LEGAL AND POLICY IMPLICATIONS OF THE PERCEPTION OF PROPERTY RIGHTS IN CATCH SHARES

Mark Fina* & Tyson Kade**

Abstract: Catch shares are a fishery management strategy under which persons are allocated exclusive access to specific portions of the total allowable catch of a fishery. Proponents of catch share management argue that these programs allow for more efficient management of annual catch limits and mitigate the negative biological and economic impacts associated with other management programs. Because of the exclusivity of their allocations, catch share programs have been characterized by their opponents as privatizing the public fisheries resource and granting catch share holders a property right to fish. However, case law suggests that a court is unlikely to conclude that catch shares constitute property or entitle a share holder to compensation under the Fifth Amendment takings clause if those shares are revoked or modified.

Nevertheless, the Magnuson-Stevens Fishery Conservation and Management Act instills catch shares with more attributes of property than other fishing permits. This paper examines the existing authority for establishing catch share management programs and the property right implications of that authority. Despite the low probability that a court would find a compensable taking, an analysis of takings law provides useful guidance to policymakers and fishery managers as they attempt to develop catch share programs. Consideration of takings law can help managers to structure a program that provides some of the benefits that arise from property rights, while avoiding potential claims of entitlement from catch share holders when program modifications are implemented.

* Mark Fina, Ph.D., J.D. is a Senior Economist at the North Pacific Fishery Management Council.

** Tyson Kade, J.D. is an attorney at Van Ness Feldman, LLP, a law firm focused on energy, environmental and natural resources law in Seattle, Washington and Washington, D.C.

I. INTRODUCTION

Catch shares are a fishery management strategy under which individuals, harvesting cooperatives, communities, or other entities are allocated exclusive access to specific portions of the total allowable catch of a fishery.[1] Proponents of catch share management argue that these programs allow for more efficient management of annual catch limits, mitigate negative biological and economic impacts associated with the race for fish that typically arises under limited access management, and promote safer and more profitable fishing practices.[2]

---

1. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NOAA CATCH SHARE POLICY i, *available at* http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/noaa_cs_policy.pdf.

2. *See generally* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES (Donald R. Leal

Because of the exclusivity of allocations, catch share programs have been characterized by their opponents as privatizing the public fisheries resource and granting catch share holders a property right to fish.[3]

Since 1990, the National Marine Fisheries Service (NOAA Fisheries), the federal agency tasked by the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") with managing the nation's fisheries, has implemented seventeen catch share programs.[4] In response to increased support for the use of catch share management programs, in 2010, NOAA Fisheries released its Catch Share Policy, which states:

> [T]o achieve long-term ecological and economic sustainability of the Nation's fishery resources and fishing communities, NOAA encourages the consideration and adoption of catch shares wherever appropriate in fishery management and ecosystem plans and their amendments, and will support the design, implementation, and monitoring of catch share programs.[5]

Despite the increased support for the development of catch share programs,[6] program modifications are strongly resisted

---

ed., 2005) (wherein several economists describe their perspectives on these benefits).

3. Daniel Bromley, *Abdicating Responsibility: The Deceits of Fishery Policy*, 34 FISHERIES 280, 283–84 (2009); Seth Macinko & Daniel W. Bromley, *Property and Fisheries for the Twenty First Century: Seeking Coherence from Legal and Economic Doctrine*, 28 VT. L. REV. 623, 638–43 (2004).

4. *See Catch Shares – Programs by Region*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/catchshare_region.htm (last visited Nov. 10, 2012).

5. NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 1, at 3, 7; "NOAA Fisheries developed its catch share policy to "encourage well-designed catch share programs to help maintain or rebuild fisheries, and sustain fishermen, communities and vibrant working waterfronts, including the cultural and resource access traditions that have been part of this country since its founding." *Id.* at i.

6. *See, e.g.*, KATE BONZON, ET AL., CATCH SHARE DESIGN MANUAL: A GUIDE FOR MANAGERS AND FISHERMEN (2010), *available at* http://www.edf.org/sites/default/files/catch-share-design-manual.pdf; THE PEW CHARITABLE TRUSTS, DESIGN MATTERS: MAKING CATCH SHARES WORK (2009), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/CatchShare.pdf?n=5322; NATIONAL PANEL ON THE COMMUNITY DIMENSIONS OF FISHERIES CATCH SHARE PROGRAMS, COMMUNITY DIMENSIONS OF FISHERIES CATCH SHARE PROGRAMS: INTEGRATING ECONOMY, EQUITY, AND ENVIRONMENT (2011), *available at* http://www.ecotrust.org/fisheries/NPCDFCSP_paper_031511.pdf (The strength of the movement toward catch share management is evident as non-

by share holders who assert a loss of property based on the concern that their investments may be devalued by modifications.

While the Magnuson-Stevens Act contains a disclaimer that catch shares do not confer a compensable property right,[7] the characterization and implementation of catch share programs have created the opposite perception among fishermen. For example, the hallmark of a catch share program is that it provides a share holder with exclusive access to a specified amount of catch.[8] Much like traditional property, a fisherman can typically buy, sell, or lease catch shares thereby adjusting the amount of fish that the share holder could harvest. While initially issued for a specified duration, the 2006 Magnuson-Stevens Act Reauthorization includes a provision for renewal of catch shares unless those shares are revoked, limited, or modified under the terms of the program.[9] NOAA Fisheries has characterized this renewal as creating a "rolling conditional permanence" of catch shares.[10] In addition, the 2006 Magnuson-Stevens Act Reauthorization allowed the use of auctions or other royalty programs where fishermen would pay for an allocation of catch shares.[11] Finally, for certain fisheries, NOAA Fisheries may provide federal financing, with loan durations of up to twenty-five or thirty years, to allow fishermen to purchase catch shares.[12]

In the event of an amendment or revocation of an established catch share program, catch share holders may bring suit against the federal government in an attempt to recover any lost property value.[13] The Fifth Amendment of the United States Constitution provides that "nor shall private

---

governmental organizations have issued manuals to ensure that their organizations' objectives are considered in the development of catch share programs.).

7. 16 U.S.C. § 1853a(b) (Supp. V 2006).

8. NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 1, at i.

9. 16 U.S.C. § 1853a(f)(1)-(3) (Supp. V 2006).

10. NAT'L MARINE FISHERIES SERV., THE DESIGN AND USE OF LIMITED ACCESS PRIVILEGE PROGRAMS 27 (NOAA Technical Memorandum NMFS-F/SPO-86) (Lee Anderson and Mark Holliday eds., 2007), *available at* http://spo.nmfs.noaa.gov/tm/tm86.pdf.

11. 16 U.S.C. § 1853a(d) (Supp. V 2006).

12. *Id.* § 1853a(g) (Supp. V 2006); 50 C.F.R. § 253.27–.30 (2012).

13. 28 U.S.C. § 1491(a)(1) (2006). (The Tucker Act vests the United States Court of Federal Claims with exclusive jurisdiction over claims against the United States for a taking in excess of $10,000).

property be taken for public use, without just compensation."[14] To establish a taking of property for Fifth Amendment purposes, a claimant must first establish a property interest.[15] If such an interest exists, the claimant must establish that the government action constitutes a compensable taking of that property interest.[16] If the alleged taking is not categorical, meaning that the property owner retains some economic value,[17] the court will determine whether a taking occurred based upon an examination of the following three factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[18]

Courts have concluded that catch shares are property in certain contexts,[19] but have not yet addressed this question for purposes of compensation for a Fifth Amendment taking. When considering the revocation of other types of fishing permits, the courts have conclusively held that these permits are revocable privileges, they are not property, and that the permit holder is not entitled to any compensation as a result of changes to the management regime or revocation of the permit.[20] However, given the nature of catch shares, and the manner in which catch share programs are established, it could be argued that catch shares are more akin to property than the fishing permits that have been subject to Fifth Amendment analysis to date.

This paper examines the rationale and existing authority for establishing catch share management programs. It also summarizes how courts have considered Fifth Amendment takings claims involving fishing permits, and considers whether the inclusion of certain measures in catch share programs could influence a court's decision of whether catch

---

14. U.S. CONST., amend. V, cl. 4.

15. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

16. *Id.*

17. *Id.* (citations omitted).

18. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1973).

19. Ferguson v. Ferguson, 928 P.2d 597, 599–600 (Alaska 1996) (IFQs are property in marital dissolution); Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) (IFQ is property for procedural due process).

20. *E.g., Am. Pelagic Fishing Co.*, 379 F.3d at 1379; Conti v. United States, 291 F.3d 1334, 1341 (Fed. Cir. 2002).

shares are a compensable property right. Given the novelty of catch share management and the transitions brought on by their introduction in a fishery, the need for program revisions should be anticipated. Recognizing that a court is unlikely to determine that catch shares are property rights for Fifth Amendment compensation purposes, the paper identifies considerations for the development of catch share programs and amendments to those programs, as well as successor management programs, that could minimize perceptions that catch shares are property and reduce the potential for permit holders to seek compensation for investment losses in a catch share-based fishery management regime. Maintaining awareness of the considerations that lead share holders to conclude catch shares are private property (even if a court will not likely find property rights in catch shares) may treat catch share holders more equitably by allowing for program modifications with less disruption to their interests in the fishery.

II. BACKGROUND

A. Economic Justification for Development of Catch Shares as a Fishery Management Tool

1. Economic Issues Associated with Traditional Fisheries Management

Economists developed the foundations of catch share management to address perceived shortcomings arising from an absence of property rights in fisheries.[21] Fisheries are generally considered a public trust resource. Principles of the public trust doctrine have guided fishery management for centuries.[22] Under that doctrine, fisheries resources are held

---

21. Rögnvaldur Hannesson, *The Privatization of Oceans, in* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2, at 25, 31–37.

22. *See* NAT'L RESEARCH COUNCIL, SHARING THE FISH: TOWARD A NATIONAL POLICY ON INDIVIDUAL FISHING QUOTAS 39–45 (1999) (The public trust doctrine dates to Roman and English common law. Courts have frequently applied the doctrine to state management of fishery resources, interpreting fish as being public assets to be managed for the benefit of the public until captured.). *See generally* Douglas F. Britton, *The Privatization of the American Fishery: Limitations, Recognitions, and the Public Trust,* 3 OCEAN & COASTAL L.J. 217 (1997) (describing the application of the public trust doctrine and related common law doctrines that prevent the establishment of property rights in fish or fishing permits. It should be noted that the public trust doctrine has not been directly applied by courts to federal waters of the exclusive

by the government in trust to be managed and regulated for the public's benefit. Resources subject to the public trust doctrine are inalienable and cannot be transferred. The public may access and use public trust resources subject to regulations intended to advance the public good. The public trust doctrine has often been applied to provide fishermen with open access to fisheries, allowing anyone to take fish. It should be noted that the public trust doctrine has not been directly applied by courts to federal waters of the EEZ, which are those waters between three and 200 nautical miles from the coastal baseline.

