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2009 Moot Court Problem

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**2009 National Environmental Law Moot Court
Competition Problem***

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.

CIVIL ACTION

CA. No. 08-1001

Scheduling Order

Following the issuance of the Order of the District Court dated November 15, 2008, in the above-captioned matter, all parties filed a Notice of Appeal. Specifically, Galleon takes issue with the District Court's ruling: (1) on the Law of Finds; (2) on the Law of Salvage with regard to the artifacts recovered within the boundaries of the Gold Coast National Marine Sanctuary ("GCNMS"); (3) on the authority of the United States Army Corp. of Engineers' ("COE") and the United States Environmental Protection Agency ("EPA") to issue permits for Galleon's salvage activities; (4) on National Oceanic & Atmospheric Administration's

* The 2009 Problem was drafted by members of the Lawyers' Committee for Cultural Heritage Protection (LCCHP) including: Caroline Blanco, Assistant General Counsel National Science Foundation; Sherry Hutt, J.D., Ph.D. Program Manager National NAGPRA Program National Park Service; Gary Nurkin, Assistant Regional Counsel U.S. Environmental Protection Agency Region 2; David Tarler, National NAGPRA Program Officer National Park Service; and Ole Varmer, Attorney-Advisor Office of General Counsel for International Law National Oceanic and Atmospheric Administration.

(“NOAA”) authority under the National Marine Sanctuary Act (“NMSA”) and (5) on the Secretary of Commerce’s decision not to issue a permit pursuant to the Endangered Species Act (“ESA”). Spain appeals the District Court’s ruling under the Sunken Military Craft Act (“SMCA”) and the Law of Salvage regarding all artifacts. The United States appeals the District Court’s ruling with regard to NOAA’s authority to require a permit to recover artifacts outside the boundary of the GCNMS. The United States also takes issue with the District Court’s application of the SMCA

Therefore, it hereby ordered that the parties are to brief all of the following issues:

1. Whether the SMCA applies to the wreck referred to as *La Contesta*. (Galleon argues that the SMCA does not apply; Spain and the United States argue that SMCA does apply.)
2. Whether the shipwreck is subject to sovereign immunity and, if so, whether salvage requires the consent of the sovereign. (Galleon argues that sovereign immunity does not apply and the consent of Spain is not required; Spain argues that sovereign immunity does apply and consent of the sovereign is required; and the United States questions whether the vessel is subject to the principle of sovereign immunity.)
3. Whether NOAA acted arbitrarily and capriciously in denying Galleon a salvage and recovery permit for its activities within the GCNMS. (Galleon argues that it did; the United States and Spain argue that a permit was properly denied and Spain would further argue that a permit cannot be issued without its consent.)
4. 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. (Galleon argues that a NMSA permit was not required; the United States and Spain argue that a permit was required and Spain would further argue that a permit cannot be issued without its consent.)
5. Whether the Secretary of the Commerce acted arbitrarily and capriciously in denying Galleon an Endangered Species permit to drill through the endangered deep sea coral. (Galleon argues that it did; the United States and Spain argue that a permit was properly denied.)
6. Whether a COE and/or NPDES permit is required for Galleon’s salvage activities. (Galleon argues that neither permit was required for its activities; Spain and the United States argue that both permits were required.)

SO ORDERED

Entered December 15, 2008

[No cases decided after Sept. 1, 2008 may be cited either in the briefs or in oral argument]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION IN ADMIRALTY

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.

