No. 03-5101

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

vs.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in 99-CV-119
Senior Judge Eric G. Bruggink

PETITION FOR REHEARING EN BANC OF PLAINTIFF-APPELLEE AMERICAN PELAGIC FISHING COMPANY, L.P.

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STATEMENT OF COUNSEL PURSUANT TO CIRCUIT RULE 35(b)

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and precedents of this Court: *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Cienega Gardens* v. *U.S.*, 331 F.3d 1319 (Fed. Cir. 2003); *Chancellor Manor* v. *U.S.*, 331 F.3d 891 (Fed. Cir. 2003); *Pete* v. *U.S.*, 531 F.2d 1018 (Ct. Cl. 1976). Based on my professional judgment, I believe that, if this appeal is not governed by the above precedents, then it requires an answer to a precedent-setting question of exceptional importance: Does the Takings Clause protect uses of property that are subject to regulation?

_____

Attorney of Record for Appellee

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel reached the unprecedented conclusion that the Takings Clause does not protect uses of private property that are subject to regulation. Because most uses of private property are subject to regulation, the panel's ruling would effectively abolish the government's obligation to compensate citizens for virtually all regulatory takings.

The record below was undisputed. The government first induced the American Pelagic Fishing Co. ("APFC") to invest in a large fishing vessel (the *Atlantic Star*) to harvest under-utilized fish stocks in the Atlantic fisheries; next issued to the *Atlantic Star* all required fishing permits; and then enacted brand-new special legislation revoking only the *Atlantic Star*'s permits and barring only the *Atlantic Star* from fishing in any waters in the Exclusive Economic Zone of the U.S. ("EEZ"). These actions deprived the vessel of all economic value. A42. Following a thorough regulatory takings analysis, Judge Bruggink concluded: "[I]f the Constitution doesn't protect private property under these circumstances, then I don't think it's worth the paper it's written on." JA4624-25.

The panel reversed Judge Bruggink's finding of a taking not by disputing his painstaking *Penn Central* analysis, but rather by reaching the astonishing conclusion that APFC never had a property interest protected by the Fifth Amendment in using its fishing vessel to fish. The panel reasoned that APFC bought its vessel after Congress adopted the Magnuson Act, which authorized the

government to regulate fishing within the EEZ. According to the panel, the U.S.'s rights over "conservation and management of the EEZ" (A23) "precluded any permitted fisherman from possessing a property right in his vessel to fish" (A24). The panel thus held that the Fifth Amendment does not protect property uses over which the government has regulatory power. That ruling eliminates constitutional protection against regulatory takings.

The implications of the panel's decision are staggering. At minimum, it places the fishing, airline, transportation, and mining industries – all of which invest huge sums in personalty (vessels, airplanes, trucks, equipment) used in heavily regulated public areas – on notice that the uses they currently "enjoy," though now legal, are simply "use[s] * * * that the government [has not yet] chose[n] to disturb." A20. The government may at any time, according to the panel, adopt unforeseeable use restrictions rendering such property valueless, yet risk no obligation to pay just compensation.

What is more, the panel did not limit the reach of its ruling to personalty or uses requiring access to public resources. Real property, too, is acquired subject to use-restricting regulations. Under the panel's analysis, such zoning and wetlands regulations would foreclose real property owners from acquiring a compensable property right to, for example, build houses or hotels. As the Supreme Court and this Court have made clear in numerous cases, that is simply not the law.

The panel's decision is irreconcilable with the Supreme Court's decision in

Lucas, 505 U.S. at 1030, which held that the Fifth Amendment protects an owner's interest in using property in any manner not specifically excluded from its title by "background principles" of common law. Use of a vessel to fish in the EEZ was not proscribed by any such "background principles" – let alone by the Magnuson Act or its regulations – when APFC purchased the *Atlantic Star*.

