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David Sive Award Best Brief Overall- Galleon Enterprises, Inc. (University of Houston Law Center)

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TWENTY-FIRST ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

David Sive Award for Best Brief Overall*

GALLEON ENTERPRISES, INC.

UNIVERSITY OF HOUSTON LAW CENTER
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CA. No. 08-1001
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

GALLEON ENTERPRISES INC.,
Plaintiff—Appellant
v.
THE UNIDENTIFIED SHIPWRECKED VESSEL,
if any, its apparel, appurtenances, and cargo located
within a five-mile radius of the
GOLD COAST NATIONAL MARINE SANCTUARY,
coordinates provided to the Court under seal,
Defendant, *in rem*
and
THE KINGDOM OF SPAIN,
Claimant
and
UNITED STATES OF AMERICA,
Intervenor—Appellee

BRIEF FOR PLAINTIFF—APPELLANT
Galleon Enterprises, Inc.

* This brief has been reprinted in its original format. Please note that the Table of Contents and Table of Authorities for this brief have been omitted.

JURISDICTIONAL STATEMENT

This lawsuit was brought by Galleon Enterprises Inc. ("Galleon") for title to, or in the alternative, a salvage award for salvage activities conducted on an unidentified, wrecked, and abandoned vessel and its cargo that sank on or about the year 1734. (R. at 3.) At issue are several federal laws including the Endangered Species Act, ("ESA"), 16 U.S.C. §§ 1531 – 1599 (2008), the National Marine Sanctuary Act ("NMSA"), 16 U.S.C. §§ 1431-1445(a) (2008), The Rivers and Harbors Act ("RHA"), 33 U.S.C. § 401 *et. seq*., and the Federal Water Pollution Control Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2008), intertwined with and subsumed within an *in rem* admiralty action. This case was properly brought in Admiralty with the filing of a verified complaint *in rem*. FED. R. CIV. P. 9(h). Further, Galleon's complaint was also properly filed in district court under federal question jurisdiction. 28 U.S.C. § 1331 (2008).

All parties have brought timely appeal of the district court's final order on Galleon's complaint. Before trial, the parties stipulated to standing and the district court issued a final order on the merits of Galleon's claims on November 15, 2008. The parties properly brought appeal under 28 U.S.C. § 1291 (2008).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the SMCA applies to the wreck referred to as *La Contesta*.
II. Whether the shipwreck is subject to sovereign immunity and, if so, whether salvage requires the consent of the sovereign.
III. Whether the NOAA acted arbitrarily and capriciously in denying Galleon a salvage and recovery permit for its activities within the GCNMS.
IV. Whether a NMSA permit is required for the wreck and the cargo irrespective of whether that cargo lies within or without the boundaries of the GCNMS.
V. Whether the Secretary of Commerce acted arbitrarily and capriciously in denying Galleon an Endangered Species permit to drill through the endangered deep sea coral.
VI. Whether a COE and/or NPDES permit is required for Galleon's salvage activities.

STATEMENT OF THE CASE

This is an appeal from a final order in the United States District Court for the District of New Union in Admiralty. The parties stipulated to standing, and the district court made a ruling on the merits of Galleon's claims on November 15, 2008. (R. at 1). Galleon Enterprises, Inc. ("Galleon") brought suit by filing in Admiralty a verified complaint *in rem* for title to, or in the alternative, a salvage award for salvage activities conducted on an unidentified, wrecked, and abandoned vessel and its cargo that sank on or about the year 1734. (R. at 3). The Kingdom of Spain ("Spain") intervened. Spain sought an order declaring Spain to be the owner of the vessel; an injunction forbidding Galleon from conducting any salvage activities at the site without the express permission, approval, and authorization of Spain; and an order directing Galleon to return to Spain any objects it removed from the site. (R. at 4). The United States also intervened, claiming Galleon failed to comply with the regulations of the National Oceanic and Atmospheric Administration ("NOAA"), the U.S. Army Corp of Engineers ("COE"), and the Environmental Protection Agency ("EPA"). (R. at 4). Therefore, the United States sought an order dismissing Galleon's complaint and denying Galleon's in rem admiralty action under both the law of finds and/or the law of salvage. (R. at 4).

The district court held Spain had not abandoned the ship and therefore Galleon could not obtain title to the wreck under the law of finds, but that Galleon was entitled to a salvage award for the cargo found outside the Gold Coast National Marine Sanctuary ("GCNMS"). (R. at 8-9). The district court also held Galleon violated both the RHA and CWA by failing to obtain the relevant permits and that the Secretary of Commerce acted properly in denying Galleon a permit under the ESA. (R. at 10-11, 13). All parties appealed. Galleon takes issue with the court's ruling on the law of finds and law of salvage and challenges the authority of the COE, the EPA, and the NOAA. (R. at 1). Galleon also appeals the Secretary of Commerce's decision not to issue a permit pursuant to the ESA. (R. at 1). Spain appeals the district court's ruling under the Sunken Military Craft Act ("SMCA") and the law of salvage regarding all artifacts. (R. at 1). Finally, the United States appeals the ruling regarding the NOAA's authority to require a permit to recover artifacts outside the boundary of the GCNMS. (R. at 2). The United States also appeals the district court's application of the SMCA. (R. at 2).

STATEMENT OF THE FACTS

This case revolves around the remains of an unidentified vessel that was sank around the year 1734. (R. at 3). Spain claims the vessel is a Royal Spanish Navy military frigate named *La Contesta.* (R. at 5). In 1732, *La Contesta* was one of six frigates assigned to protect twenty Spanish merchant ships that were sailing from Spain to Peru. (R. at 5). On the return voyage, *La Contesta* was assigned to carry mail, private passengers, merchant goods, and other cargo in the same fashion as the merchant ships. (R. at 5). As the fleet entered the straits of Florida, it was met by a hurricane, and *La Contesta*, along with almost half of her fleet, was lost. (R. at 6). Pursuant to the NMSA, the GCNMS was established off the coast of New Union to include submerged lands in which these Spanish ships are buried to protect natural and historical resources, including deep sea coral and Johnson seagrasses, which are listed as endangered species pursuant to the ESA. (R. at 5). The NOAA has promulgated regulations prohibiting activities that might affect sanctuary resources, including the discharge or deposit of substances and the removal or damaging of cultural, natural, or historical resources. (R. at 5). Listed in the regulations are seagrasses, coral reefs, and shipwrecks. (R. at 5).

In April 2008, Galleon invested $300,000 in searching for treasure and found several artifacts between twenty-three and twenty-four miles offshore in areas both in and slightly outside of the GCNMS. (R. at 5-6). Galleon applied to the NOAA for a research and recovery permit to search for the ship and excavate cargo that it believed lay inside the GCNMS. (R. at 5). The NOAA determined the ship was probably Spanish and summarily denied Galleon's permit application because it did not include documentation of Spain's approval of the excavation. (R. at 6). Spain refused Galleon's request mainly because it feared the destruction of the scientific and historic integrity of the wreck and because of the archaeological value of the site. (R. at 6.) Galleon began salvage operations anyway, constructing a drilling platform to drill through coral to reach the shipwreck. (R. at 6). Galleon used a "mailbox" technique that directs propeller wash downward, removing seabed sediment. (R. at 6).

