

No. 03-5101

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

v.

UNITED STATES

Defendant-Appellant.

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

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BRIEF OF THE AMICI CURIAE STATES OF MAINE, ALABAMA, ALASKA,  
CALIFORNIA, FLORIDA, GEORGIA, MASSACHUSETTS, MICHIGAN,  
NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OREGON,  
RHODE ISLAND, AND WASHINGTON IN SUPPORT OF THE  
UNITED STATES FOR REVERSAL OF THE JUDGMENT  
IN FAVOR OF THE PLAINTIFF-APPELLEE

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## **I. Interests of the *Amici Curiae*.**

The states joining in this brief regulate the commercial harvesting of fish and other marine resources within their waters, which, with certain exceptions, lie up to three miles off of their respective coasts.<sup>1</sup> These state laws may include significant restrictions on the amounts of fish that are allowed to be harvested, as well as the manner in which the fish may be taken – such as prohibitions or restrictions on types of equipment or vessels that may be used in commercial fishing. See, e.g., 12 M.R.S.A. § 6171 (authorizing the Maine Department of Marine Resources to limit the taking of marine resources by time, method, number, weight, length and location); RCW 77.04.012 (authorizing the Washington Department of Fish and Wildlife to regulate the manner in which that State’s fishery resources are exploited). The ability to control fishing effort, including by limiting or prohibiting entry of persons and vessels permitted to take fish and even the total closure of a particular fishery, sometimes on an emergency basis, are all essential tools to the management of the states’ fisheries and marine resources for economic,

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<sup>1</sup> Under the federal Magnuson Act, 16 U.S.C. §§ 1801 et seq., the United States Congress and agencies that it so designates have authority to manage and regulate fisheries in the waters of the United States that, with certain exceptions, lie from three to two hundred miles off-shore. Each coastal state has parallel authority to manage and regulate fisheries as specified in the Magnuson Act, generally speaking within the three-mile limit of its coast. Of course, the *amici* states of Ohio and Michigan, while not coastal, have similar interests in the regulation of commercial fisheries within the Great Lakes.

conservation, public health and other public purposes. In taking these measures, the states rely upon basic and long understood legal principles that fisheries are a public resource<sup>2</sup> and that permits to take fish confer not property rights, but revocable privileges that are continuously subject to the states' authority and

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<sup>2</sup> It is a long settled principle that fish in the sea are public resources until lawfully caught.

Under the common law of England all property right in animals *ferae naturae* was in the sovereign for the use and benefit of the people. The killing, taking, and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the federal Constitution. Geer v. Connecticut, 161 U. S. 519, 527, 528, 16 Sup. Ct. 600, 40 L. Ed. 793 (other citations omitted). There is no private right in the citizen to take fish or game, except as either expressly given or inferentially suffered by the state. State v. Tice, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469.

Cawsey v. Brickey, 144 P. 938 at 939 (Wa. 1914). See, also Maine v. Tamano, 357 F. Supp. 1097 (D. Me. 1974) ("It has long been established by decisions of the Supreme Court, and of the Supreme Judicial Court of Maine, that a State has sovereign interests in its coastal waters and marine life... which interests are separate and distinct from the interests of its individual citizens.") id. at 1100, citing McCready v. Virginia, 94 U.S. 391 (1876) ("The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been lawfully granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents the people in their sovereign united capacity.") id. at 394 (citations omitted). See Tlingit and Haida Indians of Alaska v. United States, 389 F. 2d 778 (Cl. Ct. 1968).

responsibility to actively manage fisheries within their waters in the public interest. Unlike private property subject to the Constitution's takings clause, fisheries in public waters are a public resource.

These state programs, and the principles upon which they are founded, will be threatened if this Court upholds the decision of the United States Court of Federal Claims in this case. The Claims Court determined that laws enacted by Congress, invalidating and refusing to renew fishing permits for vessels over a certain size to take certain species in waters of the United States, amounted to a "temporary taking" of the claimant's *fishing vessel*. It is vital to the states that they remain able to make management decisions restricting the manner and method of taking the public's fisheries without the apprehension of being subjected to takings claims for these actions.

