Recapture of Economic Rent under the FCMA: Sections 303-304 on Permits and Fees

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I. INTRODUCTION

Perceptions of the significance and utility of the Fishery Conservation and Management Act of 1976 (FCMA) depend considerably upon the perspective of the observer. Some see the FCMA as offering both the opportunity to establish effective management systems and the hope that the fishing industry can be benefited and improved. Others see the extension of coastal jurisdiction as a disaster to those components of the United States fleet, such as those devoted to catching shrimp and tuna, which may face exclusion as a result of similar extensions by other nations off whose coasts these fishermen work. In their view, gains to United States coastal fisheries are offset by losses to United States distant-water fleets. Still others recognize that the Act might provide a capacity for improved management and a means to enhance the United States fish harvesting industry, but they find such significant defects in the legislative scheme that these prospects may be unrealizable. Finally, some observers argue that the Act in its present form portends disaster for the United States industry, primarily because it provides a badly flawed system for eliminating common property in fisheries.
Critical attention in this context has focused on the issue of recapturing economic rent\(^6\) from managed fisheries, and on the provisions of the Act concerned with the imposition of fees for permits issued to domestic fishermen. Central to this discussion is section 303(b),\(^7\) which provides that any fishery management plan prepared by a Regional Fishery Management Council\(^8\) may

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such

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6. "Economic rent" is a technical term referring to the net economic benefits realized from use of property. However, fisheries are in most instances considered common property resources because they are open to exploitation by all comers. Because access is free, new entrants join the fishery so long as any profit is available. Under these conditions the resource will be used until the marginal yield is zero. The result is to dissipate the profit, or rent. A limited-entry system, which is intended to restrict entry to the fishery and thus to prevent the dissipation of the rent, raises the issue of who gets the rent. One alternative is to permit the fishermen to retain all the profit, over and above normal return, made possible by the limited-access system. Another is to provide for ways to recapture some or all of this profit for the benefit of society as a whole, including its use for maintenance and improvement of the fishery. Helpful discussions of this concept are in F. Christy & A. Scott, The Common Wealth in Ocean Fisheries 6-16 (1965); Crutchfield, Economic Objectives of Fishery Management, in The Fisheries—Problems in Resource Management 43, 46–53 (J. Crutchfield ed. 1965).


8. The primary responsibility for preparing fishery management plans rests with eight Regional Fishery Management Councils. Id. § 302(h), 16 U.S.C.A. § 1852(h). The Secretary of Commerce may prepare a plan only if a Council fails to do so, or if a Council fails to remedy a plan which has been disapproved by the Secretary. Id. § 403(c)(1), 16 U.S.C.A. § 1854(c)(1). However, a plan prepared by the Secretary cannot include a limited-entry scheme unless such a scheme is first approved by a majority of the voting members, present and voting, of the affected Council. Id. § 304(c)(3), 16 U.S.C.A. § 1854(c)(3).
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vessels, including devices which may be required to facilitate enforce-
ment of the provisions of this Act;

(5) incorporate (consistent with the national standards, the other
provisions of this Act, and any other applicable law) the relevant
fishery conservation and management measures of the coastal States
nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to
achieve optimum yield if, in developing such system, the Council and
the Secretary take into account—

(A) present participation in the fishery,
(B) historical fishing practices in, and dependence on, the fishery,
(C) the economics of the fishery,
(D) the capability of fishing vessels used in the fishery to engage
in other fisheries,
(E) the cultural and social framework relevant to the fishery, and
(F) any other relevant considerations; and

(7) prescribe such other measures, requirements, or conditions and
restrictions as are determined to be necessary and appropriate for the
conservation and management of the fishery.

Although section 303(b)(1) of the Act specifically authorizes the use of
certain kinds of permits requiring a fee, section 304(d) provides that
any fees authorized to be charged "pursuant to section 303(b)(1) . . .
shall not exceed the administrative costs incurred . . . in issuing such
permits."9 It is this latter section which is the cause of the controversy
over recapture of rent.