CIVIL ACTION
CA. No. 08CV1015
(RNR)

Opinion

This is a complex case in which environmental issues arising from the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1599 (2006), the National Marine Sanctuary Act (“NMSA”), 16 U.S.C. §§ 1431-1445(a) (2006), the Rivers and Harbor (“RHA”), 33 U.S.C. § 401 *et. seq.*, and the Federal Water Pollution Control Act (“CWA”), 33 U.S.C. §§ 1251–1387 (2000), are intertwined with and subsumed within an *in rem* admiralty action. Galleon Enterprises Inc.¹ (“Galleon”) brought this lawsuit 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. The vessel and its cargo lie beneath 600 feet of water within the contiguous zone of the United States. The vessel is also within the boundaries of the Gold Coast National Marine Sanctuary² (“GCNMS”); however its cargo lies both within and outside the boundaries of the GCNMS. The majority of the cargo salvaged to date lies outside the boundaries of the GCNMS. Galleon seeks permission of this Court to conduct salvage operations and, asserting claims in the alternative under

1. Clarified this is a U.S. company.

2. Clarified the GCNMS was established before Galleon discovered the wreck.

both the Law of Salvage and the Law of Finds, seeks a salvage award in the event that the shipwrecked vessel has an owner, or title to this historic shipwreck and its cargo in the event that the wreck is abandoned.

The Claimant, Kingdom of Spain (“Spain”), has intervened. Spain alleges that this shipwreck is the remains of the Spanish Frigate *Nuestra Senora La Contesta de Aragon* (“*La Contesta*”). Spain claims that *La Contesta* is a warship on the official register of the Royal Navy of Spain and is the inalienable property and patrimony of the Kingdom of Spain. *La Contesta*, sank in 1733, within the coordinates given to this Court under seal, en route from Peru to Spain carrying commercial trading goods and cargo (including gold and silver coins and bullion that have a present day value of 500 million dollars). Spain also alleges that the underwater resting place of *La Contesta* may be the grave-site of Spanish military personnel who perished when *La Contesta* sank. Spain also maintains that it has not abandoned or otherwise relinquished, in any way, its ownership of *La Contesta* and its cargo. Spain has denied authorization or consent for Galleon to disturb or salvage *La Contesta* and the grave-sites of the personnel who died. *See, e.g., Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property*, 69 Fed. Reg. 5,647 (Feb. 5, 2004). In addition, Spain asserts the wreck and its cargo are important underwater Spanish cultural heritage and if removed such removal and excavation must be done in accordance the *UNESCO Convention on the Protection of the Underwater Cultural Heritage* (“*CPUCH*”), Nov. 2, 2001, 41 I.L.M. 40, in particular its attached Annex to which Spain is a signatory. Therefore, Spain seeks not only an Order of this Court declaring Spain to be the owner of *La Contesta* but also an injunction forbidding Galleon (and any other salvager) from conducting any salvage activities at the site without the express permission, approval and authorization of Spain, and an order from this Court directing Galleon to return to Spain any and all objects it removed from the site.

The United States has also intervened claiming that because the historic shipwreck—alleged by Spain to be the Spanish Frigate *La Contesta*—and its cargo are situated both within and outside the boundaries of the GCNMS, Galleon was required to obtain a permit from the National Oceanic and Atmospheric Administration (“NOAA”) before beginning any salvage operations within the GCNMS. In addition, the United States argues that Galleon failed to comply with regulations promulgated by the U.S. Army Corp of Engineers (“COE”) pertaining to the construction of platforms when Galleon built a drilling platform and drilled through coral reefs in the GCNMS to access the wreck. Furthermore, the United States

claims that because the coral that Galleon drilled through were endangered deep sea coral, Galleon was required to obtain a permit from the Secretary of Commerce. Moreover, the United States asserts that Galleon failed to obtain a CWA permit from the Environmental Protection Agency (“EPA”) pertaining to the discharge of dredged material into waters of the United States. Therefore, the United States seeks an Order from this Court dismissing Galleon’s Verified Complaint and denying Galleon’s *in rem* admiralty action under both the Law of Finds and/or the Law of Salvage.

