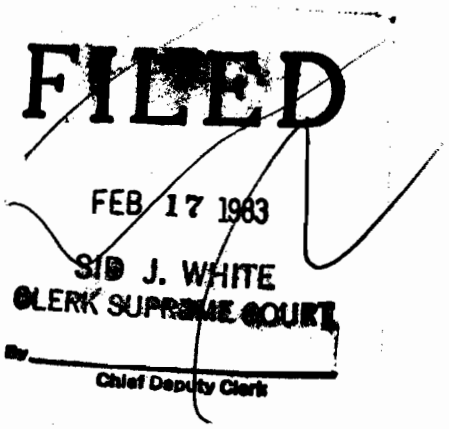
IN THE SUPREME COURT OF FLORIDA



CAPTAIN LOUIS S. LIVINGS,
District Nine Supervisor,
FLORIDA MARINE PATROL, and
STATE OF FLORIDA DEPARTMENT
OF NATURAL RESOURCES,

Petitioner,

V. CASE NO. 63,001

WENDALL DAVIS, GILBERT GREY,
and HARRY ROBERT JONES,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

The Respondents concur with the Petitioners Statement of the Case and Statement of the Facts.

ISSUE

WHETHER THE TRIAL COURT ERRED IN DECLARING EXTRATERRITORIAL APPLICATION OF SECTION 370.15 (2) (a), FLORIDA STATUTES (1979), UNCONSTITUTIONAL AND ENJOINING PETITIONERS FROM ITS ENFORCEMENT

ARGUMENT

THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT 16 U.S.C. §§1801 - 1882 PREEMPTS EXTRATERRITORIAL STATE REGULATION OF MARINE FISHERIES RESOURCES

A. THE UNITED STATES OF AMERICA IS VESTED WITH OWNERSHIP OF AND JURISDICTION OVER ALL NATURAL RESOURCES BEYOND STATE TERRITORIAL LIMITS.

The State of Florida's jurisdiction over the natural resources of the sea extends only three (3) marine leagues seaward in the Gulf of Mexico and three (3) geographic miles seaward in the Atlantic Ocean. Beyond these limits the United States is charged with developing and administering the laws concerning natural resources. U.S. v. Florida, 425 U.S. 791 (1975) reads:

> As against the State of Florida the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than three geographic miles seaward from the coastline of that state and extending seaward to the edge of the continental shelf and the State of Florida is not entitled to any interest in such lands, minerals, and resources. 425 U.S., at 791. (emphasis supplied)

A year after this decision, the U.S. Congress spoke to the issue of natural resources on the outer continental shelf by enacting the Magnuson Fishery Conservation and Management Act, Title 16 U.S.C. Section 1801 et seq. (hereinafter MFCMA), in which the Federal Government expressly asserted its jurisdiction over this exclusively federal natural resource.

The MFCMA begins by stating:

> [16 U.S.C.] §1801. Findings, Purposes and Policy
>
> (a) Findings. - The Congress finds and declares the following: ...
>
> (7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.
>
> (b) Purposes. - It is therefore declared to be the purposes of the Congress in this Chapter -
>
> (1) To take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish ...
>
> (5) To establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans ...
>
> (6) To encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen...
>
> (c) Policy. - It is further declared to be the policy of the Congress in this chapter -
>
> (2) To authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter... (emphasis supplied)

The boundaries of this federally protected area are defined by

16 USC Section 1811, entitled Fishery Conservation Zone.

In discussing the enactment of the MFCMA, H.R. Rep. No. 445, 94th Cong., 2d Sess., 24, reprinted in [1976] U.S. Code Cong. & Ad. News 593, 596 states:

> The committee made every effort to see that all segments of the U.S. fishing industry were protected, including those fishermen who fish off the coast of other nations. The major provisions of the legislation include: an extension of the United States exclusive fishery zone from 12 to 200 miles effective July 1, 1976; a comprehensive Management program governing U.S. fishermen and foreign fishermen within the zone; the regulation of all species of fish except highly migratory species... (emphasis supplied)

The purpose of the MFCMA as stated in the body thereof and also evident in the legislative history thereto, is to treat the federal resources outside the three mile territorial limit of the coastal states as a single, uniformly regulated resource for the benefit of all citizens of the United States. The decision not to enact regulations over a particular resource is as much a management decision as is enactment of a formal fishery management plan.