Some commentators suggest that this single provision drastically
impairs the utility of the Act because, in their view, it prevents any
collection of revenue from fishermen, other than the administrative
costs of permits. This view appears to be pressed with some vigor in
light of the high probability that if limited-entry schemes,10 permitted
by section 303(b)(6) of the Act, are put into effect by a Regional

9. Id. § 304(d), 16 U.S.C.A. § 1854(d) (emphasis added).
10. A "limited-entry scheme" is here defined as one which regulates the level of
fishing effort in a particular fishery, at least in part, for the purpose of improving net
economic returns to the fishermen. Such a scheme also may seek to accrue a value
from the fishery to defray the societal costs of management, including research and
management functions. See Christy, Alternative Entry Controls for Fisheries, in
LIMITED ENTRY INTO COMMERCIAL FISHERIES 86 (J. Mundt ed. 1974) (Institute for
Marine Studies, Univ. of Wash., Pub. No. I.M.S.--UW--75--1) [hereinafter cited as
LIMITED ENTRY]. See generally Note, Legal Dimensions of Entry Fishery Manage-
ment, 17 WM. & MARY L. REV. 757 (1976). Almost any fishery regulation may re-
strict access in some sense, but usually the purpose is to impose inefficiency in the
fishery rather than to improve economic return.
Council, they will undoubtedly generate significant surplus revenues. For example, Professor Frederick Bell has commented:

Any type of user charge for the resource is prohibited by Section 304(d) of the Act. This effectively eliminates an efficient limited entry scheme involving the taxation of economic rents. It is understandable that fishermen do not want to be taxed, especially if profits are at or below normal levels. The purpose of a user's tax (or fee) is to reduce excessive profits that first must be generated by the limited entry scheme.\textsuperscript{11}

He later adds:

[The FCMA] establishes regional management councils to recommend policy with respect to fisheries falling under their purview. The purpose of these councils is to repair the private market which fails to allocate capital and labor properly when a common property resource is involved. The way to repair the market failure is through the transformation of common property resources into private property resources. Limited entry through a stock certificate plan, license fee or auction of fishing rights will (1) create private property; (2) generate revenue to finance the management of the fisheries and (3) conserve the fishery resource.\textsuperscript{12}

But, according to Professor Bell, the limit on the level of the fee will prevent adoption of an effective limited-entry scheme. The "crux of the entire fishery problem"\textsuperscript{13} will thus remain unresolved and the Councils will simply use a quota system which will doom "the fishing industry into economic oblivion."\textsuperscript{14}

Dr. Francis T. Christy offers a similar analysis of section 304(d) by interpreting it to exclude any collection of rent from fishermen. He declares: "This is the only provision regarding fees charged to domestic fishermen, and it is quite clear that the Act is intended to prohibit the collection of any revenues from fishermen except for those inconsequential ones associated with the costs of issuing the permits."\textsuperscript{15} The basis for this ascription of clear meaning is not disclosed.

\textsuperscript{11} Bell, supra note 5, at 18 (emphasis added). The Act does not make specific reference to a tax.
\textsuperscript{12} Id. at 24.
\textsuperscript{13} Id.
\textsuperscript{14} Id. at 25.
\textsuperscript{15} Christy, Limited Access Systems under the Fishery Conservation and Management Act of 1976, in ECONOMIC IMPACTS, supra note 5, at 141, 144.
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In a later passage Dr. Christy identifies the impact of granting all economic rents to the fishermen rather than capturing some or all for society:

[T]his is detrimental to the interests of society because no return is received from the use of publicly owned resources. It is detrimental to the interest of the taxpayer because the costs of research, development, enhancement, regulation and enforcement will be borne by him rather than the beneficiaries—the fishermen. And, because these factors will force the Office of Management and Budget (if not Congress) to limit the funds for fisheries research and management, the fishing industry will suffer as well. To complete the catalogue, the consumer's interests are also likely to be damaged by the Act because of the incentive to exclude foreigners some of whom provide us with low-priced imports, and to substitute high-priced production by domestic fishermen.\(^\text{16}\)

The purpose of this brief article is to consider these interpretations of the Act and to suggest, in contrast, that the Act can and should be interpreted as preserving some methods of capturing the increased economic rent that will probably be generated by a limited-entry scheme. Discussion centers about the terms of the Act itself and the guidance they provide, the legislative history of the Act, and the removal of ambiguity or uncertainty by reference to the major purposes sought by the Act.

II. TERMS OF THE ACT

Careful reading of the language employed in sections 303 and 304 creates genuine doubt about the propriety of broadly interpreting the terms "permit" and "fees" to prohibit all forms of recapturing rent. The ambiguity and doubt about the scope of these provisions may be seen in a brief mention of questions to be resolved. The first problem is whether section 303(b)(1), which specifically allows a fishery management plan to "require a permit to be obtained . . . with respect to..."
any fishing vessel of the United States,"17 refers to a vessel permit or is to be understood as including any permit associated with a United States fishing vessel. Fisheries regulations restricting access commonly employ a variety of permits or licenses, such as for a particular type of gear, for the individual fishermen, or for a vessel itself, and all of these may be required simultaneously. A license or permit is often circumscribed in terms of space, time, species of fish caught, type of vessel, and characteristics of a vessel, or a combination of these. The individual fisherman’s permit may be made to depend on a host of factors, including economic and social conditions affecting individual social groups and communities.18 In order to embrace all these modalities for managing access to a fishery, the term “permit” in section 303(b)(1) requires a very expansive interpretation such that, for example, a permit “with respect to any fishing vessel” also means a permit with respect to a fisherman, a permit with respect to troll gear or purse seine or gillnet or some other gear, and a permit with respect to a particular area in relation to a particular species of fish.

