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A Colossal Bird's Nest: The Backlash Surrounding the Management of the Gulf of Mexico Red Snapper Fishery

INTRODUCTION

“Think about it like this,” posited one member of the Theodore Roosevelt Conservation Partnership, “[i]f the federal government told the states of Montana, Wyoming, Colorado, New Mexico, and Nevada that their hunters were going to get one day to kill a mule deer on their own, but if they were willing to pay a guide, they’d get 40 days,” what option would the hunters choose?¹ The question, propounded in response to new federal regulations bearing on red snapper populations in the Gulf of Mexico, juxtaposes the interests of sportsmen in two drastically different environments. By recently passing regulations regarding Gulf of Mexico red snapper, the federal government has reeled important and controversial issues to the surface of the whirling sea of discontent between Gulf fishermen and government agencies. Is there merit to the conservationist’s analogy? And, if so, how and why would behavioral patterns of Midwest hunters be applicable to red snapper fishermen in the Gulf Region?

The Gulf red snapper persists as a hot commodity for the tourism and fishing industries in the Gulf region as well as in restaurants across the United States. The bright rosy-red hue of the red snapper’s scales conceals the soft, white, mild-flavored meat that leaves seafood lovers craving more. These beautiful creatures glide effortlessly through the Gulf of Mexico’s reefs and oil rigs everyday, yet they are completely unaware of the storm brewing above the surface.

Federal management of red snapper in the Gulf of Mexico has been described as “a mess,”² “pure chaos,”³ and “a painfully obvious attempt to disenfranchise the recreational sector in favor of the desires of a New York based environmental activist group to end public access to the red snapper

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1. Todd Masson, *Feds to give Significant Portion of Recreational Red-snapper Quota to Charter-boat Industry*, NOLA, (Nov. 1, 2014, 12:53 PM), http://www.nola.com/outdoors/index.ssf/2014/10/feds_to_give_significant_porti.html [<https://perma.cc/EJ79-2DGU>].

2. David Cresson, *Guest Commentary: Gulf Fishery Management a Huge Mess*, THE ADVOCATE, (Aug. 28, 2014), <http://theadvocate.com/news/opinion/10116820-123/guest-commentary-gulf-fishery-manangement> [<https://perma.cc/Y76Y-4J5F>].

3. *Chaos Reigns at Gulf Council*, COASTAL CONSERVATION ASS’N (July 31, 2014), <http://www.joincca.org/articles/680> [<https://perma.cc/HA3A-YWFD>].

fishery.⁷⁴ Indeed, both fishermen and federal agencies alike have fallen under fire for the disorderly management of the fishery.

Demand for the high quality of red snapper has prompted both commercial⁵ and recreational⁶ fishermen to harvest the species as quickly and efficiently as possible.⁷ This “derby-style” competition has led to immense problems in the management of the species. Proliferating litigation, incredibly short fishing seasons, and federal emergency rulings have converged, casting the Gulf red snapper fishery into a frenzied and confusing state.⁸

Disagreements and competition among commercial and recreational fishermen, coupled with regulations that fail to address those conflicts fairly and successfully, continue to swirl around this economically and socially important fish. One factor vital to the disputes over red snapper management in the Gulf concerns the actual health of the Gulf red snapper population. Some red snapper fishermen, furious with the exceedingly truncated length of recent federal red snapper seasons in the Gulf, allege that the red snapper population is healthier than it has ever been; they view the short seasons as a denial of access to an abundant natural resource.⁹ Federal agencies and other interested parties, however, assert that, because the species is overfished, these measures are a necessary component of a rebuilding plan.¹⁰ Regardless of the validity of either side’s contention, the recent federal management standards utilized in regulating Gulf red

4. *Vitter Urges Gulf Council to Table Divisive Red Snapper Proposal*, COASTAL CONSERVATION ASS’N, <http://www.ccalouisiana.com/ccal1/index.php/press-room-60/press-releases/582-vitter-urges-gulf-council-to-table-divisive-red-snapper-proposal> [https://perma.cc/88EL-ZLDC] (last visited Jan. 28, 2016).

5. Commercial fishing is specified as “fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter, or trade.” 16 U.S.C. § 1802(4) (2013).

6. Recreational fishing is designated as “fishing for sport or pleasure.” 16 U.S.C. § 1802(37) (2013).

7. *See Gulf Anglers Unite for Red Snapper*, THE RECREATIONAL FISHING ALLIANCE (Apr. 2, 2014), <http://joinrfa.org/2014/04/31314-gulf-anglers-unite-for-red-snapper/> [https://perma.cc/MDJ2-HW8A].

8. This comment will analyze each of these issues and how they relate to current problems with federal Gulf red snapper management.

9. *Help Fix the Gulf Red Snapper Problem*, AMERICAN FISHING TACKLE COMPANY (Sept. 10, 2014), <http://www.aftco.com/wheelhouse/gulf-red-snapper-do-your-part/> [https://perma.cc/9X4E-DF6Z].

10. GULF OF MEXICO FISHERY MGMT. COUNCIL, RECREATIONAL RED SNAPPER SECTOR SEPARATION: FINAL AMENDMENT 40 TO THE FISHERY MGMT. PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO, 1 (2014), *available at* http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/reef_fish/2013/am40/documents/pdfs/gulf_rf_am40_feis.pdf [hereinafter FINAL AMENDMENT 40]; *see also Red Snapper*, HARTE RESEARCH INST. GULF OF MEXICO STUDIES, <http://www.harterresearchinstitute.org/ochealth-research/red-snapper> [https://perma.cc/B9S7-ECX8] (last visited Jan. 16, 2015) [hereinafter HARTE RESEARCH INST.].

snapper have sparked tremendous controversy, litigation, quota overages, violations of federal law, and inequitable access to red snapper for certain fishermen.

Many red snapper fishermen are worried that the recent enactment of Amendment 40 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Amendment 40) marked the beginning of the privatization of the Gulf of Mexico red snapper industry.¹¹ These fishermen allege that the approval of the amendment will ultimately place access to Gulf red snapper in the hands of a few individuals for private profit.¹² Determining the credibility of this assertion necessitates an examination of the current status of the Gulf of Mexico red snapper fishery and the adequacy of the management measures used to regulate the species.

In order to compete with state regulations and fishermen's rapid harvesting of red snapper, federal regulations have continuously been enacted that attempt to cure short-term concerns, but those regulations fail to address the underlying issue creating the predicament with red snapper management. An analysis of recent federal regulations, litigation, and statistics regarding the harvesting of red snapper illuminates the main problem: The inadequate regulation of the recreational red snapper fishing sector lies at the root of the problems in overall Gulf red snapper management.

This comment addresses the issues with contemporary federal regulations governing the Gulf of Mexico recreational red snapper fishery and suggests the appropriate approach to take in managing the species. Part I will provide a brief history of the Gulf red snapper fishery and the administrative and legal authority under which the fishery is governed. Next, Part II will explore the promulgation of the first federal rules concerning Gulf red snapper, along with the federal management strategy of the recreational sector of the fishery utilized until the enactment of Amendment 40. Part III will examine initial litigation, the 2014 recreational red snapper season, and the reasons for the chaos surrounding the regulation of the fishery in recent years. Part IV will discuss Amendment 40 and its objectives, the 2015 recreational red snapper

11. See GULF OF MEXICO FISHERY MGMT. COUNCIL, RECREATIONAL RED SNAPPER SECTOR SEPARATION: DRAFT OPTIONS FOR AMENDMENT 40 TO THE FISHERY MGMT. PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO, 1 (2014), available at <http://gulfcouncil.org/docs/amendments/Amendment%2040%20Sector%20Separation.pdf> [hereinafter DRAFT OPTIONS FOR AMENDMENT 40]; see also *Amendment 40 Privatization Scheme*, COASTAL CONSERVATION ASSOCIATION, http://www.joincca.org/Amendment40_Highlights [https://perma.cc/LH27-NALV] (last visited Jan. 16, 2015) [hereinafter *Amendment 40 Privatization Scheme*].

12. See *Amendment 40 Privatization Scheme*, *supra* note 11.

season, recent litigation, and why Amendment 40 is not the solution for the long-term management of the fishery. Finally, Part V proposes the optimal solution to resolve the issues facing federal Gulf red snapper management.

I. OPENING THE TACKLEBOX: THE BACKGROUND ON THE GULF RED SNAPPER FISHERY

Throughout the first half of the twentieth century, the Gulf red snapper, scientific name *Lutjanus campechanus*, was commonly confused with other snapper species, such as the Caribbean red snapper, *Lutjanus purpureus*.¹³ Despite the difference in species, the term “red snapper” was usually used in reference to the former, because Gulf red snapper were known as the superb caliber of fish.¹⁴ In the 1960s, the distinction between the different species—and the inherent eminence of the Gulf red snapper—became apparent. Nevertheless, fishermen began to use the generic term “red snapper” to refer to all types of red snapper.¹⁵ Regardless of potential misnomers, the Gulf red snapper maintains prominence as arguably the most sought after fish, yielding the greatest economic impact on both the recreational and commercial fishing industries,¹⁶ which in turn provide billions of dollars to the economies of Gulf Coast communities each year.¹⁷

13. JOSEPH E. TASHIRO, ANNOTATED BIBLIOGRAPHY AND SUBJECT INDICES FOR WESTERN ATLANTIC SNAPPERS (LUTJANIDAE), 3 (1979), available at <http://www.st.nmfs.noaa.gov/tm/sefc/sefc008.pdf>.