B. THE "EXCEPTION" PROVIDED IN SECTION 1856 (a) IS NARROW AND IS NOT ADDRESSED TO PRE-IMPLEMENTATION REGULATION.

In order to avoid confusion in construing the MFCMA, it is necessary to review some definitions contained in 16 U.S.C., Section 1802.

> [16 U.S.C.] §1802. Definitions.
>
> (6) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals, birds, and highly migratory species.

(10) The term "fishing" means -

(A) the catching, taking, or harvesting of fish,
(B) the attempted catching, taking or harvesting of fish;
(C) any other activity which can reasonbly be expected to result in catching, taking or harvesting of fish; or
(D) any operations at sea in support of, or in preparation for, any activity described in subparagraph (A) through (C).

Congress intended these two terms, "fish" and "fishing", to have the specific meanings prescribed to them through 16 U.S.C. Section 1802. Applying these definitions to the MFCMA:

> [16 U.S.C.] §1812. Exclusive Fishery Management Authority
>
> The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:
>
> (1) All fish within the fishery conservation zone. (emphasis supplied)
>
> ***
>
> [16 U.S.C.] §1856. State Jurisdiction
>
> ...nothing in this Chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state. (emphasis supplied)

It is apparent from the language of the MFCMA that Congress is dealing with different and distinct areas of fishery management. On the one hand Congress has granted the United States exclusive jurisdiction over the natural resources, while on the other hand allowing the States to maintain control over the safety and welfare of its citizenry. Section 1856 (above) speaks to "fishing" and

fishing vessels, not "fish" over which the United States has exclusive jurisdiction. The State of Florida has a very strong and direct interest in protecting its fishermen and vessels in order to maintain a strong and competitive work force and reduce the level of public assistance necessary to meet modern standards of civilized society. That State regulations concerning the safety of the fishermen, the seaworthiness of state registered non-documented vessels and the safety of their operation, are directly related and contribute significantly to this strong state interest can not be disputed. However, Fishery Management Authority over the resources included in the MFCMA's definition of "fish" is reserved, in the Fishery Conservation Zone, to the federal not state government.

The Defendants' reliance on Skiriotes v. State of Florida, 313 U.S. 69, 61 S. Ct. 924 (1941) is misplaced. Skiriotes is expressly based, in at least three places, on the premise that no conflicting federal legislation existed at the time of the infraction. Moreover, the court states:

> There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas. That doctrine was expounded in the case of The Hamilton (Old Dominion S.S. Co. v. Gilmore), 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264. There, a statute of Delaware giving damages for death was held to be a valid exercise of the power of the State, extending to the case of a citizen of that state wrongfully killed on the high seas in a vessel belonging to a Delaware corporation by the negligence of another vessel also belonging to a Delaware corporation. 313 U.S., at 77 (emphasis supplied)

This type of extraterritorial State jurisdiction, for the protection of citizens of that State, is exactly what the U.S. Congress contemplated when providing the narrow exception to Federal jurisdiction in 16 U.S.C. Section 1856. State denial to its citizens of the federal natural resources of the outer continental shelf was never contemplated.

The State of Florida simply has no jurisdiction, implied or otherwise, to regulate the fisheries outside the territorial limits of the State of Florida.

Inasmuch as the above evidence proves Congress's intent to preempt state legislation to the contrary, the Supremacy Clause of the United States Constitution applies to grant Congress the authority necessary to accomplish this goal.

