

Gary Gentile, [6 O.R.W. 285c](#) (NOAA) 1990; 6 O.R.W. 285A (NOAA) 1990.

Location: Monitor National Marine Sanctuary

Applicable Law: [National Marine Sanctuaries Act](#) (NMSA) ([16 U.S.C. §§ 1431, et seq.](#))

Where Law Applies: *National Marine Sanctuaries Act:* The NMSA applies in national marine sanctuaries designated by Congress or the Secretary of Commerce. These sanctuaries must be areas of special national significance in the marine environment, which includes coastal and ocean waters, as well as the Great Lakes and their connecting waters. The seaward limit of the NMSA is the 200 nautical mile exclusive economic zone (EEZ) and continental shelf.

Holding: The Administrative Law Judge recommended upholding NOAA's requirement that physical access to the *U.S.S. Monitor* shipwreck be conditioned upon the permittee conducting scientific research, under NOAA's regulations and the Monitor National Marine Sanctuary management plan. Proposed photography of the wreck site does not constitute a scientific research activity.

General Facts:

Gary Gentile (appellant), a professional scuba diver and underwater photographer, sought to scuba dive and photograph the wreck of the *U.S.S. Monitor* which lies within the Monitor National Marine Sanctuary (MNMS or Sanctuary) off of Cape Hatteras, North Carolina, at a depth of at least 220 feet. Under the National Marine Sanctuary Act (NMSA) ([16 U.S.C. §§ 1431, et seq.](#)), National Marine Sanctuary Program regulations ([15 C.F.R. Part 922](#)), and the MNMS Management Plan, access to the MNMS was limited in order to preserve, protect, and manage the remains of the *U.S.S. Monitor*. The Administrative Law Judge (ALJ) in this case stated that the *Monitor* "is a fragile, deteriorating fragment of the civil war era. The sanctuary designation preserves it from human interference Protection of the resource is a primary objective of the statute."

Procedural Posture:

In 1989, after filing eleven applications, two administrative appeals, and a federal lawsuit in district court, Gentile received a permit which he and fifteen others used to dive on and photograph the *Monitor*. On July 12, 1990, Gentile filed another application for a permit which was denied in a letter dated August 27, 1990. The permitting agency, the National Oceanic and Atmospheric Administration (NOAA), determined that photography did not constitute a scientific research activity within the meaning of the NMSA (16 U.S.C. § 1431(b)) and the implementing Regulations (15 C.F.R. § 924.5(a)) which state, respectively, that a purpose of the NMSA is "to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas" and any person may conduct a permitted activity in the Sanctuary if such activity is "[f]or the purpose of research related to the *Monitor*" This

appeal to the U.S. Department of Commerce ALJ followed the agency's 1990 decision to deny Gentile's permit application to photograph the wreck.

Court Holding and Reasoning:

The Judge Hugh Dolan examined the judicial definitions of "scientific research" in various contexts. He noted that the Fifth Circuit determined that "research" implies more than work and involves lengthy, complex, technical investigation. It does not include undirected studies or activities ordinarily carried on incident to commercial or business activities. For example, a historic photographic record of a Civil War conflict is not scientific research; however, activities in perfecting the camera instrument and the process for developing photographic images would constitute scientific research. The study, experimentation, and testing of others' research, as well as the development of theories, constitutes scientific research. The ALJ found that a parallel to these circumstances does not appear in this case. Gentile's 1990 permit proposal stated, "[T]he real questions here are not scientific, but photogenic." Gentile's letter of April 1, 1990, stated, "The guiding incentive for photographic subjects is artistic rather than scientific" The ALJ determined that scientific research does not include donning scuba gear and photographing a wreck for recreational or commercial purposes, even if some public awareness ultimately results from the activity. The Judge found that the sanctuary designation preserves the shipwreck from human interference which would "destroy any possibility of future meaningful archeological investigation (which constitutes scientific research). Disruption of the provenience of the site would impair future scientific inquiry." The Judge stated, "Protection of the resource is a primary objective of the statute."

The Judge recommended that NOAA's action denying the issuance of the permit should be sustained and the appeal should be denied. The application did not meet the threshold test of describing scientific research nor did the overall activity proposed constitute scientific research. NOAA's action of limiting access to the Sanctuary to rescue and research operations, as outlined in the Regulations and Sanctuary Management Plan, constitutes a valid exercise of responsibility for the Sanctuary. Since the permit application failed to meet the qualifying activity requirement of a scientific research proposal, the evaluation of the five criteria in the Regulations was unnecessary.