I. Factual and Procedural Background

In late summer of 1732, a fleet of twenty Spanish merchant galleons, accompanied by six military frigates belonging to the Royal Spanish Navy, sailed from Spain to Peru. The Spanish frigates that accompanied these galleons were to protect the merchant ships and to insure that the merchant ships were not attacked either by pirates or Spain’s enemies (*i.e.*, England, France, Netherlands, or privateers operating under the flags of England, France or Netherlands) as they sailed from Spain to Peru. One of the military vessels assigned to protect this convoy of merchant ships was *La Contesta*. In March 1733, these vessels reached the port of Lima. After being unloaded, these ships were repaired and refurbished for the journey back to Spain.

In early summer of 1733, these merchant vessels, heavily laden with commercial goods, gold coins, and other precious metals removed from the mines of Peru, set sail for Spain. On this return voyage, *La Contesta* was assigned to carry mail, private passengers, a consignment of merchant goods, and other cargos in the same fashion as the other merchant ships that were making this voyage from Peru to Spain. As the fleet entered the Straits of Florida, it was met by a hurricane which drove the ships into the reef-laced waters of the coast of New Union. Almost half the fleet was lost, including *La Contesta*. Some of the crews from these vessels reached land safely. Later, they were able to salvage some items from these ships, including *La Contesta*, but all salvage activities ceased when a second hurricane broke apart what was left of the ships.

For more than 260 years, these ships remained embedded in submerged lands. Pursuant to the NMSA, the United States Department of Commerce, acting through NOAA, was required to develop a land and resource management plan for submerged lands and resources (including natural and historical resources) that are found in unique environments, and to designate such locations as national marine sanctuaries. The Act further

provided that NOAA was to develop a management plan for the use of the sanctuaries. Historical underwater resources, including historical shipwrecks, are sanctuary resources. 16 U.S.C. § 1432(8) (2006). Pursuant to the NMSA, the GCNMS was established off the coast of New Union to include the submerged lands in which these Spanish ships are buried. The GCNMS includes the marine waters surrounding the coast of New Union out to a distance of twenty-four nautical miles from shore. The GCNMS³ was specifically established to protect natural and historical resources such as seagrasses, coral reefs and shipwrecks, including deep sea coral and Johnson seagrasses which are listed as endangered species pursuant to the ESA. NOAA, in turn, has promulgated regulations which prohibit activities that might affect sanctuary resources, including the discharge or deposit of substances, and the removal or damaging of cultural, natural, or historical resources; seagrasses, coral reefs and shipwrecks are resources explicitly listed in the regulations. Activities that are not expressly prohibited by these regulations are permitted.

In April 2008, Galleon entered the GCNMS located off the coast of New Union to search for treasure. After investing nearly \$300,000, Galleon located several artifacts between twenty-three and twenty-four nautical miles offshore in areas that are both within and slightly outside the boundary of the GCNMS. In addition, Galleon believed that embedded in coralline formations within the boundary of the GCNMS lay the ship carrying the artifacts that Galleon had discovered. Galleon applied to NOAA for a research and recovery permit to search for the ship and excavate the cargo that it discovered within the boundaries of the GCNMS. NOAA denied the permit because, based upon the information submitted by Galleon, NOAA concluded that Galleon had presumably discovered the remains of a Spanish frigate and needed the permission and express approval of Spain to excavate the vessel before a research and recovery permit could issue from NOAA. Spain refused Galleon's request for approval to excavate this vessel. Spain's refusal was premised on three grounds: (1) *La Contesta*, in the early 1700s, was technologically the most advanced warship of its time and any excavation, such as Galleon planned, would destroy the scientific and historic integrity of this wreck; (2) the commercial artifacts on board (excluding the gold and silver coins and bullion) shed light on the type of trade goods typically exchanged between

3. Clarified that competitors may use the regulations and management plan of the Florida Keys National Marine Sanctuary to inform their discussion of the hypothetical GCNMS.