The panel decision also conflicts with this Court's decisions in *Cienega Gardens* and *Chancellor Manor*. Those cases squarely hold that the mere fact that a property use is regulated does not exclude it from an owner's title and preclude a takings claim, as the panel held. Rather, the presence and scope of regulation is but a factor in the reasonable expectations analysis under *Penn Central*. Thus, a preexisting regulatory regime defeats a takings claim only if it made adoption of the specific regulation at issue ***reasonably foreseeable***. The panel did not dispute the trial court's finding that the vessel legislation was not reasonably foreseeable notwithstanding the Magnuson Act and its implementing regulations.

Nor can the panel's decision be justified by construing it to apply solely to uses of personalty that require access to regulated public resources, such as the EEZ and internal waters, federal lands, and highways. Abundant precedent establishes that the Fifth Amendment fully applies to takings of personalty whose use requires access to such public resources. Indeed, the panel's decision squarely conflicts with *Pete* v. *U.S.*, 531 F.2d 1018 (Ct. Cl. 1976), a binding precedent which found a compensable property interest in vessel use in federally regulated

waters within a national park.

The full Court should vacate the panel's radical revision of regulatory takings jurisprudence to prevent the Takings Clause from becoming a dead letter.

FACTUAL BACKGROUND[1]

During the mid-1990s, federal agencies actively urged U.S. fishermen to build large fishing vessels for deployment in the woefully underfished Atlantic mackerel and herring fisheries. Lisa Torgersen, a Seattle resident with extensive experience in the fishing industry, accepted the government's invitation. She established APFC, which invested $40 million in the *Atlantic Star*, a state-of-the-art vessel designed to ensure "clean" mackerel and herring fishing, minimizing by-catch and other incidental environmental impacts. JA602. In early 1997, the National Marine Fisheries Service ("NMFS") issued all required permits.

Ms. Torgersen knew that the regulations governing this area of the fishing industry were highly favorable. JA595-96. They required NMFS to issue and renew mackerel permits to all qualifying ships satisfying its conditions. 50 C.F.R. §648.4(e), (j). Further, NMFS had never revoked any permits (JA662-63), and the government previously had compensated permit holders when it reduced fishing capacity (JA730, 793). Ms. Torgersen also knew that entry into these fisheries provided a vessel with valuable "historical fishing rights" that protected against

[1] For a more complete factual statement with record citations, see Appellee Brief 2-16 and the trial court's opinions (A31-A63).

later imposition of entry or catch limits. JA730, 793, 3566.

As word of the *Atlantic Star* spread, opposition arose among local fishermen who feared competition from the more efficient vessel. A34. New England Fishery Management Council members proposed specific size limits that would exclude only the *Atlantic Star* and not their own vessels. JA825, 842. Legislation with similar size limits was then introduced in Congress. A34. Congress enacted appropriations legislation in November 1997 – five days before the *Atlantic Star* was to launch – incorporating similar vessel size limits that abrogated the *Atlantic Star*'s existing permits and barred it from obtaining a permit to fish "in any U.S. fishery within the EEZ." A6. "[N]o other vessel was affected by the legislation." *Id*. Indeed, the legislation grandfathered all other vessels in the EEZ that exceeded the new size limits, excluding only the *Atlantic Star*. See Appellee Br. 33.

It is undisputed that the legislative record lacked any evidence that the *Atlantic Star* in particular, or large vessels in general, threatened environmental harm. A36. According to Senator Snowe, who sponsored the legislation, the fish stocks were "healthy" but "she had key constituents [who] were against" entry of the *Atlantic Star*. JA3559.

This new vessel legislation was the first in history to abrogate a vessel's existing permits. JA678. It deprived the *Atlantic Star* of all economically viable use for 19 months, and Ms. Torgersen lost her "entire equity investment." JA617.

Judge Bruggink found that APFC's property right to use its vessel to fish

subject to regulation had been temporarily taken under *Penn Central*. After a trial on damages, the court awarded APFC just compensation equal to the vessel's fair rental value during the takings period. The panel reversed without engaging in a takings analysis, holding that the Fifth Amendment did not protect APFC's property interest in use of its vessel. A29.

