

HB

359

(1979)

COMMITTEE REPORT
SENATE

3/27/79

FURTHER: None

Date: _____

Mr. President:

The Committee on RESOURCES has had HB 359 am
salmon enhancement

under consideration and (a majority of the committee) (the committee)
reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for SUB HB 359 same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Handwritten signatures]

CHAIRMAN

A M E N D M E N T

Offered in the SENATE

By Sumner

TO: SENATE CS FOR HOUSE BILL NO. 359

Page 2, line 15:

Delete "harvest of broodstock" and insert in its place "source and number of salmon eggs, the harvest of"

OFFICE OF THE GOVERNOR

The Honorable Bill Sumner
Chairman
Senate Resources Committee
Alaska State Senate

April 2, 1979

Bob Palmer
Special Projects Coordinator
Office of the Governor

Letter of Intent for
House Bill 359 Amended

The following is a suggested text for a letter of intent for HB 359 am, which will be signed by you.

"The intention of the Legislature in enacting AS 16.10.375-620 was to encourage the construction and operation of salmon hatcheries by the private sector and to do so with no more restriction and bureaucratic red tape than is reasonably required.

"AS 16.10.400 specifies that the Commissioner of the Alaska Department of Fish and Game or his designee may issue a permit for the construction and operation of a private, non-profit hatchery. The Department has established a very thorough permit application and evaluation process involving both preliminary and final permit application forms, comments on both by all relevant divisions of the Department, public hearings on the final application and review by the Regional Planning Team to ensure compatibility with the Regional Comprehensive Plan.

"The changes in AS 16.10.440(a) and (b) in this bill are to clarify the role of the Board of Fisheries.

"The language added to AS 16.10.440(a) clarifies that the Board of Fisheries may adopt regulations relating to the harvest of the fish by hatchery operators at the specifically designated locations.

"The repeal of AS 16.10.440(b) in this bill limits the function of the Board of Fisheries to that specified in AS 16.10.440(a), eliminates any possibility of conflict between the Board of Fisheries and the Department of Commerce in section .470(b) and leaves the permitting authority completely to the Commissioner of the Alaska Department of Fish and Game."

ADDITIONAL AMENDMENT

Page 2, line 15

After "relating to the"

ADD "broodstock,"

Page 2, line 15

After "operators"

Delete "at"

ADD "and"

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(907) 272-6225

Box 27
Hope, Alaska 99605

April 2, 1979

Honorable Bill Sumner
Chairman, Senate Resources
Committee
Alaska State Senate
Juneau, Alaska 99811

Re: House Bill 359 am, an Act Relating to Salmon Enhance-
ment

Dear Senator Sumner:

The Speaker has requested that I contact you regarding the above referenced bill. I am currently representing Southern Southeast Regional Aquaculture Association, Inc., in a lawsuit wherein the statutory structure authorizing the regional associations and providing for their financing mechanism is under challenge on constitutional grounds. Specifically, the focal issue of the lawsuit is whether A.S. 16.10.530 is an unconstitutional delegation of the taxing power to an entity other than an organized borough or city in violation of Art. 10, § 2 of the Alaska Constitution. House Bill 359 am was drafted in order to eliminate all but the focal issues in the case, and is also designed to preserve the economic viability of the private associations. The purpose of this letter is to comment on proposed changes in the law necessary to maintain the present system.

Enclosed with this letter is a copy of SSRAA's brief in Superior Court. The brief is long, and I do not suggest that you read it for the purposes of understanding this letter. It does, however, discuss a number of constitutional issues with regard to the State's natural resources that you may be interested in reviewing on another date. Also enclosed is a copy of the House Journal for March 15, 1979. On pages 598-603 of that day's journal is the House Resources' letter of intent with regard to this bill.

Presently, there are five regional associations in existence: two in Southeast Alaska, one in Prince William Sound,

one in Cook Inlet, and one in Dillingham. The two Southeast Alaska associations and the Cook Inlet Regional Aquaculture Association have held assessment elections pursuant to A.S. 16.10.530 and have instituted the assessment in their regions. Southern Southeast Regional Aquaculture Association broke ground on a hatchery a year and a half after it was organized. All of the associations have been set up jurisdictionally along fish and game management units boundaries, and this is one of the problems that lead to the above referenced lawsuit. Art. 10, § 2 of the Alaska Constitution directs that the taxing power shall not be delegated to entities other than organized boroughs and cities. It is true that in a geographic sense the boundaries do occasionally overlap.