An even more difficult feat of liberal interpretation is required in reference to the term “fees.” First, to the extent “fees” in section 303(b)(1) refers only to those payable for a permit, then the questions in the preceding paragraph are pertinent; that is, are the fees payable under section 303(b)(1) only those for a vessel permit or also for all permits and licenses? Assuming the term “fees” is associated with all forms of permit and licenses, does it also extend to payments without such connection? A fee can be imposed for management purposes without reference to issuance of a license or permit, as for catching or landing a particular amount of a particular stock.19


18. The Alaska limited-entry law is illustrative. It provides that qualifications for ranking applicants for initial entry permits are those pertaining to the degree of economic hardship which they would suffer from exclusion from the fishery. Standards for this determination include:

   (1) degree of economic dependence upon the fishery, including but not limited to percentage of income derived from the fishery, reliance on alternative occupations, availability of alternative occupations, investment in vessels and gear;

   (2) extent of past participation in the fishery, including but not limited to the number of years [sic] participation in the fishery, and the consistency of participation during each year.

19. Washington State has a catching fee for every person taking fish from state
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The second, and more important, question is whether the term "fees" extends not only to payments usually labelled as such but also to all other forms of payments that might be imposed for management purposes. The limited and precise references to fees in sections 303(b)(1) and 304(d) may be contrasted with the range of methods that may be employed in a limited-entry scheme as authorized by section 303(b)(6). A fee is only one of several methods that may be used to recapture rent in such a scheme, and a fee for a vessel permit is only one type of fee that can be employed. Thus, a limited-entry scheme could be implemented by allocating individual fishermen's quotas which may be leased or otherwise exchanged. Some limited-entry laws call for a bonus payment and bidding for access to the resource. Others involve the imposition of a tax on catch or on landings. Other approaches that have been mentioned include a severance tax, an auction of licenses, and a method of contracting with fishermen who would pay the state a portion of the value of the catch.

In the face of this variety of actual and potential methods for limiting entry by imposing permit requirements and variously named charges, the use of the terms "permit with respect to a fishing vessel" and "fees" hardly seems adequate to prohibit all forms of recapturing rent. Complete prohibition would have referred to permits in a generic sense to include permits for the individual fishermen and, even more importantly, permits for particular gear. The choice of one of

waters for commercial purposes. Wash. Rev. Code § 75.32.070 (1976). Limited-entry provisions for hardshell and geoduck clams also entail payment of a stumpage fee in addition to other payments. Limited Entry, supra note 10, at 17 (statement of Charles E. Woelke, research scientist, Washington State Dep't of Fisheries).
Ohio law provides for payment of a "royalty fee" on certain species taken commercially and for which an allowable catch or quota is established. Ohio Rev. Code Ann. § 1533.35(B) (Page 1974).

21. Entry into the Washington State subtidal hardshell clam and geoduck fisheries calls for a bonus bid, a fixed annual lease payment, and a stumpage fee. See note 19 supra.
22. The Alaska limited-entry law provides for an "assessment" of 7% of the gross value of the annual catch attributed to a permit for the purpose of buying back permits when the optimum number of permits is less than the number outstanding in a fishery. Alaska Stat. § 16.43.310 (1973). See also Pontecorvo, Johnston, & Wilkinson, supra note 16 (tax proposal concerning fisheries in the Northwest Atlantic).
23. See Crutchfield, supra note 16.
these methods rather than another has very different effects on the fishery and imposes completely different management responsibilities.

Similarly, to rule out all terms of payment as a means of recap­
turing rent, the simple term "fees" in section 303(b)(1) would require expansion to read: "payments, charges, taxes, bids, royalties, or other methods of extracting payment from a fisherman." Nothing in the other language of the Act or in the legislative history, as noted below, provides a persuasive basis for such an expansive interpretation of "fees" or, as suggested above, "permit," as these terms appear in section 303(b)(1).

Thus, it appears reasonably clear that the section 304(d) limit on fee levels applies to a limited category of payments out of a number of possible kinds. Section 303(b)(1) refers either to a vessel permit and fees associated with a vessel or, at most, to fees associated with various types of permits that a Council might require. It should not be read to include other types of payments that are sometimes employed in fisheries management, such as royalties, quota charges, bids, and taxes. Such other forms of payment are authorized in the grant of competence in section 303(b)(6) to set up a limited-access system, as well as in the "necessary and appropriate" provision of section 303(b)(7).