ARGUMENT

I. THE PANEL'S RULING CONFLICTS WITH BINDING PRECEDENT

A. The Panel's Ruling Conflicts With *Lucas*

The Fifth Amendment protects a property owner's interest in using its property in any manner not excluded from its title by "background principles" of property law. *Lucas*, 505 U.S. at 1030. Use of a vessel to fish in the open sea not only was not proscribed by any background principles at the time APFC purchased the *Atlantic Star*, it has been recognized as a common law right for centuries.

The panel ruled that "background principles" did exclude use of the *Atlantic Star* to fish in the EEZ from APFC's title because, prior to APFC's purchase, the Magnuson Act established the government's "sovereign rights" to "conserve and manage the fishery resources found off the coast of the United States." A22 (quoting 16 U.S.C. §§1801(b)(1), 1811). According to the panel, the government's assertion of a right to regulate fishing "precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ." A24. The panel's ruling cannot be reconciled with *Lucas*.

Under *Lucas*, a particular use is not excluded from property title unless it has "always" actually been ***"unlawful"*** under "existing rules or understandings." 505 U.S. at 1030. Even assuming that the Magnuson Act is the sort of common law background principle the Court had in mind in *Lucas* – a highly dubious proposition[2] – it is ***undisputed*** that APFC's use of its vessel was ***not*** "unlawful" (*id.*) under either the Magnuson Act or its regulations at the time APFC acquired the *Atlantic Star*. Indeed, it was precisely because operation of the *Atlantic Star* was indisputably ***permissible*** under the Magnuson Act and its regulations – as evidenced by the fact that NMFS issued to the *Atlantic Star* all required permits – that Congress enacted ***entirely new*** legislation to accomplish its aim of banishing the vessel. *Lucas* held that "prohibit[ions on] all economically beneficial use * * * ***cannot be newly legislated***" without compensation. *Id.* at 1029 (emphasis added).

Nor was use of a vessel to fish in the EEZ "unlawful" under background principles of common law. Indeed, using a vessel to fish in the open sea has long been a common law right, which Congress took care not to abrogate in declaring the government's regulatory authority in the Magnuson Act. Congress explicitly recognized that, "[f]or well over 300 years, one of the most basic principles of the

[2] *Lucas* made clear that the "background principles" exception is narrow, limited to nuisances and dangerous or "noxious" activities long proscribed under common law and therefore understood not to inhere in one's title. 505 U.S at 1030. Thus, for example, title to a mine does not include the right to use it so as "to endanger the public health." *M&J Coal Co.* v. *U.S.*, 47 F.3d 1148, 1154 (Fed. Cir. 1995).

freedom of the seas has been the freedom of fishing," that is, "free and open access to all stock on the high seas." H.R. Rep. No. 94-445, at 24 (1975).[3] The Magnuson Act itself emphasizes that the Act introduced "no impediment to, or interference with, [such] recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter." 16 U.S.C. §1801(c)(2).[4]

Nonetheless, the panel maintained that the government's authority to regulate fishing could not co-exist with vessel owners' property rights to use their vessels to fish. It reasoned: "Plainly, rendering the ability to fish in the EEZ a matter of governmental permission, rather than a property right, is 'necessary for the conservation and management of fishery resources.'" A25. But the federal government's regulation of fishing no more precludes a vessel owner from

[3] The right to use a fishing vessel to fish on the open seas dates back to ancient times and has been an integral part of the common law since the 17th century. See GROTIUS, FREEDOM OF THE SEAS 26 (1633) (Oxford U. Press 1916). International treaties also recognize the right to fish in the high seas. *1958 Geneva Convention on the High Seas*, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, arts. 1-2.