## **II. Facts Significant to this Case.**

In its decisions below, the Claims Court spectacularly awarded \$37 million based upon a finding of a temporary taking arising out of acts of Congress that prevented the licensing of oversize vessels in fishing for herring and mackerel in waters of the United States.<sup>3</sup> The court determined that Congress' actions had effected a complete loss of the profit-making value of Appellee's vessel for the

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<sup>3</sup> Appellee's motion for summary judgment, asserting a Fifth Amendment taking of its vessel, was granted by the Court of Claims at 49 Fed. Cl. 36 (2001). The enormous takings damages were awarded by the Court at 55 Fed. Cl. 575 (2003).

period in question. The court came to this conclusion contrary to the following significant facts, which are drawn from the court's own findings:

- (1) At all times, Appellee was well aware of the heavily regulated and dynamic nature of the government's regulatory management of commercial fisheries.
- (2) During most of the time when Appellee was investing heavily in equipping its vessel, its owners were specifically aware that federal regulatory agencies and Congress itself were deeply concerned about the dramatically large capacity of its vessel and the potential impacts on the fisheries involved as well as on the traditional fishing industry in the affected waters.
- (3) Recognizing the risk of loss of its permits under these circumstances, Appellee made the business judgment to take out an insurance policy from Lloyds of London that protected against this risk, and, when this very risk was realized, millions were paid out under this policy.
- (4) Appellee then proceeded to make economic use of its vessel to fish for mackerel and herring in foreign waters, although that use did not yield the same profits that Appellee contends it would have made if its U.S. permits were left undisturbed and continuously re-issued.

- (5) The takings damages awarded by the Court of Claims included what it found to be Appellee's lost profits, extending well beyond the expiration dates of its revoked permits, as if Appellee had an entitlement to the continuous renewal of these permits notwithstanding Congress' prohibition on renewal.
- (6) Appellee ultimately sold its vessel *for a net profit*.

### **III. Argument.**

Even accepting all of the trial court's factual findings as correct, it is difficult to conceive of a more legally incorrect outcome in this case, nor one that could have greater chilling effect on the ability of government to actively manage the public's fisheries.

#### **A. Appellee Had No Compensable Property Interest.**

Perhaps the most dramatic element of the Court of Claims' ruling is its determination that Congress' enactments revoking Appellee's permits to fish for herring and mackerel in the waters of the United States, and prohibiting renewal of those permits in the future, created a constitutional taking of Appellee's *vessel*. There is no known precedent supporting this conclusion, and it stands in diametric opposition to this Court's ruling in Conti v. United States, 291 F. 3d 1334 (Fed. Cir. 2002), which is controlling. In Conti, the plaintiff claimed a constitutional taking of his license, vessel and fishing gear arising out of the federal

government's prohibition of use of that vessel, as it was equipped, for gillnet swordfishing. This Court applied its traditional, regulatory takings test, requiring a claimant to establish that (1) it owns a compensable property interest, and (2) that property interest has been taken by the government's regulation. 291 F. 3d at 1337, relying upon M&J Coal Co. v. United States, 47 F. 3d 1148 (Fed. Cir. 1995).

As to Conti's asserted property right, this Court viewed the interest conferred by the federal fishing permit as a revocable license and not a compensable interest in property. 291 F. 3d at 1340-42. See, e.g., United States v. Fuller, 409 U.S. 488 (1973); Alves v. United States, 133 F. 3d 1454 (Fed. Cir. 1998). Applying traditional notions of property law, this Court found that Conti's ownership of his vessel and equipment remained intact,<sup>4</sup> potentially useful for other fishing or available for sale, but that he had no property interest in his federal permit to use this equipment for the particular purpose of taking swordfish, even though he had been permitted to do so in the past. Just as in the present case, that permit lacked all of the indicia of property ownership, since it could not be assigned or sold, did not confer exclusive rights, held no promise of renewal and

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<sup>4</sup> Contrary to the Court's clear determination in Conti, even if there were a property interest in a fishing license, it does not follow that the denial of that license translates into a taking of a fishing vessel. To use a parallel example, a denial of a driver's license, even if legally incorrect, would not create a constitutional taking of the driver's motor vehicle.

contained no guarantee against revocation. See, Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986); Mitchell Arms v. United States, 7 F. 3d 212 (Fed. Cir. 1993), affirming 26 Cl. Ct. 1 (1992). Indeed, Conti could hardly have argued (and he did not) that he owned profit-making rights in the fish themselves, which, until lawfully harvested, remain a public resource subject to plenary government management and control. To underscore these points so that there can be no mistake, the Magnuson Act and corollary regulations place all on notice that fishing permits may be suspended, revoked or modified at any time. 16 U.S.C. §§ 1853(d)(3)(D), (d)(2)(A); 50 C.F.R. § 648.4(m).