14. *Id.*

15. *Id.*

16. *Red Snapper (Lutjanus Campechanus)*, GULF COAST MARINE LIFE CENTER, http://www.gcmlc.com/species-fish-red_snapper.php [<https://perma.cc/E5DV-ERME>] (last visited Jan. 29, 2016) (“Red snapper is the most economically important fish in the Gulf of Mexico for both the commercial and recreational fishing industries.”); see also HARTE RESEARCH INSTITUTE, *supra* note 10 (“Red snapper represents a vital economic commodity . . . and supports highly lucrative commercial and recreational fisheries.”).

17. *Landrieu: Nine-Day Red Snapper Season Hurts Fishermen and Gulf Economy*, COASTAL CONSERVATION ASS’N, <http://www.ccalouisiana.com/ccal1/index.php/press-room-60/press-releases/555-landrieu-nine-day-red-snapper-season-hurts-fishermen-and-gulf-economy> [<https://perma.cc/FP4U-92JC>] (last visited Jan. 29, 2016).

A. *The Spawning: A Brief History of Gulf Red Snapper Fishing*

Fishing efforts for red snapper in the Gulf of Mexico began in the 1840s in the northwestern portion of the Gulf;¹⁸ by 1872, the red snapper fishery constituted its own self-sustaining industry.¹⁹ With the increased prevalence of ice and trains for transport in the late nineteenth and early twentieth century, the harvesting of red snapper greatly increased—in the early 1900s, it was not uncommon for total annual Gulf red snapper landings to exceed ten million pounds.²⁰ Because increased fishing depleted red snapper in local waters, fishermen began expanding their fishing voyages to other areas of the Gulf.²¹ Soon thereafter, tourism in the Gulf states, the production of fiberglass boats, and the improvement in boat motor technology in the mid-twentieth century greatly increased recreational fishing activity in the Gulf.²² This proliferation of sport fishermen led to an astronomical spike in the annual recreational harvesting of red snapper, from an estimated 50,000 pounds to over five million pounds between World War II and the 1990s.²³

Unfortunately, consistent, reliable data pertaining to pre-1981 recreational red snapper harvests is difficult to determine on a year-by-year basis.²⁴ Nevertheless, it is without question that red snapper harvesting reached its climax in the 1960s.²⁵ Subsequent harvests would not reflect continued growth at the same rate as in years prior due to a new fishing prohibition in foreign waters and a trending decrease in the size of Gulf snapper.²⁶

18. PETER B. HOOD ET AL., *A History of Red Snapper Management in the Gulf of Mexico*, in RED SNAPPER: ECOLOGY AND FISHERIES IN THE U.S. GULF OF MEXICO, 1 (2007), available at <http://web.fisheries.org/proofs/red/hood.pdf>.

19. B.J. GALLAWAY ET AL., *Estimates of Shrimp Trawl Bycatch of Red Snapper (Lutjanus campechanus) in the Gulf of Mexico*, in FISHERY STOCK ASSESSMENT MODELS, ALASKA SEA GRANT COLLEGE PROGRAM, 817, 818 (1998), available at http://nsgl.gso.uri.edu/aku/akuw97002/akuw97002_part9.pdf.

20. Hood et al., *supra* note 18.

21. *Id.*

22. JOHN F. WALTER, BACKCALCULATION OF RECREATIONAL CATCH OF RED GROUPER FROM 1945 TO 1985, Nat'l Marine Fisheries Services, Southeast Fisheries Science Center, SEDAR12-DW15 Contribution (July 2006), 3, available at <http://sedarweb.org/docs/wpapers/S12%20DW15%20BackCalc%20rec%20catch.pdf>.

23. SEDAR 7, *Stock assessment of SEDAR 7: Gulf of Mexico red snapper*, Southeast Data, Assessment, and Review, Charleston, S.C., 480 (2005). See also Hood et al., *supra* note 18, at 1–2.

24. Hood et al., *supra* note 18, at 1–2.

25. *Id.*

26. *Id.*

B. Casting the Sinking Net: The Administrative and Legal Authority Under which the Gulf Red Snapper Fishery Floats

Operating under the United States Department of Commerce and the Secretary of Commerce (Secretary), the National Oceanic and Atmospheric Administration (NOAA) is the federal agency responsible for the management and conservation of the nation's oceanic species.²⁷ The National Marine Fisheries Service (NMFS) is the national office of the NOAA controlling fishery management.²⁸ In conjunction with regional councils, the NMFS is charged with overseeing federal fishery management plans and ensuring proper regulation of United States territorial waters.²⁹

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to govern fishery management in United States federal waters.³⁰ Commonly referred to as the Exclusive Economic Zone (EEZ), United States federal waters in the Gulf of Mexico extend from the end of state waters outward two hundred nautical miles.³¹ Legislators passed the MSA for several purposes: (1) to conserve and manage fisheries in the waters surrounding the United States, (2) to foster commercial and recreational fishing industries with appropriate management standards, and (3) to implement fishery management plans that maintain the optimum yield of fisheries while complying with national standards.³² The MSA operates in accordance with ten "national standards" to keep the goals of fishery management in view while implementing legislation.³³ Attempting to properly conserve and preserve oceanic species, while also allowing fishermen to utilize the oceans' natural resources by harvesting these species, proves a daunting and difficult task. The United States District Court for the District of Columbia has opined that the "legal framework Congress established to direct the management of fish stocks is of necessity multifaceted, specific, and complex."³⁴

27. 5 U.S.C. app. § 1 (2010).

28. Niki Pace, *Ecosystem-Based Management under the Magnuson-Stevens Act: Managing the Competing Interests of the Gulf of Mexico Red Snapper and Shrimp Fisheries*, 2 SEA GRANT L. & POL'Y J. 1, 3 (2009).

29. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 348 at Sec. 302(b)(1)(B); *see also* 16 U.S.C. § 1852(b)(1)(B).

30. 16 U.S.C. §§ 1801-84 (2013).

31. 16 U.S.C. §§ 5102(6), 1802(11), 1811(a).

32. *Guindon v. Pritzker*, 31 F. Supp.3d 169, 175 (D.D.C. Mar. 26, 2014); *see also* 16 U.S.C. § 1801(b).

33. *See* 16 U.S.C. § 1851(a).

34. *Guindon*, 31 F. Supp.3d at 175 (describing the provisions of the MSA).

In order to assist the NMFS in the implementation of fishery management and regulation, the MSA established eight federal regional councils to aid in the administration of each respective region's fisheries.³⁵ These regional councils of the NOAA are charged with developing fishery management plans (FMPs) for each fishery over which they bear authority, respectively.³⁶ Once each regional council submits FMPs, FMP amendments, or proposed regulations to the Secretary of Commerce, the Secretary evaluates the plans and ensures that they align with the provisions of the MSA and other pertinent laws.³⁷ The Secretary, operating through the NMFS, then has thirty days to approve, partially approve, or deny the proposed plans or regulations.³⁸

The Gulf of Mexico Fisheries Management Council (Gulf Council) is the regional chapter of the NOAA that regulates the fisheries of the Gulf of Mexico.³⁹ The Gulf Council has federal jurisdiction over the Gulf coastal regions of Louisiana, Mississippi, Alabama, Florida, and Texas.⁴⁰ Pursuant to section 303(a)(15) of the MSA, FMPs must establish mechanisms for identifying annual catch limits⁴¹ while also implementing regulations to prevent overfishing—including accountability measures.⁴² Section 407(d) of the MSA, applying exclusively to the Gulf of Mexico red snapper fishery,⁴³ dictates that FMPs—or any amendments thereto—must create separate recreational and commercial fishing quotas that, once reached, place a prohibition on any future harvesting of red snapper for the rest of the fishing year.⁴⁴

When contemplating whether to enact certain regulations or FMPs, the Gulf Council analyzes the Southeast Data, Assessment, and Review (SEDAR) stock evaluation to review the status of the red snapper population.⁴⁵ SEDAR stock assessments gauge information on the red snapper's average weight, spawning habits, mortality rates, overall

35. 16 U.S.C. § 1852(a)(1).

36. 16 U.S.C. § 1852(h)(1).

37. 16 U.S.C. §§ 1854(a), 1851(a), 1854(b)(1).

38. 16 U.S.C. § 1854(a)(3).

39. 16 U.S.C. § 1852(E).

40. *Id.*

41. Annual Catch Limits (ACL) represent the amount of fishing that the NMFS permits each year. *Guindon*, 31 F. Supp. 3d at 177.

