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SUPREME COURT OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, *et al.*,

Appellants,

vs.

Case No. 85,880  
1st DCA Case No. 95-1757

BRUCE MILLENDER, *et al.*,

Appellees.

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APPEAL OF A CERTIFIED JUDGMENT  
FROM THE TRIAL COURT

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**BRIEF OF APPELLANTS**

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ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

Jonathan A. Glogau  
Assistant Attorney General  
Fla. Bar No. 371823  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
(904) 488-5899

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FLORIDA CONSTITUTION

Article X, § 16, Fla. Const. . . . . *passim*

## STATEMENT OF THE CASE AND FACTS

On November 8, 1994, the people of Florida adopted Article X, § 16 of the Florida Constitution by a margin of 72% to 28%. The intent of that amendment as set forth in the text thereof is:

The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end, the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.

Art. X, § 16(a), Fla. Const. The amendment banned the use of gill and entangling nets in the waters of Florida. § 16(b)1. In addition, the amendment limits the use of all other nets in the inshore and nearshore waters of the state to a maximum of 500 square feet. § 16(b)2. Section (c) provides the definitions for understanding the prohibitions and limitations of section (b). Mesh area is defined as:

[T]he total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of the netting. **Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from**

**the net mouth to the tail end of the net to derive the slant height.** Calculations for any other nets or combination type nets shall be based on the shapes of the individual components.

Art. X, § 16(c)2., Fla. Const. (emphasis added) These prohibitions and restrictions took effect July 1, 1995. Art. X, § 16(h), Fla. Const.

After passage of the Amendment, Plaintiffs contrived to construct a shrimp trawl which would, under their interpretation of the constitutional language, be legal as of July 1. This net was inspected by staff of the Marine Fisheries Commission who determined that the net did not comply with the restrictions of the Constitution.

Plaintiffs then brought a complaint for a declaratory decree, requesting two things from the court:

1. A declaration that the calculation of the area of a trawl be calculated from a measurement of the length of the net with the "meshes open" rather than by measuring the "maximum length" of the net; and

2. A declaration that the shrimp trawl constructed by the Plaintiffs is legal under the 500 square foot limitation of the amendment. [R. 2-10]

Defendant filed a motion for summary judgment asking the court to find that, based on the undisputed facts, the net constructed by the Plaintiffs consisted of more than 500 square feet under either interpretation of the constitutional language set forth in Plaintiffs' complaint. [R. 68-71] After oral

argument, that motion was denied. [R. 298] After trial, the court issued the order on appeal herein. [R. 569-79]

A shrimp trawl is a generally conical shaped net. [T. 34, 71, 205; D. Ex. 2] The formula for the surface area of a cone is  $(\text{circumference})(\text{slant height})/2$ . Plaintiffs' trawl has a circumference of 65.75 feet. [T. 74, 146] The other critical measure for the use of the cone formula is the "slant height." [T. 50] This is the distance from the mouth to the tip of the net. [T. 221] The only way physically to measure the length of a trawl to stretch it to its maximum length and measure it with a tape measure. [T. 87, 157-58, 180, 258] Measured this way, Plaintiffs' net is 29 feet long. [T. 71, 87, 146, 157-58] This stretched length must then be converted to an open mesh length for use in the cone formula pursuant to the constitution which requires generally that the area should be measured with "meshes open to comprise the maximum square footage."<sup>1</sup> [T. 145-46]

In order to determine this conversion factor, the court below took evidence on the construction of the net. Based on this evidence, the court

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<sup>1</sup> Intervenors argue that the stretched mesh maximum length should be used in the cone formula based on the language of the amendment which provides that for trawls, the "maximum length from the net mouth to the tail end" should be used for the cone calculation. The maximum length would necessarily be the "stretched" length used to measure the physical dimensions of the net.

considered that the Plaintiffs started with less than 500 square feet of raw net stock on the cutting room floor for construction of their trawl. [T. 51, 53] The court then endeavored to find a conversion factor which would force the cone formula to approximate the amount of raw stock used for the construction. This conversion factor came to one half.

