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From: Olivia Deans, Ocean and Coastal Law Fellow

Re: Texas Shrimp Fleet Legal Research (NSGLC- 21-04-02)<sup>1</sup>

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Last year, you requested assistance from the National Sea Grant Law Center (NSGLC) via Texas Sea Grant with compiling existing policy documents, laws, or gray papers related to shrimp management in Texas since the 1920's to inform your dissertation research. As we understand it, your Texas case study focuses on how communities have been affected by the shrimp fishery and evaluates the evolution of the policy that has guided the fishery and impacted livelihoods. The NSGLC was asked to build a timeline of major management changes within the Texas shrimp fishery and compile primary source documents to assist with the development of the Texas case study. This document provides a list and brief summary of the legal sources compiled by NSGLC. Section I identifies state law findings, and section II identifies federal law findings. Each section discusses relevant case law and major legislative actions.

## I. State Law Research

### a. Case Law Research

Before state statutes specifically addressed the management of shrimp, early case law began analyzing the rights of the state of Texas to manage shrimp fishing, impose restrictions, and limit licenses. Below is a description of some of the major cases analyzing the shrimp fishing controversies in state waters.

*Raymond v. Kibbe*, 95 S.W. 727 (Tex. Civ. App. 1906).

This was one of the first cases to analyze the ownership interests of shrimp in state waters. The challengers in this case made several arguments about the State's ability to collect taxes and regulate the sale of goods. One of the issues was whether the legislature had the power to tax shrimp landed by fishermen. The Texas Court of Appeals found that the state had ownership over shrimp and other fish in public waters. Therefore, the state could pass laws for

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the preservation of shrimp and could require a tax for the taking of shrimp and fish. The court noted that a fishing license was not enough to prohibit taxation. The ownership of the captured fish is not complete until the fishermen pay the tax imposed by the legislature.

*Sterrett v. Gibson*, 168 S.W. 16 (Tex. Civ. App. 1914).

This case expanded on explaining the ownership rights of the state over shrimp and other fish. The Game, Fish, and Oyster Commission issued several orders that prohibited certain methods of fishing. The court declared that the state not only had the power to own and tax the taking of fish in state waters, but also had the power to prohibit destructive methods of taking fish. The court determined that citizens had no ownership rights to shrimp and fish and held that the state could prohibit methods of fishing. As long as the prohibition was not unreasonable, the state had the authority to prohibit fishing methods.

*Stephensen v. Wood*, 34 S.W.2d 246 (Tex. Comm'n App. 1931).

The issue in this case involved the state's power to regulate fish in the coastal waters of Texas. The Texas statute, which has since been repealed, made it unlawful to take shrimp from certain waters of the state, while permitting the take of shrimp in other waters. Stephensen, a shrimp fisherman, filed suit against the Texas Game, Fish, and Oyster Commission. Stephensen argued the statute impermissibly regulated fishermen because the statute restricted fishing in some areas of the state and not other areas of the state. The Commission of Appeals Court of Texas held that "the fish in the streams and coastal waters of Texas are the property of the state, and no person has any vested property right therein." The court noted that protection of fish along parts of the coastline is a matter of public interest and the statute was a permissible regulation of state property.

*Dodgen v. Depuglio*, 209 S.W.2d 588 (Tex 1948).

In 1948, the Texas Supreme Court analyzed whether the state had the power to regulate and limit fishing licenses to non-resident fishermen. The Court held that it was constitutional for the Texas legislature to enact a law that required registration and a higher license fee for non-resident commercial fishermen. The Texas statute, which was later repealed in 1975, required non-resident fishermen to obtain a fishing license and commercial fishing vessel registration before any shrimp could be taken from state waters. The purpose of the statute was to conserve shrimp and other fish for Texas residents by limiting the number of out-of-state fishermen. The defendant, Depuglio, was a commercial shrimp fisherman who resided, fished, and had a seafood business in Texas but had failed to register his fishing boat for the previous twelve months. The Secretary of Game, Fish, and Oyster Commission charged Depuglio for a non-resident fishing license and commercial vessel registration because Depuglio had failed to register his boat as a resident commercial fishing vessel. Later, the agency filed a suit against Depuglio for failing to pay the license and registration fees. Depuglio argued the Texas legislature acted unconstitutionally when it required fishermen to show they were residents by registering their boats within the past 12 months, and required higher priced license and registration fee for non-resident commercial fishermen than resident commercial fishermen. The Court held the statute was constitutional. The fish and shrimp within the tidewaters were property of the state, and the