42. Accountability Measures (AM) are “management controls to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs should address and minimize both the frequency and magnitude of overages and correct the problem that caused the overage in as short a time as possible.” 50 C.F.R. § 600.310(g)(1)(2013); *see also* 16 U.S.C. § 1853(a)(15).

43. *Guindon*, 31 F. Supp. 3d at 176; *see also* 16 U.S.C. § 1853.

44. *Guindon*, 31 F. Supp. 3d at 176; *see also* 16 U.S.C. § 1883(d)(1).

45. *Guindon*, 31 F. Supp. 3d at 178.

population, and other factors indicating the size and health of the fishery.⁴⁶ The Council utilizes these assessments to determine whether to develop new FMPs or to amend existing regulations.⁴⁷

II. CHUMMING THE WATER: FEDERAL REGULATION OF GULF RED SNAPPER

Federal management of Gulf red snapper is a relatively modern regulatory scheme, beginning in the late twentieth century. In the past decade or so, SEDAR assessments, along with other studies and reports, have prompted a dynamic trend of federal red snapper regulations attempting to efficiently manage the species.

A. *The First Bite: Background on Gulf Red Snapper Regulations*

Initial regulations were imposed on the red snapper fishery in the 1980s due to reports regarding the unhealthy status of the red snapper fishery.⁴⁸ By-catch—the incidental and inadvertent catching of red snapper in shrimping nets—was the impetus for imposing the initial regulations on Gulf snapper.⁴⁹ With the expansion of the Gulf shrimping industry in the 1960s, large amounts of juvenile red snapper were killed in shrimp trawl nets, resulting in the decline of the overall red snapper population.⁵⁰ This decline prompted the creation of the original management structure of the red snapper fishery.⁵¹

From the early 1980s until 2009, SEDAR conducted red snapper population assessments. In 2009, a SEDAR study reported that the management standards were effectively rebuilding the population.⁵² According to the report, overfishing—the phenomenon occurring when the rate at which fish are removed from the water due to fishing is too high—had

46. *Id.*

47. *Id.*

48. Gloria Godsell and Mary Penny Thompson, *Issues Surrounding the Gulf of Mexico Red Snapper Fishery and the Impact of the Magnuson Act Reauthorization*, 9 TUL. ENVTL. L.J. 267, 268–70 (1996).

49. *Id.* Restrictions have since been implemented to prevent by-catch, so that this phenomenon no longer predominates as a primary concern pertinent to red snapper management and rebuilding.

50. GULF OF MEXICO FISHERY MGMT. COUNCIL, FISHERY MANAGEMENT PLAN FOR THE SHRIMP FISHERY OF THE GULF OF MEXICO, UNITED STATES WATERS, 3-110 (1981), available at <http://gulfcouncil.org/docs/amendments/SHRIMP%20FMP%20Final%201981-11.pdf>.

51. Godsell, *supra* note 48.

52. See SEDAR, *Stock Assessment of Red Snapper in the Gulf of Mexico: SEDAR Update Assessment* (2009).

ceased.⁵³ That assertion found further support in a 2013 assessment by the NMFS, which revealed that overfishing was not occurring and catch limits could therefore increase; however, that same report stated that although the stock was rebuilding, the fishery remained overfished—meaning, that, despite no active overfishing taking place, the population numbers of the stock had not rebounded and were still too low.⁵⁴

Because of the success of the rebuilding process, the catch limits of Gulf red snapper have steadily increased in recent years. The catch limit for both the commercial and recreational sectors in 2008 and 2009 was five million pounds; by 2013, the limit increased to eleven million pounds, thanks largely to the attainment of rebuilding objectives.⁵⁵ As large as that increase may seem, the NMFS further stated that the limit could have potentially soared to 13.5 million pounds in 2013, but regulators refrained from setting such a liberal limit because doing so would necessitate a deduction for the 2014 and 2015 seasons.⁵⁶

B. The Receding Tide: Gulf Red Snapper Regulations Through the 2014 Season

Red snapper fishery management has generally been split into two divisions: the commercial sector and the recreational sector. Prior to the commencement of the red snapper season, the Council would use the upcoming year's projected Acceptable Biological Catch⁵⁷ (ABC) to propose a per annum quota.⁵⁸ The recreational and commercial sectors would each be awarded an allocation of the total Gulf red snapper quota.⁵⁹ The commercial sector has received, and continues to receive, fifty-one percent of the overall quota, with the remaining forty-nine percent allocated to the recreational sector.⁶⁰ However, if enacted, Amendment 28 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico may reallocate this proportion of the quota to reflect a recreational to commercial ratio of 51.5 to

53. *See id.*

54. *See* SEDAR, *SEDAR 31: Gulf of Mexico Red Snapper Stock Assessment Report* (2013).

55. *See* FINAL AMENDMENT 40, *supra* note 10, at 35.

56. *Guindon*, 31 F. Supp. 3d at 182.

57. Acceptable Biological Catch (ABC) is “an annual catch figure, set at or below the OFL [Overfishing Limit], with the difference between the OFL and the ABC designed to account for scientific uncertainty in the SSC’s [Scientific and Statistical Committee] calculation of the OFL ABC is an expression of the amount of fish that fishermen could harvest during a particular year without overfishing the stock, with accommodation for scientific uncertainty.” *Guindon*, 31 F. Supp. 3d at 177; *see* 50 C.F.R. §§ 600.310(f)(2) (ii)(2013).

58. *Guindon*, 31 F. Supp. 3d at 178.

59. 16 U.S.C. § 1883(d).

60. *Guindon*, 31 F. Supp. 3d at 178; *see* 50 C.F.R. § 622.21.

48.5 percent, respectively.⁶¹ The Gulf Council based this decision on the results of a 2014 red snapper assessment update and alleged that this reallocation of the quota will better serve each sector's needs.⁶² Amendment 28 is currently under a public comment period.

1. Commercial Fishing Regulations

Since 2007, the commercial sector has been regulated according to an "individual fishing quota" (IFQ).⁶³ Under this program, commercial fisherman must apply for an IFQ allocation, which is the amount of Gulf red snapper that a commercial fisherman is authorized to possess, land, or sell per year.⁶⁴ This allocation is determined by "multiplying a shareholder's IFQ share times the annual commercial quota for Gulf red snapper."⁶⁵ The IFQ management measure has appropriately regulated the commercial red snapper fishing industry and prevented a quota overrun because "each IFQ allocation holder is strictly monitored to ensure they do not land more fish than pounds allocated to them through the program."⁶⁶ In fact, the IFQ program has been so effective in regulating the commercial red snapper fishing sector that the 2010 Amendment to the Reef Fish FMP states "there is no possibility of a quota overrun for the commercial sector."⁶⁷ Since the commercial sector is effectively regulated without the potential for quota overruns, the current issues in red snapper management must by necessity stem from the inadequacies of recreational red snapper regulations that fail to impede quota overruns, thereby obstructing equitable access to the federal red snapper fishery for certain fishermen.

61. GULF OF MEXICO FISHERY MGMT. COUNCIL, RED SNAPPER ALLOCATION: FINAL AMENDMENT 28 TO THE FISHERY MGMT. PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO, 18 (2015), *available at* <http://gulfcouncil.org/docs/amendments/Final%20Red%20Snapper%20Allocation%20-RF%20Amendment%2028.pdf>.

62. *Id.* at 4.

63. Individual Fishing Quota (IFQ) is defined as "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person." 16 U.S.C. § 1802(23). The Regional Administrator (RA) issues shares equivalent to a percentage of the annual commercial red snapper quota based on pertinent historical landings. These shares comprise the Gulf Red Snapper IFQ allocation that is permitted for each commercial fisherman. *See* 50 C.F.R. § 622.16.

64. 50 C.F.R. § 622.21(a).

65. *Id.* at (a)(4).

66. FINAL AMENDMENT 40, *supra* note 10, at 1; *see also* *Guindon*, 31 F. Supp. 3d at 178.

67. *Guindon*, 31 F. Supp. 3d at 178.

2. Recreational Fishing Regulations Through the 2014 Season

Before the enactment of Amendment 40, the recreational sector was awarded a portion of the year's overall red snapper quota and was regulated by its quota,⁶⁸ a bag limit,⁶⁹ a size limit,⁷⁰ and fishing seasons.⁷¹ The only accountability measure implemented in recreational red snapper regulations was the in-season closure.⁷² The recreational sector of the red snapper fishery was composed of two entities: private anglers/vessels⁷³ and for-hire vessels.⁷⁴ These two groups had to abide by the bag limit, size limit, and closed season regulations; additionally, they had to collectively remain within the bounds of the recreational quota. An important factor distinguishing the two recreational bodies rested in private angler's ability to fish for red snapper in federal waters when the federal season was open, and in state waters when the state season was open.⁷⁵ By contrast, for-hire operators had to abide by the length of the federal season in procuring their annual harvest and, hence, could only fish for red snapper while the federal season was open.⁷⁶ Furthermore, in 2004, the NMFS placed a moratorium on the issuance of new federal for-hire reef fish permits.⁷⁷ As a result, for-hire vessels today consist only of those who were federal for-hire operators prior to 2004.⁷⁸ Since the moratorium was issued, the number of private recreational vessels has increased, and the number of federal for-hire operators has decreased.⁷⁹ Because of the disparity between the number of private and for-hire vessels and the private vessels' ability to fish in state

68. See 50 C.F.R. § 622.21.

69. See 50 C.F.R. § 622.38(b)(3).

70. See 50 C.F.R. § 622.37(a)(1).

71. See 50 C.F.R. § 622.34(b) (stating the recreational sector season in the EEZ closes from January 1 through May 31). "NMFS estimates in advance how long it will take for the recreational sector to harvest its quota, based on historical data, then sets the season length according to that projection." *Guindon*, 31 F. Supp. 3d at 178-79.

