No. 03-5101

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

v.

UNITED STATES

Defendant-Appellant

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 99-CV-119
SENIOR JUDGE ERIC G. BRUGGINK

BRIEF OF AMICI CURIAE OCEANA AND THE OCEAN CONSERVANCY IN SUPPORT OF THE UNITED STATES (SUPPORTING REVERSAL OF THE JUDGMENT FOR PLAINTIFF-APPELLEE)

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September 4, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Pelagic Fishing Co., L.P., v. United States

No. 03-5101

Certificate of Interest

Counsel for Amici Curiae Oceana and The Ocean Conservancy certifies the following:

1. The full name of every party or amicus represented by me is:

   Oceana
   The Ocean Conservancy

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   None

Date: September 4, 2003

_____

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INTERESTS OF AMICI

Oceana is an international non-profit organization dedicated to marine conservation with approximately 30,000 members and 100,000 supporters around the world. Oceana merged with the American Oceans Campaign on May 1, 2002. Through its legal, policy, scientific, and grass-roots activities, Oceana has been a prominent advocate for preventing overfishing and rebuilding depleted fish populations, protecting essential fish habitat, minimizing bycatch mortality, and promoting environmentally and economically sustainable fisheries. Oceana has been closely involved in efforts to restore depleted New England fish populations.

The Ocean Conservancy (formerly the Center for Marine Conservation) is a national non-profit organization with more than 900,000 members and volunteers dedicated to protecting ocean environments and marine life. Through science-based advocacy, research, and public education, The Ocean Conservancy informs, inspires, and empowers people to speak and act for the oceans. The Ocean Conservancy's Marine Fish program seeks to conserve and restore depleted fish population and to reduce the harmful effects of fishing on ocean ecosystems; its other programs focus on conservation of marine wildlife, preservation and restoration of ocean ecosystems, and protection of marine water quality.

Oceana and The Ocean Conservancy, and their members, are concerned

about and directly affected by environmental injury from fishing. The government's ability to regulate entry into fisheries and to control unsustainable fishing through regulatory measures is essential to amici's efforts to restore the vitality of the world's ocean ecosystems. Each organization has authorized the filing of this brief to protect these interests.

All parties have consented to the filing of this brief.

STATEMENT OF FACTS

This case involves a claim under the Just Compensation Clause by the owner of a fishing vessel that was precluded from fishing for Atlantic mackerel and herring by a Congressionally-imposed moratorium on the entry of large new vessels in those fisheries. Amici generally rely upon the statement of facts and statement of the case in the government's brief. Amici believe that four facts are particularly illuminating, however:

1. Plaintiff's claim arises from its attempt to introduce a very large new vessel, with enormous capacity to catch fish, into a region which has seen the collapse of virtually every commercial fish population in the past decade. Plaintiff's vessel, a converted toxic waste incineration ship weighing almost 7,000 tons, was twice the length and almost ten times the weight of any boat fishing for

Atlantic mackerel or herring. It had the capacity to catch at least 50,000 tons of fish per year.

2. Concerns about the impacts of such large factory trawlers led Congress, during the very time period when plaintiff sought to enter the New England fishery, to prohibit generally the issuance of fishery endorsements (part of the documentation required for American-flagged fishing vessels) for large new vessels in any fishery in United States waters. 16 U.S.C. §12102(c)(5), added by Pub. L. 105-277, Div. C, Title II, §202(a). The Court of Federal Claims, inexplicably, does not consider or even acknowledge this general legislation in concluding that the Congressional measures at issue here improperly "targeted" plaintiff's vessel.

3. During the Congressional moratorium, the regional fishery management councils charged under the Magnuson-Stevens Act with management and conservation of the mackerel and herring fisheries proposed barring new large trawlers from fishing for those fish populations because of concerns that such vessels, with their enormous catch capacity, would exacerbate existing problems of overcapacity in the fishing fleet. The Secretary of Commerce ultimately approved those restrictions, 64 Fed. Reg. 57,587 (Oct. 26, 1999), 65 Fed. Reg. 77,450 (Dec. 11, 2000), and those restrictions remain in effect today.

4. Plaintiff challenged the Congressional moratorium on entry of its vessel into these fisheries in the United States District Court for the District of Columbia as a violation of constitutional guarantees of Due Process and Equal Protection. The district court denied plaintiff's request for an injunction, finding a "substantial failure on the proof of the likelihood of success on the merits." American Pelagic Fishing Co. v. Daley, No. 99-573, transcript of hearing at 78 (D.D.C. March 25, 1999). Plaintiff thereafter allowed the district court to dismiss its action, abandoning its constitutional claims. American Pelagic Fishing Co. v. Daley, No. 99-573 (D.D.C. Nov. 29, 1999).

