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2009 Judges' Edition Memorandum*

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SUMMARY

This is a suit in admiralty brought by Galleon Enterprises, Inc., ("**Galleon**"), an underwater salvage company, which filed a verified complaint *in rem* seeking title to an unknown sunken vessel, or in the alternative, for a salvage award for services rendered. The Kingdom of Spain ("**Spain**") on its own behalf, and the United States of America ("**United States**") on behalf of the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("COE"), have intervened.

The area at issue in this case involves the Gold Coast National Marine Sanctuary ("GCNMS"), which surrounds the marine waters off the coast of New Union. GCNMS was specifically created to protect both the natural and historic resources of the region, including coral formations, shipwrecks, deep sea coral, and Johnson seagrasses. R 5[1]. Deep sea coral and Johnson seagrasses were previously designated as "endangered species" by the Secretary of Commerce, pursuant to 16 U.S.C. § 1533 (2006). R 5. The unknown wreck of which Galleon is seeking title is allegedly embedded in

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** Taryn L. Rucinski the 2009-2010, Editor-in-Chief of Pace Environmental Law Review will receive her J.D. and her Certificate in Environmental Law from Pace in 2010. This memorandum would not have been possible without the assistance of Pace Law School L.L.M. student Joel Gephart for his invaluable research on the National Marine Sanctuaries Act, Dean Alexandra Dapolito Dunn for her guidance during this process, and the members of the Lawyer's Committee for Cultural Heritage Protection (LCCHP) for their expertise and insight. The author would also like to thank her husband Ric and the rest of her amazing family for their love, patience and support.

1."R" refers to the Record in this case.

the endangered deep sea coralline formations of the marine sanctuary floor, which is covered by the endangered Johnson seagrasses. R 5, 6.

In April 2008, Galleon initiated an exploratory underwater excavation in the waters of the GCNMS, approximately twenty-three and twenty-four nautical miles off the coast of New Union. R 5. During its excavations, Galleon unearthed several – arguably Spanish – artifacts both within and outside the sanctuary boundary. R 6. Galleon applied to the National Oceanic and Atmospheric Administration ("NOAA") for a research and recovery permit in order to continue with the excavations and locate the originating vessel, which Galleon believed was embedded in the endangered deep sea coralline formations of the sanctuary floor. R 6. NOAA subsequently denied Galleon's permit because Spain refused to give Galleon permission to excavate the wreck. R 6. In addition, Galleon applied for an incidental take permit for disturbing the endangered deep sea coral and Johnson seagrasses on the sanctuary's seafloor. R 13. The Secretary of Commerce denied Galleon's request for an incidental take permit after finding that the techniques employed by Galleon degraded the coral's habitat and destroyed the seagrasses. R 13.

Despite the denial of its permits, Galleon continued with its salvage efforts both within and outside of the GCNMS. R 6. First, Galleon constructed a platform drill and drilled directly into the endangered deep sea coral. R 6. Next, Galleon employed a 40 year-old technique using "mailboxes" or prop wash deflectors to clear the debris. R 6. In this technique, the mailboxes are used to deflect the wash from a salvage vessel downwards onto the sea floor. R 6. The wash is then used to scour the ocean floor thereby removing both sediment and vegetation in a matter of seconds in order to reveal any artifacts. R 6, 11.

After recovering additional artifacts, Galleon filed this action in District Court seeking 1) title of the wreck under the Law of Finds; 2) in the alternative, a liberal salvage award and permission to continue salvage operations for rescuing artifacts in acute marine peril; 3) a declaratory judgment that Spain no longer has any interests in the wreck; and 4) a declaratory judgment preventing the United States Executive Branch from regulating Galleon's salvage operations. R 6.

In its Order of June 25, 2008, the District Court: 1) issued a warrant for the arrest of the shipwreck and its artifacts; 2) granted Galleon exclusive salvage rights to the wreck; 3) ordered Galleon to deposit all finds with the court; and 4) ordered the publication of a general notice of claim. R 6. The court also ordered that specific notice be given to both the United States and Spain, who have chosen to intervene in this matter as follows:

(i) Spain, through private counsel, filed a verified claim and answer on its own behalf on August 15, 2008, arguing that Galleon's salvage attempts were impermissible because the wreck in question was either the Spanish frigate, *Nuestra Senora La Contesta de Aragon*, *("La Contesta*"), or a Spanish commercial vessel, which Spain had neither expressly abandoned nor permitted Galleon to salvage. In other words, regardless of whether the wreck was a military or a commercial vessel, Spain retains ownership of the wreck and has not authorized Galleon to commence salvage operations. R 7.

(ii) The United States, on behalf of the EPA and the COE, also filed an answer in this case on August 15, 2008, asserting its regulatory authority over the entire wreck and its cargo (including all wreckage found both inside and outside the GCNMS) pursuant to both NOAA and COE regulations. The United States further argues that Galleon's request for title to the wreck should be denied based on the Law of Salvage or the Law of Finds because Galleon was operating in violation of 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 Harbors Act ("RHA"), 33 U.S.C. § 401 *et seq*., (2006), and the Federal Water Pollution Control Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2006). In other words, Galleon should not gain title to the wreck because it violated many laws during the salvage process. R 7.

This is an action in admiralty brought pursuant to 28 U.S.C. § 1333 (2006). The parties have stipulated to standing.

In its October 15, 2008 Order, the District Court:

1. **Found**, assuming that the wreck was *La Contesta*, that Spain failed to prove by a preponderance of the evidence that *La Contesta* was a sunken military craft on a "military noncommercial service" mission at the time of its sinking as defined by § 1408(3)(A) of the Sunken Military Craft Act ("SMCA"). *Pub. L. 108-375, div A, title XIV*, § 1406(c)(2), 118 Stat 1811, 2094 *et seq*. The court found in the alternative, that if the wreck was not *La Contesta*, the wreck would still not qualify as a sunken military craft within the meaning of the Act, because Spain failed to prove that such a vessel was listed on the Royal Spanish Navy register;

2. **Found**, that even though Galleon satisfied the first two requirements for a claim of ownership (the intent to reduce property to possession, and actual or constructive possession of the property), Galleon was ineligible to obtain title to the wreck under the Law of Finds, because Spain never expressly relinquished or abandoned any property interests in the wreck, which effectively precluded Galleon from attempting to prove by clear and convincing evidence that the wreck was abandoned. Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel or Vessels, 2006 WL 3091531 (M.D. Fla. 2006);

3. **Held**, that Galleon was entitled to a salvage award in the amount of 90% of the value of the cargo that it recovered outside the boundaries of the GCNMS because Galleon acted on behalf of Spain to save its property, even if Spain as an owner did not make a salvage request. R.M.S. Titanic Inc., v. Christopher S. Haver et al., 171 F.3d 943, 963 (4th Cir. 1999). However, the court further held that Galleon was not entitled to a salvage award for the wreckage located within the GCNMS because Galleon failed to comply with both NOAA and COE regulations;

4. **Held**, that Galleon violated RHA 33 U.S.C. § 401 *et seq*.(2006) when it obstructed navigation by constructing a drilling platform within the twenty-five mile contiguous zone without the authorization of the COE, and that Galleon violated the CWA 33 U.S.C. §§ 1311 (2006) when it discharged dredged material (propwash from mailboxing), a pollutant, into the navigable waters of the United States without a permit;

5. **Held**, that NOAA did not act arbitrarily and capriciously when it denied Galleon a research and recovery permit to search for and excavate the wreckage within the limits of the GCNMS, under the NMSA 16 U.S.C. §§ 1431-1445(a) (2006) because Galleon failed to obtain the consent of Spain, or in the alternative, that Galleon failed to show that the wreck belonged to a country other than Spain. The court also held that the United States' jurisdiction only extended to the boundaries of the GCNMS and that Galleon was free to assert claims under the Laws of Salvage and Finds for the parts of the wreck and cargo found outside the GCNMS;

6. **Held**, that the Secretary of Commerce properly denied Galleon a permit under ESA 16 U.S.C. § 1533 (2006), when it determined that Galleon's drilling and underwater excavation activities caused the destruction and habitat degradation of endangered deep sea coral and Johnson seagrasses in the GCNMS.

Following the issuance of the District Court's Order, all parties filed Notices of Appeal with the Court of Appeals for the Twelfth Circuit.

The parties were directed to brief the following six issues:

1. Whether 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 the consent of Spain 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 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 National Pollutant Discharge Elimination System ("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.)

This bench brief discusses each of these six issues in turn. For each issue, the positions of the parties and the law are discussed. Sample questions for the oralists are presented for each issue.

ISSUE I:
WHETHER SMCA APPLIES TO THE WRECK REFERRED TO AS *LA CONTESTA*.

A. Positions of the Parties

- Galleon argues that the SMCA does not apply to the wreck.
- Spain argues that the SMCA does apply to the wreck.
- The United States argues that the SMCA does apply to the wreck.

B. Discussion

The exact nature and identity of the unknown wreck to which Galleon is seeking title is in dispute. Although the wreck is arguably of Spanish origin based on its location and the type of artifacts recovered, the parties have failed to prove whether the wreck is either a debris field, a completely unknown vessel, a Spanish commercial vessel, a Spanish commercial vessel carrying goods belonging to Spain, or the Spanish military frigate, *La Contesta*. R 6-10.

Galleon is arguing that the wreck is either a debris field, a vessel of unknown origin, or a Spanish commercial vessel carrying commercial goods. In support of this contention, Galleon asserts that it has uncovered not a single wreck but a field of debris, including "coins and other cargo, within a five-mile radius." R 7. Moreover, Galleon avers that it has not located any remains indicating a ship, such as a "keel, ballast, pile, or any other structure associated with a shipwreck." R 7. While Galleon admits that the recovered artifacts could be from the Spanish military frigate *La Contesta*, Galleon also claims that it is just as likely that the artifacts came from jettisoned cargo, a pirate ship, or another ship lost in a storm like *La Contesta*. R 7. Ultimately, Galleon argues that the identity of the wreck, if there is a single wreck, cannot be determined until additional research and salvage operations are conducted. R 7.

Spain on the other hand, argues that the wreck is either the military frigate *La Contesta*, or a Spanish commercial vessel that was carrying goods belonging to Spain when it sank. R 6. According to the Record, in late summer of 1732, a fleet of twenty Spanish galleons sailed from Spain to Peru accompanied by six military frigates. R 5. One of the vessels assigned to the convoy was the military frigate *La Contesta*. R 5. On the return voyage in the early summer of 1733, almost half the fleet was destroyed by a hurricane in the Straits of Florida near the reef-laced coast of

New Union. R 5. The frigate *La Contesta* was one of the ships destroyed by the hurricane. R 5. At the time it was sunk, *La Contesta* was assigned to carry mail, private passengers, commercial goods, gold coins, and precious metals from the mines of Peru. R 5.

In its October 15, 2008 Order, the District Court assumed that the wreck was *La Contesta* and found that Spain failed to prove by a preponderance of the evidence that the vessel was in fact a sunken military craft on "military noncommercial service" within the meaning of § 1408(3)(A) of the SMCA, because it was carrying the same type of cargo that a contemporary merchant ship would have. R 8. The court further found in the alternative, that if the wreck was not *La Contesta*, it was still not a sunken military craft within the meaning of the SMCA because Spain failed to prove that such a vessel was listed on the Royal Spanish Navy register. R 8.

Overview of the SMCA

In 2005, as part of the Ronald W. Reagan National Defense Authorization Act for the Fiscal Year of 2005, Congress passed the SMCA.[2] *Pub. L. 108-375, div A, title XIV*, § 1406(c)(2), 118 Stat 1811, 2094 *et seq*. The main purpose of the Act was to empower the United States to retain the "right, title, and interest" to any sunken military craft of the United States. This right "(1) shall not be extinguished except by an express divestiture of title by the United States; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank." Id. at §1401(1) & (2). However, the Act also has the practical effect of "immunizing foreign sovereign vessels in U.S. waters from recovery operations and to impose an express abandonment rule tantamount to a claim of perpetual ownership for U.S. sunken military craft."[3] Under the Act, persons are prohibited from disturbing or possessing a sunken military craft without a permit. Id. at §1402. Persons found in violation of the Act can be assessed civil penalties of up to $100,000 a day for each violation and they can also be held liable for any damage resulting from such activities. Id. at §§ 1404 & 1405.