72. *Guindon*, 31 F. Supp. 3d at 178-79; 78 Fed. Reg. at 17883; Accountability measures are "management controls to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur." 50 C.F.R. § 600.310(g)(1).

73. FINAL AMENDMENT 40, *supra* note 10, at x (describing private vessels as vessels fishing for sport or pleasure without a federal reef-fish permit).

74. *Id.* (describing for-hire vessels as vessels fishing for sport or pleasure with a federal reef-fish permit).

75. *Id.*

76. *Id.*

77. *Id.*

78. See *id.*

79. FINAL AMENDMENT 40, *supra* note 10, at x.

waters, private vessel harvesting of red snapper has accounted for a greater proportion of the recreational quota as a whole.⁸⁰

III. TANGLING LINES DURING A FEEDING FRENZY: INITIAL LITIGATION, THE 2014 SEASON, AND THE CHAOTIC STATE OF GULF RED SNAPPER MANAGEMENT

In 2012, an amendment to the Reef Fish FMP generated total red snapper quotas for the 2012 and 2013 seasons for both commercial and recreational fishermen.⁸¹ The 2012 total quota was set at 8.08 million pounds, and the 2013 total quota was fixed at 8.69 million pounds.⁸² The amendment also provided that, if the 2012 ABC was exceeded during the 2012 season, the 2012 quota would remain in place for the 2013 season.⁸³

The recreational sector exceeded its quota in 2012 by 1.187 million pounds, yet the GMFMC inexplicably chose to set the 2013 quota at 8.46 million pounds instead of again utilizing the 2012 quota as the 2012 amendment demanded.⁸⁴ The Council did not set any future quotas because of a new SEDAR stock assessment that was to be produced later in 2013.⁸⁵

In response to the NMFS's actions, the five states under GMFMC's authority planned to implement season lengths and bag limits that were less stringent than the proposed federal regulations.⁸⁶ The NMFS then issued an emergency rule in March 2013 that enacted state closure dates for the recreational sector.⁸⁷ Two months later, a "May Final Rule" implemented the 8.46 million pound (mp) quota⁸⁸ and imposed season closure dates for each Gulf state.⁸⁹ The District Court for the Southern District of Texas found that the rule was inconsistent with the requisite emergency ruling criteria measures and held the state-specific season closure dates to be a violation of 16 U.S.C. § 1851(a)(4).⁹⁰ After the district court vacated the rule,⁹¹ the NMFS set a Gulf-wide recreational sector closure date and maintained the 8.46 mp quota.⁹²

80. *Id.* at x–xi.

81. *Guindon*, 31 F. Supp. 3d at 181.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Guindon*, 31 F. Supp. 3d at 181.

88. 4.315 mp commercial quota and 4.145 mp recreational quota.

89. *Guindon*, 31 F. Supp. 3d at 181.

90. *Id.* (citing *Texas v. Crabtree*, 948 F. Supp. 2d 676, 690 (S.D. Tex. 2013)).

91. *Id.*

92. *Id.*

In July 2013, the Council devised two more proposals for the 2013 red snapper season.⁹³ The Council wanted to increase the 2013 overall quota and then, depending on the availability of unused quota, reopen the season in the fall.⁹⁴ The NMFS obtained landing estimates from the Marine Recreational Information Program⁹⁵ (MRIP) in late August that revealed an overage exceeding both the current and proposed quota.⁹⁶ Despite these discoveries, the NMFS still proceeded to reopen the season in the fall.⁹⁷

A. Setting the Hook: Guindon v. Pritzker

By 2014, the recreational fishing sector had exceeded its red snapper quota in six out of the past seven seasons.⁹⁸ In response, commercial fishermen filed suit⁹⁹ against the Secretary, the NOAA, the NMFS, and the Coastal Conservation Association (CCA)¹⁰⁰ alleging that the May Final Rule and June Temporary Rule of 2013 violated multiple provisions of the MSA.¹⁰¹ In *Guindon v. Pritzker*, the commercial fishermen contended that inadequate regulatory measures in the Gulf red snapper recreational sector, as well as consistent recreational quota overruns, posed negative effects—both current and prospective—on their industry.¹⁰²

The CCA countered that these commercial fishermen lacked Article III standing, that their claims were moot, and that they did not properly raise their concerns with the NMFS according to regulatory procedure.¹⁰³ The District Court for the District of Columbia disagreed with each of the CCA's defenses,¹⁰⁴ finding that commercial red snapper fishermen could appropriately challenge these actions because the overharvesting of red snapper could negatively affect both sectors' interests in the health of the fishery.¹⁰⁵ Plaintiffs demonstrated that overages in the recreational sector could affect the plan for "constant catch" in future years,¹⁰⁶ and the court

93. *Id.* at 193.

94. *Guindon*, 31 F. Supp. 3d at 193–94.

95. MRIP is "the primary data source for estimating" the total weight of red snapper landed by recreational fishermen. *Id.* at 179.

96. *Id.* at 183.

97. *Id.* at 193.

98. *Id.* at 188.

99. The suit was filed in the United States District Court for the District of Columbia.

100. CCA was a defendant-intervenor in the suit.

101. *Guindon*, 31 F. Supp. 3d at 192.

102. *Id.* at 193–200.

103. *Id.* at 186.

104. *Id.* at 187.

105. *Id.*

106. *Guindon*, 31 F. Supp. 3d.

held that overharvesting was directly traceable to the NMFS's actions.¹⁰⁷ The *Guindon* court also determined that plaintiffs' claims were rooted in the exact kind of agency actions for which the "capable-of-repetition-yet-evading-review" exception exists, as the recreational sector had exceeded its allotted quota in six out of the past seven years. Given the short notice of the emergency rules, these actions fell under that exception.¹⁰⁸

With no prior jurisprudence guiding the issue, the *Guindon* court interpreted section 407(d) of the MSA to require that the NMFS close the season, without the ability to reopen it, once it was determined that the quota had been reached.¹⁰⁹ As of 2013, the agency had experienced years of recreational quota overruns, and the NMFS should have acknowledged that its process in incrementally shortening the season was not working.¹¹⁰ The court opined, in *dicta*, that the NMFS could comply with the requirements of section 407(a) by enacting a regulation prohibiting the retention of fish above the quota (including setting an accurate and conservative season length in advance based on a projection of when the quota would likely be met—i.e., a dramatically shortened season), a buffer, or some other strategy.¹¹¹

The NMFS attempted to defend reopening the season despite excessive harvests by arguing that if it had the technology of MRIP landings, it would have originally set a more accurate, higher quota and ABC for the 2013 quota.¹¹² The *Guindon* court found this argument to be without merit, and it instead held that the NMFS, by its very failure to use the best scientific technology available, had violated a national standard set forth in the MSA.¹¹³ In other words, the NMFS should not have reopened the red snapper season in the fall absent utilization of the MRIP landings technology.

Additionally, the NMFS erred, according to the *Guindon* court, in failing to impose any accountability measures in accordance with section 303(a)(15) of the MSA.¹¹⁴ While the Council's Scientific and Statistical Committee (SSC) had recommended an added buffer for the recreational sector quota due to the uncertainty and management disparities between the recreational and commercial sectors,¹¹⁵ the Council did not accept the buffer regulation—and the NMFS wrongfully approved that omission.¹¹⁶ The court chose not to stipulate which accountability measures would have

107. *Id.*

108. *Id.*

109. *Id.* at 194.

110. *Id.* at 193.

111. *Id.*

112. *Guindon*, 31 F. Supp. 3d at 195.

113. *Id.* at 195.

114. *Id.* at 200.

115. *Id.* at 199.

