

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**THE FISHING RIGHTS ALLIANCE, INC.;** **KURT THEODORE**, an Individual;  
and **JACK HEXTER**, an Individual;  
Plaintiffs,

v.

Case No.

**PENNY S. PRITZKER**, Secretary of Commerce; **EILEEN SOBECK**, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, National Marine Fisheries Service; **NATIONAL MARINE FISHERIES SERVICE;** **ROY CRABTREE, Ph.D**, Regional administrator for the National Marine Fisheries Service, Southeast Region,

Defendants.

\_\_\_\_\_ /

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Plaintiffs, by and through their undersigned counsel, bring this action against Defendants, and allege:

**INTRODUCTION AND JURISDICTION**

1. The purpose of this action is to enjoin and to declare unlawful Amendment 40 to the Fishery Management Plan.
2. Amendment 40 was published in the Federal Register on April 22, 2015

and takes effect May 22, 2015 (80 Fed. Reg 22422). Amendment 40 is not a conservation measure but is intended to permanently enrich a small group of charter fishermen at the expense of the general public.

3. This Court has subject-matter jurisdiction over this action and the parties under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (“APA”); and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 U.S.C. § 1801 et seq. (hereafter referred to as the “MSA”).

4. District Courts of the United States have exclusive jurisdiction over any case or controversy arising under the MSA, 16 U.S.C. §1861(d).

5. The recreational take of reef fish in the Gulf of Mexico (“GOM”) in federal waters (beyond 9 nautical miles) is governed by a Fishery Management Plan (“FMP”), which is amended from time to time based in part on stock assessments. FMPs must balance the needs of fishery users against conservation principles by reference to ten national standards (“National Standards”). 16 U.S.C. §1851(a). Regional councils submit FMPs to the Secretary of Commerce, who acts through NMFS. Defendant solicits public comment and reviews the FMPs to ensure they are consistent with the National Standards and other applicable laws. 16 U.S.C. §§1852(h)(1), 1854(a)(1)-(2). The National Standard guidelines promulgated to assist in development of FMPs and amendments to FMPs state that “[t]he national standards are statutory principles that must be followed in any [fishery management plan].” 50 C.F.R. §600.305. If a FMP plan is consistent with applicable law, NMFS must approve it. 16 U.S.C. §1854(a)(3).

### **STANDING**

6. The Fishing Rights Alliance, Inc. (“FRA”) is a Florida corporation with its

headquarters in St. Petersburg, Florida. FRA is a marine conservation group with members throughout Florida, Georgia, Louisiana, Alabama and Mississippi. FRA membership consists of recreational and commercial fishermen, conservationists, bait and tackle store owners, dive shop operators, fishing equipment manufacturers, marina owners, boat retailers, boat repairmen, and divers. The vast majority of FRA members live near the Gulf of Mexico and fish within its waters. Many of its members seek to catch Red Snapper and FRA has been actively involved in the management of various Gulf of Mexico fisheries since its inception. It has participated in the development of many of the regulations and measures governing the Gulf of Mexico now in place and has generally supported efforts to enact recovery plans for at-risk fish in the Gulf of Mexico. FRA members are directly and adversely affected by the actions of which it complains.

7. Plaintiffs HEXTER and THEODORE are respected private recreational anglers who live in the Tampa Division of this Court and have a history of and ongoing desire to fish for Red Snapper recreationally in federal waters as there is no red snapper in state waters (within 9-miles) offshore of the counties in the Tampa Bay area.

8. Defendant NMFS is an agency of the United States government with primary responsibility management of marine fisheries. NMFS manages those fisheries by administering the Magnuson-Stevens Act and performing NEPA compliance on its Magnuson-Stevens Act actions. NMFS, under the Magnuson-Stevens Act has been delegated the responsibility to manage the United States marine fisheries through Fishery Management Plans ("FMP"), FMP amendments and regulations implementing those FMPs and FMP amendments.