The netting material used to construct Plaintiffs' trawl is made up of individual square meshes, each measuring .75 inches on a side. [T. 209-10; Appendix A] In the stretched condition, each mesh is 1.5 inches long. [T. 209-10; Appendix B] When "open," each mesh is 1.06 inches long.<sup>2</sup> [T. 82, 84, 209-10; Appendix A] The diagonal must be used because the orientation of each square is such that if a line is drawn from the center of the headrope to the end of the net, the line will cross the diagonal of each square mesh. [T. 81-82; Appendix A] The length of the net would therefore be 29 feet (the measured stretched length) times a conversion factor consisting of the ratio of the length of an open mesh to the length of a stretched mesh (1.06/1.5) resulting in a

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<sup>2</sup> For Plaintiffs' net, the diagonal across the square is used because that is the way the net is hung. This distance is determined using the Pythagorean Theorem:

$$\begin{aligned} a^2 + b^2 &= c^2 \\ (.75)^2 + (.75)^2 &= c^2 \\ 1.125 &= c^2 \\ 1.06 &= c \end{aligned}$$

length of 20.49 feet for Plaintiffs' net for the purposes of the cone calculation.

[T. 82, 83, 211]

Applying the cone formula to the dimensions of the Plaintiffs' trawl, using the "open mesh" length, the surface area is:

$$(\text{circumference})(\text{slant height})/2 = \text{area}$$

$$(65.75)(20.49)/2 = 673 \text{ square feet.}$$

The Plaintiffs' net therefore calculates out at more than 500 square feet and is not permissible under Article X, § 16, Fla. Const. [T. 211]



## SUMMARY OF ARGUMENT

Three positions are presented in this case regarding the proper determination of the length of a shrimp trawl for use in the cone formula for determining the surface area of the trawl for compliance with Article X, § 16, Fla. Const. Intervenor, FCA argues that the "maximum length" (the stretched length) should be used because, *inter alia*, the specific language of the sentence regarding trawls governs over the general language of the first sentence of § (b)(2) of the Amendment. The Plaintiffs argue, and the State agrees that the "meshes open" language in the first sentence must be harmonized with the "maximum length" language in the sentence referencing trawls. This requires that a conversion factor be used to calculate the "meshes open" length from the stretched length. Plaintiffs argue for an arbitrary factor of one half because that forces the formula for a cone to better approximate the amount of raw stock used to construct the net. The State argues that the conversion factor must be related to the orientation and mathematics of the nets as constructed. Calculating of the size of Plaintiffs' net, FCA gets 953 square feet [Pl. Ex. 9]; the State gets 673 square feet [Pl. Ex. 10]; and the Plaintiffs get 476 square feet [Pl. Ex. 8].

There is no evidence in the record to support the Plaintiffs' conversion factor or the court's finding that using that factor, the Plaintiffs' net is legal under the constitution. The only admissible evidence unequivocally shows that the Plaintiffs' net when measured with the "meshes open" has a circumference of 65.75 feet and a slant height of 20.49 feet, thereby calculating out at 673 square feet as a cone. This exceeds the constitutional limit of 500 square feet.

There also is no evidence in the record which will support the court's finding that a factor of one half should be used to convert the stretched length of the net to the "open mesh" length of the net for calculation purposes. What the record does show is that the meshes of the nets are oriented diagonally; that the mesh when stretched along the diagonal axis is 1.5 inches long; that when the mesh is open, the length along this same axis is 1.06 inches and therefore the only logical conversion factor from stretched to open is  $1.06/1.5$ . Using this factor, the length of Plaintiffs' net is 20.49 feet. There is no evidence in the record to support a finding that the net is 14.5 feet with open mesh.

The court below erred by admitting irrelevant and prejudicial evidence. The court further erred by explicitly and implicitly relying on this evidence. Whether the cone formula accurately estimates the amount of raw mesh stock used to construct the net is irrelevant. The constitution dictates the formula in clear terms and using this extrinsic aid to interpretation is error.

The court erred by treating "open mesh" as a term of art. Words in a constitutional provision should be given their ordinary meaning. When used in its ordinary sense, open mesh means completely open as a square. This meaning results in an open mesh length of 20.49 feet for Plaintiffs' net rendering it illegal under Art. X, § 16, Fla. Const.

In addition, the court admitted and relied on testimony that certain fishermen could not economically pull the nets which would be legal under the Commission's interpretation of the constitution. While unfortunate for those few who could not economically survive under the new constitutional regulation, it is irrelevant. The purpose of the amendment was to "limit net fishing." This clearly contemplates that some fishers will no longer be on the water, not simply that all current fishers will continue albeit with a marginally smaller net. The court erred by admitting and relying on this evidence.