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Spanish royalty and Inca nobility and are of tremendous archaeological value and (3) Galleon has not demonstrated to Spain's satisfaction that Galleon would be conducting its activities in accordance with the CPUCH. As Galleon had failed to include documentation of Spain's approval, NOAA summarily denied Galleon's application for the permit.

Notwithstanding the denial of its permit application, Galleon began salvage operations, constructing a drilling platform for the purpose of drilling through the deep sea coral to reach the shipwreck, and employing a "mailbox," a technique that is at least 40 years old, and discovered and removed artifacts. (Prop wash deflectors, also known as "mailboxes," are used to direct the vessel's propeller wash downwards, and thereby remove seabed sediments, including seagrasses, and expose underlying materials in the seabed in a matter of seconds.) Galleon removed the objects it recovered and brought them before this Court.

The instant action was initiated by Galleon with the filing in Admiralty of a verified complaint *in rem* against the historic shipwreck. The complaint states four counts: (1) Galleon is entitled to ownership of the wreck under the Law of Finds; (2) in the alternative, Galleon is entitled to a liberal salvage award for voluntarily recovering artifacts which are in "marine peril;" (3) Galleon is entitled to a declaratory judgment that Spain no longer exercises its sovereign prerogative over the wrecked vessel; and (4) Galleon is entitled to a declaratory judgment that the Executive Branch of the United States has no jurisdiction to regulate Galleon's salvage operations with respect to the wreck that Galleon discovered.

On June 25, 2008, this Court issued an Order directing that: (1) a warrant be issued for the arrest of the shipwrecked vessel and artifacts; (2) Galleon be granted exclusive rights of salvage until further notice of the Court, and that all finds be deposited with the Court; and (3) Galleon publish a general notice of the claim and specifically provide notice of the action to both the United States and Spain. By separate Orders of the same date, the Court appointed Galleon as substitute custodian of the wreck.

On or about August 15, 2008, through private counsel, Spain moved to intervene, and filed a verified claim and an answer on its own behalf. Spain argued that the vessel and its contents are owned by the Kingdom by Spain. Spain also argued that under the Sunken Military Craft Act ("SMCA"), Pub. L. 108-375, div. A, title XIV, 118 Stat 1811, 2094 et. sec., the shipwreck discovered by Galleon is the sunken Spanish military vessel *La Contesta*, and that Spain neither has expressly abandoned nor authorized Galleon to salvage that wreck. In the alternative, Spain argued that the vessel discovered by Galleon, irrespective of whether or not it is the *La*

Contesta, is a commercial Spanish vessel owned by Spain, which Spain neither abandoned nor permitted Galleon to salvage.

Galleon responded to Spain's arguments by asserting that the site does not represent any specific vessel and that, while it had discovered a large field of artifacts, including coins and other cargo, within a five-mile radius of the coordinates provided to this Court under seal, it had not found any remains of a ship's hull, keel, ballast pile, or other structure that would typically be associated with a shipwreck. Galleon further asserted that *La Contesta*, a Spanish vessel used to transport mail, private passengers, a consignment of merchant goods, and other cargos at the time of its sinking could be one possible source of the artifacts found by Galleon; however, the cargo discovered by Galleon may also be jettisoned cargo, or even cargo from a pirate ship or another ship that was lost at the same time as *La Contesta*. Galleon further claims that additional research and salvage are necessary to establish the identity of the vessel from which the artifacts have been retrieved.

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 pursuant to regulations promulgated by both NOAA and the COE. The United States claims that, by undertaking salvage operations, Galleon violated the ESA, NMSA and the RHA, and asks this Court to deny Galleon's request for either title to the wreck and its cargo under the Law of Finds, or a salvage award under the Law of Salvage.

II. Discussion

On November 10, 2008, a trial was held on all issues raised by all three parties. Prior to trial, the parties stipulated as to standing. The Court's determination of each issue on the merits follows.