## BACKGROUND

9. At all times relevant to this action, section 407(d) of the MSA provided: “Any fishery management plan, plan amendment, or regulation submitted by the Gulf Council for the red snapper fishery after the date of enactment of the Sustainable Fisheries Act shall contain conservation and management measures that--

(1) establish separate quotas for recreational fishing (which, for the purposes of this subsection shall include charter fishing) and commercial fishing that, when reached, result in a prohibition on the retention of fish caught during recreational fishing and commercial fishing, respectively, for the remainder of the fishing year; and

(2) ensure that such quotas reflect allocations among such sectors and do not reflect any harvests in excess of such allocations.”

10. There are approximately 1199 federally-issued GOM charter/headboat reef permits.

11. The holders of these limited-access permits will be unjustly enriched if Amendment 40 is deemed lawful.

12. In the Gulf States, Red snapper live in state waters and federally managed waters.

13. The States adjoining the GOM have exclusive authority to establish fishing rules for state waters in the GOM under 16 U.S.C. § 1856.

14. Red snapper was declared to be overfished in 1998 and placed on a 31.6 year rebuilding plan in 2004.

15. The high level of bycatch mortality on juvenile red snapper by the shrimp trawl

fishery prior to 2004 accounted for 90% of red snapper mortality.<sup>1</sup>

16. Under Amendment 30(b) to the Reef Fish Management Plan published in 2008, charter vessels and headboats with federal for-hire reef fish permits must comply with federal regulations, regardless of whether the fish are caught in state or federal waters.

17. Amendment 30(b) was adopted because certain Gulf States allowed fishing seasons which were longer than the season established for federal waters.

18. In 2013, Defendant Crabtree participated in the adoption of an Emergency Rule to establish different federal season closures for each Gulf state to address the longer state seasons. However, In Texas v. Crabtree, 948 F.Supp.2d 676 (S.D. Tex. 2013), the Emergency Rule was struck down. As the Court stated:

Respondents concede that under this Emergency Rule it was treating the fishermen in Texas, Louisiana, and Florida unequally. NMFS argued, however, that it was doing so to remedy a perceived inequality caused by the fact that the states of Alabama and Mississippi had chosen to set their state fishing season to match the EEZ season. Of course, there is nothing in either the statute or regulations promulgated to implement the Magnuson-Stevens Act that provides that the NMFS can discriminate against one group of fishermen unfairly in order to help another group. To the contrary, such actions are directly prohibited.

The only rationale, regardless as how one characterizes the underlying motive, behind the Emergency Rule is that NMFS is going to penalize the anglers living in states that enact fishing seasons that do not match the federal season and reward those that do. The NMFS (and the Secretary of Commerce) should not be in the business of penalizing states, and their citizens, merely because they exercised the very rights bestowed upon them by Congress. 16 U.S.C. § 1856.

Id. at 688-89 (emphasis added).

---

<sup>1</sup> See Coastal Conservation Ass'n v. Gutierrez, 512 F. Supp. 2d 896 (S.D. Texas 2007).

19. The Crabtree decision also stated: “Robin Hood may have robbed the rich to give to the poor, but he, regardless of his motives, nevertheless broke the law when he did it.” 512 F. Supp.2d at 689.

#### **AMENDMENT 40**

20. Undaunted by the rebuke from a federal court, Defendant Crabtree and the Gulf Council adopted Amendment 40 (by a 10-7 vote<sup>2</sup>) to punish private anglers seeking to fish in federal waters who live in a state that has a red snapper season longer than the federal season and, as such, deemed “non-compliant” by Defendant Crabtree.

21. Amendment 40, without any prior precedent, partitions the Gulf of Mexico (“GOM”) recreational fishery for red snapper between private-angling and for-hire sub-sectors.

22. Under Amendment 40, private anglers are allowed to fish for 10-days on non-permitted vessels. However, anglers fishing aboard one of the 1199 federally-permitted vessels are allotted a 44-day season for 2015.