The Appellants argue that the "clear intent" of §1856, supra, is to provide "Interim State Extraterritorial Enforcement" pending adoption of a specific fishery management plan. Appellants Brief, p. 6, see also Brief of the Secretary of Commerce, pp. 2 & 6. Nothing in the MFCMA, including Section 1856, addresses this issue. Appellants fail to allege any statutory language or "pre-implementation" construction sought. Following Appellants argument to its logical end would lead to the conclusion that upon adoption of a specific fishery plan, §1856 would no longer serve any useful function. Certainly if the U.S. Congress had intended this "self-executing" construction they would have expressed it. Quite simply, the construction urged by the Appellants is a figment of their bureaucratic imagination.

Appellants seek to rely on Anderson Seafood, Inc. v. Graham, 529 F. Supp. 512 (N.D. Fla. 1982) for support of their position. However, Anderson is merely an interlocutory ruling on a motion for preliminary injunction and did not entertain full argument on the merits of that case. There is however a federal case pending in the United States District Court for the Southern District of Florida, Union Norman Bethell v. State of Florida, Case No. 82-1516-CIV-JWK, which will entertain a full hearing on the merits of the instant controversy.

C. THE LEGISLATIVE HISTORY OF THE MFCMA SUPPORTS THE UNITED STATES' EXCLUSIVE JURISDICTION OVER MARINE RESOURCES BEYOND TERRITORIAL LIMITS.

Further evidence of Congress' intent to assume immediate exclusive jurisdiction over marine resources can be seen in the Legislative History accompanying the MFCMA. Where the language of an Act of Congress is not clear, the Court is justified in seeking englightenment from the reports of congressional committees. Wright v. Mountain Trust Bank, 300 U.S. 440, 57 S. Ct. 556 (1937), Duplex Printing Press Co. v. Deering, et al., 254 U.S. 443, 41 S. Ct. 172 (1921).

H.R. Rep. No. 445, 94th Cong., 2d Sess., reprinted in (1976) U.S. Code Cong. & Ad. News 593, 601 states:

> C. Federal Jurisdiction
>
> ... there is also a sole Federal jurisdiction over the fisheries resources found beyond the three-mile territorial sea and within the present 12-mile limit to our fisheries economic zone. In these waters, it is the Federal Government which has the responsibility for whatever management of the fish stocks occur at all. (emphasis supplied)

D. State Jurisdiction

> Under United States law, the biological resources within the territorial sea of the United States (i.e., out to 3 miles) are the management responsibility of the adjacent several States of the Union. Whatever regulation, of both fishermen and fish harvest, that occurs in this area is as deemed necessary and appropriate by each concerned state. (emphasis supplied)

The above language of the legislative history not only defines the respective jurisdictions of the Federal and State Governments, but also illustrates the very real distinction between regulation of fishermen and regulation of fish harvest.

Evidence of Congress' intent to exclude the States from jurisdiction over resources beyond their territorial limits is also available in related legislation and legislative history. House Report No. 96-1243, Part I referring to 16 U.S.C. Section 3301, the Salmon and Steelhead Conservation and Enhancement Act of 1980. [hereinafter Salmon Act], states:

> Prior to the enactment of the Fishery Conservation and Management Act of 1976 (FCMA), salmon were managed individually by the various States of the west coast and by the Indian tribes pursuant to several treaties. The high seas salmon fishery was managed pursuant to several international fishery conventions.
>
> Because each State's authority to manage salmon was limited to the extent of its jurisdiction, the States were unable to directly manage salmon harvested beyond the territorial sea. The passage of the FCMA further exacerbated the management of salmon by introducing yet another manager. The FCMA asserted jurisdiction over U.S. origin salmon from 3 miles seaward to the extent of their range and provided for their management in this zone by the appropriate Regional Fishery Management Council.