Sections Five and Six of Article 10 provide that the legislature may establish services areas in the unorganized borough and authorize the levying of taxes, charges or assessments to finance the special services. We have taken the position in the lawsuit that the assessment is not a tax, that there is not a delegation, and that in any event the private associations fit the meaning of a service area within the unorganized borough.

The Bill.

Section 1 of the bill, findings and purpose, are designed to make the legislature policy clear. In the House the FRED division objected to the emphasis on efficient aquaculture development in subparagraphs 5, 6, 7, and in paragraph B of the findings and purpose clause. The emphasis is on efficient in the findings and purpose because of the obvious efficiency in private organizations over the FRED division, and the emphasis on efficient aquaculture development in Art 8, § 15 of the Alaska Constitution.

Section 2 of the Bill is not directly related to the lawsuit. It clarifies the original intention of the Legislature that the Board of Fisheries jurisdiction over the regional associations is limited to the harvest of fish by the hatchery operators at specific locations. That section can best be explained by the Speaker or his assistant John Sund.

In Sections 3, 4 and 5 the word "royalty" is inserted before assessment. That is the only change in those sections and the change is designed to diminish any possibility that the assessment may be construed as a tax.

Section 6, p. 3, on lines 21 to 22, the language "licensed" and "A.S. 16.05.540 - 16.05.600" is deleted and the language "holding entry permits" and "A.S. 16.43.010-16.43.080" is inserted in its place. The assessment is levied on salmon harvested by commercial fisherman. The deleted language refers to persons holding gear licenses. Those sections were repealed last year and this chore would normally be reserved for the revisor of statutes but it was thought to be smoother to tag it to persons holding permits rather than persons holding gear licenses.

Section 6 also sets the lid on the assessment of 3% of the fair market value of the fish. Rather than explain it here, I will explain it later in this letter since I have a proposed language change for it.

Section 6 creates additional means by which the assessment may be terminated. New paragraph G of section .530 is designed to give more control to the Commissioner of Commerce and Economic Development over the continuance of the assessment and to strengthen the argument that the taxing power is not delegated unconstitutionally. New paragraphs (d)(2) and (h) of section .530 are the result of a floor amendment. It has political implications for the associations themselves but does not appear to have any affect upon the issues in the lawsuit.

Section 7 makes it clear that the finding by the Commissioner of Commerce and Economic Development that the assessment is reasonable is subject to the Administrative Procedure Act. Section 8, the repealer, must be reviewed in conjunct with section 2 discussed above.

PROPOSED LANGUAGE CHANGES

P. 2, lines 1-3 Change Subparagraph (9) of the findings to read

"(9) the most equitable and nondiscriminatory method for providing revenue for regional salmon enhancement is to authorize regional associations to assess percentage royalty shares against those persons commercially harvesting the resource within the region."

This proposed change states the necessary finding with regard to the regional association more clearly.

P. 4, lines 4-6 Delete the following proposed language

"the royalty assessment may not exceed 3% of the fair market value of the fish"

and insert in its place the following:

"The royalty assessment rate requested may be equal to either 2% or 3% of the fair market value of the fish. In no event shall it exceed 3%."

The purpose of this amendment is to make it clear that the Legislature is setting the rate of the assessment. A certain degree of flexibility has to be provided for, however, because some associations are choosing to proceed with central incubation facilities (hatcheries) which necessarily require a significant start up capital, whereas others are choosing enhancement methods of stream clearances or small hatcheries. The design of the amendment is to further dilute the suggestion that the law unconstitutionally delegates a taxing power. I believe the most significant argument that can be made that the current Section .530 is indeed an unconstitutional delegation lies in the fact that no specific assessment figures are established.

P. 3, line 19 After "game" and before the comma insert

"and reaching any necessary agreements with local government".