[4] The inherent right to use a vessel to fish on open waters distinguishes this case from *Mitchell Arms* v. *U.S.*, 7 F.3d 212 (Fed. Cir. 1993), on which the panel relied (A28). "The holding that there was no property interest in *Mitchell Arms* [is] limited to those cases in which the interest at issue does not inhere to some property that the plaintiff owns independently." *Cienega Gardens*, 331 F.3d at 1335-36. The Court in *Mitchell Arms* distinguished the "right to mine" that is "inherent" in ownership of a mine from an expectation to import and sell assault weapons in the U.S., which does not inhere in their ownership. 7 F.3d at 217. The longstanding right to fish in ocean waters is at least as inherent in ownership of a fishing vessel as the right to mine referenced in *Mitchell Arms*.

possessing a right to use a vessel to fish than local governments' regulation of building precludes a land owner from possessing a right to use land to build houses or hotels. In each case, the owner ***possesses a right to use his property in a manner recognized at common law, subject to regulation***. Although the government unquestionably has regulatory ***power*** to limit or banish such uses, it must pay just compensation when it exercises that power in a manner found confiscatory under a *Penn Central* analysis.

The panel suggested that, by asserting "sovereign rights" over fishing in the EEZ, the government acquired "ownership" of the fish, thereby precluding what it perceived as a competing property claim by APFC in using its vessel to fish. A24. But the Supreme Court has rejected the cases on which the panel relied (*id*.), holding that the government's "sovereign rights" over fishing do ***not*** constitute "ownership" of fish and ***are*** subject to constitutional limitations:

> [I]t 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 possession by skillful capture. * * * Under modern analysis, the question is simply whether the State has exercised its police power ***in conformity with the federal laws and Constitution.***

Hughes v. *Oklahoma*, 441 U.S. 322, 334-35 (1979) (emphasis added) (*quoting Douglas* v. *Seacoast Prods.*, 431 U.S. 265, 284 (1977)).

Further, it is indisputable that the U.S. does not "own" the EEZ as a

proprietor.[5] Indeed, the U.S. does not even claim full "sovereignty" over the EEZ as it does over the landmass of and airspace over the United States See, *e.g.*, 49 U.S.C. §40103(a)(1). Rather, within the EEZ, it asserts only limited "sovereign rights" (16 U.S.C. §1811) for the "management of natural resources and other economic activities" (RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF U.S. §514 & cmt. c (1997)).[6] Moreover, even an assertion of full "sovereignty" is not inconsistent with possession of private property interests within the sovereign territory, as evidenced by the fact that private citizens own property within the territorial United States.

B. The Panel's Ruling Conflicts With Governing Precedents That Recognize Property Rights Subject To Government Regulation.

The panel ruled that there can be no property right to use property in a manner that requires "governmental permission." A25. That ruling conflicts with

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[5] This case thus does not present conflicting claims of two proprietary owners. Cf. *Washoe County* v. *U.S.*, 319 F.3d 1320, 1327-28 & n.5 (Fed. Cir. 2003) (distinguishing citizen's claim of right to use land held by government as proprietary "landowner" from claim of right to use "navigable waters" where the government acts as ***regulator***).

[6] "'Sovereign rights' over the exclusive economic zone [are] rights for specific purposes and thus do not permit a state to exercise full powers over these areas, as 'sovereignty' might allow." Brilmayer & Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator,* 33 N.Y.U. J. Int'l L. & Pol'y 703, 703 n.2 (2001). The Governance Working Group of the U.S. Commission on Ocean Policy similarly explains that the U.S. has not asserted "broad control" over the EEZ "in the same way that we have asserted responsibility for onshore public lands." http://oceancommission.gov/commission/groups/governance.html.

the Court's decision in *Cienega Gardens*, 331 F.3d at 1330, that "enforceable rights sufficient to support a taking claim" ***do*** "arise in an area voluntarily entered into * * * which, from the start, is subject to pervasive Government control." It also conflicts with the Court's decision in *Chancellor Manor*, 331 F.3d at 903, that government regulation does not preclude acquisition of a cognizable property interest but rather is "an issue germane to the *Penn Central* analysis." Both decisions hold that preexisting regulations do not defeat a takings claim unless they made adoption of the specific regulation at issue ***reasonably foreseeable***. The panel did not dispute the trial court's holding that the new vessel size limits were not reasonably foreseeable. The panel's ruling also conflicts with the scores of cases requiring a takings analysis where the proscribed use was subject to pervasive government regulation, including permit requirements.[7]

