

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

**REPLY 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.

Michael and Taffi Adt

Michael Barnes

Richard Blaze

Billy D. Causey

Geoff Chapman

Pat Clyne

Chief Judge Edward B. Davis

Kane and Karen Fisher

Kim and Lee Fisher

Melvin A. and Deloris E. Fisher

Melvin Terry and Carla Fisher

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Mark Fonseca

Mark S. Fonseca

Magistrate Judge Garber

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

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CERTIFICATE OF TYPE SIZE AND STYLE

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

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SALVORS, INC. AND MOTIVATION, INC.

ARGUMENT

**I. RIGHT TO 1992 SALVAGE IN COFFINS PATCH AREA –
EFFECTIVE DATE OF SANCTUARY.**

A. Introduction

The paramount issue concerns the right to salvage in the Coffins Patch area of the Florida Keys National Marine Sanctuary (“FKNMS”) between the date of designation of the sanctuary in 1990 and July 1, 1997, the effective date of FKNMS

rules and regulations which now govern permits and commercial salvage activity. The issue **is not** the general right to conduct maritime salvage in existing marine sanctuaries at any time or any place. Apparently all parties agree that if the Fisher group had the right to salvage in the Coffins Patch area in 1992 that the government case fails.

There is also an independent ground for denying the damage claim. If the sanctuary legally did not “take effect” until compliance with 16 U.S.C. § 1434(b) (requiring submission to Congress and Florida – as in fact was done), no claim for damage would exist under 16 U.S.C. § 1443. If compliance with § 1434(b) can be ignored for the sanctuary to take effect, then there would be no liability under § 1443 because of subsection c, exempting activity authorized by federal law i.e. the right to salvage.

The government Answer Brief does **not** discuss (1) that this Court’s Order allowed salvage without a permit restricting only the future use of mail boxes unless a permit was obtained; (2) that the rules and regulation which became effective on July 1, 1997 recognized rights in the sanctuary that were being exercised prior to that date, not the 1990 date of designation; (3) that there were no existing rules or statutes in 1992 that prohibited the Coffins Patch salvage in question; and (4) that under controlling Fifth Circuit precedent (in which the United States was a party) the salvor is entitled to articles of salvage it located, recovered, and preserved from the outer continental shelf of Florida.

The government Answer Brief does discuss the statutory requirement to submit proposed rules to Congress and Florida for the sanctuary to take effect under 16 U.S.C. § 1434(b) but claims it was voluntary. Concerning the need to comply with 16 U.S.C. § 1434(b) for the sanctuary to “take effect,” NOAA has taken one position with Congress and the opposite position with the Eleventh Circuit. NOAA has complied with § 1434(b) including making sanctuary-wide changes because of Florida’s objections. NOAA’s representations to the Eleventh Circuit were and are incorrect. This is discussed, *infra*.

B. Right to Salvage

Resolution of the right to salvage issue first requires consideration of the ruling of the District Court and this Court on granting the preliminary injunction. NOAA had sought a preliminary injunction barring all salvage. Fisher had sought a preliminary injunction barring the government from interfering with its salvage operation. Maritime salvage was expressly allowed to continue without a permit without using mailboxes. If mailboxes were to be used, Fisher needed to apply for a special permit. The government’s position would in essence nullify the holding of the District Court and this Court’s adjudication. This decision was rendered between the 1990 designation and the 1997 effective date of the rules. As noted, under the injunction, the only restriction on salvage was the prospective use of mailboxes.

The jurisdictional basis for the preliminary injunction that allowed salvage should be examined. On the preliminary injunction appeal, the Fishers and the

government took opposite positions on the application of the 45-day period required at § 7a of the Florida Keys National Marine Sanctuary and Protection Act and 16 U.S.C. § 1434(b). Fisher unsuccessfully contended that NOAA could not seek a prospective injunction until after the rules had been promulgated and submitted to Congress and the 45-day period for rejection had passed. NOAA contended the 45-day period did not apply to sanctuaries designated by Congress and that the Secretary was not required to submit proposed rules and regulations to Congress or to the State of Florida. Although it is now established in fact and in law that the government's prediction was wrong and that the 45 day period after promulgation of the rules did apply to the Florida Keys National Marine Sanctuary,¹ there is another rationale that fully supports the jurisdictional basis for this Court's ruling which upheld Fisher's right to salvage subject to future restriction on ban of mailboxes.

