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Best Brief: The Kingdom of Spain

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

Best Brief*

THE KINGDOM OF SPAIN

GEORGETOWN UNIVERSITY LAW CENTER
JOSEPH MATHEWS AND WEI XIANG

Civ. App. No. 08-1001
IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

Brief for THE KINGDOM OF SPAIN
Claimant-Appellee

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

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the District of New Union. The district court sat in both admiralty and federal statutory jurisdiction. U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (2008). Appellate jurisdiction in this Court arises under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the wreck referred to as *La Contesta* is protected by the SMCA.

II. Whether the shipwreck is subject to sovereign immunity and, if so, whether salvage requires the consent of the sovereign.

III. Whether NOAA properly refused to issue Galleon a permit to excavate and recover portions of a historical shipwreck within the GCNMS.

IV. Whether the sunken ship and cargo, both inside and outside the boundaries of the GCNMS, may not be recovered without an NMSA permit.

V. Whether the Secretary of Commerce properly denied Galleon an Endangered Species permit to drill through endangered deep sea coral within a national marine sanctuary.

VI. Whether Galleon's salvage operations are illegal without permit authorization by the COE or EPA.

STATEMENT OF THE CASE

The instant action was initiated by Galleon Enterprises, Inc. ("Galleon"), with the filing of a verified *in rem* complaint in admiralty against the shipwreck known as *La Contesta*. Galleon sought (1) title to *La Contesta* under the Law of Finds; (2) in the alternative, a liberal salvage award for voluntarily recovering artifacts; (3) declaratory judgment that Spain no longer exercises its sovereign prerogative over the wrecked vessel; and (4) declaratory judgment that the Executive Branch of the United States has no jurisdiction to regulate salvage operations with respect to *La Contesta*.

The Kingdom of Spain answered by filing a verified claim, and the United States intervened. A trial was held on all issues raised by all three parties. The district court held that (1) the SMCA does not apply to *La Contesta* because the vessel is not a sunken military craft; (2) Galleon

cannot obtain title to the shipwreck under the Law of Finds because Spain had not abandoned title thereto; (3) Galleon is entitled to salvage award equivalent to 90% of value of artifacts recovered outside boundaries of the GCNMS under the Law of Salvage, but is precluded from salvage within the GCNMS because of its failures to comply with permitting requirements of NOAA and the Corps; (4) Galleon violated both RHA and CWA permitting requirements with respect to activities within the GCNMS; (5) cargo found outside of the GCNMS is segregable from cargo found within, and Galleon is enjoined from conducting research or recovery activities within the GSNMS without permits from NOAA and the Corps; and (6) the Secretary of Commerce acted properly in denying permit to Galleon to drill through coral reefs to reach *La Contesta*.

Following the issuance of the Order of the District Court, all parties timely appealed.

STATEMENT OF THE FACTS

In 1733, the Spanish frigate *Nuestra Senora La Contesta de Aragon* (*La Contesta*) was driven off course by a hurricane and wrecked, with nearly half its fleet, on the coral reefs surrounding what is now New Union. (R. at 4.) A second hurricane shortly after the initial wreck broke apart the remnants of the ships and terminated salvage efforts. (R. at 5.) *La Contesta* had traveled from Spain to Peru as one of six frigates protecting a fleet of merchant galleons from attack. (R. at 5.) As it escorted the galleons back to Spain, *La Contesta* also carried mail, passengers, and cargo, including $500 million in gold and silver coins and bullion. (R. at 4.) The National Oceanographic and Atmospheric Administration (NOAA) established the Gold Coast National Marine Sanctuary (GCNMS) to protect these historical Spanish shipwrecks and the natural resources of the submerged lands in which they lie buried. (R. at 5.)

In 2008, Galleon Enterprises, Inc. (Galleon) discovered artifacts from an ancient shipwreck inside and slightly outside the GCNMS, within the contiguous zone of the United States. (R. at 3.) The sunken vessel that is the source of the artifacts lies inside the marine sanctuary, embedded in coral formations. Id.; (R. at 6.) All evidence points to the wreck being of Spanish origin. (R. at 12.) Hoping to profit from the wreck by recovering its cargo, Galleon applied to NOAA for a Research and Recovery permit that would legalize certain recovery activities inside the GCNMS. (R. at 6.) Based upon the evidence Galleon presented, NOAA concluded the sunken ship was a Spanish vessel and Galleon would need Spain's express consent before NOAA could issue a permit for excavation or recovery of any

portion of the wreck. When Galleon failed to prove Spain's consent, NOAA denied the permit application. Id.

Disregarding NOAA's denial of its permit application, Galleon began excavation and recovery of the Spanish vessel and its cargo, both inside and outside the GCNMS. Id. Galleon used devices called "mailboxes" to direct the propeller wash of its ship straight downward, blasting away the seabed of the marine sanctuary and uncovering artifacts. Galleon also constructed an illegal drilling platform inside the sanctuary and attempted to access the sunken ship itself by drilling through the endangered deep sea coral believed to cover it. Id. Galleon removed artifacts from inside and outside the Marine Sanctuary and brought them before the court.

SUMMARY OF THE ARGUMENT

The Sunken Military Craft Act applies to *La Contesta* because *La Contesta* is a sunken Spanish military craft to which Spain retains title. The SMCA, when read consistently with treaties and customary international law, does not require warships to have been on noncommercial service at their time of sinking. Spain has also not abandoned or transferred its title to *La Contesta* because Spain must do so expressly, and it has instead expressly stated that it has not in any manner relinquished its title to sunken vessels lost in its service. As such, the SMCA conveys Spanish sovereign immunity to *La Contesta*, and prevents Galleon from asserting the Law of Salvage without consent of the sovereign. Alternatively, the 1902 Treaty of Friendship and General Relations does the same for all sunken Spanish vessels, not merely warships.

NOAA's denial of Galleon's application for a Research and Recovery permit for the Spanish wreck was not arbitrary or capricious. Rather, NOAA has full discretion under the NMSA to grant or deny permit applications, and denial of Galleon's permit was proper in order to uphold the United States's commitments to the Sunken Military Craft Act and the 1902 Treaty of Friendship and General Relations. Galleon's salvage activities have a devastating effect on the shipwreck site, which is a sanctuary historical resource protected by the NMSA, and the sanctuary resources of the surrounding marine environment. Without a permit to conduct these activities, Galleon's actions both inside and outside the sanctuary are prohibited. Finally, the Secretary of Commerce did not act arbitrarily and capriciously in denying Galleon an Endangered Species Act permit to drill through endangered deep sea coral. Because drilling through this coral was prohibited by GCNMS regulations, it was not an "otherwise

lawful" activity, one of the explicit requirements for incidental take permits under the ESA.

Galleon needs permits from both the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency to salvage *La Contesta*. The Rivers and Harbors Act requires that Galleon obtain a permit from the Corps of Engineers. Galleon's drilling platform is a structure and an obstruction that interferes with the navigability of the navigable waters of the United States. Concurrently, the Clean Water Act established two permitting schemes, one under the authority of the Corps of Engineers and the other under the Environmental Protection Agency, and both permits apply to Galleon's salvage operations of *La Contesta*. Galleon's mailbox and drilling operations constitute the addition of pollutants in the form of seabed sediment and seagrasses (dredged materials regulated by the Corps under § 404 of the CWA) and coral (biological materials that require permitting from the EPA through the NPDES under § 402 of the CWA) into the waters of the United States. Additionally, Galleon's drilling platform is not a vessel exempted from CWA coverage in the contiguous zone and instead constitutes a conveyance that is a point source for discharging pollutants.