SUMMARY OF ARGUMENT

The government's brief demonstrates convincingly that the Court of Federal Claims erred in holding that the government's actions in this case constituted a taking. Amici seek to assist the Court by providing a broader understanding of scientific concerns regarding the sustainability of ocean fishing and of the principles of marine fishery management that form the context for this case. Regrettably, the Court of Federal Claims lacked an accurate understanding of these matters, terming ocean fishing an "innocuous business," 49 Fed. Cl. 36, 47, suggesting that appellee had an inherent right to use its vessel to fish in United

States waters, id. at 47-48, and dismissing Congress's stated concern for fishery conservation, id. at 51.

Amici also seek to assist the Court by outlining the traditional principles of wildlife law that vest complete control over the taking of fish and wildlife in the sovereign. Those principles preclude assertion of private property rights to the taking of fish or wildlife. In this case, the Magnuson-Stevens Act asserts exclusive sovereign control over any fishing within the United States exclusive economic zone ("EEZ"), precluding any claim that an owner of a vessel has an "inherent right" to use the vessel to fish in such waters. Under these settled principles of law, plaintiff has no compensable property interest in its expectation of being allowed to fish in federally-controlled waters.

Finally, amici seek to assist the Court by focusing on the error committed by the Court of Federal Claims in evaluating the "character" of the government's action in this case. Contrary to the trial court's view, the Congressional moratorium on the entry of large new vessels into the Atlantic mackerel and herring fisheries was driven by prudential concerns regarding the potential harm that could result from such vessels generally; it did not single out plaintiff's vessel. Congress's actions were fully consistent with proper fishery management, and based upon its plenary authority over fishing within United States waters.

ARGUMENT

I. REGULATION OF FISHING EFFORT IS ESSENTIAL TO THE ESTABLISHMENT AND PROTECTION OF SUSTAINABLE OCEAN FISHERIES

A. The Health of Ocean Fish Populations is Broadly Threatened, With Numerous Populations Depleted or Overfished

Every responsible fishery management official and marine scientist agrees that numerous fish populations, both internationally and in United States waters, are depleted or imminently threatened with depletion from overfishing, and many others are fully exploited and cannot sustain further fishing effort. The United Nations Food and Agriculture Organization ("FAO") estimates that 47% of the world's major marine fish populations for which information is available are fully exploited, while 18% are overexploited, and 10% are significantly depleted or recovering from depletion. The FAO notes that the trend is worsening as fishing pressure increases. FAO, The State of World Fisheries and Aquaculture 2002, at 22-23 (available at www.fao.org).

American fisheries are under similar stress. In enacting the Fishery Conservation and Management Act of 1976 (now known as the Magnuson-Stevens Act), Congress found that:

> Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially

> reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls, or (C) direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.

16 U.S.C. §1801(a)(2). Concerned that unregulated ocean fishing, particularly by large foreign vessels, was driving coastal fish resources "to the point of essentially commercial extinction," H.R. Rep. No-94-445, at 43-4, reprinted in 1976 U.S.C.C.A.N. 593, 611, Congress claimed "sovereign rights and exclusive fishery management authority" for the United States within a new "exclusive economic zone" extending out to 200 miles from the United States coastline. 16 U.S.C. § 1811.

Unfortunately, notwithstanding almost three decades of federal management, the health of ocean fish populations in United States waters remains at great risk from the pressures of modern industrial fishing and other human-induced changes in the marine ecosystem. The Senate Committee on Commerce, Science, and Transportation noted ruefully in 1996 that "the elimination of foreign fishing has not been accompanied by the expected transition to stable and sustainable harvests by American fishermen." S.Rep. No. 104-276, at 3, reprinted in 1996 U.S.C.C.A.N. 4073, 4075. The National Oceanic and Atmospheric Administration ("NOAA") estimates that 24% of federally-managed populations

whose status is known are currently subject to unsustainable fishing levels, while 36% have populations reduced to the point where they are classified as overfished. Department of Commerce, NOAA Fisheries 2002 Report to Congress (April 2003), at iv (available at www.nmfs.noaa.gov/sfa/reports.html). The biological status of more than a third of major populations (those with landings of 200,000 pounds or more) is unknown, as is the status of virtually all minor populations. Id. at vi.

Even these official estimates may far understate the extent to which the ocean's fish populations have been depleted. Fisheries scientists at Dalhousie University in Nova Scotia found recently that fishery managers have been establishing goals for sustainable fish populations by reference to populations that were already significantly depleted by fishing. These scientists' research indicates that industrialized fishing has reduced populations of large predatory fishes worldwide by 90% from levels existing before World War II, typically depleting a species by 80% within 15 years of exploitation. Ransom A. Myers & Boris Worm, Rapid worldwide depletion of predatory fish communities, Nature, May 15, 2003, at 280 (available at www.nature.com).