Because these latter provisions are drafted in general terms, there might be difficulties in interpreting the FCMA to permit Councils to include a landing or other tax in a limited-entry plan. Initially the obstacle arises because, if such a tax were challenged, there could be judicial reluctance to deal with the issue of the power of Congress to delegate to a federal agency the power to tax. A court might construe the Act narrowly to forbid a Council from imposing a tax. It is even conceivable, although unlikely, that a Council decision to levy a charge on fishermen, whether or not called a tax, might be considered such and declared unconstitutional. The source of these potential problems in implementing the Act is suggested by a recent Supreme Court decision, National Cable Television Ass'n v. United States,26 in which the Court construed a 1952 statute declaring the sense of Congress that benefits provided by any federal agency to any person "shall be self-sustaining to the full extent possible" and authorizing for this purpose the head of each federal agency "to prescribe . . . such fee,

charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts.”

The Federal Communications Commission imposed an annual fee on cable television companies which was said to approximate “the value to the recipient” as used in the act.

The question for the Court was whether the general language of the statute should be construed to permit the agency to impose a tax as well as a fee. The Court stated:

Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483a narrowly as authorizing not a “tax” but a “fee.” A “fee” connotes a “benefit” and the Act by its use of the standard “value to the recipient” carries that connotation. The addition of “public policy or interest served, and other pertinent facts,” if read literally, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

The opinion declared that, in light of the reference to the “public policy or interest served,” the assessment might be varied to achieve different goals, and that “[s]uch assessments are in the nature of ‘taxes’ which under our constitutional regime are traditionally levied by Congress.” The Court then referred approvingly to the language in *A. L. A. Schechter Poultry Corp. v. United States*,30 stating that Congress cannot “transfer to others the essential legislative functions with which it is thus vested.”31 The Court noted, however, that Congress does delegate power to agencies and sets standards to guide their

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27. *Id.* at 337.
28. *Id.* at 340–41 (original emphasis) (footnote omitted).
29. *Id.* at 341.
31. *Id.* at 529.
determinations, and that in *Hampton, Jr. & Co. v. United States*, the Court had upheld delegation of the power to set tariffs, declaring a delegation is not forbidden if Congress provides in the legislation an "intelligible principle" to which the agency must conform in setting the tariff. Then the Court stated: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions leads us to read the Act narrowly to avoid constitutional problems."  

It is possible the Court meant that Congress could not delegate the power to tax at all, in which case Congress could not constitutionally authorize Regional Councils under the FCMA to impose a tax on catch and landings. But the references to *Schechter* and *Hampton* do not necessarily foreordain judicial prohibition of all delegations of power; they appear to call for an "intelligible principle" to which the delegate must conform in the exercise of that power. Thus, if delegation of the power to tax is not to be treated differently from other delegations, the question is whether the FMCA provides such a principle to which a Council must conform in levying a tax as part of a limited entry scheme.

The provisions of section 303(b)(6) do provide sufficient guidance for devising a limited-access system which would recapture some of the rent and which would withstand judicial assessment. The reference to "economics of the fishery," in particular, calls attention to those considerations that pertain to distribution of the surplus generated by limited access. Additional useful direction is to be found in section 301(a)(4):

Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The problem may be illustrated in a concrete setting. Suppose the

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32. 276 U.S. 394 (1928).
33. 415 U.S. at 342.
North Pacific Council is asked, as may well happen, to adopt Alaska's limited-entry law, including its assessment provision, for a specific fishery. Leaving aside questions about the desirability of this scheme from other standpoints, what result might be expected if the assessment were challenged as being beyond the Council's authority under section 303(b)? For the reasons discussed above, a court would be on solid ground in reading sections 303(b)(6) or 303(b)(7) to authorize such a charge. Such an interpretation need not run afoul of National Cable. The various methods of recapturing rent discussed above are readily distinguishable from the kind of charge the Court thought might constitute a tax in National Cable, hence, the power to tax as

36. See note 22 supra.

37. In National Cable the Court's first concern was the nature of the mechanism used to recover the value of the benefit conferred. The Court defined a "fee" as "incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast system." 415 U.S. at 340 (emphasis added). The Court found that for such services an agency "may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." Id. at 340-41. A "tax," on the other hand, was viewed as a power which could be exercised "arbitrarily" and would allow an agency to "disregard benefits bestowed by the Government ... and go solely on ability to pay, based on property or income." Id. at 340.