This proposed change goes to the heart of the lawsuit. One of the problems that has concerned me when realistically reviewing plaintiffs' claims in the lawsuit is that the geographic boundaries do overlap. Art. 10, § 13 of the Alaska Constitution provides that agreements may be made between local government and the state for "cooperative or joint administration of any function or power". In conjunction with similar language already in the municipal government section, I believe this proposed language change makes it clear that in the areas where sound fisheries biology requires an overlapping of geographic jurisdictions, that the State, the qualified regional associations and the local government entities possibly affected can enter into a cooperative agreement regarding the assessment. This agreement can take the form of local government merely stating that they have no objection to the levying of the assessment within their geographic boundaries, or in the instance of a local government which is actually levying a tax on the sale of fish (which is occurring in Naknek) that the assessment may not be levied within the jurisdiction wherein the tax is being levied.

The case in court is a close call, frankly, and I believe that House Bill 359 am with the proposed language changes and additions will cure any constitutional defect. I am

available to meet with you and the Speaker, and upon your request I will be available to make comments to the Committee. I do not wish to have the appearance of urging policy changes on any members of the Legislature, since I feel that that would be in conflict with my present status as a contractor to members of both the House and the Senate. I will be in Juneau April 6th through 10th and will be available to speak with either of you during that time period.

Sincerely,



Douglas Pope

DP/emm

cc: Honorable Terry Gardiner
Speaker, Alaska State House
Of Representatives

Letter of Intent for House Bill 359 am

The intention of the Legislature in enacting AS 16.10.375-620 was to encourage the construction and operation of salmon hatcheries by the private sector and to do so with no more restriction and bureaucratic red tape than is reasonably required.

AS 16.10.400 specifies that the Commissioner of the Alaska Department of Fish and Game or his designee may issue a permit for the construction and operation of a private, non-profit hatchery. The Department has established a very thorough permit application and evaluation process involving both preliminary and final permit application forms, comments on both by all relevant divisions of the Department, public hearings on the final application and review by the Regional Planning Team to ensure compatibility with the Regional Comprehensive Plan.

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The language added to AS 16.10.440(a) clarifies that the Board of Fisheries may adopt regulations relating to the harvest of the fish by hatchery operators at the specifically designated locations.

The repeal of AS 16.10.440(b) in this bill limits the function of the Board of Fisheries to that specified in AS 16.10.440(a), eliminates any possibility of conflict between the Board of Fisheries and the Department of Commerce in section .470(b) and leaves the permitting authority completely to the Commissioner of the Alaska Department of Fish and Game.

Cordova District Fisheries Union

Headquarters: Box 939, Cordova, Alaska



March 23, 1979

359

Senator Bill Sumner
Chairman, Senate Resource Committee
Pouch V
Juneau, Alaska 99811

Dear Senator Sumner:

We understand that HB 359 passed out of the House and into the Senate on March 22nd. It is somewhat disheartening to be constantly exposed to bills being passed back and forth with only cursory review, and then getting hit between the eyes by laws that have far reaching and dramatic effects.

HB 359 appeared relatively innocent at first reading until we took time for a second review with a pessimistic approach. We are very much concerned with the controversy and problems that could and probably will be created with a portion of Section 1 - Findings and Purpose, and with the exemption of the Alaska Board of Fisheries involvement in the process.

We have reviewed the bill with the ADF&G-FRED Division and the Commercial Fish Division and support the amendments the department has proposed to relieve our fears.

The proposed amendments are as follows:

Section 1 Findings and Purpose (a) (5) ^{Increased involvement of other than Board} Regional user involvement in salmon enhancement planning and production will promote maximum benefit to the users.

(8) Regional Associations comprised of user groups will effectively promote aquaculture development in the State.

Amend Page 2 - Lines 14 and 15 to read as follows:

by hatchery operator. (b) The Board of Fisheries may adopt regulations necessary to implement 400 to 460 ^(less 70) of this chapter, in accordance with the Administrative Procedures Act (AS44.62), relating to etc.

On Page 6 - Line 4 - Delete the whole line that states:
(Sec. 8 AS 16.10.440 (b) is repealed)

We sincerely hope that the Senate will adequately review this bill before it acts on it and amends it to conform with the recommended changes.