The jurisdictional explanation in accord with restricting only a method of salvage while allowing salvage activities is so simple and obvious that it appears to have been overlooked. The government suit was brought as an admiralty action and this Court's and the District Court's orders were entered under admiralty jurisdiction. NOAA would have standing to seek prospective restrictions until rules and regulations could be adopted. The Federal Court pursuant to its admiralty jurisdiction has the power to control salvage activities and regulate conduct of salvors. This had

¹ See Initial Brief, pages 28-33 and this Reply Brief *infra*.

been previously established in reference to salvage of ancient wrecks. See e.g. *Cobb Coin Company v. Unidentified Wreck*, 549 F.Supp 540 (S.D. Fla. 1982) (Cobb Coin, Inc. is now Salvors, Inc., a defendant in this action). And, in particular in reference to the Coffins Patch area where the admiralty court refused to enjoin competing salvage activities until a salvor had located a sufficient primary cultural deposit or major portion of the wreck to justify a warrant of arrest and protective injunctive relief. Kane Fisher's salvage activities were conducted in accordance with the rulings of the Admiralty Court in *Cobb Coin* and *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp 311 (S.D. Fla. 1986), as well as the earlier decision of this Court (old Fifth Circuit) in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).

This admiralty power to grant a preliminary injunction restricting future salvage methods existed even if the sanctuary did not "take effect" until compliance with 16 U.S.C. § 1434(b). The holding of the Court, for purpose of the law of the case, was that failure to submit to congress rules and regulations did not deprive the admiralty court of jurisdiction to restrict salvage techniques pending final resolution. The Court further held that the mere designation of sanctuary without promulgating any contra rule or regulation did not bar salvage or require a permit for salvage.² The government's Answer Brief at page 28 states:

² The government acknowledged it was not writing permits in January of 1992 and had no

One final matter regarding maritime and admiralty law bears note. Although Fisher places great reliance on these concepts, it was not until 1995, several years after his excavations in Coffins Patch the he even attempted to invoke the admiralty jurisdiction of the district court.

Fisher in 1992 sought a preliminary injunction in the admiralty court barring government interference with the salvage. Fisher did not apply for a warrant of arrest earlier because of the *MDM Salvage* decision. Fisher, however, sought the arrest prior to the effective date of the sanctuary to establish rights that are now recognized under 15 C.F.R. §§ 922.166 and 922.167.

As stated, even if compliance with § 16 U.S.C. 1443(b) were not required, there is no liability for a salvage activity in Coffins Patch under subsection (c) of § 1443 for the claimed injury. The salvage activities come within the exception. The statute reads in part, “. . . caused by an activity authorized by federal or state law. . . .” For the reasons stated in Fisher’s Initial Brief, pages 17-19, maritime salvage under Constitutional provisions, Supreme Court precedent, and Congressional enacted salvage statutes is an activity authorized by federal law. The government Brief contends the statute is to be narrowly construed in accordance with the provisions’ Congressional history. Under decision of Supreme Court governing statutory construction, the excision of “maritime salvage” from the meaning of the statute must

procedures. See quote Initial Brief page 24, note 12.

be “clearly expressed.”³ On the contrary, “maritime salvage” is an activity that literally satisfies the plain language of the statute “authorized by federal law.”

Under legislative history the statutory provision “activities authorized by federal law” that should include maritime salvage. The government Answer Brief at page 25 quotes from House Report 22:

This defense is intended to be construed narrowly, and the authorization giving rise to the defense must be for the specific activity giving rise to the damage. Thus, where a vessel runs aground within a sanctuary, it cannot use this defense to assert that the license to operate within the territorial waters of the United States entitles it to a defense because the authority to operate in territorial waters does not constitute the authority to run aground within a marine sanctuary.