116. *Id.* at 182.

been appropriate, leaving that determination to the discretion of agency experts.¹¹⁷

Finally, the *Guindon* court held that the NMFS violated section 304(b) and National Standard 4 of the MSA by deciding to ignore the already exceeded recreational quota and reopen the red snapper season during the fall.¹¹⁸ That violation contravened the terms of the FMP by failing to reflect the 51:49 allocation split between the commercial and recreational sectors. National Standard 4 was violated in not providing an equitable allocation of fishing privileges to all fishermen.¹¹⁹

B. Setting the Drag Too Tight: The 2014 Recreational Red Snapper Season

In May of 2014, the NMFS declared a conservatory and managerial need to issue a temporary “emergency” rule bearing on the 2014 Gulf of Mexico red snapper recreational season.¹²⁰ In its ruling, the GMFMC issued a nine-day recreational season based on the Annual Catch Target (ACT), which would run from June 1 to June 9, 2014, as well as a twenty percent buffer.¹²¹ The GMFMC openly stated that the emergency ruling was issued to prevent a recreational quota overrun, in response to the interpretation of MSA provisions under *Guindon*.¹²²

More specifically, the NMFS’s 2014 emergency ruling¹²³ responded to *dicta* in *Guindon*, wherein the court opined that an effective regulatory measure to prevent a recreational quota overrun might take the form of a dramatically shortened federal recreational red snapper season.¹²⁴ In an effort to avoid litigation similar to *Guindon*, the GMFMC enacted the 2014 emergency rule to abide by the MSA and curb recreational quota overruns.

117. *Id.* at 200.

118. *Guindon*, 31 F. Supp. 3d at 195.

119. *Id.* at 200.

120. 2014 Limited Commercial and Recreational Fishing Seasons for Red Snapper in the Southern Atlantic States, 79 Fed. Reg. 32,496, 32,497 (June 5, 2014).

121. *Id.* at 32,496.

122. *Gulf of Mexico 2014 Recreational Red Snapper Season Final Emergency Rule—Accountability Measures: Frequently Asked Questions*, NATIONAL MARINE FISHERIES SERVICE (May 2014), http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/reef_fish/2013/rs_2014_rec/documents/pdfs/red_snapper_er_2014_faqs.pdf [<https://perma.cc/G74H-FYWN>].

123. *Id.*

124. *Guindon*, 31 F. Supp. 3d at 175.

C. Spooling: The Disarray in Federal Management of Gulf Red Snapper Prompting Change

Though the Council's ruling may have helped in preventing a recreational sector overrun, the extremely short recreational federal season left many anglers outraged. Furious fishermen demanded answers: Why restrict federal seasons so severely when the red snapper population was—and remains—healthy enough for the catch limit to increase every year?

The NMFS attempted to answer that question—and justify the truncated federal season—on the grounds that the rate of recreational catch continues to increase.¹²⁵ In recent years, recreational fishermen caught eight times as many pounds of Gulf red snapper as they did before the population began to recover, and three to four times the 2007 rate.¹²⁶ While the catch limit increased by 120 percent from 2009 to 2013, recreational catches increased by 800 percent per day.¹²⁷ Furthermore, the amount of fish caught in state waters has increased tremendously in the past five to eight years.¹²⁸ The NMFS concluded that, because of the increased catch rates and the growing amount of red snapper harvested in state waters, the federal season must be shortened in order to adequately manage the fishery.¹²⁹ As such, the measure, in some ways, seems an unavoidable necessity to the Council's prevention of quota overruns and future litigation.

Unappeased by that rationale, recreational fishermen have continued to voice strong opposition to the extremely stringent standards imposed on the 2014 season. The controversy surrounding the short season has created massive rifts between commercial and recreational fishermen, as well as between federal and state agencies.

At its essence, the main problem with the current management of Gulf red snapper is two-fold. First, the Council has instituted shorter federal recreational red snapper seasons each year because of the rapid increase in which recreational fishermen are filling the quota. Because of the length of recent federal seasons, private and for-hire anglers have been extremely limited as to the amount of time in which they may fish in federal waters. Second, shorter federal recreational seasons have increased private anglers' fishing efforts in state waters and have actually exacerbated the

125. *National Marine Fisheries Service, Southeast Regional Office, 2013 recreational red snapper quota closure analysis*, SERO-LAPP-2012-10 (Dec. 2012) available at http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/red_snapper/documents/pdfs/gulf_red_snapper_quota_closure.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

management problem because more of the quota is being fulfilled by private anglers in state waters when federal waters are closed. The social result has been: (1) for-hire operators' discontent with their lack of equitable access to the fishery compared to private anglers, and (2) private and for-hire operators' frustration with the narrow time period in which they can fish in federal waters. The more important results are private anglers expending a disproportionate amount of the recreational quota compared to the federal for-hire operators, and recreational landings consistently exceeding the recreational quota year after year.

Although red snapper fishery management has been a "mess" for several years, the stringency of the 2014 regulations infuriated Gulf fishermen enough to cause them to demand immediate action.¹³⁰ Many anglers have asserted that the nine-day recreational season restricted access to an abundant natural resource—the limitation was not the result of necessary conservation efforts but instead flowed from the fact that the overall management of the fishery remains in utter disarray.¹³¹ Knowing that a better management approach is essential to the future of the red snapper industry in the Gulf of Mexico, the NMFS and the GMFMC approved Amendment 40 to aid in the resolution of the problem.¹³²

IV. POPPING THE LINE: AMENDMENT 40, THE 2015 SEASON, AND RECENT LITIGATION

In response to the recent red snapper controversy, the GMFMC convened on October 23, 2014 to approve Amendment 40. On April 10, 2015, the NMFS approved the amendment and it was subsequently published as a Final Rule in the Federal Register.¹³³ Effective May 22, 2015, Amendment 40 institutes distinct private angling and federal for-hire components within the recreational red snapper fishery and allocates red snapper resources between the two recreational divisions.¹³⁴ The NMFS claims that establishing these two divisions provides a basis for

130. David Cresson, *Guest Commentary: Gulf Fishery Management a Huge Mess*, BATON ROUGE ADVOCATE, (Aug. 28, 2014), <http://theadvocate.com/news/opinion/10116820-123/guest-commentary-gulf-fishery-manangement> [https://perma.cc/9UWT-F4CC].

131. Todd Masson, *Gulf Fishing Authority Says Red-snapper Fix is Easy*, NOLA, (Aug. 22, 2014, 2:19 PM), http://www.nola.com/outdoors/index.ssf/2014/08/gulf_fishing_authority_says_re.html [https://perma.cc/VUF6-QNVQ].

132. See FINAL AMENDMENT 40, *supra* note 10, at i, xxii, 125, 131.

133. Amendment 40, 80 Fed. Reg. 22,422, 22,423 (Apr. 22, 2015) (to be codified at 50 C.F.R. pt. 622).

134. *Id.*

flexible management of red snapper tailored to fit each division.¹³⁵ The plan purports to reduce the probability of a recreational quota overrun by attempting to produce the optimum yield of red snapper while also aiding in the rebuilding of the red snapper species.¹³⁶ The amendment also contains a three-year sunset provision and establishes separate red snapper season closures for each component of the recreational sector.¹³⁷

A. Tying a Quick, Loose Knot in Attempting to Catch One Quickly: Amendment 40

Under the provisions of the amendment, the recreational sector is split into two subdivisions – federal for-hire anglers and private anglers.¹³⁸ The federal for-hire group is composed of anglers with federal charter vessel permits; private anglers include private vessel anglers and state-permitted for-hire vessels.¹³⁹ The amendment allocates 42.3 percent of the quota to the for-hire component and the remaining 57.7 percent to private anglers.¹⁴⁰ Seasons for both components of the recreational sector will commence on June 1, and the length of each component’s season will be based upon the ACT, with a twenty percent buffer.¹⁴¹ The sunset clause in the amendment provides that recreational sector separation will cease at the end of 2017, unless federal agencies take further action.¹⁴²

B. A Short Fight: The 2015 Season

The total recreational quota for the 2015 season was 7.01 million pounds.¹⁴³ The final ACT for the for-hire component was 2.371 mp and 3.234 mp for private anglers.¹⁴⁴ Based on these numbers, the private angler season lasted from June 1–10, 2015, and the for-hire season lasted June 1–

135. GULF OF MEXICO FISHERY MGMT. COUNCIL, RECREATIONAL RED SNAPPER SECTOR SEPARATION: PUBLIC HEARING DRAFT FOR AMENDMENT 40, 14 (2014), available at <http://gulfcouncil.org/docs/amendments/Reef%20Fish%20Amendment%2040%20Public%20Hearing%20Draft.pdf>. [hereinafter PUBLIC HEARING DRAFT].

136. *Id.*

137. Amendment 40, 80 Fed. Reg. at 22422.

138. *Id.* at 22423.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Gulf of Mexico Red Snapper Final Rule—Commercial and Recreational Quota Increases: Frequently Asked Questions*, NATIONAL MARINE FISHERIES SERVICE (May 2015), http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/reef_fish/2015/rs_framework_quota/documents/pdfs/gulf_rs_framework_faqs.pdf [<https://perma.cc/8ZZ4-EKLE>].