ARGUMENT

As a threshold matter, the sunken vessel and the cargo are the same entity, the shipwreck. "Shipwreck" means a vessel or wreck, its cargo, and other contents. 43 U.S.C. § 2102(d) (2006). This interpretation is consistent with the common principle of admiralty jurisdiction that in an *in rem* action, a court gains jurisdiction over the res, the property named as defendant, by seizing and actually controlling the res. Great Lakes Exploration Group, LLC v. Unidentified Wrecked & (For Salvage-Right Purposes), Abandoned Sailing Vessel, 522 F.3d 682, 694 (6th Cir. 2008) (citing R.M.S. Titanic, Inc., v. Haver, 171 F.3d 943, 964 (4th Cir.1999)). To obtain possession over the res, district courts sitting in admiralty may issue a warrant of arrest for a physical part of a shipwreck (an "artifact") and, based on this arrest, exercise constructive jurisdiction over the entire shipwreck. Id. (citing 3A-X Benedict on Admiralty § 137 (2007)). If such cargo as a bottle of champagne is sufficient to represent the entirety of a shipwreck, see California v. Deep Sea Research, 523 U.S. 491, 496 (1998) (recognizing a court's *in rem* admiralty jurisdiction on the basis that the salvor presented artifacts from the shipwreck, including china and a bottle of champagne), the wreck and its cargo must necessarily be presumed a single, contiguous

entity unless proven otherwise (in which case there must be additional defendants in the *in rem* action).

I. THE SUNKEN MILITARY CRAFT ACT APPLIES TO *LA CONTESTA* BECAUSE *LA CONTESTA* IS A SUNKEN SPANISH MILITARY CRAFT TO WHICH SPAIN RETAINS TITLE.

The Sunken Military Craft Act ("SMCA"), Pub. L. No. 108-375, 118 Stat. 2094 (2004), prohibits the disturbance, without authorization by permit from the Secretary of the Navy, of any (A) sunken military craft where (B) title thereto has not been abandoned or transferred by its government operator. Although the district court correctly found that Spain retained title to *La Contesta*, its erroneous interpretation of the SMCA caused it to find that *La Contesta* was not a sunken military craft. Because statutory construction is reviewed de novo, the district court's interpretation is accorded no appellate deference, and for the following reasons, its holding that the SMCA does not apply to *La Contesta* should be reversed.

A. *La Contesta* is a Sunken Military Craft Because it was a Warship, and the SMCA Does Not Require Warships to Have Been on Noncommercial Service at Their Time of Sinking.

The SMCA defines "sunken military craft" to include any and all portions of "any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank." Pub. L. No. 108-375, § 1408(3), 118 Stat. 2094, 2097 (2004). The craft includes all associated contents, id., which include the cargo and contents of the craft with its debris field. Id. at § 1408(1). The district court correctly interpreted the statute with respect to the residual element of § 1408(3)(A), that any "other vessel" is subject to the requirement of ownership or operation by a government on military noncommercial service at time of sinking. However, the court incorrectly interpreted this requirement of noncommercial service to apply to warships. The plain ordinary meaning of warship is "[a] ship commissioned by a nation's military, operating with a military command and crew and displaying the nation's flag or other external marks indicating its country of origin." Black's Law Dictionary (8th ed. 2004). Although Congress may have contemplated that a warship might serve in a nonmilitary commercial capacity, and thereby be excluded from the protection of SMCA, both (1) treaties and (2) customary international law suggest that warships are

distinct from other vessels to which the noncommercial requirement applies.

1. The 1958 Geneva Convention on the High Seas, to which the United States is a party, distinguishes between warships and other vessels on noncommercial service.

The SMCA must be applied in accordance with treaties to which the United States is a party. Pub. L. No. 108-375, § 1406(b); see also U.S. Const. art. VI, § 1, cl. 2. The 1958 Geneva Convention on the High Seas ("GCOHS") was ratified by the United States, 13 U.S.T. 2312 (1962), and holds that "'warship' means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline." Id. at Art. 8. The GCOHS makes a distinction from mere ships "owned or operated by a State and used only on government noncommercial service." Id. at Art. 9. The district court's construction of SMCA § 1408(3) is inconsistent with the clear delineation in the GCOHS between warships in general and other vessels on noncommercial service. An application of § 1408(3) that is consistent with the GCOHS requires that warships such as *La Contesta* be afforded protection under the SMCA, as they are under the GCOHS, regardless of the nature of their service at the time of sinking.

2. The 1982 UN Convention on the Law of the Sea, which the United States considers customary international law, makes the same distinction.

Generally recognized principles of international law are incorporated into the SMCA. Pub. L. No. 108-375 § 1406(b); see also RMS Titanic, Inc. v. Haver, 171 F.3d 943, 960-61 (4th Cir. 1999) (stressing that a court sitting in admiralty jurisdiction defers to international maritime law and the common law of the seas) (citing Lauritzen v. Larsen, 345 U.S. 571, 581 (1953)). Under the 1982 UN Convention on the Law of the Sea ("UNCLOS"), "'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline." 1833 U.N.T.S. 397 (1994), Art. 29. UNCLOS makes the same

distinction as the GCOHS between warships and other ships. Compare id. at Art. 95 (discussing the immunity of warships on the high seas) with id. at Art. 96 (discussing the immunity of "ships used only on government non-commercial service" on the high seas). Although the United States has not ratified UNCLOS, these commonly accepted concepts in admiralty form the understanding of SMCA by its own military and Department of Homeland Security services. See United States Coast Guard Shipwreck Policy, http://www.uscg.mil/history/faqs/USCG_Shipwreck_Policy.asp (last visited Nov. 21, 2008) ("Throughout history, warships and other craft in the service of the government have been accorded special protection under the concept of sovereign immunity, which exempts a warship or other governmental vessel in noncommercial service from the jurisdiction of any other state. In the modern era, this doctrine has been accepted as customary law by the courts in most jurisdictions as well as having been memorialized in articles 95 and 96 of the 1982 UN Law of the Sea Convention.").

B. Spain Has Not Abandoned or Transferred Its Title to *La Contesta* because Spain Must Do so Expressly and It Has Instead Expressly Stated That It Has Not in Any Manner Relinquished Its Title to Sunken Vessels Lost in Its Service.

Under traditional rules of admiralty law, abandonment must be shown by express acts where an owner asserts title to a shipwreck. Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 641 (4th Cir. 2000) (citing Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992)), cert. denied, 531 U.S. 1144 (2001); see also Dluhos v. Floating & Abandoned Vessel, 162 F.3d 63, 74 (2d Cir. 1998) (even where a vessel has been abandoned, title still remains with the original owner) (citing 3A Martin J. Norris, Benedict on Admiralty, § 150, at 11-1 (1997)). Even where courts have questioned this rule and inferred abandonment, their holdings have been limited to vessels originally owned by private parties. Id. at 642 (citing Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 177 F.3d 491, 500 (6th Cir. 1999)). Spanish vessels are further protected by Article X of the 1902 Treaty between the United States and Spain of Friendship and General Relations ("1902 Treaty"). See 33 Stat. 2105 (1903) ("In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases."). The 1902 Treaty grants immunities to Spanish vessels that the United States shares with no other foreign state. Sea Hunt, 221 F.3d

at 642 (internal citation omitted). Among these immunities is that the United States cannot abandon or relinquish its property, including vessels, without an "express, unambiguous, and affirmative act." Id. (citing U.S. Const. art. IV, § 3; United States v. California, 332 U.S. 19, 40 (1947)). "Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation." Id. at 643.

