

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

NIGHT BOX
FILED

MAR 25 1991

CARLOS IJENKE
CLERK, USDC / SDFL / MIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

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

Defendants.

MOTIVATION, INC.,

Plaintiff,

v.

UNIDENTIFIED, WRECKED AND
ABANDONED SAILING VESSEL,
etc.,

Defendant.

CASE NO.
92-10027-CIVIL-DAVIS

MAGISTRATE JUDGE GARBER

Consolidated with

CASE NO.
95-10051-CIVIL-DAVIS

MAGISTRATE JUDGE GARBER

MOTION FOR SUMMARY JUDGMENT

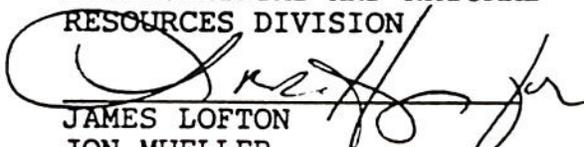
The United States files its Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, against Melvin A. Fisher, Kane Fisher, Salvors, Inc. and Motivation, Inc. under the National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1431-45, and the Florida Keys National Marine Sanctuary and Protection Act (the Sanctuary Act), Pub. L. No 101-605, 104 Stat. 3089 (1990). As set forth in the

accompanying memorandum, this court should hold that the Fishers are liable to the United States for assessment costs and for damages to Sanctuary Resources as provided in the NMSA. In addition, the Court should permanently enjoin these parties from treasure hunting in the Florida Keys National Marine Sanctuary without a permit.

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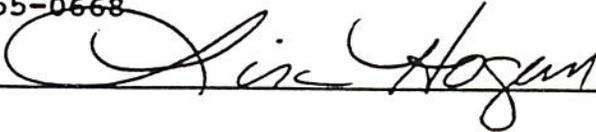
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 1997, a copy of the foregoing was served by overnight mail, postage prepaid, on:

Michael R. Barnes
513 Whitehead Street
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
) v.)
)
) MELVIN A. FISHER, KANE FISHER,)
) SALVORS, INC., a Florida)
) Corporation, in personam;)
) M/V BOOKMAKER, M/V DAUNTLESS,)
) M/V TROPICAL MAGIC, their)
) engines, apparel, tackle,)
) appurtenances, stores and)
) cargo, in rem.)
)
) Defendants.)

CASE NO.
92-10027-CIVIL-DAVIS

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MOTIVATION, INC.,)
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) Plaintiff,)
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)
) UNIDENTIFIED, WRECKED AND)
) ABANDONED SAILING VESSEL,)
) etc.,)
)
) Defendant.)

Consolidated with

CASE NO.
95-10051-CIVIL-DAVIS

MAGISTRATE JUDGE GARBER

ORDER

This matter is before the Court on the United States' Motion for Summary Judgment. For the reasons stated in the United States' Memorandum in Support of Motion for Summary Judgment,

IT IS ORDERED that the United States' Motion for Summary Judgment is GRANTED in the amount of \$ _____ jointly and severally, against Melvin A. Fisher, Kane Fisher, Salvors, Inc., and Motivation, Inc. (the Fishers);

IT IS FURTHER ORDERED that the Fishers are permanently enjoined from conducting treasure hunting operations within the boundaries of the Florida Keys National Marine Sanctuary without a duly authorized permit issued by the National Oceanic and Atmospheric Administration (NOAA); and

IT IS FURTHER ORDERED that the Fishers shall return at their own expense all treasure or marine artifacts that they recovered from the Coffins Patch area of the Sanctuary in 1992 to NOAA at such time and place as requested by NOAA.

This ____ day of _____, 1997.

Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

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MAGISTRATE JUDGE GARBER

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 Defendant.)

Consolidated with

CASE NO.
95-10051-CIVIL-DAVIS

MAGISTRATE JUDGE GARBER

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Plaintiff United States submits this memorandum in support of its Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, against Melvin A. Fisher, Kane Fisher, Salvors, Inc. and Motivation, Inc.¹ under the National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1431-45, and the

1. Melvin A. Fisher, Kane Fisher and Salvors, Inc. are the original defendants in Case No. 92-10027-CIVIL-DAVIS and consequently these parties will be referred to as "the defendants". Motivation, Inc. is a separate treasure hunting company owned and operated by Melvin Fisher, Kane Fisher and other family members. Collectively, Melvin A. Fisher, Kane Fisher, Salvors, Inc. and Motivation, Inc. will be referred to as "the Fishers."

Florida Keys National Marine Sanctuary and Protection Act (the Sanctuary Act), Pub. L. No 101-605, 104 Stat. 3089 (1990). This Court should hold that the Fishers are liable to the United States for assessment costs and damages to Sanctuary Resources as provided in the NMSA.

HISTORY OF THE CASE

The United States filed this action on April 21, 1992, alleging that the defendants' treasure hunting activities in the Florida Keys National Marine Sanctuary (the Sanctuary) were causing the unlawful destruction, loss of, or injury to sanctuary resources within the meaning of the NMSA, 16 U.S.C. §§ 1431-45, and the Sanctuary Act, Pub. L. No 101-605, 104 Stat. 3089 (1990). The United States filed a complaint, seeking injunctive relief and damages. The United States also filed a motion for a preliminary injunction to restrain the defendants' use of propeller wash deflectors in the Sanctuary, pending disposition of the case on the merits.

