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The Privatization Of The American Fishery: Limitations, Recognitions, And The Public Trust

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THE PRIVATIZATION OF THE AMERICAN FISHERY: LIMITATIONS, RECOGNITIONS, AND THE PUBLIC TRUST

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And God blessed them, and God said unto them,
Be fruitful, and multiply, and replenish the earth, and subdue it:
and have dominion over the fish of the sea . . . .[1]
Freedom in a commons brings ruin to all.[2]

I. INTRODUCTION

In *Douglas v. Seacoast Products, Inc.*,[3] the United States Supreme Court seemingly laid to rest any lingering contentions of vested ownership theory relating to fisheries resources, stating that "it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to capture."[4] This doctrine, that common resources such as fish are of an inherently wild nature, or *ferae naturae*, such that actual possession is required in order to establish individual ownership, has survived as an unwavering fixture of the common law, and has guided courts in their treatment of fishermen's rights and interests in the living resource that they harvest. In near defiance of this doctrine, some courts have gone so far as to suggest that fishermen hold a "constructive property interest" in fisheries,[5] but in spite of such developments, the doctrine of *ferae naturae* has maintained its vitality and persists as theoretical support to another common law doc-

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1. *Genesis* 1:28.
2. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).
3. 431 U.S. 265 (1977).
4. *Id.* at 284.
5. Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978 (E.D. Va. 1981).

trine, that of *res communes*, under which fisheries resources are owned in common, and which supports a common right to fish.[6] However, traditional definitions of "property" recognize that the essence of property lies in the sum of rights and powers incident to ownership,[7] with particular emphasis on rights of use. This Comment utilizes a "sum of rights" approach to discuss the modern proprietary relationship between fishermen and the fisheries that they depend upon. By analyzing this relationship from the perspective of specific legal contexts, this Comment argues that U.S. fishermen have acquired a sufficient quorum of property interests to recognize that they may hold some legitimate form of private property interest in fisheries resources,[8] and that this interest may be recognized under the framework of the public trust doctrine in the furtherance of fisheries management and conservation efforts.

This Comment begins its analysis in Part II, by outlining the common law doctrines that have historically limited the ability of fishermen to acquire proprietary interests in fisheries resources. Part III will then analyze the proprietary interests that *are* held by fishermen in fisheries resources, through the discussion of several specific legal contexts,

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6. *See* Anthony D. Scott, *Conceptual Origins of Rights Based Fishing*, in RIGHTS BASED FISHING 11, 15-17 (P. Neher et al. eds., 1988); J. MacGrady, *The Navigability Concept in the Civil and the Common Law*, 3 FLA. ST. L. REV. 513, 522-23, 523 n.50 (1975) (noting that *res communes* is also accepted to mean ownership by the state, which is commonly refered to as *res publicae*); Seth Macinko, *Public or Private?: United States Commercial Fisheries Management and the Public Trust Doctrine, Reciprocal Challenges*, 33 NAT. RES. J. 919 (1993).

7. *See, e.g.*, Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 268 (1933). *See also* RESTATEMENT OF PROPERTY § 5 cmt. e (1936) (the "totality of interests" constitutes complete property).

8. For the purposes of this Comment, the following statutory definitions of "fishery" and "fishery resource" are adopted:

> (13) The term "fishery" means–
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> (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
>
> (B) any fishing for such stocks.
>
> (14) The term "fishery resource" means any fishery, any stock of fish, any species of fish, and any habitat of fish.

16 U.S.C.A. § 1802(13)-(14) (West 1985 & Supp. 1997). Under these definitions, the concept of a "fishery" resource includes the use of these resources by fishermen. Thus, in the context of the discussion that follows, the focus of references to "private" or "proprietary" interests in fisheries resources lies in the right of fishermen to have access to the use of these resources.

including the ability of fishermen to recover for economic losses in tort. Next, Part IV discusses the extent to which the Fifth Amendment has provided constitutional protection for the proprietary interests of fishermen. Part V continues by outlining the various private interests that fishermen have acquired through rights based fishery management systems. Finally, Part VI discusses how proprietary interests in fisheries may be recognized under the public trust doctrine in the furtherance of fisheries management and conservation efforts.

The recognition and future utilization of proprietary interests in U.S. fisheries management is a matter of particular importance in view of the Sustainable Fisheries Act,[9] enacted in October of 1996, which amended the Magnuson Fishery Conservation and Management Act[10] and which also mandated a moratorium on the implementation and approval of any fishery management plan that creates a new individual fishing quota program.[11] This legislation also calls for a comprehensive study and report on the use of individual fishing quota programs, to be completed by October 1, 1998.[12] As the federal government pauses to reconsider and evaluate the future use of such rights-based fishery management programs, it is important to realize, as this Comment argues, that the recognition of these proprietary rights is consistent with how the law has traditionally recognized such private interests in a variety of contexts. Moreover, the framework of the public trust doctrine, by providing for the concurrent existence of public and private interests in common resources, should to a large extent dispel the condemnation of rights-based fishery management programs as an unqualified give-away of public resources, and that this framework provides a foundation for recognizing more stable, long-term proprietary interests in fisheries that may enhance the overall effectiveness and conservation value of rights-based fishery management strategies in the future.

II. DOCTRINES, DEFINITIONS, RIGHTS, AND INTERESTS

The common law doctrines of *ferae naturae* and *res communes* have historically imposed fundamental limitations on the existence of private interests in common fisheries resources. Although these doctrines pre-

9. Pub. L. No. 104-297, 110 Stat. 3559 (1996).
10. 16 U.S.C. §§ 1801-1883 (West 1985 & Supp. 1997).
11. *Id.* § 1853(d)(1)(A).
12. Pub. L. No. 104-297, § 108(f), 110 Stat. at 3577 (1996).

clude the recognition of absolute vested ownership in fisheries, other forms of proprietary interests may be held by fishermen in these common resources. By using a "summation of rights" approach to examine these interests in a number of illustrative legal contexts, it is possible to evaluate the extent to which U.S. fishermen have developed a proprietary interest in fisheries resources.

A. An Overview of Common Law Doctrines

There are several common law doctrines that frame the boundaries of the modern fisherman's proprietary relationship with fisheries resources.[13] The present status of the fisherman's proprietary interest in fisheries has evolved from a common law context beginning in 1215 with the Magna Carta, from which modern conceptions of a public right to fish have been derived.[14] Before the Magna Carta, the king could grant rights to inshore tidal fisheries.[15] At that time, all submerged lands were held by the Crown, and these submerged lands could be granted to private individuals who would also obtain exclusive rights to any overlying fisheries.[16] In the event that the submerged lands and the overlying fishery were too far offshore to allow for exclusive ownership, the fishery was classified as *res nullius*, meaning that the fishery belonged to no one in the sense of private property under the common law, the rationale for which was premised upon the impossibility of any nation's ability to protect or defend these offshore fisheries.[17]

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13. It is not the purpose of this Comment to supply a detailed historical analysis of the common law doctrines that relate to property interests in fisheries resources; for a complete treatment, *see generally* Scott, *supra* note 6. For a judicial account of such doctrines, *see generally* Greer v. Connecticut, 161 U.S. 519 (1896); Shively v. Bowlby 152 U.S. 1 (1893). Although the public trust doctrine is intimately related to the discussion in this section, full consideration of this doctrine is given *infra*, in Part VI of this Comment.

14. Scott, *supra* note 6, at 17-18. *See also* Martin v. Waddell 41 U.S. (16 Pet.) 367, 412 (1842) (discussing the effect of Magna Carta to prevent the king from granting rights in free fisheries).

15. Scott, *supra* note 6, at 17.

16. *Id.*

17. MacGrady, *supra* note 6, at 523. *See also* Peter H. Pearse, *From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy*, 23 OCEAN DEV. & INT'L L. 71, 72 (1992) (noting that Hugo Grotius argued in 1609 that property could only exist if the holder was able to defend it against others).

After the Magna Carta was signed in 1215, the Crown could no longer grant exclusive rights to fisheries,[18] and since that time fisheries have been *res communes* only, meaning that ownership is common, or held by the public, and there has existed a public right to fish under the common law.[19] As the Supreme Court has stated, in reviewing the common law in England in relation to the ownership of fisheries, "the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury of their right, be restrained of it."[20] Thus, fisheries on the high seas remained *res nullis*, but fisheries within the territorial sea of a given country were owned in common by the people of that country, who enjoyed a common right to fish those resources.[21] Individual ownership of the actual fish was, and still is, limited by the doctrine of *ferae naturae*, under which common property resources, such as fish, are inherently wild and remain *res communes* until a person reduces it to possession by capture.[22] This doctrine has been widely utilized by the courts in the United States and continues to serve as a basis for the limitation of private property interests in U.S. fisheries.

B. Proprietary Interests in Relation to Property Theory

Individual ownership of actual fish, and the public ownership of fisheries are both distinguishable from the public right to fish, which is derived from the Magna Carta and English common law,[23] and which is preserved under the public trust doctrine.[24] The right to fish has independent characteristics of property,[25] which are derived from the theory

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18. Scott, *supra* note 6, at 17.

19. Pearse, *supra* note 17, at 72.

20. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842).

21. *Id. See also* GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 76 (1989) ("Both common law as well as legislative and judicial actions, have emphasized the right of all citizens for free access to fisheries and other wildlife.").

22. Greer v. Connecticut, 161 U.S. 519, 526-27 (1896). *See also* Missouri v. Holland, 252 U.S. 416 (1920); Douglas v. Seacoast Products, Inc., 431 U.S. at 284; Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805).

23. Martin v. Wadell, 41 U.S. at 412.

24. The public trust doctrine is discussed *infra* Part IV.

25. Macinko, *supra* note 6, at 923. *But see* Christopher L. Koch, *A Constitutional Analysis of Limited Entry*, *in* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL 251, 265 (R. Bruce Ritteg & Jay J. C. Ginter eds., 1978) ("A claim that there is a property right in the right to fish is groundless as an abstract proposition.").

of property as a collection of rights.[26] This rights-based approach to property allows for a distinction to be drawn between "corporeal" and "incorporeal" property.[27] The right to fish, as a species of property, may be theoretically categorized as an incorporeal form of property, if it is sufficiently supported by other incidents of ownership commonly referred to as a "bundle of rights."[28] Among the more important rights which are elements of the concept of property are exclusivity, durability, flexibility, transferability, title, and divisibility.[29] Most essential is the right of use, which gives meaning to title and the diminution of which is a focus of takings claims.[30]

Another relevant theory of private property is that the owner of private property is that person who, in the case of destruction or damage to that property, must sustain the loss of the property.[31] This theory can apply to either corporeal or incorporeal property, and serves as a functional test for the existence of private property rights.