The district court found as a matter of fact that the shipwreck is Spanish, thereby triggering the protection of the 1902 Treaty and the immunities that it incorporates. See Sea Hunt, 221 F.3d at 642-43. The court also found that Spain had never abandoned or transferred its title in the craft, actions which would nullify SMCA protection. See Pub. L. No. 108-375, § 1408(3). The Secretary of State invited the Kingdom of Spain to join in the SMCA, see id. at § 1407, and Spain requested SMCA protection for its sunken military craft. 69 Fed. Reg. 5647 (Feb. 5, 2004) ("[R]egarding the remains of sunken vessels that were lost while in the service of the Kingdom of Spain and/or were transporting property of the Kingdom of Spain . . . Spain has not abandoned or otherwise relinquished its ownership or other interests with respect to such vessels and/or its contents."). Therefore, title to *La Contesta* remains with Spain, and the SMCA applies to the shipwreck. [1]

1. If this Court treats the issue of the 1902 Treaty as one first raised on appeal, it should nonetheless resolve the matter within its discretion. See Turner v. City of Memphis, 369 U.S. 350, 353 (1962) ("On the merits, no issue remains to be resolved. This is clear under prior decisions and the undisputed facts of the case. Accordingly no occasion is presented for abstention, and the litigation should be disposed of as expeditiously as is consistent with proper judicial administration."). "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases" with respect to the need for developing evidence and preventing injustice. Singleton v. Wulff, 428 U.S. 106, 121 (1976) (citing Turner); see also Hormel v. Helvering, 312 U.S. 552, 556-57 (1941) (purpose of district court is to serve as forum for development of all evidence to relevant issues, but where arguments raised for the first time before appellate court concern solely questions of law rather than of fact, appellate court should not be so rigid in refusing to adjudicate those questions where justice would be served); Wagenknecht v. United States, 533 F.3d 412, 418 (6th Cir. 2008) ("A federal appellate court can resolve an issue not passed on below where the proper resolution is beyond any doubt or where injustice might otherwise result.") (internal quotations and citations omitted); Lane v. Dep't of Interior, 523 F.3d 1128, 1140 (9th Cir. 2008) ("The panel need not consider arguments not before the district court unless review is necessary to preserve the integrity of the judicial process . . . or the issue is purely one of law and does not depend on the factual record below." (citing Bolker v. Comm'r of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985)). The Courts of Appeals adjudicate new arguments to prevent such injustice, Meijer, Inc. v. Biovail Corp., 533 F.3d 857, 867 (D.C. Cir. 2008), and review them for plain error. Bath Junkie Branson, LLC v. Bath Junkie, Inc., 528 F.3d 556, 561 (8th Cir. 2008) (where there is "(1) error, (2) that is plain, and (3) that affects substantial rights" and if "(4) the error seriously affects the fairness, integrity, or

II. SPANISH SOVEREIGN IMMUNITY APPLIES TO *LA CONTESTA* AND PREVENTS GALLEON FROM ASSERTING THE LAW OF SALVAGE WITHOUT CONSENT FROM THE SOVEREIGN.

Sovereign immunity, as applied to property, is the extension of a sovereign entity's immunity from challenge to its interests and title in that property, unless such immunity is waived. See Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 285, 287 (1983). As detailed supra at Sec. I(B) of this brief, one example of such immunity is that the sovereign's title can only be expressly abandoned. Immunities may also be conferred by statute, and depending on the particular statute that this court chooses to apply, *La Contesta* (A) is subject to the sovereign immunity of Spain, and (B) may not be salvaged without the consent of that sovereign. Additionally, (C) consent of the United States through statutory permitting schemes is required regardless of sovereign immunity.

A. The Shipwreck Is Subject to the Sovereign Immunity of Spain.

Depending on this Court's holding with respect to the first question presented, *La Contesta* is subject to the sovereign immunity of Spain as conveyed by either (1) the SMCA or (2) the 1902 Treaty.

1. The SMCA conveys the sovereign immunity of Spain upon all sunken Spanish warships.

The SMCA grants sovereign immunity to the crafts to which it applies. See Fathom Exploration, LLC v. Unidentified Shipwrecked Vessel or Vessels, 352 F. Supp. 2d 1218, 1230 n.16 (S.D. Ala. 2005) (noting with regard to a sunken vessel that the United States claimed under the SMCA, "[t]o the extent, then, that the Shipwreck is United States property which the United States has not abandoned, Fathom conducts salvage operations on that site at its own risk."). Therefore, if this Court held that *La Contesta*

public reputation of the judicial proceeding."). The United States' treaty obligation to the Kingdom of Spain would be violated in a wholly unjust manner if the judgment of the district court were not reversed or at least vacated and remanded for consideration. This is solely a "question[] of law, the proper resolution of which [is] beyond reasonable doubt, and the failure to address the issue[] would result in a miscarriage of justice." Habecker v. Town of Estes Park, 518 F.3d 1217, 1228 (10th Cir. 2008). Nor would this Court be alone in specifically considering claims arising under the 1902 Treaty. See, e.g., Romero v. Int'l Terminal Operating Co., 244 F.2d 409, 410 (2d Cir. 1957) (per curiam) (addressing invocation of 1902 Treaty on the merits, where claim was first made on appeal).

is subject to the SMCA, then the SMCA conveys the sovereign immunity of Spain upon the shipwreck.

2. The 1902 Treaty of Friendship and General Relations conveys Spanish sovereign immunity upon all sunken Spanish vessels.

If this Court does not find that *La Contesta* is a sunken warship upon which the SMCA conveys Spanish sovereign immunity, sovereign immunity is nonetheless granted by Article X of the 1902 Treaty between the United States and Spain of Friendship and General Relations. See 33 Stat. 2105 (1903) ("In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases."); see also Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 642 (4th Cir. 2000), cert. denied, 531 U.S. 1144 (2001). The treaty covers all vessels, not merely warships or vessels on any particular service, commercial or otherwise. See 33 Stat. 2105; see also, e.g., Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678, 680 (E.D. Va. 1999) ("Although there is a factual dispute between the parties as to whether the JUNO and LA GALGA are warships, that question is immaterial and does not prevent the Court from ruling on the [applicability of the 1902 Treaty]."). It is also irrelevant that *La Contesta* was sunken in 1733, before the existence of the United States as a sovereign nation. See Sea Hunt, 221 F.3d at 639 (noting that La Galga sank in 1750).

The district court found that the *in rem* defendant is a Spanish shipwreck, a factual conclusion that is accorded deference on appeal. Therefore, the 1902 Treaty conveys the sovereign immunity of Spain upon *La Contesta*.[2]

2. Alternatively, if this Court finds that *La Contesta* is abandoned or alternatively that the wreck was never Spanish or otherwise sovereign at any time, there is a colorable argument that the shipwreck is subject to the sovereign immunity of the United States as an abandoned shipwreck in federal waters. The Abandoned Shipwreck Act of 1987 ("ASA") provides that "[a]ny abandoned shipwreck in or on the public lands of the United States is the property of the United States Government." 43 U.S.C. § 2105(d); see also 43 U.S.C. § 2102(c) (citing 16 U.S.C. § 470bb(3)(B) (defining "public lands" as lands to which the United States holds fee title, with exceptions that do not herein apply)); Fathom Exploration, LLC v. Unidentified Shipwrecked Vessel or Vessels, 352 F. Supp. 2d 1218, 1223 n.4 (S.D. Ala. 2005) ("The ASA specifically reserves to the United States title in all shipwrecks . . . in federal waters."). United States title may be reinforced by the fact that *La Contesta* is embedded in the soil of the seabed, land which belongs to the United States. See Klein v.