> Section 306 of FCMA [16 U.S.C. §1856] provides that, with a narrow exception, nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of an State within its boundaries. Thus, although the FCMA, for the first time, provided for the direct regulation, of the ocean fishery, it further complicated the already uncoordinated salmon management system. H.R. Rep. No. 96-1243, Part I, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News, 6793, 6818. (emphasis supplied)

The Salmon Act is intended to coordinate the various authorities which exert jurisdiction over the Salmon stock in the northwestern U.S. and it is apparent from the Act itself as well as the legislative history that distinct areas of jurisdiction exist between the Federal and respective State governments.

D. THE MFCMA REQUIRES UNIFORM TREATMENT OF ALL CITIZENS THROUGHOUT THE UNITED STATES WITHOUT REGARD TO THEIR PARTICULAR RESIDENCE OR STATE OF INCORPORATION.

In the MFCMA, Subchapter III - National Fishery Management Program, Sections 1851 through 1861, sets out the national standards under which the United States Secretary of Commerce is guided in implementation of management plans for specific marine resources in the Fishery Conservation Zone. This Subchapter begins with:

> [16 U.S.C.] §1851. National Standards for Fishery Conservation and Management
>
> (A) In general. - Any fishery management plan prepared, and any regulation promulgated to implement such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> ***

> (4) Conservation and management measures shall not discriminate between residents of different States. (emphasis supplied)

Further, in discussing Section 1851, House Report No. 445 states:

> With respect to the standard that requires such measures to be nondiscriminatory between residents of different States, the Committee would like to make it clear that this subparagraph would require the management plan to provide for uniform and equal treatment of United States citizens and corporation's operating or engaging in the fisheries concerned without regard to their particular residence or state of incorporation. H.R. Rep. No. 445, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 593, 630.

It is plain that not only does the express language of the MFCMA provide for exclusive Federal jurisdiction and control over the federal resources in question, but Section 1851 and the legislative history and discussion surrounding its passage clearly establishes a comprehensive national plan allowing for the management of all marine fishery resources and the selection of specific fishery resources which may need regulation for future conservation and protection for the benefit of all citizens of the United States. The conduct of the State of Florida in prohibiting its citizens from harvesting the same national resources, in the same manner as can be carried out under the Act by all other citzens of the United States is clearly contrary to the express language of the MFCMA and the intentions of Congress in establishing same.

Appellants reliance on the California case of People v. Weeren, 163 Cal. Rptr. 255, 607 P. 2d 1279 (Cal. 1980), cert. den., 449 U.S. 839 (1980) is misplaced for at least two reasons. First, the Courts in Florida are not bound by decisions in California. Moreover, the geography of California is not sufficiently similar to that of Florida to allow comparison between the instant case and Weeren. Florida's position in the Gulf of Mexico allows boats from Texas, Mississippi, Louisiana, Alabama and Georgia, not to mention the Bahamas, to fish beyond the territorial boundaries of Florida with no competition from Florida boats. While the boats from Florida are subject to arrest for violation of Florida laws, the other boats can enjoy unfettered harvest of the very same federal resources. California's long coast does not present the same problem. As the trial court below stated:

> It is neither fair nor equitable to allow boats registered in other states to sail into the rich shrimping grounds north of the Florida Keys, catch their loads of shrimp and then sail back to the ports in Alabama, Louisiana, Mississippi and Texas, while Florida citizens are prohibited from the same conduct by operation of F.S. 370.15 (2) (a). Livings V. Davis, Case No. 81-684-CA-17 (Fla. 16 Cir. Ct. 1981).

E. PROVISIONS FOR EMERGENCY REGULATIONS IN THE MFCMA PROTECT RESOURCES FROM DEPLETION PENDING ADOPTION OF A PARTICULAR RESOURCE MANAGEMENT PLAN.