Over time, the absence of regulatory restrictions may result in overcapitalization, and possibly overexploitation, of the fishery as individuals perceiving an opportunity to draw increased benefit from use of the resource increase effort through deploying more (or more productive) vessels and fishing gear. A progression of regulatory restrictions may be applied in an attempt to constrain effort in the fishery to protect the resource or economic returns.[23] These restrictions may include defined seasons or other temporal constraints, restrictions on entry or gear, and limits on total allowable catch. Despite these restrictions, participants frequently exploit regulatory gaps in order to increase effort. For example, vessel length limits may be ineffective in limiting growth of capacity if vessel owners are permitted to increase vessel width and engine horsepower.

Economists have observed that, faced with restrictions on inputs, fishery participants will typically find ways to increase effort to fully dissipate rents (or scarcity profits) from a fishery.[24] The phenomenon of rent dissipation arises from common pool resource management, which allows any person

---

economic zone (EEZ)). *See also* Kevin J. Lynch, *Application of the Public Trust Doctrine to Modern Fishery Management Regimes*, 15 N.Y.U. ENVTL. L.J. 285, 288 (2007). Federal waters are those waters between three and 200 nautical miles from the coastal baseline.

23. *See* Lynch, *supra* note 22, at 302–3 (Regulation of uses to protect fishery resources, such as limits on entry, gear type, and seasons, are generally regarded as consistent with the public trust obligation to manage the resource for the public benefit.).

24. NAT'L RESEARCH COUNCIL, *supra* note 22, at 21–25 (Rents are the difference between revenues and costs of production (including normal profits or returns to capital). In natural resource markets, extraordinary profits or rents may be available because of the scarcity of the resource.).

to derive a benefit from use of the resource. Rather than invest in a manner that derives maximum total profits from the resource, each person will invest to derive maximum individual profits, given the behavior of others. Participants typically invest to secure a greater share of the total resource, instead of producing a defined share of the resource at the least cost. These expenditures to increase one's share of the fishery will dissipate profits from the resource.[25]

2. Economic Rationale for Use of Catch Shares

Economists, influenced in large part by the dissipation of rents from fisheries under existing management regimes, began to advocate for the development of harvest privileges bearing some characteristics of private property rights, such as individual fishing quotas or individual transferable quotas,[26] now more commonly known as catch shares.[27] Under a catch share management program, participants are allocated an exclusive portion of the annual total allowable catch.[28] These catch share allocations are intended to align each participant's individual profits and the total profits from the fishery.[29] Since a person's allocation provides access to a specific amount of fish (regardless of the catches of others), the catch share holder will deploy fishing effort to realize the

---

25. NAT'L MARINE FISHERIES SERV., *supra* note 10, at 5–9; James E. Wilen, *Property Rights and the Texture of Rents in Fisheries*, *in* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2, at 53–55, 64.

26. Over time, a variety of terms have been used to describe systems that are now collectively referred to as "catch shares," including individual fishing quotas (IFQs), individual transferable quotas (ITQs), dedicated access privileges (DAPs), and limited access privileges (LAPs). This paper refers to these specific terms, when applied by managers to describe a particular program, but otherwise uses the generic, all encompassing, term "catch shares." Where relevant, differences in the terms are described.

27. NAT'L MARINE FISHERIES SERV., *supra* note 10, at 5–6. *See generally* H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954) (thought to be the origin of catch shares and other individual fishing quotas), *and* Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955). On economists' evaluation of catch shares, *see, e.g,.* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2; James L. Anderson, *Property Rights, Fisheries, Aquaculture, and the Future*, *in* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2, at 239–57 (asserting that fisheries will need to develop catch shares (or property rights) to remain competitive with aquaculture and other catch share fisheries).

28. NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 1, at i.

29. Although an allocation is not exclusive with respect to specific fish, the allocation provides an exclusive share of the permitted catch.

greatest gain from those fish, rather than deploying effort to secure a greater share of the fishery.[30]

Under these conditions, the individual catch share holder's choices should also maximize profits from the fishery overall. Arguably, imbuing catch share allocations with more characteristics of property rights should increase the degree of alignment between individual profits and total profits from a fishery. For example, allowing free divisibility and transfer of shares would allow shares of less efficient harvesters to be acquired by more efficient harvesters, with both participants increasing returns along with an increase in total returns from the fishery. In addition, increasing the tenure of shares—for example, by making allocations permanent rather than for a term of years—could increase stewardship in the resource by share holders, who will perceive a future benefit from stock conservation efforts.[31]

B. Magnuson-Stevens Act Catch Share Authority

1. History of Catch Shares under the Magnuson-Stevens Act

Under the Magnuson-Stevens Act, management authority over federal fisheries is vested in eight regional Councils and the Secretary of Commerce.[32] The Councils are comprised of representatives from each state in the Council's region, and a state fishery management official from each constituent state.[33] The primary responsibility of each Council is to develop fishery management plans (FMP) governing the regional fisheries consistent with conservation and management standards established by the Magnuson-Stevens Act.[34] These national standards include: "prevent[ing] overfishing while

30. Hannesson, *supra* note 21, at 34. Wilen, *supra* note 25, at 53–55.

31. *See generally* R. Quentin Grafton et al., *Incentive-Based Approaches to Sustainable Fisheries*, 63 CAN. J. FISHERIES & AQUAT. SCI. 699 (2006) (Collective actions of catch share holders to influence managers to take actions to protect stocks are cited as evidence of this stewardship effect.).

32. Pub. L. No. 104-297 (1996) (Sustainable Fisheries Act amending and reauthorizing the Magnuson Fishery Conservation and Management Act of 1976). Pub. L. No. 109-479 (2006) (Magnuson-Stevens Fishery Conservation and Management Reauthorization Act). 16 U.S.C. § 1801(b) (2006) (explaining the purpose of the Magnuson-Stevens Act).

33. 16 U.S.C. § 1852(a)–(b) (Supp. V 2006).

34. *Id.* § 1852(h)(1).

achieving, on a continuing basis, the optimum yield from each fishery"; "consider[ing] efficiency in the utilization of fishery resources"; and "minimiz[ing] bycatch and . . . the mortality of such bycatch."[35]

As initially adopted, the Magnuson-Stevens Act did not expressly authorize catch shares. Instead, authority for catch share management was found in the Act's authorization of limited access programs. Specifically, the Act provided regional Councils and the Secretary of Commerce with the authority to create "systems to limit access to [a] fishery" provided those systems:

> take into account –
>
> (A) present participation in the fishery;
>
> (B) historical fishing practices in, and dependence on, the fishery;
>
> (C) the economics of the fishery;
>
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
>
> (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
>
> (F) the fair and equitable distribution of access privileges in the fishery; and
>
> (G) any other relevant considerations[.][36]

The 1975 Senate Commerce Committee Report, prepared in conjunction with the initial Magnuson-Stevens Act, identified three management measures to limit access to a fishery.[37] First, a limit on the number of vessels, fishermen, or inputs could be established. Second, a fee or tax on participation could be used to deter entry beyond the desired participation level. Third, the total allowable catch could be divided into "shares or quotas" which are then distributed to participants. This third suggested measure is effectively a catch share.[38] No specific

---

35. *Id.* § 1851(a).

36. *Id.* § 1853(b)(6).

37. S. REP. NO. 94-416 (1975), *reprinted in* STAFF OF SENATE COMMISSION ON COMMERCE AND NATIONAL OCEAN POLICY STUDY, 94TH CONG., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, 653, 691–92 (Comm. Print 1976).

38. Senator Ted Stevens, however, asserted in the discussion of the Sustainable Fisheries Act in 1995 that "IFQ's [sic] are a new tool that we did not even consider in 1990, the last time we reauthorized the Magnuson Act. They were not even dreamed of when we first passed the Magnuson Act." 142 CONG. REC. S10810 (daily ed. Sept. 18, 1996).

reference was made to the nature of the privilege created by any limited access permit (or the revocability of any such permit) in the initial version of the Magnuson-Stevens Act.

Between 1988 and 1992, three Councils relied upon the general authority to limit access to fisheries to develop catch share programs.[39] In 1988, the Mid-Atlantic Fishery Management Council developed the first IFQ system to manage the Atlantic surf clam and ocean quahog fishery.[40] In 1991, the South Atlantic Fishery Management Council developed an IFQ system for the wreckfish fishery.[41] In 1992, the North Pacific Fishery Management Council developed an IFQ program for the halibut and sablefish fisheries.[42] For each of these actions, the Councils identified their general authority to limit access to the fishery as providing the authority to develop a catch share program.

Following development of these programs (and the controversies surrounding their implementation), in 1996 Congress adopted specific requirements for the development of IFQ programs in the Sustainable Fisheries Act.[43] Congress defined an "individual fishing quota" 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 . . ."[44] To quell the immediate controversy, the Sustainable Fisheries Act contained a moratorium on the submission and implementation of IFQ

---

39. For a comprehensive discussion of the authority for IFQs under the Magnuson-Stevens Act prior to its most recent reauthorization, *see* George J. Mannina, Jr., *Is There a Legal and Conservation Basis for Individual Fishing Quotas?* 3 OCEAN & COASTAL L.J. 5 (1997).

40. MID-ATLANTIC FISHERY MGMT. COUNCIL, AMENDMENT #8, FISHERY MANAGEMENT PLAN FOR THE ATLANTIC SURF CLAM AND OCEAN QUAHOG FISHERY 54 (1990).

41. SOUTH ATLANTIC FISHERY MGMT. COUNCIL, AMENDMENT 5 (WRECKFISH), REGULATORY IMPACT REVIEW, INITIAL REGULATORY FLEXIBILITY DETERMINATION AND ENVIRONMENTAL ASSESSMENT FOR THE FISHERY MANAGEMENT PLAN FOR THE SNAPPER-GROUPER FISHERY OF THE SOUTH ATLANTIC REGION 18 (1991).

42. Final Rule for Halibut and Sablefish IFQ Program, 58 Fed. Reg. 59,375, 59,379–81 (Nov. 9, 1993).

43. *See* 142 CONG. REC. S10,810–18 (daily ed. Sept. 18, 1996) for an extensive discussion of the controversy by Senators Ted Stevens, John Kerry, Patty Murray, and Slade Gorton.

44. 16 U.S.C. § 1802(23) (Supp. V 2006).

programs until October 1, 2000.[45] The Sustainable Fisheries Act also clarified Congressional intent that permits (including both limited access permits and IFQs) are privileges, revocable without compensation to the holder. The act provides:

> (2)(A) No provision of law shall be construed to limit the authority of a Council to submit and the Secretary to approve the termination or limitation, without compensation to holders of any limited access system permits, of a fishery management plan, plan amendment, or regulation that provides for a limited access system, including an individual fishing quota program.[46]

and

> (3) An individual fishing quota or other limited access system authorization—
>
> (A) shall be considered a permit for purposes of sections 1857, 1858, and 1859 of this title;
>
> (B) may be revoked or limited at any time in accordance with this chapter;
>
> (C) shall not confer any right of compensation to the holder of such individual fishing quota or other such limited access system authorization if it is revoked or limited; and
>
> (D) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested.[47]

In addition, Congress commissioned the National Academy of Sciences to prepare a report on IFQs and directed the Secretary to use the report to develop a national policy on IFQs.[48] The report was to address "all aspects of such quotas" including transferability, limits on foreign control of IFQs, limits on duration of IFQ programs, and measures to minimize adverse effects on fishing communities.[49]

While the Sustainable Fisheries Act may have codified Congressional intent that IFQs are a fishing privilege, revocable without compensation, other aspects of that Act

---

45. 16 U.S.C. § 1853(d)(1)(A) (1994), *repealed by* Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, § 106, Pub. L. No. 109-479, 120 Stat. 3586 (Jan. 12, 2007).