The perspective of private property rights as a sum of rights and powers incident to ownership[32] serves as a useful "prism" through which to analyze the present status of fishermen's proprietary interest in fisheries. An examination of these rights can give insight into the extent to which fishermen have developed a private interest in fisheries under particular circumstances. Relevant subjects for this examination are: (1) the ability of fishermen to recover for economic loss due to damage to fisheries resources, including recovery under publicized private settlements; (2) the ability of fishermen to recover in takings claims for the physical or regulatory loss of fishing harvest; (3) the present status of rights that fishermen have obtained through limited entry fishery management systems; and, (4) the present status of the fisherman's right to fish as protected under the public trust doctrine.

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26. RESTATEMENT OF PROPERTY § 5 cmt. e (1936).

27. *See* Macinko, *supra* note 6, at 945.

28. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

29. Scott, *supra* note 6, at 14.

30. Lucas v. South Carolina Coastal Council, 505 U.S. at 1030; Yee v. City of Escondido, 503 U.S. 519, 523 (1992).

31. *See* Automobile Underwriters, Inc. v. Tite, 85 N.E.2d 365, 367 (Ind. 1949); T.W. Sprinks Co. v. Pachound Bros., 92 S.W.2d 50, 54 (Ky. 1936).

32. Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 268 (1933).

III. RECOVERY FOR ECONOMIC LOSS

One illustration of the existence of fishermen's proprietary interests in fisheries is the ability of fishermen to recover for economic losses arising from damage to fisheries resources, particularly in the context of pollution related damages. Although traditional tort principles under the maritime law have historically limited the ability of private parties to recover for economic losses, an exception to these principles has developed to allow for fishermen to recover for economic losses arising from pollution related damages to fisheries resources. Several rationales have been offered for this exception, including the existence of a "constructive property interest" held by fishermen in fisheries resources. Fishermen also have an enhanced ability to recover for economic losses under federal statutory mechanisms, and they have historically demonstrated an ability to recover substantial monetary settlements from private entities in the wake of significant oil spills and similar incidents that have damaged natural resources. The overall ability of fishermen to recover for economic losses sustained to fisheries resources is evidence of a special relationship between fishermen and those resources, and this favored ability represents one set of distinguishing legal interests that fishermen hold in fisheries resources.

A. Recovery for Economic Loss: Background Principles

Under maritime law, the general rule that governs an individual's ability to recover for the negligent infliction of economic loss is set forth under the seminal case of *Robins Dry Dock & Repair Co. v. Flint.*[33] In

33. 275 U.S. 303 (1927). A complete analysis of the recovery of economic losses under the maritime law is beyond the scope of this Comment; for a thorough discussion *see* Karen Beth Clark, *Recovery for Economic Losses Under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act: Chapter 21E,* 21 B.C. ENVTL. AFF. L. REV. 511 (1994); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill,* 23 J. LEGAL STUD. 1 (1994); Cameron H. Totten, *Recovery for Economic Loss Under Robins Dry Dock and the Oil Pollution Act of 1990:* Sekco Energy, Inc. v. M/V Margaret Chouest, 18 TUL. MAR. L. J. 167 (1993); Sturla Olsen, *Recovery for the Lost Use of Water Resources: M/V Testbank on the Rocks?,* 67 TUL. L. REV. 271 (1992); Bruce B. Weyhrauch, *Oil Spill Litigation: Private Party Lawsuits and Limitations,* 27 LAND & WATER LAW REV. 363 (1992); Pegeen Mulhern, *Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses,* 18 B.C. ENVTL. AFF. L. REV. 85 (1990); James W. Shephard, *The Murky Waters of Robins Dry Dock: A*

Robins, a time charter sought recovery of economic losses which occurred when the defendant dry dock company negligently damaged the propeller of a chartered vessel that was suspended in dry dock, although the dry dock company was not then aware of the charter held by the plaintiff. The United States Supreme Court denied recovery on the grounds that:

> The damage was material to . . . [the charter] only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.[34]

The Court then went on to state that "no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract" with the other person, without the knowledge of the wrongdoer.[35] The holding of *Robins* has been interpreted to mean that in order for a plaintiff to recover for economic losses, the plaintiff must hold a property interest in what is damaged, and that the damage must be some form of actual physical damage.[36]

The rule of *Robins* has been consistently applied in cases of maritime tort law.[37] The rationale for the rule has often been explained in terms of protecting defendants from the potentially enormous liability that may arise in the context of economic loss[38] (for example, as with oil spills),

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Comparative Analysis of Economic Loss in Maritime Law, 60 TUL. L. REV. 995 (1986); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

34. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. at 308.

35. *Id.* at 309.

36. *See* Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Louisiana *ex rel.* Guste v. M/V Testbank, 728 F.2d 748 (5th Cir. 1984), *aff'd en banc*, 752 F.2d 1019 (5th Cir. 1985); *In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991); L.O.F. (Jersey) Ltd. v. M/T Cantigny, 1982 A.M.C. 2707 (E.D. La. 1982); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981); *In re* Oriental Republic Uruguay, 821 F. Supp. 950 (D. Del. 1993); Thomas W. Kinnane, *Recovery for Economic Losses by the Commercial Fishing Industry: Rules, Exceptions, and Rationales*, 4 U. BALT. J. ENVTL. L. 86 (1994).

37. *See, e.g.*, Cargill, Inc. v. Doxford & Sunderland, Ltd., 782 F.2d 496, 499 (5th Cir. 1986); Hercules Carriers, Inc. v. Florida, 720 F.2d 1201, 1202-03 (11th Cir. 1983); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 153 (5th Cir. 1983); Getty Ref. & Mktg. Co. v. M/T Fadi B, 766 F.2d 829, 831 (3d Cir. 1985).

38. Totten, *supra* note 33, at 169.

and also in terms of promoting judicial efficiency through the deterrence of unnecessary or fraudulent litigation.[39] In operation, the rule has served to limit private individuals' recovery under maritime law for economic losses arising from negligent damage to natural resources, such as fisheries.[40]

B. The Fisherman's Exception to Robins Dry Dock

The rule of *Robins* has not, however, been applied uniformly to all claimants. An exception to the rule exists for commercial fishermen, which has been allowed, at least in the Ninth Circuit, since its 1953 genesis in *Carbone v. Ursich.*[41] In *Carbone*, the Ninth Circuit allowed commercial fishermen to recover for economic losses arising from negligent damage sustained to a certain fishing vessel and fishing gear, where the claimant fishermen were not the owners of the damaged property.[42] Later, in *Union Oil Co. v. Oppen*,[43] the Ninth Circuit reaffirmed the exception to *Robins* for commercial fishermen and allowed the recovery of economic losses sustained by the fishermen as a result of a 1969 oil spill in Santa Barbara, California. The court carved out an expansive rationale for recovery in recognizing that the fishermen's recovery would be consistent not only with the maritime law, which applied in the case, but that recovery could also be obtained under California tort law,[44] including recovery under a nuisance theory.[45]

The result in *Oppen* solidified the exception to the rule of *Robins*, and has given rise to what is now termed the "*Oppen* Exception."[46] This exception has since been applied to allow for the recovery of economic losses sustained by commercial fishermen as a result of pollution or oil

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39. Pegeen Mulhern, *supra* note 33, at 91.

40. *See* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (not allowing recovery by businesses for economic losses arising from oil spill).

41. 209 F.2d 178 (9th Cir. 1953).

42. *Id.* at 179. Even before *Carbone*, some state courts had also allowed commercial fishermen to recover, under a private nuisance theory, for economic losses arising from damages to fisheries resources as a result of pollution related harms. *See* Masonite Corp. v. Steede, 23 So.2d 756 (Miss. 1945); Hampton v. North Carolina Pulp Co., 27 S.E.2d 538 (N.C. 1943).

43. 501 F.2d 558 (9th Cir. 1974).

44. *Id.* at 565.

45. *Id.* at 568.

46. Kinnane, *supra* note 36, at 99.

spill related damages to fisheries resources.[47] Such recovery has been allowed even though fishermen theoretically do not possess a private property interest in the fisheries resources that sustained damage.

C. Rationales for the "Oppen Exception"

The rationale for the fishermen's exception, or "*Oppen* Exception" in admiralty has been attributed to several theories. First, and perhaps most prevalently, the special treatment of commercial fishermen has been based upon the principle of forseeability. As the court in *Oppen* stated:

> [T]he presence of a duty on the part of the defendants in this case . . . turn[s] substantially on forseeability. That being the crucial determinant, the question must be asked whether the defendants could reasonably have foreseen that negligently conducted drilling operations might diminish aquatic life and thus injure the business of commercial fishermen. We believe the answer is yes. The dangers of pollution were and are known even by school children. The defendants understood the risks of their business and should have reasonably foreseen the scope of its responsibilities.[48]

This explanation gives rise to a duty of care which is owed to commercial fishermen by defendants who are in a position to damage fisheries resources through environmental pollution.[49]

A second rationale for the fishermen's exception is public policy, which demands that those who are responsible for the negligent or criminal damage to a marine ecosystem should be liable, to some extent, as a means of deterrence.[50] A third rationale is rooted in the law of

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47. *See* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981) (allowing commercial fishermen to recover for economic damages arising from chemical spill in James River); *In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991) (allowing commercial fishermen to recover for damages to fisheries resources in wake of *Exxon Valdez* oil spill); Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (recovery for economic losses allowed for commercial fishermen in wake of oil spill); Louisiana *ex rel.* Guste v. M/V Testbank, 524 F. Supp. 1170, 1173-74 (E.D. La. 1981) (commercial fishermen, shrimpers, and oyster farmers allowed to recover economic losses arising from ship collision resulting in oil spill).

48. Union Oil Co. v. Oppen, 501 F.2d at 569.

49. *Id.*

50. *Id. See also* Andrew W. McThenia & Joseph E. Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517, 1526 (1983)

admiralty. As one court has explained, "claims for economic loss asserted by the commercial oystermen, shrimpers, crabbers and fishermen raise unique considerations requiring separate attention. Traditionally, seamen have been recognized as favored in admiralty and their economic interests require the fullest possible legal protection."[51] However, the most controversial explanation, and the most relevant for the present discussion, is the recognition of a "constructive ownership" interest that fishermen hold in fisheries, which allows them to circumvent the obstacle of *Robins,* which requires a property interest in that which is damaged in order to allow for economic recovery.[52]

The recognition of a "constructive ownership" interest held by fishermen in fisheries resources has not been widely accepted,[53] nor has the idea of fishermen holding some form of private right to fish,[54] which is undoubtedly a result of the modern legal paradigm that regards fisheries resources as *res communes*. However, the theory is appealing because it recognizes the special relationship that exists between fishermen and the marine life they harvest. This relationship essentially places fishermen in a guardianship role over fisheries, because their economic relationship with this resource can determine whether a given fishery population exists at a sustainable level, or whether the fishery is depleted as a consequence of overfishing and the now proverbial "tragedy of the commons."[55] In view of this intimate relationship, the "constructive ownership" rationale

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(discussing deterrence rationale).