B. The Consent of Spain Is Required for Galleon to Obtain Any Salvage Award.

Under the SMCA, "[n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state." Pub. L. No. 108-375, § 1406(d). United States waters include the contiguous zone of the United States, § 1408(7), which are the areas radiating seaward and between twelve and twenty-four nautical miles away from the United States coastline. § 1408(4) (citing Presidential Proclamation 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999)). If this court holds that the SMCA subjects *La Contesta* to the sovereign immunity of Spain, then the express consent of Spain is necessary for Galleon to acquire salvage rights to *La Contesta*, and Galleon must be denied all salvage award because it has failed to elicit Spain's consent.

Alternatively, "[u]nder the doctrine of salvage, an owner in possession of a vessel may refuse proffered help and thereby deny a salvage claim to the would-be salvor." United States v. Ex-USS Cabot/Dedalo, 297 F.3d 378, 387-88 (5th Cir. 2002) (citing Merritt & Chapman Derrick & Wrecking Co. v. United States, 274 U.S. 611, 613 (1927)). Spain, which retains title to *La Contesta*, has expressly refused Galleon's offer of salvage. Therefore, Galleon's salvage claim must be denied.[3]

Unidentified, Wrecked, & Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985). The Kingdom of Spain does not endorse this argument insofar as its application necessitates a finding that Spain does not currently hold title to *La Contesta*.

3. Concurrently, regardless of the applicability of sovereign immunity to *La Contesta*, Galleon requires a number of permits from the United States to conduct its salvage operations without forfeiting any possible salvage award. Permitting schemes may restrict or even practically prohibit Galleon's lawful salvage of the shipwreck. See Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F. Supp. 953, 963 (M.D. Fla. 1993) ("Plaintiff would not prevail on a salvage claim because he cannot lawfully gain possession of the alleged vessel without first obtaining a permit from the United States."). As detailed supra in Sec. VI of this brief, Galleon is required to obtaining a number of permits to ensure that its salvage operations do not negatively impact the environmental soundness of the waters. Therefore, Galleon has no salvage claim until it has obtained those permits. See id. at 964 ("When Plaintiff obtains a permit, Plaintiff's salvage activities and recovery of artifacts will be deemed lawful.").

III. NOAA'S DECISION TO DENY GALLEON A NATIONAL MARINE SANCTUARY RESEARCH AND RECOVERY PERMIT UNDER THE NMSA WAS SUPPORTED BY GOOD CAUSE, AND THEREFORE WAS NOT ARBITRARY OR CAPRICIOUS.

The National Marine Sanctuary Act (NMSA), 16 U.S.C. §§ 1431-1445 (2008), grants the Secretary of Commerce authority to designate and manage marine areas of special national significance as national marine sanctuaries. The primary purpose of the NMSA is to protect "sanctuary resources;" "any living or nonliving resource[s] of a national marine sanctuary that [contribute] to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary." Id. § 1432(8). Historic shipwrecks are sanctuary resources. 15 C.F.R. § 922.3 (2008); see id. § 922.60.

The Secretary of Commerce has delegated his duties under the NMSA to the National Oceanic and Atmospheric Administration (NOAA), which now regulates marine sanctuaries. S. Rep. No. 595, 1988 U.S.C.C.A.N. at 4387-88. The Gold Coast National Marine Sanctuary (GCNMS) was established pursuant to the NMSA to include the submerged lands in which a group of sunken Spanish ships are buried and to protect the natural and historical resources of these lands, including the shipwreck in this case. (R. at 5); see (R. at 3.)

In reviewing an agency decision, a court may set the decision aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 702(2)(A) (2006). The court must inquire whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990). This standard of review is deferential, and a court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Motor Vehicle Mfr. Ass'n, Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983). In this case, NOAA acted according to proper procedure under broad discretion granted by the NMSA, and its decision that there existed good cause to deny Galleon's permit was neither arbitrary nor capricious.

A. NOAA Properly Denied Galleon's Permit In Order to Ensure Compliance with Other Laws and Treaties of the United States.

Before acting on an NMSA permit application, NOAA may request additional information from a permit applicant and seek the views of "any persons or entity within or outside the Federal government"; NOAA may then issue a permit or deny issuance for good cause. 15 C.F.R. §§ 922.48(c)-(d) (2008). Consistent with this authority, NOAA's action in the present case constituted both a request for additional information from Galleon – whether or not Spain consented to Galleon's proposed salvage – and an indirect inquiry, through Galleon, into the views of Spain on the potential permit issuance. NOAA acted properly, following express Congressional authority, in reviewing Galleon's permit application.

Once NOAA learned that Spain did not consent to Galleon's recovery plan, it denied Galleon's Research and Recovery permit application for good cause: in order to ensure Agency compliance with the SMCA and the 1902 Treaty. Pub. L. 108-375, 118 Stat. 2094 (2004); 33 Stat. 2105 (1903). Although the NMSA does not define "good cause" as used in Section 922.48(d) and no standard for good cause has been established in NMSA case law, Black's Law Dictionary defines "good cause" as "a legally sufficient reason." Black's Law Dictionary (8th ed. 2004). Adherence to the laws and treaties of the United States plainly constitutes "a legally sufficient reason" for NOAA to deny a permit application.

NOAA denied Galleon's permit application in order to ensure compliance with the SMCA. A Research and Recovery permit issued by NOAA would authorize Galleon to move, remove, and possess sanctuary historical resources from the GCNMS, including items from the Spanish wreck. Issuance of a Research and Recovery permit to Galleon would therefore constitute the grant of a salvage right by NOAA. Because the SMCA applies with full force to the shipwreck in this case, issuance of a Research and Recovery permit by NOAA without Spain's consent would violate the SMCA provision that "[n]o salvage rights or awards shall be granted with respect to any foreign military craft located in United States waters without the express permission of the relevant foreign state." Pub. L. 108-375, § 1406(c)(2) (2004). Without Spain's blessing, denial of Galleon's permit application by NOAA was proper in order to abide by the explicit mandate of the SMCA.

Additionally, NOAA denied Galleon's permit to uphold the United States's obligation under the 1902 Treaty. 33 Stat. 2105 (1903). Section 305 of the NMSA provides that regulations issued to designate and *implement* the Act "shall be *applied* in accordance with generalized

principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party." 16 U.S.C. § 1435(a); 15 C.F.R. § 922.4 (emphasis added). The permitting provisions of the GCNMS Program Regulations, 15 C.F.R. § 922.166, constitute "implementation" of the NMSA, and NOAA's decisions on the issuance of Research and Recovery permits fall under the purview of the Act's "application" as referenced in section 305. According to the Congressional intent embodied in section 305 of the NMSA, NOAA shall not apply GCNMS regulations in contravention of existing international agreements to which the United States is a party. 16 U.S.C. § 1435(a). As the district court found, Spain has not abandoned the wreck, and the 1902 Treaty applies to the shipwreck at issue. (R. at 9.) Therefore, NOAA's denial of Galleon's permit application was a valid rejection for the good cause of fulfillment of the 1902 Treaty.