Evidence that overfishing and other man-made alterations of the ocean environment threaten the ocean's ability to sustain life is mounting. Sudden

collapses of major fisheries, such as Pacific coast rockfish, New England cod, and California sardines, have repeatedly devastated American fishing communities, and may indicate permanent alteration of ocean ecosystems: Atlantic halibut, for example, were so heavily overfished in the 19th century that they have never recovered. See Pew Oceans Commission, America's Living Oceans (May 2003) ("Pew Oceans Report"), at 36 (available at www.pewoceans.org). New England fisheries have been among the hardest hit: the New England groundfish fishery has collapsed in recent years, with virtually every fish population depleted from overfishing, see, e.g., Conservation Law Foundation v. Evans, 209 F.Supp.2d 1, 7 (D.D.C. 2001), while Canada has proposed listing cod as an endangered species. As Theodore Roosevelt IV told the Pew Oceans Commission: "We may be seeing the last great buffalo hunt taking place on the world's seas." Pew Oceans Report at 35.

B. Given the Pervasive Depletion of Ocean Fish Populations, Reduction of Fishing Effort is an Essential Focus of Fishery Management

To conserve and restore depleted fish populations, and to prevent other populations from being overexploited, fishery managers must be able to take effective measures to reduce unsustainable fishing levels. As the National Research Council's Committee on Ecosystem Management for Sustainable Marine

Fisheries has concluded:

> [A] significant overall reduction in fishing mortality is the most comprehensive and immediate ecosystem-based approach to rebuilding and sustaining fisheries and marine ecosystems.
>
> ...
>
> Reducing fishing effort in the short term is necessary to achieve sustainable fishing. The options lie in deciding how and when to reduce effort so as to reduce economic and social disruption. The options, however, can be exercised only if decisions are made before the resources are depleted.

National Research Council, Sustaining Marine Fisheries (1999) ("NRC Fisheries Report"), at 5-6.

The federal fishery management program established under the Magnuson-Stevens Act provides comprehensive authority for managers to control the level of fishing effort. Fishery management plans under the Act may require federal permits for fishing vessels, designate zones where fishing is limited or not permitted, establish limited access fisheries closed to new entry, and prohibit or limit the use of particular types of gear and vessels. 16 U.S.C. §1853(b). Limited access fisheries have been widely utilized to reduce fishing pressure on depleted populations, including all populations of New England groundfish. Frustrated with the failure of fishery management plans to protect coastal fish populations from overexploitation, Congress in 1996 made the use of measures to prevent

overfishing and to rebuild depleted fish populations mandatory in the Sustainable Fisheries Act, Pub. L. 104-297. 16 U.S.C. §§ 1853(a)(1), (10), 1854(e).

Reducing the capacity of existing fishing fleets is critical to achieving sustainable catch levels. The existence of a large, undersatisfied fleet puts economic and political pressure on fishery managers to allow unsustainable catch levels, leads to a "race for fish," and exacerbates problems of control and monitoring of the fishery. See NRC Fisheries Report at 74-75; Pew Oceans Report at 39-40. The United States has joined in an international plan to manage fishing capacity, pledging to eliminate or substantially reduce overcapacity in 25% of federally-managed fisheries by 2009. See Department of Commerce, Draft United States National Plan of Action for the Management of Fishing Capacity (February 2003). In addition to limits on entry and effort quotas, the Magnuson-Stevens Act authorizes voluntary buy-out programs funded by the fishing industry with federal support. 16 U.S.C. §1861a(b). Congress has separately authorized buy-back programs totaling over $140 million, with limited success. See General Accounting Office, Effectiveness of Fishing Buyback Programs Can Be Improved, GAO-01-699T (May 10, 2001). Limiting the capacity of a fishing fleet before it reaches overcapacity is obviously more effective, less costly, and less disruptive than after-the-fact efforts to reduce a fishing fleet.

C. Large, Industrial Fishing Vessels Like the *Atlantic Star* Pose Particular Concerns for Fishery Conservation

Scientific and government concern about the impacts of fishing activity on the ocean's fish populations and ecosystems centers on the dramatic increase in efficiency (and in mortality) made possible by modern, sophisticated fishing vessels. As the National Research Council notes, "distant-water fleets" of factory trawlers "changed the face of fishery management" in the 1950s and 1960s, causing international disputes and leading to the creation of exclusive economic zones, international treaties, and international fishery-management bodies. NRC Fisheries Report at 17. New technologies permitted large vessels to freeze their catch and process it as it was taken aboard, and significantly enhanced the ability of fishermen to find and catch fish, exacerbating problems of fishing fleet overcapacity. As the Pew Oceans Commission observes, "Excess fish-catching capacity, or fishing power, is a combined result of the number of boats, their size, and their enhanced technology." Pew Oceans Report at 39. The Commission explains:

> New technology has made it hard for fish to hide and has vastly increased fishing efficiency. Geographic information systems and other computer technology have increased our ability to locate schools of fish we previously could not "see." Boats today have larger, stronger, and heavier gear capable of fishing in previously

> inaccessible areas. ... Our technology is simply outstripping natural obstacles and the ability of fish to replenish.