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[7] *E.g.*, *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687, 699 (1999) (affirming verdict for developer on takings claim based on permit denials); *Dolan* v. *City of Tigard*, 512 U.S. 374, 395 (1994) (governmental conditions on development permit took property interest); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("the right to build on one's own property" is subject to the Takings Clause "even though its exercise can be subjected to legitimate permitting requirements"); *Hodel* v. *Irving*, 481 U.S. 704, 712 (1987) (engaging in taking analysis where Congress had "broad authority to regulate the descent and devise of Indian trust lands"); *Bass Enters.* v. *U.S.*, No. 03-5056 (Fed. Cir. Aug. 31, 2004) (applying *Penn Central* factors to analyze whether delay in approving drilling permit was temporary taking); *Appolo Fuels* v. *U.S.*, No. 03-5088 (Fed. Cir. Aug. 30, 2004) (analyzing whether rejection of mining permit was a taking); *Cooley* v. *U.S.*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) (remanding for takings analysis of fill permit denial); *Loveladies Harbor* v. *U.S.*, 28 F.3d 1171, 1182 (Fed. Cir. 1994) (denial of fill permit was taking); *Yancey* v. *U.S.*, 915 F.2d 1534, 1540 (Fed. Cir. (cont'd)

C. The Panel's Ruling Conflicts With Governing Precedents That Recognize Property Rights In Uses That Require Access To Public Resources.

The panel did not suggest that its holding was limited to uses of personalty requiring access to public resources. Regardless, such a construction would not save the decision from conflict with governing precedent, including *Pete* and *Maritrans*. The facts in *Pete* are indistinguishable in any relevant respect from those here. The plaintiffs built three floating cabin barges for commercial use on a lake that was part of the Superior National Forest.[8] When Congress changed the laws governing that part of the national forest, creating the Boundary Waters Canoe Area (BWCA), it barred operation of all such commercial enterprises. *Pete*, 531 F.2d at 1020-21. The government argued that "loss of the use" of the barges was not compensable because it was merely "an unintended incident" of government regulation of an area that had been a national park prior to plaintiffs' investment. *Id*. at 1033. The Court rejected that argument, holding that the change

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(… cont'd)

1990) (regulation to control disease took personal property notwithstanding "Government's proper exercise of regulatory authority"); *United Nuclear Corp.* v. *U.S.*, 912 F.2d 1432, 1437-38 (Fed. Cir. 1990) (leasehold interest to mine was property for purposes of Takings Clause notwithstanding need for government approval).

[8] *Pete* involved only the plaintiffs' personal property, *i.e.*, the barges. Their real property was the subject of an independent case, *U.S.* v. *967.905 Acres of Land*, 447 F.2d 764, 765 (8th Cir. 1971), which confirms that the barges long had been situated within the national forest, *i.e.*, regulated public lands.

in laws that rendered Pete's barges "useless" effected a taking. *Id.* at 1035. *Pete* establishes unequivocally that banishing commercial use of a vessel in regulated public waters ***can*** take property and require compensation.

The Supreme Court and this Court have reached the same conclusion in numerous cases where the use of private property required access to public resources. *E.g.*, *Monongahela Navigation Co.* v. *U.S.*, 148 U.S. 312, 336 (1893) (finding a taking of plaintiff's right to obtain tolls from locks and dams constructed on navigable waters despite the federal government's "supreme control" over commerce and navigation); *Palm Beach Isles Assocs.* v. *U.S.*, 208 F.3d 1374, 1384 (Fed. Cir. 2000) (rejecting government's contention that "there never can be a taking of property" situated in navigable waters subject to the federal government's regulation and control); *Skaw* v. *U.S.*, 740 F.2d 932, 939-41 (Fed. Cir. 1984) (vacating summary judgment to government and remanding for analysis of whether restrictions by U.S. Forest Service on unpatented mining rights constituted a taking); *Laney* v. *U.S.*, 661 F.2d 145, 149-50 (Ct. Cl. 1981) (same); *Branning* v. *U.S.*, 654 F.2d 88, 98 (Ct. Cl. 1981) (government's "plenary power to regulate navigable airspace [does] not afford a blanket exemption from the taking clause").