Using the illustration contained in the House Report, “maritime salvage” activity would come within the statute. Unlike a vessel that has run aground – activity not authorized by maritime law, the salvage operation using mailboxes to remove overburden (that caused injury to seagrass) to locate and recover artifacts is the very

³ The inquiry begins with the language of the statute, see *Ardestani v. INS*, 502 U.S. 129, 135 (1991), which “must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980),. “The ‘strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances,’ when a contrary legislative intent is clearly expressed.” *Ardestani*, 502 U.S. at 135-36 (citation omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In the absence of that rare and exceptional

essence of maritime salvage activity regarding ancient shipwrecks. Salvage of shallow ship wrecks, particularly ancient wooden vessels, unlike deep water wrecks, is complicated because the succession of storms and currents continually cover and uncover the scatters of the vessel remains and cargo from the time of its initial breakup from first striking a reef during a hurricane until the present. Salvors looked to find a line of scatter buried under the sand or mud to lead to a primary deposit or major portion of the vessel remains or cargo. Magnetometers, airlifts, sonar, and mailboxes are used to locate and recover items. Sometimes a major find is never located. The Atocha took over 17 years. See testimony of Dr. Matheson, R235-16-46-243, and *Diving to a Flash of Gold*, R8-31-241, Def. Ex 15 (1992). See also *Cobb Coin and Treasure Salvors, Inc.*

The government's own archeologist was asked what salvage methods would he use in Coffins Patch. The answer was to use "mailboxes."⁴ This was the maritime salvage activity used by Fisher that caused the asserted injury to some grass beds.

circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, --- U.S. -- -, 118 S.Ct. 838, 841, 139 L.Ed.2d 849 (1998).

⁴ Q. You were asked a question that if you were salvaging in Coffins Patch, that you would use mailboxes. Do you remember that question on your deposition?

A. I don't remember it specifically, but if that's my opinion, I think it is a reasonable way to do it. If you are asking me if that's my opinion, I believe that it is.

Until the FKNMS rules and regulations became effective on July 1, 1997, there was no prohibition to engage in salvage. The House Report relied upon by the government expressly contemplates that there are existing sanctuary rules and permits in place. There were no rules in this case. For those who now wish to engage in maritime salvage or previously have engaged, permits are authorized under 15 C.F.R. §§ 922.166 and 922.167.

The government's argument that no right to salvage existed is constructed on a series of faulty disclosed and undisclosed premises. It is not based upon any existing rule, regulation, statute or applicable cases. **In all of the government case authority, a rule, regulation, or statute proscribing salvage existed.** Besides the attempt to finesse the rulings of this Court allowing salvage, the government's argument conveniently overlooks its own regulations in the FKNMS, which were expressly cited and discussed in Fisher's initial brief. In particular, these regulations recognize the cutoff date for establishing prior right and **use is not the date of designation** of the sanctuary in 1990 but the date of July 1, 1997, when the rules and regulations became effective. While the government brief has some interesting arguments on retroactive application of damage statutes, which will be discussed subsequently in this brief, the government's own regulations preclude any retroactive application of rules and regulations to 1992 salvage activity in Coffins Patch:

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....

15 C.F.R. § 922.167.. See also 15 C.F.R. 922.166 concerning salvage permits.

Although Congress can regulate maritime salvage, there were no rules, regulations, or laws in effect in the Coffins Patch area in 1992 that precluded salvage. The government cannot be permitted to ignore this Court upheld the right to salvage in 1992 without a permit. The Government's Answer Brief at page 13 misstates and misrepresents Fisher's position and argument to this Court. The government states:

Fisher again asserted that the District Court decision in *MDM Salvage* . . . granted Fisher and others a right to salvage in Coffins Patch *irrespective of any subsequent Congressional action*. [Emphasis added.]

To the contrary, Fisher's Brief to this Court at page 15 stated:

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.

See also page 13 of Fisher's Brief.⁵

⁵ 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

The government should not make material misrepresentation of Fisher's argument in order to set up a straw man to be knocked down. Another example is at the government Answer Brief at page 25 which states:

Fisher appears to suggest that the Archeological Resources Protection Act (Br. 15 n. 3 citing 16 U.S.C. 470(b)) exempts his treasure hunting activities in the Sanctuary. However, Fisher's activities, which he does not dispute occurred within the Sanctuary's boundaries, are governed by the NMSA and the Sanctuary Act.