state had the power to exclude or limit non-residents as long as the classifications are not unreasonable or arbitrary.

#### b. Legislative Research

Prior to 1959, Texas did not specifically regulate shrimp by statute or regulation. State agencies were given authority to broadly manage aquatic species and natural resources. Early state agencies issued orders that began to limit certain shrimp fishing techniques or geographic areas. However, the agencies did not promulgate regulations specific to shrimp management until the Texas Shrimp Conservation Act of 1959. Early statutory requirements for non-resident shrimp fishermen began in 1945. The state increased regulation and oversight of shrimp fishing with the passage of the Texas Shrimp Conservation Act of 1959, Texas Shrimp Fishery Management Plan of 1989, and the Shrimp License Management Program of 1995. Shrimp fishing is currently regulated under the Texas Parks and Wildlife Code §§ 77.001 – 77.155.

#### 1895 authorization of Office of the Fish and Oyster Commission

In 1895, House Bill 55 authorized the creation of the Office of the Fish and Oyster Commission. The Commission's purpose was to protect marine life along Texas bays and coastal waters. Additionally, the Commission was given authority to monitor fish preservation. House Bill 55 did not specifically address shrimp fishing. Instead, it established broad oversight of marine life.

#### 1929 Senate Bill authorizing the Texas Game, Fish, and Oyster Commission

In 1929, Senate Bill 83 eliminated the Office of the Fish and Oyster Commissioner and created the Texas Game, Fish, and Oyster Commission. The Commission was composed of six members with six-year terms. The Commission made decisions regarding fish hatcheries, oysters, and predator control activities. Like the 1895 Office of the Fish and Oyster Commission, S.B. 83 did not address shrimp management specifically, but rather general marine life management. In 1951, the Commission was renamed the Texas Game and Fish Commission by Senate Bill 463.

#### 1945 Vernon's Texas Statutes Penal Code

Enacted in 1945 as part of Texas' Penal Code, the Texas legislature broadly regulated licenses for commercial fishing. The provisions were codified under Title 13 - Offenses Against Public Property, Chapter 6 - Game, Fish, and Oysters, Article 934. Section 3 prohibited a taking of shrimp by a non-resident commercial fisherman without a license from the Game, Fish, and Oyster Commission. Article 934 imposed a penalty fee for any non-residential commercial fisherman that took aquatic species out of the state without a Texas license. Section 6 of Article 934 established a boundary for commercial fishermen. This boundary applied to resident and non-resident commercial fisherman. The boundary extended from "Sabine Pass" through "Jaycee Pier" and extending three leagues into the Gulf of Mexico along the coast to the boundary between Texas and Mexico. This Act was repealed in 1985.

### Texas Shrimp Conservation Act of 1959.

In 1959, the Texas legislature enacted a management statute specific to shrimp: the Texas Shrimp Conservation Act of 1959. The purpose of the Act recognized that shrimp were an important resource and needed to be protected from depletion so that the people of Texas could benefit from the industry. Under the Texas Shrimp Conservation Act of 1959, the Game and Fish Commission was given oversight authority of shrimp management. The Act established two responsibilities for the Game and Fish Commission: 1) research shrimp management and factors affecting the population, and 2) limit takings of shrimp and establish license requirements. The license requirements differentiated between commercial fishing in bay waters and gulf waters. Additionally, the Act placed restrictions on shrimp fishing, type of shrimp, time of fishing, areas of fishing, and imposed penalties. This act was repealed in 1975 by the Parks and Wildlife Code. Current regulation of shrimp fishing is codified in the Parks and Wildlife Code.