Following a hearing and Report and Recommendation by the magistrate judge, the Court entered an order on July 23, 1993, granting the United States' motion for a preliminary injunction. The defendants appealed, and on June 3, 1994, the Eleventh Circuit affirmed the order granting the preliminary injunction. United States v. Fisher, 22 F.3d 262 (11th Cir. 1994).

On August 3, 1995, Motivation, Inc. filed a complaint in rem seeking full custodianship of the defendant vessel and the same artifacts recovered by the defendants in the Sanctuary in 1992 or, alternatively, a salvage award. Subsequently, the United States filed a motion to intervene, an answer and counterclaim in

June 1996. The government's motion to intervene was granted and the two cases were consolidated for discovery in June 1996. On October 3, 1996, the Court set these matters for trial on May 12, 1997.

STATEMENT OF FACTS

The Fishers are treasure hunters who have recovered historic artifacts from shipwrecks lying in what are now federal waters of the Sanctuary.² Melvin A. Fisher is the president of Salvors, Inc., and Kane Fisher has been engaged in the business of marine salvage for Salvors, Inc. at all times material to this action. Defendants' Response to United States' First Request for Admissions, No.s 1 & 2 (hereafter "R/A") (Exhibit A). Deposition Transcript of Kane Fisher, p. 6 (Exhibit B.) During the first three months of 1992, the defendants operated three vessels in the Sanctuary, the M/V DAUNTLESS, the M/V TROPICAL MAGIC, and the M/V BOOKMAKER. R/A No. 3, 4, and 5; see also the Vessel Logs from the three vessels (Exhibit C). Kane Fisher was the captain of the M/V DAUNTLESS, whose job it was "to bring in the loot," and the other vessels worked as subcontractors for Salvors, Inc. See Deposition Transcript of Kane Fisher, p. 18, 23.

At his deposition, Mel Fisher admitted that the in rem action filed on behalf of Motivation, Inc. involved the same artifacts recovered from Coffins Patch by Kane Fisher in early 1992. Deposition Transcript of Melvin A. Fisher, p. 51 (Exhibit D). However, he seemed confused about why the action had been

2. See, e.g., 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).

filed on behalf of Motivation, Inc. rather than on behalf of Salvors, Inc. In fact, Mr. Fisher did not recall at first ever seeing the complaint that he signed on behalf of Motivation, Inc. Id. at 49-50. At best, Mr. Fisher's testimony contradicted Kane Fisher, who testified that he was working for Salvors, Inc. when he recovered the artifacts at Coffins Patch in 1992. See Exhibit B, p. 18, 23; Exhibit D, p. 49-60.

Whomever they were working for, the three Fisher vessels were equipped with prop wash deflectors, which are commonly known as "mailboxes," to assist in treasure hunting. R/A No. 6. A mailbox typically consists of a pair of large, parallel, angular pipes mounted on the transom of a vessel. Once lowered from the transom, one end of each pipe fits directly over each of the vessel's propellers. At the propeller end, the pipe turns at a ninety degree angle and then extends straight down toward the sea bottom. When in operation, the mailboxes direct the thrust of the ship's engines towards the ocean floor. See Defendants' Answers to Plaintiff's First Interrogatories, Answer No. 2(f) (Exhibit E). The Fishers used this method of underwater excavation from their vessels in the Sanctuary in January, February and March of 1992. Id., Answer No. 2(c). By the time of the hearing in May of 1992, the Fishers had blasted nearly 600 craters using their mailboxes in "Coffins Patch," an area within the Sanctuary off Grassy Key. R/A No.s 7 & 8; Vessel Logs. A line of craters, many as large as 30-40 feet in diameter and nine feet deep, was found to extend for more than a mile. Report of MacIntosh Marine, Inc. to David Paul Horan (Exhibit F). Many of

the Fishers' blowholes were made in seagrass meadows in the Coffins Patch area. See Defendants' Proffer of New Evidence on Environmental Issues and attached Affidavit, p. 2 (Exhibit G). By their own calculation, the Fishers destroyed a total of approximately 1.63 acres of seagrass in Coffins Patch in 1992 as a result of their treasure-hunting activities. See p. 2-3 of the Affidavit of Defendants' Experts, attached to Exhibit G. The seagrass that the Fishers destroyed is a "sanctuary resource" as that term is defined in the NMSA. 16 U.S.C. § 1432(8).

In addition, the Fishers illegally removed a large number of artifacts from Coffins Patch in 1992 during the course of their treasure hunting activities. R/A No.s 15 & 16; see also Exhibit A to Defendants' Response to Plaintiff's Third Request for Production of Documents (Exhibit H); Conservation Lab Artifact Record attached to Defendants' Response to Plaintiff's Response to Request for Production of Documents to Melvin A. Fisher, Kane Fisher, Salvors, Inc. and Motivation, Inc. (Exhibit I); and the Vessel Logs. The Fishers, by their own admission, did not have a federal permit to conduct these activities. R/A No. 14. Lastly, the Fishers did not provide documents that demonstrate that they used basic archeological methodology in removing the artifacts from the Sanctuary. The only information supplied by the Fishers include the Vessel Logs and the Conservation Lab Records. See Vessel Logs and Exhibit I.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Although the facts must be viewed and inferences drawn in the light most favorable to the nonmoving party, the district court is not required to evaluate every conceivable inference which can be drawn from evidentiary matter, but only reasonable ones. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986); Parker v. Federal Nat. Mortg. Ass'n, 741 F.2d 975, 980 (7th Cir. 1984).