46. *Id.* § 1853(d)(2)(A).

47. *Id.* § 1853(d)(3).

48. Sustainable Fisheries Act, §108(f), Pub. L. No. 104-297, 110 Stat. 3577 (Oct. 11, 1996).

49. *Id.*

furthered the ambiguity concerning the nature of the privilege created by IFQs (and the extent to which policymakers intended to induce interested parties to treat IFQs as if they are property rights). First, the Sustainable Fisheries Act directed the Secretary to establish an "exclusive central registry system . . . for limited access system permits . . . including individual fishing quotas" for the "registration of title to, and interests in, such permits."[50] Such a lien registry is typically intended to secure and prioritize liens and other interests applied to private property interests. Second, the Sustainable Fisheries Act authorized Councils to develop loan programs to support the purchase of IFQs by small boat fishermen and first time purchasers of IFQs.[51] These federally funded loans effectively induce purchase of shares by persons wishing to enter or expand their interests in IFQ fisheries. Although neither of these provisions directly conflict with Congress's intent that IFQs create no compensable property right, both provisions promote IFQs as transferable fishing privileges that may be acquired through long-term, secure financing arrangements, typically characteristic of property interests.

In October of 2002, after a two-year extension, the moratorium expired.[52] After repeated efforts to revise the

---

50. 16 U.S.C. § 1855(h)(1) (1994).

51. *Id.* § 1853(d)(4)(A), *repealed by* Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, § 106, Pub. L. No. 109-479, 120 Stat. 3586 (Jan. 12, 2007), *recodified at* 16 U.S.C. § 1853a(g) (Supp. V 2006). In addition, the Act directed the North Pacific Fishery Management Council to recommend to the Secretary a loan program for the financing of halibut and sablefish IFQs. Sustainable Fisheries Act, §108(g), Pub. L. No. 104-297, 110 Stat. 3579 (Oct. 11, 1996).

52. Consolidated Appropriations Act of 2001, Appendix D § 144(a), Pub. L. No. 106-554, 114 Stat. 2763A-238 (Dec. 21, 2000). Despite its moratorium on IFQs, Congress continued to authorize the development of catch share programs for certain fisheries through specific legislation. In 1998, the American Fisheries Act established a "cooperative program" for the Bering Sea Pollock fishery. American Fisheries Act, §§ 205-211, enacted as part of Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681-616 (Oct. 20, 1998). In addition, as a part of the legislation extending the IFQ moratorium, Congress directed the North Pacific Fishery Management Council to examine catch share management for the Gulf of Alaska groundfish fisheries and the Bering Sea and Aleutian Islands crab fisheries. Consolidated Appropriations Act of 2001, Appendix D § 144(b), Pub. L. No.106-554, 114 Stat. 2763A-238 (Dec. 21, 2000). After the North Pacific Fishery Management Council developed the required catch share program for the Bering Sea and Aleutian Islands crab fisheries, Congress mandated its implementation. Consolidated Appropriations Act of 2004, § 801, Pub. L. No. 108-199, 118 Stat. 108 (Jan. 23, 2004) (codified at 16 U.S.C. § 1862(j) (Supp. V 2006)).

Magnuson-Stevens Act provisions authorizing catch share programs,[53] Congress included revisions of that authority as a part of the 2006 Magnuson-Stevens Fishery Conservation Management Reauthorization Act.[54] These provisions define the current authority for establishing catch share systems.

C. Current Catch Share Authority under the Magnuson-Stevens Act

The 2006 reauthorization of the Magnuson-Stevens Act made substantial changes to the authority of Councils and the Secretary of Commerce to develop and implement catch share programs.[55] The reauthorization maintains the clear statement, codified by the Sustainable Fisheries Act, that catch shares are a privilege subject to revocation without compensation.[56] Specifically, in its current form, the Magnuson-Stevens Act provides that catch shares (or limited access privileges, as they are defined by that Act):[57]

---

53. *See*, *e.g.,* IFQ Act of 2001, S. 637, 107th Cong. (2001); Fishing Quota Act of 2003, S. 1106, 108th Cong. (2003).

54. Magnuson-Stevens Fishery Conservation Management Reauthorization Act, § 106, Pub. L. No. 109-479, 120 Stat. 3586 (Jan. 12, 2007).

55. *Id.* (codified at 16 U.S.C. § 1853a (Supp. V 2006)). The Act adopted the defined term "limited access privileges" (LAPs) to include a broader range of holders of catch shares than the traditional holders of IFQs. 16 U.S.C. § 1802(26) (Supp. V 2006). Although the wording of the definition is unchanged, the change in terms is intended to emphasize the introduction of two new types of catch share holders: regional fishing associations, which may hold LAPs for the benefit of regional interests, and fishing communities, which may hold LAPs for the benefit of a community. *See* S. REP. NO. 109-229, at 8 (2006).

56. 16 U.S.C. § 1853a(b) (Supp. V 2006). In addition, the Report of the Committee on Commerce, Science, and Transportation states that:

> NO CREATION OF RIGHT, TITLE, OR INTEREST.—The new section 303A(b) would re-affirm existing law relating to IFQs that a LAPP is a permit that may be revoked or limited at any time without right to compensation. This permit would be considered a grant of permission to participate in the fishery and, as such, would not grant the holder any right to a fish before it was harvested. As a permit, the privilege could also be revoked or modified for any failure to comply with the program or if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen.

S. REP. NO. 109-229, at 26 (2006).

57. The Magnuson-Stevens Act uses different terminology for catch shares, defining a "limited access privilege" as a:

> Federal permit . . . to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person . . . .

16 U.S.C. §1802(26) (Supp. V 2006), while NOAA Fisheries states that:

> Catch share is a general term for several fishery management strategies that allocate a specific portion of the total allowable fishery catch to individuals, cooperatives, communities, or other entities. Each recipient of a catch share is

> (1) shall be considered a permit for the purposes of sections 1857, 1858, and 1859 of this title;
> (2) may be revoked, limited, or modified at any time in accordance with this chapter, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;
> (3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;
> (4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and
> (5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share.[58]

However, the reauthorization contained several other provisions that are likely to reinforce contentions of catch share holders that any revocation of catch shares would unfairly deprive them of an interest in those shares. These provisions are intended to induce reliance by establishing an expectation that the privilege will be continued without revocation.

Under the reauthorization, when developing a catch share program, a Council must establish policies and procedures regarding the allocation and acquisition of shares.[59] As part of this development, the Council must "establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies

---

directly accountable to stop fishing when its exclusive allocation is reached. The term includes specific programs defined in law such as 'limited access privilege' (LAP) and 'individual fishing quota' (IFQ) programs . . . .

NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NOAA CATCH SHARE POLICY 1 (Nov. 4, 2010). The definition goes on to include territorial use rights fisheries (TURFs), under which a person has an exclusive privilege to fish in a certain geographical area. *Id*. The inclusion of TURFs in the definition seems appropriate only in cases where the exclusive geographic privilege is accompanied by an exclusive privilege to a specific quantity of fish (or a total allowable catch is defined for the applicable geographic area). This paper only intends to address catch shares defining an exclusive privilege to harvest a certain quantity of fish.

58. 16 U.S.C. § 1853a(b) (Supp. V 2006).

59. *Id.* § 1853a(c)(5).

adopted by the Council for the [allocation of shares]."[60] Although a Council could prohibit the transfer of catch shares pursuant to this provision, it is also clear that a Council could allow unfettered transferability, provided that the policy is consistent with the applicable allocation criteria. Notably, the statute specifically authorizes the transfer of catch shares by sale or lease. This authorization of compensated transfers bolsters arguments that shares are "owned" by their holders.

The Magnuson-Stevens Act reauthorization requires Councils to consider the use of auctions or other programs to collect royalties for the distribution of initial or subsequent allocations.[61] Auction revenues are to be deposited in a fund for management of the lien registry and the fishery from which the royalties were collected.[62] If a Council establishes a royalty collection program, it will likely prompt arguments that the catch shares are purchased privileges and, as such, should not be revocable absent a refund of any previously paid royalty fees.[63] In addition, if auction revenues are used for management of the fisheries, catch share holders could argue unjust enrichment if their shares are revoked and redistributed to others.

The Magnuson-Stevens Act reauthorization limits the duration of any catch share permits issued under new catch share programs, but also mandates that permits be reissued under certain conditions. A catch share permit established after January 12, 2007, the date of the Magnuson-Stevens Act reauthorization, is issued for a period of not more than ten years, but "will be renewed before the end of that period, unless it has been revoked, limited, or modified."[64] Congress provided that a catch share permit can only be rejected, limited, or modified if the holder fails to comply with certain identified terms of the applicable FMP or commits an act prohibited by section 307 of the Magnuson-Stevens Act.[65] Establishing a maximum ten-year duration for catch share

60. *Id.* § 1853a(c)(7)(A).

61. *Id.* § 1853a(d).

62. *Id.* § 1855(h)(5).

63. A less compelling argument could be advanced based on cost recovery payments required to cover government management, data collection and analysis, and enforcement costs associated with a program. *Id.* § 1853a(e).

64. *Id.* § 1853a(f)(1).

65. *Id.* § 1853a(f)(2)–(3). Section 307 contains general prohibitions, such as a prohibitions on fishing in violation a permit or after revocation of a permit. *Id.* § 1857.

permits might strengthen arguments that these permits are not issued in perpetuity and that the holder should have no expectation of permanence beyond the term of the share. However, defining conditions which, if satisfied, will result in the renewal of the permit is clearly intended to create an expectation that the permit will be renewed. NOAA Fisheries has acknowledged this interpretation by characterizing the renewal system as establishing a "rolling conditional permanence" of catch shares.[66]

The Magnuson-Stevens Act reauthorization maintained the loan authority originally established under the Sustainable Fisheries Act.[67] Pursuant to this authority, NOAA Fisheries, through its Fisheries Finance Program, may provide federal financing to participants in the Alaska halibut, sablefish, and crab fisheries and to certain Alaska community groups to enable the purchase of catch shares.[68] NOAA Fisheries has limited the duration of such loans to twenty-five years for fishermen and thirty years for community groups.[69] In practice, loans of twenty-five years are not uncommon.[70] Given the nature of the catch share asset, purchasers typically rely on returns from catch to fund their loan payments. Purchasers are likely to interpret the issuance of these relatively long-term loans by the same agency that issues the catch shares as a reflection of the long-term nature of the catch shares they are acquiring. The long-term loans clearly reinforce any impression that catch shares have a degree of permanence at least as long as the term of the loan.

D. Controversy Associated with Use of Catch Shares

While the momentum for development of catch share programs is surging, a vocal opposition has also grown. Much of the opposition focuses on the distributional effects of the programs. Stakeholders left out of the initial allocation of shares assert that they are disenfranchised by the

66. NAT'L MARINE FISHERIES SERV., *supra* note 10.

67. 16 U.S.C. § 1853a(g) (Supp. V 2006).