51. Louisiana *ex rel.* Guste v. M/V Testbank, 524 F. Supp. at 1173 (citing Carbone v. Ursich, 209 F.2d at 182); Union Oil Co. v. Oppen, 501 F.2d at 567; *see also* Kinnane, *supra* note 36, at 93-94 (discussing fishermen and seamen as the "favorites of admiralty" under rationale of the "*Oppen* Exception").

52. Pruitt v. Allied Chem. Corp., 523 F. Supp. at 978.

53. Douglas v. Seacoast Products, 431 U.S. 265, 284 (1977) (discussing doctrine of *ferae naturae*); Le Clair v. Swift, 76 F. Supp. 729, 733 (E.D. Wis. 1948) (commercial fishermen do not have absolute right to fish and do not possess private property interest in fish within state waters, which belong to state until reduced to possession); Burgess v. M/V Tamano, 370 F. Supp. at 250 ("[T]he fishermen and clam diggers have no individual property rights with respect to the waters and marine life allegedly damaged by the oil spill."); Gregg L. Spyridon and Sam A. LeBlanc, III, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action,* 6 TUL. ENVTL. L. J. 287, 295 (1993) (fishermen have no private property interest in marine life).

54. *See, e.g.,* Burgess v. M/V Tamano, 370 F. Supp. at 249-50 ("[T]he right to fish or harvest clams in Maine's coastal waters is not the private right of any individual.").

55. Hardin, *supra* note 2, at 1243.

for the "*Oppen* Exception" is an insightful reflection of the increasingly "finite" nature of fisheries resources.

The "constructive ownership" theory does not displace the common law doctrines that have established fisheries resources as common property subject to the common right to fish held by the public. However, in spite of such proprietary limitations, this explanation for the fishermen's ability to recover for economic losses, and the very existence of the "*Oppen* Exception" as an operational doctrine of the law of admiralty, suggests that there has been a growing recognition of legitimate interest that fishermen have in fisheries resources. In situations where fisheries are damaged by oil spills or other environmental pollution, it is indeed the fisherman who most clearly "must sustain the loss"[56] of the resource. In this sense, the fishermen holds at least one small piece of a "bundle of rights" in fisheries resources which is not uniformly held by others under the maritime law.

D. Statutory Recovery for Economic Loss by Fishermen Under the Oil Pollution Act

The Oil Pollution Act of 1990 (OPA),[57] enacted by Congress in the wake of the catastrophic *Exxon Valdez* oil spill, has dramatically altered the landscape of tort recovery for economic loss arising from oil spill damage to natural resources, including fisheries resources.[58] The OPA was enacted to provide a comprehensive statutory framework for recovery that replaces the inadequate statutory framework that existed prior to the OPA.[59] Under the OPA, fishermen and non-fishermen can both recover as private claimants for economic damages arising from oil spill damages to natural resources. As stated in § 2702(a), "each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the

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56. *See supra* note 31 and accompanying text.

57. 33 U.S.C. §§ 2701-2761 (1994).

58. While this section gives a brief overview of the OPA in the context of fishermen's recovery of economic losses, a complete discussion of the OPA, and state oil pollution recovery statutes enacted subsequent to the OPA, is beyond the scope of this Comment. For a comprehensive treatment, *see* Goldberg, *supra* note 33; Mulhern, *supra* note 33; Mark E. King, Note, *In Re Complaint of Armatur, S.A.: The Limitation of Liability Act and Maritime Environmental Disasters*, 21 ENVTL. L. 405, 412-16 (1991); Weyhrauch, *supra* note 33; Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1 (1990).

59. *See* Rodriguez & Jaffe, *supra* note 58, at 1.

navigable waters and adjoining shorelines . . . is liable for the removal costs and damages . . . that result from such incident."[60] More specifically, the OPA allows claimants to recover damages for "injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property."[61] Additionally, and most important to the present discussion, the OPA provides for recovery of damages "for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, *without regard to the ownership* or management of the resources."[62] This provision circumvents the limitations of the recovery rule of *Robins* by allowing private parties to recover for economic losses in the absence of any proprietary interest in the natural resource which is damaged.

A Conference Committee Report elaborated on the ability of a claimant to recover under the OPA without actually having a property interest in the natural resource:

> [A]ny claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, *even though the fisherman does not own those resources*.[63]

Thus, the legislative history of the OPA does not recognize an ownership interest, or "constructive ownership" interest, in its explanation of allowing for the recovery of economic losses. However, the Conference Report does indicate that commercial fishermen are the most likely candidates for the recovery of such losses. The extent to which non-

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60. 33 U.S.C. § 2702(a) (1994). The term "liable" has been used by Congress as meaning strict and joint and several liability. *See* Rodriguez & Jaffe, *supra* note 58, at 15-16.

61. 33 U.S.C. § 2702(b)(2)(B) (1994).

62. *Id.* § 2702(b)(2)(C) (emphasis added). Section 2702(b)(2)(E) specifies that recovery is allowed for damages that are "equal to the loss of profits of impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant." *Id.* § 2702(b)(2)(E).

63. H.R. CONF. REP. NO. 101-653, at 103 (1990), *reprinted in* 1990 U.S.C.C.A.N 779, 781 (emphasis added).

fishermen private claimants will be able to recover under the OPA remains to be determined.[64] However, despite the clear non-ownership language stated above, it remains apparent that recovery of such economic losses will still involve a requirement of proximity under traditional causation principles of tort law,[65] and there is no claimant who is better positioned to recover for proximate injury than the fisherman who depends upon the healthy condition of the fish to make a living. Although the significance of the "*Oppen* Exception" has been diminished by the emergence of the economic recovery provisions of the OPA, under which recovery is not fully preempted by the *Robins* rule under maritime law,[66] the special relationship which fishermen have with fisheries resources is still manifested in their favored ability to recover for proximate damages.

E. Recovery for Losses Under Private Settlements

Another prism through which to view the interests of fishermen in fisheries is that of private oil spill liability settlements. Settlements, of course, are not direct evidence of property rights, but they are instructive to the extent that they evince some form of recognition, by private parties, of the fisherman's special relationship with fisheries resources. When a private party arrives at a settlement involving the claims of fishermen for oil spill related damages, the settlement indicates, among other things, that the claimant fishermen is in some respect entitled to compensation for the damage inflicted upon a given fishery. As described below, the examples of such settlements are numerous.

The best-known oil spill in U.S. history occurred when the *Exxon Valdez* ran aground in Alaska's Prince William Sound, on March 24, 1989, spilling approximately eleven million gallons of heavy crude oil into the previously pristine waters.[67] After the barrage of litigation was

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64. Olsen, *supra* note 33, at 287.

65. *See* Benefiel v. Exxon Corp., 959 F.2d 805 (9th Cir. 1992) (finding that gasoline purchasers in California could not recover for economic losses due to increased gas prices following the *Exxon Valdez* oil spill, despite strict liability scheme that applied under the Trans-Alaska Pipeline Authorization Act); Olsen, *supra* note 33, at 287.

66. The OPA is not preempted by the maritime law to the extent that claimants may recover economic damages up to the statutory limits provided. For a discussion of the relationship between the maritime law and recovery under the OPA, and subsequently enacted state oil pollution liability statutes, *see* Olsen, *supra* note 33, at 289-91; Weyhrauch, *supra* note 33, at 392-401.

67. Dave Lenckus, *Exxon Seeks More Spill Cover; Oil Giant Reaches Partial*

finished, Exxon had paid out approximately $3.8 billion dollars total, including $2.5 billion in clean-up costs, $1 billion to settle state and federal civil charges, and $300 million to settle claims that were filed by some 12,000 fishermen and other claimants.[68] As a part of that historic series of settlements, Exxon paid $20 million to compensate Native Alaskans for the fish, seals, and other subsistence resources that were destroyed by the spill.[69] In another twist to Exxon's settlement history, the oil giant unsuccessfully attempted to reach a $70 million settlement with Seattle fish processors,[70] which was later vitiated by a U.S. district court judge. In keeping with the *Robins* rule, recreational fishermen were not allowed to recover damages from Exxon.[71] The settlements reached in the wake of the *Valdez* disaster illustrate the advantaged position that commercial fishermen and Native subsistence fishermen enjoy in the context of pursuing claims for oil spill damages to fisheries resources.

In a series of related settlements, the Alyeska Pipeline Service Co. reached a $98 million settlement with thousands of Alaska Natives, fishermen, and other claimants, following the *Exxon Valdez* oil spill.[72] In the settlement, $37.3 million was paid out specifically to Alaska fishermen, Natives, seafood processors, and aquaculture associations to compensate for Alyeska's role in the historic *Valdez* oil spill.[73]

In a more recent oil spill, the barge *North Cape* spilled oil into Rhode Island waters on January 19, 1996. In the wake of this oil spill, many lobstermen who were unable to work as a result of the spill, have accepted partial settlements with the owners of the barge, Eklof Marine.[74]

Settlement with Insurers, BUS. INS., Jan. 22, 1996, at 1, *available in* LEXIS, News Library, Papers File.

68. *Id.*

69. *Alaska Natives to Get $20 Million for Exxon Valdez Spill*, Liability Week, Nov. 21, 1994, *available in* LEXIS, News Library, Newsletters File; *Exxon Settles Suit by Alaska Natives for $20 Million in Valdez Settlement*, ENERGY REP., Aug. 1, 1994, *available in* LEXIS, News Library, NWLTRS File.

70. *Alaska: Judge Assails Secret Exxon Valdez Settlement*, LIABILITY WEEK, June 17, 1996, *available in* LEXIS, News Library, NWLTRS File.

71. *Fishermen Lose Suit Over Valdez Spill*, UPI, Aug. 23, 1994, *available in* LEXIS, News Library, Wires File.

72. *Panel Says Alyeska Can't Recover Spill Costs from Pipeline Tariffs*, ANCHORAGE DAILY NEWS, Apr. 3, 1996 at 1B, *available in* LEXIS, News Library, Papers File.

73. *Valdez Spill Payment OK'd; 1989 Exxon Valdez Oil Spill, Payment of Damages*, OIL DAILY, Dec. 1, 1994, at 5, *available in* LEXIS, News Library, Papers File.

74. Tom Mooney, *Fishermen Wary of Settlement; But an Adjuster Says that Accepting Partial Payments Now Won't Jeopardize the Seamen's Future Claims Involving the North*

In two different settlements involving Native Americans, money was paid to Indian tribes for costs involved with the restoration of fisheries resources that were damaged by oil spills. In 1994, the Owners of the Japanese fishing vessel *Tenyo Maru* and the Chinese bulk carrier *Tou Hai* reached a $52,000 settlement with the Makah Indian tribe following a 1991 oil spill when the two vessels collided in Canadian waters, spilling 120,000 gallons of intermediate fuel and 53,000 gallons of diesel fuel.[75] In another settlement in Canada, the Nuu-chah-nuith Tribal Council reached a settlement with Sause Bros. Ocean Towing, as part of a greater $8.7 million settlement that was reached with the U.S. and Canadian governments, after a December 1988 oil spill that occurred when the tug *Ocean Service* collided with, and punctured its barge, the *Nestucca*.[76] The agreement compensated for the damage to commercial and native fisheries, and for other environmental damages.[77] Although the settlement was not reached for damages to fisheries exclusively, they do demonstrate a recognition of the special damages that occur when commercial and native fisheries are disrupted by oil spills.