2. It has been suggested that Congress enacted the SMCA under the Property Clause of the Constitution. U.S. CONST. Art. IV § 3, cl. 2. (stating that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 A.J. INT'L 649, 654 (2006).

3. *See*, Bederman, supra note 2, at 661-62.

However, for the purposes of our present case, the Act is most important because in § 1405, it abolishes the applicability of the Law of Finds and the Law of Salvage to both foreign and domestic sunken military craft within the waters of the United States. Id. at § 1405(c)-(d). Specifically,

> (c) The law of finds shall not apply to-
> (1) any United States sunken military craft, wherever located; or
> (2) any foreign sunken military craft located in United States waters.
> (d) No salvage rights or awards shall be granted with respect to-
> (1) any United States sunken military craft without the express permission of the United States; or
> (2) any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.

Id. at §1405(c)-(d). *See* Fathom Exploration, LLC v. Unidentified Shipwrecked Vessel or Vessels, 352 F.Supp.2d 1218, 1227-28, n.13 (S.D.Ala. 2005) (discussing generally the provisions of the SMCA and their potential applicability to all Civil War era vessels).

Under this Act, the term "sunken military craft" is defined as all or any portion of "any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank" and "any sunken military aircraft or military spaceship that was owned or operated by a government when it sank." Id. at §1408(3). Moreover, this definition also encompasses the associated contents of the vessels defined as "the equipment, cargo, and contents of a sunken military craft that are within a debris field" and "the remains of personal effects of the crew and passengers of a sunken military craft." Id. at § 1408(1). Finally, the Act defines the phrase "United States waters" to mean "internal waters, the United States territorial sea, and the United States contiguous zone." Id. at §1408(7).

Was the wreck to which Galleon is seeking title engaged in "military noncommercial service", thereby qualifying as a "sunken military craft" within the meaning of § 1408(3) of the SMCA?

The first issue to be addressed is the identity of the wreck. Is it a debris field, a completely unknown vessel, a Spanish commercial vessel, a Spanish commercial vessel carrying goods belonging to Spain, or the

Spanish military frigate, *La Contesta*? R 6-10. In the event the wreck is determined to be of Spanish origin, it must next be determined whether the wreck was owned by Spain, operated by Spain, or merely associated with Spain. Last, parties must argue whether the vessel at the time it was sunk was on "military noncommercial service" within the meaning of § 1408(3) of the SMCA.

The analysis of this issue is completely fact-based and turns on the parties' interpretations of the significance of the artifacts recovered, Galleon's description of the site, and Spain's historical data. In the event the court finds that the wreck is *La Contesta*, the parties should be prepared to argue the meaning and significance of the activities which the frigate is alleged to have participated in, including the significance of mail, private passengers, commercial goods, gold coins, and precious metals from the mines of Peru. R 6-10.

Galleon's Argument

Galleon will argue that the wreck in question is an unknown vessel whose ownership can not be determined at this time and in the alternative, either: a debris field, an unknown vessel, or a privately owned commercial vessel or a Spanish vessel that was being operated in a military commercial service (as opposed to military noncommercial service) at the time it sank. Galleon may further argue that too little about the wreck is known to make a determination as to whether the SMCA applies.

Spain and the United States' Arguments

Spain will argue that the wreck is the Spanish military frigate *La Contesta* and thus within the meaning of sunken military craft under 1408 (3). In the alternative, Spain will argue that if the wreck was a privately owned vessel, the SMCA still applies because at the time it sunk it was on military-non-commercial service and was being operated by the Spanish government. The United States will argue that if Spain proves either the wreck is the Spanish military frigate *La Contesta* (or another Spanish naval vessel on military non-commercial service) or that the wreck was a privately owned vessel on military non commercial service operated by the Spanish government at the time it sunk, that wreck will be subject to the SMCA.

C. Questions

1. For Galleon:

a. Based on the facts of this case, if this Court finds that the wreck was a privately owned commercial vessel being operated by Spain for military service, does the SMCA apply? If so does it extend to the vessel's cargo?

b. How does the SMCA affect the U.S. common law doctrines of the Law of Salvage and the Law of Finds?

c. What facts can you point to in the Record to support a position that the wreck is not in fact a wreck, but actually a debris field?

d. What facts or factors should this Court consider in order to determine if the vessel was on commercial service and not on military noncommercial service when it sunk and thus not subject to SMCA or principal of sovereign immunity?

2. For Spain and the United States:

a. What was Congress' intent in passing the SMCA?

b. If this Court finds that the wreck is a Spanish vessel, then what facts or factors show whether the vessel was on government military mission or operating in a more commercial capacity?

c. Given that too little may be known about the wreck in order for this Court to make a determination of ownership, what harm is there in allowing Galleon to continue salvage efforts so that ownership of the wreck can be ascertained?

ISSUE II:
WHETHER THE SHIPWRECK IS SUBJECT TO SOVEREIGN IMMUNITY AND, IF SO, DOES SALVAGE REQUIRE THE CONSENT OF THE SOVEREIGN.

A. Positions of the Parties

- Galleon argues that sovereign immunity does not apply and the consent of Spain is not required.
- Spain argues that sovereign immunity does apply and the consent of the sovereign is required.

- The United States questions whether Spain has presented sufficient facts / evidence to show that the wreck is a Spanish vessel on military noncommercial service (note, the SMCA is a codification of the principle of sovereign immunity).

B. Discussion

As discussed in Issue I, the exact nature and identity of the unknown wreck has not been settled, as parties will claim that the wreck is either: a debris field, a completely unknown vessel, a Spanish commercial vessel, a Spanish commercial vessel carrying goods belonging to Spain, or the Spanish military frigate, *La Contesta*. R 7-10. The sovereign immunity issue is whether Spain has a governing interest in the unknown wreck. If it does, either because the wreck is the Spanish military frigate *La Contesta*, or a Spanish commercial vessel carrying goods belonging to Spain, the issue then becomes whether the doctrine of sovereign immunity applies, thereby requiring Galleon to obtain Spain's consent in order to salvage the wreck. If the wreck is a government vessel on government noncommercial service, there is also the question of whether the principle of sovereign immunity that covers the public vessel also extends to privately owned cargo and personal effects that are part of the shipwreck site.

Here, the District Court found that the wreck belonged to Spain and therefore Galleon was ineligible to obtain title to the wreck under the Law of Finds because Spain never expressly relinquished or abandoned any property interests in the wreck. R 8, 9. Next, the court found that the doctrine of sovereign immunity was inapplicable because the court saw no difference between a "sunken commercial vessel whose owners are insurance companies and a sunken commercial vessel being operated by a sovereign." R 10. Therefore, the court held that Galleon was entitled to a salvage award in the amount of 90% of the value of the cargo recovered outside the GCNMS. R 10. However, the court further noted that Galleon was not entitled to a salvage award for the wreckage located within the GCNMS because Galleon failed to comply with both NOAA and COE regulations. R 10.

Overview of the Law of Finds

The Law of Finds is a common law doctrine that honors "the ancient and honorable principle of 'finders, keepers.'" Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987). Historically, the Law of Finds was

solely applied to property that had never known an owner such as "ambergris, whales, and fish." Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 459-60(4th Cir. 1992); see 3A *Benedict on Admiralty* § 158, at 11-15. In modern day, the Law of Finds is applied in circumstances where sunken property has been abandoned by its previous owners or "in cases involving ancient shipwrecks where no owner is likely to come forward." Massachusetts v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549, 551 (Mass. 1988) (discussing the unlikelihood that descendants of pirates would come forward to claim the sunken pirate ship the WHYDAH); Columbus-America Discovery Group, 974 F.2d at 461.

In order for a finder to obtain ownership to a wreck under the Law of Finds, a "Plaintiff must show (1) intent to reduce property to possession, (2) actual or constructive possession of the property, and (3) that the property is either unowned or abandoned." Odyssey Marine Exploration, Inc. v. The Unidentified, 2006 WL 3091531, 3 (M.D.Fla. 2006). Under this framework, title to property obtained via the Law of Finds vests in "persons who reduce to their possession objects which have been abandoned at sea." Id. In order for property to be "abandoned" specific thresholds must be met because "[w]hen articles are lost at sea the title of the owner in them remains." *THE AKABA*, 54 F. 197, 200 (4th Cir. 1893).

The Supreme Court has declined to address a conflict between the Circuits as to the definition of the term "abandon" in the context of the Law of Finds. California and State Lands Commission v. Deep Sea Research, Inc., 523 U.S. 491, 508 (1998) (leaving the issue of the definition of abandonment for further reconsideration on remand). The Circuits have split on the issue of an appropriate test for determining when sunken property is abandoned. In R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, the Fourth Circuit held that in order for sunken property to be abandoned the owner must have either "expressly relinquish[ed] title" or in the case of ancient shipwrecks, "no owner appears in court to claim them." R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 1992). Conversely in Fairport International Exploration Inc., v. Shipwrecked Vessel, Captain Lawrence, the Sixth Circuit held that proof of intent of abandonment by an owner could be inferentially proved by a showing of clear and convincing evidence. Fairport International Exploration Inc., v. Shipwrecked Vessel, Captain Lawrence, 177 F.3d 491, 499-501 (6th Cir. 1999). Despite the split, a majority of courts have held that abandonment is an affirmative act that requires intent on the part of the abandoning party. See Zych v. The Unidentified, Wrecked and Abandoned Vessel, 755 F.Supp. 213, 214

(N.D.Ill.1990) (holding that there is an *actus* element in proving intent in abandonment); THE PORT HUNTER, 6 F.Supp. 1009, 1011 (D.Mass. 1934) (stating that "abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership"); Hatteras, Inc. v. THE U.S.S. HATTERAS, 1984 A.M.C. 1094, 1097 n. 5 (S.D.Tex. 1981) (finding that "[w]hile mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon").

Does the Law of Finds Apply to the Unknown wreck?

The issue here is whether the unknown wreck has been proven to belong to Spain. The District Court held that Galleon was ineligible to obtain title to the wreck under the Law of Finds because either the vessel or the cargo belonged to Spain. R 8. The court further held that Spain had never expressly relinquished its property interest in the wreck, thereby effectively precluding Galleon from attempting to prove by clear and convincing evidence that the wreck was abandoned. R 8. However, in support of this finding, the Record only indicates that artifacts that are arguably of Spanish origin were recovered by Galleon and that Spanish ships had sunk in the general area where the unknown wreck was discovered. R 8.

Galleon's Argument

Galleon also will argue that the unknown wreck is not a government vessel. If it is found to be a government vessel, then alternatively it will argue that was conducting a commercial service (as opposed to a government service) and thus not entitled to sovereign immunity. Finally, if it is found to be a government vessel on non commercial service that is entitled to sovereign immunity, then it would argue that the sovereign immunity does not extend to privately owned cargo and personal effects.

Spain and the United States' Arguments

Spain and the United States also will argue that the wreck in question is *La Contesta,* a government vessel entitled to sovereign immunity. If it is determined that the vessel is not a government vessel but rather a Spanish commercial vessel, then Spain and US will argue that it was being operated by the Spanish government on a government noncommercial service. Finally, if the court determines the vessel is not being operated by the

Spanish government on a noncommercial service and is not subject to the principle of sovereign immunity, then, Spain, as the owner of cargo and carried goods has the right under the Law of Salvage to deny salvage and any rights to an award. The Law of Finds should not apply to property in which the owner is asserting its rights to its property.

Cases Discussing the Law of Finds

In discussing the issue of whether the unknown wreck is subject to the Law of Finds the following cases are helpful.

In Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186 (S.D.Fla. 1981), the court did not have to reach the issue of abandonment because the Spanish government failed to appear in court and make a claim of ownership on a 1715 Spanish wreck.

In Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337(5th Cir. 1978), the Fifth Circuit found that the United States could not claim ownership to a Spanish wreck under the concept of sovereign prerogative. The court found in favor of the plaintiff Florida corporation, the finders under the Law of Finds, stating that the "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." Id.

In Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450(4th Cir. 1992) a plaintiff filed suit in court seeking title to an 1857 shipwreck and its cargo of gold under the Law of Finds. Numerous underwriters proceeded to intervene claiming they had never abandoned their interests in the vessel, which at the time was operating as a commercial vessel. Id. The Fourth Circuit found that the vessel's underwriters had never expressly abandoned their interest in the vessel and accordingly, the Law of Salvage should be applied, despite the fact that over 130 years had elapsed and no documentation could be found. Id. This case shows a preference to apply the Law of Salvage over the Law of Finds. The case also shows that admiralty maritime Law of Salvage presumes that there is an owner. This presumption is consistent with the courts' preference for protecting property rights.

Overview of the Principle of Sovereign Immunity

The principle of Sovereign Immunity has origins in English common law where the king was immune from a suit by his subjects. It has evolved into an important principle under international law of diplomacy where one

nation will not sue or take enforcement actions against the officers of a foreign government without the consent of the sovereign. This principle has been extended to the embassies and vessels of foreign governments. In the United States, its origins in regard to government vessels being subject to admiralty jurisdiction can be traced to the case of The Schooner Exchange v. McFadden, 11 U.S. 116 (1812) (A public vessel of war of a foreign sovereign is exempt from the jurisdiction of the country). Courts have further held that this immunity applies to the attachment of a sovereign's property. The doctrine of sovereign immunity is based on "notions of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." National City Bank of New York v. Republic of China, 348 U.S. 356, 362 (1955). "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (U.S. 1897). The doctrine of sovereign immunity is not absolute as exceptions can be found in cases of counterclaims against a sovereign and where the sovereign is acting as a private party.[4] National City Bank of New York, 348 U.S. at 364.

In analyzing the applicability of sovereign immunity to vessels and other property, courts have focused on the sovereign's interest in the property and its current possession. The Supreme Court has held that a foreign sovereign's warships, as well as public vessels in its possession, "even though engaged in the carriage of merchandise for hire," are immune from suit under the doctrine of sovereign immunity. Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562, 570 (1926) (finding that "merchant ships owned [possessed] and operated by a foreign government have the same immunity that warships have"); The Schooner Exchange, 11 U.S. 116, 133-34 (1812) (finding that a public vessel operated by a sovereign is subject to sovereign immunity); The Maipo, 252 F.627 (2d Cir. 1918) (finding that a Chilean naval ship that was carrying commercial goods was subject to the doctrine of sovereign immunity). However, the court has declined to extend this

4. On May 19, 1952, the United States formalized its position on the private acts of sovereigns in a letter from Acting Legal Advisor Tate to the Acting Attorney General Perlman ("Tate Letter"); the letter noted that "according to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 26 Dept. State Bull 984 (1952) (discussing the "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments").

same protection to "vessels owned and not possessed by a foreign government." Republic of Mexico v. Hoffman, 324 U.S. 30, 38, (1945) (finding that "it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize"). Although the Supreme Court has noted that "the judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it," that it has upheld the requirement that a sovereign's property be in its possession for the doctrine of sovereign immunity to attach. Republic of Mexico, 324 U.S. at 35-36 (1945); The Fidelity, 8 F.Cas. 1189, 1191 (C.C.N.Y. 1879) (stating that "property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the government"). This case also provides an excellent summary of the factors for determining government noncommercial service.

On February 5, 2004, in support of the doctrine of sovereign immunity and the SMCA, the State Department issued a public notice on the Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property. The State Department noted that it is the United States' policy that disturbance or recovery of sunken state craft "should not occur without the express permission of the sovereign." 69 FR 5647. Pursuant to this notice, the Governments of France, Germany, Japan, Russian Federation, Spain, and the United Kingdom submitted notice of their own policies toward sunken craft. Spain articulated in their document that "Spain has not abandoned or otherwise relinquished its ownership or other interests" regarding "sunken vessels that were lost while in the service of the Kingdom of Spain and/or were transporting property of the Kingdom of Spain." Id. Spain further required that the express consent of a Spanish representative was required before any salvage actions involving their property could be conducted. Id. Finally, Spain concluded that a sunken craft could only be relinquished or abandoned pursuant to a Royal Decree or Act of Parliament. Id.

Overview of the Law of Salvage

When "sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the Law of Salvage over the Law of Finds." Columbus-America Discovery Group, 974 F.2d at 464-65. The Law of Salvage is a common law doctrine that allows for the "right to possess another's property and to save it from destruction,

danger or loss, allowing a salvor to retain it until being compensated by the owner. Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 961 (M.D.Fla. 1993). Therefore,

> under this law, the original owners still retain their ownership interests in such property, although the salvors are entitled to a very liberal salvage award. [which] . . . often exceed the value of the services rendered, and if no owner should come forward to claim the property, the salvor is normally awarded its total value.

Columbus-America Discovery Group, 974 F.2d at 459. Moreover, courts have noted that the underlying purpose of the Law of Salvage is to "diminish the incentive for salvors to act secretly, to hide their recoveries, or to ward off competition from other would-be salvors." Id. at 460-61.

As a precursor to a salvage claim, salvors must show that they lawfully acquired possession. Otherwise, as one court noted, "buccaneering would again flourish on the high seas." Lathrop, 817 F.Supp. at 963-64 (citing Martha's Vineyard Scuba HQ. v. Wrecked and Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987) (emphasis in original). "When Plaintiff obtains a permit, Plaintiff's salvage activities and recovery of artifacts will be deemed lawful." Lathrop, 817 F.Supp. at 963-64 (stating that "legislation which supplements admiralty jurisdiction by imposing necessary restrictions on salvage activities is an important legislative function properly reserved to Congress").

After possession has been established, the elements of a salvage claim require that a "plaintiff must show (1) a marine peril, (2) service voluntarily rendered, and (3) success, either wholly or partly, in recovering the imperiled property." Odyssey Marine Exploration, Inc. v. The Unidentified, 2006 WL 3091531, 3 (M.D.Fla.) (internal citations omitted). With respect to ancient shipwrecks, courts have held that "marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation" and can include the "actions of the elements." Treasure Salvors, Inc., 569 F.2d at 337; Columbus-America Discovery Group, 974 F.2d at 460-61 (finding that because of the adverse nature of possession in salvage, "property may not be 'salvaged' unless it is in some form of peril"). Moreover, "the standard is not whether the peril is imminent, but rather whether it is 'reasonably to be apprehended.'" Fort Myers Shell & Dredging Co. v. Barge NBC, 404 F.2d 137, 139(5th Cir. 1968). In analyzing the second element of a salvage claim, courts have held that salvage operations "cannot be performed pursuant to a preexisting duty or contract. In other words, an individual's efforts to protect a vessel from peril must be voluntary." U.S. v. EX-USS

CABOT/DEDALO, 297 F.3d 378, 382 (5th Cir. 2002). In evaluating whether a salvage attempt is voluntary, courts are further instructed not to consider a salvor's motives; "whatever motive impels the true volunteer, be it monetary gain, humanitarian purposes or merely error, it will not detract from the status accorded him by law." B.V. Bureau Wijsmuller v. U.S., 702 F.2d 333, 338-39 (2d Cir. 1983). Therefore, professional salvors are entitled to salvage awards for voluntary services rendered. The Camanche, 75 U.S. 448 (1869). Lastly, the third element simply requires salvors to be either wholly or partly, successful in recovering the imperiled property.

After a valid salvage claim has been established, courts are charged with determining the amount of any salvage awards. Under the salvage award formula articulated by the Supreme Court in The Blackwall, courts are required to evaluate whether the following six factors have been met for a salvage award,

> (1) The labor 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 such property was exposed; (4) The risk 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. 1, 14 (1869). The Fourth Circuit has presented a seventh potential factor, which the District Court there chose to adopt – "the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved." Columbus-America Discovery Group, 974 F.2d at 468. Additionally, courts have determined that this evaluation should be conducted on a case-by-case basis, as no precise formula for calculating salvage awards exists. Allseas Maritime v. M/V Mimosa, 812 F.2d 243, 246 (5th Cir. 1987). However, courts are urged to calculate this figure truly in terms of a reward "on the notion that salvors should receive a bounty in order to encourage others to help vessels that are in distress." New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc., 240 F.Supp.2d 101, 115 (D.Mass. 2003); see also The J.C. Pfluger, 109 F. 93, 95 (N.D.Cal. 1901). Moreover, salvors who voluntarily offer their services in a professional capacity should be entitled to greater salvage awards on the basis that they "possess unique skills and must maintain expensive equipment to continue rendering services to those in need." New Bedford Marine Rescue, 240 F.Supp.2d at 115.

Does the Admiralty court have jurisdiction over sovereign immune vessels or are sovereign vessels immune from arrest under the Law of Salvage? If the Law of Salvage applies does it provide for a reward when the sovereign owner has provided advance notice that it does not want its shipwrecks salvaged?

The threshold issue here is whether the vessel was on government noncommercial service. If so, then the issue whether the application of the principle of sovereign immunity means that the vessel is immune from an Admiralty arrest and whether US Admiralty court therefore lacks jurisdiction over a foreign sovereigns shipwreck. In determining the threshold issue, one factor is whether Spain's interest in the vessel's ownership and operations – does Spain's interest reflect the interests of the sovereign, or does it reflect a private interest. If Spain has retained an interest in the wreck because the vessel is the Spanish military frigate *La Contesta*, the doctrine of sovereign immunity is applicable and Galleon's salvage award should be denied. Conversely, in the event the unknown wreck is not *La Contesta*, nor was it carrying property belonging to Spain, the doctrine of sovereign immunity may not apply unless Spain can somehow show that the private vessel and property were charted and being operated for some public government mission as opposed to some private interest. If the vessel and cargo are private and Spain's interest is more of a private commercial interest rather than public government service then the principle of sovereign immunity does not apply, and neither does Spain's notice about denying salvage to its sovereign immune vessels. In that case, Galleon's salvage award should be upheld.

Another question that arises is: If the unknown wreck is a Spanish commercial vessel carrying goods belonging to Spain, does sovereign immunity attach to the ship? To the cargo? Or, to both?

Another question is if the vessel is a Spanish government vessel subject to sovereign immunity, does that make any private cargo and personal effects immune from arrest under Admiralty maritime law of salvage or otherwise not subject to Admiralty jurisdiction of U.S. Admiralty court. Doesn't the notice by Government of Spain regarding salvage of sovereign immune vessels preclude the award of salvage rights to recovery of private cargo and personal effects associate with the sovereign immune vessel?

Please note that the parties may also decide to address under the Law of Salvage whether Galleon's possession of the shipwreck was lawful as a necessary threshold to a salvage claim; whether the unknown wreck was

truly in marine peril; whether Galleon's services were rendered voluntarily; and whether Galleon's salvage award met the requisite factors for an award.

Galleon's Argument

Galleon will argue that the unknown wreck either does not belong to Spain, or is a Spanish commercial vessel that was not being operated by Spain on a government noncommercial service mission. It will also argue that it was not carrying goods belonging to Spain. If the wreck is found to be a Spanish commercial vessel carrying goods belonging to Spain, Galleon will argue that the doctrine of sovereign immunity does not apply when sovereigns are acting with the interests of private parties.

Spain and the United States' Arguments

Spain will argue that if the unknown wreck is found to be either *La Contesta* or a Spanish commercial vessel on government noncommercial service, then the doctrine of sovereign immunity will apply to both the wreck and the cargo. Spain will argue that Galleon was on notice that Spain didn't want its sunken vessels salvaged and that Galleon was required to obtain Spain's consent before it initiated its salvage operations. Galleon therefore should be denied any award and ordered to return the salvaged artifacts to the government of Spain.

The United States will argue that if the wreck is *La Contesta*, the doctrine of sovereign immunity applies and Galleon was required to obtain Spain's consent before initiating its salvage operations. The United States will also question whether the doctrine of sovereign immunity applies in the event that the wreck is found to be a commercial vessel carrying goods belonging to Spain. This is because in the United States, in order for a sovereign's property to be eligible for sovereign immunity, courts have required that the property must have been used by the government for some governmental public purpose as opposed to a more private commercial purpose.

Cases Discussing the Issues of Sovereign Immunity and the Law of Salvage

In discussing whether the doctrine of Sovereign Immunity applies to the Law of Salvage, the following cases are helpful.