Sincerely,

Bob Blake
Bob Blake
Chairman

BB:jmr

cc: To all Members of the Senate

TO: [The Honorable Bill Sumner
Chairman
Senate Resources Committee
Alaska State Senate

DATE: April 2, 1979

FILE NO:

TELEPHONE NO:

FROM: Bob Palmer *BP*
Special Projects Coordinator
Office of the Governor

SUBJECT: Letter of Intent for
House Bill 359 Amended

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"The intention of the Legislature in enacting AS 16.10.375-620 was to encourage the construction and operation of salmon hatcheries by the private sector and to do so with no more restriction and bureaucratic red tape than is reasonably required.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT, AT JUNEAU

WAYNE ALEX, WILLIAM A. THOMAS,)
JR., ED MAKI, JOHN C. MARTIN,)
WARREN S WESTROM, DICK WORKMAN,)
MARK W. WHITE, CARL SINS, BRUCE)
R. GILBERT, FRED CHAMBERS, DOUGLAS)
D. KARNS, HAROLD D. BIELESKI and)
LEO R. ALBECKER, JR.,)

Plaintiffs,)

vs.)

SOUTHERN SOUTHEAST REGIONAL)
AQUACULTURE ASSOCIATION, ET AL.,)

Defendants.)

No. 1JU-78-191 Civil

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OF SOUTHERN SOUTHEAST REGIONAL
AQUACULTURE ASSOCIATION, INC.

February 15, 1979

Douglas Pope
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 272-6225

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- Rogers, The Future of Alaska (1962) 26 fn
- Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 1970 Michigan Law Review 471. 32 fn
- Schwartz, American Constitutional Law (1963) . . . 78-79
- The Alaska Constitution and The State Patrimony: The Constitution and Natural Resources, Public Administration Service (1955). 32 fn

INTRODUCTION

It is the position of defendant, Southern Southeast Regional Aquaculture Association that a regionally initiated assessment of a royalty share of the fishery harvest, from the exclusive class of commercial fishermen for the express purpose of fisheries enhancement by a quasi private organization, subject to plan approval by the State, is constitutionally permissible. Plaintiffs would have this court look to the assessment in isolation for the purpose of determining whether the aquaculture programs stand upon firm ground. Such a simplistic approach to a question requiring detailed analysis of constitutional, executive and legislative policy does not do justice to the growth and interaction of these policies. With that in mind defendant has constructed the memorandum in support of this motion for summary judgment in such a manner that this court will have a full opportunity to review the interacting policies dealing with the natural resource bounty of our State, local governments and revenues. There is a clearly emerging doctrine of flexibility with regard to the raising and use of revenues from clear identifiable exclusive classes within the private sector for purposes which will most directly and demonstrably benefit the exclusive class. The unique role of the legislative and executive branches in Alaska delegated by the constitution for the purpose of developing and enhancing common property resources of the State adds dimension to this emerging doctrine of flexibility. To fully understand the added dimensions to this doctrine of flexibility the court must grasp the state of evolution of fundamental constitutional doctrines at this point in history in American and Alaskan society.

It is also defendant's position that plaintiffs have totally ignored many fundamental procedural requirements basic to the judicial process while seeking judicial intervention into a domaine primarily involving executive

and legislative policy functions. The failure to address those threshold requirements by the plaintiffs is developed in a different section of this memorandum. Most of these procedural issues require detailed factual analysis. The court should note that discovery is still proceeding on these detailed questions, but should be completed prior to argument in this case. Should the court find that there are genuine material issues of fact regarding the procedural issues that must be further explored it is not necessary to do so if defendants are entitled to summary judgment as a matter of law on the substantive issues discussed herewith.

No fundamental issues in this lawsuit initiated by plaintiffs have yet been resolved. As frequently happens when a party moves for summary judgment in its entirety upon the pleadings alleged as supported by depositions, affidavits and appendages, it is necessary for the moving party to discuss in detail each and every one of the issues raised by the plaintiffs regardless of varying weights of comment those issues raised actually deserve. For example, plaintiffs have alleged equal protection violations but have primarily focused on what they perceive to be a delegation of a taxing power. Even though they raise an equal protection issue without further alleging that the legislature is powerless to enter the field through the means they have chosen, it is still necessary for the defendants to dispose of that allegation. Defendant believes however, that discussion of such issues as equal protection, in a meaningful manner, will result in providing the court with a better background for the purpose of ruling on the issues that plaintiffs have focused upon so far. For this reason equal protection is discussed first in this memorandum, after the background material is developed.