B. The NMSA and the NMS Program Regulations Grant the Director Broad Discretion Over the Issuance of Permits.

The NMSA, NMS Program Regulations, and GCNMS Regulations all grant the Secretary, Director, or administrator broad discretion over the permitting process. Given the wide latitude Congress intended the administrator of the NMSA to have in issuing permits, NOAA's permit decisions are entitled to the highest level of deference under arbitrary and capricious review.

In the NMSA itself, Congress provided that the Secretary "*may*" issue special use permits "*if the Secretary determines* such authorization is necessary . . .." 16 U.S.C. § 1441 (emphasis added). Congress relied explicitly upon the judgment of the Secretary to identify when authorization for special use permits was necessary; the Secretary has since delegated this discretion to NOAA. S. Rep. No. 595, 1988 U.S.C.C.A.N. at 4387-88. The general NMS Program Regulations issued to implement the NMSA follow Congressional intent by giving the Director significant autonomy in making permitting decisions. During the application review process, the Director may request more information from an applicant and consult the views of others inside or outside the Federal government. 15 C.F.R. § 922.48(c). The Director then, "*at his or her discretion, may* issue a permit," or "*may* deny a permit application . . . in whole or in part" if the applicant has violated the NMSA "or for other good cause." 15 C.F.R. § 922.48(d); 15 C.F.R. § 922.48(f). The specific regulations for the GCNMS borrow the same discretionary language: the Director "at his or her discretion, may

issue a Research/Recovery of Historical Resources permit." 15 C.F.R. § 922.166(c)(2).

The language of the NMSA itself and the regulations promulgated to implement it make the issuance of permits a matter of discretion, utilizing "may," rather than the imperative, "shall," throughout the text of the law. Because Congress conferred such discretion upon the administrator of the NMSA, the determinations NOAA made regarding Galleon's permit may only be overturned if they are irrational and contrary to Congress's intent under the NMSA. See Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990). Because NOAA considered the merits of Galleon's permit application and denied it for good cause – in order to abide by existing laws and treaties of the United States – NOAA's action was proper and this Court must defer to the agency's decision.

C. NOAA's Conclusion That the Sunken Ship Is of Spanish Origin Was Rationally Supported By the Record and Is Entitled to Deference.

The good cause denial of Galleon's Research and Recovery permit application by NOAA was predicated on NOAA's preliminary determination that the ship was a sunken Spanish frigate. This conclusion was rationally supported by the record before NOAA at the time, has not been discredited by more recent evidence, and is therefore entitled to deference. Motor Vehicle Mfr. Ass'n, Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

The Administrative Procedure Act requires a court to review the agency decision on the basis of the record before the agency when the decision was made. 5 U.S.C. § 706 (2006). As the district court noted, the "evidence presented to NOAA by Galleon implies and strongly suggests that the only ships that sank within the GCNMS within historic times were Spanish vessels". (R. at 12.) Galleon presented no evidence that the wreck it had discovered was a ship belonging to any country other than Spain, or that ships other than Spanish ships even sank in the area of the GCNMS. Id. The historic evidence presented to NOAA also did not imply that the wrecked ship belonged to a nation other than Spain. Id. Accordingly, based on the administrative record before NOAA during its review of Galleon's application, the conclusion that the shipwreck was of Spanish origin was not implausible or counter to the evidence. Motor Vehicle Mfr. Ass'n, 463 U.S. at 43.

The district court also recognized that "all of the artifacts brought before this Court are of Spanish origin or are of the type that Spain typically

brought to its ports from Peru." (R. at 12.) Although the character of artifacts brought before only the district court has no bearing on the propriety of NOAA's decision, the fact that Galleon has been unable to present any artifact that implies the wreck is *not* of Spanish origin, even long after the agency decision, suggests NOAA's conclusion was neither arbitrary nor capricious.

IV. GALLEON'S SALVAGE ACTIVITIES BOTH INSIDE AND OUTSIDE THE BOUNDARIES OF THE GCNMS REQUIRE AN NMSA PERMIT.

Under the NMSA, it is illegal to "destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary." 16 U.S.C. § 1436. It is well established that historic shipwrecks constitute historical or cultural sanctuary resources. 15 C.F.R. § 922.3.

The GCNMS was established to "protect, preserve, and manage the conservation, ecological, recreational, research, educational, historical, and aesthetic resources and qualities of the area," including historic shipwrecks. 15 C.F.R. § 922.160(a). To achieve this purpose, the GCNMS Regulations prohibit moving, removing, injuring, or possessing sanctuary historical resources except by those acting under a valid National Marine Sanctuary permit. 15 C.F.R. § 922.163(a)(9); 15 C.F.R. § 922.163(b). Permits may be obtained by the procedures described in the NMS Program Regulations and the GCNMS Regulations. 15 C.F.R. § 922.48; 15 C.F.R. § 922.166.

A. Galleon's Removal of Artifacts and "Mailbox" Excavation within the Boundaries of the GCNMS Require a Research and Recovery of Sanctuary Historical Resources Permit.

The removal and possession of Sanctuary historical resources is prohibited by the GCNMS Regulations. 15 C.F.R. § 922.163(a)(9). Cultural resources, including historic shipwrecks and artifacts, are a subcategory of historical resources within the definitions of the NMS Program Regulations. 15 C.F.R. § 922.3. Therefore, any movement of, removal of, possession of, or injury to artifacts or other Sanctuary historical resources is a violation, in the absence of a GCNMS Research and Recovery of Sanctuary Historical Resources permit. Galleon has already recklessly disregarded the Sanctuary's clear prohibition and NOAA's proper denial of its permit application by excavating and removing Sanctuary artifacts and bringing them before this Court. If Galleon

continues its salvage and recovery activities upon the shipwreck within the GCNMS, it will continue to be in violation of these GCNMS Regulations. 15 C.F.R. § 922.163(a)(9). Galleon must be enjoined from further salvage of shipwrecks, artifacts, and other historical resources inside the boundaries of the GCNMS until it obtains a permit making its actions legal. Furthermore, the artifacts Galleon has removed from the Sanctuary to date must be returned to the GCNMS. See U.S. v. Fisher, 977 F. Supp. 1193, 1201 (S.D. Fla. 1997).

Galleon's "mailbox" excavation technique is also prohibited by the regulations designed to protect the GCNMS. 15 C.F.R. § 922.163(a)(3),(5). "Mailboxes" are devices that redirect the powerful thrust of a ship's engines downward toward the sea bottom in order to blast away the ocean floor and expose buried items. See Fisher, 977 F. Supp. at 1196; (R. at 6.) Mailboxes "can excavate up to twenty-five feet of sand from the ocean bottom," or "make a hole in sand thirty feet across and three to four feet deep in fifteen seconds." Fisher, 977 F. Supp. at 1196. Due to the devastating impact mailbox excavation has on seagrasses, marine life, historical sites, and other sanctuary resources, the GCNMS prohibits "engaging in prop-dredging" except in limited circumstances that do not apply here. 15 C.F.R. § 922.163(a)(3). The definition of "prop dredging" within the GCNMS Regulations explicitly includes "use of propulsion wash deflectors," like those implemented in Galleon's mailbox technique. (R. at 6); 15 C.F.R. §922.162. Therefore, Galleon's implementation of mailbox devices to blast away the seabottom is an express violation of the GCNMS prohibition on prop-dredging, and illegal inside the GCNMS boundaries without a valid permit.