The action filed by Galleon stated four counts: (1) Galleon is entitled to ownership of the wreck; (2) in the alternative, Galleon is entitled to a liberal salvage award; (3) Spain no longer exercises sovereign prerogative over the wrecked vessel; and (4) the Executive Branch of the United States has no jurisdiction to regulate Galleon's salvage operations. (R. at 6). On June, 25, 2008, the district court ordered: (1) the arrest of the shipwreck and artifacts; (2) Galleon be granted exclusive rights and that all finds be

deposited with the court; and (3) Galleon publish notice of the claim and specifically provide notice to the United States and Spain. (R. at 6). On August 15, 2008, Spain intervened, arguing that the vessel and its contents are owned by the Kingdom of Spain. (R. at 7). Galleon responded by asserting that the site does not represent any vessel and that additional research and salvage are necessary to establish identity of the vessel. (R. at 7). Also on August 15, 2008, the United States filed an answer asserting its regulatory authority over the shipwreck and all its cargo lying both inside and outside the boundaries of the GCNMS. (R. at 7). The U.S. claims Galleon violated the ESA, the NMSA, and the RHA and should not be given title to the wreck or receive a salvage award. (R. at 7).

SUMMARY OF THE ARGUMENT

The Kingdom of Spain had the burden to prove the shipwreck was a sunken military craft as defined by SMCA. Because they failed to do this, the SMCA does not apply and the traditional laws of salvage and finds do apply. Even if the wreck is *La Contesta*, the SMCA still would not apply because *La Contesta* was not on military, noncommercial service when it sank. This determination is made at the time the ship sank, and therefore whether *La Contesta* may have been on military duty at some point before the wreck is irrelevant.

The shipwreck is not subject to sovereign immunity, and the consent of the sovereign is not required to salvage the wreckage. Sovereign immunity does not apply when a suit in admiralty is brought to enforce a maritime lien and the lien is based upon a commercial activity of the foreign state, nor does it apply when the vessel and cargo in question have been abandoned, as is the case here. Also, sovereign immunity does not apply to the cargo recovered by Galleon and brought before the Court. Further, even if this Court determines that sovereign immunity does apply, consent of the sovereign is not required for salvage activities.

The NOAA acted arbitrarily and capriciously in denying Galleon a salvage and recovery permit for its activities within the GCNMS because it considered factors other than those contemplated by Congress. But should the Court determine that Spain's approval was a proper consideration, the NOAA failed to articulate a rational connection between the facts found and the decision made.

Galleon is entitled to title or a salvage award for the cargo outside the GCNMS even if the NMSA denies Galleon's permit for the cargo inside the GCNMS because the cargo found outside the boundaries can be segregated from the cargo found within the boundaries. Courts have the ability to

divide wrecks subject to multiple claims of ownership and have used this ability to find that part of a single shipwreck is abandoned while another part is not. The NOAA has no authority outside the GCNMS, and therefore Galleon should be awarded either title or a salvage award to this cargo.

The Secretary of Commerce acted arbitrarily and capriciously in denying Galleon an Endangered Species permit, and no reasonable connection was shown between the facts and its decision, as Galleon's actions do not constitute a "take." Galleon has not threatened the continued existence of either the deep sea coral or the Johnson seagrasses. Further, the Secretary of Commerce acted without considering relevant factors and did not demonstrate a reasoned connection between the facts and its decision.

Neither a COE nor a National Pollutant Discharge Elimination System ("NPDES") permit is required for Galleon's salvage activities because the wreck rests outside the territorial waters of the United States. Legislation of Congress applies only within the territorial jurisdiction of the United States. The Outer Continental Shelf Lands Act ("OCSLA") does not extend the authority of the CWA or RHA. However, even if Congress had the power to require these permits, Galleon did not need a COE or NPDES permit for the discharge of a pollutant because the water used in the mailbox technique does not constitute "dredge material."

STANDARD OF REVIEW

The scope of review in admiralty actions is limited, and the judgment of the district court may be set aside only when clearly erroneous. *McAllister v. U.S.*, 348 U.S. 19 (1954). A finding is clearly erroneous when, though there is evidence to support it, the reviewing court is left with a definite and firm conviction that an error has occurred. *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1963). Admiralty review under this standard allows greater flexibility than would an appeal from a jury verdict because it considers "the qualitative factor of truth and right of the case – the impression that a fundamental wrong has been reached." *Oil Screw Noah's Ark v. Bentley & Felton Corp*., 322 F.2d 3, 5 (5th Cir. 1963). The appellate court is permitted to consider all the evidence in the record as well as the personal knowledge of the judges. *U.S.-American President Lines, Ltd. v. Towboat Seneca*, 384 F.2d 511 (2nd Cir. 1967). Additionally, in the case of erroneous conclusions of law, full appellate review is appropriate. *Esso Std. Oil S. A. v. S. S. Gasbras Sul*, 387 F.2d 573 (2nd Cir. 1967).

ARGUMENT

I. THE LAWS OF SALVAGE AND FINDS APPLY TO THE UNIDENTIFIED VESSEL BECAUSE IT IS NOT A SUNKEN MILITARY CRAFT ACCORDING TO THE SMCA.

The SMCA provides that the traditional admiralty law of finds does not apply to sunken foreign military craft in United States waters. Sunken Military Craft Act, Pub L. No. 108-375, § 1406(c)(2), 118 Stat. 1811, 2094 (2005). It also provides that the law of salvage does not apply to sunken foreign military craft in United States waters unless the salvor receives express permission from the relevant foreign state. *Id.* § 1406(d)(2). "United States waters" means the contiguous zone of the United States. *Id.* § 1408(4). The contiguous zone extends twenty-four nautical miles from the United States' shores. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999). Because the shipwreck lies within the contiguous zone of the United States, it falls into the geographical area controlled by the SMCA. (R. at 3). However, the relevant provisions of the SMCA apply only to "sunken military craft." SMCA § 1406(c)(2), (d)(2). The SMCA identifies a sunken military craft as "any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sunk." *Id.* §1408(3)(A). At trial, the Kingdom of Spain had the burden of proving, by a preponderance of the evidence, that the unidentified shipwreck was a sunken military craft as defined by the SMCA. (R at 8). Because Spain failed to prove this, the SMCA does not apply to the wreck, and the traditional laws of salvage and finds apply.

A. The evidence at trial was insufficient to show the wreck at issue is *La Contesta* or any other wreck that qualifies as a sunken military craft.

Finders and salvors of shipwrecks are not required to positively identify the wrecks before bringing *in rem* admiralty proceedings against them. *Fathom Exploration, L.L.C. v. The Unidentified Vessel or Vessels*, 352 F. Supp. 2d 1218, 1225 (S.D. Ala. 2005) (holding that salvor's inability to identify vessel did not constitute a violation of Rules C(2)(b) or E(2)(a) of the Supplemental Rules of Certain Admiralty and Maritime Claims). To require finders and salvors to do so would chill salvage operations and result in the loss of historical artifacts. *Id.* at 1225. Under the Supplemental Rules, salvors are only required to provide reasonably available information about the location, nature, and embedded status of the wreck. *Id.* at 1227.

Galleon supplied the coordinates of the wreck, described the nature of the wreck, and provided the fact that it is embedded. (R. at 5-7). Galleon has thus supplied sufficient information. However, this information does not prove that the wreck is *La Contesta*.