STATEMENT OF THE CASE

On March 15, 1978, plaintiffs filed this lawsuit. On behalf of themselves and on behalf of a putative class of persons "consisting of all fishermen who have fished, wish to fish in Southeast Alaska" plaintiffs request that the enabling legislation providing for regional aquaculture associations pursuant to A.S. 16.10 be declared unconstitutional, that mandatory assessments of shares from the common property fisheries reduced to capture by commercial fishermen of the State pursuant to A.S. 16.10.530 be declared unconstitutional, and that all such shares paid by plaintiffs and the putative class they purport to represent be returned. On May 11, 1978, plaintiffs requested production of material relating to: (1) the implementation of A.S. 16.10 in the Northern and Southern region of Southeast Alaska; (2) the promulgation of any regulations emergency or otherwise promulgated thereunder; (3) the recognition of the Southern Southeast Regional Aquaculture Association and the Northern Southeast Regional Aquaculture Association by the Department of Fish and Game; (4) the elections held by said associations; and (5) the assessment and levy of assessments conducted pursuant to A.S. 16.10. On May 25, 1978, after answers by all parties, plaintiffs moved for partial judgment on the pleadings regarding the issues of (1) whether the class is so numerous that joinder of all members is unpracticable; and (2) whether there were questions of law common to the class. Defendants Southern Southeast Regional Aquaculture Association then moved for a protective order regarding some of the matters requested in plaintiffs' request for production. Earlier, defendant Southern Southeast Regional Aquaculture Association had moved to void the return of service of summons or to dismiss the action against the Southern Region. On June 16, 1978, this court granted that motion to void the

return of service and summons, and finished that order by stating "other issues raised by these defendants will be held in abeyance pending these defendant's production and plaintiffs' response." Plaintiffs have never responded to defendant's motion for protective order.

In the meantime, the Northern Region held elections pursuant to A.S. 16.10.530, and as of May 17, 1978, regulations implementing A.S. 16.10 for the Northern Region were effected. On December 11, 1978, plaintiffs moved to maintain and certify class action. On December 21, 1978, plaintiffs moved to amend the complaint to include the election and assessment provided for by the Commissioner of Commerce and Economic Development by regulation for the Northern Region. On December 15, 1978, plaintiffs moved to enjoin expenditures by the Northern Region from any funds derived from "payments made by defendant processors pursuant to A.S. 16.10.530."

On January 3, 1979, a motion to intervene as parties-defendants was filed by a fisherman, on behalf of himself and a class of persons similarly situated. Various oppositions to these motions have been filed, and on January 17, 1979, the date set for this motion for summary judgment was agreed to.

I. FACTUAL BACKGROUND

Southern Southeast Regional Aquaculture Association, Inc. (SSRAA) organized in early 1976. The principle purpose for which the corporation was formed was to "engage in aquaculture." (See Articles of Incorporation, Appendix). The Corporation is a nonprofit corporation, and is constrained by the law of Alaska relevant to nonprofit corporations. However, the articles specifically provide that all corporate "powers are to be construed in limitation of the powers which the corporation may have under the present or future laws of the State of Alaska." The corporation has been recognized by the Internal Revenue Service as a tax exempt nonprofit organization, commonly known as a 501(c)(3) corporation. Pursuant to the by-laws, fishermen elect 55% of the board. Members of other user groups, including subsistence fishermen and processors, are appointed by the full board of fishermen. Also included on the board is at least one representative of local government.

SSRAA has shown a history of being aggressive in pursuit of responsible and efficient aquaculture development with a maximum of user and other local input, and a board which is actively involved in the management corporation. The board is currently composed of five standing committees, and every member of the board is assigned to a committee. Those committees are the Executive Committee, Ways and Means Committee, Personnel Committee, the Regional Planning Team and the Nomination and Board Development Committee. Each Committee is staffed with professional advisors pursuant to budget approval of the full board. The board - committee system setup in the Southern Region provides an opportunity for all members of the association to participate actively.