The Court of Claims below seems to have attempted to distinguish Conti from the present case on the grounds that this Court in Conti had not evaluated whether the government action had taken the claimant's vessel and gear. This is not correct. This Court in Conti fully considered both whether the government's action had taken Conti's permit, his gear *and* his vessel, as Conti had claimed. 291 F. 3d at 1338-9. Because Conti retained all the attributes of ownership of his tangible property, and could continue to use it in other fisheries or sell it, this Court concluded that the fundamental attributes of his property had been left untouched. Id. The fact that the loss of his permit had an economic impact on Conti's use of his gear and vessel, this Court found, did not result in the government's appropriation of that property. Id. See also, Burns Harbor Fish Co. v. Ralston, 800

F.Supp. 722 at 726 (S.D. Ind. 1992). The exact same is true here. While Appellee's permits to fish for certain species of a public resource in United States waters were rescinded, its fundamental attributes of ownership in its fishing vessel were unaffected.

The present case is legally on all fours with Conti. The Court of Claims erred in finding that Appellee had a property interest that was implicated when Congress took action to revoke and refuse to renew its permits to fish for herring and mackerel in waters of the United States.

**B. Appellee Lacked Any Reasonable, Investment-Backed Expectations Necessary to its Takings Claim.**

Property interests are often evaluated in terms of investment expectations. “[The Supreme] Court has dismissed ‘taking’ challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.” Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124-25 (1978) (citations omitted).<sup>5</sup> Particularly with regard to takings cases relating to personal business

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<sup>5</sup> While this discussion focuses on the reasonable expectations of the property owner, Appellee fails as well the other two considerations of the traditional Penn Central, three part takings analysis. (1) The “character of the government action” in this case was to deny permits to take a public resource in federally regulated waters, not the kind of government action that should give rise to a constitutional

property used under government permits to access public resources, Congress' enactments revoking and prohibiting renewal of those permits do not result in a constitutional taking.

Both this Court in Conti and the District Court in Burns Harbor rejected claims that the purchase of personal property in connection with the business of fishing, coupled with a permit to fish for a particular species, created a reasonable expectation to continue fishing under that permit. Such an expectation is clearly unreasonable where the regulatory system puts all on notice that a permit may be revoked or the type of gear may be banned in the future. As the Burns Harbor Court explained, this condition derives from the fact that, when the government issues a permit allowing access to a publicly owned resource, the government retains the right to reclaim that access and there can be no reasonable expectation otherwise. 800 F. Supp. at 728.

Appellee made its investment with the fullest knowledge that commercial fisheries are heavily and dynamically regulated by the government. Indeed, knowing the regulatory risks that it was taking on, Appellee purchased an insurance policy to hedge against the risk of its permits being revoked, and then proceeded to recover under that policy when Congress took action to do so.

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taking of a vessel. (2) There was no diminution of value of the vessel in this case; the vessel was economically used and then sold for a profit.

Moreover, during virtually the entire period of 1997, when Appellee was actively engaged in investing in outfitting its large vessel for catching herring and mackerel, Appellee was *specifically* aware of the federal government's concern over the sheer capacity of its vessel and its potential effect on fisheries and traditional fishing industry. During this time, as the Claims Court found, Appellee attended Congressional hearings and meetings with key legislators in an effort to deter the actions that Congress took later that same year to revoke its permits and subsequently to prohibit their re-issuance. Even without Congressional action the federal regulatory agencies explicitly retained the right to suspend, revoke or nullify the fishing permits at any time. 50 C.F.R. § 648.4(m).

In sum, throughout virtually the entire period of its investment, Appellee could (and did) clearly foresee the speculative risks that it was taking, and acted to insure against those risks. Finally, contrary to the vast damages awarded by the Court of Claims, Appellee had no legally cognizable expectation whatsoever, no less a property right, that its permits would be renewed. The expiration dates of its permits closely followed the date when its vessel's outfitting was complete and ready for deployment, and Appellee was certainly not entitled to continuous permit renewals.

Courts have long emphasized that rights sufficient to support a takings claim cannot arise in a business voluntarily entered into, which, from the start, is known

to be subject to pervasive government regulation. See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986); Dames & Moore v. Regan, 453 U.S. 654 (1981); Andrus v. Allard, 444 U.S. 51 (1979); Mitchell Arms v. United States, 7 F. 3d 212 (Fed. Cir.1993). When an investment is made in a highly regulated industry, reasonable expectations must be based not only on then-existing regulations but also on the recognition that there may well be changes in those regulations in the future that are adverse to the economic interests of a particular business. Branch v. United States, 69 F. 3d 1571 (Fed. Cir. 1995); Atlas Corp. v. United States, 895 F. 2d 745 (Fed. Cir. 1990). The Magnuson Act itself provides a comprehensive and pervasive federal regulatory scheme reflecting congressional intent to occupy the field of fisheries management within federal waters, and, as noted above, specifically states that permits to take fish are not property rights and may be revoked at any time.

