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## II. STATEMENT OF THE CASE AND OF THE FACTS

### A. Background

From Florida's earliest prehistory to the mid 1970's, sea turtles were a part of the diet of many Floridians. They were caught by the early explorers and settlers and their flesh and body parts became a major industry in this state in the late 1800's and early 1900's (see Appendix and statutory history of §370.12, F.S.). With the expansion of the industry, the increased use of otter trawls to catch shrimp and the development along coastal nesting beaches, the slow growing and slow moving animals soon began to disappear. By 1974 the stock was so depleted that the legislature enacted amended §370.12, F.S., to prohibit the further removal of sea turtles from Florida waters. By 1978 most species were declared endangered or threatened by the Federal and state government. In 1983, the Florida Marine Fisheries Commission was created by the Legislature to oversee marine resources conservation and management.

The story of the decline of one sea turtle, the Atlantic Kemp's Ridley, is indicative of the results of the many years of abuse. In the late 1940's, a single beach in Mexico was visited by over 40,000 nesting Kemp's Ridley sea turtles. Because of the uniqueness of this turtle nesting beach, the Mexican government declared it a protected area and prohibited the taking of turtles or eggs. Since that time, the beach has been patrolled and protected by the Mexican government and private guards from the international conservation community. Last year, fewer than 700 nesting turtles nested on the beach. The best scientific evidence available indicates that the cause of the most recent downturn was directly attributable to drowning and strangulations caused by turtle captures in shrimp trawls (Marine Fisheries Commission

record before the 1st District Court of Appeals #89-2 120, Testimony of Dr. Peter Prichard).

For the last fifteen years, the large amount of deaths of turtles caught in shrimp nets have been well known to the scientific community (Marine Fisheries Commission record before the 1st District Court of Appeals #89-2 120, testimony of Dr. Peter Prichard). Numerous meetings were held with shrimping interest since that time to develop devices that would prevent these deaths and still allow shrimping to continue off the shores of Florida. In response to these meetings, the National Marine Fisheries Service conducted over 70,000 hours of tests and developed various turtle excluder devices, generically referred to as TED's (Marine Fisheries Commission record before the 1st District Court of Appeals),

These TED's are **additions** to the existing nets that **allow** a turtle to swim out the top or bottom of the net (depending on the type of TED) while the shrimp is trapped in the **small** "cod" at the end. The TED's permit up to 97% of the turtles to escape while reducing shrimp catch in an amount ranging from 4% to 40% depending on whose information is accepted. The data collected by the National Marine Fisheries Service in their scientific tests indicate from 4%-12% loss while the shrimp industry's anecdotal testimony indicates 40% plus may be lost (Marine Fisheries Commission record before the 1st District Court of Appeals).

The position of the industry (mainly in the northern Gulf of Mexico) is that sea weed and other debris clog the TED's and allow the shrimp to escape. The National Marine Fisheries Service was unable to verify these claims in numerous tests (Marine Fisheries Commission record before the 1st District Court of Appeals). The Florida **Marine** Fisheries Commission

position is that it is charged with the protection and recovery of marine resources through fishing gear regulations, season closures and fishery management plans. It correctly considers sea turtles a marine resource within their protection, whether endangered, threatened or harvested for food,

#### B. Statement of the Case and the Facts

The Amici adopt the statement of the case and the facts as expressed by the State in its brief

### II. SUMMARY OF ARGUMENTS

The lower court's restriction of the Marine Fisheries Commission's rulemaking authority to marine life that is presently being harvested has no basis in the law. There is no doubt that the harvest of turtles in the past constituted a "fishery" but the removal of the ability to harvest because of severe depletion does not affect this designation. The Florida Marine Fisheries Commission is charged by law with developing fish management plans. These plans cannot be complete unless they can contain provisions to restore fisheries that have been depleted. To restrict its power in this area would be an absurd result that would not support the legislative intent of "management and preservation of [Florida's] renewable marine fisheries resources, ..."

The Florida Marine Fisheries Commission has the rulemaking authority to require all persons using shrimp nets in state waters to install TED's. This

authority exists even if the primary purpose of the regulation is to protect endangered sea turtles. Though this authority is not exclusive, it is a power that may be concurrently exercised with other agencies. Any other interpretation of the appropriate statutes would lead to an absurd result that was not intended by the legislature.

Should this court find that the Florida Marine Fisheries Commission does not have rulemaking authority to require the emergency use of TED's to protect "endangered species," it certainly has the authority to protect "threatened species" of sea turtles by requiring the use of the same gear. Section §370.027(2)(f) F.S., gives the commission exclusive authority over all "protected species" of marine life which would include "threatened" species.

#### IV. ARGUMENTS

A. The emergency rule of the Florida Marine Fisheries Commission is within its legislative authority to adopt.

1. The authority of the Florida Marine Fisheries Commission to adopt rules to manage and conserve marine resources includes the authority to protect sea turtles regardless of whether they are presently capable of being harvested.