A. *Sunken Military Craft Act*

The Sunken Military Craft Act ("SMCA"), *Pub. L. 108-375, div. A, title XIV, § 1406(c)(2)*, 118 Stat 1811, 2094 et. sec., provides in part "that the Law of Finds shall not apply to any foreign sunken military craft located in United States waters." Similarly, the SMCA provides in part that "[n]o salvage rights or awards shall be granted with respect to any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state." *Id.* at § 1406(d)(2), 118 Stat. 1811, 2097. United States waters are defined to include the United States' territorial sea and contiguous zone as those terms are defined in the Law of

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the Sea Convention. *Id.* at § 1408(7), 118 Stat. 1811, 2098. The wreck discovered by Galleon lies within the contiguous zone. Galleon claims that, without further exploration and research, it cannot definitely state what vessel it discovered, whether that vessel belonged to Spain, or whether that vessel was a commercial vessel. For the purposes of this decision, and without in any way compromising Galleon's right to argue otherwise, I will assume that the vessel Galleon discovered was *La Contesta*, and that Galleon did not receive express permission from Spain to excavate this wreck. The issue, however, is not whether Galleon received permission to excavate *La Contesta* but, rather, whether *La Contesta* is a sunken military craft, as defined within the SMCA.

A sunken military craft is defined 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.* at § 1408(3)(A), 118 Stat. 1811, 2098 [emphasis added]. Assuming, *arguendo*, that the wreck discovered by Galleon is *La Contesta*, Spain has the burden of proving by a preponderance of the evidence that *La Contesta* was on a military noncommercial venture at the time of its sinking. The evidence presented to this Court indicates *La Contesta* was on military noncommercial service when it sailed from Spain to Peru. When it sailed from Peru in late 1733, however, *La Contesta* was carrying the same type of cargo and property as the other merchant ships. If the vessel discovered by Galleon is *La Contesta*, I find that it was on a commercial venture at the time that it sank, is not a sunken military craft as defined by the SMCA, and, therefore, is not subject to the protections of that Act.

Alternatively, if the vessel discovered by Galleon is not *La Contesta* but in fact some other Spanish vessel, Spain has failed to provide any evidence that such vessel was listed on the registry of the Royal Spanish Navy and was on a military noncommercial venture at the time of its sinking. Therefore, I find that the vessel discovered by Galleon, assuming it is not *La Contesta*, is similarly not a sunken military craft subject to the protections of the SMCA.

B. Law of Finds

Under the Law of Finds, in order to establish a claim of ownership, a Plaintiff must show (1) intent to reduce the property to possession, (2) actual or constructive possession of the property, and (3) that the property is either unowned or abandoned. *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel or Vessels*, ___F. Supp. 2d___, 2006 WL 3091531 (M.D. Fla. 2006). If the finder meets these three criteria, title to the

property is vested in the finder. Galleon has demonstrated it meets the first two criteria. The only issue in dispute is whether the shipwreck and its cargo are abandoned.

There is no uniformity among the Circuits as to how “abandonment” is defined. This issue was specifically left open in the Supreme Court’s decision in *California and State Lands Commission v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998) [“We leave that issue for reconsideration on remand, with the clarification that the meaning of ‘abandoned’ under the ASA conforms with its meaning under admiralty law.” (emphasis added)]. Within the Fourth Circuit maritime property is abandoned if either the original property owner expressly relinquishes title to that property or, with respect to items recovered from ancient shipwrecks, no owner appears in court to claim that property. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006); *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 461 (4th Cir. 1992). Within the Sixth Circuit, abandonment need not be proven by an express renouncement; a party claiming abandonment may prove by inference that a shipwreck last owned by a private party was abandoned. *Fairport International Exploration Inc. v. Shipwrecked Vessel, Captain Lawrence*, 177 F.2d 491, 500 (6th Cir. 1999). Nevertheless, as in the Fourth Circuit, proof of abandonment must be shown by clear and convincing evidence. Compare, *Columbus-America* at 464-465 with *Captain Lawrence* at 501.