68. 50 C.F.R. § 253.27–.30 (2012).

69. *Id.*

70. Interview with Earl Bennett, Financial Services Division, NOAA Fisheries, in Silver Spring, MD (March 27, 2012).

programs.[71] Fish processors assert that negotiating leverage shifts to vessel owners, devaluing their stake in the fisheries.[72] Some critics claim that catch shares lead to the redistribution of fishing interests from traditional fishermen to corporate investors. This shift purportedly undermines small fishing communities through redistribution of share holdings, which is compounded by the concentration of landings in more efficient, larger ports.[73] Crewmembers also claim to be harmed by declines in crew employment with the consolidation of catch on fewer vessels and reduced pay associated with this shift in employment.[74]

Throughout the debate over the merits of catch share management, supporters frequently describe catch shares as private property rights.[75] These proponents contend that the benefits derived from catch shares arise primarily from their property right characteristics.[76] A variety of factors are typically cited as indicia of property rights. Generally, a property right is legally characterized by the right to possess, use, and dispose of a thing.[77] These characteristics may be

71. Evelyn Pinkerton & Danielle N. Edwards, *The Elephant in the Room: The Hidden Costs of Leasing Individual Transferable Quotas*, 33 MARINE POL'Y 707, 708–9 (2009).

72. *See* SCOTT C. MATULICH & MICHAEL CLARK, ALASKA DEP'T OF FISH AND GAME & WASHINGTON STATE UNIVERSITY, EFFICIENCY AND EQUITY CHOICES IN FISHERY RATIONALIZATION POLICY DESIGN: AN EXAMINATION OF THE NORTH PACIFIC HALIBUT AND SABLEFISH IFQ POLICY IMPACTS ON PROCESSORS (2002).

73. Pinkerton & Edwards, *supra* note 71, at 710–12; ECOTRUST & ECOTRUST CANADA, CATCH-22: CONVERSATION, COMMUNITIES, AND THE PRIVATIZATION OF B.C. FISHERIES: AN ECONOMIC, SOCIAL AND ECOLOGICAL IMPACT STUDY (2004); SETH MACINKO & WILLIAM WHITMORE, A NEW ENGLAND DILEMMA: THINKING SECTORS THROUGH, FINAL REPORT TO MASSACHUSETTS DIVISION OF MARINE FISHERIES 52–54 (2009).

74. Pinkerton & Edwards, *supra* note 71, at 711.

75. Even federal regulators periodically refer to catch shares as property rights. *See*, *e.g.*, Nat'l Marine Fisheries Serv., O*cean Quahog (Arctica islandica),* FISH WATCH—U.S. SEAFOOD FACTS, http://www.fishwatch.gov/seafood_profiles/species/clams/species_pages/ocean_quahog_clam.htm (last visited Dec. 6, 2012) ("[The ITQ] system[is] an innovative "catch share" program that allocates shares of the annual harvest to individual fishermen or vessels."). References to "property rights" in fisheries appear throughout EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2.

76. *See* EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2; NAT'L MARINE FISHERIES SERV., *supra* note 10; Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50 ARIZ. L. REV. 511, 544–46 (2008).

77. *See* 63C AM. JUR. 2D *Property* §§1, 3 (2009); 73 C.J.S. *Property* §1–2 (2012). Economists Anderson and Holliday suggest that critical characteristics for establishing a property right are a) exclusivity, b) permanence, c) security of title or interest, and d) transferability. NAT'L MARINE FISHERIES SERV., *supra* note 10.

present, to varying degrees, in a catch share program. By definition, catch shares provide the holder with an exclusive privilege to harvest a quantity of fish. Some programs permit transfers. In some cases, shares may be subject to the encumbrances of liens. The presence of these characteristics is cited by proponents as evidence that catch shares establish a property right.[78]

While some proponents refer to catch shares as creating a property right, this liberal use of terminology has drawn the ire of critics of catch share management. These critics consistently refer to both the public trust and related common law doctrines, as well as statutory language, to support an argument that catch shares are not private property rights, but are only harvest privileges.[79]

Case law generally supports the proposition that federally issued fishing permits are not property rights. As such, courts have held that these permits may be revoked without compensation.[80]

While these cases appear to have settled issues related to whether fishing permits constitute property that is subject to protection under the takings clause of the Fifth Amendment to the United States Constitution, no court has considered whether a catch share permit is a property right subject to the takings clause.[81] In addition, the facts and merits of prior permit cases may differ from potential future claims alleging that revocation of a catch share permit constitutes a

---

78. Throughout EVOLVING PROPERTY RIGHTS IN MARINE FISHERIES, *supra* note 2, authors refer to catch share programs as creating "property rights." *See also* USE OF PROPERTY RIGHTS IN FISHERIES MANAGEMENT: PROCEEDINGS OF THE FISHRIGHTS99 CONFERENCE (TECHNICAL PAPER 404/2) (Ross Shotton ed., 2000), *available at* http://www.fao.org/docrep/003/X8985E/X8985E00.HTM (in which several authors refer to catch share programs as "creating property rights").

79. Bromley, *supra* note 3, at 283–84 (2009); Macinko & Bromley, *supra* note 3, at 638–43.

80. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1379–81 (Fed. Cir. 2004).

81. In other contexts, courts have determined that an IFQ permit is property. *E.g.*, Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) ("There can be no doubt that the IFQ permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution."). However, the court's examination in *Foss* was limited to whether there is a constitutionally protectable property interest in acquiring an IFQ permit under the Due Process Clause. The court distinguished the claims at issue from those relating to ownership of the fish, which it dismissed as "pure fantasy." *Id.*

deprivation of property. Catch share programs are defined by the Councils and the Secretary of Commerce under the authority of the Magnuson-Stevens Act.[82] That authority provides substantial discretion to the Councils and the Secretary in shaping catch share programs to the needs of the applicable fishery. Recent revisions to the Magnuson-Stevens Act authorizing (and in some cases requiring) the Secretary of Commerce and Councils to incorporate certain measures into catch share management programs can be argued to have shifted these privileges closer to a property interest subject to the protection of the Fifth Amendment takings clause.

III. FISHERIES AND PROPERTY RIGHTS

Catch shares are frequently characterized as providing the holder with a property right in the relevant fishery. From a legal perspective, this statement is overly simplistic and may create a perception that the catch share holder possesses more than what is legally recognized. Given that catch shares are frequently bought, sold, and leased for significant amounts of money, and support the purchase of fishing vessels and gear, it is necessary to examine which rights a catch share holder may possess. It is then necessary to look at whether such catch shares would entitle the holder to any compensation should the regulatory program be amended or terminated, thereby extinguishing the holder's shares. This section provides an overview of the law regarding the taking of property rights and how courts have considered claims for compensation based on taken fishing permits.

A. Overview of Fifth Amendment Taking Law

The Fifth Amendment to the United States Constitution states, in pertinent part, that "nor shall private property be taken for public use, without just compensation."[83] The courts have recognized that this clause prohibits the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[84] While it is readily apparent that a formal

82. 16 U.S.C. § 1853(a) (Supp. V 2006).

83. U.S. CONST., amend. V, cl. 4.

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1973) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

appropriation or physical occupation of private property by the government may constitute a taking, the Supreme Court has recognized that a taking can occur "if regulation goes too far."[85] As the Court has stated, a regulatory taking may occur when government action, although not encroaching upon or occupying private property, "still affect[s] and limits its use to such an extent that a taking occurs."[86] While a vessel could conceivably be subject to appropriation or physical occupation, for purposes of this discussion, we are primarily focused on whether a government regulatory action affecting a catch share (including the revocation of a catch share) could effectuate a taking.

In the regulatory taking context, the Court of Appeals for the Federal Circuit[87] has established a two-part test to determine whether government regulation constitutes a taking of private property without the payment of just compensation.[88] The court as a threshold matter, must first "determine whether the claimant has established a 'property interest'" that has been impacted by government action.[89] In doing so, courts are frequently forced to sort through various claimed interests to determine which may qualify as compensable property under the Fifth Amendment. For example, a fisherman may assert a right to a certain amount of fish, a right to a fishing permit, or a right to use a vessel to fish. If the court determines that the claimant failed to establish a legally cognizable property interest, the court will dismiss the case.[90]

Second, assuming that a property interest exists, the court will determine whether the governmental action constituted a compensable taking of that property interest.[91] As part of this determination, the court will examine whether the taking was

---

85. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

86. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

87. The Tucker Act vests the United States Court of Federal Claims with exclusive jurisdiction over claims against the United States for a taking in excess of $10,000. 28 U.S.C. § 1491(a)(1) (2006).

88. Conti v. United States, 291 F.3d 1334, 1339 (Fed. Cir. 2002).

89. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

90. *Id.* at 1372 ("[I]t is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.") (citation omitted).

91. *Id.*

categorical or not. In explaining the difference between a categorical and noncategorical taking, the Federal Circuit has stated:

> A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use."[92]

The Supreme Court has stated that a categorical taking involves the "total deprivation of beneficial use."[93] As such, a property owner must demonstrate that it was forced to "sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[94]

In considering a categorical taking, the nature of the property interest may be relevant to a court's determination of whether a taking has occurred. In *Members of the Peanut Quota Holders Ass'n v. United States*,[95] a court found a property interest in government created peanut quotas, but found that revocation of those quotas did not entitle the owner to compensation. The court based its finding on the fact that the quotas were wholly a creation of the government and that "unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit the right to withdraw those benefits or qualify them as it chooses."[96]

If a categorical taking did not occur, the court will determine if the governmental action constituted a non-categorical regulatory taking based on an examination of the three factors identified in *Penn Central Transportation Company v. New*

---

92. *Id*. (citations omitted).

93. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).

94. *Id*. at 1019 (emphasis in original).

95. 421 F.3d 1323 (Fed. Cir. 2005).

96. *Id*. at 1335. The court's decision creates some uncertainty as to whether the case is one of a categorical or non-categorical taking, as its rationale for the decision cites *Penn Central*, which established the test for determining a non-categorical taking. The contested government action, however, was a revocation of quotas, which deprived holders of their quotas in their entirety.

York City.[97] Those three factors are: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[98]

Under the first factor, the economic impacts of the action, a court will assess the degree to which a regulation interferes with the claimant's property interest. To do so, the court will "compare the value that has been taken from the property with the value that remains in the property."[99] While there is no definitive test for how much impact must occur to constitute a taking, the courts have suggested that the loss must be substantial.[100] Recently, the Supreme Court stated that the goal of the *Penn Central* test is to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[101] By characterizing a regulatory taking in this manner, the Court identified the magnitude of the economic loss that must occur. Accordingly, to succeed on a taking claim, the claimant must establish that the regulatory action rendered the subject property essentially valueless.[102]

Under the second factor, interference with investment-backed expectations, the court will examine the reliance of the claimant on the pre-existing regulatory regime. The Federal Circuit will consider three factors when determining the reasonableness of a party's expectations:

> (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the

---

97. 438 U.S. 103 (1978).