144. *Id.*

14, 2015.¹⁴⁵ The bag limit was two fish with a 16-inch minimum total length size limit.¹⁴⁶

C. Threading the Eyelets of Amendment 40: The Aims of the Amendment

The Council has stated that, regardless of whether the recreational sector is maintained as a single entity or divided into two components, the overall recreational quota will not change, and fishing activity will, therefore, most likely remain consistent.¹⁴⁷ However, the Council predicts that the implementation of sector separation could affect a potential shift in private angling fishing activity from federal to state waters because state and federal snapper seasons would remain inconsistent.¹⁴⁸ In addition, the Council reports that private anglers' unfair access to red snapper over the for-hire component would persist, again because of competition between federal seasons and their more liberal state counterparts.¹⁴⁹ The alleged benefit that for-hire operators would receive in exchange would be more equitable access to the red snapper fishery through the issuance of separate quotas and seasons for each newly divided component.¹⁵⁰ Interestingly, the Council admits that the potential benefits that sector separation offers to for-hire operators "could be decreased should the amount of red snapper harvested in state waters outside the federal season increase."¹⁵¹ In other words, private anglers might fulfill or exceed the recreational quota in state waters before the federal seasons start; thus, the entire red snapper quota would be caught in state waters. Although the provisions of Amendment 40 were active during the 2015 season, the true effects of the amendment will likely not be seen until all of the data is compiled over the next few years.

D. Attempting to Net the Monster: 2015 Litigation

Attempting to invalidate Amendment 40, CCA members filed suit against the Department of Commerce, the NOAA, the NMFS, and a for-hire fishing association in the United States District Court for the Eastern District of Louisiana in the spring of 2015.¹⁵² The CCA alleged that the implementation of Amendment 40 will injure them "because it will reduce

145. *Id.*

146. *Id.*

147. *See* FINAL AMENDMENT 40, *supra* note 10, at xiii.

148. *Id.*

149. *Id.* at xiv.

150. *See id.* at xxvii.

151. *Id.* at xiv.

152. *Coastal Conservation Ass'n v. U.S. Dept. of Commerce*, No. 15-1300, 2016 WL 54911, at *2 (E.D. La. Jan. 5, 2016).

the maximum quantity of red snapper that individual recreational fisherman can catch.”¹⁵³

The CCA made four legal arguments for invalidating Amendment 40,¹⁵⁴ asserting that: (1) Amendment 40 violates the MSA by regulating charter and for-hire fishermen independently from private anglers; (2) the NMFS and the GMFMC violated both federal statute and National Standard 8 by failing to assess, specify, and analyze the economic and social effects of Amendment 40; (3) Amendment 40 violates National Standard 4 by effectuating an unfair and inequitable allocation of fishery resources; and (4) Amendment 40 establishes an improper delegation of the GMFMC’s authority by authorizing the NMFS to determine allocation levels.¹⁵⁵

After both plaintiffs and defendants moved for summary judgment, Judge Milazzo ruled in favor of the defendants in January of 2016.¹⁵⁶ While discussions of a potential appeal are circulating, it seems rather unlikely that courts will find Amendment 40 is invalid. Despite its apparent legal validity, Amendment 40 does not offer the long-term solution needed in Gulf red snapper management. While the Amendment remains in effect, more prudent solutions should be contemplated to ensure appropriate long-term regulations for the fishery.

E. Popped Line: Why Amendment 40 is Not the Permanent Solution

Regulatory management schemes raise major concerns for private vessels, for-hire operators, and the Council, as proper apportionment of the red snapper quota between the two recreational components is crucial. Amendment 40 attempts to resolve this problem, but, while it may deliver some prospective benefits, it fails to provide the requisite long-term solution needed for the Gulf red snapper fishery.

The only accountability measure included in pre-Amendment 40 regulations—federal season closure—has proven unsuccessful in preventing recreational quota overruns, primarily because of private anglers’ ability to fish for red snapper in state waters. As seen in past years, the recreational sector has exceeded its quota under a variety of different management measures, and sector separation does not provide any concrete solution to this problem. Though the amendment will apportion the quota between the two divided sectors, the only accountability measure remains season closures—a mechanism that on its own has proven ineffective. Theoretically, the provisions of Amendment 40 will aid in

153. *Id.* at *3.

154. *Id.*

155. *Id.*

156. *Id.* at *9.

curing the aforementioned problems by apportioning the quota between the two new recreational components and instituting separate seasons, so that for-hire and private anglers are afforded more equitable timeframe in which to fulfill their quota. However, both private and federal for-hire anglers can still potentially exceed their quotas, even with separate seasons. Furthermore, although the amendment may quell the for-hire versus private angler competition during the federal season by awarding for-hire operators their own quota and season, private anglers will still enjoy the advantage of access to red snapper in state waters, even when their own federal season is closed.

Though Amendment 40 may effectively alleviate some of the issues in Gulf red snapper fishing, it fails to guarantee any comprehensive solution. While the Council asserts that sector separation will create unique management approaches for each division, “potentially resulting in increases in economic value,”¹⁵⁷ the magnitude of these economic benefits depends upon what kind of management measures are enacted.¹⁵⁸ These economic impacts, though potentially beneficial, are not supported by concrete data evincing future economic gains for either sector.

Many private anglers also allege that Amendment 40 marks the beginning of the privatization of the recreational red snapper fishery.¹⁵⁹ Their assertion rests on the assumption that a few wealthy for-hire operators will eventually “buy out” most of the other for-hire operators. Because of the new allocation of the recreational quota under Amendment 40, these few for-hire operators could then monopolize access to Gulf red snapper.¹⁶⁰ Critics worry that private anglers fishing for red snapper will eventually be forced out of federal waters and will only be able to gain access to the fish there by paying the few for-hire operators controlling the industry.¹⁶¹

Like the mule deer hunting permits discussed in the opening paragraph of this article, sector separation creates a “pay-to-play” incentive for those individuals with sufficient resources. In so doing, Amendment 40 by necessity deprives equitable access to anglers of more meager means. This scenario hardly seems fair, but the speculative, extreme nature of this hypothetical, as applied in the context of the red snapper industry, render such a monopoly implausible, at least to some extent.

157. FINAL AMENDMENT 40, *supra* note 10, at xv.

158. *Id.*

159. *See* COASTAL CONSERVATION ASS'N, *supra* note 3.

160. *See id.*

161. *See Anglers Applaud States' Stance on Snapper Management, Florida, Louisiana, Texas Urge Gulf Council to back away from Sector Separation*, COASTAL CONSERVATION ASS'N, (Oct. 8, 2014), <http://www.joincca.org/articles/693> [<https://perma.cc/2ADL-E2QZ>].

Furthermore, Amendment 40 contains a “sunset clause,” whereby the amendment will phase out after three years absent a Council vote to re-enact it.¹⁶² This provision has purportedly been Amendment 40’s saving grace, being the only reason why some Gulf states chose to vote for it.¹⁶³ With the benefit of the sunset provision, the aforementioned advantages offered by enactment of Amendment 40—particularly the potential equitability between the private and for-hire components—can be enjoyed without real danger of long-term harm.

Although Amendment 40 will not resolve the entire recreational management problem, it nevertheless promises certain potential benefits. By approving Amendment 40, those benefits can begin to take effect while a more comprehensive solution to the larger problem is considered.

V. BREAKING THE SURFACE: A REGIONAL MANAGEMENT STRATEGY

The major issue in red snapper management remains the inadequate management measures used to implement and prevent overruns of recreational quotas, paired with the continuous and substantial reduction of the length of the federal red snapper season.

As one CCA official commented, if federal red snapper regulations continue on this same route, “a situation where private anglers will not be allowed in federal waters in the next years” could occur.¹⁶⁴ Instead of continuing to enact federal regulations that fix short-term problems, the NMFS, GMFMC, and the Gulf states must take a step back and evaluate red snapper management as a whole. They must then work cooperatively to develop management solutions that address all areas of concern within the red snapper fishery.

Amendment 40 has already prompted strong opposition, litigation, and rivalry between private and federal for-hire anglers. To combat the current insufficient management standards and the fierce discord amongst participants in the realm of Gulf recreational red snapper fishing, the most prudent course of action requires implementation of a regional management standard.

162. Amendment 40, 80 Fed. Reg. at 22,422.

163. MINORITY REPORT FOR OCTOBER 2014 MEETING OF THE GULF OF MEXICO FISHERY MGMT. COUNCIL, § 1.3.4 (Oct. 2014), available at <http://gulfcouncil.org/docs/minority%20reports/Amendment%2040%20Minority%20Report%20Final%20with%20Signatures%20-%2017Dec14.pdf>.

164. Barbara Liston, *Fishermen tangle lines in U.S. battle over popular red snapper*, REUTERS (Jul. 19, 2014, 9:00 AM), <http://www.reuters.com/article/2014/07/19/usa-fishing-snapper-idUSL2N0PK16220140719> [<https://perma.cc/MX9U-7JL4>].