### Texas Shrimp Fishery Management Plan of 1989

In 1989, the Texas Parks and Wildlife Department published the Texas Shrimp Fishery Management Plan. The Parks and Wildlife Code required the Texas Parks and Wildlife Department to publish a management plan and economic impact analysis before any changes could be made to shrimp fishing regulations. The purpose of the management plan was to establish a broad management strategy for the Texas shrimp fishery. The statute required the Texas Parks and Wildlife Commission (Commission) to consider six factors for managing shrimp:

1. Measures to prevent overfishing while achieving the optimum yield for the fishery.
2. Measures based on the best scientific information available.
3. Measures to manage shrimp throughout their range.
4. Measure that will promote efficiency in utilizing shrimp resources.
5. Measures that will minimize cost and avoid unnecessary duplication in administration.
6. Measures to enhance enforcement.

Along with these consideration factors, the Commission determined that it would treat shrimp similar to other publicly-owned natural resources managed by the state, such as oil, gas, or timber. In determining the management plan, the Commission utilized input from public hearings and comments, the Texas Coastal and Marine Council, the Texas Shrimp and Oyster Industry, the United Shrimp Association, the Texas Shrimp Association, and other interested organizations.

### The Shrimp License Management Program of 1995

The Shrimp License Management Program was signed into law in 1995 when the Texas Legislature passed Senate Bill 750. This Bill established a shrimp limited entry program where commercial shrimp fishing licenses would not be granted or renewed unless the fishermen already owned the fishing vessel prior to 1995. Other key provisions of the Shrimp License Management Program include:

1. A buyback program for fishermen to sell back a shrimp fishing license
2. A review board to hear cases by fishermen appealing licensing determinations
3. Restrictions on vessel upgrades
4. Restrictions on license transfers
5. Suspension of license for violations of the program

## Texas Parks and Wildlife Code

Shrimp management is currently codified and regulated under the Texas Parks and Wildlife Code. The shrimp management provisions in the Texas Parks and Wildlife Code adopted by the Legislature in 1975 repealed the Texas Shrimp Conservation Act of 1959. Specifically, Texas Parks and Wildlife Code §§ 77.001 – 77.155 apply to shrimp fishing. The statute authorizes the Game and Fish Commission – a division of the Texas Parks and Wildlife Department – to regulate the catch, possession, purchase, and sale of shrimp. The Game and Fish Commission is required to consider several factors when implementing regulations and must include an economic impact analysis. Some of these factors include consideration of the prevention of overfishing, the best scientific information available, efficiency, avoidance of confusion, enhancement of enforcement, and minimization of cost. The limited entry program, as well as the license buyback program, established under the Shrimp License Management Program of 1995 is codified in the Texas Parks and Wildlife Code.

## II. Federal Law Research

### c. Case Law Research

Prior to the 1970's and the enactment of the Magnuson-Stevens Act, most fishing activity was regulated by state action. Therefore, most federal case law directly impacting shrimp fisherman occurs after 1976. Most of the litigation issues arise from requirements of the Magnuson-Stevens Act and implementation of fishery management plans. For this project, case law research was limited to the United States Supreme Court, United States Court of International Trade, United States Court of Appeals for the Fifth Circuit (which covers Texas), and Federal District Courts located in Gulf States.

### *Gospodonovich v. Clements*, 108 F.Supp. 234 (E.D.La. 1951)

This case analyzed the ability of a state to prohibit fishing by fisherman of other states. A Louisiana statute created a licensing requirement that varied depending on whether the fisherman was a resident or nonresident of the state. The licensing requirements were enforced up to 27 miles offshore. Six commercial fishermen from Alabama and six commercial fishermen from Mississippi brought suit against the Louisiana agency implementing the licensing statute and argued the statute was a violation of the privileges and immunities clause of the United States Constitution. The petitioners were commercial fisherman of fish, shrimp, and oysters. The court found that the licensing program used a distinction based solely on citizenship and was therefore an unconstitutional violation of the privileges and immunities clause.