Irrespective of which approach is used to define abandonment, I find that the Spanish vessel discovered by Galleon is not an abandoned vessel. Spain has specifically stated “regarding the remains of sunken vessels that were lost while in the service of the Kingdom of Spain and or were transporting property of the Kingdom of Spain . . . Spain has not abandoned or otherwise relinquished its ownership or other interests with respect to such vessels and/or its contents . . . “ 69 Fed. Reg. 5647 (February 5, 2004). In light of this express pronouncement of ownership or nonabandonment, Galleon cannot prove by “clear and convincing evidence” that the Spanish shipwreck it discovered was abandoned. Therefore, Galleon cannot obtain title to this wreck under the Law of Finds.

C. Law of Salvage

Under the Law of Salvage, the salvager acts on behalf of the owner in saving the owner’s property, even if the owner made no such request, because there is a presumption that an owner desired such salvage services. *R.M.S. Titanic Inc. v. Christopher S. Haver et. al.*, 171 F.3d 943, 963 (4th

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Cir. 1999). The three elements of a salvage claim are that: (1) marine peril exists; (2) the [salvage] service was voluntarily rendered; and (3) the effort was successful in whole or in part. *Southernmost Marine Services Inc. v. One (1) 2000 Fifty Four Foot (54') Sea Ray named M/V Potential*, 250 F.2d 1367 (S.D. Fla. 2003); *see also, The Sabine*, 101 U.S. (11 Otto) 384 (1879); *Fine v. Rockwood*, 895 F. Supp. 306 (S.D. Fla. 1995).

Applying these elements to the instant case, Galleon is entitled to a salvage claim. With regard to the first element, courts have generally found that historic shipwrecks are in marine peril. *Fine, supra* at n.13. As to the second element, Galleon certainly was under no legal or contractual obligation to salvage the wreck and, thus, its service was voluntarily rendered. Although Spain did not authorize or approve of Galleon's salvage activity, neither did the insurers in *Columbus-America* enter into any salvage contracts or relinquish any of their rights to the gold subsequently found on the SS Central America. *Columbus-America, supra*, at 457. Just as the Fourth Circuit found that *Columbus-America's* salvage services were voluntarily rendered, *id.*, I, too, find that Galleon's salvage services were voluntarily rendered. I see no distinction between a sunken commercial vessel whose owners are insurance companies and a sunken commercial vessel being operated by a sovereign. The Law of Salvage is equally applicable to both types of vessels. With respect to the third element, Galleon has successfully brought before this court artifacts from the wreck. Thus, Galleon has met all elements for a salvage award.

As to the salvage reward, I find that Galleon, like the salvors in *Columbus-America*, has met the six elements admiralty courts use when fixing an award for salvage:

- (1) The labors expended by the salvors in rendering the salvage service,
- (2) The promptitude, skill, and energy displayed in rendering the service and saving the property,
- (3) The value of the property employed by the salvors in rendering the service, and the danger to which the property was exposed,
- (4) The risks incurred by the salvors in securing the property from the impending peril,
- (5) The value of the property saved, and
- (6) The degree of danger from which the property was rescued.

The Blackwall, 77 U.S. (10 Wall) 1, 13-14, 19 (1869); *Columbus-America, supra*, at 468.

In addition, the Fourth Circuit adds another factor "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items saved." *Columbus-America, supra* at 468. I agree that this additional factor should be utilized in determining Galleon's salvage award, and that Galleon has met this factor with respect to the artifacts it

has already salvaged. Thus, I find that Galleon is entitled to a salvage award equivalent to 90% of the value of the cargo that it found outside the boundaries of the GCNMS.

With respect to the shipwreck lying within the boundaries of the GCNMS and the cargo similarly situated within those boundaries, I must deny Galleon a salvage award due to its failure to comply with the requirements of NOAA and the COE.