These considerations do not cause difficulty for action under the FCMA, such as adoption of a catch assessment as in the Alaska law. First, recapture of rent is "incident to a voluntary act." Second, the very purpose of a charge under the Act is to recover the "benefit bestowed." There is a concrete basis to determine its amount: the value of the permit. The recapture of some of the extra returns a fisherman is receiving from a limited-entry system, if done nondiscriminatorily, could neither be "arbitrary" nor in disregard of benefits bestowed by the management authority.

The Court also seemed concerned that allowing the FCC to tax in National Cable would carry the agency "far from its customary orbit and [put] it in search of revenue." Id. at 341. The "taxes" contemplated in a limited-entry scheme under the FCMA, however, do not have as an objective the "search of revenue." The Alaska assessment, for example, is aimed precisely at maintaining the value of the permit. Such charges are a management device, whose essentiality economists seem to regard as paramount. Furthermore, and more importantly, the taxes imposed under a limited-entry program, even if they were to recapture the entire surplus rent accruing to the fishermen, are not likely to equal the amount expended under the Act for enforcement, management, etc.—services which directly benefit those persons using the fishery.

The third point of apparent concern to the Court was highlighted in the companion case to National Cable, FPC v. New England Power Co., 415 U.S. 345 (1974), which construed the same statute. The FPC had imposed an annual assessment against all jurisdictional electric companies. The Court found this to be outside the scope of the act. The key to the decision was the holding that an agency charging a "fee" must apply that charge to "identifiable recipients" of the special benefits conferred. The FPC had charged a general assessment against all utilities. This is not a difficulty under the FCMA. Taxes would only be imposed on recipients of the benefits. For example, the Alaska assessment on catches is paid only by the fishermen who benefit from limited entry in a specific fishery.

Mr. Justice Marshall, joined by Mr. Justice Brennan, wrote a separate opinion concurring in New England Power's result but dissenting from National Cable. He characterized the Court's opinion as "an attempt to draw metaphysical distinctions between
discussed in that case is not at issue. On the other hand, if the Alaska
assessment were considered a tax, the Act contains sufficient guidance,
or "intelligible principle," to satisfy the constitutional test. 38

If National Cable has a lesson in this context it may be that Coun-
cils should seek to assure the viability of methods to recapture rent by
making sure that the methods do not resemble a tax within the con-
ception set out in National Cable. Apparently, semantic distinctions
are important to the Supreme Court, so perhaps it would also be ad-
visable to avoid the term "tax."

Aside from this question about taxes, why is the legislation drafted
to make only partial specific reference to the range of means that
might be used to impose charges on fishermen? There appear to be
several responses to that question. One is that the drafters were intent
on referring to the most common form of fee payment, the one con-
nected with securing a vessel permit. It could reasonably be thought
that because this device is the most important one used for manage-
ment, it was sufficient to refer to it. Another response may be that leg-
islators were unfamiliar with the detailed tools of fishery management
and unaware that their language was partial in its effect, but there is
evidence that this was not the case. 39 It is not even inconceivable that
legislators, although aware of the limited reference of the term "fees"
and intending that other charges under such labels as tax, assessment,
and royalty not be precluded under the Act, did not expressly mention
these kinds of charges due to questions of jurisdiction within the Con-
gress. 40 It is noteworthy, at the least, that there is no express prohibi-
tion of other charges and that there is a clear directive to use a limited-
entry scheme which takes into account the "economics of the fishery."

a 'fee' and a 'tax.' 415 U.S. at 352. This, of course, is even worse than a semantic
distinction, and this author does not go so far.

38. Some of the considerations in the preceding footnote are also relevant when
the issue concerns standards for judging the legality of a delegated power to tax.

39. See note 51 and accompanying text infra.

40. A recent news report suggests this practical reason. In the United States Senate,
consideration of proposed legislation containing provision for a "tax." instead of
or in addition to a fee, must be referred to the Senate Finance Committee. This some-
times causes difficulty. For example, when the Carter administration proposed water-
ways legislation that would impose a tax on barge fuel, rather than a fee of some
kind, it required reference to and approval of the Finance Committee rather than the
Public Works Committee. The choice of terms in that instance probably doomed the
proposed charge because the Chairman of the Finance Committee, Senator Russell
Long of Louisiana, is opposed to such waterways charges, and legislation for that
purpose probably would not be approved in his committee. Washington Post, May 3,
1977, at A5, col. 2. The author is grateful to Francis T. Christy, Jr., for calling his at-
tention to this report.
Another interpretation is more attractive than any of these because it is more attuned to the purposes of the legislation. This interpretation is that whatever section 303(b)(1) refers to by way of permits and fees, the limit in section 304(d) applies only to such charges as are made pursuant to section 303(b)(1). Section 303(b)(6), on the other hand, may be construed to authorize permits and fees as part of an overall management scheme aimed at limiting entry, and in the event such a scheme is adopted, the limit applicable to section 303(b)(1) is not effective.