Galleon has not discovered any remains of a ship's hull or any other structure that would be associated with a shipwreck. (R. at 7). It discovered a large field of artifacts that may or may not be the site of a shipwreck. (R. at 7). The cargo Galleon discovered could be jettisoned cargo; cargo from a French, British, or Dutch pirate ship; or even another ship lost at the same time as *La Contesta.* (R. at 7). *La Contesta* was only one ship out of a fleet of twenty six, twenty of which were Spanish merchant galleons, unaffiliated with Spain's military. (R. at 5). Half of the vessels in the fleet were lost along with *La Contesta*. (R. at 5). Not only would it be impossible for Galleon to identify the vessel as *La Contesta* at this early stage, but it is likely the unidentified wreck is a lost merchant galleon, not *La Contesta* or any other military vessel. Because it would be impossible at this point to determine with certainty that the shipwreck is a sunken military craft according to the SMCA, Galleon should be allowed to continue with its salvage activities.

B. If the wreck is *La Contesta*, the SMCA does not apply because *La Contesta* was not on military, noncommercial service when it sank.

The SMCA defines the term "sunken military craft" as:

> all or any portion of: (A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on *military noncommercial service when it sank*; (B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and (C) the associated contents of a craft referred to in subparagraph (A) or (B), if title thereto has not been abandoned or transferred by the government concerned.

SMCA §1408(3) (emphasis added). The SMCA provides no further explanation of the term "military noncommercial service," a term crucial to this Court's determination. The Act's legislative history shows its purpose was to codify the principle that governmental vessels in noncommercial service should be accorded special protection under the concept of sovereign immunity and should be exempted from the jurisdiction of any other state. *H.R. Rep.* No. 108-767, at 817 (2004) (Conf. Rep.). This suggests the definition of "noncommercial service" in the SMCA is parallel to its definition under the doctrine of sovereign immunity.

1. La Contesta was not on "military noncommercial service" as it is defined under the doctrine of sovereign immunity.

The doctrine of sovereign immunity is codified in the FSIA, which provides the sole basis for obtaining jurisdiction over a foreign state in United States courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The Act provides that foreign states are immune from United States jurisdiction unless certain exceptions apply, all of which have to do with commercial activity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-489 (1962). However, the Act does not clearly define the term "commercial." *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 612 (1992). In interpreting the term, the United States Supreme Court in *Weltover* found that the FSIA was intended to codify the "restrictive" theory of sovereign immunity. *Id.* at 612-13. Under the restrictive theory of sovereign immunity, a state engages in commercial activity when it exercises only those powers that can also be exercised by private citizens, as opposed to those powers that only sovereigns may exercise. *Id.* at 614 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976)).

La Contesta sank en route from Peru to Spain carrying commercial trading goods and cargo. (R. at 4). It had taken on the role of a private merchant galleon when it sank. *La Contesta* was performing a function that a private, civilian vessel would be able to perform when it sank, not something that only a sovereign could do. Thus, it was on commercial service at the time it sank.

2. The fact that La Contesta was possibly on military noncommercial service before it sank is irrelevant to the consideration of whether it is a sunken military craft pursuant to the SMCA.

The distinction between commercial and sovereign activity is challenging today, but it is even more difficult to apply to activities in the 17th and 18th centuries, when the roles of public vessels were less rigid and these ships often served hybrid purposes. *La Contesta* was one such ship that converted from protector of merchant galleons to one of the merchant galleons it was originally meant to protect. (R. at 5). The SMCA seems to anticipate this problem by specifying that a sunken military craft is a craft on military, noncommercial service *when it sank*. SMCA § 1408(3)(A). As discussed above, at the time *La Contesta* sank, it was serving a non-military purpose. Additionally, at the time of the SMCA's ratification, the term

"military noncommercial service" appeared in several treaties. All of these treaties included the word "only" before the term "military noncommercial service." For example, in the U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 [hereinafter UNCLOS], Article 96 states: "Ships owned or operated by a State and used *only* on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State." *Id.*, art. 96 at 1288 (emphasis added). The language also appears in Article 236, which states: "The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, *only* on government noncommercial service." *Id.*, art. 236 at 1315 (emphasis added). Similarly, the annex to the Madrid Protocol on Environmental Protection to the Antarctic Treaty states: "This Annex shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, *only* on government noncommercial service." The Madrid Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, Annex IV, Art. 11, para. 1, 30 ILM 1455, 1485 (1991) (emphasis added). The use of "only" in these treaties suggests they were intended to exclude vessels that were not *exclusively* on military, noncommercial service. This meaning of noncommercial service clarifies the SMCA's application to historic wrecks. Because *La Contesta* was not an exclusively military and noncommercial vessel but rather a hybrid of commercial and noncommercial service, it is not a sunken military craft as defined by the SMCA. The laws of salvage and finds apply to the vessel, and Galleon is entitled to title to it or, in the alternative, a salvage award.

II. SOVEREIGN IMMUNITY DOES NOT APPLY TO THE VESSEL OR ITS CARGO, AND CONSENT IS NOT REQUIRED TO SALVAGE THE WRECKAGE.

It is well settled admiralty law that warships and other craft on government service are protected by the concept of sovereign immunity. UNCLOS at arts. 95 and 96. However, as previously discussed, the vessel in question is on commercial service. For this and the following reasons, the owner of the wreckage cannot claim the protection of sovereign immunity.

A. Assuming the wreck is *La Contesta,* Spain is not entitled to immunity under the FSIA.

The FSIA is the sole basis for acquiring subject matter jurisdiction over foreign states and their agents and instrumentalities. 28 U.S.C.A. § 1330, 1602-1611 (West 2008); *Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 3 (1st Cir. 2002). The statute declares foreign states shall be immune from the jurisdiction of U.S. courts, subject to certain exceptions. 28 U.S.C.A. § 1604. One exception is that foreign states are not immune from U.S. jurisdiction in any admiralty action to enforce a maritime lien against a vessel or cargo of the foreign state, when the lien is based upon a commercial activity of the foreign state." *Id*. § 1605(b). Galleon must put on evidence this exception applies, but Spain bears the ultimate burden of disproving this issue. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2nd Cir. 1993).

This is a case for title to or a salvage award for salvage activities conducted on unidentified wreckage, and thus it falls within the definition of a maritime lien. (R. at 4); *Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F.Supp. 1377, 1388 (S.D. Fla. 1988) (explaining salvage services give rise to a maritime lien). The requirement the lien be based upon a commercial activity of the foreign state is also met. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C.A. § 1603(d). As previously discussed, foreign states engage in commercial activity for the purposes of the statute when they exercise only those powers that can also be exercised by private citizens. *Weltover*, 504 U.S. at 614. Applying this rationale, the Court must find Spain engaged in commercial activity when it sailed *La Contesta*.

Though the wreck is not definitely identified as the *La Contesta*, historical data suggests that vessel sank while carrying commercial trading goods, private passengers, and other cargo. (R. at 6). Other merchant ships making the voyage were carrying similar items. (R. at 6). Legal scholars surmise that ships carrying persons and goods are considered commercial enterprises since they are carried out by the state in competition with private enterprises. A. N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul. L. Rev. 1274 (1983). Notably, the district court ruled *La Contesta* was on a commercial mission at the time of its sinking. (R. at 9). Thus, Spain cannot effectively claim sovereign immunity protection.

