

6 O.R.W. 285A (N.O.A.A.)  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration

**Enclosure**

**\*285B In the Matter of: Gary Gentile, Appellant**

**UNITED STATES DEPARTMENT OF COMMERCE**

**OFFICE OF ADMINISTRATIVE LAW JUDGE**

**SUITE 6716**

**WASHINGTON, D.C. 20230**

**Docket No. 051-389**

**November 30, 1990**

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**RECOMMENDED DECISION**

**PRELIMINARY STATEMENT**

This expedited proceeding has been initiated under the Marine Protection, Research and Sanctuaries Act of 1972, [16 U.S.C. § 1431 et seq.](#), and the implementing regulations 15 C.F.R. Part 922 as well as [33 U.S.C. §§ 1401 et seq.](#)

**BACKGROUND**

This Appeal and Recommended Decision represent another stage in a saga that has been ongoing for almost 6 years. Appellant, a scuba diver, underwater photographer and author, again seeks to dive on the wreck of the Monitor, the civil war "cheese box-on-a-raft" which sank off Cape Hatteras

over a century ago. In 1974, **\*285c** it was designated as part of the Monitor Marine Sanctuary.<sup>1</sup> Under the Act, regulations and Management Plan, access to it is limited.

**\*\*2** In 1989 after filing some 11 applications, two administrative appeals and a suit in Federal District Court Appellant received a permit which he and some 15 others thereafter utilized to dive on and take photographs of the Monitor within the Monitor National Marine Sanctuary. Another application for a permit, dated July 12, 1990, was filed by Appellant. This was denied in a letter dated August 27, 1990.<sup>2</sup> This Appeal followed.

## ISSUE

Does the Appellant's proposal to perform underwater photography constitute "research related to the Monitor" within the meaning of 15 C.F.R. 924.5(a) and [16 U.S.C. 1431\(b\)](#).

## STATUTE AND REGULATIONS

[16 U.S.C. § 1431](#). Findings, purposes, and policies

(b) Purposes and policies. The purposes and policies of this title are—

(1) to identify areas of the marine environment of special national significance due to their resource or human-use values;

(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities;

(3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas;

**\*285d** (4) to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and

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

15 C.F.R. § 924.5 Permitted activities

Any person or entity may conduct in the Sanctuary any activity listed in § 924.3 of this part if:

(a) Such activity is either: (1) For the purpose of research related to the Monitor, or, ...

(Emphasis added).

## WHAT CONSTITUTES SCIENTIFIC RESEARCH

Unlike pornography, scientific research is subject of some definition beyond knowing it when one sees it. [Jacobellis v. Ohio 378 U.S. 184, 197 \(1964\)](#). The definition of art is not for consideration here.

The Fifth Circuit in two decisions has discussed the meaning of "research". To us "research" implies more than work. It involves the notion of lengthy, complex, technical investigation. [Hobbs v. U.S. 376 F.2d 489, 496–497 \(1967\)](#), [451 F.2d 849, 870 \(1971\)](#). Inquiry into what the courts have defined as scientific research reveals numerous expostulations, in various contexts e.g. [Midwest Research Institute v. U.S. 554 F.Supp. 1379 \(1983\)](#); [95 Yale Law Journal 1857, \(1965\)](#).

Scientific research is not undirected studies. It does not include activities of a type ordinarily carried on incident to commercial or business activities. It is not operating commercial enterprises e.g. a spaghetti factory. *Midwest Research Activities v. U.S.*, supra.

Two examples come to mind that are particularly apropos here. Matthew Brady, the renowned Civil War era photographer, produced a historic record of that conflict that continues to promote graphic understanding of that carnage and era. That was his work. It was not scientific research. However, activities in perfecting the camera instrument, and the process for developing the photographic images would have constituted scientific research. The second example, involving truly memorable scientific research, is the activity of the Wright Brothers. Though perceived as **\*285e** untutored bicycle mechanics, in fact they spent years collecting the works and experiments of other researchers. Their own study, experimentation, and testing the work of others as well as the development of their theories, constituted scientific research. A parallel to those examples does not appear to fit here.

## DISCUSSION

**\*\*3** The appellant has said "... the real questions here are not scientific, but photogenic." (Appellant's Proposal dated July 12, 1990 at 7) and "The guiding incentive for photographic subjects is artistic rather than scientific, ...". (Appellant's letter of April 1, 1990). Such appraisals hardly support the present contention that his underwater photography constitutes research under the Act and regulations.

Another principal thrust of Applicant's position is that he is "entitled" to visit, observe and photograph the remains of the Monitor. He is not. It is not an open public facility. It is a fragile, deteriorating fragment of the civil war era. The sanctuary designation preserves it from human interference. This was Appellant's own presentation here and in the hearing a year ago; my recent decision in the Channel Island<sup>3</sup> cases and the facts of life, demonstrate that public access would surely destroy any possibility of future meaningful archeological investigation (which constitutes scientific research). Disruption of the provenience of the site would impair future scientific inquiry. Protection of the resource is a primary objective of the statute. Public awareness may not be equated to public presence, particularly where it would compromise the resource.

Scientific research is not the donning of scuba gear and photographing a wreck on the sea bottom for recreational or commercial purposes, even if some added public awareness ultimately results. The terms of the regulations and Management Plan set forth standards and conditions for this particular sanctuary which are consistent with the Act. They bind the Agency and the Applicant.

## FINDINGS

1. The Agency lacks the legislative authority to permit the proposed activity which is devoid of the statutorily required test of scientific research value. Nor does such activity constitute "research on the Monitor" within the framework of the implementing regulations.
2. The application does not meet the threshold test of describing **\*285f** scientific research.
3. The overall activity proposed by Appellant in his application does not constitute scientific research.

4. The Agency action of limiting access to the Monitor sanctuary area to rescue and research operations as outlined in the regulations and USS Monitor National Marine Sanctuary Management Plan constitutes a valid exercise of responsibility for the sanctuary.

5. Since the application failed to meet the qualifying activity requirement, evaluation of the five criteria was unnecessary.

### **CONCLUSION**

The application and the stated purpose for the activity proposed fail to meet the research requirements of the statute and regulations. Therefore, the Appeal must be DENIED.

### **RECOMMENDATION**

That the action denying the issuance of the permit be sustained and the Appeal be DENIED.

Hugh J. Dolan

Administrative Law Judge

\*\*4 U.S. Department of Commerce

National Oceanic and Atmospheric Administration