Pew Oceans Report at 39-40. See also William Broad & Andrew Revkin, Has the Sea Given Up Its Bounty, N.Y. Times, July 29, 2003, at C1; Andrew Revkin, Conservation as the Catch of the Day for Trawlnets, N.Y. Times, July 29, 2003, at C1.

As amici note above, at 7, the destructive impact of large foreign trawlers prompted Congress's enactment of the Magnuson-Stevens Act in 1976. In 1998, continuing concern about large industrial trawlers led Congress to enact a legislative moratorium on the entry of large new vessels into any federally-managed fishery. Introduced in September 1997, as the *Atlantic Star* was preparing to enter the New England fishery, the purposes of the American Fisheries Act included "phas[ing] out large fishing vessels that are destructive to the U.S. fishery resources because of their size and power." 143 Cong. Rec. S9949-03 (statement of Senator Stevens). Senator Murkowski "enthusiastically support[ed]" the legislation's purpose "of restoring the number of large fishing vessels operating off our shores to a reasonable and manageable level, by eliminating the entry of new vessels, regardless of ownership, and by allowing attrition to take its toll on the existing fleet." 143 Cong. Rec. S9969-03 (remarks

of Senator Murkowski). Enacted the following year, the American Fisheries Act prohibits the issuance of fishery endorsements for fishing vessels over 165 feet in length, greater than 750 tons in weight, or having engines totaling more than 3,000 horsepower, unless the relevant fishery management council approves the use of such vessels in the management plan for the fishery. 16 U.S.C. §12102(c)(5), added by Pub. L. 105-277, Div. C, Title II, §202(a), 112 Stat. 2681-617, 618.

As amici show below, the appropriations measures at issue in this case arose from the same concern regarding the impact of large trawlers on sensitive fisheries.

II. THE CONGRESSIONAL MORATORIA ON ENTRY INTO THE MACKEREL AND HERRING FISHERIES DID NOT AFFECT ANY COMPENSABLE PROPERTY INTEREST

A. Traditional Recognition of the Absolute Authority of the Sovereign Over the Taking of Fish and Wildlife Precludes the Assertion of Private Property Rights to Take Such Animals

The takings claims in this case arise in a unique area of law, in which by long-standing tradition the government enjoys complete sovereign control over private activity. As the Supreme Court observed in Geer v. Connecticut, 161 U.S. 519, 522 (1896): "From the earliest traditions, the right to reduce animals ferae naturae to possession has been subject to the control of the law-giving power."

Owned by no one in the wild, fish and wildlife were deemed under Roman law, and later in English common law, "as belonging in common to all the citizens of the State." Id. As the representative of the people, the State has traditionally exercised "absolute control" over the taking of fish and wildlife by private persons. Id. at 523. In the words of the Supreme Court of California:

> The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for its protection or preservation, or the public good.

Ex parte Maier, 37 P. 402, 404 (Cal. 1894), quoted in Geer, 161 U.S. at 529. See generally Michael J. Bean & Melanie J. Rowland, The Evolution of National Wildlife Law 7-15 (3d ed. 1997); John D. Echeverria & Julie Lurman, "Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause, 16 Tul. Envtl. L.J. 331, 339-43 (2003).

The absolute control exercised by the sovereign over the taking of wild animals precludes assertion of private property rights to engage in hunting or fishing, and bars claims for compensation when a private individual is denied permission to do so. As the Supreme Court of Illinois observed:

> [T]o hunt and kill game, is a boon or privilege granted, either expressly or impliedly, by the sovereign authority -- not a right

> inhering in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game.

Magner v. People, 97 Ill. 320 (1881), quoted in Geer, 161 U.S. at 533. Accord, e.g., Fields v. Wilson, 207 P.2d 153, 156-57 (Or. 1949).