23. Amendment 40 confers a pre-determined percentage of the total allowable recreational Red Snapper catch upon the 1199 holders of federally-issued GOM charter/headboat reef permits.

24. Amendment 40 is part and parcel of an attempt to privatize the recreational fishery and confer a windfall on GOM reef-permit holders.

---

<sup>2</sup> The margin of difference was three council members who sat on the Board of an organization (Gulf Seafood Institute) whose members stand to benefit from Amendment 40.

**COUNT I**

**VIOLATION OF SECTION 407(d) of MSA**

25. Plaintiffs reallege paragraphs 1 through 24.
26. Amendment 40 purports to establish charter and headboat fishing as a new fishing sector, contrary to section 407(d).
27. Only Congress can establish a new sector.
28. The right of a permit-holder to fish in federal waters derives from the rights of the recreational angler for whom it is a mere taxi service.
29. Defendants cannot give special privileges to this taxi service.
30. Defendants cannot re-allocate federal quota shared equally by private-anglers to a sector Congress did not authorize or permit to be regulated separate from the recreational sector.

WHEREFORE, Amendment 40 should be declared unlawful and enjoined.

**COUNT II**

**VIOLATION OF NATIONAL STANDARD 4**

31. Plaintiffs reallege paragraphs 1 through 24.
32. Defendants cannot confer special fishing privileges on recreational anglers fishing on boats which holding a federal reef-permit.
33. Defendants are but cannot legally punish anglers by reducing the red snapper season for private anglers who live in states which have state water seasons deemed “non-compliant” by Defendant Crabtree or the Gulf Council.
34. State waters are free from federal regulation under 16 U.S.C. § 1854.
35. Sector separation is an attempt to classify identically situated anglers

differently (on the basis of whether the vessel on which they fish has a federal reef-permit) and runs afoul of National Standard 4.

36. Defendants cannot use shortened seasons to coerce private-anglers to patronize for-hire operators.

37. Nor can Defendants justify sector-separation as a means to “stabilize” the for-hire industry. Defendants cannot take from the many to reward 1199 permit holders governed by Amendment 30(b). The Crabtree decision precludes the Gulf Council and Defendant Crabtree from serving as a “Robin Hood” acting for the benefit of a few at the expense of the taxpaying public.

WHEREFORE, Amendment 40 is unlawful because it allots red snapper fishing privileges as a means of inducing compliance with Defendant Crabtree’s preferred standards.

### **COUNT III**

#### **VIOLATION OF NATIONAL STANDARD 5**

38. Plaintiffs reallege paragraphs 1 through 24.

39. National Standard 5 states: “Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.”

40. Amendment 40 is motivated to re-allocate privileges to the for-hire sector.

41. The for-hire operators did not generate 42% of all red snapper fishing trips in the federal waters of the GOM at any time in the recent past.

42. Allocating 42% of the red snapper recreational quota to for-hire permit holders is a re-allocation that is unlawful. The private-angling component will surrender red snapper

quota to for-hire permit holders under Amendment 40. See 50 CFR § 600.325(c)(3)(i)(A) ("an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of longtime participants in the fishery").

WHEREFORE, Amendment 40 is unlawful.

**COUNT IV**

**VIOLATION OF NATIONAL STANDARD 10**

43. Plaintiffs reallege paragraphs 1 through 24.

44. National Standard 10 states: "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea."

45. Defendants' 10-day red snapper season will cause many to take unnecessary risks should foul weather or high-winds present itself.

WHEREFORE, Amendment 40 is unlawful.

Respectfully submitted,

/s/ Craig L. Berman  
Craig L. Berman  
Florida Bar No. 0068977  
Berman Law Firm, P.A.  
111 Second Avenue N.E.  
Suite 706  
St. Petersburg, Florida 33701  
(727) 550-8989 (Telephone)  
(727) 894-6251 (Facsimile)  
[craig@bermanlawpa.com](mailto:craig@bermanlawpa.com)

**ATTORNEY FOR PLAINTIFFS**