Fisher cited the Archeological Resources Act to prove no permit was required under that Act. The significance is that there was no other statute, rule, or regulation, or applicable case requiring a permit. The government admitted at trial the Florida Keys Act itself did not bar commercial salvage. See Initial Brief, page 24, note 12. In *Klein and Croft*, existing regulations prohibited the salvage. In this case in 1992 there were no sanctuary regulations or rules for the FKNMS.

**C. Submission Of Rules To Congress And Florida For Sanctuary To
"Take Effect" Under 16 U.S.C. § 1434(b)**

The government's Brief, Page 4, in urging the existing restrictions on vessel traffic in the sanctuary prior to 1997 proves that salvage activities were likewise proscribed ignores the statute.. Under the express terms of FKNMS Act there is a major difference. Vessel traffic in certain areas was barred under § 6 of the Florida

in Coffins Patch. No provision of the Florida Keys Act or any existing regulations, however, barred the 1992 maritime salvage.

Keys Act effective with the earlier of new charts, specific rules, or six months. Hydrocarbon activities were prohibited immediately. Everything else was to be submitted to Congress and Florida for approval before the provisions could “take effect” under § 7a of the Keys Act and 16 U.S.C. § 1434(b). See Fisher Initial Brief, page 15, note 2 and page 29.

For damages to be claimed under 16 U.S.C. § 1443, the sanctuary must have taken “effect” under 16 U.S.C. § 1434(b). The counter argument of the government that § 7a of the Keys Act did not require compliance with § 1434(b) is based on a false premise that NOAA did not have to publish proposed rules and regulations and submit them to Congress and Florida, but did so only as a kind and helpful favor. Surely the government does not intend this to be a serious argument. The government not only engaged in extensive and expensive efforts to secure approval of its proposed regulations, NOAA reported to Congress and explained it needed more than the 30 months set forth in the statute. Senate Report 102-411, page 8, section 105. NOAA, during the same time it was going through the pre-approval process of considering proposed rules, told this Court that the 45-day period as required by § 7 of the Florida Keys Act did not apply. See Initial Brief, pages 28-33. NOAA had to know that it was making an incorrect, if not specious, argument to this Court. Rather than apologize to this Court for its mistaken advocacy, the government seeks to

bootstrap that it was able to sell an incorrect argument to this Court: “Although this Court previously held that NMSA did not require NOAA to submit these regulations to Congress, as a matter of policy NOAA did submit these regulations to Congress.” Government Brief, page 31. This dicta in predicting future conduct of NOAA with Congress, induced by NOAA’s misrepresentation of what it was doing and what it was not going to do, is not the Court’s holding. This Court on the preliminary injunction appeal allowing salvage without future use of mailboxes did not have before it the issue of past liability for damages. As stated, both in fact and in law there were no regulations in 1992, and the rules when promulgated became effective in 1997, not 1992.

This work and effort by NOAA to draft and propose rules for approval by Congress and by Florida was required by law for the sanctuary to “take effect.” As acknowledged in the government brief at page 32:

There are sound legal and policy reasons why NOAA sends its management plans and regulations to Congress *before they become legally enforceable.* [Emphasis added.]

The Fishers agree. Section 7a of the Keys Act mandates compliance with §1434(b) [Section 304 of the Marine Protection, Research, and Sanctuaries Act] for the sanctuary to “take effect” and before claims for damages arise under § 1443. The government Answer Brief at page 29, note 20 states:

Fisher asserts, citing a letter from Florida Governor Chiles, (Br. 22) that Florida's approval of the Sanctuary was "expressly conditioned on allowing the past maritime salvage activities to continue under new regulations approved by Florida." Fisher does not offer any further explanation of this argument. Governor Chiles' approval letter, however, as reproduced in the Federal Register notice cited by Fisher makes no mention of "past maritime salvage activities." See 62 F.R. 32154 (June 12, 1997).

The government statement is not correct. "Submerged cultural resources" as the government well knows governs commercial treasure salvage operations. See following excerpts from Federal Register:

[Summary]

During the forty-five day review period the governor submitted to the Secretary of Commerce a certification that implementation of the specific amendments were made to the regulations. In response to the Governor's certification, NOAA amended those regulations certified as unacceptable to incorporate the Governor's changes. Consequently, upon their effective date the regulations, as modified by this notice, and management plan, in their entirety, will apply throughout the **Sanctuary**, including within State waters of the **Sanctuary**.