The argument to this effect is that section 303(b) spells out a variety of management tools that are available at the discretion of the Councils and the Secretary. Subsections 1–5 of section 303(b) specifically identify such tools while subsection 6 refers to a management system that might include both the tools specified in the preceding subsections and others associated with limited-entry systems. It may be argued that the reference to a vessel permit and fee in subsection 1 dealt with this particular tool as an independent management measure divorced from adoption of a limited-access system. In contrast, a Council is authorized by subsection 6 to set up a system for limiting access, suggesting a planned, coherent overall access scheme which might include, inter alia, the limits, restrictions, or conditions referred to in subparagraphs 1–5. Thus, when incorporated in a limited-access scheme under subsection 6, rather than as an independent measure under subsection 1, the fee for a vessel or other permit would not be subject to the limit specified in section 304(d), because such a fee would not be adopted pursuant to section 303(b)(1).

This interpretation aids in explaining the apparent anomaly in limiting the level of a fee only by reference to section 303(b)(1). By this reference, the prohibition of fee level larger than administrative cost applies only to a fee imposed outside the bounds of a limited-access system. In such a situation there would very probably be no surplus rent produced which should be recaptured, and it makes eminent sense to limit the fee in such a context. On the other hand, under a

41. The subsections refer to such measures as permits and fees with respect to fishing vessels; designated fishing zones; limitations on catch based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors; prohibitions, limits, requirements, or conditions regarding use of specified types and quantities of fishing vessels, gear, and equipment; and relevant conservation and management measures from coastal States nearest the fishery (if consistent with the Act and any other applicable law). FCMA § 303(b)(1)–(5), 16 U.S.C.A. § 1853(b)(1)–(5) (West Supp. 1977).
limited-access system there is every reason to believe a surplus would be created, and it would be subject to recapture by a fee under section 303(b)(6).

III. LEGISLATIVE BACKGROUND

On the question of recapture of economic rents, it is difficult to get much guidance from the proceedings in Congress or from the reports of the House and Senate committees involved, because the final Act’s fee provisions do not resemble those in either the House or Senate bill. Unfortunately, the report of the conference committee, which reconciled inconsistencies in these versions, does not clarify the meaning and scope of the fee provisions either.\(^{42}\) Thus, the implications to be derived from these differences are not easy to draw.

The key relevant provisions in the House bill\(^ {43}\) concerned a limited-access system, fee payments, a definition of fees, and provision for their collection. The provision for limited access called for recognition, “among other considerations,” of a variety of enumerated factors, but conspicuously omitted reference to the value of the privilege of fishing under limited access.\(^ {44}\) A later provision in the same section, however, would have permitted a Regional Council to “specify those licenses, permits or fees . . . which should be required as a condition” to fishing, and specifically declared that the amount of these “may vary between domestic and foreign fishermen, between different categories of domestic fishermen, or between different categories of foreign fishermen.”\(^ {45}\) The term “license fee” was defined as “any fee

\(^{42}\) Although not explicit, the conference report indicates that the term “permit” may be narrowly construed, and recapture of rent should be permitted. First, in analyzing § 303(b)(1), the report states that a management plan can include “a permit requirement for each vessel engaged in the fishery,” thus supporting the conclusion that the subsection refers to vessel permits only. S. Rep. No. 94–711, 94th Cong., 2d Sess. 52 (1976). Second, the report states in regard to § 303: “The House and Senate provisions for this section were not mutually exclusive and the [FCMA’s] provisions utilize parts of both versions.” Id. at 53. This logically implies that the final version agreed upon encompasses no less authority to recapture economic rent than either the House or Senate bills. Because both bills provided for recapture, the resulting inference should be that the Act does also. Finally, the conference report states that § 304(d) “directs the Secretary to set, by regulation, the level of any fees which may be changed [sic] under fishery management plans for U.S. fishing vessels. This level cannot exceed the Secretary’s administrative costs in issuing these permits.” Id. This again implies that the limitation is only on fees charged for fishing vessels.


\(^{44}\) Id. § 304(b)(3)(B).

\(^{45}\) Id. § 304(b)(3)(E).
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which is imposed on any person under any fishery management plan implemented under this Act for the privilege of fishing." 46 Finally, the House bill provided that all fees collected from domestic fishermen were to be used to carry out stock assessment and other research and development. 47 This provision makes it abundantly clear that the amount recoverable was intended to be the surplus economic rent, not just administrative costs, because the recovery of costs could not support stock assessment or research and development activities.