In California and State Lands Commission v. Deep Sea Research, Inc. et. al., 523 U.S. 421 (U.S. 1998), Deep Sea Research ("DSR") located, within the territorial waters of California, the remains of the SS Brother

Jonathon which was carrying an estimated $2,000,000 in gold at the time of its sinking in July 1865. DSR sought either title to the vessel under the Law of Finds or a liberal salvage award under the Law of Salvage. California intervened arguing it had *colorable title* to the SS Jonathon under both the Submerged Lands Act (43 U.S.C. § 1301 *et. seq*.) and the Abandoned Shipwreck Act (43 U.S.C. § 2101 *et. seq*.). California further claimed that DSR's *in rem* admiralty action was an action against the State in violation of the Eleventh Amendment (State Immunity from US Federal Court without consent) The District Court found that California failed to demonstrate a *colorable claim* to the Brother Jonathan under federal law and the Ninth Circuit held that California failed to prove by a preponderance of the evidence that it had *colorable title* to the wreck. The Supreme Court held that the 11th Amendment does not bar a federal court's jurisdiction over an in rem admiralty action where the *res* is not within the State's possession. It distinguished its prior holding in *Florida Department of State v. Treasure Salvors Inc*., 458 U.S. 670 (U.S. 1982) (federal courts are barred from adjudicating State's title to property without the consent of the State) and took a more "nuanced" approach because DSR asserted rights to a res that was not in the possession of the State. The Supreme Court also overturned the District Court's holding that the wreck was not abandoned and noted that a rehearing of that issue may also address the issue of preemption. Note: only if the lower court found that the shipwreck was abandoned would it possibly address the issue of preemption. In the context of this case, if the sovereign immunity of the several States of the US in the case of the Brother Jonathan is determined to be analogous to the sovereign immunity of the Spanish Government, then it could be argued that the principle of sovereign immunity under international law does not bar US federal court adjudication of Spain's title in an in rem admiralty action where the sovereign lacks possession of the subject res.

In Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000), Spain intervened in an admiralty suit by plaintiff salvors. At issue was whether Spain had abandoned its claims to two vessels that sank off the coast of Virginia. The *LA GALGA*, a Spanish frigate served as a convoy ship at the time of its sinking and the *JUNO* a frigate, was carrying military personnel and their families when it sank. The Fourth Circuit found that both LA GALGA and JUNO, as sovereign vessels of Spain, are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. Under the terms of this 1902 treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts. The Fourth Circuit found that Sea Hunt

cannot show by clear and convincing evidence that the Kingdom of Spain had expressly abandoned these ships either in the 1763 Definitive Treaty of Peace Between Great Britain, France and Spain or the 1819 Treaty of Amity, Settlement and Limits. Id. at 638. The Fourth Circuit noted "[t]he State Department has likewise emphasized that its policy is 'to recognize claims by foreign governments-such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA-to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent *express abandonment by the sovereign'* Statement of Interest, U.S. Dep't of State, ¶ 9" (emphasis in the original). Id. at 643. Because "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment" Id., the Fourth Circuit held both LA GALGA and JUNO remain the property of Spain.

In International Aircraft Recovery L.L.C. v. Unidentified Wrecked and Abandoned Aircraft, 218 F.3d 1255 (11th Cir. 2000), the Eleventh Circuit found that the United States Navy did not abandon its interests in a Navy torpedo bomber when it struck that bomber from its inventory of active planes after the bomber crashed in international waters during World War II. The Eleventh Circuit further held that the United States, as owner of the bomber, could prohibit salvage efforts and International Aircraft Recovery L.L.C. had no right to continue its salvage operations over the express objections of the United States.

In The Schooner Exchange v. McFadden, 11 U.S. 116 (1812), an action by United States citizens to recover a vessel seized by the French government that had been returned to United States waters, the Supreme Court outlined the foundational principals of sovereign immunity in finding that sovereigns, as well as their attached property, are immune from suit in United States courts unless they consent. Id. The court noted that the doctrine should be applied narrowly to interests involving a sovereign's power, and not to private property belonging to a sovereign. Id. Ultimately the court found that the vessel at issue was a "ship of war" and could not be attached.

In Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562 (1926) the Supreme Court decided a libel *in rem* case for contract damages against the Italian steamship the Pesraro. In that case, the Court addressed the issue of "whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest" under the doctrine of sovereign immunity. Id. at 611. The

commercial vessel at issue was owned and possessed by the Italian government and was commissioned for the purpose of carrying private party goods between Italy and New York. The Court held that because the vessel was owned and possessed by the Italian government, it was entitled to immunity as a vessel used for a "public purpose." Id.

In The Maipo, 252 F.627 (2d Cir. 1918) the court found that a Chilean naval ship operated by naval personnel was subject to the doctrine of sovereign immunity, even though it had been chartered by a private party and was carrying commercial goods.

C. Questions

1. For Galleon:

a. Can you please briefly explain the doctrine of sovereign immunity, its purpose and why it should not be applied in this case?

b. Why should the Law of Finds or the Law of Salvage be applied in this case if we find that that the wreck was a Spanish vessel?

c. The governments argue that marine peril associated with a recent marine casualty passed many years ago and that the wreck is now a relative state of stability. Can you explain why the court should find the wreck was in "marine peril" such as to entitle you to an award under the Law of Salvage? Please articulate the standard for evaluating marine peril of a wreck that has been underwater for centuries.

d. A necessary precursor to asserting a salvage claim is lawful possession. Was Galleon's possession in this case lawful?

e. In the event this Court finds that the wreck is either a debris field, or an unknown wreck and the Law of Salvage applies, is your claim here mooted by the Abandoned Shipwreck Act?

2. For Spain and the United States:

a. Explain what the principle of sovereign immunity is, what its underlying purpose is, and why it should be applied in this case? What does its application in this case accomplish in light of its public purpose?

b. In what circumstances, if any, should courts apply the Law of Finds and the Law of Salvage to shipwrecks subject to sovereign immunity?

c. Does the doctrine of sovereign immunity extend to a sovereign's property? Does it extend to private property that is on the public vessel? Does the Government have the right to deny owners of private property from salvaging their property from a sovereign immune vessel without the prior consent of the sovereign?

d. How, if any, does possession by the sovereign affect the analysis of whether sovereign immunity attaches to a sovereign's property?

ISSUE III: WHETHER NOAA WAS ARBITRARY AND CAPRICIOUS IN DENYING GALLEON A RESEARCH AND RECOVERY PERMIT FOR ITS ACTIVITIES WITHIN THE GCNMS.[5]

A. Positions of the Parties

- Galleon argues that NOAA was arbitrary and capricious in denying it a permit.
- Spain argues that the permit was properly denied and that a permit cannot be issued without its consent.
- The United States argues the permit was properly denied.

B. Discussion

In April 2008, after its initial discoveries, Galleon applied to NOAA to obtain a Research and Recovery Permit in order to continue its excavation of the remaining wreck and cargo located within the boundary of the GCNMS. R 6. Upon review of its application, NOAA denied Galleon's permit on the basis that Galleon had not obtained the authorization of the owner of the ship in order to initiate a salvage operation. R 6. In its denial, NOAA found that Galleon had arguably discovered the remains of a Spanish vessel and that in order to commence salvage operations, Galleon

5. The Record calls this permit a "salvage and recovery permit," however this was done before parties were instructed to apply the sanctuary regulations applicable to the Florida Keys National Marine Sanctuary for clarification purposes which were posted on the NELMCC website, Questions about Official Rules and Moot Problem, #28. http:www.pace.edu/page.cfm?docid=32381 (last visited Nov. 7, 2008).

needed to include documentation of Spain's express approval of the salvage operation before NOAA could issue the permit. R 6. In addition, NOAA noted that Galleon failed to provide any documentation illustrating that the wreck was anything other than a Spanish vessel. R 12.

In its October 15, 2008 Order, the District Court held that NOAA did not act arbitrarily and capriciously when it denied Galleon's permit for its excavation activities within the GCNMS because the court found that Galleon failed to obtain the consent of Spain, or in the alternative, failed to show that the wreck belonged to a country other than Spain. R 11. However, when Galleon contacted Spain to obtain authorization, Spain refused to grant permission to excavate the wreck. R 6. First, Spain stated that the wreck was *La Contesta* – a ship that was an example of the most sophisticated technology of its time – and that Galleon's salvage operation would destroy the scientific and historical integrity of the wreck. R 6. Second, Spain claimed that the artifacts aboard the vessel (aside from the coins and bullion) were historic examples of the type of trade that Spain and the Incan Empire dealt in, and that the wreck was of tremendous archaeological value. R 6. Third, Spain denied Galleon's request because Galleon had not proven to Spain's satisfaction that they would conduct their excavation in accordance with the *UNESCO Convention on the Protection of the Underwater Cultural Heritage* ("CPUCH"), Nov. 2, 2001. [6] R 6. Finally, Spain argued that *La Contesta* may be the final resting place of unknown numbers of Spanish military personnel and that Galleon's excavation would inevitably disturb their graves. R 4.

The Arbitrary & Capricious Standard of Review

Appeals from administrative agency decisions are governed by § 706 of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706 (2006); see e.g., Environmental Information Center v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2000) (ESA agency actions are subject to judicial review under § 706 of the APA). Under the APA § 706 an administrative agency's decision can be set aside in the event a court finds that the agency's action was "'arbitrary and capricious, an abuse of discretion, or otherwise nor in accordance with law" or "without observance of procedure required by law.'" 5 U.S.C. § 706 (2)(A) (2006); NRDC v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998). Under § 702 of the APA this standard of

6. Ratification by Saint Lucia of the Convention on the Protection of the Underwater Cultural Heritage http://portal.unesco.org/en/ev.phpURL_ID=36854&URL_DO=DO_TOPIC&URL_SECTION=201.html (Paris, 2 Nov. 2001) (last visited Nov. 28, 2008).

review applies to all forms of agency decisions including failing to approve a permit. 5 U.S.C. § 702 (2006).

Courts generally defer to agency decisions under the arbitrary and capricious standard of review, because the "standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) (discussing an agency decision made by the Department of Transportation). In addition, the Supreme Court has stated that a decision should not be vacated unless the agency has

> relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. There must be a "rational connection" between the relevant facts considered and the agency's decision. Burlington Truck Lines v. U.S., 156, 168 (1962); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). "Decision[s] of less than ideal clarity [will be upheld] if the agency's path may be reasonably discerned." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). In addition, courts are instructed not to supply a "reasonable basis" for the agency's action when they themselves have not provided one. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). In the event an agency's decision is found to be arbitrary and capricious, the appropriate remedy is to remand the decision to the agency for further clarification of its reasoning. Gonzales v. Thomas, 547 U.S. 183, 186 (2006).

Overview of the NMSA

For a discussion of the NMSA including the standards for Research and Recovery Permits, please see Issue IV at 22-23.

Was NOAA arbitrary and capricious in denying Galleon a research and recovery permit for its activities within the GCNMS?

Galleon's Argument

Galleon will first argue that the unknown wreck was either: a debris field, a wreck of unknown origin, or a Spanish vessel that was carrying private cargo. Accordingly, Galleon will maintain that it did not need to

obtain Spain's consent because the doctrine of sovereign immunity does not apply to what Galleon found. Galleon will then defend its actions within the GSNMS by claiming that NOAA acted arbitrarily and capriciously in requiring it to obtain consent from a non-owner – the Kingdom of Spain, and, in the absence of such consent, summarily denying its permit request.

Spain and the United States' Arguments

Spain and the United States will argue that the unknown wreck is either a Spanish vessel carrying goods belonging to Spain or the Spanish military frigate, *La Contesta;* NOAA properly denied Galleon's permit request because Galleon had not obtained prior consent from the Kingdom of Spain as required by NOAA.

C. Questions

1. For Galleon:

a. What is the purpose of a Research and Recovery Permit?

b. What is the standard of review for a federal agency's denial of a permit?

c. Did NOAA improperly consider the ownership of the wreck in determining whether to grant Galleon's permit?

2. For Spain and the United States:

a. What factors should this Court should be looking at in order to determining whether the NOAA acted arbitrary and capriciously in denying Galleon's permit?

b. If the doctrine of sovereign immunity applies here, was Galleon required to obtain Spain's consent before receiving a permit?

c. Aside from the issue of sovereign immunity, are there any other grounds to find that NOAA properly denied Galleon a Research and Recovery Permit?