Initially, the moving party has the burden of demonstrating the absence of any material factual issue that is genuinely in dispute. Coats & Clark, Inc. v. Gay, 755 F.2d 1506 (11th Cir.), cert. denied, 474 U.S. 903, 106 S. Ct. 231 (1985). Once the moving party has met its burden, the opposing party may not rest upon its pleadings, nor may it allege in a general or conclusory fashion that issues of fact exist or might exist. Fed. R. Civ. P. 56(e). Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913 (11th Cir. 1993), reh'g denied, 16 F.3d 1233 (11th Cir. 1994). The opposing party must present, by affidavits or otherwise, "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Celotex, at 324.

Under this standard, the United States is entitled to summary judgment holding the Fishers strictly liable in personam for damages to sanctuary resources as set forth below.

II. STATUTORY BACKGROUND AND ELEMENTS OF LIABILITY UNDER NMSA

A. Statutory Background

Congress enacted the NMSA in response to "growing concern about the increasing degradation of marine habitats." S. Rep. No. 100-595, 2d Sess. 1, reprinted in, 1988 U.S. Code Cong. & Admin. News 4387 (Sen. Report). The NMSA

provides for the protection of important and sensitive marine areas and resources of national significance through the establishment of marine sanctuaries. The purpose of such sanctuaries is to preserve or restore such areas for their conservation, recreational, ecological, or aesthetic value.

Id.; see also 16 U.S.C. § 1431.

The NMSA confers authority for the designation and management of marine sanctuaries, and for NMSA enforcement, on the Secretary of Commerce, 16 U.S.C. §§ 1433, 1434, who has delegated these responsibilities to the National Oceanic and Atmospheric Administration (NOAA).

As amended, the NMSA imposes liability on "any person who destroys, causes the loss of, or injures any sanctuary resource...." 16 U.S.C. § 1443. See United States v. Fisher, 22 F.3d 262, 264 (11th Cir. 1994). The statute defines "sanctuary resource" broadly to "mean[] 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); Fisher, 22 F.3d at 264.

Under the NMSA, "damages" are defined to include:

(A) compensation for --

(i)(I) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and

(II) the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource; or

- (ii) the value of a sanctuary resource if the sanctuary resource cannot be restored or replaced if the equivalent of such resource cannot be acquired;
- (B) the cost of damage assessments under section 312(b)(2); and
- (C) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources;

16 U.S.C. § 1432(6).

The statute further provides for injunctive relief:

If [NOAA] determines that there is an imminent risk of destruction or loss of or injury to a sanctuary resource, or that there has been actual destruction or loss of or injury to a sanctuary resource which may give rise to liability under section 1443 of this title, the Attorney General, upon request of [NOAA], shall seek to obtain such relief as may be necessary to abate such risk or actual destruction, loss or injury, or to restore or replace the sanctuary resource, or both.

16 U.S.C. § 1437(i); Fisher, 22 F.3d at 264.

This explicit provision for injunctive relief, and other liability and enforcement provisions, were added to the NMSA in the 1988 amendments that enhanced NOAA's enforcement authority. See Sen. Report at 2-3.

The Florida Keys National Marine Sanctuary was the first marine sanctuary to be designated legislatively by Congress. The Sanctuary Act specifically recites Congress' determination that:

- (2) Adjacent to the Florida Keys land mass are located spectacular, unique, and nationally significant marine environments, including seagrass meadows, mangrove islands, and extensive living coral reefs.
- (3) These marine environments support rich biological communities possessing extensive conservation, recreational, commercial, ecological, historical, research, educational, and aesthetic values which give this area special significance.
- (4) These environments are the marine equivalent of tropical rain forests in that they support high levels of biological diversity, are fragile and easily susceptible to damage from human activities, and possess high value to human beings if properly conserved. . . .

Sanctuary Act § 2 (emphasis added).

The stated "purpose of this Act is to protect the resources of the Sanctuary." Sanctuary Act § 3. Accordingly, the statute provides that the area described in the statute "is designated as the Florida Keys National Marine Sanctuary under title III of the [NMSA]. The Sanctuary shall be managed and regulations enforced under all applicable provisions of such title III as if the Sanctuary had been designated pursuant to such title." Sanctuary Act § 4.³⁴

B. The NMSA Imposes Strict Liability

With respect to liability, the NMSA provides that:

Subject to paragraph (3), any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.

16 U.S.C. § 1443(a)(1). The liability provisions of the NMSA were modeled on virtually identical provisions contained in the Clean Water Act (CWA), 33 U.S.C. § 1321, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607. H.R. Rep. 100-739, 100th Cong., 2nd Sess. 1, 22 (June 28, 1988)[hereinafter House Report].⁴⁴ The law is well

3. Both the NMSA and the Sanctuary Act were amended by the Oceans Act of 1992, which became law after the injunction in this case was issued. Pub. L. No. 102-587, 106 Stat. 5039 (Nov. 4, 1992), reprinted in 1992 U.S. Code, Cong. & Admin. News. The Oceans Act enhanced the enforcement and liability provisions of the NMSA. Among other such provisions, the act added a new Section 1436 clarifying that "[i]t is unlawful to -- ... destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary," *id.* § 2106.

4. H.R. Rep. 100-739 reports on H.R. 4208, which was incorporated in toto into H.R. 4210 and passed by the House on
(continued...)

settled that these liability provisions impose strict liability.^{5/} In fact, this Court has held that the NMSA imposes strict liability. United States v. M/V Miss Beholden, 856 F. Supp. 668, 670 (S.D. Fla. 1994). Therefore, the United States need only prove that the Fishers injured, destroyed or caused the loss of sanctuary resources in order to establish liability.