The courts have therefore repeatedly rejected claims for compensation by disappointed hunters or fishermen, even where restrictions on the taking of fish or wildlife impair a property owner's ability to conduct a profitable business. See, e.g., Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942) (closure of plaintiff's private land to waterfowl hunting not a taking, despite landowner's claim that restriction rendered his marsh land and improvements worthless); Lansden v. Hart, 168 F.2d 409 (7th Cir.), cert. denied, 335 U.S. 858 (1948) (closure of area to hunting did not violate constitutional rights of owners of hunting leases and operators of hunting clubs). The courts have upheld the authority of the government to restrict fishing, even on private property, with equal vigor. E.g., State v. Roberts, 59 N.H. 484, 484-86 (1879); State v. Theriault, 70 Vt. 617, 623-24 (1898).

The public's sovereign authority over fish and wildlife thus represents a "background principle" of property law, recognized in every state, that limits private property rights in land or personalty, precluding takings claims based on an expectation of being allowed to fish or hunt. See Lucas v. South Carolina Coastal

Council, 505 U.S. 1003, 1029 (1992) (regulatory restrictions cannot effect a taking if they "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership."). See generally Echeverria & Lurman, supra, at 369-71; Bean & Rowland, supra, at 38.[1]

The precedent of this Circuit itself establishes that public ownership of wildlife is a principle of property law that bars a taking claim based on wildlife-protective regulations. In Bishop v. United States, 126 F.Supp. 449 (Ct.Cl. 1954), cert. denied, 349 U.S. 955 (1955), the United States Court of Claims ruled that a proclamation issued under the Migratory Bird Treaty Act barring hunting of wild geese on plaintiff's property did not effect a taking. The Court stated:

> "[T]he general right of the government to protect wild animals is too well established to be now called in question. ... The measures best adapted to this end are for the legislature to determine, and the courts cannot review its discretion. If the regulations operate, in any

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[1]Plaintiff may challenge the continuing vitality of these principles on the basis of language in several Supreme Court decisions holding that the state's traditional authority over wildlife does not preclude enforcement of federal mandates. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 333-34 (1979). But these decisions "do not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the citizens of a state." Oliver Houck, Why Do We Protect Endangered Species and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings" 80 Iowa L. Rev. 297, 311 n. 77 (1995). See, e.g., Shepard v. State, 897 P.2d 33, 41-43 (Alaska 1995) (explaining that Hughes addresses whether wildlife represents goods in commerce, not the scope of government authority to conserve wildlife within its jurisdiction).

> respect, unjustly or oppressively, the proper remedy must be applied by that body."

Id. at 452-53, quoting Barrett v. State, 116 N.E. 99 (N.Y. 1918). The court noted that, after Geer, "Plaintiff's allegation in their petition that the right to hunt wild geese is a property right cannot be taken seriously... . No citizen has a right to hunt wild game except as permitted by the State." Id. at 451. Bishop thus establishes a binding rule in this circuit that, even where a wildlife regulation denies an owner all economically viable use of the property, the doctrine of public ownership precludes a finding of a taking.[2]

Of particular relevance here, the Court of Claims relied upon the sovereign ownership principle in squarely rejecting a claim that federal acquisition of tribal lands had deprived the tribes of an alleged exclusive right to take salmon from rivers on those lands. Tlingit and Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968). The Court noted:

> Since the primordial decision in Geer v. Connecticut, ... it has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters. Fish are ferae naturae, capable of ownership only by possession and control. No citizen has any right to the fish.... It has

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[2]The decisions of the former Court of Claims represent binding precedent in this Court. See South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

> long been recognized that the sovereign owns the right to fish in the navigable waters and tide waters within its territorial boundaries.

389 F.2d at 785-86 (citations omitted). The Court held that the tribes lacked a compensable property interest in either the fish themselves or their use of their former lands as a location to fish. Id. at 787.

B. The United States Exercises Exclusive Sovereign Control Over Fishing in the United States EEZ, Precluding Plaintiff's Assertion of a Private Property Right to Fish in Such Waters

The Court of Federal Claims ignored these long-standing principles of law that vest the sovereign with plenary authority over the taking of fish and wildlife. Although the court acknowledged that "plaintiff's rights to fish were subject to a pervasive regulatory scheme," the court found "nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace," and held that fishing vessels came with "an inherent right of use." 49 Fed. Cl. at 47. The court concluded: "Fishing as a livelihood is not a creation of the government. We conclude that plaintiff possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime." Id. at 48.

The court's conclusion on this point was essential to its ultimate finding of liability, since the court properly acknowledged that plaintiff lacked a cognizable

property interest in its fishing permits themselves. Id. at 46 ("Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferable."). This Court confirmed that point in Conti v. United States, 291 F.3d 1334, 1342 (Fed. Cir. 2002), concluding that a fishing permit issued under the Magnuson-Stevens Act is merely a "revocable license, instead of a property right." Nor could plaintiff claim that the government had seized its vessel; plaintiff remained in full possession of its ship, and was free to use it to fish in non-United States waters (as it did) or for other purposes. Most importantly, plaintiff remained free to sell it (as it ultimately did, for a profit). As this Court recognized in Conti, id. at 1343-44, those facts preclude a taking claim for the vessel itself as a matter of law.