The State of Florida contends that until "specific" Fishery Management Plans are originated by the Regional

Fishery Management Councils and are adopted by the Secretary of Commerce, there will be no regulation over the natural resources outside the state's territorial waters. The State perceives an absence of regulation as a problem, however under the MFCMA the absence of a problem means no management plan is needed! The U.S. Congress has in fact examined the need for regulation of the resources over which there are valid State concerns and Congress concluded:

> The term "depleted", as defined in the bill means a species of fish or a stock of fish that has been so reduced as a result of overfishing or other natural or induced causes that a substantial reduction in fishing effort must be achieved in order for the stock to replenish itself and once again provide an optimum sustainable yield.
>
> After considering the testimony and evidence offered at the hearings, the Committee has concluded that the following stocks of fish of direct interest and importance to the United States fishermen are depleted: Alaska pollack, California sardine, haddock, halibut, herring, ocean perch, Pacific mackeral, sablefish, yellowfin sole, and yellowtail flounder. These resources have been and are the subject of competitive harvesting by both foreign and domestic fishermen.
>
> The Committee is aware that there are other species of fish that will qualify as being depleted. The most obvious ones have been enumerated in this report. The Committee expects the Secretary to carefully study those species of fish that may possibly fall within this definition and take the necessary steps to see that they receive proper management as the results of improper management are reversible if appropriate action is taken in time. H.R. Rep. No. 445, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 593, 616. (emphasis supplied)

The foregoing illustrates that Congress did in fact determine which species of fish were in jeopardy at the time of enactment of the MFCMA and it made provisions for the Secretary to consider the very fishery resources that the State of Florida considers as being in "great danger". The Secretary of Commerce was directed by Congress to continue studying the marine resources to determine additional species of fish which might qualify for a management plan. Further, if the State of Florida felt there were species of fish in danger of being "depleted" or under "intensive use", the MFCMA provided:

> [16 U.S.C.] §1855. Implementation of Fishery Management Plan.
>
> ***
>
> (e) Emergency Actions - If the Secretary finds that an emergency involving any fishery resources exist, he may -
>
> (1) promulgate emergency regulations...to implement any fishery management plan, if such emergency so requires...

Further, the legislative history, House Report No. 445, supra, states:

> Section 308 - TEMPORARY EMERGENCY FISHERY MANAGEMENT PLANS PREPARED AND IMPLEMENTED BY THE SECRETARY WITH RESPECT TO CERTAIN FISHERIES
>
> (A) In General. - This subsection would require the Secretary, within 90 days after the date of enactment of this Act, on his own initiative or at the request of any State to prepare a management plan and promulgate such regulations as may be necessary to implement such plan with respect to any coastal species or Continental Shelf species which he believes to be as of the date of the enactment of this Act, depleted, in imminent danger of becoming depleted, or under intensive use but unregulated because of the absence of management authorization.

> Before preparing such a plan, the Secretary would be required to consult with appropriate states and fishing industry representatives with respect to the fishery involved. The plan and implementing regulations would apply only within those waters which comprise the 9 mile contiguous fisheries zone, not within the territorial waters of the United States. Also, the plan and the implementing regulations would be deemed to be temporary emergency regulations. H.R. Rep. No. 445, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 593, 639. (emphasis supplied)

The preceding analysis shows that the U.S. Congress intended to, and in fact did, establish a comprehensive resource management scheme to the exclusion of all other regulation. The Secretary of Commerce was directed to provide for those species in great danger immediately, while allowing the Regional Fishery Management Councils established by 16 U.S.C. Section 1852 to commission studies, conduct hearings and consider input from all interested parties before deciding if regulations were necessary and if so the Councils could recommend the appropriate regulations to the Secretary.

F. EXTRATERRITORIAL ENFORCEMENT OF STATE LAWS PROVIDES A CONFLICT OF INTEREST WITH REGARD TO STATES' PARTICIPATION ON REGIONAL FISHERY MANAGEMENT COUNCILS.