III. THE FISHERS ARE LIABLE FOR DAMAGING OR CAUSING THE LOSS OF SANCTUARY RESOURCES

A. Approximately 1.63 Acres of Seagrass Was Destroyed

There is no dispute that the Fishers destroyed or injured sanctuary resources.

"[S]anctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of a sanctuary.

16 U.S.C. § 1432(8). In Section 2 of the Sanctuaries Act, Congress specifically named seagrass meadows as one of the "spectacular, unique, and nationally significant marine environments" that it sought to protect by designating the Florida Keys National Marine Sanctuary. Fisher, 22 F.3d at 266.

The Fishers have admitted that in January, February and March of 1992 they injured, destroyed and caused the loss of seagrass meadows within the Sanctuary. See Answer, ¶ 25.

4. (...continued)
July 26, 1988. 134 Cong. Rec. H5815 (July 26, 1988).

5. See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989) (CERCLA); United States v. M/V Big Sam, 693 F.2d 451, 453 (5th Cir. 1982), cert. denied, 462 U.S. 1132, 103 S. Ct. 3112 (1983) (CWA).

In addition, the Fishers submitted a Proffer of New Evidence, which was signed and submitted to the Court by counsel for the Fishers (Exhibit G). The proffer states that "duly qualified experts" were "retained to examine and evaluate the environmental impact of Fisher's search and salvage operations." Id. at 2. Attached to the Proffer is an affidavit, which was executed by five experts who were retained to provide professional services in this case. Id. at Affidavit, p. 1. In the affidavit, the experts state that they "have reviewed information on the above case and provide analyses on the extent of damage to seagrass beds in the vicinity of Coffins Patch Reef (sic) resulting from the use of prop wash." Id. On page 2 and 3 of the affidavit, the Fisher experts provide an analysis of the extent of damage caused by the Fishers in Coffins Patch. As a result of their analysis, the Fisher experts estimated that

approximately 10 percent of the seagrass in Section A and 8 percent of the seagrass in Section B was lost in the impact sites. This equates to a total loss of 6,597 m² (71,150 feet² or 1.63 acres) of seagrass bed.

Id. at Affidavit, p. 2-3. Accordingly, based on their own admission, the Fishers are liable for causing the loss of 1.63 acres of seagrass in the Florida Keys National Marine Sanctuary.

B. Historic Artifacts and Contextual Information Were Lost

As set forth above, there is no dispute that, during the course of their 1992 treasure hunting activities, the Fishers removed hundreds of historic sanctuary resources from Coffins Patch. See R/A No.s 15 & 16; see also Exhibit A to Defendants' Response to Plaintiff's Third Request for Production of Documents (Exhibit H); and (Exhibit I). There is also no dispute that the

Fishers removed these sanctuary resources by using mailboxes without prior authorization to do so from NOAA. R/A No. 14. Accordingly, by removing artifacts from the Sanctuary without prior authorization, the Fishers caused the loss of historic sanctuary resources.

The Fishers are also liable for the loss of contextual information that could have been derived from the artifacts had they used basic archeological methodology. Experts retained by both the United States and the Fishers agree that the components of basic archeological methodology include conducting initial research, generating a comprehensive research design, conducting a systematic remote sensing survey, mapping the accurate location of the artifacts, recording the stratigraphic and environmental data, conserving the artifacts and completing a report are basic components of archeological methodology. Report of Larry E. Murphy, p. 2-7; Deposition Transcript of Duncan Mathewson, p. 21, 37-43, 47-48, 56-57, 60-65, 80-82 (Exhibit R); Deposition Transcript of Robert Baer, p. 42-43, 58, 227-29, 234-35, 237-40, 255-59 (Exhibit S). The Fishers, however, have failed to produce documents evidencing that even basic archeological methodology was used when they removed the artifacts from the Sanctuary. See Vessel Log Sheets; (Exhibit I); and Deposition Transcript of Duncan Mathewson, p. 107, 108, 129. The Fishers' sole record of archeological information concerning the artifacts is based on the Vessel Logs and the Conservation Lab Records. *Id.* (NOAA does not take issue with the Fishers' conservation of the artifacts. Murphy Report, p.11). If there were any question

left as to whether the Fishers followed basic archeological methodology in 1992, Kane Fisher's deposition testimony clearly provides the answer -- he admitted that the only plan that he had for his treasure hunting activities in Coffins Patch was "in [his] head." Id. at 32, 37. Accordingly, the Fishers' "plan" did not even meet the minimal requirements set forth by the profession. As a result of the insufficient information recorded about the artifacts, the archeological context of these historic sanctuary resources has been lost. Report of Larry Murphy, p. 7. This loss is significant: "[w]ithout context, little beyond the specifics of the artifact can be derived from archeology, no spatial patterns can be observed and few questions about the past other than those about technology or design can be answered. Virtually, all archeological inference about the past ultimately relies on context." Id. at 3. Had the Fishers obtained a permit prior to conducting their illegal treasure hunting activities, proper methodology would have been required, and the loss that the Fishers caused would have been prevented. Consequently, the Fishers are liable for the loss of contextual archeological information as well.

IV. DAMAGES FOR SEAGRASS LOSSES UNDER THE NMSA

A. The Value of the Lost Use of Destroyed Seagrasses and the Cost of a Compensatory Seagrass Restoration Project to Replace the Lost Seagrasses

Under the NMSA, the United States is entitled to compensation for the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and the value of the lost use of a sanctuary resource pending its restoration or

replacement or the acquisition of an equivalent sanctuary resource. 16 U.S.C. § 1432(6)(A). In order to determine the appropriate compensation, it first had to be determined whether destroyed seagrass could be replaced or restored.

