorang.

In addition, Kane Fisher has testified that he only used mailboxes and caused blowholes where there was sand and rubble on the ocean floor, not seagrass. Fisher also testified that he had been told that several people salvaged and created blowholes in Coffins Patch in 1990 and 1991, and that he saw those blowholes when he first arrived in 1992.

Because the Court must construe the evidence in a light most favorable to the non-moving party, the Court concludes that these conflicting scientific reports establish disputed issues of fact. Resolving them would require the Court to weigh conflicting evidence and make credibility determinations. This is inappropriate on a motion for summary judgment. *Mize*, 93 F.3d at 742. Therefore, the Court denies the Government's summary judgment motion on the issues of damage to seagrass and the cost of repairing it.

B. Who Caused The Damage

It is undisputed that from January through March of 1992, the three Defendant boats salvaged in Coffins Patch. Ex. C. To Govt. Memo; K. Fisher Depo. Of May 2, 1995, at 22; Answer at ¶ 25; Def. Answer to Plaintiff's First Set of Interrogatories at 2(c). It is also established that the boats were working for Salvors, Inc., during this period. *Id.* Kane Fisher, operations manager of Salvors, directed the salvaging activities. K. Fisher Depo. of May 2, 1995, at 29-50, 69-81. Finally, the Defendants acknowledge that they used mailboxes to unearth buried treasure. *Id.* at 29-49.

However, there is a genuine issue of material fact as to whether the Defendants' mailboxing damaged seagrass. On one hand, Kane Fisher has acknowledged that no other salvors were working in Coffins Patch at the same time the Defendants were. *Id.* at 76. And Government scientists have consistently testified that when they examined Coffins Patch in the spring of 1992, they found freshly made blowholes. On the other hand, defense scientists say the holes they saw were old. And the Government has not disputed Kane Fisher's testimony that other salvors made blowholes in Coffins Patch in 1990 and 1991.

On this evidence, the Government has not established that the Defendants damaged seagrass in Coffins Patch. At best, the Government has produced circumstantial evidence that the Defendants were responsible. However, making that determination requires weighing testimony and credibility, functions that are the province of the fact-finder. The Court therefore denies the Government's summary judgment motion on the issue of who caused seagrass damage in Coffins Patch.

C. Personal Liability of Mel and Kane Fisher

By the way it has styled and argued its case, the Government appears to be trying to hold Mel and Kane Fisher personally liable for any seagrass damage. As corporate officers acting on behalf

of Salvors, Inc., the Fishers normally would be shielded from personal liability. While it is entirely proper for a court in an admiralty case to hold corporate officers personally liable,⁶ the Government has not proved the facts necessary for this Court to hold that as a matter of law it should pierce the corporate veil.

In admiralty cases, the Court should apply federal common law to decide whether to pierce the corporate veil. *Talen's Landing, Inc. v. M/V Venture II*, 656 F.2d 1157, 1161 n.6 (5th Cir. 1981); *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So.2d 1141, 1151 (Fla. 3d DCA 1995). This law provides general guidelines, although each case is distinct and must be determined on its own facts. *Talen's Landing*, 656 F.2d at 1161 n.6; *Hilton Oil*, 659 So.2d at 1151. The Court may apply Florida state law tenets as well. *Talen's Landing*, 656 F.2d at 1161 n.6; *Hilton Oil*, 659 So.2d at 1151.

Courts have used a number of factors in determining whether to hold corporate officers personally liable, including the absence of corporate formalities, inadequate capitalization, and use of corporate funds and facilities for personal rather than business purposes. Florida law contains a further requirement. The corporation must have been organized or operated for an improper or fraudulent purpose. *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1120-21 (Fla. 1984).

The Government has not proved any of those factors. Regardless of whether Mel or Kane Fisher personally directed the salvaging operations in Coffins Patch, there remains a disputed issue of material fact on whether the Court should pierce the corporate veil and hold the Fishers personally liable. Accordingly, the Court denies the Government's motion on the grounds that the Fishers are liable for seagrass damage.

⁶*Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Talen's Landing, Inc. v. M/V Venture II*, 656 F.2d 1157 (5th Cir. 1981); *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So.2d 1141 (Fla. 3d DCA 1995).

D. Historical Damage

The Government contends that the Defendants damaged the historical value of the Florida Keys Sanctuary by removing artifacts. According to the Government's argument, this removal caused the loss of valuable archeological data that the Fishers could have obtained by better mapping and recording the location and condition of the artifacts before removing them.

As a threshold matter, removing artifacts from a national marine sanctuary can damage the sanctuary's historical resources. *See Craft*, 34 F.3d 918. But the Government has not shown that as a matter of law, the Defendants' actions in this case damaged the Florida Keys Sanctuary's historical resources. Both sides agree that the artifacts found in Coffins Patch have historical significance because of the ship(s) from which they came, and because of their location and condition in the water. Ex. A to Govt. Memo; Ex. 4 to Murphy Depo.; Murphy Depo. And the Government acknowledges that the Defendants have not damaged the artifacts. Murphy Report at 11.

The parties differ, however, on whether the Defendants took appropriate steps to safeguard the artifacts' archeological value. The Government has presented evidence that the Defendants did not do so. Ex. 4 to Murphy Depo. at 2-7; Ex. R to Govt. Memo. The Defendants have presented evidence showing that they had a proper archeological plan. Mathewson Depo. at 105-08. The Court cannot resolve such blatant factual disputes on summary judgment. Accordingly, it must deny the Government's motion on the grounds that as a matter of law, the Defendants are liable for damaging historical resources in the Florida Keys Sanctuary.

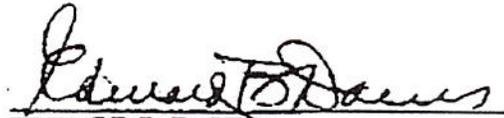
CONCLUSION

Because so many factual issues remain to be settled at trial, the Court cannot grant the Government's request for a permanent injunction at this time. For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Government's Motion for Summary Judgment (D.E. # 146) is GRANTED only on the grounds that the Government has established as a matter of law that the Defendants had no preexisting salvage rights in the Florida Keys Sanctuary. It is

FURTHER ORDERED AND ADJUDGED that the Government's Motion for Summary Judgment (D.E. # 146) is DENIED on all other issues and grounds.

DONE AND ORDERED in Chambers in Miami, Florida, this 30 day of April, 1997.


EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

Copy:

Carolyn Zander
James Loftin
Richard Rummell
Michael Barnes
William Vandercreek