The legislative intent of the act establishing the Marine Fisheries Commission is clearly stated in S370.025:

(1) The Legislature hereby declares the policy of the state to be management and preservation of its renewable marine fishery resources, based upon the best information available, emphasizing protection and enhancement of the marine and estuarine environment in such a manner as to provide for optimum sustained benefits and use to all the people of this state for present and future generations.

This language is clear and unambiguous and should be given its plain, obvious meaning. McDonald v. Roland, et al., 65 S.2d 12 (Fla. 1953). The commission is to manage and preserve the states fisheries. It is to do so in a manner that will create the most benefits to all the people for "present and future generations" (emphasis added). The commission cannot accomplish this legislative mandate if it does not have the power to restore a fishery that has failed because of overfishing, habitat loss or pollution. It cannot manage a species for "future" generation if it does not have the authority to assist in recovery of depleted species.

The lower court reached the conclusion that sea turtles were not a "renewable marine resource" and thus outside the authority of the Florida Marine Fisheries Commission to control because the legislature protected them from capture or use. The court ignored or disregarded the clear intent of the statute and the historical data and information that indicated that turtles were part of Florida's commerce until they were "fished out" in the late 70's (See Appendix). For the lower court to rule that sea turtles were not part of a "fishery" would lead to an "unreasonable and ridiculous conclusion" that flies in the face of accepted rules of statutory interpretation. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

If the Florida Marine Fisheries Commission could only conserve, protect and manage species that are presently being fished, it would loose authority over marine species at a time when controls were most needed to manage them. The logic of the lower court could lead to "ridiculous" situations such as the following. At the present time, the quantity of red snappers in Florida waters has declined to such an extent that the commission has considered adopting a management plan that will prevent all harvest of the



fish. If they adopted such a plan, under the logic of the lower court, they would no longer have jurisdiction to adopt rules that affect red snapper. Thus, they would not be allowed to require special gear to be used in other fisheries that would assist in red snapper recovery nor would they have the power to open the red snapper fishery If the fish recover to harvestable amounts. They would be prohibited from managing this fishery.

The same logic would apply should any other entity declare a present marine fisheries resource closed. If the federal government declared that the redfish (or bluefish or any fish) was an endangered or threatened species pursuant to 16 USC § 1533, 50 CFR 17.11 (Federal Endangered Species Act of 1973), the Marine Fisheries Commission would no longer have the power to manage and protect these fish. This interpretation of the statute would not only produce an unreasonable result, in violation of the general rules of statutory interpretation, State v. Webb, 398 So.2d 820 (Fla. 1981), but would also lead to an interpretation that could render the statute unconstitutional.

It is a long standing maximum of constitution law that it is an unconstitutional delegation of legislative power to convey to an administrative agency the authority to adopt rules that depend upon some future federal action. Fla. Industrial Com. v. State, 21 So.2d 599 (Fla. 1945). If the lower court's interpretation of the statute is correct, the federal government will be able to remove from the Marine Fisheries Commission the authority to manage and control marine species by listing certain species as endangered or threatened. For example, if the red snapper was listed as "threatened" and not subject to taking, the Marine Fisheries Commission would be prohibited from requiring shrimp nets to be

constructed or hauled in such a way as to avoid destroying bottom habitat important for the recovery of the red snapper. This would be an obvious unconstitutional delegation of state power to the federal government, The courts of this state do not favor a statutory interpretation that would render a statute unconstitutional. Dunedin v. Bense, 90 So. 2d 300,(Fla. 1956).

The lower court further buttresses its argument that sea turtles were not a "fishery" by quoting sections of the statutes that appear to emphasize the role of the Florida Marine Fisheries Commission in controlling existing fisheries and providing plans that will allow for optimum sustained benefits. Unfortunately, the court relied upon the stated goals and not the fact that the Florida Marine Fisheries Commission was only to "emphasize" these goals and give them "paramount" importance. It failed to recognize that none of the goals cited were "exclusive" or in any way limiting in their ability to protect marine species.

Amici agree that the primary purpose of the Florida Marine Fisheries Commission is to establish plans to conserve and manage ongoing fisheries. However, it is not the sole purpose of the commission. in order to carry out its legislative mandate it must also be able to regulate gear and seasons to protect those fisheries that are no longer open in order to allow them to become open in the future. The restriction of gear in the shrimp industry was necessary to allow any possible opening of a turtle fishery in the future. This is the only way the Marine Fisheries Commission can provide benefits to "future generations" as required by the statute. §370.025(1), F.S.

2. The Florida Marine Fisheries Commission has the legislative authority to adopt rules requiring types of gear that will protect endangered species.

A cursory reading of §370.025 -370.029 could cause confusion in the minds of some concerning the protection of endangered species by the Florida Marine Fisheries Commission. The law states that the Commission has exclusive rulemaking authority "relative to marine life, with the exception of endangered species,..." (§370.027(2) F.S.). It nowhere states, however, that the Florida Marine Fisheries Commission has "no" authority over endangered marine life species, merely that the authority is not "exclusive". There is no language in the statute that would prohibit the Florida Marine Fisheries Commission from exercising "concurrent" authority with any other agency if it were carrying out its mandated duty to protect and marine species "for present and future generations." §370.025, F.S.