*State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)

The State of Louisiana and the “Concerned Shrimpers of Louisiana” brought suit against National Marine Fisheries Service (NMFS) regulations requiring the installation and use of turtle excluder devices in trawling nets. In 1987, the agency issued a final regulation that required shrimp trawlers in the Gulf and South Atlantic region to reduce the incidental catch of sea turtles and install turtle excluder devices. The State of Louisiana argued the regulation was invalid because it violated the shrimp fishermen’s due process and equal protection rights. On appeal, the Fifth Circuit Court of Appeals upheld NMFS’s regulations requiring turtle excluder devices.

*Earth Island Institute v. Christopher*, 913 F.Supp. 559 (CIT 1995)

In this case, the United States Court of International Trade analyzed the applicability of the Endangered Species Act requirements to fisherman importing shrimp or shrimp products. Environmental organizations brought suit to compel protection of sea turtles from shrimp trawling. These organizations argued that NMFS was required to restrict shrimp fishing in order to comply with the Endangered Species Act. After deciding a number of procedural arguments, the court ultimately ordered the agency to prohibit the importation of shrimp harvested in the wild with commercial fishing technology “which may adversely affect” endangered species of sea turtles.

*Center for Marine Conservation v. Brown*, 917 F.Supp.1128 (S.D.Tex. 1996)

Environmental groups brought an action against NMFS in federal district court. In this case, the environmental groups argued that the agency had failed to require commercial shrimp fisherman to take measures to ensure the protection of endangered sea turtles. Under the authority of the Endangered Species Act, NMFS issued a Biological Opinion that allowed for some incidental taking of sea turtles by shrimp commercial fisherman. Among other arguments, the environmental groups claimed this was a violation of the Endangered Species Act and requested the court to require NMFS to rescind the incidental take authorization and implement shrimp fishing management tactics to ensure the protection of the endangered sea turtles. The court disagreed with the environmental organizations and held NMFS acted properly and the incidental take of sea turtles was proper.

*Coastal Conservation Association v. Gutierrez*, 512 F.Supp.2d 896 (S.D.Tex. 2007)

In this case, environmental organizations challenged NMFS’s adoption of amendments to the Reef Fish Management Plan. NMFS was reviewing actions to preserve red snapper in the Gulf of Mexico. The case noted the shrimp fishery was believed to be the most lethal source of red snapper mortality. The agency approved an amendment to the Reef Fish Management Plan that included a conclusion that no regulatory action was needed to end overfishing and rebuild the red snapper stock. In response, the environmental organizations petitioned the court to require the agency to address the failure of the shrimp industry to utilize bycatch reduction devices to meet the rebuilding stock requirements for the red snapper. The court agreed with the environmental organizations and held the amendment failed to minimize bycatch of red snapper.

#### d. Legislative Research

As a general rule, the federal government has authority to manage fishing activities in water three to two hundred miles off the coasts of the United States. Prior to the passage of the Magnuson-Stevens Act in 1976, fishing was primarily regulated through state programs. After enactment of the Magnuson-Stevens Act, shrimp fishing in federal waters is primarily regulated and impacted by management decisions occurring under authority of the Magnuson-Stevens Act.

##### Endangered Species Act of 1973

The Endangered Species Act was enacted in 1973 for the purpose of protecting various species of fish, wildlife, and plants that are threatened or in danger of extinction. If a species is determined to be threatened or endangered, then an agency, usually the Secretary of Interior or Secretary of Commerce, is required to develop and implement recovery plans with specific action to be taken in order to bring the species to the point where protection from the Endangered Species Act is no longer required. One of the protective measures of the Endangered Species Act is the prohibition on “taking” an endangered species. A take may include activities that harass, harm, wound, trap, capture, or collect an endangered species. Federal agencies are also required to adhere to consultation requirements and environmental analysis to ensure that regulations, policies, and federal activities do not impact or take endangered species.