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When a reviewing court finds that the decision on appeal is supported by no evidence on the record from the trial court, that decision must be reversed. That is the case here. The lower court's determination that the net constructed by Plaintiffs is 14.5 feet long for the purposes of calculating the surface area using the cone formula finds no support in the evidence. [Order at 7] The undisputed evidence in the record demands the conclusion advocated by the Defendants, that the net is 20.49 feet for the purpose of calculating the surface area and that the net constructed by Plaintiffs is illegal under Art. X, § 16, Fla. Const. [T. 211]

Plaintiffs' net is a shrimp trawl. [T. 77] It has a net mouth with a maximum circumference of 65.75 feet. [T. 74, 146] The length of the net is 29 feet when stretched to its maximum length. [T. 71, 87, 146, 157-58] All of the experts agreed that the only way the length of a net of this type can be physically measured is to stretch it out and lay a tape measure to it. [T. 87, 157-58, 180, 258] Plaintiffs' net is constructed of mesh which is .75 inches on each side of the square and 1.5 inches long when stretched. [T. 209-10;

Appendices A and B] Finally, Plaintiffs' net has the meshes hung "on the diagonal."<sup>3</sup> [T. 81, 125, 207]

The court below based its findings on two bodies of evidence, neither of which will actually support those findings. First, the court relied on the Plaintiffs' contention that the formula as they describe it (dividing the stretched net length by two to get the open mesh length) more accurately gives an approximation of the number of square feet of raw mesh used to construct the net. [Order at 7] This evidence is irrelevant and inadmissible and clearly influenced the court to make the wrong decision.<sup>4</sup> Article X, § 16, Fla. Const.,

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<sup>3</sup> When the mesh is hung in this orientation, a line drawn from the center of the headrope to the back end of the net crosses each square across the diagonal, not along a side. The length of a diagonal across a square which is .75 inches on a side is 1.06 inches. Plaintiffs' expert Golden testified that some nets are hung with a differential orientation with some meshes on the diagonal and some not. However, this does not cast any doubt on Defendants position for two reasons. First, he also admits that when hung differentially, the meshes at the center of the headrope, where the measurement takes place, are hung on the diagonal. Second, Plaintiff, Crum, admitted that Plaintiffs net is hung diagonally.

<sup>4</sup> The court misconstrues the Defendants' continual objections to the relevance of this material. He states that:

I understand your position. Your position is, it doesn't make any difference what part -- size of net you start with. You've got to use the cone formula even if its 300 square feet. So I understand your position, but I don't think that it's necessarily irrelevant to their position of the case. They are entitled to put their -- the Defendant, it may not be the winning position, as you've told me, but its not irrelevant.

limits the size of nets in the nearshore and inshore waters of Florida to 500 square feet. The Amendment then describes in clear language how that square footage is to be determined. In the section relevant to this proceeding, the Amendment says:

Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height

Nowhere does the Amendment say anything about approximating the amount of area used to construct the net. The court's choice of an arbitrary factor of one half in order to force the formula to approximate the amount of raw stock used to construct the trawl does violence to the clear language and the intent of the Amendment. When addressing the construction of constitutional provisions:

when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language.

Florida League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992); City of St. Petersburg v. Briley Wild & Assoc., 239 So. 2d 817 (Fla. 1970) (If the language

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The question is not whether the evidence is relevant to *Plaintiffs' position*, but whether it is relevant to the issues presented by the language of the constitution. That language is clear and does not reference the amount of stock used to construct the net. It only states that the net, measured using the cone formula, cannot exceed 500 square feet.

is clear and not entirely unreasonable or illogical in its operation we have no power to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to words used therein.") Forcing the formula to approximate the amount of raw stock through the use of an arbitrary conversion factor is an extrinsic guide which should have been ignored by the court. Additionally, interpreting the constitution in a manner that requires an arbitrary and capricious conversion factor would be unreasonable and strained and therefore should be avoided. In Re Advisory Opinion to the Governor, 374 So. 2d 959, 964 (Fla. 1979). The reduction in the size of the net from that previously permitted by law is insignificant [T. 203-04] using the court's formulation, thereby defeating the intent of the amendment to limit net fishing and protect the marine resources of the State.