In 1992, another settlement arose from the July 30, 1984, oil spill that occurred when the oil tanker *Alvenus* ruptured off of the coast of Louisiana.[78] The spill affected over forty miles of coastline, causing extensive damage to coastline property. As part of a $6.3 million settlement with the owners of the *Alvenus*, commercial shrimpers were specifically compensated for diminished catches that followed the disaster.[79]

In the wake of the 1987 Glacier Bay oil spill, approximately 700 commercial fishermen reached settlements for a total of about $28 million.[80] In yet another U.S. oil spill settlement, the Greek owners of the *World Prodigy* tanker, which in 1989 spilled 289,000 gallons of oil into

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Cape Oil Spill, PROVIDENCE J.-BULL., Mar. 6, 1996, at 1B, *available in* LEXIS, News Library, Papers File.

75. *Owners of Tenyo Maru and Tuo Hai Agree to Pay $9 Million to Settle Claims from 1991 Oil Spill*, OIL SPILL INTELLIGENCE REP., Oct. 20, 1994, *available in* LEXIS, News Library, NWLTRS File.

76. *Settlement Reached on Environmental Damage from Nestucca Oil Spill*, Canada Newswire, June 1, 1992, *available in* LEXIS, News Library, Wires File.

77. *Id.*

78. *Islanders Pocket Cash from Oil Spill*, HOUSTON BUS. J., Jan. 27, 1992, *available in* LEXIS, News Library, Papers File.

79. *Id.*

80. Mark Cursi, *Oil Spill Bonanza Forces Association to Restructure*, RECORDER, Mar. 22, 1991, *available in* LEXIS, News Library, Papers File.

Narragansett Bay, reached a $550,000 agreement in 1991 with 465 fishermen for their lost earnings that resulted from the spill.[81]

A total settlement of $115 million dollars was finally reached in 1989 between Amoco and several French claimants, including the French Government, French fishermen, shellfish farmers, and other parties, for the catastrophic 1978 oil spill that occurred when the *Amoco Cadiz* supertanker broke up off of the coast in northern France,[82] spilling over sixty-eight million gallons of oil.[83] In another foreign oil spill, Sedco Inc. reached an agreement with fishermen, as part of a $2.14 million settlement with other claimants, following the gigantic Ixtoc I well blowout that occurred in the Bay of Campeche in Mexico, on June 3, 1979.[84] As a final example,[85] Texaco reached a $100,000 settlement in 1975 with thirty-three clam diggers following the July, 1972, oil spill in Maine that occurred when the Norwegian tanker *Tamano* struck a submerged ledge in Casco Bay.[86]

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81. *Tankers Owners Pay for R.I. Spill*, BOSTON GLOBE, Mar. 18, 1991, Metro/ Region, at 19, *available in* LEXIS, News Library, Papers File.

82. Deborah Hargreaves, *Amoco Told to Pay More for Oil Spill*, FIN. TIMES, Feb. 22, 1989, Section I, at 2, *available in* LEXIS, News Library, Papers File.

83. *Damages Set in Amoco Oil Spill*, L. A. TIMES, Jan. 11, 1988, Part 1, at 1, *available in* LEXIS, News Library, Papers File.

84. *Sedco Settles Gulf Spill Suits*, FACTS ON FILE WORLD NEWS DIGEST, Apr. 8, 1983, A2, at 244, *available in* LEXIS, News Library, Papers File.

85. Although this Comment focuses on oil spill settlements that have been reached with private commercial and native fishermen, there have also been numerous settlements that have been paid to U.S. and state governments in order to compensate, among other things, for damages to fisheries resources. *See, e.g., Oil Spill Settlement*, City News Service, Aug. 6, 1996, *available in* LEXIS, News Library, Wires File (following spill of 400,000 gallons of crude oil when tanker *American Trader* grounded off California coast, three owners of the tanker have settled with state governmental entities for a total of $10.9 million); *Chevron Agrees to Pay $500,000 in Settlement for El Segundo Spill*, OIL DAILY, May 21, 1993, *available in* LEXIS, News Library, Papers File (Chevron reaches $500,000 settlement with California agencies for March 16, 1991 oil spill of 20,000 gallons); *$1.7 Million Settlement*, HOUSTON CHRON., Aug. 12, 1994, Section A, at 40, *available in* LEXIS, News Library, Papers File ($1.7 million settlement reached between Texas government and owners of vessels involved in July 28, 1990 collision that resulted in 700,000 gallon spill); *Shell Agrees to $19.75 Million Accord*, FACTS ON FILE WORLD NEWS DIGEST, Dec. 8, 1989, at 908 E1, *available in* LEXIS, News Library, Papers File (Shell settles for $19.75 million with State of California for 500,000 gallon oil spill from an oil refinery in San Francisco Bay in April 1988).

86. *Information Bank Abstracts*, N.Y. TIMES, Nov. 4, 1975, at 22, *available in* LEXIS, News Library, Papers File.

This list of oil spill settlements demonstrates that the claims of commercial and native fishermen carry significant weight when the fisheries that they harvest are damaged by oil spills. Thus, the settlement agreements represent another prism through which can be seen a recognition by private parties of the intimate and unique relationship between fishermen and fisheries resources. In this sense, the agreements are evidence of additional interests which are held by fishermen in marine resources.

IV. CONSTITUTIONAL DIMENSIONS TO FISHERMEN'S INTERESTS

Under the Fifth Amendment, the proprietary interests of fishermen have traditionally received limited constitutional protection in the context of takings and due process claims that arise from their use of fisheries resources. However, there have been several circumstances in which fishermen have been successful in bringing such claims, which indicates that fishermen do enjoy some measure of constitutional protection of their proprietary interests in fisheries. This protection provides additional evidence of the existence of special proprietary interests held by fishermen in fisheries resources.

A. Proprietary Limitations Evidenced Under the Fifth Amendment

The Fifth Amendment to the United States Constitution states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[87] The extent to which fishermen's interests in fisheries resources are protected under this clause is the subject of this section.[88] By using the Takings Clause, and to a lesser extent, the Due Process Clause, as a prism through which to view the development of constitutional protections given to fishermen's interests, it can be seen that fishermen do have some protected interests under the constitution which are unique to their relationship with fisheries resources.

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87. U.S. CONST. amend. V.

88. For a complete discussion of the Takings Clause and the Fifth Amendment, *see generally* Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735 (1985); Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

Historically speaking, fishermen have not been successful in their pursuit of takings claims for the compensation of restricted fishing rights or lost fisheries resources,[89] mostly due to the historical treatment of fish, and the doctrine of *res communes*.[90] Fishermen have consistently been denied compensation for their takings claims,[91] which have usually been brought against a government entity for an alleged regulatory taking. Courts have reasoned that the common law prevents fishermen from establishing a private, compensable interest in either fisheries, or in the right to fish, even if those interests are protected by fishing licenses. As one court has firmly stated: "[The] plaintiff does not have property in its fishing licenses that requires protection pursuant to the takings clause of the fifth amendment or the due process clause of the fourteenth amendment."[92]

As intimated by the quote above, the definition and recognition of "property" for purposes of the Fifth Amendment[93] is central to the claims of fishermen under the Takings Clause, and also under the Due Process Clause. Whether fishermen bring claims under the Due Process Clause, the Takings Clause, or whether they request injunctive relief, which necessitates a constitutionally protected property interest,[94] the inability of

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89. One commentator has stated that: "There is no historical or logical basis for arguing that a fisherman has a constitutionally cognizable property right in the fish inhabiting the fishery conservation zone or state waters. Similarly, a claim that there is a property right in the right to fish is groundless as an abstract proposition." Koch, *supra* note 25, at 265.

90. *See* Douglas v. Seacoast Products, 431 U.S. 265 (1977).

91. There are numerous cases that demonstrate the inability of fishermen to recover for a takings claim under the Fifth Amendment: *see, e.g.*, Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp. 722 (S.D. Ind. 1992) (gill net ban did not constitute unconstitutional taking of fishermen's property interests); Organized Fishermen of Fla. v. Watt, 590 F. Supp. 805 (S.D. Fla. 1984) (regulations restricting fishing in everglades did not constitute unconstitutional taking of licensed fishermen's property); Bigelow v. Michigan Dep't of Natural Resources, 727 F. Supp. 346 (W.D. Mich. 1989), *vacated*, 970 F.2d 154 (6th Cir. 1992) (rejecting takings claim of commercial fishermen, later vacated by Sixth Circuit for lack of ripeness of claims).

92. Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp. at 726.

93. *See* Bender, *supra* note 88, at 746 n.25. For a general discussion of the concept of property, *see* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); John A. Humbauch, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982). For an instructive analysis of various property interests created under federal and state statutes in public lands, *see* Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1 (1987).

94. Ridenour v. Furness, 504 N.E.2d 336, 339 (Ind. App. 1987). "Property interests"

fishermen to establish a private property interest has almost uniformly lead to a denial of relief.[95] The limitations that presently exist in relation to fishermen's interests in fisheries was summarized by the court in *LaBauve v. Louisiana Wildlife and Fisheries Commission*, which explained that "fish which are at large in state waters are the property of the state, as public or common things," that "an individual has no proprietary interest in the fish he is prevented from catching," and that "an individual has no proprietary right to fish commercially in state waters."[96] Essentially, fishermen have been regarded under these circumstances as possessing no compensable, or prosecutable, property interests for purposes of the Fifth Amendment, which is a natural consequence of the history of the common property resources as established in history and under the common law.

B. Recognition of Proprietary Interests Under the Fifth Amendment

In spite of overwhelming precedence and commentary which dictates that fishermen hold no proprietary interests in fisheries, or in the right to fish, there have yet been several exceptions where courts have protected these controversial interests. These recognitions, as described below, give

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for purposes of the Takings Clause and the Due Process clause are not coextensive. Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp. at 726. *See also* Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983) (merely because licenses do not have "some of the conventional attributes of property . . . does not mean they are not property in a due process clause sense").

95. *See supra* note 91. *See also* California Gillnetters Ass'n v. Department of Fish & Game, 46 Cal. Rptr. 2d 338 (Cal. Ct. App. 1995) (no fundamental right to fish as to support claim that gillnet ban violated substantive due process); New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303 (2nd Cir. 1994) (scope and existence of trawler's permit to take lobsters were not guaranteed by due process clause, such that amendments to N.Y. conservation law to prohibit trawlers from taking, landing, or possessing lobsters did not deprive trawlers of property interest under due process clause); Le Clair v. Natural Resources Bd., 483 N.W.2d 278 (Wis. App. 1992) (fishermen held no constitutionally protested property interest to indefinite continuation of fish quotas and time and area restrictions sufficient to support due process claim); Ridenour v. Furness, 504 N.E.2d 336 (Ind. App. 1987) (fishermen had no property interest in fish harvested from Indiana waters of Lake Michigan as to be entitled to preliminary injunction preventing enforcement of temporary gillnet ban); LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370 (E.D. La. 1978) (Louisiana fishermen held no private property right in fish, which belonged to the state, nor did they have private right to fish as to support request for injunctive relief against fisheries regulations under due process).

96. LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. at 1378.

further evidence of the plausibility of fishermen holding some measure of private proprietary interests in their relationship with fisheries resources.

In one rare exception to the generally unsuccessful nature of fishermen's takings claims, the United States Court of Claims held in 1952 that where a deceased fishing licensee obtained a commercial fishing license from the State of Maryland, which could be sold, devised, or passed onto his estate, and where the licensee was prevented from fishing by actions of the federal government, the licensee's right to fish was a property right and the action of the government constituted a taking.[97] The plaintiff had been a commercial pound net fisherman in Chesapeake Bay, and when the Secretary of War reestablished the boundaries of a particular proving grounds, the plaintiff was displaced from the area, which he held a license to fish.[98] The court stated that "the plaintiff had a sort of property right in his fishing ground, and . . . the [g]overnment took that property from him."[99] This decision is unusual,[100] because licenses and permits are not generally viewed as property for eminent domain purposes. Furthermore, they are considered to convey only a privilege, not a right, and the license or permit is considered revocable at the discretion of the issuing governmental authority.[101]

However, fishing licenses and permits have been found in certain circumstances to constitute protectable property rights for purposes of the

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97. Jackson v. United States, 103 F. Supp. 1019 (Ct. Cl. 1952).

98. *Id.* at 1020.

99. *Id.*

100. There are, however, other situations in which a licensed fisherman may succeed in a takings claim; as one court has noted, "[a] license may very well be considered property in relation to a third party." Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp. 725, 728 (S.D. Ind. 1992).

101. *See, e.g.*, Organized Fishermen of Fla. v. Watt, 590 F. Supp. 805, 815 (S. D. Fla. 1984) (fishing permit is a revocable privilege that does not support takings claim); Acton v. United States, 401 F.2d 896, 899 (9th Cir. 1968) ("[A] license does not constitute property for which the [g]overnment is liable upon condemnation . . . ."); Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492-93 (11th Cir. 1990) ([P]ermits to perform activities on public land . . . are mere *licenses* whose revocation cannot rise to the level of a Fifth Amendment taking."); Connerty v. Metropolitan Dist. Comm'n, 495 N.E.2d 840 (Mass. 1986) (license held by master clamdigger did not create property right that would permit him to recover from Commission for discharge of raw sewage into harbor). *See also* Koch, *supra* note 25, at 265 (discussing ephemeral characteristics of a license). *But see* Haavik v. Alaska Packers' Ass'n, 263 U.S. 510 (1924); Anderson v. Smith, 71 F.2d 493 (9th Cir. 1934) (property right does exist in "right to fish" when right is expressly provided for in statute).

Due Process Clause.[102] Under the Due Process Clause the proper inquiry requires an application of federal constitutional principles, which dictate a "functional" analysis of state law, to determine whether that law creates a "legitimate claim of entitlement" for a fisherman in any given license.[103] After reviewing the state statutes in Indiana that provided for fishing licenses, the court in *Burns Harbor Fishing Co., Inc. v. Ralston* concluded that:

> [The] plaintiff has a protectable property interest in its fishing licenses. Plaintiff pays for the right to fish the Indiana waters of Lake Michigan. The right to fish commercially is limited and has value. Moreover, the Indiana licensing statute creates specific rules for when a license may be revoked. . . . Thus, for the duration of its licenses, Burns Harbor had a legitimate claim of entitlement to fish in accordance with the terms of those licenses.[104]

This language adds an additional "right" or entitlement that further supports the argument that fishermen hold a sufficient "bundle" of rights as to enable the recognition of some measure of a fisherman's proprietary interest in fisheries. However, it must also be noted that the due process protection that is afforded to fishing licenses is not normally reasoned upon an actual property interest, but rather is defined as a right of use which arises from the consent of the person or authority that holds the interest affected by the license.[105] Additionally, it must also be noted that such "proprietary" interests, created by licenses, are approached by courts in a fashion similar to that given to claims involving economic interests,

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102. *See* Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp. at 730 (citing Barry v. Barchi, 443 U.S. 55, 64 (1979) (horse trainer's license); Bell v. Burson 402 U.S. 535, 539 (1971) (driver's license); Easter House v. Felder, 910 F.2d 1387, 1395 (7th Cir. 1990) (child welfare agency license); LeBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. at 1378-79 (fishing license)).

103. *Id.* at 729 (quoting Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983)). *See also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (in order to have a property interest in a government provided benefit, e.g., a fishing license, a person "must have more than an abstract need" and must have a "legitimate claim of entitlement").

104. Burns Harbor Fish Co., Inc. v. Ralston, 800 F. Supp at 729-30. *See also* LeBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. at 1378-79 (fishermen's interests in fishing license constitute "legitimate claims of entitlement").

105. RESTATEMENT OF PROPERTY § 512 (1936).

or "the right to livelihood,"[106] which as a rule will invoke the least demanding standards of review regarding substantive and procedural due process protections.[107]

An example of what is perhaps a more obvious and accepted recognition of fishermen's proprietary interests in fisheries is where a fishermen, most usually an oyster fishermen, holds a leasehold interest in a fishery.[108] Leasehold interests[109] are a form of personal property that convey to the lessor possessory interests[110] which are compensable for purposes of the Takings Clause.[111] Courts have regularly acknowledged the compensable nature of leaseholds,[112] both inside and outside of the context of fisheries related leaseholds.[113] As one court found: "Manifestly it seems that, subject to the Government's dominant power over navigation, a lease of oyster grounds, pursuant to state law, . . . constitutes 'private property'

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106. For a thorough discussion of the "right to livelihood" and its historical treatment under the due process analysis, *see generally* Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993-94). *See also* Koch, *supra* note 25, at 254-59 (discussing substantive and procedural due process in relation to limited entry fishery management regimes).

107. *See, e.g.*, California Gillnetters Ass'n v. Department of Fish and Game, 46 Cal. Rptr. 2d 338, 344 (Cal. Ct. App. 1995) ("[C]ourts have repeatedly cautioned that while a particular right such as the right to work may have sufficient gravity to warrant heightened judicial scrutiny of administrative rulings affecting that right, that status does not elevate the right to one that is 'fundamental' for purposes of strictly scrutinizing legislative enactments" that regulate the right.)

108. Although this section discusses lease interests in relation to takings and due process claims, further discussion is offered, *infra* Part VI, on the topic of proposed leasehold interests as an improved means of limited entry or rights based fishery management.

109. *See generally* 1-3 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES (3d. ed. 1990 & 1994 Cum. Supp.)

110. *Id.* § 1.1.

111. *Id.* § 1.1.

112. *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973) (just compensation due to lessee not only for lost use, but also for loss of total expected useful life of improvements made to underlying fee property); United States v. Petty Motor Co., 327 U.S. 372 (1946) (compensation awarded for government's condemning of buildings occupied by lessor Petty Motor Company); 767 Third Avenue Assocs. v. United States, 48 F.3d 1575, 1578 n.2 (Fed. Cir. 1995) (individual's right to income under lease constitutes property under the Fifth Amendment).

113. *See* Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87 (1913) (owner or lessee of submerged lands has property right to uses of such lands that are not obstructions to the overriding public interest in navigation); Blake v. United States, 181 F. Supp. 584 (E.D. Va. 1960) (oyster leasehold constitutes private property, though plaintiff was not entitled to compensation for alleged taking of oyster ground markers).

in the lessee."[114] This recognition of compensable interests is not unique to fishermen, because the compensability of leasehold property interests is a consequence of the nature of the lease interest, rather than a result of the occupational characteristics of the lease holder. However, the existence and compensability of such leases in the context of fisheries resources at least represents an additional element to the range of potential protectable interests that may be held by fishermen.

Finally, in one last anomalous example of protectable or compensable interests held by fishermen, the United States Court of Claims found in 1961 that certain fishermen in Chesapeake Bay had an *equitable right* to be compensated for the value of their fishing rights that were taken as a result of a restriction imposed upon them by regulations issued by the War Department.[115] In so holding, the court expressly stated that the plaintiffs had no *legal* claim because of the long delay in bringing the suit.[116] The court stated that the plaintiffs have "an equitable but not a legal claim against the United States."[117] Thus, there may be in equity at least one more potentially protectable interest held by fishermen in either the right to fish, or in fisheries resources.

V. RIGHTS BASED FISHERY MANAGEMENT SYSTEMS

Fishermen have acquired significant proprietary interests in fisheries resources through their participation in rights based fishery management programs. These programs are founded upon an economic theory that seeks to increase the incentives for fishermen to conserve common fisheries resources by granting to those fishermen a private property interest in the fishery. Many variants of these programs have developed, including territorial use rights, limited entry fishing permits, and individual catch quotas. Additionally, interests created within these programs are often transferable. In the United States, rights based fishery management systems have been implemented primarily on a federal level, and though there has been a temporary moratorium imposed on any new individual quota management plans, it has been widely recognized that these forms of management systems convey substantial proprietary interests to participant fishermen. The development of these rights based manage-

114. Blake v. United States, 181 F. Supp. at 587.
115. Todd v. United States, 155 Ct. Cl. 111 (1961).
116. *Id.*
117. *Id.*

ment systems, and the proprietary interests that they create, provides additional evidence of the extent to which fishermen have acquired private property interests in fisheries resources.

A. A Brief Survey of Rights Based Fishery Management Systems

Most discussion concerning the privatization of fisheries resources has occurred within the context of rights based fishery management systems.[118] These systems are perhaps the most openly acknowledged examples of the privatization of fishermen's interests in fisheries resources.[119] Such systems attempt to remedy the inherent flaws of open access fishery management systems[120] by creating certain forms of private property interests in a given fishery.

The need for such private property interests arises from the perceived failure of open access fishery management systems,[121] under which fisheries resources around the world have been tragically exploited and overfished,[122] so much so that many fisheries are now threatened with imminent collapse.[123] It has been argued by many commentators that the

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118. A large amount of commentary and legal analysis has developed in relation to rights based fishery management systems. For a complete analysis of these systems, *see generally* LIMITED ENTRY AS A FISHERIES MANAGEMENT TOOL (R. Bruce Rettig & Jay J. C. Ginter eds., 1978); Robert B. Groseclose & Gregory K. Boone, *An Examination of Limited Entry as A Method of Allocating Commercial Fishing Rights*, 6 U.C.L.A.-ALASKA L. REV. 201 (1977); Franz Thomas Litz, Comment, *Harnessing Market Forces in Natural Resource Management: Lessons from the Surf Clam Industry*, 21 B.C. ENVTL. AFF. L. REV. 335 (1994); William J. Milliken, *Individual Transferable Quotas and Antitrust Law*, 1 OCEAN & COASTAL L.J. 35 (1994); Pearse, *supra* note 17; Scott, *supra* note 6; Carrie A. Tipton, *Protecting Tomorrow's Harvest: Developing a National System of Individual Transferable Quotas to Conserve Ocean Resources*, 14 VA. ENVTL. L.J. 381 (1995); Jon D. Weiss, Note, *A Taxing Issue: Are Limited Entry Fishing Permits Property?*, 9 ALASKA L. REV. 93 (1992).