A. Selecting the Right Lure: Prospective Regional Management Strategies

In contemplating an effective solution for the Gulf red snapper management problem, the Gulf Council has considered several options for the appropriate regulation of recreational fishermen while furthering the goals of the MSA and the conservation of the red snapper species. Aside from the sector separation approach proposed in Amendment 40, other possible management strategies include: an allocation shift favoring the recreational sector over the commercial sector, a days-at-sea program for the for-hire sector, inter-sector trading, a fish tag program, and a for-hire IFQ program.¹⁶⁵

The most effective solution to the problem, however, lies in a regional management strategy that would allocate regional catch limits among the five Gulf states. Under this system, each state would then set its own bag limits, size limits, and seasons. Both a 2015 House Bill and an amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico have been considered in order to implement such a regional management program, though no final action has been taken on either plan.

1. Amendment 39

The Council has contemplated institution of a regional management strategy for the recreational Gulf red snapper fishery since 2008; however, no true headway was made until June of 2012, when the Louisiana Department of Wildlife and Fisheries proposed a recreational red snapper regional management pilot program.¹⁶⁶ In furtherance of that effort, the Council developed plans and scoping documents, and, in February of 2014, released the Final Draft for Amendment 39 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Amendment 39). Similar to that of Amendment 40, the stated purpose of Amendment 39, aims to “provide flexibility in the management of the red

165. Nat'l Oceanic and Atmospheric Admin., Southeast Regional Office, *How Do We Improve the Situation? Other Options for the Future*, http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/red_snapper/overview/ [<https://perma.cc/4S6S-CTAZ>] (last visited Jan. 22, 2015).

166. GULF OF MEXICO FISHERY MGMT. COUNCIL, FINAL DRAFT FOR AMENDMENT 39 TO THE FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO, INCLUDING DRAFT ENVIRONMENTAL IMPACT STATEMENT, FISHERY IMPACT STATEMENT, REGULATORY IMPACT REVIEW, AND REGULATORY FLEXIBILITY ACT ANALYSIS, 3 (Feb. 2014), *available at* <http://gulfcouncil.org/docs/amendments/Regional%20Management%20Red%20Snapper.pdf> [hereinafter FINAL AMENDMENT 39].

snapper recreational component” and to prevent overfishing while producing the maximum yield.¹⁶⁷ However, Amendment 39 attempts to achieve this end by utilizing a regional management strategy, modifying for-hire permit provisions, and creating accountability measures for recreational sector quota overages for different regions of the Gulf.¹⁶⁸

Amendment 39 contains numerous different actions with multiple alternatives for each action. Action 1 of Amendment 39 determines the basic structure of regional management.¹⁶⁹ While Alternative 1 provides a “no action” alternative,¹⁷⁰ the Council’s preferred option, Alternative 2, would develop a regional management strategy delegating authority to a Gulf state, or group thereof, to create regulations pertaining to the recreational aspects of the fishery for an allocated portion of the quota.¹⁷¹ By comparison, Alternative 3 for Action 1 would implement a regional management program that would allow the GMFMC to establish distinct recreational management measures for certain Gulf regions.¹⁷²

Under either Alternative 2 or Alternative 3 to Action 1, red snapper would continue to be federally regulated, with the states having limited management authority.¹⁷³ States would only receive full management authority over regulations under the provisions of Action 4, discussed *infra*.¹⁷⁴ If the Council adopts the preferred state approach in Alternative 2, the regulations chosen must be consistent with FMPs and the MSA.¹⁷⁵ Alternative 3, on the other hand, bears similarities to the no action alternative, in that the Council already enjoys the authority to establish specific regional management measures. However, the selection of Alternative 3 would signify the Council’s intent to implement regional management regulations, as opposed to the currently utilized Gulf-wide regulations.¹⁷⁶

The provisions of Action 2 contemplate determination of the regions subject to management.¹⁷⁷ The Council’s preferred option establishes five separate regions—one for each Gulf state.¹⁷⁸ Establishing each Gulf state as its own region would undoubtedly allow the most pliability in terms of

167. *Id.* at 7.

168. *Id.* at 7.

169. *Id.* at 8.

170. The “no action” alternative would maintain the current regulatory structure of the recreational Gulf red snapper fishery.

171. FINAL AMENDMENT 39, *supra* note 166, at 11.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 4.

176. *Id.* at 12.

177. FINAL AMENDMENT 39, *supra* note 166, at 14.

178. *Id.*

management methods.¹⁷⁹ The other provisions of Action 2's other alternatives establish multi-state regions or allow states to determine their own regions.¹⁸⁰ The implementation of multi-state Gulf regions would require those states falling within a given zone to agree on shared management measures and season closures.¹⁸¹

Reportedly, the source of controversy presently delaying passage of Amendment 39 lies in Action 3, which contemplates the allocation of the recreational red snapper quota amongst the different regions.¹⁸² Five alternatives for apportionment are stipulated, but the GMFMC has yet to choose its preferred alternative.¹⁸³

Action 4 entails identification of the regional management measures that each region would be allowed to implement under the guise of the NMFS and the GMFMC.¹⁸⁴ Current federal regulations set forth a daily bag limit of two red snapper per angler per day, a of sixteen inch minimum total size length limit, and a season start date commencing on June 1, each year. Under Action 4, the preferred alternatives of the Council would allow the regions to (1) create season structure and start and end dates;¹⁸⁵ (2) set bag limits ranging from zero to four red snapper per angler per day; (3) determine minimum total size length limits between fourteen inches and eighteen inches; (4) establish a maximum red snapper size limit; (5) cordon off protected areas within the EEZ adjacent to their region;¹⁸⁶ and (6) institute sub-allocations for the private and for-hire sub-sectors.¹⁸⁷ In enacting these standards, regions may *not* create additional fishing days, and the measures must be consistent with the region's projected season length and its allocated quota.¹⁸⁸ Season dates and structure, bag limits, and size limits comprise the obligatory measures that must be set by each region; a region's choices regarding the other six standards are optional.¹⁸⁹

179. *Id.* at 15.

180. *Id.* at 14.

181. *Id.*

182. *Id.* at 17.

183. FINAL AMENDMENT 39, *supra* note 166, at 17.

184. *Id.* at 23.

185. The purported benefit of vesting this authority regionally lies in the fact that it would allow for each region to assess the most appropriate time for seasons according to that region's own particular history of hurricanes, tourist seasons, and lodging. *Id.*

186. This provision intends to provide regions with flexibility to spatially control where their apportioned part of the quota is harvested within the region, in accordance with varying weather conditions and tourism seasons. *Id.*

187. *Id.*

188. *Id.*

189. FINAL AMENDMENT 39, *supra* note 166, at 23.

Action 5 of Amendment 39 concerns restrictions on federal permitted for-hire vessels.¹⁹⁰ Alternative 1 for that action would maintain the current standards, by which federal for-hire operators must comply with federal regulations when they are more restrictive than state regulations.¹⁹¹ Specifically, if federal waters are closed, a Gulf charter-permitted vessel cannot simply travel to state waters to harvest red snapper.¹⁹² This regulation was enacted to ensure federal regulatory compliance and to prompt consistent state regulation through its application to commercial and for-hire vessels.¹⁹³ The chance of a landing overage declines when federal for-hire operators fishing in state waters are required to abide by the more restrictive federal reef fish regulations.¹⁹⁴ By comparison, Alternative 2 for Action 5 would exclude the provision mandating charter-permitted operators' compliance in state waters with the more restrictive federal recreational red snapper regulations.¹⁹⁵

However, official action has yet to be taken on Amendment 39, allegedly due to the Council's protracted deliberation on the appropriateness of the quotas to be issued to each Gulf state, and the Amendment's status currently remains "on hold."

2. H.R. 3094

In 2013, Senator Mary Landrieu introduced The Gulf of Mexico Red Snapper Conservation Act of 2013 in an attempt to institute a regional management strategy.¹⁹⁶ However, the congressional session ended without any final action on the matter, and the bill died in the House. In the summer of 2015, Representative Garret Graves introduced his own initiative to transfer Gulf red snapper regulatory power to the Gulf states via the Gulf States Red Snapper Management Authority Act (H.R. 3094).¹⁹⁷

Under this bill, the Secretary would create a Gulf States Red Snapper Management Authority (GSRMSA), which would be composed of the "principal fisheries manager of each of the Gulf coastal states."¹⁹⁸ The GSRMSA would develop measures to be followed by each Gulf state in

190. *Id.* at 30.