The Senate bill 48 had two provisions concerning permits and fees. First, it provided for a limited-access system which would recognize, inter alia, "the value of the fishing privilege." 49 Second, it provided for a variety of licenses or permits, stating that such may "be issued by the Secretary as a condition to engaging in any fishery, upon such terms as may be prescribed, including the payment of fees appropriate to the value of the fishing license or permit." 50 The Senate bill thus took into account the full range of permits that would be used in management and placed no limit on the level of fees.

In concluding that the FCMA prohibits all forms of recapturing rent, some observers place great weight on the contrast between these explicit provisions on fees in the House and Senate bills and the provision in section 304(d) that a fee under section 303(b)(1) cannot exceed the administrative cost of its issuance. 51 The difficulty with this focus of attention is that most, if not all, emphasis appears to be placed on the former provisions rather than on those in the FCMA. The result is a failure to note that, while the broad language on fees in the House and Senate bills does not appear in the FCMA, the specific language limiting the level of a fee and the provision for a permit and fee are very precise in reference and do not express expressly foreclose all imposition of fees, licenses, taxes, and charges that can be authorized under more general provisions of FCMA. The misemphasis further neglects to note that the FCMA contains different but similarly broad language which, reasonably construed, allows recapture of rent under a limited access arrangement.

46. Id. § 306(a).
47. Id. § 306(e).
49. Id. § 203(b)(2).
50. Id. § 203(b)(5) (emphasis added).
In its consideration of this legislation, Congress explicitly recognized that permits or licenses are employed in a variety of ways and that various types of fees or other payments including taxes may be charged to the fishermen.\textsuperscript{52} Hence, the limited terminology in the FCMA is not there because of unfamiliarity with either the range of appropriate management tools or the terms to describe them. Furthermore, as noted above, the Act contains language which authorizes, beyond the explicitly stated discretionary provisions for regulation, "such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."\textsuperscript{53} Thus, in spelling out the types of management tools in section 303(b)(1)--(6), the Act does not exclude any other tools the Council or Secretary may use so long as they are considered to be "necessary and appropriate."

One other change in the limited-access provision is noteworthy. Although the Act drops the reference in the Senate version to recognition of the value of the fishing privilege, it adds language which includes reference to this value and to other economic elements by specifying that a limited-access system should take into account the "economics of the fishery."\textsuperscript{54} Specific mention and reiteration of this factor in the context of limited access lends it unusual weight in view of the Act's general emphasis upon economic considerations in carrying out its major purposes. It does no violence to language to construe this phrase as authorizing a management plan containing a limited-access system requiring from fishermen payments which reflect the value of that access.

IV. INTERPRETATION IN ACCORDANCE WITH THE MAJOR PURPOSES OF THE ACT

The foregoing discussion of the relevant provisions in the FCMA strongly suggests that there is considerable basis for doubt about the inclusiveness of the term "fees" in sections 303(b)(1) and 304(d). By itself, as well as in the context of the Act, the term is oddly chosen if it


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was intended to embrace all taxes, charges, or payments for items other than a vessel permit. At the very least, the preceding discussion shows that it is an ambiguous term, and that its reference is unclear and open to question. In resolving lack of clarity, ambiguity, and doubt, the principal guide in interpretation is the major purpose of the Act. Is this purpose promoted by a broad interpretation of sections 303–304 so as to prohibit every means of collecting rent? Or is the fundamental objective of the Act better served by a narrower interpretation of these sections which either limits the scope of the relevant terms "permit" and "fees" or confines the operation of section 304(d) solely to permits and fees imposed outside a limited-entry system?

In the most general terms, the aim of the Act is to benefit the United States fishing industry by conserving living resources in the fisheries zone and by managing them to secure the optimum yield therefrom. This goal is to be sought through several means: The establishment of an exclusive fishery management system within a 200-mile zone (and beyond for certain species); the prevention of overfishing; the grant of a priority on fishing in the zone to United States vessels to the extent of their capacity and intention to harvest the resources; the development of under- or non-utilized fisheries; the specification that the overall goal of management is that of securing the optimum yield from the fishery; and the betterment of the industry through limiting access to the fishery. Throughout, management is to take into account economic and social considerations in addition to the biological and ecological health of the living resources and the relevant ecosystem.