62 F.R. 32154 (June 12, 1997)

[Florida Governor's Objection]

In accordance with subsection 304(b)(1) of the National Marine Sanctuaries Act and that resolution, the following terms are certified as unacceptable in state waters:

62 F.R. 32155 (June 12, 1997)

We also call to your attention the now erroneous reference in section 922.166(b)(2)(iii) to the Submerged Cultural Resources Agreement contained in Volume 1 of the management plan. We suggest striking that reference. The final agreement is that considered by the Board of Trustees on January 28, 1997 and executed by the signatory parties.

62 FR 32155 (June 12, 1997)

[Resolution of Florida Cabinet]

WHEREAS, the management plan development period was extended to six years to provide the maximum opportunity for participation by all segments of government, industry, and the citizens of Florida and the United States; and

WHEREAS, Memoranda of Agreement of the Florida Keys through a cooperative partnership have been developed and included in the management plan, including the:

(3) Submerged Cultural Resources Agreement

62 FR 32156 (June 12, 1997)

IN TESTIMONY WHEREOF, the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida have hereunto subscribed their names and have caused the Official Seal of the State of Florida to be hereunto affixed in the City of Tallahassee on the 28th day of January, 1997.

62 F.R. 32157 (June 12, 1997)

[NOAA's Response]

In response to the Governor's certification of March 20, 1997, NOAA has amended those regulations certified by the Governor as being unacceptable in State waters. With the modifications, the entire

regulations and management plan are accepted by the Governor and will apply throughout the **Sanctuary**, including within State waters of the **Sanctuary**, upon their effective date. The basis and purpose of the changes to the regulations are as follows.

62 F.R. 32157 (June 12, 1997)

(6) The erroneous reference to the Submerged Cultural Resources Agreement has been corrected by eliminating the reference to Volume I of the management plan.

For clarity, this notice publishes the revised **Sanctuary** specific regulations at 15 C.F.R. part 922, subpart P in their entirety, which will replace subpart P as published in the January 30, 1997 Federal Register notice. Consequently, subpart P as published in this notice and all remaining regulations in the January 30, 1997, notice shall become effective on July 1, 1997. [Regulations for future and past salvage permits set out in 15 C.F.R. §§ 922.166 and 922.167.]

62 F.R. 32158 (June 12, 1997)

It is now manifest that mandatory language of § 7a of the Keys Act “shall follow.” 16 U.S.C. § 1434(b) meant what it says. The sanctuary as reflected in its own rules and report to Congress did not “take effect” until July 1, 1997. The truth is self evident. NOAA submitted the proposed rules to Congress and Florida because they knew they had to do so for the sanctuary to take effect.⁶ The government, NOAA, should apologize to this Court and seek leave to dismiss the action.

⁶ Compare, *United States v. M/V Jacquelyn L.*, 100 F.3d 1520 (11th Cir. 1996), where NOAA successfully argued as a fact that the Florida Cabinet and Governor had given final approval without

II. DAMAGES FOR SEAGRASS INJURY

A. Retroactivity - Plaintiff Government Has Burden To Claim And To Prove Entitlement

NOAA (United States) as plaintiff filed this complaint on April 21, 1992. All salvage activity by the Defendants had ceased prior to the date of the complaint. The April complaint sought injunctions and damage relief under statutes that were then in existence. NOAA as plaintiff never amended its complaint. The Defendants denied that the plaintiff (NOAA) was entitled to any damages.

The plaintiff government has the burden to prove at least a prima facie case that it is entitled to damages. Retroactive application of damage statutes is rare and special event fraught with constitutional and statutory problems. The government has the difficult burden to claim and to prove it is specially entitled to the claim by retroactive application of legislation as a part of its case-in-chief. The Supreme Court's 1997 decision in *Hughes* is very explicit:

We have frequently noted, and just recently reaffirmed, that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence." *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994). "The 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Ibid.* (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring)). Accordingly, we apply this time-honored presumption

objections. NOAA was wrong.

unless Congress has clearly manifested its intent to the contrary. 511 U.S., at 268, 114 S.Ct., at 1498-1499.

Hughes Aircraft Company v. United States, 117 S.Ct. 1871, 1876 (1997).