1. Restoring or Replacing the Destroyed Seagrass is Not Feasible

There is no dispute in this case that the seagrass that was destroyed at Coffins Patch in 1992 cannot be replanted in the areas where it was destroyed. After the discovery of the seagrass damage in Coffins Patch in 1992, NOAA conducted a pilot project to determine if the seagrasses at the Coffins Patch damage tract could be restored by on-site replanting of seagrass. See Expert Report of Mark S. Fonseca (Exhibit J).

As predicted by Dr. Joseph C. Zieman at the hearing on the preliminary injunction,^{6/} NOAA was unable to establish plantings with techniques that have been employed with great success in more quiescent settings.^{7/} By the summer of 1996, none of NOAA's transplants in Coffins Patch had survived. Report of Mark S. Fonseca.

At his deposition, Fisher expert Harold Wanless agreed that seagrass restoration at Coffins Patch could not be accomplished

6. Transcript of Hearing on Preliminary Injunction, p. 94-95 (Exhibit K).

7. The reason that seagrass cannot be transplanted in Coffins Patch is that the area is swept with very high energy waves that keep the bare sand areas in motion, which inhibits or prevents recolonization of seagrass. Natural recolonization in the natural sand patches or blowouts is very slow, and there have been no successful transplants in other areas with wave energy as powerful as that at Coffins Patch. See Report of Dr. Joseph C. Zieman, p. 9 (Exhibit L).

using standard planting techniques. See Deposition Transcript of Harold R. Wanless, p. 151 (Exhibit M). Dr. Wanless agreed that any effort at seagrass planting at Coffins Patch would be experimental and that high costs could be a factor. Id. at 152. Dr. Wanless also agreed that even though the craters were made five years ago, the initiation of recolonization had just begun. Id. at 119. Dr. Wanless admitted that the re-filled craters are still mostly bare sandy bottom. Id. at 122.

Given that the destroyed seagrass at Coffins Patch could not be replaced or restored, acquiring the equivalent sanctuary resource is appropriate. See 16 U.S.C. § 1432(6). Acquiring an equivalent sanctuary resource in this case means performing seagrass restoration at another suitable location within the Sanctuary to the proper scale. Thus, the appropriate measure of compensation for the seagrass injury at Coffins Patch is the sum of the cost of implementing an appropriate offsite restoration project scaled to compensate for the interim lost resource services from the time of injury until full natural recovery; the cost of monitoring the compensatory restoration project; damage assessment costs, and interest on these assessment costs. See Report of Brian E. Julius, p. 3 (Exhibit O).

2. Selection of an Appropriate Compensatory Restoration Project

In late 1996, one of the United States' expert witnesses who lives and works in the Florida Keys, Curtis R. Krueger, was asked to conduct a survey to identify potential seagrass restoration projects in the Sanctuary that are appropriate in scale and nature to compensate for the seagrass injuries at Coffins Patch.

Mr. Krueer's report, which includes his description of available seagrass projects in the Sanctuary, is attached as Exhibit N.

Based on Mr. Krueer's research, NOAA reviewed the projects to determine which would be the most appropriate to compensate for the seagrass losses at Coffins Patch. Sites were reviewed for suitability, and NOAA selected the project category Seagrass Transplants into Boat Impacts in Established No-Motor Zones (Prop Scar Restoration Project) as the most viable candidate for off-site restoration in this case. Boat impacts were selected because they are among natural seagrass beds, represent a human-induced injury, can be found in hydrodynamically protected areas, occur as large-scale scarring that is not readily recovering, have been restored both in this geographic area and elsewhere, occur in sufficient acreage and constitute an injury not unlike that found at Coffins Patch. Report of Mark S. Fonseca, p. 4.

Consequently, a restoration plan was developed for the implementation of the chosen project. The primary components of the plan include identification of methods of site marking, planting techniques, monitoring and success criteria. See Restoration Plan attached to Fonseca Report.

3. Scale of the Compensatory Restoration Project

The NMSA provides that damages shall include compensation for the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource. 16 U.S.C. § 1432(6)(A). To determine the appropriate scale of the compensatory seagrass restoration project, NOAA employed an assessment methodology known as the

Habitat Equivalency Analysis (HEA). The HEA determines the quantity of equivalent habitat necessary to be restored and/or created beyond the restoration of the injured resources to baseline, such that the total services provided by the compensatory habitat over its lifespan equals the total services lost due to the resource injuries. See Report of Brian E. Julius, p. 3.

The HEA is appropriate for scaling compensatory restoration projects when: the primary category of lost on-site services pertains to the ecological/biological function of the area; feasible restoration projects are available that provide services of the same type, quality and comparable value to those that were lost; and sufficient data on the required HEA input parameters exist and are cost effective to collect. Given that all these criteria were met, NOAA concluded that the HEA was the most technically appropriate and cost-effective methodology for quantifying the seagrass damages associated with this case. Id. at 3-4.

Based on an initial seagrass injury of 1.63 acres at Coffins Patch, NOAA calculated the total services lost due to the seagrass injury, the total services provided by the compensatory restoration project, and the total acreage of compensatory habitat necessary to compensate for the total resource services lost. Id. at 4. Using the HEA, NOAA calculated that a total of 44.08 acre-years of seagrass services will be lost from the time of the initial injury until the Coffins Patch site is expected to reach full recovery. An acre-year represents the total level of

ecological services provided by one acre of seagrass over a single year. Id. at 5.