The other evidence that the court erroneously relied upon is that in the past there has been in the net industry two ways to express the size of mesh, to wit: the "bar" measure and the "stretched mesh" measure. [T. 120, 174] For the mesh used in Plaintiffs' trawl, the bar measure (the length along the side of the square mesh) is .75 inches. The "stretch mesh" measure is 1.5 inches. [T. 209-10] The bar length is always one half the stretch mesh length. [T. 56-57, 210] Relying on this evidence to deduce a conversion factor of one half is error

for two reasons. First, there is no evidence in this record to relate the "bar" measure to the length of a shrimp trawl when the mesh in the trawl is hung on the diagonal, as Plaintiffs' net is hung. In fact, the only evidence in this record is to the contrary. The "bar" length is wholly unrelated to the length of the net because when the net is hung on the diagonal, the "bar" of each mesh is not oriented along the axis of measurement; that axis is along the diagonal through the squares of the netting. [T. 81-82, 211; Appendix A]

Second, past practice of the industry is irrelevant in this instance. The Amendment presents a new way to measure and regulate the size of shrimp trawls. Previous regulation addressed only the size of the mouth opening, never the length of the net. [T. 82] Now that there is a necessity to measure the length of the net, a new method must be adopted. When determining the conversion factor from the maximum length to the open mesh length of a shrimp trawl, said factor must be related to the length of the diagonal across the square of the mesh. Such a measurement in this case results in an open mesh length of 20.49 feet, making the Plaintiffs' net illegal. [T. 82, 211]

The court below also erred by applying an improper standard of construction to the words in the amendment. "Mesh area" is to be measured with the "meshes open." This should not have been treated as a term of art.



[Order at 7-8] When construing a constitutional provision,

the words and terms of a Constitution are to be interpreted in their most usual and obvious meaning. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them.

State v. Florida State Improvement Commission, 47 So. 2d 627, 630 (Fla. 1950);

Florida Boater's Ass'n v. DOR, 400 So. 2d 1006, 1007 (Fla. 1st DCA 1981).

This must be so because the purpose of construing the constitutional provision is to "ascertain and effectuate the intent of the framers and the people." Gallant v. Stevens, 358 So. 2d 536, 539 (Fla. 1978). This is a different task from a court's duty under the vagueness doctrine when a court is trying to determine the meaning of a statute or rule. In that situation, the court is to determine whether a reasonably intelligent individual in the regulated community will be able to discern the prohibited conduct. State v. Cummings, 365 So. 2d 153, 155 (Fla. 1978)(The statutory language was not vague because it used language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. State v. Wershaw, 343 So. 2d 605 (Fla. 1977)). Here, the common, ordinary meaning must be used because it is the meaning the voter would have had in his/her mind in the voting booth while pulling the lever.

Open mesh, therefore, has no relationship to the length of the "bar," but merely reflects the intent to measure the length of the net with the meshes fully extended to their open, square shape rather than stretched to their maximum length. This open measurement is 1.06 inches across the diagonal of each square, thereby converting the 29 foot stretched length to 20.49 feet which then calculates out to a surface area of 673 square feet for Plaintiffs' net. The decision of the court below must be reversed and this court must declare that the Plaintiffs' net is not permissible under Article X, § 16, Fla. Const.

THE COURT BELOW ERRED BY ADMITTING AND  
RELYING UPON IRRELEVANT AND PREJUDICIAL,  
AND THEREFORE INADMISSIBLE, EVIDENCE

Two major bodies of evidence were erroneously admitted and relied upon by the trial court over the continual objections of the Defendants. As discussed above, the evidence concerning the amount of mesh stock used to construct the net is not relevant in the face of the constitutional provision which dictates that the 500 square feet is to be determined by the cone formula. The court below clearly relied on this evidence to conclude that the arbitrary factor of one half should be applied to the measured maximum length of the net to convert the measurement to the open mesh length for use in the cone formula. [Order at 7]

In addition to the amount of mesh stock used, the court erroneously admitted evidence of the commercial viability of the nets as proposed by the

Defendants. The court also erred by relying on this evidence. [Order at 8-9]


The constitutional amendment, in clear language, limits the size of nets in the nearshore and inshore waters of Florida to 500 square feet or less. The size of shrimp trawls is to be determined using the formula for a cone. The purpose of this limitation is "to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste." This purpose is served by requiring that smaller nets be used. It is not inconsistent with this stated purpose that some fishermen will no longer find their livelihood pulling these smaller nets. The limitation in the amendment was clearly not intended to ensure that all shrimp fishermen currently operating in these areas will continue albeit with smaller nets. Some will have to move offshore, some will have to move on to other pursuits. The court below was improperly influenced by this evidence into adopting an arbitrary conversion factor in order to minimize the economic impact to the affected community. Both of these errors require reversal of the order on appeal.