The government admittedly has failed to allege and to prove entitlement to retroactive damages and now seeks, of course, to blame the defendants for its own failure. The case authority cited by the government does not support the government's failure to prove its case. *Nary v. Dean*, 32 F.3d 1521 (11th Cir 1994) and *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir 1993) do not involve entitlement to damages by retroactively applying statutes. Both cases in reality are against the government argument. NOAA failed to plead and prove entitlement to retroactive application of statutes in trial court, cannot blame the defendant for its failure. The prior dates of salvage activity were known and agreed to and there is likewise no dispute over the subsequent effective dates of the statutes. The trial court entered judgement without finding the statutes should be applied retroactively. Under the Supreme Court cases cited by *Fisher*, it is the party who is seeking to apply statutes retroactively that has the burden. In this case that burden is on the government (NOAA). NOAA's brief does not discuss the controlling precedents by the Supreme Court. It seeks to dodge those cases. The trial court erred, and the damage award totaling \$600,000.00 must be reversed.

The government claim there is no error in the retroactive application of the statute to award \$26,533 in prejudgment interest because it was within the district

court's discretion (Answer Brief, pages 44-46). Fisher denied the government was entitled to interest. The trial court awarded interest under the statute without finding it should be applied retroactively. NOAA did not claim discretionary interest and is making this claim for the first time on appeal. The trial court did not award interest as an exercise of discretion.

The government brief also persists in claiming that the Fisher defendant stipulated to the response and assessment of damages. The Fisher Initial Brief quoted this stipulation. We will quote it again:

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 cost in this matter.

R5-185-11.

The government's characterization is simply wrong. Maybe the moral of the story is to never stipulate with the government, but this would be contrary to the spirit and purpose of federal rules and practice.

The trial court further erred in applying the Habitat Equivalency Analysis. Not only by selective use of some provisions and ignoring others, but because the result itself demonstrates the inappropriateness of the approach. The government's Answer Brief at page 40 states:

Fisher also contends (Br. 39-40) that the United States has failed to comply with "procedural rules" before seeking costs but the rules cited by Fisher are OPA rules not NMSA regulations. Fisher's argument that if "NOAA had allowed the Defendants to participate in Dr. Hudson's survey in 1992 mutually accessible [sic] assessment

measurements could have occurred,” overlooks the fact that in 1992 Fisher did commission a study (the McIntosh Report) that they subsequently disavowed. Given that he has now cast aside his own 1992 Report Fisher can hardly claim (Br. 40) that NOAA’s failure to include Fisher in its investigations “was highly prejudicial.” Finally, Fisher suggests (Br. 45-46) that because the amount of response and assessment costs has increased since 1995 these costs are unreasonable. Brian Julius, however, explained that the 1995 costs were based on a different project. R15-238-63-74. Julius testified that the project ultimately decided upon is “the most cost-effective site that meets our restoration criteria.” *Id.* at 66.

Because of the existence of the McIntosh Report that claimed little or no resulting injury to the environment and the aerial showing 102 depressions, it was absolutely critical to immediately see if the extent of injury could be measured by ground proofing the depression with the video pictures and comparing prior aerials. Also consultation was needed to find a suitable project. The government went from a moderately expensive project to an exceedingly expensive project. See Initial Brief pages 36 through 41 and testimony of Dr. Thornaugh.

The government Answer Brief at page 38 states:

Thornaug’s estimate, based, in part, on a voluntary labor force and borrowed boats, breaks down to \$15 a square foot. At this rate the United States’ 1.55 acre (67,518 square feet) restoration project would cost \$1,012,770. This amount is significantly in excess of the United States’ \$351,648 Prop Scar Restoration Project. This is consistent with Brian Julius’s testimony that the project selected by NOAA was the least costly project that met the requirements of NOAA’s expert ecologist.

This is a gross distortion of Dr. Thornaug’s testimony:

Q. With that a predicate, tell me, and let’s start at, let’s say, 2500 square feet, what you would charge, and if you can break it out, if

you can say this much for materials and this much for monitoring, that's fine. But I want to get a turnkey number.

A. In this particular situation, Mr. Fisher and I discussed the use of his boats and the use of whatever boats and motors and other equipment I have. And the use of public interest groups, like boy scouts and girl scouts.