The most general question is whether the overriding objective of benefiting the fish-harvesting industry through conservation and management is furthered, hindered, or unaffected by alternative interpretations of section 304(d). At one level, the answer to this is that the harvesting segment, or rather a fixed component of it, would significantly benefit if the term "fees" is construed to refer to, and therefore

57. Id. § 201(d), 16 U.S.C.A. § 1821(d).
58. Id. § 2(b)(6), 16 U.S.C.A. § 1801(b)(6).
60. Id. § 303(b)(6), 16 U.S.C.A. § 1833(b)(6).
61. Id. § 3(18), 16 U.S.C.A. § 1802(18).
to prohibit, all methods of capturing any surplus rent from fishing. The effect of such a construction would be to permit the surplus to go to the fishermen who are permitted access to the fishery under a limited-entry scheme. Wider distribution of enlarged profits would occur only as a result of later transactions with processors and of the normal operation of federal and state tax systems.

But such an answer is superficial and reflects exclusively shortrun considerations. The effect of foreclosing recapture would almost certainly be a disservice not only to the industry but also to the consumer and to the taxpayer. Professor Bell believes that use of a quota system, without the recapture measures he believes prohibited by section 304(d), "will be dooming the fishing industry into economic oblivion." 62 Dr. Christy has written an entire article attempting to catalog the evils which would ensue from the inability to recapture through fees or taxes the rent which will be produced by limited-entry systems. 63 On the assumption that quotas will not be used and that any payments by way of fee or taxes would not be permitted, he believes the industry would continue to be afflicted by overcapitalization, inefficiency, reduced opportunities for technological innovation, and loss of public funds for support of research and management. 64 Conservation itself would suffer because there would continue to be excessive fishing pressure on the fish stocks. 65 He also believes that the taxpaying public and the consumer would incur losses from this development. 66 If these were in fact the consequences, it is not difficult to see that the fishing industry would be harmed, not benefited, by a prohibition on any method of recapturing the rent from fisheries. Certainly there could be no serious question that society as a whole would pay a tremendous cost for permitting a small segment of it to obtain disproportionate benefits.

Among the advantages of recapturing the rent through taxes or payments of one kind or another would be the provision of major assistance in building a more profitable and attractive industry, the major goal of the FCMA. Reducing excessive fishing effort might alleviate the tendency toward boom or bust which afflicts the harvesting

62. Bell, supra note 5, at 25.
63. Christy, supra note 15.
64. Id. at 150–54.
65. Id. at 153.
66. Id. at 146.
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industry. Matching effort with available resources reduces pressure on stocks. The viability of the limited-entry system might well be threatened if rent is not recaptured, and the public perceives that individual fishermen are enriched at public expense.\textsuperscript{67} Recapture also helps maintain access to the fishermen's occupation by younger fishermen and lends stability to patterns of individual ownership of vessels and permits by obviating the necessity to rely on corporate funding to afford a vessel or permit.

In this context, the substantial testimony of economists and other knowledgeable observers is that the Act should provide for a means of capturing economic rent if it is to succeed in conserving resources or improving the gain from their exploitation. Failure to provide a means for recapturing rent will harm taxpayers, the fishing industry, and consumers, and will virtually guarantee that the Act will be unsuccessful if not a disaster. In the face of this array of expert opinion, it is indeed difficult to understand why the Act, if it is unclear in this respect, must necessarily be interpreted in a fashion that has such harmful effects. To the contrary, the interpretation which both benefits the affected interests and promotes the Act's goals is one which reads the Act to permit collection of rent from the fisherman. Such an interpretation preserves the discretion of the Regional Councils to select from the whole array of management tools and to combine those thought necessary and appropriate to achieve both conservation and optimum yield.

In these circumstances, it would seem to achieve heights of folly to dispel uncertainty or ambiguity in meaning either by an interpretation that a limited-access system cannot recapture rent through a fee or other payment, or by an interpretation that the term "fees" must be read as if it also embraced any levying of royalties and taxes, any pro-

\textsuperscript{67} The following revealing exchange occurred during a discussion of limited entry:

\textit{Lauber:} Finally, society will not allow Limited Entry to continue if the program creates a class of rich men. We had better find some way of controlling this or Limited Entry will destroy itself. The people will not tolerate having what they consider to be a public resource controlled by a small group of people.

\textit{Rickey:} You are right, I don't think that society will tolerate a club of millionaires operating on a public resource as they have in the past; but this is not an insoluble problem.

LIMITED ENTRY, supra note 10, at 60 (exchange between R. Lauber, Manager, Ass'n of Pacific Fisheries, and R. Rickey, Acting Chairman, Commercial Fisheries Entry Comm'n of Alaska).
vision for bonus bidding or lease payments, and any charges for allocation of quotas. There is simply no justification for such a gratuitous emasculation of potentially effective legislation.