## CONCLUSION

This court should REVERSE the judgment of the court below and find that the only conclusion which can be drawn from the admissible evidence in this case demands that the calculation of the size of a shrimp net under Article X, § 16, Fla. Const., be done as calculated by Defendant, Marine Fisheries Commission and that Plaintiffs' net is illegal under Article X, § 16, Fla. Const.

Respectfully submitted this 10 day of July, 1995.

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

  
Jonathan A. Glogau  
Assistant Attorney General  
Fla. Bar No. 371823  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
(904) 488-5899

CERTIFICATE OF SERVICE

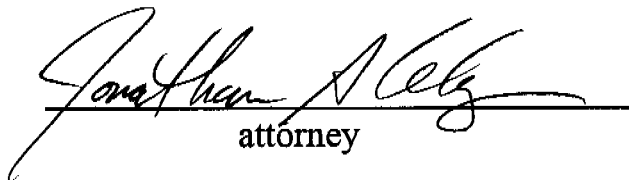
I HEREBY CERTIFY that a true and correct copy of the forgoing has been served by United States mail this 10 day of July, 1995, on:

J. Patrick Floyd  
408 Long Avenue  
P.O. Drawer 950  
Port St. Joe, Florida 32456

Terry L. McCollough  
609 East Central Blvd.  
Orlando, Florida 32801

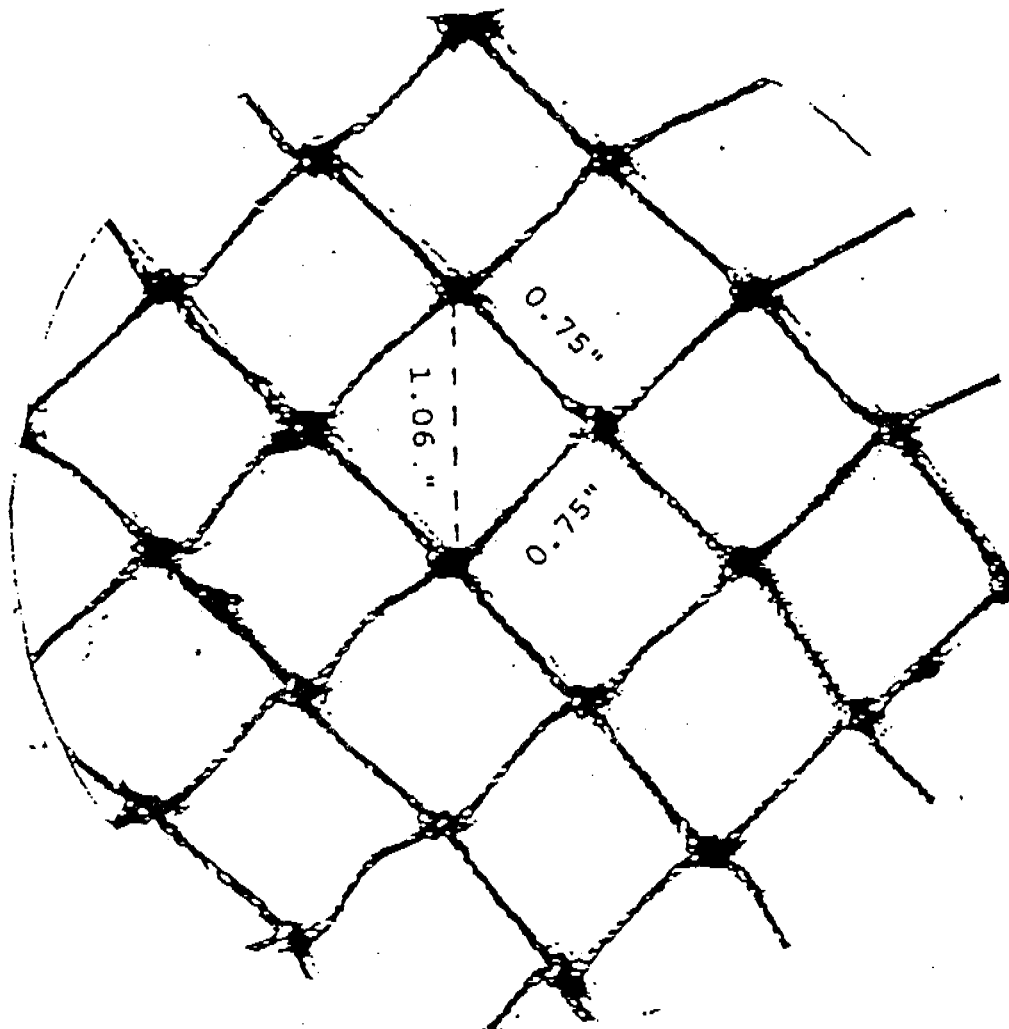
Alfred O. Shuler  
P.O. Box 850  
Apalachicola, Florida 32329