ISSUE IV:
WHETHER A NMSA PERMIT IS REQUIRED FOR THE WRECK AND THE CARGO IRRESPECTIVE OF WHETHER THAT CARGO LIES WITHIN OR OUTSIDE THE BOUNDARIES OF THE GCNMS.

A. Positions of the Parties

- Galleon argues that a NMSA permit was not required for its salvage operations.
- Spain argues that a NMSA permit was required and that a permit cannot be issued without its consent.
- The United States argues that a NMSA permit was required.

B. Discussion

Previously, the United States has argued that because the unknown wreck is a single archaeological site, NOAA's jurisdiction should extend outside of the boundaries of the GCNMS in order to effectively manage the site. R 12. In response, the District Court in its October 15, 2008 Order, found that to uphold the United States' position would place a "great burden upon Galleon." R 12. The District Court found that the United States' jurisdiction only extended within the boundaries of the GCNMS and that Galleon was free to assert claims under the Laws of Salvage and Finds for the parts of the wreck and cargo found outside the GCNMS. R 12. Moreover, the court went on to distinguish the facts of this case from the facts in Columbus-America Discovery Group, finding that the court's decision to treat both privately owned cargo and cargo owned by insurance carriers as one for the purposes of calculating a salvage award was dispositive. Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 459-60(4th Cir. 1992). In reaching this conclusion, the court determined that Galleon was entitled to a salvage award in the amount of 90% of the value of the cargo that it recovered outside the boundaries of the GCNMS because Galleon acted on behalf of Spain to save its property, even if Spain as an owner did not make a salvage request. R 13. However, the court held that Galleon was not entitled to a salvage award for the wreckage located within the GCNMS because Galleon failed to comply with both NOAA and COE regulations. R 13.

Overview of the NMSA

The NMSA was passed in order to designate and manage marine sanctuaries within the waters of the United States for the purpose of preserving the United States' underwater, natural, and cultural resources. 16 U.S.C. § 1431 (2006). Congress described its underlying purpose in passing the Act as to prevent the "thoughtless utilization of the oceans," 117 Cong. Rec. 30,855 (1971) (quoting Representative Mosher), and "to assure the preservation of our coastal areas and fisheries."[7] 117 Cong. Rec. 30,858 (1971) (quoting Representative Keith). Although the NMSA names the Secretary of Commerce as the Administrator of the Act, the Secretary instead chose to delegate his authority under the NMSA to NOAA. 39 Fed. Reg. 10,255 (1974). Moreover, under the NMSA, NOAA has broad authority as it, "may designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation." 16 U.S.C.A. § 1433(a) (2006). Pursuant to this authority, NOAA has promulgated both general applicability and marine sanctuary specific regulations. 15 C.F.R. § 922 (2008). For the purposes of this case, the sanctuary specific regulations of the Florida Keys National Marine Sanctuary apply.[8] 15 C.F.R. § 922.160 (2008).

The basic prohibition of the NMSA makes it unlawful for any person to 1) "destroy, cause the loss of, or injure any sanctuary resource," 2) "possess, sell, offer for sale, purchase, import, export, deliver, carry, transport, or ship by any means any sanctuary resource," or 3) to interfere with any law enforcement efforts, without first obtaining a permit. 16 U.S.C. § 1436(1)-(4) (2006). For the purpose of this section, "sanctuary resource," means "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8) (2006). The courts have extended the definition of "sanctuary resource" to include seagrasses. U.S. Fisher, 977 F.Supp. 1193 (S.D. Fla. 1997) (finding that seagrass is a "resource" within the definition of the NMSA). However, NOAA may issue permits,

7. For a discussion of the legislative history and the effectiveness of the NMSA. See, Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Envtl. L.J. 711, 716 -17 (2003).

8. The regulations specific to the fictitious GCNMS were not initially disclosed in the Record, however, parties were instructed to apply the sanctuary regulations applicable to the Florida Keys National Marine Sanctuary for clarification purposes which was posted on the NELMCC website, Questions about Official Rules and Moot Problem, #28. http://www.pace .edu/page.cfm?docid=32381 (last visited Nov. 7, 2008).

authorizing these prohibited activities within a marine sanctuary in the event it deems the conduct necessary "(1) to establish conditions of access to and use of any sanctuary resource; or (2) to promote public use and understanding of a sanctuary resource." 16 U.S.C. § 1441(a)(1)-(2) (2006). Permits may only be issued if the Administrator determines that a given activity is "compatible with the purposes for which the sanctuary is designated and with protection of sanctuary resources" and is carried out "in a manner that does not destroy, cause the loss of, or injure sanctuary resources." 16 U.S.C. § 1441(c)(1) & (3) (2006). Permits issued under this section are only valid for a period of years, and permittees are required to carry liability insurance or post a bond for their activities. 16 U.S.C. §§ 1441(c)(2) & (4) (2006). Lastly, a sanctuary can "amend, suspend or revoke a permit for good cause." 15 C.F.R. § 922.166(g) (2008). The sanctuary "may deny a permit application, in whole or in part, if it is determined that the permittee or applicant has acted in violation of a previous permit, of these regulations, of the NMSA or [GCNMS], or for other good cause." 15 C.F.R. § 922.166(g) (2008). An appeal procedure is available for denied permits pursuant to 15 C.F.R. § 922.50 2008). 15 C.F.R. § 922.166(h) (2008).

Under the specific regulations applicable to the GCNMS, four different types of permits can be issued to applicants: a General Permit, a Survey/Inventory of Historical Resources Permit, a Research/Recovery of Sanctuary Historical Resources Permit, and a Special-Use Permit. 15 C.F.R. §§ 922.166(a)-(d) (2008). In this case, however, Galleon did not apply for a permit.

(a) General Permit. 15 C.F.R. § 922.166(a) (2008).

A General Permit can be issued to allow any of the prohibitions listed in §§ 922.163 & 922.164, except where another permit is applicable. 15 C.F.R. § 922.163(a)(1) (2008). A general permit can be issued for the following activities relevant in this case: 1) the removal of, or injury to, or possession of living or dead coral,[9] 15 C.F.R. § 922.163(a)(2) & (2)(i) (2008); 2) the "drilling into, dredging, or otherwise altering the seabed of the Sanctuary, or engaging in prop-dredging," 15 C.F.R. § 922.163(3) (2008); 3) "discharging or depositing, from within the boundary of the Sanctuary, any material or other matter," 15 C.F.R. § 922.163(4)(i) (2008);

9. There is also a prohibition against takings in the NMSA, however, corals are carved out as a distinct group subject to their own regulations. 15 C.F.R. § 922.163(a)(10) (2008); 15 C.F.R. § 922.162 (2008)

and 4) "discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource." 15 C.F.R. § 922.163(4)(ii) (2008). Here the term "prop dredging" means "the use of propulsion wash deflectors or similar means of dredging or otherwise altering the seabed of the Sanctuary." 15 C.F.R. § 922.162 (2008). Moreover the term, "injure" means "to change adversely, either in the short or long term, a chemical, biological or physical attribute of, or the viability of. This includes, but is not limited to, to cause the loss of or destroy." 15 C.F.R. § 922.3 (2008).

The prohibitions against "moving, removing, injuring, or possessing, or attempting to move, remove, injure, or possess, a Sanctuary historical resource," are allowed via the following permits. 15 C.F.R. § 922.163(9) (2008).

(b) Survey/Inventory of Historical Resources Permit. 15 C.F.R. § 922.166(b) (2008).

A Survey Permit is issued when an applicant is seeking to conduct historical survey or inventory activities that "will involve test excavations or removal of artifacts or materials for evaluative purposes." 15 C.F.R. § 922.166(b)(1) (2008). Conversely, a Survey Permit is not required when a party engages in activities "that are non-intrusive, do not include any excavation, removal, or recovery of historical resources, and do not result in destruction of, loss of, or injury to Sanctuary resources." 15 C.F.R. § 922.166(b)(1) (2008).

(c) Research/Recovery of Sanctuary Historical Resources Permit. 15 C.F.R. § 922.166(c) (2008).

A Research/ Recover Permit may be issued by the sanctuary if the applicant is: 1) "professionally qualified" perform and complete the work, 15 C.F.R. § 922.166(a)(3)(i) (2008); 2) "has adequate financial resources" to complete the work, 15 C.F.R. § 922.166(a)(3)(ii) (2008); 3) that the duration of the project is sufficient to complete the work, 15 C.F.R. § 922.166(a)(3)(iii) (2008); 4) that the "methods and procedures" proposed are appropriate to achieve the goal of the project, 15 C.F.R. § 922.166(a)(3)(iv) (2008); 5) that the permitted activity will be "conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities," 15 C.F.R. § 922.166(a)(3)(v)(2008); 6) the project is necessary for the applicant to achieve its goals, 15 C.F.R. § 922.166(a)(3)(vi) (2008); and 7) the "reasonably expected end value of the

activity . . . outweighs any potential adverse impacts on Sanctuary resources and qualities." 15 C.F.R. § 922.166(a)(3)(vii) (2008); 15 C.F.R. § 922. 166(2)(i) (2008).

After these preliminary issues have been addressed, a permit will only be issued if 1) "the recovery of the resource is in the public interest as described in the SCR Agreement," 15 C.F.R. § 922.166(2)(ii) (2008); 2) "Recovery of the resource is part of research to preserve historic information for public use," 15 C.F.R. § 922.166(2)(iii) (2008), and 3) "recovery of the resource is necessary or appropriate to protect the resource, preserve historical information, and/or further the policies and purposes of the NMSA and the [GCNMS]," and will be conducted in accordance with the conditions of the SCR Agreement. 15 C.F.R. § 922.166(2)(iv) (2008).

(d) Special-Use Permit. 15 C.F.R. § 922.166(d) (2008).

A Special- use Permit applies to situations where a person is seeking to conduct "commercial or concession-type activit[ies]" for the purpose of "deaccess[ing]/transfer[ing] [ ] Sanctuary historical resources." 15 C.F.R. § 922.166(d)(2) (2008). Under this section permits cannot be issued unless the conduct "is compatible with the purposes for which the Sanctuary was designated and can be conducted in a manner that does not destroy, cause the loss of, or injure any Sanctuary resource." Id. These types of activities allowed by the permit must also conform with all the requirements of the Programmatic Agreement for the Management of Submerged Cultural Resources in the [GCNMS] among NOAA, the Advisory Council on Historic Preservation, and the State of Florida ("SCR"). Id. In issuing a Special-use permit, a sanctuary may also assess fees. 15 C.F.R. § 922.166(d)(3) (2008).

Did Galleon have to apply for an NMSA permit for the wreck and cargo lying within the boundaries of the GCNMS?

The issue here is not whether Galleon should have applied for an NMSA permit, but rather, did Galleon engage in any prohibited activities for which it should have obtained a NMSA permit. Ultimately, because Galleon's activities seem to fall squarely into the prohibited actions for which permits are required under the Act, Galleon will most probably have to concede that a permit was required for its activities within the GCNMS. However, Galleon will defend its actions by claiming that NOAA acted arbitrarily and capriciously in denying its permit. The analysis in this

section solely requires applying the facts of the case to the various permitting schemes discussed above.

Galleon's Argument

Galleon will first argue that the unknown wreck was either a debris field, a wreck of unknown origin, or a Spanish vessel that was not carrying goods belonging to Spain, and therefore it did not need to obtain Spain's consent because the doctrine of sovereign immunity does not apply. Galleon will then defend its actions within the GSNMS by claiming that NOAA acted arbitrarily and capriciously in denying their permit.

Spain and the United States' Arguments

Spain and the United States will argue that Galleon was potentially eligible for multiple NMSA permits for its activities within the GCNMS. Among the potential permits are a Survey Permit for Galleon's initial explorations, a Special-use Permit for removing artifacts from the sanctuary, and a General Permit for its drilling and prop-dredging activities, for its destruction of coral, and for its discharges within the GCNMS. In addition, Spain will argue that the unknown wreck is either a Spanish vessel carrying goods belonging to Spain or the Spanish military frigate, *La Contesta*, and therefore Galleon is required to obtain Spain's consent under the doctrine of sovereign immunity before NOAA can issue Galleon a permit for its activities within the GCNMS.[10]

Did Galleon have to apply for a NMSA permit for the wreck and cargo lying outside the boundaries of the GCNMS?