The panel's ruling also conflicts with *Maritrans Inc.* v. *U.S.*, 342 F.3d 1344, 1353 (Fed. Cir. 2003), where the Court rejected the government's argument that Maritrans lacked a "cognizable property interest" because the restricted use required access to public waterways. The Court explained that, although the

restricted use of Maritrans' vessels was of public waters, "those facts do not somehow diminish or eliminate the basic property interest that Maritrans has in its [vessels]." *Id.* There is no principled basis for a different conclusion here. APFC too held a "basic property interest" in its vessel which was taken by restriction of its "use of public waters." *Id*. The panel's argument that the property interest in *Maritrans* was in the vessel itself rather than "in the use of its vessels in the navigable waters of the United States" (A29-A30 n.21) thus applies equally here. Regardless, it was precisely that distinction that *Maritrans* rejected as a spurious basis for failing to apply the *Penn Central* analysis. *Id*. Finally, the takings claim failed in *Conti* v. *U.S.*, 291 F.3d 1334 (Fed. Cir. 2002), not for lack of a property right to use gear to catch swordfish, as the panel states (A28), but because the gear had alternate uses that foreclosed a severe economic impact. *Id*. at 1343-44.[9]

[9] As in *Maritrans*, that evaluation of economic impact would have been pointless if there were no property right to begin with. Even if footnote 8 of *Conti* could be construed to suggest a lack of a property right because use of a vessel to catch swordfish "was dependent upon a revocable permit" (A28), no such permit was involved here. Unlike in *Conti*, APFC's mackerel permit was not revocable except for cause, indisputably absent. The mackerel regulations expressly state that a mackerel "permit ***will continue in effect*** unless it is revoked, suspended, or modified under 15 CFR part 904" (50 C.F.R. §648.4(h) (emphasis added)), and part 904 authorizes revocation only for offenses or for reasons specified in specific permit provisions (15 C.F.R. §904.300(a)). Although the enforcement provision states that "Nothing in this [enforcement] subpart precludes sanction or denial of a permit for reasons not relating to enforcement," the mackerel permit provisions contain no other grounds for revocation and state that, absent such other grounds, the permit "will continue in effect." 50 C.F.R. §648.4(h); see also 16 U.S.C. §1858(g) (authorizing revocation only as sanction for violations). The government (cont'd)

II. THE PANEL'S RULING THREATENS DESTRUCTION OF PROPERTY RIGHTS ON A VAST SCALE.

Whether barring a particular use takes property requires a concrete analysis of "particular circumstances." *Penn Central*, 438 U.S. at 124. The panel's ruling circumvents that requirement by transforming the reasonable expectations prong of *Penn Central* into a threshold bar to the very existence of a property interest.

The implications of that novel ruling are extraordinary and extend far beyond the EEZ to all public waters, lands, and airspace over which the government exercises sovereign rights or regulatory jurisdiction. Indeed, it would immunize confiscatory bans on ***any*** use of property requiring a permit. Permits are required for a barge to carry freight on a river, for a truck to carry cargo on public highways, and for a steel mill to produce steel. That cannot mean that barring barge or truck transport or steel production would implicate no property right.

The panel's ruling would authorize the government to accomplish by legislation what it could not accomplish by physical seizure – complete abrogation of a use of property without just compensation. The Court en banc should reject such judicial revision of the Fifth Amendment.

CONCLUSION

The Petition for Rehearing en Banc should be granted.

(… cont'd)

formally admitted below that it had no discretion to deny renewal of a permit absent noncompliance with regulations. JA 907.

September 30, 2004

Respectfully submitted,

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ADDENDUM

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 30, 2004 she caused two copies of the Petition for Rehearing en Banc of Plaintiff-Appellee American Pelagic Fishing Company, L.P. to be served upon the following by U.S. Postal Service first-class mail:

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