##### Magnuson-Stevens Act of 1976<sup>2</sup>

#### a. Authority and Jurisdiction

In 1976 Congress passed the Magnuson-Stevens Act. The Act established the Exclusive Economic Zone (EEZ) within the area between the state boundary line and 200 miles offshore. Within the EEZ, the Act established rules and authority to manage fishing activities. The Act has been reauthorized and amended several times. The Act gave authority to NMFS, a division of the National Oceanic and Atmospheric Administration (NOAA), to manage fishing activities within the EEZ. In some instances, NMFS may exercise authority in state waters. If state management of a fishery in state waters will “substantially and adversely affect” fishery management of a fishery plan in federal waters, then NMFS may exercise authority over fishing activities in state waters. One example of this management authority is known as the “Texas closure” where shrimp fishing is limited for a period of time in both federal waters and state waters. In limited circumstances, states may sometimes exercise authority in federal waters. For example, states may regulate state registered fishing vessels in federal waters if there is no fishery management plan or federal fishing regulations for that fishery.

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<sup>2</sup> The law was originally known as the Fishery Conservation and Management Act. Pub. L. No. 94-265, § 2. Congress renamed it the Magnuson Fishery Conservation and Management Act in 1980. Pub. L. No. 96-561, tit. II, § 238. In 1996, the law was renamed the Magnuson-Stevens Fishery Conservation and Management Act. Pub. L. No. 104-108, Tit. II, § 211.

## b. Management of Fisheries

The Act created a regulatory framework where fisheries are managed by a fishery management plan through regional fishery management councils. There are eight regional fishery management councils. The Gulf of Mexico Fishery Management Council oversees fishery management in the waters off the Texas coast. Fishery management councils are composed of mandatory members and appointed members. Appointed members may include citizens such as fishing industry members, nominated by the state governors and appointed by the Secretary of Commerce. Once a fishery is determined to need “conservation and management” then the fishery management council develops a fishery management plan. The Act contains required and optional standards that the fishery management plans may include. Unless NMFS finds the plan to be inconsistent with the Act or other law, then NMFS must approve the fishery management plan. Some of the most litigated issues of fishery management plans include the standards used to:

- Prevent overfishing and rebuild overfished fish populations;
- Reduce bycatch;
- Utilize scientific information;
- Protect essential fish habitat.

## c. Foreign Trade

One of the goals of the Magnuson-Stevens Act was to promote domestic commercial fishing and fully utilize fishing resources. Under authority of the Magnuson-Stevens Act, the Secretary of State and Secretary of Commerce may negotiate Governing International Fishery Agreements (GIFAs) with foreign nations for fishing activities within the EEZ. After a GIFA is approved, Congress must ratify it. After amendments in 1991, foreign vessels were no longer permitted to conduct fishing in the EEZ. With some exceptions, there continues to be no foreign fishing permitted within the EEZ.

### Shrimp Fishery Management Plan of 1981

Under authority of the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council implemented the Shrimp Fishery Management Plan in 1981. The purpose of the plan was to enhance shrimp yield in volume and value. The plan created a 45-day seasonal closure off the coast of Texas (commonly referred to as the Texas closure) to protect brown shrimp from nursery areas. The plan also established a reporting system for vessels dealers and processors. The plan was subsequently amended many times. Below is a brief description of the amendments:

- Amendment 1: authorized the Regional Administrator of NOAA to adjust the Texas closure or eliminate the closure for one year.
- Amendment 2: updated catch and economic data in the fishery management plan.
- Amendment 3: updated shrimp and stone crab gear inconsistencies applicable to the Florida coast.