Generally, Galleon's activities outside the GCNMS would not require Galleon to apply for an NMSA permit. However, in the event Galleon's activities generated a discharge that flowed into the sanctuary from non-sanctuary lands, Galleon would have been required to obtain a General Permit under the exception in 15 C.F.R. §922.163(a)(4)(ii) (2008), if the discharge "injured" any sanctuary resources. As such, in order to determine whether Galleon's activities would be subject to this exception, parties will first have to argue whether the nature of Galleon's drilling and mailboxing activities would cause a discharge to flow into the Sanctuary. Second, parties will have to argue whether the discharge injured a sanctuary

10. For a discussion of the applicability of sovereign immunity please see *supra* Issue II at 11-12.

resource within the meaning the Act thereby requiring Galleon to obtain a permit.

Galleon's Argument

Galleon will argue that its mailboxing activities did not cause a discharge within the meaning of the NMSA. In the alternative, Galleon will argue that if a discharge did flow into the sanctuary from its activities, it still would not have to obtain a permit for its extra-sanctuary activities because the discharge did not injure a sanctuary resource.

Spain and the United States' Arguments

Spain and the United States will both argue that Galleon's mailboxing activities created a discharge that flowed into the sanctuary and ultimately injured sanctuary resources. Spain will additionally argue that in issuing a permit, NOAA properly required Galleon to obtain Spain's consent for its activities under the doctrine of sovereign immunity.[11]

C. Questions

1. For Galleon:

a. What are the different kinds of permits that Galleon could be eligible for under the NMSA?

b. Does Galleon's use of prop-wash deflectors constitute a discharge under the NMSA?

c. If Galleon is found to have discharged rocks and debris from outside the GCNMS, onto the endangered Johnson seagrasses inside the GCNMS, effectively covering them, should Galleon have obtained a permit for its activities?

2. For Spain and the United States:

a. What is the purpose and scope of the NMSA?

b. Was Galleon required to obtain an NMSA permit for any of the activities it conducted within the boundaries of the Marine Sanctuary?

11. For a discussion of the applicability of sovereign immunity please see *supra* Issue II at 11-12.

c. If this Court finds that a discharge from Galleon's activities outside the GCNMS, flowed onto the sanctuary floor, would Galleon be required to obtain a permit from NOAA for this activity?

ISSUE V:
WHETHER THE SECRETARY OF COMMERCE ACTED ARBITRARILY AND CAPRICIOUSLY WHEN HE DENIED GALLEON AN ENDANGERED SPECIES PERMIT TO DRILL THROUGH THE ENDANGERED DEEP SEA CORAL.

A. Positions of the Parties

- Galleon argues that the Secretary of Commerce acted arbitrarily and capriciously when it denied the company an ESA permit.
- Spain argues that the ESA permit was properly denied.
- The United States argues that the ESA permit was properly denied.

B. Discussion

At some point prior to Galleon's suit, presumably after Galleon completed its preliminary excavations, Galleon applied for an ESA incidental take permit.[12] The Secretary of Commerce subsequently denied Galleon's application. R 13. In its October 15, 2008 Order, the District Court addressed this issue and held that the Secretary of Commerce did not act arbitrarily and capriciously when it denied Galleon an incidental take permit. R 13. Specifically, the court found that Galleon's excavation activities harmed both the endangered deep sea coral and the endangered Johnson seagrasses species thereby causing an overall degradation of their habitat in the GCNMS, because 1) Galleon's drilling techniques "destroy[ed] or degrade[d] the deep sea coral," and 2) Galleon's mailbox activities additionally destroyed Johnson seagrasses. R 13.

The Arbitrary & Capricious Standard of Review

For a discussion of the arbitrary and capricious standard as it relates to administrative agency decisions please see supra Issue III at 18-19.

12. The nature of the permit Galleon applied for under the ESA was not initially disclosed in the Record but was added for clarification purposes and posted on the NELMCC website, Questions about Official Rules and Moot Problem, #18 & #24. http://www.pace.edu /page.cfm?doc_id=32381 (last visited Nov. 7, 2008).

Overview of the ESA

The ESA, 16 U.S.C. §§ 1531 et seq., was passed to specifically provide for the "conservation, protection and propagation of endangered species of fish and wildlife."[13] SR No. 93-307, US Code Cong & Adm News 2989 (1973). Congress entrusted enforcement of the Act to the Fish and Wildlife Service under the Department of the Interior and to the National Marine Fisheries Service under the Department of Commerce depending on the duties and responsibilities assigned to each.[14] 16 U.S.C. §§ 1542(1) & (2) (2006); 16 U.S.C § 1532(10) (2006). In its definition section, the Act identifies "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(4) (2006). The definition of "species" includes "any subspecies of fish or wildlife or plants." 16 U.S.C. § 1532(11) (2006). Therefore, under the facts of this case, Johnson seagrasses qualify as plants however, it is unknown whether the endangered deep sea coral[15] will qualify under the "fish and wildlife" provision. 16 U.S.C. §§ 1532(5) & (9) (2006). Here, ESA regulations define "coral (live)," with respect to the prohibitions section, as "pieces of coral that are alive." 50 C.F.R. § 23.5 (2008). The Endangered Species List classifies "coral" as its own separate category. 50 C.F.R. Part 223 (2006). This contrasts sharply with common principles of biology that classify coral as a microscopic marine animal.[16]

The prohibition section of the ESA, Section 9, makes it unlawful for any "person," defined as "any individual, corporation, partnership, trust" or any other private or governmental agency or agent, to engage in any of the prohibited activities defined in the Act. 16 U.S.C. § 1532(8) (2006). For endangered species of fish or wildlife, Section 9 prohibits the "tak[ing] [of an endangered species of fish or wildlife] within the United States or the

13. The Marine Mammal Protection Act of 1972 is inapplicable in this case because no marine mammals are involved. 16 U.S.C. § 1543 (2006) (stating "no provision of this Act [ESA] shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972 [16 U.S.C. §§ 1361-1407 (2006)]."

14. NOAA has been delegated jurisdiction over the listing of endangered and threatened marine species pursuant to 50 C.F.R. Pt. 17 (2007) (stating that jurisdiction for listing such species as coral was delegated to NOAA).

15. Even though in real life coral is listed as a "threatened" species under the ESA, for purposes of this problem participants have been instructed to treat the deep sea coral as "endangered." NELMCC website, Questions about Official Rules and Moot Problem, #30. http://www.pace.edu/page.cfm?doc_id=32381 (last visited Nov. 7, 2008).

16. *See*, National Geographic, http://animals.nationalgeographic.com/animals /invertebrates/coral.html (last visited Nov. 22, 2008) (classifying corals as "tiny, soft-bodied organisms [translucent animals] related to sea anemones and jellyfish."

territorial sea of the United States," 16 U.S.C. § 1538(1)(B) (2006).[17] Here "take" is defined as "to 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(14) (2006). Whereas "harm" within the context of the "take" definition,

> means an act which actually kills or injures wildlife. Such 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.

50 C.F.R. 17.3 (2008).

With respect to endangered plants, Section 9 of the Act also prohibits persons from maliciously damaging or destroying any endangered plant species or knowingly "remov[ing], cut[ting], dig[ing] up, or damag[ing] or destroy[ing] any such [plant] species" from federal land or from "other" lands if it violates state criminal trespass laws. 16 U.S.C. § 1538(2)(B) (2006); Northern California River Watch v. Wilcox, 547 F.Supp.2d 1071, 1074-75 (N.D.Cal. 2008). While there is no incidental take permit provision in Section 10 of the ESA for endangered plants, 16 U.S.C. § 1539(a)(1)(B), the question still arises whether Galleon's activities constituted a prohibited "take" of endangered plants. R 13.

When interpreting the prohibitions of Section 9 of the ESA, courts have held that the prohibition against the taking of an endangered species under 16 U.S.C. § 1538(a)(1) (2006) is absolute, and not allowable without a permit. Sierra Club v. Clark, 755 F.2d 608, 614 (Minn. 1985) (finding a government regulation allowing seasonal hunting of the eastern timber wolf, a threatened species, to be beyond the authority given the agency by Congress). Moreover, courts have further held that a "taking" need not be intentional and that negligence that results in a taking will satisfy the prohibition under 16 U.S.C. § 1538(a)(1) (2006); Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704, 708 (1995) (holding that the term "take" should be interpreted in the broadest possible language to include purposeful and indirect actions and that "significant habitat modification or degradation that actually kills or injures wildlife" constitutes a taking). Actual death or injury is not necessary to show a

17. On May 9, 2006, NOAA issued an endangered species determination for two forms of coral. In the announcement, NOAA determined that the species were designated as threatened therefore prohibitions of a Section 9 Incidental Take Permit did not apply. 50 C.F.R. Part 223 (2006).

taking. *See*, 40 Fed. Reg. 54748, 54750 (1981); Coho Salmon v. Pacific Lumber Co., 61 F.Supp.2d 1001, 1012-13 (Cal. 1999) (holding that an injury under an ESA claim does not require actual injury or death to the endangered species). However, courts have interpreted that "harm" from significant habitat modification must result in the reasonably certainty of "threat of imminent harm to a protected species." Defenders of Wildlife v. Bernal, 204 F.3d 920, 924-25 (9th Cir. 1999). Potential or hypothetical injuries are generally insufficient to constitute harm. Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (Or. 1995). As such,

> "harm" can be realized through the modification or degradation of a listed species habitat where it is shown that such modification or degradation, indirect or prospective, will either kill or injure wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.

San Carlos Apache Tribe v. U.S., 272 F.Supp.2d 860, 874 (Ariz. 2003).

Under the Exceptions Section of the ESA, Section 10, the Secretary may permit private parties to apply to take certain endangered species that are otherwise protected by the Act so long as the "taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (2006). In applying for an incidental take permit, applicants must first submit a Habitat Conservation Plan ("HCP") that addresses (1) the potential impact of the taking; (2) the steps the applicant will take to minimize or mitigate the impact of the taking; (3) a list of alternatives and a description of why they were rejected; and (4) any other measures that the Secretary may deem appropriate. 16 U.S.C. §§ 1539(a)(2)(A)(i) - (iv) (2006); Environmental Information Center v. Simpson Timber Co., 255 F.3d 1073, 1076-77 (9th Cir. 2000). Next, applicants are required to submit an Implementation Agreement ("IA") that describes how the applicant will fulfill its obligations under the HCP. Simpson Timber Co., 255 F.3d at 1077.

After opportunity for public comment, a permit application may be approved if the Secretary finds (1) an incidental taking; (2) all impacts from the proposed taking have been mitigated to the "maximum extent practicable;" (3) assurances of adequate funding have been made; (4) "the taking will not appreciably reduce the likelihood of the survival and recovery of the species;" and (5) that any conditions imposed by the Secretary on the Applicant are met. 16 U.S.C. §§ 1539(a)(2)(B)(i) - (v). Regulations additionally require applicants to include a "'complete' description of the activity sought to be authorized" and "[t]he common and

scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known[.]" 50 C.F.R. § 17.22(b)(1)(i)-(ii); Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231, 1238-39 (11th Cir. 1998). Permits are construed to "authorize a single transaction, a series of transactions, or a number of activities over a specific period of time." 50 C.F.R. §§ 17.22 & 17.32 (2008). An issued permit may be revoked upon a finding by the Secretary that the "permittee is not complying with the terms and conditions of the permit." 16 U.S.C. § 1539(2)(C) (2006).[18] Parties that proceed without obtaining a permit, "risk [ ] civil and criminal penalties if a 'take' occurs." Defenders of Wildlife v. Bernal, 204 F.3d 920, 927 (9th Cir. 2000) (discussing the risks parties who do not apply for incidental take permits accept).

Does Galleon's deep sea coral drilling amount to an "incidental taking"?