Any argument that removes the authority from the Florida Marine Fisheries Commission to "concurrently" control endangered species has an ironic twist. The agency responsible for the management of marine species (including endangered species) is the Department of Natural Resources (§372.027(4)(a)(2) F.S). The Florida Marine Fisheries Commission is "created within the Department of Natural Resources,..." §370.026(1) F.S. The entity that approves the rules of the Florida Marine Fisheries Commission is the Governor and Cabinet, sitting as the head of the Department of Natural Resources. §370.027(3)(a) F.S. The Florida Marine Fisheries Commission has no independent existence outside of the Department of Natural Resources. The Governor and Cabinet also approve all rules of the Department of Natural Resources. In this case, the Governor and Cabinet approved the emergency rule that is the subject matter of this litigation and, in fact, requested that

the Florida Marine Fisheries Commission adopt such a rule (Marine Fisheries Commission record before the 1st District Court of Appeals #89-2120).

The Governor and Cabinet sit as the head of many agencies. Though one might be able to argue that they have no authority to act on a matter purely within the purview of the State Board of Education while sitting as the Land and Water Adjudicatory Commission, it makes little sense to argue that they cannot act as the head of the Department of Natural Resources while sitting as the head of the Department of Natural Resources. Since the emergency rule was approved and adopted by the head of the Department of Natural Resources, the question of the authority of the Marine Fisheries Commission to adopt this rule appears moot. It was adopted by the head of the agency for both the Department of Natural Resources and the Marine Fisheries Commission.

In addition, the record established by the Marine Fisheries Commission at its rulemaking hearing clearly supports the proposition that it has its own power to propose rules for approval of the Governor and Cabinet as the head of the Department of Natural Resources. The present most prevalent cause of sea turtle mortality is drowning and strangulation in shrimp nets. The only way to prevent this mortality is to require a gear change or close the season on shrimping. The Florida Marine Fisheries Commission has exclusive rule making authority over these areas. §370.027(2)(a),(i) F.S. Because of its "exclusive" power, any ruling that prohibits the Florida Marine Fisheries Commission from exercising this authority would remove the ability of any agency from acting to protect these turtles in Florida. The Legislature obviously did not intend to reach this result.

3. The Florida Marine Fisheries Commission has the exclusive legislative authority to adopt rules requiring types of gear that will protect "threatened" species.

Regardless of the interpretation of the authority of the Florida Marine Fisheries Commission over "endangered" species, there can be little question that it has full authority over "threatened species. There is no restriction on the exclusive rulemaking authority of the Commission over "threatened species." Most of the turtles sought to be protected by the emergency rule are classified as "threatened under the federal Endangered Species Protection Act of 1973 (16 USC §1533, 50 CFR 17.11) and the Florida Endangered and Threatened Species Protection Act of 1977 (§372.072, F.S.). The power of the Florida Marine Fisheries Commission to protect threatened species alone is sufficient to support the validity of the rule challenged.

It should also be noted that §370.027(2)(f) F.S., gives the commission exclusive authority over all "protected species" of marine life. Though the term "protected species" is not defined in the act, there can be little doubt that "threatened" species are "protected species" within the meaning of §370.027(2)(f) F.S. The Florida Endangered and Threatened Species Act of 1977 states that it is the "intent of the Legislature to provide for research and management to conserve and protect these species as a natural resource." (§372.072(2) F.S., emphasis added). Section 372.072(3)(c) F.S. lists "threatened species" as a separate category from "endangered species" within the act. The language of the statute is clear and unambiguous in this regard and should be given its obvious meaning. McDonald v. Roland, 65 So.2d 12 (Fla. 1953).

## VI. CONCLUSION

The Florida Marine Fisheries Commission has the authority and the duty to protect sea turtles from extinction and aid in their recovery. Emergency rule, (46ER89-3 F.A.C.) is within the scope of this authority and was properly adopted. Amici urge this court to reverse the decision of the lower court and rule that 46ER89-3 F.A.C. is a valid exercise of legislative authority by the Florida Marine Fisheries Commission that is to be enforced throughout the state.

Respectfully submitted this 19th day of December, 1989.

I hereby certify that a true copy of the above has been delivered to J. Patrick Floyd, 408 Long Ave., P.O. Drawer 950, Port St. Joe, FLORIDA 32456: Jim Hintz, Assistant State Attorney, Franklin County Courthouse, Apalachicola, FLORIDA 32320: John Newton, Carson and Linn, P.A. 171 1-D, Mahan Dr., Tallahassee, FLORIDA 32308: Jon Glogau, 11 1-36 S. Magnolia Dr., Tallahassee, Florida, 32301 and Winston Bartkowski, Owens and Storch, 926 S. Ridgewood Ave., Daytona Beach, FLORIDA 32114, on the above date at the addresses specified.



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