B. If the Court should determine the FSIA exception does not apply, the *rem* at issue is abandoned, and thus its owner cannot claim sovereign immunity.

Under the law of finds, a plaintiff is entitled to a claim of ownership if he can show (1) intent to reduce the property to possession; (2) actual or constructive possession of the property; and (3) that the property is either owned or abandoned. *See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 435 F.3d 521, 532 (4th Cir. 2006). In the present case, the first two elements are not at issue; the only question is whether the vessel and its cargo are abandoned. Abandonment is the voluntary relinquishment of one's right to property. *Mucha v. King*, 792 F.2d 602, 610 (7th Cir. 1986). Thus, one who abandons his property is precluded from a later claim of sovereign immunity. Applying traditional principles of maritime law, this Court must find that the vessel and cargo are indeed abandoned.

The question of what constitutes abandonment has troubled U.S. courts for decades. In fact, the Supreme Court has deliberately left the definition of the term open. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998). The Sixth Circuit has ruled that abandonment need not be expressly stated and may be implied by a combination of several factors proved clearly and convincingly. *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, Captain Lawrence*, 177 F.3d 491, 499 (6th Cir. 1999). Such a combination of factors is present in this case.

The fact that this vessel sunk centuries ago and remains underwater is primary evidence of its abandonment. Courts have recognized that to assume a ship that has spent centuries in the depths of the sea retains its owner "stretches a fiction to absurd lengths." *Treasure Salvors, Inc. v Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978). In fact, the Sixth Circuit has expressly stated that it views "length of time as one factor among several relevant to whether a court may infer abandonment." *Fairport Int'l Exploration*, 177 F.3d at 499. Further, though it is not unequivocally clear Spain is indeed the owner of the wreckage, in the event that it is, Spain has declined to search for the wreckage of *La Contesta* for more than 200 years despite the fact the approximate place of her sinking was known. (R. at 5). This too suggests the country has abandoned the vessel and cargo. *Moyer v. Wrecked and Abandoned Vessel, Known as Andrea Doria*, 836 F.Supp. 1099, 1105 (D. N.J. 1993) (stating factors including place of the shipwreck as well as the conduct of the parties having ownership rights in the vessel are evidence of abandonment) (citation omitted). Finally, the availability of technology to

salvage the wreck, coupled with the failure of the owner to do so, is another factor to be considered. *Fairport Int'l Exploration v. The Captain Lawrence*, 245 F.3d 857, 864 (6th Cir. 2001). Though the "mailbox" technique necessary to reach the vessel in this case has been in use for more than 40 years, Spain, or any other country, has not attempted to salvage the ship. (R. at 7). This, too, indicates the wreck is abandoned.

The Fourth Circuit has suggested only an express statement is sufficient to prove abandonment when a party appears to assert ownership, as in the present case. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 640 (4th Cir. 2000). However, this contention does not comport with existing case law. To the contrary, numerous courts have considered an owner asserting an interest in a historic wreck as only one circumstance to be considered, along with other recognized factors such as lapse of time, non-use, location of the vessel, and efforts by the owner to recover the ship. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (explaining abandonment can be inferred when the circumstances give rise to that inference); *Moyer*, 836 F.Supp at 1105 (D. N.J. 1993) (stating non-use by the owner and lapse of time indicate abandonment).

Though Spain has made a blanket statement alleging it did not relinquish ownership in any sunken vessel under its service, this is not sufficient to defeat a finding of abandonment. (R. at 10). There is no conclusive evidence this wreck is the *La Contesta*. As previously discussed, the ship could be the vessel of any country, and the cargo could be jettisoned from another wreck or cargo from a pirate ship. To find that Spain's statement defeats a finding of abandonment will preclude Galleon from obtaining its rights to the *rem* under the law of finds or, alternatively, the law of salvage. Simply, there is no evidence this vessel is the *La Contesta*. Thus Spain's statement of non-abandonment cannot overcome the other factors that suggest it is abandoned.

C. Sovereign immunity similarly does not apply to the cargo recovered by Galleon because the *rem* is within the jurisdiction of the Court.

Article III of the Constitution extends the power of U.S. federal courts to all cases concerning admiralty and maritime jurisdiction. U.S. Const. art. III, § 2, cl. 1. Congress further implemented this article by granting district courts original jurisdiction over any civil cases of admiralty or maritime jurisdiction and "any prize brought into the United States" as well as all

proceedings involving that prize. 28 U.S.C. § 1333 (2008). This case is an *in rem* action. (R. at 4). *In rem* actions are prosecuted to enforce rights against *things* rather than individuals. *The Sabine*, 101 U.S. 384, 388 (1879) (emphasis added). Because *in rem* actions adjudicate rights to specific property brought before the court, the judgment rendered operates against anyone in the world making a claim against the property. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999); *See The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866). However, in order to exercise *in rem* jurisdiction over the cargo from a shipwreck, a court must have that cargo within the district in which the action is filed. *Haver*, 171 F.3d at 964. In this case, Galleon has brought several items recovered from the wreck before the Court, and thus this Court has jurisdiction to adjudicate the parties' interest in these items. (R. at 11).

D. In the alternative, if the Court should determine sovereign immunity does apply, consent of the sovereign is not required for salvage activities.

Principles of salvage law are designed to encourage prompt rendering of services to ships in marine peril by assuring payment and reward to salvors for their efforts. *Haver*, 171 F.3d at 962. A salvor acts on behalf of the owner of a ship to save his property, though no such request may have been made, as salvage law assumes the owner desires his property to be saved. *Id*. at 963. As such, it would be against well-settled principles of salvage law and thus improper to require Galleon to obtain the consent of the ship's owner before continuing its salvage activities.

Salvors are granted the right to possess another's property with the intent to save it from destruction, danger, or loss until compensated by its owner. *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F.Supp. 953, 961 (M.D. Fla. 1993). As such, an owner cannot defeat a salvor's right to rescue a vessel by later claiming the assistance was unwarranted. *See generally Int'l Aircraft Recovery, L.L.C. v. Unidentified Wrecked & Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000). While the right to save distressed vessels is not inherent, only an express rejection of the service by the owner can prevent a salvor from undertaking salvage activities on wreckage he alone has discovered. *Lathrop*, 817 F.Supp at 964. The sovereign typically communicates his rejection through a sign, buoy, marker or public advertisement. *Id*. The owner of the ship has taken no such action in this case. While Spain argues it is the ship's owner and it rejects Galleon's services, no conclusive evidence unequivocally proves this fact. Thus, the ship's owner has not expressly denied Galleon's services

and to deny Galleon from continuing its salvage activities cuts against time-honored policies of salvage law.

Courts have address the particular problem of the uncertainty of ownership of historic shipwrecks by stating that to bar a salvor from pursuing action to secure salvage rights on a wreck until it is capable of precisely identifying the owner presents serious policy problems. *Fathom Exploration*, 352 F.Supp.2d at 1230 (noting it would "defy logic" to bar Fathom from conducting salvage on a wreck until a owner is identified and notified). If identification of the wreck, and thus permission of the sovereign, were required, a salvor of unidentified wreckage would have no method by which to prevent claimants and competing salvors from essentially overtaking his salvage site. As the court opined in *Fathom Exploration*, to require a salvor by law to positively identify the owner of wreckage would place him in a serious predicament and force him to (1) surreptitiously engage in salvage activities so as to prevent being noticed by other claimants or salvors; (2) make reckless guesses as to the ship's identity or owner; or (3) avoid undertaking salvage activities altogether for fear he will not be compensated. *Id*. at 1224. To impose a duty to seek consent on a salvor would effectively create a "moratorium" on the thriving and beneficial practice of marine salvage, which serves such an important historical purpose. *Id*. at 1230.