The trial court instead recognized a property interest in the plaintiff's expectation of being allowed to use its enormous ship to fish in United States waters. That argument must fail, however, in the face of the federal government's plenary control over fishing in such waters. International law has long recognized the sovereign right of national governments to control fishing within a nation's territorial waters. See, e.g. Martin v. Waddell, 41 U.S. 367 (1842); Manchester v. Commonwealth of Mass., 139 U.S. 240, 257 (1891). In 1976, with the enactment

of the Magnuson-Stevens Act, Congress asserted its "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. § 1811.

Under the Magnuson-Stevens Act, just as under traditional principles of wildlife law, no one can claim a "right" to fish within the EEZ. The Act bars foreign fishing entirely within the EEZ except as the United States may permit, 16 U.S.C. §1821, and authorizes the regional fishery management councils and the Department of Commerce to require federal permits for United States fishermen to engage in fishing for any fish population in the EEZ. 16 U.S.C. § 1853(b)(1). The councils and the Department are empowered to designate zones and periods where fishing is limited or prohibited, or permitted only by specific types of fishing vessels, id. § 1853(b)(2), and may prohibit or limit specified fishing gear and fishing vessels. Id. § 1853(b)(4). The authority of the federal government to regulate fishing and fishermen under these provisions has been uniformly upheld. See, e.g., Fishermen's Dock Co-op, Inc. v. Brown, 75 F.3d 164 (4th Cir. 1996) (affirming annual catch quota for summer flounder established by Secretary of Commerce pursuant to Act); Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456 (9th Cir. 1987) (upholding ban on trawl and pot fishing adopted by Secretary of Commerce pursuant to Act).

Given the longstanding sovereign authority over public fishery resources, and the "exclusive fishery management" exercised by Congress within the EEZ, the notion that a vessel owner has an "inherent right" to use its boat to fish, as the Court of Claims noted in rejecting a similar claim in Bishop, "cannot be taken seriously." 126 F.Supp. at 451. Just as "[n]o citizen has a right to hunt wild game except as permitted by the State," id., no citizen has a right to fish in the EEZ except as permitted by the federal government. Plaintiff's ability to use the *Atlantic Star* to fish, instead of for its original purpose of toxic waste disposal, was always wholly dependent upon federal permission.

As this Court has recognized in Conti and in Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993), this basic fact bars the assertion of a property interest cognizable in a takings claim. In Conti the fisherman claimed that a federal ban on the use of drift gillnets to fish for swordfish had taken the "use" of his vessel and gear. This Court found that claim untenable as a matter of law, since the plaintiff's use of his vessel in this manner "was dependent upon a permit that was revocable at all times and that ... did not constitute a property right for purposes of the Fifth Amendment." 291 F.3d at 1345 n.8. Because the federal regulation "banned a particular use of Mr. Conti's vessel and gear 'which was not inherent in its ownership' and was 'totally dependent upon the ... permit issued by'

the government," id., this Court rejected Conti's claim.

The Conti Court relied upon the reasoning in Mitchell Arms, a case which parallels this case in important respects. In Mitchell Arms, as here, the plaintiff challenged the revocation of a federal permit in an area uniquely subject to governmental control – in Mitchell Arms, Congress's exclusive authority to regulate commerce with foreign nations. Because the plaintiff's expectation in Mitchell Arms of being allowed to import and sell firearms in the United States "was not inherent in its ownership of the rifles," but rather "c[ame] into being only upon the issuance of an import permit," the Federal Circuit held that it was merely a "collateral interest" beyond the protection of the Fifth Amendment. 7 Fed. 3d at 217.

The trial court attempted to distinguish Mitchell Arms on the ground that fishing is less dangerous than firearms. 49 Fed. Cl. at 47. Although the trial court's assumption that fishing is "innocuous" is contradicted by the urgent concerns, described by amici above, concerning the impact of commercial fishing on fish populations and ocean ecosystems, the trial court's reasoning misses the point in a more fundamental way. The reason the plaintiff in Mitchell Arms lacked a compensable property interest is because the government's control of commerce with foreign nations is plenary and absolute; there is no "inherent right"

to import and sell goods. The government's authority is equally absolute over fishing in United States waters. Contrary to the trial court's view, the opportunity to fish is indeed "totally a matter of government grace."