98. *Id.* at 124.

99. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

100. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

101. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

102. While lower values may support a taking, courts have generally found a taking to occur when value losses are "well in excess of 85 percent." Brace v. United States, 72 Fed. Cl. 337, 357 (2006).

regulatory environment at the time of purchase.[103]

To ensure reasonableness, courts have stated that there "must be more than a unilateral expectation or an abstract need."[104] Further, in considering the nature of the regulation, courts have distinguished between "legislation that merely clarified the originally-intended meaning of an existing statute" and "legislative amendments that fundamentally changed the scheme legislated previously."[105]

Under the third factor, the character of the government action, the court will examine the purpose and importance of the public interest associated with the regulatory action.[106] The Supreme Court has stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[107] The Court has recognized that individuals may be burdened by government actions as part of the benefit of living and conducting business in a civilized society.[108] However, some government action is "so substantial and unforeseeable . . . that justice and fairness require that [it] be borne by the public as a whole."[109]

B. There is no Property Interest in Wild Fish, Generic Fishing Permits, or the Use of a Vessel or Gear

As discussed previously, a court will conduct a two-part analysis to determine if a taking has occurred. First, the court will examine whether a property interest exists in the asset at issue. Second, if a property right exists, the court will examine whether the governmental action constituted a compensable taking of that property interest.

As an initial inquiry, it is necessary to determine what property a claimant may allege will be taken should NOAA

---

103. Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (citations omitted).

104. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (citation omitted).

105. Cienega Gardens v. United States, 331 F.3d 1319, 1351 (Fed. Cir. 2003) (emphasis in original).

106. Maritrans Inc. v. United States, 342 F.3d 1344, 1356 (Fed. Cir. 2003).

107. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1973).

108. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984).

109. *Id*. (citations omitted).

Fisheries revoke the claimant's fishing permit or modify the governing management regime. In many instances, to participate in a commercial fishery, a fisherman must make large capital investments in the necessary gear and vessel and obtain the required permits before pursuing the target catch species. For purposes of the takings analysis, all three elements—fish, permits, and vessel/gear—could be considered property subject to compensation. As discussed below, the courts have considered whether a claimant has a property interest in all three components.

When considering whether a property interest exists, for purposes of a Fifth Amendment takings claim, the Federal Circuit has stated that "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment."[110] Instead, whether a property interest exists is determined by the law that creates the interest and by "'existing rules and understandings' and 'background principles' derived from independent sources, such as state, federal, or common law."[111] In summarizing the existing law the Federal Circuit stated that a "compensable interest is indicated by the absence of express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude."[112] To satisfy a court's inquiry, the claimant must show more than an abstract need, desire, or unilateral expectation of a particular benefit, the claimant must "have a legitimate claim of entitlement to it."[113]

1. There is no Property Interest in Wild Fish

It is well established that a fishermen does not have a property interest in fish until the fish have actually been caught. This principle dates back to the nineteenth century case of *Pierson v. Post*, which concluded that a property right

---

110. Conti v. United States, 291 F.3d 1334, 1340–42 (Fed. Cir. 2002).

111. Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) and *Maritrans Inc.*, 342 F.3d at 1352)). As such, the typical analysis examines the relationship between the claimant and the alleged property, and considers whether the claimant has the right to exclude, use, transfer, or dispose of the property. *Id*.

112. *Members of the Peanut Quota Holders Ass'n*, 421 F.3d at 1331.

113. *Id*. at 1330.

in wild animals can only be acquired through possession.[114] Subsequent courts have dismissed the notion that a fisherman has a property right to fish prior to their capture. For example, the Supreme Court has stated that it is "pure fantasy to talk of 'owning' wild fish, birds, or animals."[115] In expounding upon this statement, the Court stated that "[n]either the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[116] Accordingly, the courts have readily distinguished between a property right in fishing permits and in the fish themselves.[117] Regarding the latter, until the fish are actually captured and possessed, a fisherman is unlikely to succeed on a taking claim regarding the lost value of fish. Put another way, a fishing permit provides an opportunity to catch fish, or in the case of catch shares, a certain quantity of fish, but until possession occurs through capture, there is no property right in that quantity of fish.

2. There is no Property Interest in Generic Fishing Permits

When considering generic fishing permits, but not catch shares, the courts have consistently held that these permits are not a compensable property interest. In *Conti v. United States*, the court considered whether a regulation that banned the use and possession of gillnets for the purpose of harvesting swordfish constituted a taking of the owner's permit, vessel, and fishing gear.[118] Beginning in 1985, Mr. Conti had been commercially fishing for Atlantic swordfish using drift gillnet gear. Shortly thereafter, NOAA Fisheries began imposing increasingly severe restrictions on the fishery, culminating in January 1999 with the entire prohibition of drift gillnet gear in the Atlantic swordfish fishery. The purpose of the prohibition

---

114. Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805). The case involved a dispute of ownership regarding a fox that Post had been pursuing, but Pierson killed. The court found that "mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him." *Id.* at 178.

115. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977).

116. *Id.*; *see also* Alliance Against IFQs v. Brown, 84 F.3d 343, 344 (9th Cir. 1996) ("[T]o get title to a fish, a fisherman has to catch it before someone else does.") (citing *Pierson*, 3 Cai. at 175).

117. Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) ("[T]he property right in obtaining this specific permit is, of course, distinguishable from a claim of owning the fish themselves.").

118. Conti v. United States, 291 F.3d 1334, 1337 (Fed. Cir. 2002).

was to reduce the bycatch of marine mammals and sea turtles while conserving swordfish and other species.[119] Mr. Conti filed suit in December 1999 alleging a Fifth Amendment taking of his property without just compensation.[120]

Regarding the fishing permit, the court recognized that "courts have held that no property rights are created in permits and licenses," noting a line of cases involving government grazing permits and preferences.[121] Turning to Mr. Conti's permit, the court determined that the fishing permit lacked certain qualities that typically characterize property. For example, while the permit could be utilized to fish, Mr. Conti could not assign, sell, or otherwise transfer the permit.[122] Further, the swordfish permit did not confer exclusive fishing privileges authorizing Mr. Conti to exclude others from the swordfish fishery.[123] In addition, the government retained the ability to revoke, suspend, or modify the permit at any time.[124] Finally, the court recognized that the Magnuson-Stevens Act expressly states that the limited access permit system "shall not create . . . any right, title, or interest in or to any fish," and that NOAA Fisheries could amend or terminate a permit program without compensation to holders of any limited access system permits.[125] Based upon these factors, the court concluded that the fishing permit "bestowed a revocable license, instead of a property right."[126]

---

119. *See* 64 Fed. Reg. at 4055; *Conti*, 291 F.3d at 1337.

120. In clarifying the nature of his taking claim, the court noted that Mr. Conti's permit, vessel, and gear were not physically taken from him. The permit remained valid for other types of swordfishing, and Mr. Conti maintained possession of the fishing vessel and gear. *Conti*, 291 F.3d at 1339. In short, Mr. Conti's taking claim asserted that the government had taken the ability to use property in a specific way. *Id*. at 1340.

121. *Id*.

122. *Id*. at 1341. ("[T]he rights to sell, assign, or otherwise transfer are traditional hallmarks of property.") (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982)).

123. *Id*. (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994), (The "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (citation omitted)).

124. *Id*. at 1341–42 (citing 50 C.F.R. § 6235.4(a)(3) (2000)).

125. *Id.* (citing 16 U.S.C. § 1853(b)(3)–(4)).

126. *Conti*, 291 F.3d at 1342. In reaching this conclusion, the court recognized that a contrary holding "counterintuitively would compensate a claimant for 'the value of a right that the Government . . . can grant or withhold as it chooses.'" *Id*. (citing United States v. Fuller, 409 U.S. 488, 493 (1973)).

In a subsequent case, *American Pelagic Fishing Co. v. United States*, the court reaffirmed the holding in *Conti* regarding a property interest in fishing permits.[127] In *American Pelagic*, American Pelagic purchased a large, U.S. flagged hull and converted it into the *Atlantic Star*, a commercial fishing freezer trawler.[128] American Pelagic also applied for and received the requisite fishing permits for participation in the Atlantic mackerel and Atlantic herring fisheries. In response to concerns about the size of the *Atlantic Star* and its impacts on fish stocks, in 1997, Congress passed a rider to an appropriations act that had the effect of revoking the plaintiff's existing fishing permits and banned reissuance of the permits for a year.[129] The legislative ban was enacted again in 1998 and made permanent in 1999.[130] The *Atlantic Star* was the only existing vessel affected by the legislation.[131] After subsequent attempts to participate in other fisheries were unprofitable, American Pelagic filed suit alleging a taking of its fishing permits and the use of the *Atlantic Star*.[132]

Applying *Conti*, the court concluded that American Pelagic "did not and could not possess a property interest in its fishing permits."[133] Specifically, the court noted that there was "no contention that American Pelagic had the authority to assign, sell, or transfer its permits and authorization letter, nor that it was granted exclusive privileges to fish for Atlantic mackerel and herring in the EEZ."[134] The court also noted that the relevant regulations allowed NOAA Fisheries to deny or sanction the fishing permits for any reason.[135] For these

---

127. 379 F.3d 1363, 1374 (Fed. Cir. 2004).

128. The resulting fishing vessel, the *Atlantic Star*, was 369 feet long, displaced 6900 gross tons, and had a total of 13,400 horsepower. *Id.* at 1367–68. By comparison, all the other vessels in the mackerel and herring fisheries were less than 165 feet long, displaced less than 750 gross tons, and had less than 3000 shaft horsepower. Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 42 (2001).

129. *Am. Pelagic*, 379 F.3d at 1368.

130. *Id.* at 1368–69.

131. *Id.* at 1369.

132. *Id.*

133. *Id.* at 1374. (citing Conti v. United States, 291 F.3d 1334, 1341–42 (Fed. Cir. 2002) ("[B]ecause he could not assign, sell, or transfer his swordfishing permit, because it did not confer exclusive fishing privileges, and because the government at all times retained the right to revoke, suspend, or modify it, [Conti] did not possess a property interest in his permit.")).

134. *Id.*

135. *Id.* (citing 15 C.F.R. § 904.301(a)).

reasons, the court concluded that the present fact-pattern was consistent with the conditions set forth in *Conti*; therefore, American Pelagic did not have a property interest in its fishing permits for purposes of the Fifth Amendment takings clause.

3. There Is No Property Interest in the Ability to Use a Vessel or Gear

Courts will usually find that a claimant has a property interest in physical property sufficient to support a taking claim. For example, in *Conti*, the Federal Circuit recognized that Mr. Conti's boats, net, and gear constitute a cognizable property interest under the Fifth Amendment.[136] Likewise, in another vessel-related case, the Federal Circuit concluded that a vessel owner had various rights in its tank barges that qualified them as property for purposes of the Fifth Amendment.[137] The court relied on the owner's ability to sell or otherwise dispose of the barges, possess or transport them, and alter them by adding physical improvements.[138] Therefore, as a general proposition, it appears to be well established that a fishing vessel and gear will qualify as a property interest for purposes of the Fifth Amendment taking analysis.[139]

However, courts typically distinguish between a property right in the vessel and gear and a right to use the property for a particular purpose. In most cases, the loss of a fishing permit does not result in a change of ownership of the vessel or gear. Accordingly, there typically is no categorical taking, just a restriction on certain uses of the property. While a court will often recognize property rights in physical property, it has not recognized a right to use that property for a particular purpose. As the Supreme Court explained:

---

136. *Conti,* 291 F.3d at 1342–43.

