

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION**

**CLAMTASTIC SEAFOOD, INC.,
and DIANA TOPPING.**

PETITIONERS,

v.

**FARM SERVICE AGENCY,
and UNITED STATES
DEPARTMENT OF AGRICULTURE,**

RESPONDENTS

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CV-2021-_____

**PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION,
AND HEARING DE NOVO**

Clamtastic Seafood, Inc. and Diana Topping suffered losses in their clam farming operation as a result of severe weather resulting from Hurricane Irma in 2017. They applied for reimbursement of their losses through the WHIP program. Although the county and state committees denied their claims, the administrative judge, presented with formidable evidence on the issue of weather causation regarding the losses, reversed the county and state committees, awarding the denied reimbursement to the Petitioners. Unfortunately, the Director of the USDA National Appeals Division, Secretary of Agriculture, reversed the administrative judge's ruling on May 28 of this year. Now Clamtastic Seafood, Inc. and Diana Topping,

the petitioners, ask this Honorable Court to overturn the Director's rulings in Case Nos. 2020S000187 and 2020S000188.

INTRODUCTION

1. This Petition arises from the denial of claim benefits and the denial of statutory allowable equitable relief under the Wildfires and Hurricane Indemnity Program (WHIP) pursuant to provisions of the 2018 Bipartisan Budget Act, Pub. L. 115-123, 132 Stat. 65-66 (Feb. 9, 2018) and the provisions of the Federal Agricultural Improvement and Reform Act of 1966. (7 USC § 7333; 7 USC § 1996(b) (1)(2); 7 C.F.R. Part 760 Subpart O §§ 1500-1517 (July 18, 2018); 7 CFR § 760.1500; and the WHIP Handbook (HB) 1-WHIP, Par. 6A and Par. 210.

2. The Petitioners file this joint petition seeking relief from the denial of benefits made on May 28, 2021 by the Director, USDA National Appeals Division, Secretary of Agriculture in Case Nos. 2020S000187 and 2020S000188. Ex. 1, Director Decision. The May 28 decision by the director reversed the decision of the hearing officer rendered in favor of the Petitioners. Ex. 2, Adm Judge Op.

3. Your Petitioners have exhausted all administrative remedies, including available County Committee reviews, State Committee reviews, the USDA National Appeals Division Review and the Director Review. This Petition appeals the final Agency actions by the Director and asks this Court to reinstate the opinion of the Hearing Judge and to obtain other equitable relief hereinafter requested.

PARTIES

4. Petitioner Clamtastic Seafood, Inc. is a corporation owned by Christopher Topping and his wife, Diana Topping, and is incorporated in the State of Florida with its principal place of business located in Levy County in the Gainesville Division of the Northern District of Florida. Petitioner Diana Topping is over the age of 21 years and is a resident citizen of the Northern District of Florida, Gainesville Division. Respondent Farm Service Agency (FSA) is an authority or agency of the Respondent, United States Department of Agriculture (USDA). The respondents FSA and USDA are jointly referred to as Agency, or Government.

5. The records of the Agency Actions, as well as various statutes and regulations, are attached and specifically incorporated herein by reference.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 USC § 706; 7 USC § 1508(b)(c)(h); 7 USC §§ 6998, 7333 & 7996, 7997; 7 C.F.R. § 1437; 7 C.F.R. § 11; 7 CFR §§ 760.1500-1700; 28 USC §§ 1331, 1391, 1346(a), 1402(a); 28 USC § 2341 et. seq.

7. Venue is proper in the United States District Court for the Northern District of Florida, Gainesville Division, because your Petitioner, Diana Topping (Topping) is over the age of 21 years, resides in Levy County, Florida, and Petitioner Clamtastic Seafood, Inc.'s (Clamtastic) principal place of business lies in Levy

County, Florida. The actions complained of herein occurred in the Northern District of Florida, Gainesville Division. 28 USC § 2343.

HISTORY AND BACKGROUND

8. Molluscan shellfish aquaculture is the largest food-use aquaculture industry in Florida. Hard clams, such as those grown by Clamtastic and Diana Topping, dominate the industry. Clams, like most molluscs, are filter feeders; that is, they filter their food, phytoplankton, out of the seawater flowing around them.

9. There are three stages, essentially, to the production of hard clams. In the first stage, the hatchery stage, adult clams are induced to spawn in a controlled facility. The fertilized eggs, and then the free-swimming larvae of the clams, are reared until they reach about 1 mm in size. The second stage is the nursery stage. Once the clams reach 1 mm in size, they are moved to a nursery, again a closed or semi-closed system, where the clams are further nurtured until they reach a size suitable for planting in open waters on land the clam farmers lease from the state of Florida. The final stage is the planting stage. When the clams are big enough, clam farmers place the nursery seed in sea-floor bags of small mesh size, which are staked to the bottom of the ocean lease site using materials such as PVC pipe. After the seed reaches a size of around ½ inch, the seed is transferred to sea-floor bags of larger mesh-size, again staked to the bottom of the ocean lease site, and allowed to grow to market size. The mesh bags are necessary to protect the cultured clams from

predators such as predatory fish including Black Drum and other inshore ocean fish and marine invertebrates. At some point after being planted, when the bottom substrate conditions are right, the clams attach themselves to the seabed floor, digging into the substrate, but for a while after they are planted, only the stakes hold the mesh bags to the ocean floor.

10. Clamtastic produces clam seed that it sells to clam farmers and members of its corporation. The president of Clamtastic is Christopher Topping, and his spouse is Diana Topping. Ex. 2, Adm. Judge Op. p. 1. The Petitioners' clam operations are in Cedar Key, Florida, a cluster of small islands in Levy County Florida. Its landmass areas are boarded by the Gulf of Mexico. Clamtastic's clam lease site, Unit 1713, is on the east side of Cedar Key. Topping's lease site, Unit 1718, is also on the east side of Cedar Key. Ex. 2, Adm. Judge Op. pp. 2, 3; page 1; Ex. 5, Lease Sites at Cedar Key; Ex. 6, Wave Depths of Lease Sites at Cedar Key.

11. Throughout the months of July and August 2017, Petitioners planted nursery size and grow-out size clams in clam bags on their lease sites in the claim area. After Hurricane Irma struck the area, affecting the weather, the petitioners discovered that many of their clam bags were missing.

12. Hurricane Irma, tracked by the National Hurricane Center and other tracking sources as it traveled through the southern, central, and northern counties made landfall in Florida on September 10, 2017. Tornado watches and warnings

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