The analysis of this issue is fact based and hinges on whether Galleon's drilling activities into the endangered deep sea coral constituted a "taking" in which case Galleon's permit was properly denied, or an "incidental taking" which would have entitled Galleon to an incidental take permit. 16 U.S.C. § 1539(a)(1)(B) (2006); 16 U.S.C. § 1532(14) (2006). Or in other words, whether Galleon's drilling of the endangered deep sea coral was its primary or secondary purpose. Because the protections afforded endangered fish and wildlife are stronger than those for endangered plants, if Galleon's actions qualify as a "taking," whether or not the taking occurred inside or outside of the GCNMS is irrelevant. 16 U.S.C. §§ 1538(1)(B) & (2)(B) (2006); Northern California River Watch v. Wilcox, 547 F.Supp.2d 1071, 1074 (N.D.Cal. 2008) (stating that "the fish and wildlife protections apply anywhere in the United States," and are not solely applicable to Federal Lands").

Galleon's Argument

Galleon will first argue that coral is not classified as a fish or wildlife under the ESA and therefore the company was not required to apply for an Incidental Take Permit. In the event the deep sea coral is found to be subject to Section 9, Galleon will next argue that the Secretary acted

18. There is a hardship exemption in § 1539(b) of the Act, however, there are insufficient facts in the record to support a claim by Galleon under this provision. 16 U.S.C. § 1539(b) (2006).

arbitrarily and capriciously in denying it a Section 9 permit on grounds that the company's actions constituted an "incidental take."

Spain and the United States' Arguments

Spain and the United States will argue that coral is a microscopic marine mammal and should therefore be eligible for the protections offered under Section 9. Spain and the United States will further argue that the Secretary acted properly in denying Galleon a permit because their actions constituted a "taking."

Cases Discussing "Takings"

In analyzing the takings issue, the following cases are helpful.

In Defenders of Wildlife v. Bernal, 204 F.3d 920, 924-25 (9th Cir. 1999), the Ninth Circuit Affirmed the district court's decision that the construction of a new high-school complex by a local Tucson school district did not constitute a taking of the endangered cactus ferruginous pygmy owl. Id. at 927. Specifically, the court found that the construction did not constitute a taking because 1) an owl was living on a part of the site that was not being developed; and 2) the alleged "harm" that might occur to the pygmy owl because of the construction of the school complex was too speculative because there was contradictory expert evidence indicating that pygmy owls well tolerated human activities. Id. at 926-27.

In San Carlos Apache Tribe v. U.S., 272 F.Supp.2d 860 (Ariz. 2003), the Arizona district court found that Plaintiffs did not satisfy their burden in showing that the release of waters from the San Carlos Reservoir would cause harm to endangered bald eagles sufficient to constitute a taking. Id. at 866-67. Specifically, Plaintiffs failed to show that the summertime draining of the lake would decrease the bald eagles' food supply in the long term and increase their exposure to disease in the short term, thereby constituting an imminent and significant habitat modification and not just a speculative injury to the eagles. Id. at 876-80. The court held that that the habitat modification that would result from the decreased reservoir levels only suggested a potential injury that was not actual or imminent enough to qualify as a taking. Id. at 880.

In Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988), the Ninth Circuit affirmed the district court's decision that the Defendant's actions of allowing mouflon sheep to occupy the same area as the endangered Palila, a finch billed bird native to Hawaii, constituted a taking under the ESA. Id. at 1110. The court held that the habitat of the

Palila was significantly degraded, and injury to the animal was imminent because the grazing habits of the mouflon sheep destroyed the manmade woodlands and manmade pods upon which the Palila exclusively depended for food. Id. at 1107-10.

C. Questions

1. For Galleon:

a. What is the purpose and scope of the ESA?

b. Can you describe for me what this Court should be looking at in order to determining whether the Secretary of Commerce acted arbitrarily and capriciously in denying Galleon's permit?

c. For the purpose of determining whether Galleon's activities constitute a "take," what was Galleon's primary purpose in drilling into the endangered deep sea coral?

d. If this Court finds that Galleon's actions caused significant habitat degradation for the endangered coral, did Galleon's actions constitute a taking under the ESA?

2. For Spain and the United States:

a. Do Incidental Take Permits apply to the sanctuary's endangered Johnson seagrasses?

b. It is undisputed that Incidental Take Permits apply to endangered species of fish and wildlife, generally defined as "animals." However here, the endangered species is deep sea coral. Can you describe for me what coral is? And more specifically does it qualify as an animal?

c. What factors in the record support that Galleon's activities constituted an incidental take and are thereby exempt from permitting?

d. Did Galleon's activities cause sufficient harm to the coral to constitute a taking?

ISSUE VI: WHETHER A COE AND / OR NPDES PERMIT IS REQUIRED FOR GALLEON'S SALVAGE ACTIVITIES.

A. Positions of the Parties

- Galleon argues that neither a COE nor a NPDES permit was required for its activities.
- Spain argues that both permits were required.
- The United States argues that both permits were required.

B. Discussion

After NOAA denied Galleon a research and recovery permit, Galleon decided to continue its excavation efforts both within and outside of the GCNMS. R 6. In order to excavate the wreck and its cargo, Galleon first constructed a drilling platform to drill into the endangered deep sea coral which Galleon believed encased the remains of a ship and its cargo. R 6. Afterwards, Galleon employed prop wash deflectors, or mailboxes, to scour the sediment, sand, and vegetation in order to gain access to the artifacts. R 6. In its October 15, 2008, Order the District Court held that the waters off the coast of New Union have been used historically for interstate commerce and therefore qualified as navigable-in-fact. R 11. The court further found that Galleon violated both the RHA 33 U.S.C. § 401 et seq., (2006) and the CWA 33 U.S.C. § 1311 (2006), when it obstructed navigation by constructing a drilling platform within the twenty-four mile contiguous zone without the authorization of the COE, and when Galleon discharged dredged material (propwash from mailboxing), a pollutant, into the navigable waters of the United States without a permit. R 11.

Overview of the RHA

Article 1 Section 8 of the Commerce Clause grants Congress the power to regulate commerce. U.S. Const. Art. 1 § 8. Pursuant to this authority it has designated the navigable waters of the United States as the "public property of the nation, and subject to all the requisite legislation by Congress." Wyandotte Trans. Co. v. U.S., 389 U.S. 191, 201 (1967) (citing Gilman v. City of Philadelphia, 3 Wall. 713, 725 (1865). Therefore, "the federal government is charged with ensuring that navigable waterways, like any other route of commerce over which it has assumed control, remain free of obstruction." Wyandotte, 389 U.S. at 201.

The origin of the RHA dates back to the 1800s, after an unpopular Supreme Court decision found that there was no common law prohibition against obstructions or nuisances in navigable waters. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888) (finding that a state may obstruct a river through the construction of a bridge in the absence of any federal legislation to the contrary). In response, Congress passed Section 10 of the RHA in order to prohibit 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 (2006). The Act further prohibits the construction of any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States." 33 U.S.C. § 403 (2006). The COE regulations clarify this definition of "structure" to mean, "any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction." 33 C.F.R. § 322.2 (2008). Moreover, the Act further prohibits excavating or filling a navigable water in order to "alter or modify its course, location, condition, [ ] capacity . . . or channel." [19] 33 U.S.C. § 403 (2006). While courts have generally applied this prohibition to structures, the Supreme Court has interpreted the phrase "any obstruction" broadly, by stating:

> It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.

U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708 (1899); U.S. v. Republic Steel Corp., 362, U.S. 482, 486-87 (1960) (holding that the term obstruction should be interpreted broadly to encompass accumulations of waste deposits in riverbeds).

RHA permits under Section 10 are governed by COE regulation 33 C.F.R. § 325 (2008). The permit process generally requires a pre-application consultation and an application containing: 1) a description of

19. Parties may attempt to argue that a Section 10 excavation and fill permit may be applicable here, however, there are insufficient facts in the record to show that Galleon's actions are in fact "alter[ing] or modify[ing the] course, location, condition, [ ] capacity … or channel" of the contiguous zone.19.33 U.S.C. § 403 (2006).

the proposed activity and any activities that are reasonably related; 2) whether the project requires dredging; 3) whether the dredging results in a discharge and what the impact on the water body is because of the discharge; 4) if the project requires the construction of a filled area, impound structure, or artificial reef; and 5) a signature. 33 C.F.R. § 325 (2008). However, the regulations also provide for different exemptions for Section 10 permits including activities requiring nationwide permits, 33 C.F.R. § 330 (2008); activities that were commenced and completed before May 27, 1970, 33 C.F.R. § 322.4(a) (2008); and construction of wharves and piers in single state navigable bodies of water that have historically been used for interstate commerce, 33 C.F.R. § 322.4(b) (2008). Ultimately, permits can be revoked if the revocation is found to be in the public interest. 33 C.F.R. § 325.7(d) (2008).

Section 13 of the RHA, known as the Refuse Act prohibits the discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing there from in a liquid state, into any navigable water of the United States," without a permit. 33 U.S.C. § 407 (2006). Historically, courts have interpreted this provision broadly to include such things as suspended solids. U.S. v. Republic Steel Corp., 362 U.S. 482, 490-91 (1961) (finding that suspended industrial waste particles discharged from a mill into a navigable body of water required a Section 13 COE permit).

Do the prohibitions in the RHA apply to Galleon's activities in the US contiguous zone?

The issue here is whether the prohibitions of the RHA apply to the construction of a drilling platform in the contiguous zone of the United States which extends from 12 to 24 miles off shore, beyond the twelve mile territorial seas.[20] Here, the wreck to which Galleon is seeking title is located approximately twenty-three to twenty-four nautical miles off the coast of New Union at a depth of 600 ft. R 3, 5. The District Court held that the waters off the coast of New Union were historically used in interstate commerce and therefore qualified as navigable in fact. R 11.

20. There are no additional facts found in the Record describing the nature or form of the drilling platform including whether or not it was a temporary or a fixed structure.

Galleon's Argument

Galleon will argue that the RHA is not applicable because the company's drilling platform was neither permanently nor temporarily attached to the sea floor. Galleon does not have a strong argument with regard to whether Congress made the RHA applicable beyond US territory, as it explicitly did in the Outer Continental Shelf Lands Act (OCSLA).

Spain and the United States' Arguments

Spain and the United States will argue that under the OCSLA the United States has jurisdiction over the soil and subsoil of the outer continental shelf where Galleon drilled into the seabed floor and into the endangered deep sea coral.

There is no issue as to whether the seas are navigable. They are under any definition. The issue is whether Congress, either explicitly or implicitly made certain US laws applicable beyond the 12 mile territorial sea. Under international law a coastal state has sovereign rights over its territorial sea, and more limited rights to take certain kinds of actions in the contiguous zone and the EEZ. It has substantial control over activities on the continental shelf. But most of international law provisions are focused on the rights of the US versus the rights of other countries. Note that Spain is not challenging the application of the RHA in the contiguous zone.

Certainly the US has the right to control the conduct of its nationals, e.g., Galleon, probably anywhere in the world. But Congress has to make that choice. So the relevant question is, did Congress intend to make the RHA applicable beyond US territory? The answer is that it explicitly did in the OCSLA. In enacting the OCLSA, Congress extended the laws of the United States "to the subsoil and seabed of the outer Continental Shelf" as well as to temporary or artificial structures that are attached to the sea floor in order to pursue different resources. 43 U.S.C. § 1333 (2006). The phrase "outer Continental Shelf" as defined in the OCSLA to mean "all submerged lands lying seaward and outside the area of lands beneath navigable waters." 43 U.S.C. § 1331(a) (2008). Moreover, Section 1333(e) of the OCSLA grants the COE the ability to prevent obstructions to navigation in the navigable waters of the United States thereby extending the jurisdiction of the RHA under the COE to,

> all artificial islands and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of exploring for, developing, or producing resources there from, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources.

Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 398 F.3d 105, 108-09 (1st Cir. 2005 (emphasis omitted) (finding that even though the term "resource" was not defined in the OCSLA, and while all other listed terms were defined relating to mineral extraction, that Congress intended § 1333(e) to apply to all structures and not just those related to mineral extraction).

Did Galleon's activities require an RHA Section 10 structure permit?

In the event that the RHA applies to the contiguous zone, it is highly likely that the drilling platform that Galleon built in order to drill through the endangered deep sea coral will have qualified as a "structure" under the COE regulations thereby requiring Galleon to obtain a Section 10 permit.