III. THE NOAA ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED GALLEON'S APPLICATION FOR A RESEARCH AND RECOVERY PERMIT.

This court reviews the NOAA denial of Galleon's application for a research and recovery permit under a rational basis standard of review pursuant to the Administrative Procedures Act ("APA"). 5 U.S.C. § 702(2)(A) (2008); *See Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987). Agency decisions must be set aside if they are found by the Court to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 702(2)(A). The Court must examine whether the agency considered the relevant data and articulated a rational connection between the facts found and the choice made. *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (citation omitted).

The regulations of the GCNMS dictate that salvors must apply for a Research/Recovery of Sanctuary Historical Resources Permit if they desire to undertake salvage activities within the sanctuary boundaries. 15 C.F.R. § 922.166(C)(1) (2008). The director of the agency may, at his discretion,

grant a permit to the applicant if the following requirements are met: (1) the activity satisfies the General Permit requirements; (2) the recovery of the historical resource is in the public interest; (3) the recovery is part of research to preserve historic information for public use; and (4) the recovery is necessary or appropriate to protect the resource, preserve historical information, and/or further the policies and purposes of the NMSA and the GCNMS. 15 C.F.R. § 922.166(C)(2)(i-iv). Notably, whether the owner or presumed owner of the wreckage would consent to salvage is not one of the factors to be considered.

A. The NOAA acted arbitrarily and capriciously because it considered factors other than those contemplated by Congress in denying Galleon's permit application.

The Supreme Court has stated that an agency rule should be considered arbitrary and capricious if the agency relied on factors Congress did not intend for it to consider. failed to consider an important aspect of the issue. offered an explanation for its decision that was not in accordance with the evidence before the agency. or is entirely implausible. *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 43 (1983). Because the NOAA relied on factors outside of Congress' contemplation of the purposes of the NMSA in denying Galleon's permit, its decision must be found arbitrary and capricious.

The GCNMS was created pursuant to the NMSA. In enacting the NMSA, Congress outlined a number of purposes and policies of the system: (1) to identify, designate, and manage areas of national marine significance; (2) to provide comprehensive and coordinated conservation and management of the sanctuaries; (3) to maintain, protect, repair, and enhance biological communities; (4) to enhance public awareness and appreciation of sustainable use of the resources in the designated sanctuaries; (5) to promote, support, and coordinate scientific research of these areas; (6) to facilitate public and private uses of the resources; (7) to develop and implement coordinated management plans for the sanctuaries in accordance with other federal agencies and state and local governments; (8) to create models and incentives to manage the areas; and (9) to cooperate with global programs of marine conservation. 16 U.S.C. § 1431(b)(1-9) (2008). Notably, at no time did Congress contemplate preserving historical artifacts or resources that other countries might lay claim to. However, this factor was the sole reason the NOAA cited when denying Galleon's permit. (R. at 7). Thus, under the *State Farm* standard, NOAA's decision must be found arbitrary and capricious.

B. In the alternative, should the Court determine Spain's approval was a proper consideration, the NOAA failed to articulate a rational connection between the facts found and the decision made.

As previously stated, when issuing a decision, an administrative agency must state a rational relationship between the facts found and the decision rendered. *Pyramid Lake Paiute Tribe*, 898 F.2d at 1414 (citation omitted). In the present case, upon receiving Galleon's permit application, the only express criteria for the NOAA to consider were the aforementioned requirements. The record states the NOAA summarily denied Galleon's application by simply stating it determined the wreckage was presumably that of a Spanish vessel and the salvor had failed to include documentation of Spain's approval to excavate the site. (R. at 7). However, this explanation, in the context of the requirements to obtain a research and recovery permit, does not articulate a rational basis for denial. If an ownership consideration was proper, further explanation by the agency was needed.

Galleon met each element needed to obtain a GCNMS research and recovery permit under the written regulations. As such, the NOAA should have granted its request. Whether Galleon met the general permit requirements is not at issue. As to the remaining elements, it is well settled law that the recovery of long lost historical shipwrecks is in the public's interest and is essential to the preservation of historical information for the public's use. *MDM Salvage, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 631 F.Supp. 308, 310 (S.D. Fla. 1986) (stating the public interest favors the award of exclusive salvage rights to salvors); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.* (*Columbus-America I*), 974 F.2d 450, 468 (4th Cir. Va. 1992) (explaining that archeological preservation of a site is particularly compelling to the public interest when a ship offers an opportunity to create a historical record); *Haver*, 171 F.3d at 954 (recognizing organized salvage efforts are needed to protect the public's interest in salvaging historically significant shipwrecks). Similarly, courts have also ruled that historic wrecks are in marine peril and thus should be rescued to preserve their historical information. *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055 (5th Cir. 1980); *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 557 (D.C. Fla. 1982). The permission of a wreck's owner or presumed owner is not an express factor in whether a permit should be granted. However, if the Court should find this is an

appropriate consideration for the agency, its explanation of its reasoning is seriously lacking.

The Supreme Court has ruled that in reviewing an agency decision under the arbitrary and capricious standard, the reviewing court is not to compensate for deficiencies in the agency's explanation of its ruling. *State Farm*, 463 U.S. 29 at 103. In essence, the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* However, this is precisely what has occurred in this case. According to the record, the NOAA summarily denied the permit, with its only explanation for the decision being that "based upon the information submitted by Galleon" the ship was presumably the remains of a Spanish frigate and Spain's permission to excavate the wreck was not presented to the agency. (R. at 7). However, the district court significantly expands upon the reasons for denial in its discussion, opining that the artifacts before the court are presumably of Spanish origin. (R. at 13). The court further comments that Galleon has not presented any documentation that vessels other than those flying under the Spanish flag sank in the area. (R. at 13). While the district court's surmising does serve to explain more fully the agency's decision making process, under the rule articulated by the Supreme Court in *State Farm*, such speculation as to why the agency ruled as it did is inappropriate. *State Farm*, 463 U.S. 29 at 103. When viewed alone, the NOAA did not rationally articulate the connection between the facts it found and the decision it rendered. Thus, this Court must find the agency's denial of Galleon's permit was arbitrary and capricious.

IV. IF THE NOAA DENIES GALLEON'S PERMIT FOR THE CARGO INSIDE THE GCNMS, GALLEON IS STILL ENTITLED TO TITLE TO OR A SALVAGE REWARD FOR THE CARGO OUTSIDE THE SANCTUARY BECAUSE THAT CARGO CAN BE SEGREGATED FROM THE CARGO WITHIN THE BOUNDARIES.