In short, it is hard to conjure up a set of facts where a claim could be so lacking in the sort of reasonable expectations necessary to a successful takings challenge. Indeed, the Court of Claims in this case acknowledged as much when it wrote “under existing precedent, it is far from clear that the Takings Clause is implicated.” 49 Fed. Cl. at 44. Appellee was simply engaged in a business gamble, one in which it was ultimately made financially whole, but now Appellee demands a multimillion dollar windfall as a constitutionally protected property right.

**C. Appellee Suffered No Economic Loss Justifying a Constitutional Taking.**

Even if Appellee were found to be vested with a property right that the government had taken, it suffered no economic damage, no less that which would justify a constitutional taking. See Brown v. Legal Foundation of Washington, 123 S. Ct. 1406 (2003). A constitutional taking does not occur simply because the claimant is frustrated in realizing the profits that it had hoped for in its economic venture. See Andrus v. Allard, 444 U.S. 51 (1979). If it were as Appellee would have it, compensable takings would be so commonplace that government could hardly function.

In the instant case, Appellee was able to use its vessel to fish for herring and mackerel in foreign waters. It also benefited from substantial sums recovered under its insurance policy protecting it against the known risk of the government's refusal to allow it to fish in U.S. waters. And, it ultimately sold its vessel for a net profit. There is simply no precedent supporting a takings determination based upon a claimant's speculative hopes of maximizing the profits of its business venture.

**D. Whatever Constitutional Scrutiny might Apply to the Government's Actions in This Case Would Lie Under the Due Process Clause, Not the Takings Clause.**

There was no constitutional impediment to Congress taking action, as it did, to stop Appellee from deploying its enormous vessel to fish for herring and mackerel in U.S. waters. However, even if one were to advocate for a

constitutionally imposed limitation on these facts, the proper analytical framework would be under the Constitution's due process clause rather than the takings clause. In this regard, the Court of Claims misapprehended the significance of the Supreme Court's collective opinions in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). 49 Fed. Cl. at 45-46. In Eastern Enterprises, the majority of Justices (comprised of Justice Kennedy in concurrence and Justices Stevens, Souter, Ginsburg, and Breyer in dissent) agreed that the applicable framework for evaluating a retroactive law unfairly causing substantial financial loss to a business venture should be the due process clause. Where such retroactivity results in upsetting long settled transactions in a fundamentally unfair way, the due process clause may be applicable in judging the validity of the legislative measure.

The Court in Eastern Enterprises was confronted with a Congressional enactment retroactively imposing a very heavy financial burden on a company that had left the regulated business and settled its affairs *decades* earlier. While the Court struck down this law, the majority of the Justices found that the appropriate constitutional framework for doing so was the due process clause. Of course, the Court of Claims has no jurisdiction to strike down a law on this basis. Instead, the court attempted to fashion an incorrect remedy under the takings clause, by overlooking fundamental takings principles that reject the existence of a compensable property interest when the government's action relates to permits it

has granted to take a public resource but leaves ownership of the privately owned property intact.

Even applying the due process clause to this case, there is nothing in Eastern Enterprises or in other known precedent that would justify a declaration of invalidity of Congress' enactments here. Unlike the plaintiff in Eastern Enterprises, during most of the time of its investment Appellee was on notice of the prospect of regulatory intervention in its proposed business. Also unlike Eastern Enterprises, Congress' action here was prospective not retroactive. Appellee had no right or reasonable expectation to the continuation of its permits to fish for herring and mackerel in U.S. waters, and certainly none to renewals of those permits. By any analysis, the Congressional enactments in question were not in violation of the Constitution.

#### **IV. Conclusion.**

The Court of Claims erroneously found that Congress committed a constitutional taking of Appellee's vessel. This determination should be overturned as clearly inconsistent with established case law of this Court and of the Supreme Court.

Dated: August \_\_\_, 2003

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jeffrey Pidot, Chief of the Natural Resources Division for the Office of the Attorney General in the State of Maine, attorney for the *Amici Curiae*, herein certify that, on August \_\_\_, 2003, the Brief of the *Amici Curiae* in Support of Reversal of Judgment was filed by dispatch to Federal Express for overnight delivery to the United States Court of Appeals for the Federal Circuit in accordance with Fed. R. App. P. 25(a)(2)(B). I hereby certify that I also served two copies of the Brief on the following parties by way of Federal Express, overnight delivery:

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