In U.S. v. Republic Steel Corp., 362, U.S. 482, 486-87 (1960), the Supreme Court held that a discharge of waste from an industrial site that caused build up and shoaling constituted an obstruction under the RHA.

In U.S. v. Angell, 292 F.3d 333, (2d Cir.2002) the Second Circuit held the defendant violated Section 10 of the RHA by failing to apply for a permit for floats mounted to an attached pier and floating dock located in a tidal canal.

Did Galleon's activities require an RHA Section 13 discharge permit?

Regardless of whether or not the RHA applies to the contiguous zone, it is unlikely that the Galleon's discharge from the mailboxing will require a Section 13 permit because the discharge prohibition has been preempted by the CWA. 33 C.F.R. § 320.2(d) (noting that even though the Refuse Act is still in effect, the CWA discharge prohibitions is §§ 1342 & 1345 have effectively preempted use of the permit).

Overview of § 404 COE Permits Under the CWA

A CWA § 404 dredge and fill permit issued by the COE prohibits the discharge of a pollutant into the waters of the United States without a permit. 33 U.S.C. § 1344(a) (2006) (stating that the Secretary of the Army, is authorized to "issue permits after notice an opportunity for public hearings for the discharge of dredged or fill materials into the navigable waters at specified disposal sites"). The permitting process under § 404 is governed by 33 C.F.R. § 325.1 (2008) and is the same for a § 404 CWA permit as for a Section 10 RHA permit. See *supra*.

A CWA § 404 permit uses the CWA definition of "pollutant" as it applies to such dredge materials as "dredged spoil, solid waste . . . biological materials . . . heat . . . rock, sand, [and] cellar dirt." 33 U.S.C.A. § 1362(6) (2006). COE regulations further clarify this prohibition by defining "dredged material" to mean "material that is excavated or dredged from waters of the United States" and "discharge of dredged material" to represent an "addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. §§ 323.2(c) & (d)(1) (2008). In contrast, incidental fallback, discharges of pollutants from onshore processing of dredged material, and activities that solely involve the cutting and removing of vegetation without disturbing the roots systems do not constitute a discharge of dredged material into the waters of the United States. 33 C.F.R. § 323.2(3)(i)-(iii) (2008). Examples of discharges of dredged material include, but are not limited to, 1) adding dredged material to a site within the waters of the United States; 2) runoff or overflow from a "contained land or water disposal area;" and 3) "any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation." 33 C.F.R. §§ 323.2(d)(1)(i)-(iii)(2008). Conversely, the following activities are considered to be "non-prohibited" discharges of dredge or fill material: A) farming and other agricultural activities; B) maintenance or reconstruction of emergency damaged structures; C) the construction and maintenance of farm stock ponds or irrigation and drainage ditches; D) the construction of temporary sedimentation basins; E) the construction and maintenance of farm roads; F) any activity where a State delegated dredge and fill permit has been issued. 33 U.S.C. § 1344(f) (2006).

Furthermore, "fill material" is also defined in COE regulations to mean material placed in the waters of the United States that "has the effect of

replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. §§ 323.2(e)(1)(i)-(ii) (2008). Examples of fill material include "rock, sand, soil, clay, plastics, construction debris, wood chips, over burden from mining and other excavation activities, and material used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.2(e)(2) (2008). Likewise, the addition of fill material "generally includes, without limitation" such activities as "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f) (2008).

Moreover, under the COE's regulations "waters of the United States" is defined as **"**all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1). As such, the regulatory jurisdiction of the COE is generally limited to waters three nautical miles seaward of the baseline, 33 C.F.R. § 329.12(a) (2008); however, their jurisdiction is extended over the Outer Continental Shelf for purposes of enforcement of the RHA, 33 C.F.R. § 322.3(b) (2008).

Does the mailbox technique employed by Galleon constitute exempt incidental fallback or the discharge of a "dredge and fill material" into the waters of the United States for the purposes of a CWA § 404 permit? Is Galleon "discharging a pollutant" from its operations?

The problem in the case highlights the subtle difference between the CWA § 502 definition of ***discharge of a pollutant*** (which includes discharges in the contiguous zone that are not from a vessel) and the EPA regulatory definition of a discharge of a pollutant (which includes discharges in the contiguous zone from a vessel that is not being used for transportation purposes). See 40 CFR 122.2 (2008).

CWA § 502 defines "discharge of a pollutant" as

> (a) any addition of any pollutant to navigable waters from any point source,
>
> (b) any addition of any pollutant to the waters of the contiguous zone or the ocean ***from any point source other than a vessel or other floating craft***.

33 U.S.C. § 1362(12) (2006) (emphasis added). Galleon could argue that its salvage operation qualifies as a vessel and thus that its propwash discharge is excluded from the scope of the CWA.

By contrast, the U.S. Environmental Protection Agency (EPA) has a slightly different regulatory definition for "discharge of a pollutant." According to EPA, discharge of a pollutant means:

> (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or
>
> (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source ***other than a vessel or other floating craft which is being used as a means of transportation***.

40 C.F.R. 122.2 (2008) (emphasis added).

The "incidental fallback" argument is a red herring – "incidental fallback" covers the situation where dredged material is being removed from the water for disposal NOT in the water, and some of the material "incidentally" falls back. Here, all of the dredged material is falling back – the fall back is not "incidental" – it is the way all the material is being disposed of. United States v. M.C.C. of Florida, is on point for this situation, since it deals with bottom sediments stirred up by boat propellers. In United States v. M.C.C. of Florida, 722 F.2d 1501, 1506 (11th Cir. 1985), the Eleventh Circuit held that "the redepositing of soil dredged up by the tug's propellers onto the adjacent sea grass beds clearly disturbs the "physical and biological integrity" of the subject areas and constituted a violation of the CWA. In this case, the court found "dredged spoil" to include chopped up vegetation and sediment that had resettled onto an adjacent seabed.

Galleon used prop wash deflectors, or mailboxes, to scour the sediment, sand, and vegetation from the ocean floor after drilling, in order to gain access to the embedded wreck. R 6. In its Order the District Court held that Galleon violated the prohibitions of the CWA 33 U.S.C. § 1311 (2006), when it discharged a pollutant and dredged material into the waters of the United States without a permit. R 11.

Galleon's Argument

Just as in the RHA jurisdictional argument above, Galleon will first argue that because their drilling platform was neither permanently or temporarily attached to the sea floor and their operations were solely within

the seas of the contiguous zone, the United States does not retain jurisdiction because in the absence of explicit language to the contrary, the jurisdiction of the United States ends at the territorial seas. In the event that there is jurisdiction, Galleon will then argue that their activities are exempt from permitting as incidental fallback.

Under the regulatory definition of "discharge of a pollutant", Galleon will argue that its that its activities are not covered because they are operating a vessel (under the statutory definition) and that the vessel also is being used as a means of transportation (the regulatory definition) (in that the company transported its people to the salvage site). Galleon also will argue that EPA's regulatory definition is not entitled to deference because it differs from the precise statutory language.

Spain and the United States' Arguments

Spain and the United States will also argue for a second time that Galleon drilled into the seabed floor and into the endangered deep sea coral, therefore the United States retains jurisdiction over the subsoil of the outer continental shelf under the Outer Continental Shelf Lands Act (OCSLA). In the alternative, Spain and the United States will argue under the CWA, the Commerce Clause, and International treaties, that they have an interest in extending their control into the contiguous zone in order to regulate natural and cultural resources. In the event there is jurisdiction, Spain and the United States will then argue that Galleon's prop-wash effluent constitutes either the significant excavation and redeposit of a dredged material, or the placement of fill material that changes the bottom elevation of any portion of the waters of the United States.

For a discussion of the COE's jurisdiction in the contiguous zone, see supra Issue VI.

The U.S. also will argue that once Galleon anchored its operation and began salvage operations, the vessel was no longer "being used as a means of transportation" and thus its discharge of pollutants is covered by the CWA and requires a permit. The U.S. will also have to argue that its regulatory definition is entitled to deference. In the event deference is not given, the U.S. will argue that Galleon is operating a fixed structure, not a vessel or floating craft.

During discussions, parties should discuss the leading case of National Association of Home Builders v. U.S. Army Corps of Engineers, in which the D.C. District Court found that the failure of the COE to establish a "bright line" test for determining which discharges qualified as incidental fallback was unconstitutional. National Ass'n of Home Builders v. U.S.

Army Corps of Engineers, 2007 WL 259944, 2-4 (D. D.C. 2007). In National Association of Home Builders v. U.S. Army Corps of Engineers, plaintiffs sued challenging the facial constitutionality of the COE's 2001 regulations defining "discharge of dredged material" (the Tulloch II rule) and "incidental fallback." Id. Specifically, plaintiff's challenged the language that "landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback," 33 C.F.R. § 323.2(d)(2)(i) (2008), and that "incidental fallback" should include the redepositing of small amounts of dredged material in "substantially the same place as the initial removal" 33 C.F.R. § 323.2(d)(2)(ii) (2008). The regulation additionally emphasized that the fallback must be incidental to the excavation activity; common examples of incidental fallback included the soil disturbed from shoveling, and back-spill from a bucket. 33 C.F.R. § 323.2(d)(2)(ii) (2008). After analyzing the language, the court held that the regulations were unconstitutional because the regulation: 1) required agencies to obtain project specific evidence from projects over which they lacked jurisdiction; and 2) the "incidental fallback provision failed to address a time limitation or a volume amount. National Ass'n of Home Builders, 2007 WL 259944 at 2-4.

Cases Discussing Incidental Fallback

In discussing the issue of what activities constitute incidental fall, the following cases are helpful to this analysis.

In U.S. v. Wilson, 133 F.3d 251, 269-71(4th Cir. 1997), the Fourth Circuit held that § 404 permits include "sidecasting" or the practice of "mov[ing] native wetland a few feet to the side of the ditch being created." Id. The court further held that sidecasting in this sense does not constitute incidental fallback.

In United States v. M.C.C. of Florida, 722 F.2d 1501, 1506 (11th Cir. 1985), the Eleventh Circuit held that "the redepositing of soil dredged up by the tug's propellers onto the adjacent sea grass beds clearly disturbs the "physical and biological integrity" of the subject areas and constituted a violation of the CWA. In this case, the court found "dredged spoil" to include chopped up vegetation and sediment that had resettled onto an adjacent seabed.

In U.S. v. Bay-Houston Towing Co., Inc., 33 F.Supp.2d 596, 608 (E.D.Mich 1999) the court held that the "use of indigenous bog vegetation

and clays to create haul roads and windrow foundations can constitute the discharge of 'fill materials' under the Act."

In Avoyelles Sportmen's League v Alexander, 473 F.Supp. 525, 532 (WD La 1979) the court found that the leveling of wetland vegetations constituted "fill."

In Iroquois Gas Transmission System v. FERC, 145 F.3d 398, 402 (2nd Cir. 1998) the court held that the COE regulates the backfilling of trenches.

C. Questions

1. For Galleon:

a. Did the drilling platform that Galleon constructed violate the provisions of the RHA or the CWA?

b. Does the RHA have its own prohibition against discharges? If so should Galleon additionally have to apply to the COE for a discharge permit under the RHA?

c. How far does the jurisdiction of the United States extend under the RHA? Does this Court have jurisdiction under the facts of this case?

d. Does Galleon's use of prop-wash deflectors qualify as the discharge of a pollutant?

e. How is this case any different than the Ninth Circuit's recent decision in Northwest Environmental Advocates v. U.S. E.P.A., 537 F.3d 1006, 1013-12 (9th Cir. 2008).

2. For Spain and the United States:

a. What are the basic principals and prohibitions of the RHA?

b. If this Court finds that the drilling platform Galleon constructed was only a floating platform, do the provisions of the RHA apply? What about if this court finds the drilling platform to be a vessel?

c. Does prop-wash constitute the discharge of a pollutant?

d. How do the facts of the case here support your position that a prop-wash deflector is a point source? The CWA generally requires there to be some form of a discrete or discernable channel that discharge can "escape" from. How can this occur within the confines of an ocean?

e. Do Galleon's discharges qualify as "incidental fallback" and are therefore exempt from a COE § 404 permit?