119. *See* Scott, *supra* note 6, at 33 (arguing that the emergence of rights based fishery management systems is part of an overall transition to systems based on private rights).

120. *See* Michael K. Orbach, *Social and Cultural Aspects of Limited Entry*, *in* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL 211, 214-15 (R. Bruce Rettig & Jay J. C. Ginter eds., 1978).

121. *See* Pearse, *supra* note 17, at 71.

122. *See* Tipton, *supra* note 118, at 382-83.

123. Betsy Carpenter & Lisa Busch, *Not Enough Fish in the Stormy Sea*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 55 (noting that off of New England shores, stocks of haddock, cod, flounder, and other groundfish have been reduced by a stunning 65 percent between 1977 and 1987).

inherent tragedy[124] of this global crisis is an inevitable[125] consequence of the nature of open access property systems.[126] In an effort to combat this crisis, rights based fishery management systems have been developed which essentially grant fishermen a certain measure of private property interests in a given fishery.[127] The economic theory behind such systems dictates that by granting a private property interest in the fishery, an individual fisherman will be forced to internalize the "externalities,"[128] or costs, which would otherwise be shared by all in the exploitation of a common property system.

B. Forms of Rights Based Fishery Management Systems

There are several different forms of rights based fishery management mechanisms. These mechanisms include territorial use rights, limited entry licensing systems, and individual catch quotas.[129] Territorial use

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124. The quintessential article on the "tragedy of the commons" was written by Garret Hardin in 1968; *see* Hardin, *supra* note 2, at 1243. A defining passage from Hardin's allegory states that where a hypothetical herdsman has open access to a common property resource, such as a commons used for grazing of cattle, the rational herdsman will seek to maximize his gain and thus "concludes that the only sensible course for him to pursue is to add another animal to the herd. And another, and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy." *Id.* at 1244.

125. One commentator has explained the regulatory and economic implications of this exigency as follows:

> If there is no control over access in fisheries and if demand for a stock (or stocks) of a fish is increasing, then:
>
> 1. Overcapitalization is inevitable and will become worse as prices for the product increase.
>
> 2. Measures to prevent depletion will either impose or lead to increased costs of fishing to the fishermen, and these costs will become greater as prices for the product increase.
>
> 3. The costs of management, research, and enforcement will be borne entirely by the taxpayer.

Francis T. Christy, Jr., *The Costs of Uncontrolled Access in Fisheries, in* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL 201, 201 (R. Bruce Rettig & Jay J. C. Ginter eds., 1978).

126. *See, e.g.*, Milliken, *supra* note 118, at 37.

127. *See* Scott, *supra* note 6, at 26-27.

128. *See* Harold Demsetz, *Toward a Theory of Property Rights, in* THE ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS 23, 31 (Henry G. Manne ed., 1975) ("The resulting private ownership . . . will internalize many of the external costs associated with communal ownership.").

129. Scott, *supra* note 6, at 22. The discussion within this section is limited to those

rights (TURFs) are exclusive use rights that generally arise in limited circumstances where conditions permit the acquisition and defense of private property rights.[130] TURFs have existed for centuries, and have traditionally been applied to situations such as oyster and mussel beds, seaweed beds, raft cultures, artificial reef structures, fixed net fishing, and bottom fish, octopus, or lobster trapping.[131] These systems are very flexible in terms of what exclusive use rights may be conveyed to the participant fishermen and what form of tenure is involved, but they most always will involve a transfer of exclusive property rights in the fishery.[132] Although TURFs have not been widely adopted in the United States, they represent a method of fishery privatization which can most closely resemble a private property system. The historical existence, and persistence of this method of rights based fishing provides concrete evidence of the existence of special or private property rights held by fishermen in marine resources.

A second form of rights based fishery management mechanism is the limited entry license system, by which the optimum participation of fishermen in a fishery is maintained by limiting the actual number of licenses granted for that particular fishery.[133] Limited license systems have the ability to elevate the property interests of the participant fisherman by allocating at least some small degree of exclusive use rights, and by allowing the transferability of those rights where the system permits such transfer.[134]

A third type of rights based mechanism, and perhaps the most common and most widely discussed form of rights based mechanism, is the use of individual catch quotas.[135] These systems utilize a market-based

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rights based management systems that give the participant fisherman at least some degree of exclusivity; for a discussion of other "limited entry" systems that limit participation by economic disincentive, such as taxation, license fees, and royalties, *see* Groseclose & Boone, *supra* note 118, at 205-208.

130. FRANCIS T. CHRISTY, JR., FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, TERRITORIAL USE RIGHTS IN MARINE FISHERIES: DEFINITIONS AND CONDITIONS, FAO FISHERIES TECHNICAL PAPER NO. 227, at 1 (1982).

131. *Id.*

132. *Id.* at 3-5.

133. Groseclose & Boone, *supra* note 118, at 207. Limited entry systems can also limit the number of fishing boats and specified forms of fishing gear. *Id.*

134. Scott, *supra* note 6, at 23-24.

135. *See generally* Tipton, *supra* note 118 (discussing the use of catch quotas in the United States, and the use of similar systems presently utilized in foreign fishery management systems).

rationale in allocating a certain percentage of allowable catch quotas to participant fishermen prior to the beginning of each new fishing season.[136] The rationale behind this form of management system is that the quotas will give each participant fisherman a private "stake" in the fishery,[137] and that this stake, coupled with the long term security of obtaining a certain harvest,[138] will give the fisherman an incentive to engage in less wasteful and less dangerous fishing practices[139] that are normally associated with other forms of fisheries regulations.

C. Rights Based Systems Under the Magnuson Act

Rights based fishery management systems that limit the access of fishermen to the fishery resources in the United States are implemented on a federal level under the Magnuson Fishery Conservation and Management Act[140] of 1976. The Magunson Act was adopted in response to worldwide and domestic declines in fisheries populations.[141] Under the Act, the United States asserted sovereignty and exclusive rights to fishery management control over all fisheries resources within the Exclusive Economic Zone (EEZ),[142] which extends to 200 miles out from the shores of the United States.[143] The Magnuson Act authorizes the federal government to promulgate fisheries regulations in the form of regional fisheries management plans, administered by Regional Fishery Management Councils.[144] The underlying objective of the Magnuson Act is the conservation of fisheries resources,[145] the harvest of which is governed

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136. *Id.* at 397-400.

137. Milliken, *supra* note 118, at 39-40.

138. *Id.*

139. Tipton, *supra* note 118, at 397-400.

140. 16 U.S.C.A. §§ 1801-1883 (West 1985 & Supp. 1997). *See generally* Sen. Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427 (1977) (discussing the historical circumstances underlying the enactment of the Magnuson Act). The Magnuson Act was remaned in 1996 as the Magnuson-Stevens Fishery Conservation and Management Act by the passage of the Sustainable Fisheries Act, which amended the statute. Pub. L. No. 194-297, 110 Stat. 3559 (1996).

141. Tipton, *supra* note 118, at 387.

142. Douglas M. Ancona, *Managing United States Marine Fisheries*, 4 NAT. RESOURCES & ENV'T, Spring 1990, at 23.

143. *Id.*

144. 16 U.S.C.A. §§ 1852 (West 1985 & Supp. 1997).

145. *Id.* § 1851(a)(1).

under the Act by an "optimum yield" objective.[146] Specifically, in the context of limited entry fishery management systems, the Magnuson Act currently provides that a fishery management plan may "establish a limited access system for the fishery in order to achieve optimum yield."[147] However, numerous factors must first be considered by the Council and the Secretary of Commerce before the plan may be adopted.[148] These factors include social, historical, and cultural considerations in addition to the economic circumstances of the fishery.[149]

D. Proprietary Interests in ITQs

By possessing an ITQ, a fisherman obtains a right to an allocated amount of a fishery harvest, and with this right the fisherman acquires several important characteristics of private property,[150] despite the consistent statements from government agencies and commentators that ITQs are merely privileges, and not rights.[151] Among these property characteristics are: (1) economic value, (2) exclusivity, (3) duration, (4) divisibility, (5) inhabitability, and (6) transferability.[152]

The economic value of an ITQ can be quite significant. For example, most ITQ permits maintain an estimated value in excess of $100,000, and some are valued at more than $500,000.[153] Thus, ITQs do in fact have

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146. National Standard #1 states that: "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." *Id.*

147. *Id.* § 1853(b)(6). While § 1853(b)(6) provides authorization for limited entry systems under the Magnuson Act, Congress enacted in October of 1996 a moritorium on the implementation and approval of any fishery management plan that creates a new individual quota program. *Id.* § 1853(d)(1)(A).

148. *Id.* § 1853(b)(6)(A)-(F) (1994).

149. *Id.*

150. Weiss, *supra* note 118, at 111-12 (concluding that ITQ's are property for the purposes of taxation).

151. Koch, *supra* note 25, at 265.

152. *See* Scott, *supra* note 6, at 14, 21-24.

153. Weiss, *supra* note 118, at 106. Weiss notes examples of where courts have found ITQs to be of some significant monetary value. *Id.* at 106 n.100. *See, e.g.*, Bronsan v. Bronsan, 817 P.2d 478, 479 (Alaska 1991) (limited entry permit worth $240,000 at time of divorce); Anderson v. Anderson, 736 P.2d 320, 324 (Alaska 1987) (limited entry fishing permit is subject to execution for satisfaction of past due child support funds); Brown v. Baker, 688 P.2d 943, 948 (Alaska 1984) (permit constitutes a valuable license for the participation of licensee in fishery); State v. Ostrosky, 667 P.2d 1184, 1191 n.8 (Alaska 1983) (noting average prices of limited entry fishing permits), *appeal dismissed*, 467 U.S.

economic value which has been quantified by the free market system which underlies them.

ITQs also demonstrate characteristics of exclusivity.[154] To the extent that some other non-participant fisherman can not harvest from an ITQ fishery, the owner of the ITQ has an exclusive interest in the use of the fishery that is superior to that of the non-participant fisherman.

There is also some measure of durational interests associated with the fishing rights acquired under a ITQ fishery management system.[155] Although ITQ interests normally are allocated for one year or less, the existence of such durational characteristics gives the ITQ holder a valuable right, in that it allows the holder to utilize the quota at any rate of consumption, thereby allowing for more efficient fishing practices and a more secure setting. To the extent that a ITQ participant fisherman can count on his fishing rights to exist at some time in the future, an ITQ conveys valuable durational rights from the standpoint of expectancy interests.