Traditionally courts have treated a shipwreck as a unified *res* for the purposes of jurisdiction and calculating salvage awards. *See Treasure Salvors, Inc. v. the Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) (explaining the fiction of treating wrecks as single persons for the purposes of admiralty jurisdiction); *Nicholas E. Vernicos Shipping Co. v. United States*, 223 F. Supp. 116, 120, 1964 AMC 1222 (S.D.N.Y. 1963), *aff'd as modified*, 349 F.2d 465, 1965 AMC 1673 (2nd Cir. 1965) (stating it is appropriate to take into account the value of both vessels and their cargo to calculate salvage award). However, courts

do have the ability to divide wrecks subject to multiple claims of ownership and have used this ability to find part of a single shipwreck is abandoned while another part is not.

In *Columbus-America Discovery Group v. Alliance Mut. Ins. Co.* (*Columbus-America II*), 56 F.3d 556 (4th Cir. 1995), Columbus-America Discovery Group brought an *in rem* action for title or salvage rights to the wreck of the S.S. Central America, a nineteenth century passenger ship that sank in the Atlantic Ocean in 1857 while carrying more than $1 million in California gold. *Columbus-America II*, 56 F.3d at 561. British and American insurers intervened in the action, claiming they insured a portion of the gold, paid claims on the lost gold, and thus had an ownership interest in any gold Columbus-America recovered. *Id.* The case made its way to the Fourth Circuit twice. The first time, one of the main issues on appeal was whether the wreck was abandoned. *Columbus-America I*, 974 F.2d at 455. The court found the insurers had not abandoned the gold and remanded the case, directing the district court to apply the law of salvage rather than the law of finds. *Id.* at 468. In doing so, the court noted that if Columbus-America could prove that any of the cargo it salvaged was not insured by the insurers seeking ownership interests in the ship, that cargo should be found abandoned because none of its owners had come forth. *Id.* at 465. Therefore, if the value of the wreck was determined to be more than the insurers had insured, Columbus-America would get title to the surplus. *Id.* Thus, the court could adjudicate part of the wreck abandoned and apply the law of finds, while another part of the wreck could be subject to the law of salvage.

This caused some confusion for the insurers, who argued on remand that the court held they established an ownership interest. *Columbus-America II*, 56 F.3d at 575. On a second appeal to the Fourth Circuit, the court, clarifying that it had not found each insurer had verified its claim, affirmed its earlier assertion that the wreck could be divided. The court explained:

> If the total amount of gold proved owned by the underwriters constitutes less than one hundred percent of the gold salvaged – either because the proof of ownership fails with regard to one or more underwriters, or because a significant portion of uninsured gold is recovered, or for any other reason – Columbus-America may retain the excess.

Columbus-America II, 56 F. 3d at 576.

The lower court distinguished *Columbus-America I* from the present case in our favor. (R. at 12). However, the lower court misinterpreted

Columbus-America I as holding that privately-owned cargo and cargo owned by the insurers should be treated as one for purposes of calculating the salvage award. (R. at 12). As explained above, *Columbus-America I* held *not* that the cargo should be treated as one, but that it should be divided for the purposes of applying the laws of salvage and finds.[2] *Columbus-America II*, 56 F.3d at 576. The *Columbus-America* series of cases is analogous to the present case and shows that a shipwreck may be divided according to ownership interests. It is possible that a portion of a shipwreck is abandoned and thus subject to the law of finds, while another portion of the wreck is not abandoned thus subject to the law of salvage. In the present case, the situation is similar. Because the wreck site lies partly within and partly outside the GCNMS, a portion of the shipwreck is subject to the jurisdiction of the NMSA, while a portion of the shipwreck is not. (R. at 4). Just as in *Columbus-America I and II*, where the insurers' ownership interests did not extend to the portions of the ship they had *not* insured, the NMSA's jurisdiction does not extend to the portion of the wreck outside of the bounds of its jurisdiction. Outside of the GCNMS, the traditional laws of finds and salvage apply to the ship's cargo, and Galleon is entitled to title to this cargo under the law of finds, or in the alternative, a salvage award under the law of salvage.

The Supreme Court also addressed this issue in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). Deep Sea Research discovered the wreck of the Brother Jonathan, which sank in 1865 *en route* from Portland, Oregon, to Vancouver, carrying more than $2 million in gold and $250,000 in army payroll. *Id.* at 495. Like the *Columbus-America* cases, some of the Brother Jonathan's cargo had been insured, and the insurers asserted ownership of a portion of the wreck. However, the Ninth Circuit Court of Appeals declined to divide the wreck into abandoned and unabandoned portions because it feared the Eleventh Amendment and the Abandoned Shipwreck Act ("ASA") would result in both federal and state courts concurrently adjudicating the Brother Jonathan's fate. *Deep Sea Research v. The Brother Jonathan*, 102 F.3d 379, 389 (9th Cir. 1996). The Supreme Court granted certiorari and explained the Eleventh Amendment did not bar complete adjudication of the competing claims to the Brother Jonathan in federal court. *Deep Sea Research*, 523 U.S. at 508. It directed the trial

2. It is possible that the lower court misinterpreted the Fourth Circuit's holding based on its determination that Columbus-America should have exclusive rights to market the salvaged gold, the proceeds of which would later be divided amongst the claimants. *See Columbus-America II*, 56 F.3d at 574-575 (holding that Columbus-America should coordinate a unified marketing plan for the gold).

court on remand to reevaluate its determination of abandonment based on the clarified Eleventh Amendment issue, implying that it was permissible – even under the Eleventh Amendment and ASA – to divide a shipwreck and determine that only a portion of the wreck is abandoned. *Id.*

Based on the Fourth Circuit's determination that a shipwreck may be divided to determine whether the law of finds or the law of salvage should apply, and the Supreme Court's implied approval of this ability in *Deep Sea Research*, this Court should affirm the judgment of the trial court holding that the cargo outside the GCNMS may be segregated from the cargo within the GCNMS. Because the NOAA has no authority outside the GCNMS, Galleon is entitled to title to the cargo, or in the alternative, a salvage award.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE SECRETARY OF COMMERCE ACTED PROPERLY IN DENYING GALLEON AN INCIDENTAL TAKE PERMIT BECAUSE THE SECRETARY'S ACTIONS WERE ARBITRARY AND CAPRICIOUS AND NO REASONABLE CONNECTION WAS SHOWN BETWEEN THE FACTS AND THE DECISION, AS GALLEON'S ACTIONS DO NOT CONSTITUTE A "TAKE".

As was pointed out earlier, the APA governs judicial review of agency action. 5 U.S.C. § 706. The Court should set aside an agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review has been applied to decisions made by the Secretary of Commerce. *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979) (applying arbitrary and capricious review to the Secretary of Commerce's decision regarding state coastal zone management plan). To withstand a challenge against this standard, the Secretary of Commerce is required to examine the relevant data and articulate a satisfactory explanation for its action. *Islander East Pipeline Co., L.L.C. v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79, 94-95 (2nd Cir. 2006) (quoting *State Farm*, 463 U.S. at 42-43). In this case, the district court ruled the Secretary of Commerce acted properly because Galleon's activities constituted a "take" under § 1532 of the ESA due to of the "harm" caused to the deep sea coral and Johnson seagrasses. 16 U.S.C. § 1532(19) (2008); (R. at 13). But the facts in the record do not show that Galleon's salvage operations constituted more than an "incidental take," and the Secretary of Commerce has provided zero evidence to support its denial of an incidental take permit to Galleon, and thus, acted arbitrarily and capriciously in its decision.