191. *Id.*

192. *Id.*

193. *See id.*

194. *Id.*

195. FINAL AMENDMENT 39, *supra* note 166, at 31.

196. Gulf of Mexico Red Snapper Conservation Act of 2013, H.R. 3099, 113th Cong. (2013).

197. Gulf States Red Snapper Management Authority Act, H.R. 3094, 114th Cong. (2015).

198. *Id.*

regulating red snapper in the waters adjacent to each respective state.¹⁹⁹ Each Gulf state would submit a FMP to the GRSMA complying with section 303(a) of the MSA.²⁰⁰ Each Gulf state's FMP must consist of guidelines and procedures for "the long-term sustainability of Gulf of Mexico red snapper based on the best available science."²⁰¹ These FMPs must also set the recreational quotas consistent with stock assessments for the red snapper fishery adjacent to each Gulf state, while also complying with the standards set by the GRSMA.²⁰² After holding a public comment period, the GRSMA would review each state's FMP and approve them if they comply with the requirements set forth by the GRSMA as well as section 303(a) of the MSA.²⁰³

Once the GRSMA approves a Gulf state's FMP, the GRSMA would certify to the Secretary that a FMP has been approved.²⁰⁴ The Secretary would then revoke any regulations or portions of federal FMPs that conflict with the newly approved state FMP and transfer management of the Gulf red snapper to the GRSMA.²⁰⁵ Each Gulf state would then assume responsibility for enforcing its approved FMP.²⁰⁶ All federal funding would be distributed by the Gulf States Marine Fisheries Commission to the Gulf states.²⁰⁷

Following the transfer of management to the states, the GRSMA must assess whether each Gulf state has properly adopted and implemented the approved FMP, and whether the FMP is consistent with the previously-set GRSMA standards and the long-term sustainability of the fishery.²⁰⁸

If, by chance, overfishing occurs, or if the fishery is subject to a rebuilding plan in the waters adjacent to a Gulf state, that state must certify to the GRSMA that it enacted the requisite measures to prevent overfishing or to rebuild the fishery and that it consulted with the NOAA and implemented a data recording program to appropriately monitor such state's harvesting of red snapper.²⁰⁹ In the event that a state does not follow these rules, the GRSMA would then vote on whether to recommend that

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Gulf States Red Snapper Management Authority Act, H.R. 3094, 114th Cong. (2015).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Gulf States Red Snapper Management Authority Act, H.R. 3094, 114th Cong. (2015).

the Secretary to close the fishery in that state's Gulf waters.²¹⁰ The Secretary would then have the discretion to close the fishery after evaluating the Gulf state's and the GRSMA's comments.²¹¹

Every year, each Gulf state would submit to the GRSMA a report on the fishery in the coastal waters adjacent to each respective state.²¹² At least once every five years, the GRSMA would, in turn, submit a report to the Secretary of Commerce using the information provided in each Gulf state's annual report.²¹³ Additionally, the administrator of the NOAA would supply Congress with an annual report of effects of the act.²¹⁴

During the three years that this law would be in effect, the Council would continue to regulate the commercial sector of the Gulf red snapper fishery. The act would not affect the current IFQ regulations in place for the commercial sector.

B. Landing the Tail of a Lifetime: Advantages of the Regional Management Strategy over Current Management Standards

The holding in *Guindon* exposed the undeniable source of the management problems afflicting the entire Gulf of Mexico red snapper fishery—ineffective regulation of the recreational snapper-fishing sector.²¹⁵ Those in the commercial sphere have felt the effects flowing from the recreational sector's quota activities. As discussed *supra*, the main problem with current recreational regulations in recent years has been short federal seasons coupled with private anglers' inequitable access to red snapper fishing during more liberal state seasons.²¹⁶ A regional management strategy, by allowing states to assess the current status of the Gulf fishery across jurisdictional lines, creates a system whereby states can accurately implement catch and season limits—in both federal and state waters—that will keep the red snapper population healthy and afford private anglers and federal for-hire anglers fair access to the fishery. The Council, in its attempt to conserve the fishery, has been imposing stricter seasons and standards to counteract each Gulf state's longer red snapper season, but the competition has already prompted litigation and retaliation by anglers. This fiery feud will likely continue to spiral out of control if the fishery is not placed under effective management soon.

210. *Id.*

211. *Id.* This only refers to closing the fishery in federal waters.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See Guindon*, 31 F. Supp. 3d at 175.

216. *See id.* at 178–81.

Some opponents of Amendment 40 claim that the quota standard should be done away with altogether,²¹⁷ but that solution will not properly address the problem. The quota standard ensures that anglers can yield the maximum amount of landings without imperiling the future of the red snapper species. By allowing Gulf states to assess the current state of the fishery, states can set appropriate federal and state seasons that work cooperatively to achieve the MSA's goals without the need for the systemic federal-state competition currently bearing on the red snapper season.

A regional management strategy will consider the unique differences and needs in each Gulf region. Specifically, the needs of anglers from states with nine-mile jurisdictions can be addressed in a different manner than those of fishermen who need only travel three miles to fish in federal waters.²¹⁸ Furthermore, a regional strategy will enable the enactment of regulations appropriate to each state's particular circumstances, such as variations in weather patterns and tourist seasons among the Gulf states.²¹⁹ Additionally, a Gulf state's research programs will assess with greater accuracy the migratory patterns and presence of red snapper in its state waters and federal waters during certain time periods, making it more tenable for states to ensure that red snapper are not overfished in one area as compared to another, thus maintaining a healthy population in both federal and state waters. By planning state and federal seasons conjunctively, the states will be able to set regulations that avoid providing private anglers an unfair advantage in freer access to state waters that federal for-hire operators lack.

Cooperative federalism between the Council and Gulf states will ensure the most effective management plan. The states possess the optimum means and measures to evaluate their regions' fishing needs and deficiencies, and they will correct those issues if given the authority to set their own standards. Under a cooperative federalist regime, the states' ability to communicate their regional status to federal agencies will benefit those agencies by providing them with better knowledge to inform administrative decision-making. Furthermore, a regional management program will also place a check on states' powers by requiring submission of all chosen regulations to the GMFMC, which would ensure that the regulations align with the goals and provisions of the FMP. Finally, mandated approval by the Secretary of Commerce would guarantee consistency between the respective states' regulations, the GMFMC's FMP, and the goals, national standards, and requirements of the MSA.

217. See Masson, *supra* note 131.

218. See FINAL AMENDMENT 39, *supra* note 166.

219. See *id.*

Despite its numerous benefits, a regional management program will, admittedly, not be without flaws. A regional regulatory system is inherently more complex. The overall quota for the entire Gulf region must be appropriately and rationally distributed amongst all of the states, and such allocation can cause prospective debate—that task has, in fact, already caused delays in the process.²²⁰ Additionally, the synergy of federal and state management efforts could potentially generate further conflict between the two entities.²²¹ Moreover, authority vested in multiple governing bodies, as opposed to one federal sovereign, could decrease efficiency in managing the red snapper species. States must also be receptive to accepting new quotas, should geographical changes in the distribution of red snapper so require.²²² Regional management would also be more expensive due to the necessity of collecting larger data samples and examining more extensive catch records.²²³ Finally, regulatory enforcement could be problematic, especially along boundaries between regions with differing seasons and limits.²²⁴

Before enacting a regional management strategy for the recreational Gulf red snapper fishery, the Council must contemplate solutions to these problems and preparations must be made to address any complications. For example, to ameliorate the enforcement issues raised by anomalous regulations along regional boundaries, agents could, upon checking a fishermen's dockside landings, adhere to the standards of the adjoining state with the more liberal regulations.²²⁵

Despite the potential obstacles that a regional management strategy might present, that regime still offers the best solution to the current problems in federal Gulf red snapper management; regional management may in fact be the only truly effective method of resolving the ills facing the Gulf fishery. For that reason, the Council must agree on an appropriate quota allocation for each Gulf state and trust the states to efficiently and effectively impose regulations, in keeping with the goals of the MSA, on red snapper in its region.

Enactment of either H.R. 3094 or Amendment 39 should sufficiently provide for proper conservation and preservation of the Gulf red snapper species, while rendering the maximum harvest to commercial and recreational fishermen alike. Amendment 39, however, offers more possible management options than H.R. 3094. Thus, Amendment 39 ostensibly provides the more sound solution to the management problem, as the Gulf Council and Gulf states can continue to research and analyze which alternatives of each of the amendment's actions should be implemented.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *See* FINAL AMENDMENT 39, *supra* note 166, at 3.

225. *Id.*

CONCLUSION

The recent debate surrounding the federal management of Gulf red snapper arises from years of complications and controversies surrounding this unique fish, upon which so much of the Gulf region's cultural identity and financial well-being turns. Despite a massive decline in the species in the late twentieth century, federal regulations have allowed the Gulf red snapper population to prosper. Recently, however, federal recreational management standards have been forced to contend with increasing catch rates and broader, more liberal state regulations. This competition has led to a calamitous regulatory landscape for fishermen and has produced unfavorable results for federal agencies. In an attempt to address the complications of recreational red snapper management, the GMFMC's approval of Amendment 40 represents only the first step towards effectively regulating this component of the fishery. While the consequences of Amendment 40 are yet to be seen, more comprehensive options must be explored, and further action will be necessary.

Although the plan will likely not take effect for a few years, a regional management strategy should be agreed upon and implemented to effectively regulate the Gulf recreational red snapper sector. Such a program provides the most viable path to achieving proper preservation and conservation of the species, while at the same time maximizing harvests and access for anglers. Sportfishing for Gulf red snapper bears too much economic and cultural significance for both the Gulf region, and the United States as a whole, to allow the fishery to continuously be thrust into a state of contentious debate and poor regulatory measures. Fishermen and governmental agencies alike will discover harmony and success in enacting a regional management strategy that motivates both state and federal officials to mutually bolster the conservation and management of this coveted fish.

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