137. Maritrans Inc. v. United States, 342 F.3d 1344, 1353 (Fed. Cir. 2003) (alleging that double hull requirement of Oil Pollution Act of 1990 affected a taking of Maritrans' single hull tank barges).

138. *Id*.

139. In *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360 (2004), the court considered whether the enactment of the American Fisheries Act resulted in the taking of a fishing vessel and associated property interests. While the court concluded that there was no property interest in the fishing permits, the court did find a property interest in the vessel. *Id*. at 370–71. However, based upon the *Penn Central* factors, the court held that no taking occurred. *Id*. at 384–86. We note that this decision predated *Am. Pelagic Fishing Co. v. United States*, so it is unclear what precedential effect can be attributed to *Arctic King*.

> [O]ur "takings" jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . .[140]

In applying this rationale to the fisheries context, the Federal Circuit has concluded that fishermen do not have a cognizable property interest in the use of their vessels to fish in the United States EEZ.[141]

In *Conti*, the court refused to find that a regulatory taking had occurred. Indeed, the court declined to apply the *Penn Central* test to the alleged taking of Mr. Conti's fishing vessel. Instead, in affirming the lower court, the court stated that "Mr. Conti's continuing ability 'to sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses,' . . . precluded a finding that a regulatory taking had occurred."[142] In addition, the court noted that Mr. Conti's claim also failed because his use of the vessel and gear was totally "dependent upon a permit that was revocable at all times."[143]

In *American Pelagic*, in reversing the Federal Court of Claims, the court declined to find that a right to fish for Atlantic mackerel and herring was a legally cognizable property interest inherent in ownership of the *Atlantic Star*. In doing so, the court examined "existing rules or understandings" and "background principles" derived from

---

140. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

141. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1377 (Fed. Cir. 2004).

142. Conti v. United States, 291 F.3d 1334, 1343 (Fed. Cir. 2002). In doing so, the court relied upon the Supreme Court's decision in *Andrus v. Allard*, where the Court concluded that regulations prohibiting the purchase, sale, or trade of migratory birds and eagles, and their parts, did not constitute a taking of appellees' Indian artifacts that were partially made of feathers from the protected bird species. 444 U.S. 51, 54 (1979). In *Andrus*, the Court stated that the regulations at issue did not require the surrender of the artifacts or impose a "physical invasion or restraint upon them." *Id.* at 65. Significantly, the Court stated that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65–66.

143. *Conti*, 291 F.3d at 1345 n.8 (citing Mitchell Arms, Inc. v. United States, 7 F.3d 212, 217 (Fed. Cir. 1993)).

existing laws.[144] The court reviewed the Magnuson-Stevens Act and preexisting common law to find that there is no right to fish that would inhere in an owner's title to a fishing vessel.[145] For example, the court found that, in the Magnuson-Stevens Act, "Congress explicitly assumed 'sovereign rights and exclusive fishery management authority over all fish' in the EEZ" and that "Congress also erected an elaborate framework by which the fisheries in the EEZ would be managed under the oversight of the Secretary."[146] Because the Magnuson-Stevens Act was in place at the time the fishing vessel was purchased, the court found that the statute was an "existing rule" or "background principle" that inhered in American Pelagic's title to the vessel.[147] Therefore, because the ability to fish was subject to governmental permission and not a right inherent in the ownership of the fishing vessel, the court concluded that the loss of the ability to use the vessel and gear to fish was not a compensable taking under the Fifth Amendment.[148]

C. Provisions of the Magnuson-Stevens Act May Create the Perception of Property Rights Under Certain Circumstances

While the courts have definitively stated that generic fishing permits are not property under the Fifth Amendment, the courts have not yet ruled specifically on whether catch shares are property for takings purposes.[149] While, as described below,

---

144. *Am. Pelagic*, 379 F.3d at 1376 (citing *Lucas*, 505 U.S. at 1030).

145. *Id.* at 1381.

146. *Id.* at 1378–79. The court also determined that the Magnuson-Stevens Act was consistent with the preexisting common law with regard to the role played by the sovereign in managing fisheries resources. *Id.* at 1379 (citing McCready v. Virginia, 94 U.S. 391, 394 (1874) ("[T]he 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 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.")).

147. *Id.*

148. *Id.* at 1381.

149. For purposes of marital dissolution, courts have held that fishing permits are property. Ferguson v. Ferguson, 928 P.2d 597, 599–600 (Alaska 1996) (while recognizing that IFQ does not constitute property in Fifth Amendment context, Court held that IFQ creates a property interest subject to marital division based on value associated with right of limited access to fishery resources). Likewise, courts have recognized that fishing permits are property in the due process context. Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) (In determining whether a party had a protectable property interest in acquiring an IFQ permit for purposes of

catch shares embody more attributes of property than fishing permits and there are strong arguments in support of finding a property right in catch shares, the Magnuson-Stevens Act contains a strong disclaimer against any compensable property rights. The Act provides that catch shares "may be revoked, limited, or modified at any time . . . shall not confer a right of compensation . . . shall not create . . . any right . . . or interest in or to any fish before the fish is harvested . . . and shall be considered a grant of permission" to participate in fishing activities.[150] Accordingly, even if catch shares are found to be property for Fifth Amendment takings purposes, catch share holders remain subject to the government's ability to make changes to the management regime and likely have no right to compensation for any loss of share value.[151] Yet, many of the attributes of catch shares foster the perception that share holders possess a property right in those shares. Creating such a perception has significant implications for management programs.

1. Arguments Supporting a Finding of Property Rights in Catch Shares

Given the nature of catch shares and the administrative attributes of any catch share management regime, there are strong arguments in support of finding that a catch share is property right for purposes of the Fifth Amendment. Notably, catch shares are more closely aligned with traditional property and can be distinguished from the fishing permits at issue in *Conti* and *American Pelagic*. As with any other legal determination, the particular circumstances are likely to affect the strength of any claim that a catch share revocation should be considered a taking.

In both *Conti* and *American Pelagic*, the courts emphasized that the plaintiffs lacked the ability to transfer, assign, or sell the permit at issue. In contrast, one of the hallmarks of most

---

procedural due process, the Ninth Circuit concluded that "[t]here can be no doubt that the IFQ permit is property"). Because the Fifth Amendment examination of due process rights is broader than that for a takings claim, this conclusion does not necessarily resolve the issue here. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 318 (2007).

150. 16 U.S.C. § 1853a(b) (Supp. V 2006).

151. Members of Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323, 1334 (Fed. Cir. 2005).

catch share programs is that the permits can be assigned, leased, sold, or transferred.[152] The current Magnuson-Stevens Act authority requires that a catch share program include a "policy and criteria" for transferability of shares, which could allow for liberal share assignment, sale, or transfer.[153] A policy supporting freely transferable catch shares would further arguments that those shares are a property right.[154]

The Supreme Court has recognized that "the right to exclude is 'perhaps the most fundamental of all property interests.'"[155] In *Conti* and *American Pelagic*, the court emphasized that generic fishing permits created no exclusive fishing privilege.[156] In characterizing this lack of excludability associated with fishing permits, the court in *Members of the Peanut Quota Holders Ass'n* stated that:

> [T]he number of [fishing] licenses to be issued under such a scheme is not fixed. Each additional license dilutes the value of the previously issued licenses. So long as the government retains the discretion to determine the total number of licenses issues, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive. [T]he fisherman . . . can[not] exclude later licensees from entering the market, increasing competition, and thereby diminishing the value of his license.[157]

By comparison, the court found the federally issued peanut quotas at issue in that case to be a property right as those quotas "represented a right to plant and produce a certain amount of peanuts at a certain price in specific crop years."[158] Catch shares likely occupy a middle ground between

---

152. For examples, *see* NAT'L MARINE FISHERIES SERV., *supra* note 10, at 103–17.

153. 16 U.S.C. § 1853a(c)(7) (Supp. V 2006).

154. *Members of the Peanut Quota Holders Ass'n*, 421 F.3d at 1333 ("[T]he transferability of the quotas supports the conclusion that the quotas constitute property.").

155. *Id*. (citing *Lingle*, 544 U.S. 528, 539 (2005)).

156. The court's consideration of exclusivity in determining whether the *Conti* permit constituted a property right relied on the statement from *Dolan v. Tigard,* 512 U.S. 374, 384 (1994) that "the right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Conti v. United States, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (quoting Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

157. *Members of the Peanut Quota Holders Ass'n*, 421 F.3d at 1333–34.

158. *Id*. at 1334. The court noted that "[t]he statutory scheme limited the number of total pounds of quota peanuts and, in conjunction with the price supports, guaranteed

the permits in *Conti* and *American Pelagic* and the quotas in *Members of the Peanut Quota Holders Ass'n*. As defined by the Magnuson-Stevens Act, catch shares are "held for exclusive use."[159] Catch shares represent a privilege, allocated to a limited number of qualified fishermen, to harvest a percentage of each year's total allowable catch.[160] Catch shares, however, are distinguishable from the peanut quotas at issue in *Members of the Peanut Quota Holders Ass'n* in a few respects. Rather than providing a fixed quantity protection annually, catch shares provide exclusive access to the specified proportion of the available catch. This exclusivity is critical to maintaining catch within biological limits, as it allows total catch to be appropriately constrained. This structure appears to maintain the government's authority to issue additional catch shares, which would dilute the interests of existing catch share holders by reducing the portion of the allowable catch that they would be allocated, in a manner similar to the dilution of interests that would arise from the issuance of additional fishing permits.[161] In addition, the price protections embodied in those peanut quotas are not present in catch shares.

So, while catch shares are more of an exclusive right and more akin to property than the fishing permits previously considered by the courts in the Fifth Amendment context, they also lack some of the attributes that led to the court conclude that peanut quotas are a property right. It may, nevertheless, be plausible to contend that catch shares are a property right because, as stated by the court in *Members of the Peanut Quota Holders Ass'n*, "[a] property right accrues when the government has seen fit to take a limited resource and secure

---

a minimum price on the peanuts. Once a particular quota had been awarded, the granting of further quotas did not dilute that allotment . . . By awarding a quota holder a set price on a fixed quantity of peanuts, the government established a defined market for each quota holder—a market exclusive to that quota holder." *Id*.

159. 16 U.S.C. §§ 1802(23), 1802(26) (Supp. V 2006).

160. *Id*. § 1802(26).