D. Rivers and Harbors Act and Clean Water Act

The United States, on behalf of the COE and the EPA, brought this action alleging that, in constructing a drilling platform and drilling through coral reefs to expose a historic shipwreck in the GCNMS without authorization from the COE, Galleon is in violation of 33 U.S.C. § 403 (2000). The United States is correct.

The creation of any obstruction not affirmatively authorized by Congress is prohibited except if such structure were authorized by the COE. The authority of the COE to prevent obstructions to navigation is extended by the Outer Continental Shelf Act to fixed structures located on the Outer Continental Shelf which includes the contiguous zone. 43 U.S.C. §§ 1331, 1333 (2000); *Alliance to Protect Nantucket Sound Inc. v. U.S. Dept. of Army*, 398 F.3d 105 (1st Cir. 2005). In that case, the Court found that “Congress made it clear that [t]he existing authority of the Corps . . . applies to all artificial islands and fixed structures on the [OCS] whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom.” *Id.* at 110. Thus, a Section 10 permit is required for the installation of any structure which may interfere with navigation, *United States v. Angell*, 292 F.3d 333 (2d Cir. 2002), irrespective of whether that structure is erected for developing or removing resources therefrom. *Alliance, supra* at 111. The RHA was obviously intended to prevent obstructions in the Nation’s waterways and is to be broadly defined with respect to obstructions. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191(1967), *U.S. v. Republic Steel Co.*, 362 U.S. 482 (1960).

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 U.S.C. § 328.3(a)(1) (2000); *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), *cert. denied*, *Moses v. U.S.*, ___ U. S. ___, 2008 WL 743960 (U.S. June 23, 2008); *United States v. Schmitt*, 999 F. Supp. 317, 369 (E.D.N.Y. 1998), *aff’d*, 28 Fed. Appx. 63 (2d Cir. 2002).

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The waters off the coast of New Union are waters that are presently used or have been used in the past to transport foreign commerce. Thus, these waters are “navigable-in fact-waters” as that phrase is defined within the RHA.

Galleon constructed a drilling platform and began drilling through the coral reef formation in the GCNMS to expose a historic shipwreck that lay beneath the coral reef, all without obtaining the approval of the COE. The drilling platform is an obstruction, and the propwash from the mailboxing constitutes a discharge of a pollutant without a permit under section 301(a) of the CWA. 40 C.F.R. 122.2 (2008) (definition of a “discharge of a pollutant”); *see also, United States v. MCC of Florida, Inc., vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in part and remanded in part on other grounds*, 848 F.2d 1133 (11th Cir. 1988). Galleon’s activities resulted in unauthorized discharges under both the RHA and the CWA. Galleon was required to obtain a permit from the COE before it constructed such a platform and began drilling through the coral reef formation to expose the historic shipwreck that lay beneath that reef. In addition, Galleon’s activities resulted in the unauthorized discharge of dredged material into waters of the United States. Galleon was required to have obtained a permit from the EPA before its mailbox activities caused such a discharge. Therefore, Galleon violated both the RHA and CWA with respect to its activities within the GCNMS.

E. National Marine Sanctuary Act

As noted earlier, the NMSA requires that the United States Department of Commerce develop a land and resource management plan for submerged land and resources that are found in unique environments, and designate such locations as national marine sanctuaries. The GCNMS was established pursuant to that Act. To protect the natural and cultural resources within the GCNMS, NOAA promulgated regulations which prohibit activities that might adversely affect the sanctuary resources. In accordance with the Act, Galleon applied for a research and recovery permit. That was summarily denied. Thereafter, Galleon conducted its salvage activities in the GCNMS without a permit, and removed a number of artifacts that were found both within and outside the sanctuary.