Based on parameters used to characterize the Prop Scar Restoration Project, NOAA was able to calculate the scale of the compensatory habitat necessary to compensate for seagrass services that will be lost as a result of the Fishers treasure hunting in Coffins Patch in 1992. Using the HEA, NOAA calculated that 1.55 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the 44.08 seagrass acre-years of services that will be lost at Coffins Patch. Id. at 5-6. Report of Brian E. Julius.

4. Estimated Costs to Perform a 1.55-Acre Prop Scar Restoration Project

NOAA has estimated the total costs to implement a 1.55-acre Prop Scar Restoration Project in No-Motor Zones in the Sanctuary. The estimated costs include obtaining aerial photographs of the selected sites, performing on-site groundtruthing of sites, collecting and installing seagrass planting units, implementing a monitoring program, obtaining permits for the project, and performing oversight of the project. Id. at 6.

The estimated costs for the Prop Scar Restoration Project were calculated by adding the expected labor costs, travel costs, material and equipment costs, and monitoring costs. The total estimated costs required to implement the Prop Scar Restoration Project are \$351,648. See Attachment B to Report of Brian E. Julius.

B. Damage Assessment and Response Costs

During the five years of the pendency of this action, NOAA has incurred certain response and assessment costs necessary to assess the injuries to sanctuary resources caused by the Fishers as a result of their illegal treasure hunting in 1992. The assessment costs include labor, travel and expenses necessary to: quantify and document the extent and nature of the injuries, measure the amount of lost habitat services until full recovery, and develop a seagrass restoration plan to compensate for the lost habitat services. As described by Wiley R. Wright, III, an accountant who has reviewed and audited these costs, the assessment costs incurred by NOAA in this matter total \$211,130. Report of Wiley R. Wright, III (Exhibit P).

C. Interest

In addition, the NMSA provides for recovery of interest on sanctuary resource damage awards. Interest on past assessment costs was determined by first calculating the annual damage assessment costs associated with each fiscal year, from the time of the injury through fiscal year 1996. Interest for each year was then calculated by compounding the total annual costs by the historic 1992 5-year nominal U.S. Treasury Bill rate (6.2 percent) for the number of years elapsed since the costs were incurred. Annual interest calculations were summed over all years to arrive at the total amount of interest due. The total amount of interest due on the \$211,130 in assessment costs incurred through January 1997 is \$26,553. See Report of Brian E. Julius, p. 7-8.

V. DAMAGES FOR LOSSES TO HISTORIC SANCTUARY RESOURCES

As discussed above, the Fishers are liable for the removal of artifacts and the loss of contextual archeological information. Accordingly, the United States is entitled to receive compensation for these losses. See 16 U.S.C. § 1432(6); 16 U.S.C. § 1437(i); and Fisher, 22 F.3d at 264.

The proper remedy for the Fishers' removal of the artifacts from the Sanctuary is, pursuant to 16 U.S.C. §§ 1432(6)(A), 1437(i) and consistent with 16 U.S.C. § 1436(d)(1), return of those artifacts to NOAA. Except for one anchor, the recovered artifacts are apparently in the Fishers' possession. Deposition Transcript of Kane Fisher, p. 42-3.⁸ Therefore, the Fishers should be ordered to return the artifacts they removed from the Sanctuary to the public's trustee, NOAA.

In addition, the Fishers should compensate NOAA for the costs associated with long-term curation of the removed artifacts. But for the Fishers' illegal treasure hunting activities, NOAA would not be forced to incur these costs, which include \$1,000.00 for a professional evaluation of the conservation status of the recovered artifacts, and \$5,385.00 for estimated long-term curation responsibilities. Report of Larry E. Murphy, p. 11. Accordingly, it is the Fishers, not the taxpayers, who should bear this financial responsibility. 16 U.S.C. § 1432(6)(A)(i)(I).

NOAA, as trustee for the public, should also be compensated for the loss of contextual archeological information. 16 U.S.C. §

8. Kane Fisher testified that the Fishers knew the location of the anchor referred to above and were in the process of seeking its return. Id.

1432(6)(A). While it is impossible to restore all of the information lost to the public as a result of the Fishers' conduct, a scientifically performed analysis of the impacted site can, according to maritime archeology expert, Larry E. Murphy, restore at least part of the lost archeological and historical data. Id. at 1, 7-12.²⁴

The analysis proposed here, albeit very conservative, contains the following components:

- 1) generating a comprehensive research design, 2) conducting a systematic remote sensing survey, 3) completing a very limited test excavation that includes environmental context investigation, 4) conserving artifacts recovered for analysis during test excavations, 5) conducting primary historical research, 6) performing artifact analysis, and 7) generating a final report.

Id. at 8-10. Details of each component are set forth in Mr.

Murphy's Report. Id. The total cost for completing the analysis is \$68,445.00. Combining this figure with the costs discussed earlier (for the conservation analysis and long-term curation of the removed artifacts), results in a total damages claim of \$74,830.00 for loss of historic sanctuary resources.