161. Although no such allocation of catch shares is known to have been made, one year after implementation of the Bering Sea and Aleutian Islands crab rationalization program, Congress made an allocation of processor quota shares in that program to a company as a part of the Coast Guard and Maritime Transportation Act of 2006. *See* Pub. L. No. 109-241, § 417(a), 120 Stat 516, 545 (2006). The processor quota shares issued in that program authorize the acceptance of deliveries of harvested crab in a manner analogous to authorization of crab harvests under a catch share. This processor quota share issuance had the effect of diluting the interests of existing processing quota share holders in that program.

it for the benefit of an individual or a predetermined group of individuals."[162]

The auction of shares or use of a federal loan to support a share purchase could further reinforce arguments that catch shares are property rights.[163] Following the payment of an auction price to the federal government, a share holder whose shares are subject to revocation would have a reasonable argument that the government's acceptance of payments is an implicit acknowledgement of their value as property and the retention of any payment constitutes unjust enrichment.[164] The ability to secure a federal loan to fund the purchase of shares also supports an argument that the holder has a property

---

162. 421 F.3d at 1334.

163. Such an argument is advanced with respect to proposed auctions of broadcast licenses. *E.g.*, David Seth Zlotlow, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CAL. L. REV. 885, 904–07 (2004) (arguing that the property right characteristics of the broadcast licenses and the extent to which a reasonable expectation of compensation has been created by the government have created property rights.

164. Similar (but distinguishable) circumstances arise under federal grazing permits and leases. Those contracts typically have a ten year term with a renewal preference for the permit or lease holder. Leases and permits are subject to cancellation in accordance with their terms. So cancellation can occur during the term of the lease. Yet, payments are made annually limiting potential arguments of unjust enrichment should a permit or lease be cancelled. In addition, leases and permits are subject to non-renewal, if those lands remain available for grazing under land use plans. 43 U.S.C. § 315b (2006). Despite the legislative authority for ending leases and permits (and authority for non-renewal) conservation and environmental groups have bought grazing permits and leases to retire those privileges and, together with some ranchers, have periodically exerted efforts to initiate a federally funded buyback of permits and leases. These initiatives are for voluntary buyouts or buybacks under which a lease or permit holder would receive a one-time payment intended to facilitate the retirement or termination of the existing permit (or lease) and any preference for continuation of the permit (or lease). Interestingly, any contention that a buyback is appropriate to retire or terminate permits (and leases) implicitly acknowledges that these permits (and leases) carry some long term privilege to access to the grazing lands at the prevailing federal permit or lease rate. Similar arguments could be applied to the long term privilege associated with catch share allocations, whether or not those allocations require payment from their recipients. *See* April Reese, *The Big Buyout*, HIGH COUNTRY NEWS, Apr. 4, 2005, http://www.hcn.org/issues/295/15398; for examples of proposed buyout legislation see Multi-Use Conflict Resolution Act of 2005, H.R. 3166, 109th Cong. (2005); Voluntary Grazing Permit Buyout Act, H.R. 3324, 108th Cong. (2003); Arizona Voluntary Grazing Permit Buyout Act, H.R. 3337, 108th Cong. (2003). Several similar buybacks of fishing vessels and federal fisheries permits have occurred to address overcapacity. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-699T, COMMERCIAL FISHERIES: EFFECTIVENESS OF FISHING BUYBACK PROGRAMS CAN BE IMPROVED (2001) (Statement of Barry T. Hill, Director, Natural Resources and Environment Report, before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans).

interest in any catch shares. These loans have terms of up to twenty-five or thirty years, suggesting that the interest being acquired may be expected to retain value for that period. In addition, loans are typically secured by the purchased shares,[165] a further acknowledgement of long-term value.

On its face, limiting the duration of catch shares to a term of no more than ten years would appear to diminish any expectation of the permanency of catch shares and any assertion that the revocation of the share allocation should be compensable. Yet, the cyclical share renewal established under the Magnuson-Stevens Act (described by NOAA Fisheries as a "rolling conditional permanence") could strengthen arguments that a catch share is a property right in some cases. Under the provision, catch shares are issued for a period of no more than ten years, but are renewed unless those shares are revoked, limited, or modified.[166] The FMP establishing the catch share program may identify the reasons for a revocation, limitation, or modification. For example, a catch share program could condition share renewal on the acquisition and use of costly gear and adoption of costly fishing practices. Such a structure may lead to an expectation in the share holder that, not only will the share not be revoked or modified during the defined term, but that the shares will also be reissued at the end of its term, if the share holder satisfies the conditions of the plan. A share holder who expends the resources and efforts to satisfy the conditions could argue that the expenditures were made to ensure the continuation of the fishing privilege for an additional period.[167]

Although Congress declined to revisit its statement that catch shares are not compensable property rights when it reauthorized the Magnuson-Stevens Act, it expressly authorized the creation of catch share programs that embody more attributes of property than previous fishing permits. Notably, the hallmarks of many catch share programs are their

---

165. *See*, *e.g.*, 50 C.F.R. § 253.28(g) (2011) (shares primary collateral for loan).

166. 16 U.S.C. § 1853a(f)(1) (Supp. V 2006).

167. Revocation of catch shares subject to this "conditional permanence" may be distinguishable from revocation of the impermanent quotas in *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed. Cir. 2005). The peanut quotas under that program were revoked prior to a sunset of the program. *Id.* at 1335. Yet, those peanut quotas were not subject to any renewal provision (particularly a renewal provision intended to induce the holder to adopt certain practices in the use of those quotas, as might be created under a catch share program). *Id.*

exclusivity and transferability, two of the attributes of property found lacking in the fishing permits in *Conti* and *American Pelagic*. In addition, potential auction payments or federal loans further the share holder's expectation of a property interest in those catch shares. Accordingly, it is possible that, depending upon the structure of the catch share program at issue, a court could find that catch shares are property for purposes of the Fifth Amendment's takings analysis.

2. Even if Considered Property, Catch Shares are Unlikely to Create a Right to Compensation from the Government.

Unfortunately for the catch share holder, even if catch shares are considered property, this conclusion is not determinative regarding the availability of compensation for any taken shares. The second *Penn Central* factor, which considers the reasonableness of the expectations of the property holder, seems most relevant to any determination of whether revocation of catch shares would constitute a compensable taking. Any issued catch shares are subject to Congress's statement that catch shares "shall not confer any right of compensation . . . if . . . revoked, limited, or modified."[168] This statement should diminish any expectations concerning the government's authority to revoke catch shares without compensation.

Although the Magnuson-Stevens Act disclaimer creates a substantial hurdle for a person asserting a takings claim, the Court has suggested that such a disclaimer alone may not be determinative. In *Palazzalo v. Rhode Island*, the Supreme Court held that a purchaser of land who took title after the adoption of wetlands regulations could challenge those regulations as enacting a taking.[169] The Court specifically

168. 16 U.S.C. § 1853a(b) (Supp. V 2006). In both *Conti* and *American Pelagic*, the Federal Circuit relied, in part, on the ability to "suspend, revoke, or modify" to conclude that the permits at issue bestowed "a revocable license, instead of a property right." Conti v. United States, 291 F.3d 1334, 1341–2 (Fed. Cir. 2002); Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1374 (Fed. Cir. 2004). In an analogous situation, involving the revocation of a grazing permit issued under the Taylor Grazing Act, the Supreme Court found that similar language in the statute expressed the clear Congressional intent that no compensable property interest was created by the permit. United States v. Fuller, 409 U.S. 488, 494 (1973).

169. 533 U.S. 606, 627–28 (2001).

stated that "a blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."[170] In the case of catch shares, however, it seems unlikely that the creation of expectations of a secure property right could rise to the level of creating a right to compensation due to the strength of the Magnuson Stevens Act disclaimer.[171]

The conclusion that catch shares carry no right to compensation on their revocation is also supported by the statement of the *Members of the Peanut Quota Holders Ass'n* court that:

> [t]he government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.[172]

In denying compensation for the owners of peanut quotas, the court stated that "the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election."[173] Accordingly, unless there is a clear intention that catch shares are irrevocable, based upon the Magnuson-Stevens Act disclaimer, a share holder likely has no right to

---

170. *Id* at 628.

171. For example, in *Kaiser v. U.S.*, the Court found a right to compensation resulted from the government's creation of public access to a navigable waterway. 444 U.S. 164 (1979). The plaintiff dredged the waterway across its land to a pond enclosed on the plaintiff's property. *Id.* at 167. The Court found the consent of government officials to the dredging persuasive in finding for the plaintiff, stating that:

> While the consent of individuals officials representing the United States cannot estop the United States (citations omitted), it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land owner's property.

Id. at 179. However, the Court in *Kaiser* also suggested that had the government conditioned its approval of dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation, it may have found no compensable property interest. *Id.* at 178. The disclaimer of creating a compensable interest in the Magnuson-Stevens Act would seem to serve to overcome any expectations of a compensable property interest that might be created by the various property-like characteristics of catch shares.

172. 421 F.3d at 1335.

173. *Id*. at 1334.

compensation for any lost share value and associated investment in vessels and gear resulting from a revocation or modification of the applicable fishery management regime.

IV. POLICYMAKERS SHOULD REFER TO THE JUDICIAL TAKINGS ANALYSIS WHEN IMPLEMENTING OR AMENDING CATCH SHARE PROGRAMS

Although it may be unlikely that a court would find that a catch share is a compensable property right, the structure of catch share programs may create an expectation in share holders that catch shares are property that have some measure of permanence. Some share holders have secured loans and made significant monetary investments to acquire catch shares and purchase the necessary vessels and gear to harvest the associated allocation of fish. Arguably, a share holder's inability to recover this lost investment following the government's modification or revocation of the catch share program would be inequitable. In fact, a catch share program's benefits are derived from inducing share holders to behave as if catch shares are a property right; while the government retains the authority to revoke those shares, based on the disclaimer that the shares are not property. If that expectation can be effectively moderated, without deterring the desired behavior, the potential inequity may be avoided. While, as discussed above, the ability of a share holder to recover lost investment through a Fifth Amendment taking claim is tenuous, the share holder's predicament could be addressed through the applicable Council when developing, amending, or revoking a catch share program. Accordingly, fishery managers may benefit from consideration of the following principles, as informed by the *Penn Central* factors, when contemplating a transition between different management structures.

A. Penn Central *Factors Applied to Specific Fisheries Management Decisions*

When applying the *Penn Central* factors, a court undertakes a fact-based examination of the economic impact of the regulation on the claimant, the extent to which the regulation interferes with an investment backed expectation, and the

character of the government action.[174] By considering the *Penn Central* factors, policymakers could design catch share programs and successor management structures that ease the transition between the different management regimes by moderating expectations of participants in the fishery. Specifically, measures that reduce the potential for a takings finding are also likely to mitigate the disruption to fishery operations due to any transition between alternative management regimes.[175]

The first *Penn Central* factor considers the economic impact of the regulatory change. Annual changes in allocations arising from changes in allowable catches are anticipated from the structure of catch share programs. In addition, periodic amendments intended to fine tune the programs to achieve an intended result are commonplace and should be anticipated.[176] While somewhat disruptive to catch share holders, these changes generally cannot be characterized as "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain,"[177] as would be needed to support a takings claim. Only larger changes, such as catch share revocations or abandonment of a catch share program, are likely to have the substantial economic effect on participants that characterizes compensable takings.

The economic impact of transitioning from a catch share program to another form of management would depend upon the catch share program, the subsequent management regime of the fishery, and how that new management dovetails with the catch share structure. If catch share holders are left without a fishing opportunity under the new management regime, the economic impact will be significant. For example, consider a Council that wishes to transition from a catch share

---

174. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1973).