Galleon argued as an affirmative defense that NOAA acted arbitrarily and capriciously in denying Galleon a research and salvage permit. Agency decisions are reviewed under the Administrative Procedure Act (APA) and may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)

(2006); *Ocean Mammal Institute v. Gates*, ___F. Supp. 2d___, 2008 WL 2185180 (D. Haw. 2008). This is a deferential standard, and courts must presume that an agency action is valid. *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir.1992). The relevant inquiry is whether the agency considered the relevant factors 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).

Evidence presented to NOAA by Galleon implies and strongly suggests that the only ships that sank within the GCNMS within historic times were Spanish vessels that sailed in the mid 1730's from Peru to Spain. Although Galleon claimed that some of the sunken vessels within the GCNMS may have been ships belonging to nations other than Spain, Galleon has provided no documentation that vessels other than vessels flying the flag of Spain or belonging to Spain sank in this area. Neither the historic evidence presented to NOAA nor the artifacts recovered to date suggest that the vessel discovered by Galleon belonged to a country other than Spain. In fact, all of the artifacts brought before this Court are of Spanish origin or are of the type that Spain typically brought to its ports from Peru. Galleon's protestations to the contrary do not convert NOAA's determination into a decision that was arbitrary and capricious.

Therefore, I find that NOAA did not act arbitrarily or capriciously when the agency denied Galleon a research and recovery permit on the grounds that Galleon had failed to obtain prior approval from Spain to excavate the wreck within the GCNMS.

The United States argued that, as the historic shipwreck and its cargo form a single archaeological site, NOAA should have jurisdiction over Galleon's activities outside of the sanctuary, too. I disagree. Treating the cargo finds within and outside the boundaries of the GCNMS as a single archaeological site imposes an undue burden upon Galleon. The jurisdiction of the United States extends only to the cargo found within the GCNMS. Within the GCNMS, Galleon is required to comply with the permitting requirements of both NOAA and the COE. Cargo found outside of the GCNMS is subject to this Court's admiralty jurisdiction. Outside the boundary of the GCNMS, Galleon, under this Court's admiralty jurisdiction, is entitled to assert claims under both the Law of Salvage and the Law of Finds to seek not only salvage rights but also title to the cargo that it has discovered. Galleon has established this at trial.

This case is distinguishable from *Columbus-America*, supra, where the Court found that both the privately owned cargo and the cargo owned by the insurance carriers should be treated as one for purposes of calculating

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Columbus-America's salvage award. Here, by contrast, as Galleon argued at trial, the cargo found within the boundaries of the GCNMS can be segregated from the cargo found outside the boundaries of the GCNMS. As Galleon is forbidden from undertaking its salvage activities within the GCNMS, it can only undertake such activities outside the boundaries of the sanctuary. Thus, the cargo found outside the boundaries of the sanctuary can be segregated and distinguished from the cargo found inside the GCNMS. Galleon is permitted to conduct salvage activities outside of the GCNMS, and is entitled to a salvage award from the Kingdom of Spain equal to 90% of the value of the goods it recovers there. Galleon is prohibited from conducting any research or recovery activities within the GCNMS without the express approval of and permits from NOAA and the COE.

F. Endangered Species Act

Pursuant to the ESA, the Secretary of Commerce shall determine whether any species is an endangered or a threatened species. 16 U.S.C. § 1533 (2006). The deep sea coral and Johnson seagrasses situated in the GCNMS have been identified by the Secretary of Commerce as endangered species. 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 twospecies by causing a degradation to their habitat in the GCNMS. *San Carlos Apache Tribe v. U.S.*, 272 F.Supp. 2d. 860 (D. Ariz. 2003). Thus, the Secretary of Commerce acted properly in denying Galleon a permit⁴ because of the harm to the seagrasses and deep sea coral in the GCNMS.

III. Conclusion

For the foregoing reasons, an Order shall be entered consistent with this Opinion.

SO ORDERED

Entered November 15, 2008

Romulus N. Remus,

United States District Judge

4. Clarified Galleon applied for an incidental take permit under the ESA.