I could, in that situation, do with the supplies and materials and gasoline and so forth at one of the three sites I gave you, the Pennekamp Park site or the Marathon site or the Boca Chica Naval Air Base site, for about, I think, \$7,500 planting part.

The monitoring, in the Government requirement of once every six months for four years, that's much more expensive. that would be about \$30,000. With a third party Monitor who would be a Government employee who has about 20 years experience with looking at seagrass mitigation, and he would once a year do a report of what was happening in the mitigation site.

Q. So, if I understand you, the whole package would be approximately \$37,500?

A. About that.

Q. Now move up to the next level of some 4,000 feet. We have moved from 2500 to 4,000 square feet?

A. The square footage, once you are mobilized, the difference in square footage is negligible.

Q. What if we moved up to , let's say, one acre?

A. It would probably move to 16, 17,000 for the planting, but the monitoring wouldn't be a lot different because you are out there with your video cameras, anyhow, and you are out there with very high technical people. So the monitoring costs doesn't move a lot.

R236-16-182 to 185.

The government Answer Brief at page 36 states:

While Fisher asserts (Br. 53) that the only theory of the case “100% consistent” with the evidence is that the over 600 large craters he admits creating in Coffins Patch were confined to sand. This conclusion, however, is simply not consistent with the testimony of the government witnesses who personally observed the destroyed seagrass beds in 1992 or with the McIntosh Report.

The June 1992 aerial showed only 102 depressions of overlapping of the 600 times the mailbox was used. The logs show each time this mail box was used and the location may have moved only a foot or two along a line. The aerials before and after the salvage show a primarily sandy tract. The McIntosh Report also states that there was de minimis damage to the environment.⁷ The McIntosh Report did not examine prior aerials to determine the percent of sand and seagrass in the area where the depressions were located. The video of Mr. Hudson shows a few chunks of seagrass bed that may have sloughed off the edges as a result of the depression in the sand. Based upon before and after aerials approximately 2,500 square feet of seagrass was damaged. The government failed to prove the percent of sand and seagrass in the area worked and the Court made no findings on this critical issue. Indeed, the total area depicted on the holes where damage was claimed would be less than the 1.61 acres. NOAA’s Answer Brief at page 35 argues:

⁷

1) The extent of damage to seagrass beds within the axis area examined is small when compared to nearby area and even smaller when compared to the abundant seagrass within the Sanctuary.

2) Hard-bottom or live-bottom habitat resulting from propwash activity can result in a community which is as valuable or even more valuable than that which existed previously from a socioeconomic perspective.

There is no evidence that the district court confused the mechanics or physics of the propwash deflectors with that of a "2000 pound bomb." Br. 45. As to Fisher's "jacuzzi jet" theory, this theory has been raised for the first time in Fisher's brief on appeal and is completely unsupported by any evidence or trial testimony.

Of course, immediately after the preliminary injunction hearing Fisher also proffered the McIntosh Report which concluded that 1.63 acres of seagrass was destroyed by his operations.

Government witness Mr. Hudson confused mailbox operation with a bomb. See Initial Brief, page 46. The "jacuzzi jet" illustration was argued post trial and not during the trial. Federal appellate courts, nevertheless, are *not* precluded from using common sense and the basic laws of physics in deciding cases.

III. CONCLUSION

The government claims for damages should be dismissed and the articles of salvage located, recovered, restored, and preserved awarded to the defendants. The government knowing that the sanctuary did not "take effect" until compliance with 16 U.S.C. § 1434(b) should not have sought damage for past acts. Even under the government's theory of repudiating § 1434(b), there is no liability for damages under subsection c of 16 U.S.C. § 1443 - maritime salvage was an activity authorized by federal law. Admiralty law in fact or in law had not been modified in the Coffins Patch area at the time of the salvage in 1992.

There is no liability for any damages. In the alternative, the entire damage award must be reversed and set aside for the reason stated. The artifacts recovered should be granted to the defendants.

Respectfully Submitted,

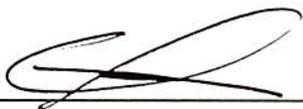
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CERTIFICATE OF SERVICE

I certify that on this 23 day of September, 1998, a copy of the foregoing has been furnished by U.S. Mail to **Andrew C. Mergen**, 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.



William VanDercreek, Esquire