This Court must enjoin Galleon from further mailbox excavation inside the GCNMS in the absence of a Research and Recovery of Sanctuary Historical Resources permit issued under 15 C.F.R. § 922.166(c) of the GCNMS Regulations.

B. Galleon's Salvage Activities outside the Boundaries of the GCNMS Require a Research and Recovery of Sanctuary Historical Resources Permit.

The NMSA is ambiguous as to whether "sanctuary resources" subject to protection under the Act may lie partially outside the designated sanctuary boundaries. When Congress delegates authority to an agency but is silent or ambiguous with respect to a specific issue related to that authority, it is within the discretion of the agency to interpret the issue,

provided the agency interpretation is reasonable. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

1. The NMSA definition of "sanctuary resource" is ambiguous.

Congress defined "sanctuary resource" as any living or nonliving "resource of a national marine sanctuary" that contributes to the value of the sanctuary. 16 U.S.C. § 1432(8). In using the phrase, "resource of a national marine sanctuary," Congress intended a close connection between the sanctuary and the resource. However, though Congress has used language limiting protected resources to those within geographic boundaries before, see 16 U.S.C. § 19jj(d), Congress did not mandate that the protected resource be entirely *inside* the sanctuary to qualify as a "sanctuary resource" under the NMSA. The district court therefore erred in its conclusion that "jurisdiction of the United States extends only to the cargo found within the GCNMS." (R. at 12.)

Congress chose to protect significant marine environments by designating certain areas for protection, but nowhere in the NMSA did Congress limit the scope of sanctuary resources to those geographically located within the lines drawn for the sanctuary. See 16 U.S.C. §§ 1431-1445. Congress made it unlawful to "destroy, cause the loss of, or injure any sanctuary resource" without regard to where the destructive activity takes place; the only element Congress required was the causation between the activity and the harm to the sanctuary resource. 16 U.S.C. § 1436(1).

2. The vessel and its cargo make up a single shipwreck and archeological site, and therefore NOAA's interpretation of the site as a unitary sanctuary resource is reasonable.

The Supreme Court has recognized that "an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 864. After Galleon discovered artifacts from the Spanish wreck outside the boundaries of the GCNMS, it was entirely reasonable for NOAA to assert regulatory authority over what it interpreted to be a collection of material constituting a single sanctuary resource.

Although the NMSA does not provide a definition for "shipwreck," the Abandoned Shipwreck Act defines a shipwreck as "a vessel or wreck, its cargo, and other contents." 43 U.S.C. § 2102(d). Courts have recognized that a shipwreck does not consist solely of the sunken vessel and whatever remains inside the ship. See Fisher, 977 F. Supp. at 1198. In Fisher, the

court explained that shipwrecks typically consist of the primary cultural deposit where the ship itself lies at the bottom of the sea, secondary scatter of artifacts surrounding this site, and tertiary scatter of artifacts spread over an even broader area. Id. The relationships among the objects discovered throughout the scatter field of a shipwreck provide unique contextual information from which archeologists can glean invaluable insights into past cultures. Id. This contextual information is precisely one of the resources Congress intended to preserve when it recognized marine environments having "historical, scientific, educational, cultural, [and] archeological . . . significance" and acted to protect them by passing the NMSA. 16 U.S.C. § 1431(a)(2).

Under the NMS Program Regulations, "shipwrecks" and "archeological sites" are specifically enumerated within the definition of "cultural resources," a subset of historical sanctuary resources entitled to protection. 15 C.F.R. § 922.3. The sunken Spanish vessel and its cargo constitute both a single "shipwreck" and a single "archeological site," and therefore, all elements of the wreck, including the vessel, its cargo, and the remains of its passengers form a single sanctuary resource under the NMSA. NOAA's interpretation of its delegated authority as including the entire Spanish shipwreck was a permissible, rational view entitled to Chevron deference.

Galleon's salvage and recovery activities outside the boundaries of the sanctuary "destroy, cause the loss of, [and] injure" the contextual information associated with a GCNMS sanctuary resource – the Spanish shipwreck and the archaeological site it represents. Galleon must obtain a Research and Recovery of Historical Sanctuary Resources permit before conducting further excavation or recovery of the wreck and its cargo, even outside the boundaries of the GCNMS.

V. THE SECRETARY OF COMMERCE DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DENYING GALLEON AN ENDANGERED SPECIES PERMIT TO DRILL THROUGH ENDANGERED DEEP SEA CORAL WITHIN THE GCNMS.

The district court properly concluded that the Secretary's denial of Galleon's Endangered Species permit was neither arbitrary nor capricious. As the court noted, the deep sea coral within the GCNMS has been listed as an endangered species, and is therefore entitled to the protections provided by the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1599 (2006). (R. at 13.) Although the ESA authorizes the Secretary to issue permits

exempting applicants from ESA protections in limited circumstances, Galleon's proposed plan to drill through endangered deep sea coral to salvage a historic wreck within a national marine sanctuary is not such an exception. Because drilling through coral inside the GCNMS is unlawful, the Secretary had no statutory authority to issue Galleon a permit for this activity. See 16 U.S.C. § 1539(a)(1)(B).

Denial of an EPA permit application is final agency action subject to judicial review under the APA's arbitrary and capricious standard. Oregon Natural Resources Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007). If there is no clear error of judgment and "a rational connection between the facts found and the choice made," the court cannot overturn the agency's determination. Id.

A. Drilling through Endangered Deep Sea Coral Is a "Taking" of the Coral under the Endangered Species Act.

Section 9 of the ESA makes it unlawful to "take" any listed endangered species within the territorial seas of the United States or on the high seas. 16 U.S.C. § 1538(a)(1)(B)-(C). The Endangered Species Act defines "take" 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. Courts have recognized that Congress intended "take" to be interpreted "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9th Cir. 2003) (quoting S.Rep. No. 307, 93d Cong., 1st Sess. (1973)). Galleon's plan to drill through endangered deep sea coral, tearing through the coral with a drill bit to access the sunken vessel beneath, would clearly "harm" or "wound" the coral displaced by the drill and the surrounding coral. It therefore constitutes a "taking" under the ESA. 16 U.S.C. § 1532.

B. Drilling through Coral Is Unlawful under GCNMS Regulations.

The GCNMS Regulations explicitly prohibit "removal of, injury to, or possession of coral or live rock," including "moving, removing, taking, harvesting, damaging, disturbing, breaking, cutting, or otherwise injuring. . .any living or dead coral. . .". 15 C.F.R. § 922.163(a)(2). NOAA promulgated this regulation as a sanctuary-specific implementation of the NMSA prohibition on destruction, loss, or injury to sanctuary resources. See 16 U.S.C. § 1436. Galleon's intention to access the remains of the sunken vessel by drilling through the coral formations presently burying it

would necessarily involve at least "moving," "removing," "damaging," "disturbing," or "otherwise injuring" the coral. If effectuated, Galleon's plan would violate one or more of the prohibitions protecting all living and dead coral formations within the Sanctuary. Drilling through the endangered deep sea coral would therefore be an unlawful activity.

C. The Secretary of Commerce Properly Denied Galleon the ESA Permit Because the Secretary May Only Issue Permits for Scientific Purposes or Takings Incidental to *Otherwise Lawful* Activity.