VI. THE FISHERS CANNOT USE THE MOTIVATION, INC. ACTION TO AVOID COMPLIANCE WITH FEDERAL LAW

The Fishers should not be allowed to use this Court's admiralty jurisdiction to exempt themselves from complying with the NMSA and the Sanctuary Act. Under the NMSA, it is clear that Congress intended for NOAA, as trustee for the public, to protect

9. The use of such an analysis to determine compensation for damages to historic resources located on lands managed by the federal government is wholly consistent with other federal historic preservation statutes. See, e.g., the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470, et seq.; see also Expert Report of Larry E. Murphy at page 8, fn. 1.

and comprehensively manage historic and natural sanctuary resources. See 16 U.S.C. §§ 1431(a)(2) and 1432(8). In fact, the very first National Marine Sanctuary, designated in 1975, was established to protect the historic (Civil War-era) shipwreck, the *USS Monitor*, from unwanted claims under the admiralty/maritime laws of finds and salvage. Regardless of this clear Congressional intent, the Fishers claim that they are entitled, under the admiralty/maritime laws of finds and salvage, to full custodianship or, alternatively, a salvage award equal to the value of the artifacts that they admittedly removed from the Sanctuary. See *Complaint In Rem* filed in the *Motivation, Inc.* matter. *Id.*^{10/}

Under the law of finds, title to abandoned historic vessels and their cargo vests in the person who first reduces those artifacts to his or her possession with the intention of becoming the owner thereof. See *Treasure Salvors*, 569 F.2d at 336-37 (5th Cir. 1978). The law of salvage authorizes a salvage award for services rendered that, in some cases, is equal to the value of the entire vessel and its cargo. *Id.*

The Fishers cannot credibly claim that their unauthorized treasure hunting activities in a national marine sanctuary are justified under admiralty/maritime law. The United States clearly has the authority to exercise its sovereign prerogative over ancient shipwrecks located within its jurisdiction and

10. It is noteworthy that the Fishers filed the *Motivation, Inc.* action after performing their treasure-hunting activities, thereby admitting that their activities were not conducted pursuant to a pre-existing admiralty right.

control and did so by enacting the Sanctuary Act. See Sanctuary Act § 3 and 16 U.S.C. § 1432(8). See also Treasure Salvors., 569 F.2d at 337-38. Accordingly, the Fishers' claim must fail.

NOAA's sanctuary authority over these public historic resources was recognized by the Ninth Circuit in Craft v. National Park Service, 34 F.3d 918 (9th Cir. 1994). In Craft, the Ninth Circuit upheld an administrative law judge's imposition of penalties in excess of \$100,000 issued against recreational divers for their unauthorized removal of historic sanctuary resources from the Channel Islands National Marine Sanctuary. See also Klein v. Unidentified, Wrecked Sailing Vessel and Abandoned, 758 F.2d 1511, 1514 (11th Cir. 1985) (holding that the United States had the authority to exercise dominion and control over an historic Park resource); and Randy L. Lathrop v. The Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 963 (M.D. Fla. 1993) (court rejected salvor's admiralty/maritime claim to historic seashore resources for failure to obtain permits required under federal environmental/historic preservation statutes). Here, the Fishers' treasure hunting activities, conducted under the cloak of admiralty/maritime law, resulted in the unauthorized removal and destruction of historic sanctuary resources. This is precisely the type of result that Congress sought to avoid when it provided for the protection and comprehensive management of natural and historic sanctuary resources. To allow the Fishers to hide behind admiralty/maritime law to avoid complying with valid federal law should not be tolerated.

VII. THE FISHERS SHOULD BE PERMANENTLY ENJOINED FROM TREASURE HUNTING IN THE SANCTUARY WITHOUT A PERMIT

Section 1437(i) of the NMSA empowers district courts to enjoin to enjoin violations of the Act. This explicit provision for injunctive relief, and other liability and enforcement provisions, were added to the NMSA in 1988 amendments that enhanced NOAA's enforcement authority. Sen. Report at 2-3.

The standard for entry of a permanent injunction between private litigants is essentially the same as for a preliminary injunction, except the moving party must show actual success on the merits rather than a likelihood of success. Accordingly, the traditional standard for entry of a permanent injunction in private litigation is: (1) success on the merits; (2) a substantial threat of irreparable harm if the injunction is denied; (3) the threatened harm to the movant outweighs the threatened harm to the other party if the injunction is granted; and (4) that the injunction will not be adverse to the public interest. Del Pino v. AT&T Information Systems, Inc., 921 F. Supp. 761, 765 (S.D. Fla. 1996).^{11/}

11. Courts have differed in interpreting the standard for injunctive relief when the United States moves to compel compliance with the law. See California v. American Stores, 495 U.S. 271, 295-96 (1990); Amoco Production Company v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1977); United States v. Du Pont, 366 U.S. 316, 326, 334; United States v. Bethlehem Steel Corp., 38 F.3d 862, 867-68 (7th Cir. 1994); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984); United States v. Hayes Corp., 415 F.2d 1038, 1045 (5th Cir. 1969); United States v. Medina, 718 F. Supp. 928, 930 (S.D. Fla. 1989).

The Fishers should be permanently enjoined from treasure hunting in the Sanctuary without a permit issued by NOAA. Not only have the Fishers violated the statute by admittedly destroying seagrass and illegally removing artifacts, but there exists some cognizable danger of recurrent violation. At the hearing on the preliminary injunction, the defendants stipulated that they would continue their treasure hunting operations in the Sanctuary absent a Court order. See Notice of Filing Stipulations, Docket No. 37. In addition, at their depositions, both Kane Fisher and Melvin Fisher refused to answer questions concerning whether they had continued treasure hunting operations in the Sanctuary in areas outside Coffins Patch. Apparently, the Fishers were concerned that their testimony would implicate them in a violation of the Court's order granting the preliminary injunction. Deposition Transcript of Melvin A. Fisher, p. 39-40; Deposition Transcript of Kane Fisher, p. 21.