175. It should also be noted that the inverse is likely also true, in that measures that tend toward a taking increase the disruption to fishery participants. Participants who are likely to gain from a catch share program might therefore advocate for program elements that strengthen property rights and argue for a finding of a taking to increase the security of their gains under the program. Even if these stakeholders are unlikely to persuade a court that a program modification that revokes their shares is a taking, policymakers supporting the modification will have to face stronger equity arguments in opposition to the change.

176. Mark Fina, *Evolution of Catch Share Management: Lessons from Catch Share Management in the North Pacific*, 36 FISHERIES 164–77 (2010).

177. *Penn Central,* 544 U.S. at 539.

program back to a limited entry program. If the catch share program permitted shares to be divisible on transfer, the fishery may have far more catch share holders than could be reasonably accommodated by a limited entry program. Such a limited entry program would require a very abbreviated fishing season that would pose problems to both managers attempting to manage to the allowable catch and participants attempting to realize a reasonable return from the fishery.[178]

One obvious way to address this problem would be to grant fishing privileges (or limited entry permits) only to persons who hold over a threshold amount of catch shares. This, however, would exclude persons who hold under the threshold number of shares. These excluded share holders may have less at stake in the fishery than holders of large numbers of shares, but they also may have fewer resources and fishing opportunities. Consequently, the economic impact of being excluded from the successor management regime to these small entities could be relatively large, in comparison to the impact on a larger entity.

Other catch share structures may avoid this complication. Some catch share programs are structured around a vessel licensing program (such as license limitation). Under a limited license program, participation is limited to holders of licenses that qualify for the fishery. Under an associated catch share program, these licenses continue to authorize participation, with each license holder receiving an allocation of catch shares (based on catch history or other factors). In effect, the long-term catch shares are appurtenances of the license that can be transferred only by transferring the license. Three of the catch share programs in the North Pacific use such a structure, under which each catch share allocation is both appurtenant to and inseverable from a license or vessel.[179] These structures

178. For example, the Bering Sea and Aleutian Islands crab rationalization program was, in large part, adopted to address overcapacity. Nat'l Marine Fisheries Serv., *Final Bering Sea Aleutian Islands Crab Fisheries Environmental Impact Statement*, ES-2 (2004). In each of the nine fisheries subject to that program, the current number of catch shares holders exceeds the number of vessels that participated in the fishery prior to the program, when overcapacity was perceived as a problem. NAT'L MARINE FISHERIES SERV., BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION REPORT: FISHING YEAR 2010/11, at 21–22 (2011), *available at* http://alaskafisheries.noaa.gov/ram/crab/1011crabrpt.pdf.

179. *See* 50 C.F.R. § 679.20 (2012) (describing the Bering Sea pollock fishery, under which catch share allocations to cooperatives are based on vessel ownership and catch histories of qualified vessels). Recent legislation allows for limited transfer of catch

provide a readily identifiable means for establishing fishery qualification, if managers should elect to end the applicable catch share program. If the catch share program is abandoned while retaining the vessel or licensing program, it is possible that any negative economic effects could be mitigated, since all catch share program participants would be provided an equal opportunity to participate in the fishery under the subsequent management regime.[180] Catch share programs can mitigate economic impacts of changes by adopting structures that accommodate those changes, including the possible transition to other management structures without the need to exclude any share holders.

The second *Penn Central* factor, whether the government action interferes with an investment-backed expectation, is also likely to be affected by both the structure of the catch share program (and the catch share allocations defined by it) and the succeeding fishing privileges or management regime. For example, catch share holders who acquire shares at some cost would likely have an investment-backed expectation in the continuation of their catch share interest for some indefinite term. Persons who borrowed under a government loan are likely to have an expectation that their catch shares (and the accompanying annual allocations) will remain largely intact through the life of their loan. Whether the successor management regime allows that person to continue fishing would determine the extent to which the regulation interferes with the holder's investment-backed expectation.

A program with severable and divisible catch share allocations could have many holders of small numbers of

---

histories among qualified vessels; however, allocations are only available to qualified vessels. H.R. 3619, 111th Cong. (2010) (enacted); *see* 50 C.F.R. § 679.90 (2011) (describing catch share allocations to cooperatives based on vessel ownership (or limited entry license holdings, in the event a vessel is lost) and catch histories of qualified vessel); 50 C.F.R. § 679.80 (2009) (describing the Central Gulf of Alaska rockfish program under which allocations are based on license holdings and catch histories of vessels using qualified licenses). Under each of these programs, long term catch share privileges (as distinguished from annual allocations) cannot be severed from the associated vessel or license, as applicable.

180. Some proponents of catch shares, however, advocate for the severability of share holdings as a means of achieving consolidation accompanying economic efficiencies. These commenters would likely argue that non-severability of long term share holdings (which would necessarily arise from a program that attaches the catch share allocation to a license or vessel) would prevent the program from fully achieving its potential economic benefits. *E.g.*, Hannesson, *supra* note 21, at 37; NAT'L RESEARCH COUNCIL, *supra* note 22, at 167–68.

shares. Transition to another management regime could be complicated should NOAA Fisheries attempt to ensure that each of these persons is able to continue participating in the fishery. A threshold share holding could be required to continue participation under the successor management regime. Using this structure it may be possible to develop a system that allows holders of few shares to consolidate their holdings with others to meet the threshold to allow continued participation. These share holders therefore have two choices. They can either stay in the fishery by acquiring more shares or receive compensation for their shares on exiting the fishery by transferring their shares to another person who is consolidating shares to continue in the fishery. Such a system would need to equitably balance the interests of those who hold few shares with those who hold many shares. A catch share program that retains a vessel or licensing component could overcome this problem by effectively limiting participation in a subsequent management regime to a specific number of share holders that the fishery might reasonably accommodate. Programs that maintain vestiges of prior limited entry management regimes could streamline transition from catch share management to another management structure.[181]

Catch share terms could also be used to moderate expectations of share holders. Arguably, the current Magnuson-Stevens Act, which limits share terms to ten years, has this moderating effect. However, in practice, the automatic renewal of any allocations that are not revoked, modified, or limited during their term may have the opposite effect; reinforcing expectations that catch share allocations are permanent, particularly if the conditions on renewal require the share holder to meet some performance standard. An alternative approach could be to establish fixed terms for shares; however, limiting the allocation to a fixed term begs the question of what management measures will govern the fishery and what fishing permits will be issued at the expiration of the term. Catch shares are viewed as successful for fishery management because they allow their holders to plan their harvest operations. Fixed terms allow for planning during the term, but could create great uncertainty at the

181. These structures, however, may be disfavored some commentators, as they do not allow for efficiencies that would arise from restructuring long term holdings.

expiration of the term, unless steps are taken to provide fishery participants with notice of the transition.

Under the third *Penn Central* factor, a court considers the character of the government action. Specifically, courts consider whether the action balances benefits and burdens of economic life for the common good or if the interference is so substantial that it should appropriately be borne by the public as a whole. Again, a policymaker should take this factor into consideration when contemplating the nature of the catch share program and the subsequent fishery management regime. For example, management measures that are undertaken to improve biological management of the fishery and are adopted to address environmental harms arising from fishing practices, while likely to support the common good, might appropriately be borne by participants in the fisheries who directly cause those harms. On the other hand, a reallocation of interests in the fishery intended solely for distributional effects among different classes of users could be argued to be such a direct interference with the share holder's interest strictly for the benefit of others that it is a burden that should be borne by the public in general.

For example, abandonment of a catch share program or redistribution of shares simply to benefit residents of certain economically disadvantaged communities to the detriment of catch share holders, who are thereafter excluded from the fishery, could be unfair to catch share holders who are not permitted to participate in the subsequent fishery.[182] These catch share holders could reasonably argue that their losses are more appropriately borne by the public as a whole. A Council could address this shortcoming by establishing a transition or a less severe reallocation that accommodates some interests of the existing catch share holders.

As should be apparent, the *Penn Central* factors could guide policymakers attempting to ease transitions with changes in management (including changes between catch share programs and other forms of management). Specifically, the factors provide a framework for balancing an individual's interests against the broader public interests at issue in a

182. Other program provisions could make renewal of shares contingent on maintaining a certain landing pattern to benefit fishing communities. In such a case, the disregard of share holder performance when determining fishing privileges in a new management regime could be argued to forsake an important interest that was important under the prior management.

fishery management program. Despite the likelihood that catch shares do not create compensable property rights, takings law provides a useful framework for considering the appropriateness of management actions that create or change catch share programs. Councils and NOAA Fisheries should consider the magnitude of impacts, the degree to which actions interfere with reasonable expectations of affected share holders, and the character of the actions (or the appropriate distribution of the burden between catch share holders and the public).

V. CONCLUSION

The consideration and establishment of catch share programs have generated substantial controversy over the years. While much of this focus has been on the perception that catch share programs establish property rights in fishery resources, policymakers have given relatively little consideration to the legal nature of the catch shares themselves and the associated implications for share holders. Although catch shares are generally referred to as property rights, this characterization is likely inaccurate. However, depending upon how a Council or NOAA Fisheries establishes a specific catch share program, a share holder could have substantially stronger arguments that allocated catch shares should be treated as property for purposes of compensation pursuant to the Fifth Amendment.

For example, if NOAA Fisheries auctions shares, issues loans to facilitate the purchase of shares, or establishes specific performance criteria to support a mandatory share renewal process, the holder of those shares would have a much stronger claim of entitlement compared to traditional fishing permits. Nevertheless, courts are unlikely to award compensation for revocation of catch shares. Further, policymakers who consider the elements of a takings analysis under the Fifth Amendment may be better equipped to create, revise, and terminate catch share management programs in a way that achieves their management goals while decreasing the likelihood that a takings claim could arise in the future.

To some degree, the tension arising from catch share management stems from the contradiction between the public trust doctrine, which dictates that natural resources should be held by the government for the public benefit, and the attempt to attain these same goals through a property rights-like

regime. To achieve the intended policy goals, catch share proponents advocate that catch shares should be imbued with the characteristics of property (such as exclusivity and transferability). Yet, the public trust nature of fishery resources is clearly maintained by the Magnuson-Stevens Act disclaimer that catch shares are subject to modification or revocation without compensation. As a result of this contradiction, catch share programs are developed to induce share holders to behave as if they hold a compensable property interest in those shares (both through their investment practices and through their defense of those interests before policymakers), while retaining policymakers' authority to revoke those shares without compensation. The result is uncertainty in both catch share holders and the public concerning the exact nature of the interest embodied in catch shares. To date, policymakers have not articulated a clear standard for this most critical aspect of catch share management; instead they have proceeded to attempt to balance the competing interests of catch share holders and the public through amendments to those programs. This issue will remain unsettled until a definitive reconciliation of these contradictions is presented by policymakers. In the meantime, the overarching policy considerations used in property rights cases, such as those embodied in the *Penn Central* test, may provide a tractable guide to policymakers, share holders, and other stakeholders attempting to address the contradiction while treating all stakeholders equitably and maintaining fisheries management for the common good.