The ESA authorizes the Secretary to issue permits exempting the applicants from the prohibitions of section 9 for two purposes: (A) to facilitate scientific goals, inapplicable here, or (B) to allow takings "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1). These are the only two circumstances in which the Secretary may issue permits exempting parties from ESA prohibitions.

Drilling through endangered deep sea coral inside the GCNMS, as Galleon's plan involves, is not an "otherwise lawful activity" because it is explicitly prohibited by GCNMS regulations. 15 C.F.R. § 922.163(a)(2). Galleon has not obtained a GCNMS Research and Recovery permit from NOAA and therefore cannot claim its drilling is a lawful activity as required by the ESA permit provision. The decision of the Secretary of Commerce to deny Galleon's permit application was based on rational logic applying the facts of the case to the ESA permitting provisions. The Secretary committed no abuse of discretion in denying Galleon the ESA permit to drill through endangered coral in violation of GCNMS regulations. In fact, the ESA does not authorize the Secretary to issue the contested permit.

VI. GALLEON NEEDS PERMITS FROM BOTH THE U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY TO SALVAGE *LA CONTESTA*.

Galleon's salvage operations of *La Contesta* fall under the purview of two separate environmental protection statutes: (A) the Rivers and Harbors Act ("RHA"), involving a permit from the Army Corps of Engineers ("Corps"), and (B) the Clean Water Act ("CWA"), involving permitting

schemes under both the Corps and the Environmental Protection Agency ("EPA").

A. The Rivers and Harbors Act Requires That Galleon Obtain a Permit From the Corps of Engineers.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any . . . pier . . . or other structures in any . . . canal . . . or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army . . .." 33 U.S.C. § 403 (2008). Thus, "a permit from the Army Corps of Engineers is required for the installation of any structure in the nation's navigable waters which may interfere with navigation, including piers, docks, and ramps." PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 722 (1994). As a whole, Section 10 of the RHA has been repeatedly stressed by the Supreme Court to be read broadly. United States v. MCC, 772 F.2d 1501, 1504 (11th Cir. 1985) (citing United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960)). Galleon's drilling platform is (1) a structure that obstructs (2) navigable waters of the United States and (3) interferes with their navigability.

1. Galleon's drilling platform is a structure and an obstruction.

Although the RHA enumerates a number of particular banned structures, which the Secretary of the Army may approve, Section 10's generalized first clause, which prohibits "the creation of any obstruction not affirmatively authorized by Congress [means] that Congress planned to ban any type of 'obstruction,' not merely those specifically made subject to approval by the Secretary of the Army." MCC, 722 F.2d at 1505 (quoting United States v. Republic Steel Corp., 362 U.S. 482, 486-87 (1960)). The RHA's enumeration of objects presumed to be obstructions is non-exhaustive, United States v. Members of Estate of Boothby, 16 F.3d 19, 21 (1st Cir. 1994) (citing Republic Steel, 362 U.S. at 486-87), and the Boothby court read the statute to include boathouses that the Corps determined to be sufficiently permanently moored to constitute obstructions. Id.; see also id. at 24 (obstructions need not be structures; Section 10 permit required so long as an object can plausibly be deemed an obstruction to navigation). The district court's finding of an RHA violation by Galleon necessitates a finding that the drilling platform, which must be stably moored to excavate

in rough seas, is an obstruction comparable to the Boothby boathouses, and this finding of fact is accorded deference on appeal.

2. Galleon's platform is in the navigable waters of the United States.

"The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf." 33 C.F.R. § 329.12(a) (citing 33 C.F.R. § 322.3(b)). "[Corps] permits are required for the construction of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf." 33 C.F.R. § 322.3(b); see also 33 C.F.R. § 320.2(b) (citing 43 U.S.C. § 1333(e)). The outer continental shelf extends seaward and outside of the area of lands beneath navigable waters. See 43 U.S.C. § 1331(a) (citing § 1301(b) ("in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico")). The seaward limit of the outer continental shelf is two hundred nautical miles, which covers *La Contesta*. 60 Fed. Reg. 43,825 (Aug. 23, 1995).

3. Galleon's platform interferes with navigation.

Corps regulations define navigable waters to include those waters of the United States that have been used in the past to transport foreign commerce. United States v. Angell, 292 F.3d 333, 336 (2d Cir. 2002) (citing 33 C.F.R. § 329.4). There is no doubt that the waters in which *La Contesta* lies are navigable waters; the very transport of foreign commerce led to the creation of the shipwreck. The "possibility of interference" is also an extremely low standard, id., and the district court here necessarily found as a matter of fact that Galleon's drilling platform creates the possibility of interference with navigation. This finding requires deference by this Court on appeal.

B. The Clean Water Act Established Two Permitting Schemes, One Under The Authority of the Corps of Engineers and the Other Under the Environmental Protection Agency, and Both Permits Apply to Galleon's Salvage Operations of *La Contesta*.

The Clean Water Act ("CWA") generally prohibits the discharging without a permit of pollutants by any person. 33 U.S.C. § 1311(a); see also § 1362(5) (person includes corporations, such as Galleon). A discharge is "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." § 1362(12)(B); see also United States v. W. Indies Transp., Inc., 127 F.3d 299, 307-08 (3d Cir. 1997). Galleon's employment of the mailbox prop-wash is regulated under the CWA because it constitutes (1) the addition of (2) pollutants (3) into the contiguous zone (4) from a point source other than a vessel or other floating craft.

1. Galleon's mailbox and drilling activities constitute addition.

The re-depositing of materials into the same body of water is sufficient to constitute addition. Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 947-48 (7th Cir. 2004). As the Seventh Circuit noted, the courts of appeals have generally adopted this broader interpretation in contrast to older case law holding that pollutants can only be added from the outside world. Id.; compare United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000) ("It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before."); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-24 & n.43 (5th Cir. 1983) (noting that "'dredged' material is by definition material that comes from the water itself," and that "[a] requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute"); Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001); United States v. MCC, 772 F.2d 1501, 1506 (11th Cir. 1985); Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir.1990) (dirt and gravel extracted by gold miners and re-deposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the Clean Water Act), with Nat'l Wildlife

Fed'n v. Gorsuch, 693 F.2d 156, 174-75 (D.C. Cir. 1982) and Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988).

According to the Seventh Circuit, "such a reading is compatible with the purpose of the CWA to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" Greenfield Mills, 361 F.3d at 948-49 (citing 33 U.S.C. § 1251(a)). It is quite logical that sediment and vegetation removed from the seabed of a body of water where they naturally belong and mixed into the water above disturb the ecological balance of the water. See id. (citing Avoyelles, 715 F.2d at 924 n.43.)). Galleon's mailbox prop washing of seabed sediments and drilling of coral, even though all materials remain within the same body of water, therefore nonetheless constitute addition.

2. The seabed sediment, seagrasses, and coral constitute pollutants.

Under the CWA, pollutant includes "dredged spoil, solid waste, . . . biological materials, . . . rock, [and] sand." Greenfield Mills, 361 F.3d at 947 (citing 33 U.S.C. § 1362(6) (2008)). The separate permitting schemes arise from the type of pollutant: (a) dredged spoil are pollutants whose discharge require permitting from the Corps and (b) all other pollutants that are not dredged spoil require discharge permits from the EPA under the National Pollution Discharge Elimination System ("NPDES").

a. The seabed sediment and seagrasses that Galleon dredged through its mailbox are dredged materials that require permitting from the Corps under § 404 of the CWA.