Divisibility is another important property rights characteristic conveyed by an ITQ permit,[156] whereby an ITQ may be portioned off or leased[157] to another fisherman. In a situation where the fisherman may lease the ITQ interest, the fisherman is dividing and conveying possessory interests to the lessee, who obtains all pertinent use rights without actually owning the ITQ. In this situation, the interest is divided, and demonstrates how the ITQ property interest may be divided into segments. An additional proprietary characteristic which may be exhibited in ITQ management systems is that of inheritability.[158] As in Alaskan ITQ systems, the ITQ may be inherited by the offspring of a ITQ holder.[159]

One last proprietary characteristic of ITQ interests is transferability,[160] which actually encompasses the characteristic of inheritability. Transferability, of course, is a defining characteristic of ITQs. If a fisherman desires to leave the ITQ fishery, or if the fisherman is forced to exit the

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1201 (1984).

154. *See* Scott, *supra* note 6, at 26-27.

155. *Id.* at 27.

156. *Id.* at 13-14.

157. Groseclose & Boone, *supra* note 118, at 206; Katherine A. Marvin, Note, *Protecting Common Property Resources Through the Marketplace: Individual Transferable Quotas for Surf Clams and Ocean Quahogs*, 16 VT. L. REV. 1127, 1151-52 (1992).

158. Orbach, *supra* note 120, at 220.

159. *Id.*

160. Scott, *supra* note 6, at 14.

system due to inefficient, non-competitive fishing practices, then that fisherman's ITQ interest may be sold to another fisherman who is more efficient.[161] The natural consequence of such transferability, as some commentators argue, is the consolidation of ITQ interests in those fishermen, or other entities, who have the most capital.[162] Whether this consequence is desirable or not, an ITQ fishery can resemble a stock market under the proper conditions, where quotas are bought and sold on an open market in which interests gain or lose value in accordance with the overall health of the ITQ fishery.[163] To this extent, holders of ITQ interests acquire a valuable transferable interest which gives them an incentive to safeguard the fishery in which they hold their ITQ proprietary interest.

Despite the many characteristics of property that ITQs possess, it remains apparent that the rights afforded to ITQ holders exist only as a result of permissive governmental legislation, which may in the future be revoked like any other "privilege."[164] However, even though privileges are not equivalent to vested private property rights in a legal sense, the publicized perceptions of ITQs seem to indicate that many people believe

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161. Anthony D. Scott, *The ITQ as a Property Right: Where it Came From, How it Works, and Where its Going, in* ATLANTIC INST. FOR MKT. STUDIES, TAKING OWNERSHIP PROPERTY RIGHTS AND FISHERY MANAGEMENT ON THE ATLANTIC COAST, 31, 51 (Brian Lee Crowley ed., 1996)

162. *See, e.g.*, Anthony Davis, *To Transfer or Not to Transfer*, ATLANTIC FISHERMAN, May 1993, at 5.

> Through time this process ensures that quota becomes concentrated in the possession of fewer and fewer vessel owners. It also assures that through time fewer coastal communities contain vessels with quota supplying resource to local plants. In short, quota and fishing activity become increasingly concentrated in fewer and fewer enterprises and fishing towns.

Id.

163. Tipton, *supra* note 118, at 412.

164. Scott, *supra* note 6, at 27. However, property rights have always been recognized to be constructs of a legal framework of laws. As the Supreme Court has recently stated in the context of takings, the courts must look into "existing rules or understandings that stem from an independent source such as state law [in order] to define the range of interests that qualify for protection as private 'property' under the Fifth and Fourteenth amendments." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992). Indeed, in a more theoretical context, as Jeremy Bentham once wrote: "Property and law are born together and must die together. Before the laws there was no property: take away the laws, all property ceases." Jeremy Bentham, *Principles of the Civil Code, in* THE WORKS OF JEREMY BENTHAM (John Browning ed., 1843), *quoted in* RICHARD SCHLATTER, PRIVATE PROPERTY 239 (1951).

that an ITQ is in fact a "private property right."[165] Indeed, one of the most popular arguments against ITQs is that they represent a great "give away" of treasured public resources to private parties.[166] In any event, rights based fishery management systems like ITQs do to some extent "privatize" U.S. fisheries resources.[167] As described above, they have the potential to increase the degree of private property characteristics held by fishermen in fisheries resources. As such, these management systems are yet further evidence and support of the plausibility and recognition of private property interests in fisheries under the law, at least in some measure. Indeed, as the next section demonstrates, the common law already provides the framework to recognize such rights in a way that is compatible with the long term concerns of those who fear the permanent loss of public resources to private individuals.

VI. PRIVATE FISHERY INTERESTS UNDER THE PUBLIC TRUST DOCTRINE

Under the public trust doctrine, submerged and submersible lands are held by the state in trust for the public, and as trustee the state has a sovereign responsibility to preserve and protect the right of the public to use these waters and lands for fishing, fouling, navigation, and in some circumstances, recreation. Within the framework of this doctrine, public and private interests may coexist in public trust resources, and state and

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165. *See* Betsy Carpenter & Lisa Busch, *supra* note 123, at 55 ("experts are advocating a system that in essence privatizes the nation's fisheries"); Mark Trumbull, *Fisheries Crisis Stretches Across the Globe*, CHRISTIAN SCI. MONITOR, July 6, 1994, at 8 ("turning fish resources into private property"); Donald R. Leal, *Using Property Rights to Regulate Fish Harvest*, CHRISTIAN SCI. MONITOR, July 30, 1992, at 18 ("each fisherman has a property right in a fixed proportion of the total allowable catch"); Tim Bradner, *Halibut Quotas Would Bring Order, But Could Freeze Alaskans Out*, ALA. J. COM., Jan. 6, 1992, sect. I, at 1 (individual quota allocations "establish a private property right to a public good"); Clement V. Tillon, Remarks as Panelist for National Conference to Consider Limited Entry as a Tool in Fishery Management (July 17, 1978), *in* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL 38, 39 (R. Bruce Rettig & Jay J. C. Ginter eds., 1978) ("[l]imited entry gives us a property right in the resources").

166. Tipton, *supra* note 118, at 405; *see also* Carpenter & Busch, *supra* note 123 ("critics contend . . . it constitutes a 'grand giveaway' of public resources to private industry"); *Greenpeace Clarifies Anti-ITQ Reasoning*, COMM. FISHERIES NEWS, Mar. 1996, at 7A (criticizing "management plans that call for selling off our common natural resources").

167. Pearse, *supra* note 17, at 82.

federal governments have the obligation to protect and preserve natural resources such as fisheries. Although the precepts of the public trust doctrine impose inherent limitations on the ability of the sovereign to permanently alienate these resources, the sovereign may do so when the conveyance serves a legitimate public interest. The principles of the public trust doctrine are applicable to the context of privatizing use rights in common fisheries resources, which in itself may serve a legitimate public interest as a means of conservation, and these principles provide for the long-term preservation of public interests in fisheries resources in a manner consistent with U.S. fisheries management objectives. If federal quota-based management plans are to be pursued in the future, the protective principles of the public trust doctrine may provide a framework for recognizing private property interests in fisheries resources, which could be recognized in the form of a long-term lease interest in catch quotas that could be allocated to community or regional groups in a cooperative management system.

A. A Brief Survey of the Public Trust Doctrine

Looming behind all the foregoing discussion of public and private rights in fisheries resources is the public trust doctrine, which in the United States has served as the foundation and framework of modern legal conceptions concerning the ownership of common resources such as fisheries. The public trust doctrine is an ancient, and relatively obscure common law doctrine[168] which is derived form the English common law, under which the King held in trust for the nation all lands which were subject to the ebb and flow of the tide.[169] When the United States achieved independence from the Crown, these lands and waters became vested in the states of the union.[170] As the Supreme Court stated in *Shively v. Bowlby*,[171] "[a]t common law, the tide and dominion in lands flowed by

168. For a complete analysis of the history and legal parameters of the public trust doctrine, *see generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980); Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5 (1990); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

169. Shively v. Bowlby, 152 U.S. 1, 57 (1893).

170. *Id.*

171. *Id.* at 1.

the tide water were in the King for the benefit of the nation. . . . Upon the American revolution, these rights, charged with a like trust, were vested in the original States" and also in those states that subsequently entered the union.[172] In the early but influential case of *Arnold v. Mundy*,[173] the New Jersey Supreme Court found that:

> [T]he navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.[174]

As the court in *Mundy* explained in 1821, the public trust doctrine has historically protected the public rights of fishing, fowling, and navigation in public trust lands and waters.[175] However, the doctrine has been expanded by several courts in recent history to include the protection of other public uses such as that of recreational activities.[176] In this sense, the public trust doctrine, though limited in geographical scope to lands which are subject to the ebb and flow of the tide,[177] has developed under

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172. *See* Philips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). Under the "equal footing" doctrine, each state received an equal ownership interest in public trust lands upon entry into the union. *Id* at 472.

173. 6 N.J.L. 1 (1821).

174. *Id.* at 76-77.

175. *Id. See also* Bell v. Town of Wells, 557 A.2d 168, 170-71 (Me. 1989) (noting traditionally protected public uses of fishing, fowling, and navigation under Massachusetts and Maine common law history).

176. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363-64 (1984) (holding that New Jersey public had public trust right to recreation in public trust, or intertidal lands, and that this public right carries with it rights of use that allow for the access and reasonable incidental usage of upland sand areas).

177. Phillips Petroleum Co., v. Mississippi, 484 U.S. at 479-80. In *Phillips Petroleum*, the Court found that prior decisions in admiralty "extended admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them," but that the Court did not interpret those decisions "as simultaneously withdrawing from public trust coverage

the common law to be a "dynamic" doctrine[178] that evolves with the demands of society to protect the public uses of trust lands and waters in a flexible manner that reflects the different uses of such lands that occur over the span of time.

In addition to protecting public use rights, the public trust doctrine has also been interpreted to impose a sovereign duty of environmental stewardship for the benefit of the public.[179] As one court has stated: "Under the public trust doctrine, the State . . . and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from the ownership of the resources but from a duty owing to the people."[180] The development of these "stewardship" duties is mostly a product of modern interpretations of the doctrine,[181] and although the exact affirmative scope of these duties remains ambiguous, such duties clearly apply to the state and federal government in the preservation of living marine resources.[182]

What is certain about the public trust doctrine is that it has traditionally protected the public right to fish in public trust lands and waters. Thus, as discussed above, the doctrine preserves the historical common

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those lands which had been consistently recognized in this Court's cases as being within that doctrines scope: *all* lands beneath waters influenced by the ebb and flow of the tide." *Id* (emphasis in original). In so holding, the Court rejected the idea that the scope of the public trust doctrine, which applied to "navigable waters," was defined by the "navigability in fact" definition of "navigable waters" as found in admiralty under *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

178. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d at 363-64 (expanding public trust doctrine to protect recreational activities on intertidal lands and incidental usage of upland dry sand areas); Opinion of the Justices, 437 A.2d 597 (Me. 1981) (supporting flexibility of doctrine to accommodate contemporary needs of the public).