A. Galleon has not performed any activities that involve anything more than an incidental take because Galleon has not threatened the continued existence of either the deep sea coral or the Johnson seagrasses.

Congress enacted the ESA in 1973 in response to growing public concern about extinctions of various species of fish, wildlife, and plants caused by irresponsible economic growth and development that failed to consider the negative environmental effects of such growth. *Forest Conservation Council v. Rosboro Lumber Co*., 50 F.3d 781 (9th Cir. 1995); 16 U.S.C. § 1531(a). As part of the ESA, it is unlawful to "take" any endangered or threatened species. 16 U.S.C. § 1538. "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). However, there is an exception to this rule. A permit, known as an "incidental take permit," may be issued for any taking that is incidental to the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539. Without giving any reasons as to why, the Secretary of Commerce denied Galleon's request for an incidental take permit in the case at issue. The ruling of the district court seems to indicate the permit was denied because Galleon's salvage activities were a more direct harm, as opposed to merely incidental. (R. at 13).

The district court ruled Galleon's actions "harmed" the deep sea coral and Johnson seagrasses by causing degradation to their habitat. (R. at 13). But habitat degradation is the only reason given for finding that Galleon's activities resulted in "harm," and habitat degradation, standing alone, is not sufficient to equal harm. *Arizona Cattle Growers' Ass'n v. F.W.S.*, 273 F.3d 1229, 1238 (9th Cir. 2001). Neither the district court in this case, nor the Secretary of Commerce, has provided any evidence to show the high level of impairment or degradation required in order for that impairment or degradation to amount to harm. This high level of impairment requirement is seen in the definition of "harm," upheld by the Supreme Court, which states that harm is: "an act which actually kills or injures wildlife. Such an act may include *significant* habitat modification or degradation where it actually kills or injures wildlife by *significantly* impairing essential behavioral patterns, including breeding, feeding, or sheltering."[3] 50 C.F.R.

3. "The word 'actually' before the words 'kills or injures'… makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be significant, must significantly

§ 17.3 (2008); *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 696-700 (1995) (emphasis added).

In order for Galleon's actions to be harmful and therefore constitute a "take," Appellees must prove that the habitat degradation prevents recovery of the species. *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508 (9th Cir. 1994). What this means is habitat degradation that constitutes "harm" should only be habitat degradation that could result in extinction. *See Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). Here, no attempt has been made by anyone to prove that the deep sea coral would not recover from Galleon's drilling activities or that the Johnson seagrasses would not recover from the mailbox activities. Certainly, no attempt has been made by any party to prove – nor has any party even alleged – that Galleon's actions could result in the extinction of either the deep sea coral or the Johnson seagrasses.

In *Defenders of Wildlife v. Bernal*, the appellate court dealt with whether the construction of a school complex would result in the "take" of a pygmy-owl. *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000). The appellate court affirmed the district court's ruling that there was no "take," holding that the district court's final order was a "thorough, detailed, and careful reasoned discussion and analysis of the testimony of the expert witnesses and other evidence produced." *Id*. at 925. Far from thorough and detailed, the final order in the case at issue contains but three conclusory sentences for the judge's finding that Galleon's activities constituted a "harm." Judge Remus provided no analysis and stated only:

> I find that Galleon's drilling to expose a historic shipwreck destroys or degrades the deep sea coral. In addition, I also find that Galleon's mailbox activities also resulted in destruction of Johnson seagrasses. Thus, Galleon's activities resulted in harm to these two species by causing a degradation to their habitat in the GCNMS.

(R. at 13). The district court judge, in these three conclusory sentences, does not offer any evidence or proof as to why he found Galleon's activities resulted in harm and therefore does not meet the burden of proof required. Thus, any small amount of harm done by Galleon is merely incidental to its activities, and the Secretary of Commerce should have granted an incidental take permit.

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impair essential behavioral patterns, and must result in actual injury to a protected wildlife species."

B. The Secretary of Commerce acted arbitrarily and capriciously because it acted without considering relevant factors and did not demonstrate a reasoned connection between the facts and its decision.

The Second Circuit has instructed courts applying the arbitrary and capricious standard of review to consider whether the agency: (1) considered the relevant evidence; (2) examined relevant factors; and (3) spelled out a satisfactory rationale for its action, including demonstrating a reasoned connection between the facts and its decision. *Environmental Defense v. United States Environmental Protection Agency*, 369 F.3d 193, 201 (2nd Cir. 2004). Judicial review is meaningless unless the record is carefully reviewed to "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). In this case, the Secretary of Commerce provides no reasoning or explanation whatsoever for its denial of the incidental take permit to Galleon. (R. at 13) (noting that in the only section of the record that deals with the incidental take permit there is no mentioning of any reason or evaluation given by the Secretary of Commerce for its denial).

16 U.S.C. § 1539 lays out several conditions that an applicant for an incidental take permit must meet, but as long as all of those conditions are met, § 1539(a)(2)(B) says "the Secretary *shall* issue the permit." (emphasis added). This same section of the ESA also requires the Secretary to "publish notice in the Federal Register of each application for an exemption or permit which is made under this section." § 1539(c). The purpose of this notice is to invite the submission of arguments and data pertaining to the application. *Id*. All information received is to be available as a matter of public record at every state of the proceeding. *Id*. In this case, absolutely none of this required information is found in the record. It may be that there is a reasonable explanation for why these steps were not taken or were not put into the record, but the reviewing court may not supply reasons for agency action that are not in the record. *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1236 (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The Court is not empowered to substitute its own judgment for that of the Secretary of Commerce, and the basis for the Secretary's decision must come from the Secretary. *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1236.

As the record – or lack there of – is all we have to go by, the Secretary's decision was arbitrary and capricious as a matter of law because the Court is to set aside agency action found to be "without observance of

procedure required by law." 5 U.S.C. § 706(2)(D). As was shown above, there is no indication that any of the numerous procedures were observed. Further, courts may not accept appellate counsel's *post hoc* rationalizations for agency action because those rationalizations are not articulated by the agency itself. *State Farm*, 463 U.S. at 50. Because the Secretary of Commerce did not follow the procedural requirements set forth in the ESA and did not establish that it considered relevant factors, this Court should reverse the ruling of the lower court that the Secretary's actions were not arbitrary and capricious.

VI. NEITHER A COE NOR A NPDES PERMIT WAS REQUIRED FOR GALLEON'S SALVAGE ACTIVITIES BECAUSE THE VESSEL RESTS OUTSIDE THE TERRITORIAL WATERS OF THE UNITED STATES AND BECAUSE THERE WAS NO DISCHARGE OF DREDGE MATERIAL.

The United States, on behalf of the COE and the EPA, argues that Galleon violates Section 10 of the RHA, 33 U.S.C. § 403 (2008), and section 301(a) of the CWA, 33 U.S.C. § 1311 (2008), by constructing a drilling platform and drilling to expose a historic shipwreck. (R. at 10-11). The U.S. claims the drilling platform was an obstruction to the navigable waters of the U.S. that required a Section 10 permit and the propwash from the Galleon's mailboxing activities was the discharge of a pollutant and therefore required a permit under section 301(a) of the CWA. (R. at 10).