- Amendment 4: revised objectives of the fishery management plan, and the Texas closure was extended to February 1<sup>st</sup>.
- Amendment 5: revised guidelines to include a scientifically measurable definition of overfishing and defined overfishing for Gulf brown, pink, and royal red shrimp.
- Amendment 6: eliminated annual reviews of the Tortugas Shrimp Sanctuary (located along Florida coast).
- Amendment 7: defined overfishing of white shrimp and eliminated the total allowable level of foreign fishing for royal red shrimp.
- Amendment 8: addressed management of royal red shrimp.
- Amendment 9: addressed the issue of red snapper bycatch in shrimp trawl fishery.
- Amendment 10: required the installation of bycatch reduction devices that reduce the bycatch of finfish by at least 30%.
- Amendment 11: required vessels harvesting shrimp in the EEZ to obtain a commercial shrimp vessel permit from NMFS.
- Amendment 12: established the Tortugas Marine Reserves.
- Amendment 13: defined maximum sustainable yield, optimum yield, and the overfishing threshold. The amendment also established a moratorium on the issuance of commercial shrimp vessel permits.
- Amendment 14: established a target reduction goal for juvenile red snapper mortality. The amendment also addressed overfishing and bycatch issues in both the red snapper fishery and shrimp fishery.
- Amendment 15: revised annual catch limits for royal red shrimp.
- Amendment 16: extended the Gulf shrimp commercial permit moratorium for 10 more years (up to 2026).

#### Reef Fish Management Plan of 1984

Under authority of the Magnuson-Stevens Act, the Gulf of Mexico Fishery Management Council implemented the Reef Fish Management Plan in 1984. Juvenile red snapper were often a bycatch in shrimp trawling activities, and the plan was later amended to address the effects of shrimp trawling on red snapper. The plan contained restrictions on commercial and recreational fishing catches to help rebuild the red snapper stock. Red snapper commercial fishing is regulated through a permitted fishing quota program. The Council regulates recreational fishing by setting a season, setting a quota, and then setting a season length based on how long it would take the recreational sector to catch the quota. The plan has been amended several times since 1984.

#### Regulation for Turtle Exclusion Device Requirements of 1987

In 1987, NMFS implemented a regulation requiring U.S. shrimp fisherman to utilize one of five turtle exclusion devices (TEDs). Following this regulation, there were a variety of lawsuits filed that resulted in inconsistent usage and times for TED requirements. In response, this regulation was updated in 1989 and required widespread consistent use of TEDs.

### *Shrimp Import Law for Sea Turtle Conservation of 1989*

In 1989, Public Law 101-162 required the United States to develop agreements with foreign nations to establish goals for sea turtle conservation. The law banned the United States from importing commercially harvested shrimp from countries that have not been certified as having a regulatory program comparable to that of the United States for reducing bycatch of sea turtles in shrimp trawls.

### *Reef Fish Management Plan Regulatory Amendment of 1998*

The Magnuson Stevens Fishery Conservation and Management Act of 1996 contained provisions requiring management plans to address bycatch and rebuild overfished fisheries. In response, the Gulf of Mexico Fishery Management Council passed an amendment to the Reef Fish Management Plan of 1979. The amendment required bycatch reduction devices (BRD) for shrimp trawls that were inadvertently catching red snapper in their shrimp nets.

### *Magnuson-Stevens Act Amendments of 2007*

The 2007 amendments to the Magnuson-Stevens Act authorized a detailed catch share program. The catch shares are known as limited access privilege programs (LAPPs) and individual fishing quotas (IFQs). Under this program, each recipient of a catch share is directly responsible to stop fishing when its fishing allocation is reached. Fishing participants in the Gulf of Mexico may directly approve IFS programs and receive cost recovery for administering the LAPPs. The Gulf Coast does not currently have a shrimp LAPP in place. The 2007 amendments also required fishery management councils to develop catch limits that “may not exceed the fishing level recommendations” of the scientific and technical committee, and the amendments required plans to limit fishing to sustainable levels to allow for overfished fisheries to rebuild.