179. *See* Macinko, *supra* note 6, at 951-52.

180. *In re* Complaint of Stuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Vir. 1980) (citing Toomer v. Witsell, 334 U.S. 385, 408 (1948) (upholding state's right "to conserve or utilize its resources on behalf of its own citizens")). *See also* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (recognizing "that trust which requires the government of the State to preserve such waters for the use of the public"); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (noting that "[t]here is a growing public recognition" that preservation is one of the most important uses of public trust resources).

181. For a discussion comparing the traditional principles of the public trust doctrine with its modern development encompassing stewardship objectives, *see* Jack H. Archer & M. Casey Jarman, *Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources*, 17 OCEAN & COASTAL MGMT. 253, 255-258 (1992).

182. *See In re* Complaint of Stuart Transp. Co., 495 F. Supp. at 40.

law public right to fish.[183] The doctrine is therefore intimately involved with any questions concerning public or private interests in fisheries resources. As discussed below, the proprietary theories which underlie the public trust doctrine provide useful insights into the possibility of private property interests existing in U.S. fisheries.

B. Public and Private Interests Under the Public Trust Doctrine

The public trust doctrine dictates that the sovereign state holds the subject lands in trust for the benefit of the public. However, the state's interest is not the only property interest which may exist under the public trust doctrine. In fact, conveyances of private interests in public trust lands have been approved by courts,[184] under the theory that there is an inherent dichotomy in public and private property interests that may simultaneously exist in public trust lands. This dichotomy has long been supported in American case law,[185] under which the public interest is deemed to be the *jus publicum* and the private interest is deemed to be the *jus privatum*.[186]

The Supreme Court has explained this dichotomy of public and private interests by stating that: "As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that *jus publicum* which belongs to the King's subjects,'" and that the *jus privatum* is "'clothed and superinduced with a *jus publicum*, wherein both natives and foreigners . . . are interested by reason of common commerce, trade, and intercourse.'"[187] Therefore, under the public trust doctrine as adopted by the courts, a private title to public trust lands is taken subject to the public

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183. *See supra* notes 18-22 and accompanying text.

184. *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979). The court in *Boston Waterfront* stated that:

> The jus privatum/jus publicum distinction in regard to the shoreland property was carried over to the new world, so that the company's ownership was understood to consist of a jus privatum which could be "parceled out to corporations and individuals . . . as private property" and a jus publicum "in trust for public use of all those who should become inhabitants of said territory . . . ."

Id. at 359 (quoting Commonwealth v. Roxbury, 9 Gray 451, 483-484 (1857)).

185. As early as 1893, the United States Supreme Court recognized the *jus privatum* and *jus publicum* interests in public trust lands. Shively v. Bowlby, 152 U.S. 1, 48 (1893).

186. *Id.*

187. *Id.*

trust uses, such as fishing, fowling, and navigation, which are protected under the public trust doctrine.[188]

C. Limitations on Alienation Under the Public Trust Doctrine

Any potential recognition of fishermen's private interests in common fisheries raises the issue of whether the alienation of such property, or use rights, may be "consistent with the exercise of that trust which requires the government of the state to preserve" such public trust property for the benefit of present and future generations of the public.[189]

In *Illinois Central Railroad v. Illinois,* the Supreme Court addressed the question of the alienation of public trust property by the state to private individuals. In that case, an 1869 Illinois statute conveyed, or purported to convey, a large portion of submerged lands within Chicago Harbor to a private party, Illinois Central Railroad Co.[190] Subsequently, the Legislature received overwhelming disapproval from the public, and in 1873 enacted another statute that repealed the former statute that originally conveyed the land. The state soon thereafter brought suit to quiet title to the submerged lands, and upon reaching the Supreme Court it was held, in an opinion by Justice Field, that the original conveyance was revocable due to the overriding public interests in the submerged lands which were held in trust for the public. The Court explained its holding by stating that:

> The control of the State for the purposes of the public trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[191]

Therefore, public trust property may be conveyed in the form of a *jus privatum*, but such conveyance cannot grant absolute ownership unless it is in the public interest to do so. The Court in *Illinois Central Railroad* further explained that:

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188. *Id.* at 49-50.
189. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
190. *Id.*
191. *Id.* at 453.

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government,[192]

except in those circumstances which entail the improvement of navigation or where the parcel may "be disposed of without impairment of the public interest in what remains."[193]

Therefore, there is an inherent limitation on the alienability of public trust lands, but such conveyances of private interests may be granted in situations where the conveyance is not in conflict with the public interest in those lands and serves a legitimate public purpose.[194] Additionally, such conveyances are revocable if in the future the purpose for which the conveyance was made becomes inconsistent with the contemporary public interest.[195] In an ironic twist of reasoning, it has been found in limited circumstances that the conveyance of such private property interests can in itself be a legitimate public purpose.[196]

This rationale may be consistently applied to the recognition of private property interests in the use of fisheries resources. Accordingly, any possible recognition of such rights may be construed as actually promoting a critical public interest, in that the creation of these rights may be the only way to actually preserve the public's interest in conserving fisheries

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192. *Id.*

193. *Id. See also* People v. Chicago Park Dist., 360 N.E.2d 773 (Ill. 1976) (conveyance of submerged lands by legislature held to be void under *Illinois Cent. R.R. Co. v. Illinois*); Caminiti v. Boyle, 732 P.2d 989, 997 (Wash. 1987) (state statute permitting certain owners of residential property abutting tidelands to install and maintain private recreational docks did not impair public interests in lands so as to amount to a violation of the public trust doctrine under *Illinois Cent. R.R. Co. v. Illinois*).

194. *See* People v. Chicago Park Dist., 360 N.E.2d at 781 ("self-serving recitation of a public purpose" is not conclusive) (quoting People v. McMackin, 291 N.E.2d 807, 812 (Ill. 1972)).

195. Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979) (finding that conveyance to corporation was revocable and that conveyance was in the nature of a fee simple subject to the condition subsequent that it be used for the public purpose for which it was granted).

196. Opinion of the Justices, 437 A.2d 597 (Me. 1981) (finding that statutory conveyance of all submerged lands that were filled prior to October 1, 1975, was actually in furtherance of public interest by eliminating possibility of costly and time-consuming efforts to determine actual ownership of such lands as belonging to the state or a private party).

resources.[197] In this light, a recognition of private property interests held by fishermen in fisheries resources may be deemed consistent with the public trust doctrine. Such an interest could be recognized as a leasehold interest in a fishing quota, for example, owned either by individual fishermen or by collective community-based entities that independently allocate quota interests.

D. A Possible Application of Public Trust Precepts to Rights-Based Fishing

Community-based fishery management strategies have recently received increasing attention as a viable alternative approach to modern, centralized fisheries management systems.[198] Generally, community-based fishery management systems seek to harness the forces of custom and culture to constrain the tragedy of the commons by allowing fishermen to participate in the governmental regulation of fisheries.[199] In view of the precepts of the public trust doctrine discussed above, there are several reasons why community-based management systems would be an effective mechanism for the allocation of private interests in fisheries resources in a manner consistent with public trust stewardship principles. First, community-based systems reflect the social cohesion and local conditions of a fishing community, as well as the specialized knowledge of local fishermen.[200] Second, fishermen assign greater legitimacy to rules established by such systems, as opposed to government-imposed regulations.[201] Third, the participant managers of such systems have greater incentive to maximize the benefits derived from the management

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197. *See* Scott, *supra* note 161, at 34 (proposing property rights in fisheries as an alternative to other forms of regulation in order to motivate fishers to restrain their individual harvest).

198. *See* Elinor Ostrom, *Governing the Commons* (1990), *in* AN ENVIRONMENTAL LAW ANTHOLOGY 286, 290-92 (Robert L. Fischman et al. eds., 1996); Bonnie J. McCay, *Social and Ecological Implications of ITQs: An Overview*, 28 OCEAN & COASTAL MGMT. 3, 16 (1995).

199. *See* Donald R. Leal, *Community-Run Fisheries; Preventing the Tragedy of the Commons*, *in* ATLANTIC INST. FOR MKT. STUDIES, TAKING OWNERSHIP: PROPERTY RIGHTS AND FISHERY MANAGEMENT ON THE ATLANTIC COAST 183, 185 (Brian Lee Crowley ed., 1996).

200. *Id.* at 184.

201. *Id.*

system.[202] In sum, these systems guarantee the long-term involvement of communities, and assign them a significant financial stake in the system, in a manner that may efficiently promote the preservation of the regulated fishery,[203] while maintaining the ability of the government to ultimately control overall catch levels.

The allocation of private lease interests within such a community-based system would, to a large extent, dispel the criticism that rights-based fishery management systems result in a "give away" of common fishery resources,[204] because it would be founded upon the long-term interests of entire communities, as well as the precepts of the public trust doctrine. The interest could have a greater duration than typical quotas, allowing long-term interests in a given percentage of the fishery resource. Such interests could more effectively promote a public purpose of conservation by providing a more reliable and stable form of private property interest, with greater exclusivity, duration, and transferability characteristics.[205] Additionally, if in the future the conveyance no longer served the interest of the public, it would typically be revocable by the granting authority under the precepts of the public trust doctrine.[206] The creation of such a lease-interest may be a step in the right direction if rights-based management systems are pursued in the future. Rights-based fishery management systems have successfully demonstrated the capacity of privatization to remedy over-capitalization and over-fishing in a number of fisheries.[207] With this in mind, the protections of the public trust doctrine should assist in discouraging the future abandonment of such systems under U.S. fishery management programs.

VII. CONCLUSION

The foregoing analysis demonstrates that fishermen's private property interests in fisheries are routinely recognized under the law in the United

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202. *Id.*

203. *See* Teresa M. Cloutier, Comment, *Conflicts of Interest on Regional Fisheries Management Councils: Corruption or Cooperative Management?*, 2 OCEAN & COASTAL L.J. 101, 109-11 (1996) (discussing efficiencies of cooperative management systems).

204. *See* McCay, *supra* note 198, at 13-14.

205. For a discussion of the importance of these proprietary interests in rights based fishery management systems, *see* Scott, *supra* note 161, at 37-42.

206. *See supra* notes 189-96 and accompanying text.

207. Leal, *supra* note 199, at 183-84.

States, though they may not always be in the nature of "vested" interests. Nevertheless, these interests do exist, and cumulatively they evidence a special proprietary relationship between fishermen and fisheries resources. This relationship may be pursued and acknowledged under the framework of the public trust doctrine, possibly as a long-term leasehold interest in a community-based management context. If the United States decides to pursue limited-entry or rights-based fishery management regimes in the future, then this proprietary interest may be beneficially utilized in the furtherance of fisheries management and conservation efforts. Additionally, the principles of the public trust doctrine should protect the underlying interests of the public in these treasured common resources. These same principles should also dispel the criticism that the pursuit of rights-based fishing regimes would result in a "give away" of public resources.