However, under the facts set forth in the record, Galleon was required to obtain neither of these permits, first and foremost, because the wrecked vessel was on the outer continental shelf, outside of the territorial waters of the United States. *Argentine Republic*, 488 U.S. at 441. The Executive Branch does not have jurisdiction to impose permitting requirements on Galleon outside of the territorial waters of the United States. *See Treasure Salvors*, 569 F.2d at 340.

Even if the United States did have the power to control Galleon's activities outside of U.S. territorial waters, Galleon would not need a NPDES permit or COE permit under the CWA because water is not dredge material, and therefore there has been no discharge of a pollutant without a permit. *Save our Community v. U.S.E.P.A*, 971 1155, 1166 (5th Cir. 1992); *Orleans Audubon Soc. v. Lee*, 742 F.2d 901 (5th Cir. 1984).

A. The United States does not have the power to interfere with Galleon's salvage activities in retrieving the remains of a wrecked vessel on the Outer Continental Shelf.

1. The CWA and RHA do not apply beyond the territorial sea of the United States.

Legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. *Argentine Republic*, 488 U.S. at 440 (citing *Foley Brothers v. Filardo*, 336 U.S. 281, 285 (1949)). This is because, when it wants to, Congress, as it has shown by example, knows how to place the high seas within the jurisdictional reach of a statute. *Id*. at 440. See 14 U.S.C. § 89(a) (2008) (empowering Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction"); 18 U.S.C. § 7 (2008) (extending jurisdiction to vessels on "[T]he high seas, any other waters within admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state"); 18 U.S.C. § 1701 (permitting President to declare portions of "high seas" as customs – enforcement areas).Historically, the territorial sea of the United States has only extended three nautical miles from the coast. *United States v. California*, 332 U.S. 32 (1947). However, beginning on December 28, 1988, the United States began to recognize a territorial sea of twelve nautical miles, as was allowed by international conventions. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). Thus, as of today, the territorial jurisdiction, and therefore the power of the RHA and CWA to control Galleon's activities, extends twelve miles off the coast.

As was illustrated above, Congress has in the past extended its jurisdiction to the high seas. But Section 10 of the RHA prohibits the creation of any obstruction not affirmatively authorized by Congress to "the navigable capacity of any of the *waters of the United States*." 33 U.S.C. § 403 (emphasis added). Also, "dredged material" for purposes of a CWA permit is defined as "material that is excavated or dredged from *waters of the United States*." 33 C.F.R. § 323.2(k) (1979) (emphasis added). Therefore, these statutes apply by their own terms to waters owned or controlled by the United States. The shipwreck in this case is located approximately twenty-three to twenty-four miles offshore and therefore rests on the outer continental shelf, well outside the territorial waters of the United States.

2. The Outer Continental Shelf Lands Act does not extend the authority of the CWA or RHA.

The government argues that "the authority of the COE to prevent obstructions to navigation is extended by the Outer Continental Shelf Lands Act ("OCSLA") to fixed structures located on the Outer Continental Shelf, including the contiguous zone." (R. at 10) (citing 33 U.S.C. §§ 1331, 1333). But the OCSLA was passed not to extend the U.S.'s territorial waters but to clarify the respective interests of coastal states and the nation in the natural resources of the subsoil and seabed of the continental shelf. *Treasure Salvors, Inc*. 569 F.2d at 338. The Fifth Circuit has pointed out history behind the OCSLA that demonstrates the purpose and scope of the act:

> The Truman proclamation of September 28, 1945, spurred national and international interest in exploitation of the mineral wealth of the oceans. The proclamation asserted the jurisdiction and control of the United States over the mineral resources of the continental shelf, but *was not intended to abridge the right of free and unimpeded navigation of waters above the shelf, nor to extend the limits of American territorial waters.*

Id. at 338 (emphasis added). In the years after the Truman proclamation, the U.S. and coastal states fought over control of the seabed and natural resources beneath the navigable waters. *Id*.

Congress recognized the coastal states' ownership of the seabed and resources within the original three mile territorial sea but "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." *Id*. (quoting *United States v. Maine*, 420 U.S. 515 (1975)). Thus, the OCSLA was enacted to ensure the federal government had authority to lease out various sections of the Outer Continental Shelf for resource development. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co*., 754 F.2d 1223, 1227 (5th Cir. 1985). The OCSLA was not a general extension of United States sovereignty but must be construed to comport with its purpose of establishing policies and procedures for managing Outer Continental Shelf natural resources. *Id*. In addition, 43 U.S.C. § 1332(b) provides that the Act "shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected." This section makes clear that Congress intended to control the seabed below, but not the waters above, and therefore the United States' territorial jurisdiction was not increased by the OCSLA.

B. Galleon did not need a COE or NPDES permit for the discharge of a pollutant because the water used in the mailbox technique does not constitute "dredge material."

The CWA makes the discharge of any pollutant by any person unlawful. 33 U.S.C. § 1311. § 1342 sets up the NPDES whereby an individual may apply for a permit for discharge of pollutants. Permits for discharge of dredge material may be issued under § 1344 which states the COE may issue permits, after notice and opportunity for public hearings, for the discharge of dredged material into the navigable waters at specified disposal sites. The COE defines "dredged material" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(k) (1979).

When it began its salvage activities, Galleon used a process known as the "mailbox" technique to discover and remove artifacts. (R. at 6). This technique uses elbow shaped prop wash deflectors, known as "mailboxes," to direct the vessel's propeller wash downward and thereby remove seabed sediments and seagrasses, exposing underlying materials. (R. at 6). The United States claims the propwash from Galleon's mailboxing constitutes a discharge of a pollutant without a permit because the activities resulted in the unauthorized discharge of dredged material into waters of the United States. (R. at 11).

The district court erred in finding in favor of the United States on this issue because the prop wash does not constitute a dredge material, as it is nothing more than water that is normally thrust horizontally backward to push the vessel forward, now being deflected downward. *See Save Our Community*, 971 F.2d at 1166 (holding that without the existence of an effluent discharge of some kind, there is no requirement to obtain a § 1344 discharge). In *Orleans Audubon Soc*., the Fifth Circuit held that "clear water is not within the definition of a pollutant under the CWA." *Orleans Audbon Society*, 742 F.2d at 910. The court there dealt with the exact same code provision as is at issue here – §1344, regulating permits for dredge material. *Id*. The court went on to hold that § 1344 only applies when dredged or fill material has been discharged and "water is simply not dredged or fill material." *Id*. Because the record clearly indicates only clear water flowed into the navigable water, the COE had no jurisdiction under §1344 to require a permit. (R. at 6). Similarly, in the case at issue, Galleon is using nothing but the water that was already in the sea and therefore no permits were required.

CONCLUSION

For the preceding reasons, this Court should reverse the district court's rulings on the law of finds because the SMCA does not apply and because the shipwrecked vessel is not subject to sovereign immunity. In the alternative, the district court's ruling on the law of salvage should be affirmed in part, but should also allow for a salvage award for the treasures found within the GCNMS. This Court should reverse the district court's ruling pertaining to the NOAA and the ESA and hold that the NOAA and the Secretary of Commerce both acted arbitrarily and capriciously in denying permits to Galleon. Finally, this Court should reverse the district court's ruling that RHA and CWA permits were required for Galleons salvage activities and hold that Congress had no jurisdiction over Galleon's salvage activities, as the shipwreck lies outside the territorial waters of the United States.