Section 404 of the CWA requires a permit for dredged materials. 33 U.S.C. § 1344 (2008). Dirt and vegetation from bottom of wetlands constitute dredged spoil. Deaton, 209 F.3d 331, 335-36 (4th Cir. 2000). It is unnecessary for the court determine whether the dredged spoil and its re-introduction to the water caused any harm; Congress had legislated as a rule of law that even "plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." Id. at 336. "Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life." Id. (citing 40 C.F.R. § 230.41(b)). Regardless, such review would only be possible if Galleon had undertaken the proper permitting scheme and allowed for the Corps or EPA to make the first determinations. See Kelly v. EPA, 203 F.3d 519, 523 (7th Cir. 2000) ("Driving a car without a

license is not necessarily dangerous, but it is illegal. Likewise, digging eight pits in a marsh might not cause massive environmental trauma, but doing so without a permit violates the Clean Water Act."). Lastly, there is nothing strange about needing two separate permits under the separate statutes of the RHA and the CWA from the same agency of the COE concerning the same course of conduct. See, e.g., United States v. Moses, 496 F.3d 984, 992 (9th Cir. 2007).

A party may be exempt from the § 404 permit requirement by showing that it falls under one of the provisions in § 1344(f)(1) and that its activities do not fall within the "recapture" provision, § 1344(f)(2). "Read together the two parts of Section 404(f) provide a narrow exemption for . . . activities that have little or no adverse effect on the waters of the U.S." United States v. Brace, 41 F.3d 117, 124 (3d Cir.1994). The defendants bear the burden of establishing both that they qualify for one of the exemptions of § 1344(f)(1) and that their actions are not recaptured by § 1344(f)(2). Greenfield Mills, 361 F.3d at 949. It should also be noted that because the appellants did not raise any exemption argument before the district court, this Court reviews any arguments for exemption by a clearly erroneous standard.

b. The coral that Galleon drilled through and broke off are biological materials that require permitting from the EPA through the NPDES under § 402 of the CWA.

Section 402 of the CWA requires a permit under the NPDES from the EPA for non-dredge pollutants such as biological materials. 33 U.S.C. § 1342 (2008). Human blood constitutes pollutant biological materials. United States v. Plaza Health Labs., Inc., 3 F.3d 643, 645 (2d Cir. 1993); see also Chem. Mfrs. Ass'n v. EPA, 870 F.2d 177, 218 n.148 (5th Cir. 1989) (algae is pollutant as a biological material and as a "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water" (quoting 33 U.S.C. § 1362(19))). The coral broken off by Galleon, as detailed supra in Sec. V of this brief, are live biological materials for which permitting by EPA through NPDES is therefore required.

3. The waters in which *La Contesta* is located are in the contiguous zone of the United States and are therefore regulable under the CWA.

The contiguous zone as regulated by the CWA, 33 U.S.C. § 1362(12)(B) (2008), "means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." § 1362(9). Art. 24 held that "[t]he contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." However, under the Art. 33 of the UNCLOS, "The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured." Although the United States never ratified UNCLOS, it treats many provisions of the UNCLOS as customary international law. Additionally, President Clinton declared that "[t]he contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States." Proclamation No. 7219, 64 F.R. 48701 (Aug. 2, 1999). The area in which Galleon is conducting salvage operations is, as found by the district court, between 23 and 24 nautical miles off the coast of New Union, and therefore is within the contiguous zone of the United States.

4. Galleon's drilling platform constitutes a point source for discharging pollutants.

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362(14) (2008). However, where the discharge occurs in the contiguous zone, vessels and other floating craft are exempt from coverage as point sources. § 1362(12)(B). Because (a) Galleon's drilling platform is not a vessel, (b) it is a conveyance that constitutes a point source regulable under the CWA.

a. The drilling platform is not a vessel and therefore is not exempt from the CWA's exemption of vessels in the contiguous zone.

Although vessels and other floating craft are excluded from regulation in the contiguous zone, only watercraft that have potential as means of transportation on water are considered vessels. 1 U.S.C. § 3 (2008). Drilling platforms that remain semi-fixed and serve no purpose as a means

of transportation are generally not considered to be vessels. See, e.g., 30 U.S.C. § 1419(e) (2008) ("[A]ny vessel or other floating craft engaged in commercial recovery or exploration shall not be deemed to be 'a vessel or other floating craft' under section 502(12)(B) of the Clean Water Act and any discharge of a pollutant from such vessel or other floating craft shall be subject to the Clean Water Act."); Hufnagel v. Omega Serv. Indus., Inc., 182 F.3d 340, 347 n.1 (5th Cir. 1999) (noting that drilling platforms are not vessels).

The two main factors in determining whether a craft is a vessel are "the purpose for which the craft is constructed and the business in which it is engaged." Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344, 350 (5th Cir. 1998) (quoting The Robert W. Parsons, 191 U.S. 17, 30 (1903)). "If the owner constructs or assembles a craft for the purpose of transporting passengers, cargo, or equipment across navigable waters and the craft is engaged in that service, that structure is a vessel." Id. "In the occasional case where the intended purpose of the craft is not clear, our cases have recognized that other factors may be relevant. These include the intention of the owner to move the structure on a regular basis and the length of time that the structure has remained stationary." Id. "In all of our work platform cases, the transportation function of the craft at issue was merely incidental to its primary purpose of serving as a work platform." Id. at 351. Being moored more or less permanently to the water bottom is a good indicator of not being a vessel. Id. at 351 n.9. "These drilling rigs and other special purpose craft do more than merely float on navigable waters and serve as work platforms. Instead, an important part of their function includes transporting passengers, cargo, or equipment across navigable waters." Id. at 351.

Whether the drilling platform constitutes a vessel is a question of fact which resolution by the fact-finder receives deference on appeal, see Stewart v. Dutra Constr. Co., 543 U.S. 481, 492 n.6 (2005) (citing Sw. Marine, Inc. v. Gizoni, 502 U.S. 81, 92 (2005)), and because the district court necessarily found that Galleon's platform is not a vessel, this court should only reverse that finding for clear error. Because no evidence exists on the record suggesting that Galleon's platform served any transportation purpose, the district court's finding should stand.

b. The drilling platform is a conveyance constituting a point source.

The point source itself need not be the originator of the pollutant. "Tellingly, the examples of "point sources" listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate

pollutants but merely transport them." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 104 (2004) (citing 33 U.S.C. § 1362(14) (2008)). Noting that the definition of a point source is to be broadly interpreted, the Second Circuit held that "manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law." Concerned Area Residents for the Env. v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994). Therefore, as found by the district court, Galleon's prop deflectors, which direct the current of water that hits the seabed and becomes polluted by the discharged sediment and seagrasses, and Galleon's drill, which breaks apart and discharges coral into the surrounding waters, are point sources of pollutant discharge.

CONCLUSION

For the foregoing reasons, we ask this Court to affirm the district court's holding that (1) the United States properly denied Galleon's NMSA and EPA permit applications, and (2) Galleon's unauthorized salvage operations required Corps and EPA permits. This Court should reverse the trial court's remaining conclusions, and hold (1) the SMCA applies to the wreck and Galleon can obtain no salvage award without Spain's consent, and (2) recovery of this historical shipwreck, inside and outside GCNMS boundaries, requires an NMSA permit.