Title 16 U.S.C. Section 1852 establishes Regional Fishery Management Councils for the purpose of managing the federal fishery resources of the Fishery Conservation Zone. Membership in the councils is designed to give well balanced input from all interested parties. The State of Florida is by

statute assured of one voting membership in both the South Atlantic Fishery Management Council and the Gulf of Mexico Fishery Management Council.

> [16 U.S.C.] §1852. Regional Fishery Management Councils.
>
> ***
>
> (b) Voting Members. - The voting members of each Council shall be:
>
> (A) the principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State...

Because the voting membership of each fishery council includes a state official from each of the constituent states, there is the inescapable conflict that the state officials will be pressured by bureaucrats in their own state agencies to vote to block adoption of a proposed fishery management plan in order to continue enforcement of the existing state regulation. Put another way, why would state officials vote to implement a federal fishery management plan when the state can continue state regulation over the federal resource absent a federal plan? On the other hand, the intent of the U.S. Congress in adopting 16 U.S.C. 1801 et seq. was to encourage the cooperation of all members of the Councils in developing comprehensive management of these federal fishery resources.

The MFCMA specifically provides:

> [16 U.S.C.] §1801. Findings, Purposes and Policy.
>
> ***

(B) Purposes. - It is therefore declared to be the purpose of the Congress in this Chapter -

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States... by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish...

The strained construction of 16 U.S.C. Section 1856 which promotes conflicts of interest and changes the basic concept of the entire MFCMA was never the intent of the U.S. Congress.

G. THE ENFORCEMENT OF SECTION 370.15 (2) [Shrimp Count Law] OVER THE FEDERAL RESOURCES OF THE OUTER CONTINENTAL SHELF IS ANTAGONISTIC TO THE AIMS OF THE MFCMA AND AGAINST THE PUBLIC INTEREST.

What should be remembered at this point before this Court is that this appeal was originally taken from a trial court decision which invalidated Section 370.15 (2) of the Florida Statutes. This state law was enforced as a "landing law" which required that there be a random sampling of the shrimp catch in five different locations within the cargo holds of a shrimp boat. When shrimp are caught by the shrimp nets they are dead prior to being brought to the surface and unless the law is enforced as a "landing law" there is no way for the shrimper to determine whether he is in violation of the "count law" until its too late to do anything about it. For many years prior to the invalidation of the shrimp count law by the trial court in this case the boats which were going to land their catch in the Florida Keys had to either take their chance on being caught under the shrimp count law or throw

as much as forty percent of their total catch back in in order to "get legal".

From the 1976 enactment of the Magnuson Fishery Management Act until the trial court invalidated the shrimp count law as it applies to the harvesting of the shrimp on the outer continental shelf by boats using Florida ports, the true impact of State extraterritorial enforcement was easily ascertained. Boats from Texas, Louisiana, Mississippi and Alabama could sail into the rich shrimping grounds north of the Florida Keys (outside the three (3) marine league limit) and catch the federal resource of pink shrimp while steaming alongside Florida vessels. At the end of the trip the Texas, Louisiana, Mississippi and Alabama boats could then return to their home ports with no problems being encountered. However, if they wanted to come into a Florida port or if a Florida boat wanted to come in to its home port it was in danger of being boarded, the catch confiscated, the captain and crew imprisoned and on second offense the boat confiscated.

Finally, the harm to the State of Florida's shrimping/fishing industry can easily be seen by looking at the regulations adopted under the Magnuson Act for the fishery management plan for the shrimp fishery. After receiving recommendations of the Gulf of Mexico Fishery Management Council the fishery management plan for the shrimp fishery was approved by the administrator and published in the Federal Register, Volume 46, No. 97, Wednesday, May 20, 1981. Page 27489 states:

a. Background

The notice published on November 7, 1980 contained information on the shrimp fishery and its economic value, and specified loss of habitat as the chief threat to continuance of the major species of shrimp (brown, white, and pink). There is no current evidence of overfishing on any species of shrimp. 46 Fed. Reg. 27489 (1981). (emphasis supplied)

***

b.2. The wasteful discard of small shrimp at at sea.