III. THE CHARACTER OF THE GOVERNMENT ACTION IN THIS CASE, TAKEN FOR LEGITIMATE CONSERVATION REASONS, DOES NOT SUPPORT A FINDING OF A TAKING

The Court of Federal Claims also erred in concluding that the "character" of the government's action in this case supported a finding of a taking. Although the court ostensibly "assumed that Congress had good and sufficient reasons" for revoking plaintiff's federal permits and imposing a moratorium on the entry of vessels of the size of the *Atlantic Star* into the Atlantic mackerel and herring fishery, 49 Fed. Cl. at 44, the court's decision was heavily influenced by its apparent sense that Congress's action was in fact illegitimate. The court criticized the government's action as improperly "targeted" at plaintiff's vessel in particular, as retroactive, as an improper legislative intrusion into the regulatory jurisdiction of federal fishery agencies, and as unjustified by any real concern for marine conservation. Id. 49-51. The court's sense that the government's action here was illegitimate weighed heavily in its ultimate finding of liability for a taking, influencing its analysis of both the plaintiff's reasonable expectations and the

character of the governmental action. Id.

The trial court's criticism's of the government's action are entirely unfounded, however. First, the government's action was not "targeted" only at plaintiff's ship. Although the *Atlantic Star*'s imminent entry into the Atlantic mackerel and herring fishery undoubtedly helped focus Congress's attention on the potential risks of large industrial trawlers, the legislative history underlying the appropriations measures at issue in this case makes clear that Congress was concerned about the entry of other large trawlers as well. See, e.g., 143 Cong. Rec. H7890-02 (statement of Rep. Saxton) (noting that "up to four huge factory trawler/freezer vessels ... are poised to enter this fishery within a very short timeframe."). The appropriations measures on their face regulated new entry by a class of large vessels. The size limitation adopted clearly was not focused solely on the *Atlantic Star*, which was more than twice the maximum length and almost ten times the maximum weight defined by Congress. That Congress was motivated by a general concern about the employment of large, factory trawlers in American fisheries is unmistakably shown by the enactment, in the same time period as these appropriations measures, of the provision in the American Fisheries Act suspending the issuance of fishery certifications for new, large vessels in all United States fisheries. 16 U.S.C. §12102(c)(5).

Second, the Congressional action was retroactive only in a limited and clearly justifiable sense. The moratorium established by the appropriations measures was clearly prospective in nature, limiting new entry by any large vessel. The revocation of plaintiff's newly-issued, short-term permits was necessary to carry out Congress's purpose, discussed below, of freezing the status quo so that the responsible fishery management councils could evaluate whether large vessels should be permitted in these fisheries at all. Retroactive effective dates established for the similar purpose of preventing circumvention of a new statute in the interval preceding its passage "serve entirely benign and legitimate purposes," as the Supreme Court noted in Landgraf v. USI Film Products, 511 U.S. 244, 267-68 (1994).

Third, Congress's action in this case is neither unusual nor an improper intervention in fishery management, as the trial court evidently thought. Congress exercises plenary authority over fishery management within United States waters, and plainly may take legislative action as it sees fit to regulate those fisheries. Congress has in fact taken an increasingly active role in fishery management. In 1996, just prior to the events of this case, Congress directed the Department of Commerce and the fishery management councils to take stronger action to conserve overfished fish populations, eliminate waste (bycatch), and protect

essential fish habitat in the Sustainable Fisheries Act. Two years later, the American Fisheries Act, in addition to banning large new vessels and increasing ownership requirements for American-flagged vessels, regulated the use of individual fishing vessels in the Alaskan pollock fishery by name. Pub.L. 105-277, Div. C, Title II, Subtitle II, §§208, codified at 16 U.S.C. §1851 note. Congress's actions in this case can hardly be viewed as an improper or unusual intrusion in a sphere where Congress itself possesses, and frequently exercises, plenary control.

Finally, the trial court's sense that Congress was not motivated by genuine concern for marine conservation is simply improper judicial second-guessing, influenced by the court's erroneous view that ocean fishing is an "innocuous" activity. The measures at issue in this case arose from the same concern regarding the impacts of new, large trawlers on fish resources that led Congress, in the same time period, to generally prohibit such vessels in the American Fisheries Act. The measures at issue in this case sought time for the responsible fishery management councils to consider the propriety of allowing such vessels in the Atlantic mackerel and herring fisheries in particular. Senator Snowe explained the purpose of proposed legislation that was a precursor to these measures:

> To ensure that the Atlantic Star and other vessels of its class

> receive the thorough consideration intended in the Magnuson-Stevens Act, the bill introduced by Senator KERRY and I calls a temporary timeout on the entry of very large vessels into the herring and mackerel fisheries until the [fishery management] councils have time to act.