Ron A. Mowrey  
515 N. Adams Street  
Tallahassee, Florida 32301-1111

  
\_\_\_\_\_  
attorney

# Appendix

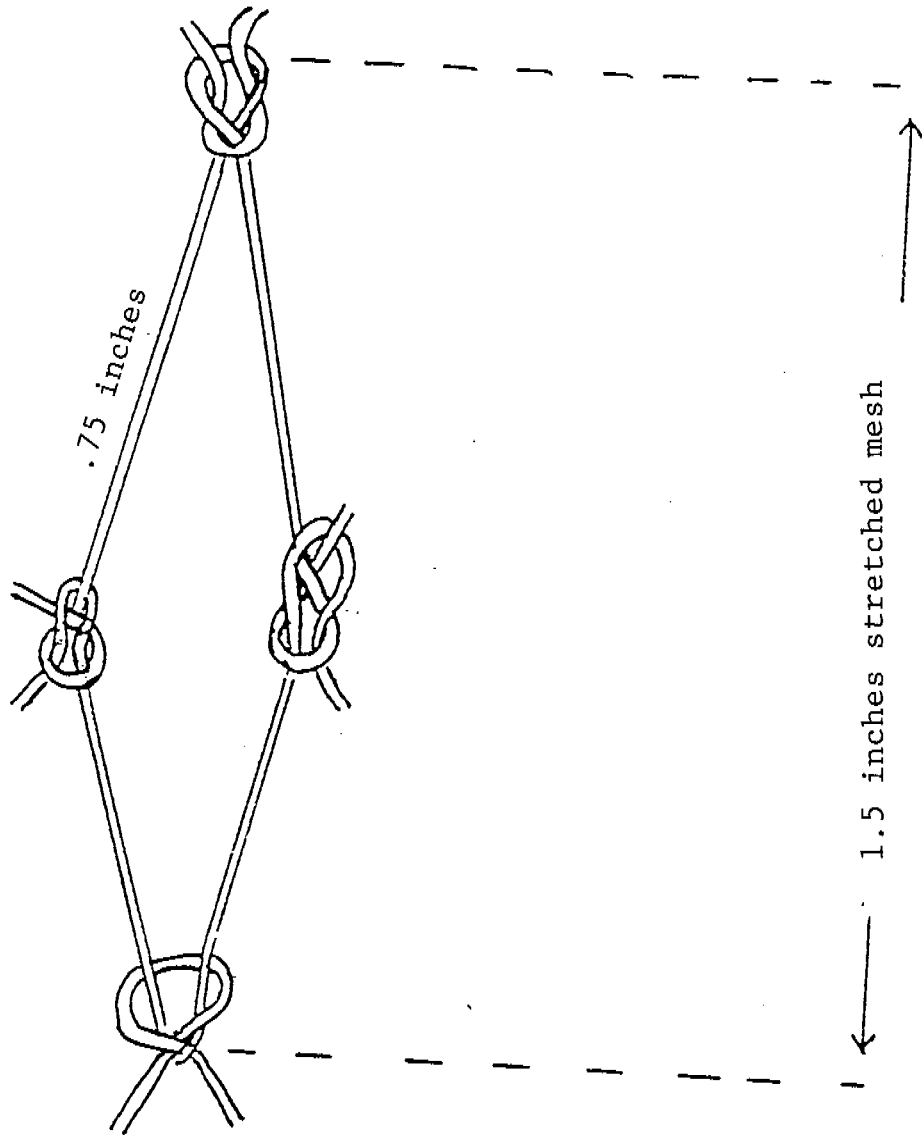
OPEN MESH  
FRONT OF NET



BACK OF NET

STRETCH MEASUREMENT

FRONT OF NET



BACK OF NET

APPENDIX B