The Council recommends elimination of State restrictions on landing of small shrimp taken during open seasons in open areas to increase the overall yield from the resource and the economic returns to the shrimp fishermen. 46 Fed. Reg. 27489 (1981).

§658.25 Size Restrictions

There are no minimum size requirements for shrimp harvested in the fishery conservation zone. 46 Fed. Reg. 27497 (1981) (codified in 50 C.F.R. §658.25) (emphasis supplied).

These recommendations by the Gulf of Mexico Fishery Management Council pursuant to the provisions of the MFCMA were made prior to the arrest of the Appellees in this case. The State of Florida's own research showed that the shrimp count law was non-productive and destructive of the resource. However, the State of Florida saw fit to continue its enforcement under the assumption that it could do so prior to formal adoption and publication of a shrimp management plan under the MFCMA.

The situation in this case is precisely what was sought to be addressed by the United States Congress' passage of the Magnuson Act.

CONCLUSION

After the Supreme Court's decision in United States v. Florida, there can be no doubt that the fishery resources outside the territorial limits of the State of Florida are federal resources. The clear and unambiguous statement by the Supreme Court was that . . . "the State of Florida is not entitled to any interest in such lands, minerals and resources." Once it is conceded that these are federal resources, then it is logical to look at the statutory language and legislative history of the Magnuson Fishery Conservation and Management Act as setting up a comprehensive management program.

The State of Florida's reliance on an "exception" in 16 U.S.C. §1856 (a) is misplaced. Given the MFCMA's manifest intent to assume exclusive jurisdiction over our national resources for the benefit of all citizens without regard to residence, the State of Florida's interpretation of §1856 (a) is incongruous. The trial court and the Third District Court of Appeal in this case and in the previous case of Tingley v. Allen, 397 So. 2d 1166 (Fla. 1981) have ruled against the State's strained construction of the Magnuson Act.

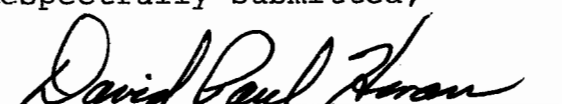
The U.S. Congress determined which resources were depleted or in danger thereof, upon passage of the MFCMA, and provided emergency provisions for additional resources

pending study and implementation of necessary management plans. However, the State of Florida was not content with the clear mandate of the U.S. Congress and chose to embark on a unilateral course of regulation. Moreover, if the State of Florida's construction is accepted, they will be in a position to perpetuate the disadvantage to Florida citizens by dysfunctional participation on the relevant Fishery Management Councils.

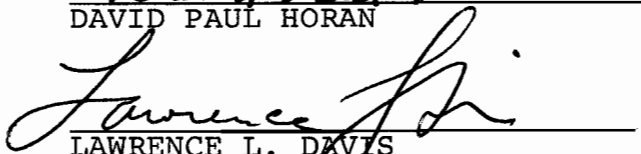
Lastly, the State of Florida perceives an absence of regulation as a problem, whereas an absence of regulation under the MFCMA is an indication that there is no problem. This is evidenced by the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, pending formal adoption at the time of Respondents arrest, which explicitly eliminates size restriction on shrimp. It is clear that a decision by a Management Council not to enact regulations is as much a management decision as is enactment of a specific formal fishery management plan.

The Respondents pray this Court will affirm the trial court and enjoin the State of Florida from violating the letter as well as the spirit of the Magnuson Fishery Conservation and Management Act.

Respectfully submitted,



DAVID PAUL HORAN



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief for Respondents has been furnished by U.S. Mail to KEVIN X. CROWLEY, ESQUIRE, Acting General Counsel, Department of Natural Resources, Suite 1003, Douglas, Building, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303 and JAMES C. KILBOURNE, ATTORNEY, Department of Justice, Todd Building - Room 639, Washington, D.c. 20530 this 16th day of February, 1983.

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