143 Cong. Rec. S9637-01 (1997). Noting that there was no fishery management plan for herring, and that the plan for Atlantic mackerel had not considered the possibility of entry of very large fishing trawlers, Senator Snowe concluded:

> Mr. President, this bill simply ensures that the analytical and deliberative process outlined in the Magnuson-Stevens Act has a chance to work as it was intended. And when the issue is the introduction of a dramatically different new fishing technology into two relatively healthy fisheries of substantial importance to many people who live in the region, the integrity of this process could not be more important. It is unfortunate that this issue was not resolved by the councils and the Commerce Department sooner, but the fact is that it was not, and Congress, if it is to ensure that our fisheries are managed responsibly, must intervene in a responsible manner.

143 Cong. Rec. S9643-44 (1997).

Representative Saxton explained the purpose of the appropriations measure finally adopted by Congress that year in the same terms:

> These stocks [herring and mackerel] are under an imminent threat. There are up to four huge factory trawler/freezer vessels which are poised to enter this fishery within a very short timeframe. ... Based on testimony before the Subcommittee on Fisheries Conservation, Wildlife and Oceans, it is clear that the mackerel fishery can only sustain a 150,000 metric ton annual harvest. ... Three of these large fishing vessels would easily meet and possibly exceed this harvest within 1 year. It is not clear that the resource can withstand this

> massive fishing effort and remain viable. Because of this threat to the resource off the East Coast, I feel compelled to offer this amendment to implement emergency action for 1 year through the appropriations process.
>
> During this 1-year cooling off period, it will be possible to obtain the necessary population data so that the Department of Commerce can make an accurate forecast of how many fish can be caught-before another crisis occurs.

143 Cong. Rec. H7890-02. Similarly, Representative Pallone stated:

> I believe that we must prohibit large vessels from the Atlantic herring and mackerel fishery until accurate information has been collected. To date, no ship of this size has fished this vulnerable fishery. There is no way for us to know how a large vessel would affect the fishery.
>
> Mr. Chairman, large vessels have the potential of depleting any fishery and have it overutilized in a short amount of time. Large fishing trawlers are highly efficient and have the ability to harvest five or six times more than any vessel currently registered on the Atlantic Coast.
>
> . . .
>
> If we are to guess as to the size of the stock and its preservation, I would rather make the mistake on the side of conservation, not exploitation.

143 Cong. Rec. H7890-02, H7895.

Congress's precaution was fully justified. The Mid-Atlantic Fishery Management Council subsequently found that "considerable uncertainty exists about the current abundance of the Atlantic mackerel stock," and determined that the existing fishing fleet in the Northeast had the potential fishing capacity to take

more than double the sustainable catch of Atlantic mackerel. Mid-Atlantic Fishery Management Council, Amendment 8 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (October 1998), at 139, 141. The council prohibited entry of new large vessels into that fishery in order to avoid exacerbating such overcapacity. Id. App. 2, at 3. Caution was particularly appropriate for fisheries in New England, of course, where virtually every other commercially-exploited population of fish had already been overfished to the point of collapse in recent years. The trial court had no basis to disparage the legitimacy of these concerns.

The character of the government's action in this case thus does not support a finding of a taking. Moreover, to the extent that plaintiff's complaint really lies with its sense that it was unfairly treated, its claims properly lie under the Due Process and Equal Protection Clauses, rather than the Takings Clause. As five Justices of the Supreme Court made clear in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), challenges to the substantive wisdom of government action, such as retroactive legislation, may not be heard under the Takings Clause. See 524 U.S. at 545, 547 (Kennedy, J.); 554 (Breyer, J.).[3]

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[3]This Court has recognized that the five-Justice vote against takings liability in Eastern Enterprises constitutes binding precedent. Commonwealth Edison Co.

Plaintiff had a full opportunity to litigate its constitutional challenges to the legitimacy of the government's action before the District Court for the District of Columbia, but abandoned them after that court denied injunctive relief on the grounds that plaintiff lacked a reasonable likelihood of success on the merits. The Court of Federal Claims, by contrast, lacks jurisdiction even to hear such claims. See, e.g., LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995). The trial court was evidently aware that plaintiff's concerns regarding the legitimacy of the government's action did not fit under a takings theory. 49 Fed. Cl. at 44 ("What makes the facts particularly troublesome is that, under existing precedent, it is far from clear that the Takings Clause is implicated."). Having abandoned its constitutional claims in one court, the plaintiff should not have been permitted a second bite at the apple in contravention of the established limitations on the Takings Clause.

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v. United States, 271 F.3d 1327 (Fed. Cir. 2001) (*en banc)*.

CONCLUSION

This Court should reverse the judgment of the Court of Federal Claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 4th day of September, 2003, I served copies of the Brief of Amici Curiae Oceana and The Ocean Conservancy in Support of United States by first class mail upon the following counsel of record:

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