Furthermore, in this case, the United States can indeed prove irreparable harm if the injunction is denied, success on the merits, that the threatened harm to the public interest if injunctive relief is denied outweighs the damage to the Fishers' private interest if it is granted, and that the requested injunction will not be adverse to the public interest.

1. The Injury at Coffins Patch Was Irreparable

In the instant case there is uncontroverted evidence to establish irreparable harm. The experts in this case agree that it will take decades to repair the damage caused by the Fishers

to the Sanctuary. Dr. Joseph Zieman, a leading authority on seagrasses, estimates that regrowth of the seagrass will take at least 50 years and may take as long as 100 years. Report of Joseph C. Zieman, p. 8. Also, the Fishers' own expert, Dr. Harold R. Wanless, agrees that recovery time will be decades, and he agrees with Dr. Zieman that the lost seagrass in Coffins Patch cannot be restored using traditional planting techniques.

Deposition Transcript of Harold R. Wanless, p. 151, 155, 161. Further, the loss of contextual archeological information that cannot be restored through the proposed scientific analysis described earlier, is lost to the public forever. As the Supreme Court has aptly stated:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.

Amoco Production Company v. Village of Gambell, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987). Based on the testimony of experts, the evidence more than suffices to support the conclusion that irreparable harm has occurred in the Sanctuary.

2. Success on the Merits

As discussed in Section III above, there is no dispute that the Fishers destroyed or injured sanctuary resources. The Fishers have admitted both in their verified answer and in their proffer that in early 1992 they injured, destroyed and caused the loss of seagrass meadows within the Sanctuary. Answer, ¶ 25; Affidavit, p. 2-3, attached to Defendants' Proffer of New Evidence on Environmental Issues. The Fishers admitted to

causing the loss of 1.63 acres of seagrass in the Sanctuary.

The evidence that the Fishers removed artifacts and caused the loss of archaeological information provides another basis for the Fishers' liability for damage to sanctuary resources. See Section III.B., above. Thus, there is no question about the Fishers' liability for damages in this case.

3. The Balance of Equities

The Supreme Court's admonition that "the balance of equities will usually favor the issuance of an injunction to protect the environment" where harm is likely, Amoco Production, 480 U.S. at 585, is especially apt in this case. The scale and significance of the harm caused by the Fishers' unregulated use of mailboxes necessarily outweighs the burden placed on the Fishers.

On the other side of the balance, the only activities from which the Fishers have been restrained are the excavation of seagrass meadows and the destruction or removal of cultural artifacts and information, conduct that expressly is declared unlawful in the NMSA. See 16 U.S.C. § 1436. The burden to the Fishers in being denied the purported right to engage in unlawful activities in the Sanctuary is not a basis to deny the injunction.

The equities particularly favor the United States in this case because injunctive relief is one of the least burdensome of enforcement actions authorized in the NMSA. The injunction was sought in lieu of other, more severe remedies, including seizure and forfeiture of the Fishers' vessels. 16 U.S.C. §§ 1437(b)(1)

(authority to "seize any vessel suspected of being used to violate this chapter"); 1437(d)(1) ("[a]ny vessel (including the vessel's equipment, stores, and cargo) ... in connection with ... any violation of this chapter shall be subject to forfeiture"). See also House Report at 7 ("possible seizure and forfeiture of vessels [] will result in more careful vessel operation"). The evidence establishes, at the very least, probable cause to seize the Fishers' vessels, the consequence of which would have been to shift the burden to the Fishers of disproving involvement in the NMSA violation. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438-39 (11th Cir. 1991) (en banc). The United States' decision to refrain from arrest, seizure, or forfeiture of the vessels reflects a considered effort to minimize interference with the Fishers' assets and operations.

4. The Public Interest at Stake

In United States v. Du Pont, 366 U.S. 316, 81 S. Ct. 1243 (1961), the Supreme Court held that where the government is the plaintiff, the public interest embodied in a Congressional statute must be given precedence over any negative effect on a private interest. The Court stated that "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." Id. 334.

Congress has provided eloquent and dispositive testimony concerning the public interest at stake in protecting the "spectacular, unique, and nationally significant environments" of

the Sanctuary. Sanctuary Act § 2. This congressional finding, coupled with the testimony concerning the effect of unregulated mailboxing on sanctuary resources, removes any doubt that the public interest demands injunctive relief in this case.

CONCLUSION

For the reasons stated above, the United States requests that the Court grant summary judgment against Melvin A. Fisher, Kane Fisher, Salvor's, Inc. and Motivation, Inc. as follows:

1) judgment in the amount of \$562,948 for seagrass injuries, assessment costs, and interest on assessment costs;

2) judgment in the amount of \$74,830 for injuries to historic sanctuary resources;

3) a permanent injunction prohibiting the Fishers from destroying, causing the loss of, or injuring any sanctuary resource, including natural resources or historic resources, without an appropriate permit issued by a duly authorized governmental agency; and

4) an affirmative injunction ordering the Fishers to return the historic artifacts to NOAA that were taken from the Sanctuary in 1992.

Dated: March 25, 1997

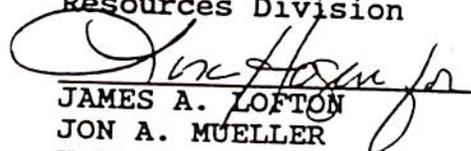
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