On November 2, 1976, the Alaska Department of Fish and Game recognized SSRAA as a qualified regional association pursuant to Chapter 161 of the 1976 Session Laws. The

region covers the same geographic boundaries as Fish and Game Regulatory district 1 through 8 in Southeastern Alaska. The Corporation had earlier hired a highly qualified chief executive officer and by the end of 1976 had devoted substantial energy and revenues for preliminary hatchery site selection and preliminary applications for a private nonprofit hatchery, as well as an intensified campaign to educate fishermen and other users about the promises of user controlled regionally oriented salmon enhancement.

In early 1977, the corporation became aware of pending legislation, then House Bill 264. The pending legislation provided for an assessment election for qualified regional associations, and also provided that "notification, public meeting and voting procedures instituted before the effective date of this Act ... in substantial compliance with A.S. 16.10.530(e) shall be considered to constitute compliance with this Act, and are ratified upon the effective date of the Act." SLA Chapter 154(1977) §18. The board resolved to proceed with a mandatory assessment election in order to meet compliance with the pending legislation. An elections committee was appointed, and the calendar of events was established to conform with the election procedures in the proposed law. The elections committee drew up procedural rules of voting, and made substantial preparations for full and adequate notice of the proposed election to all limited permits holders in Southeast Alaska. The corporation made a tremendous effort to ensure the largest turnout for the elections, and otherwise precisely followed the law prior to and during the election. The mandatory assessment passed in the Southern Region with over 56% of the qualified fishermen casting ballots voting for the assessment. A month later, on June 30, 1977, the Commissioner of the Department of Commerce and Economic Development approved the assessment, effective July 24, after finding that the procedural voting requirement had been followed, and that the assessment was

reasonable. The procedure for the Commissioner in making his findings and approving the assessment were further explicated in the regulations adopted on July 15. See 3AAC 88.010-030. It is undisputed that the major plaintiffs in this lawsuit made no attempt to provide input into the approval and regulation adoption or to request the Commissioner not to approve the assessment. (See depositions.) Although the Commissioner gave notice to the processors and other fish buyers, pursuant to A.S. 16.10, that they were to begin collecting the assessment, the processors collected but declined to transmit the assessment to the regional association. Cf. State of Alaska and Southern Southeast Regional Aquaculture Association, Inc. v. Annette Island Packing Co. et al., Civil Action No. 77-10006, Juneau. However, some fish buyers did collect and forward the assessment and by November 11, 1977, SSRAA had received some \$49,000 in assessments.

Meanwhile, the corporation was actively proceeding with plans for hatchery sites and a hatchery facility at Whitman Lake on Ravilla Island near Ketchikan. On December 15, 1977, the final request for the last \$100,000 matching grant, pursuant to A.S. 16.10.510, was sent to the Director of Business Loans, Department of Commerce and Economic Development.

In early 1978, after processors had agreed to release the impounded assessment, the corporation let an engineering and design contract for the Whitman Lake Hatchery facility. The design of the facility and its specifications were supervised by Milo Bell, Professor Emeritus of Fisheries, University of Washington, SSRAA's senior technical advisor. Subsequently, interim financing was secured through the Spokane Bank for Cooperatives, and construction began at the Herring Cove-Whitman Lake hatchery site in June. A temporary hatchery was built at Beaver Falls, near Ketchikan, primarily

for the purpose of preventing a years delay in production of salmon. The Beaver Falls Hatchery is presently incubating 800,000 Coho eggs.

Also during 1978, the corporation had become heavily involved in the regional planning process. This process is dictated by A.S. 16.10.375. Corporation expenses in 1978 exceeded \$112,000 in conjunction with this process.

Currently there exist five recognized regional aquaculture associations in the state. They are Southern Southeast Regional Aquaculture Association, Northern Southeastern Regional Aquaculture Association, Prince William Sound Regional Aquaculture Association, Cook Inlet Regional Aquaculture Association and Imarpik Regional Aquaculture Association in Dillingham. Three have implemented assessments pursuant to A.S. 16.10.530: The Southern and Northern Regions of Southeast Alaska, and Cook Inlet Regional Aquaculture Association. Specific rehabilitation and enhancement programs are currently underway, partially funded or guaranteed by the mandatory assessment.

II. HISTORIC BACKGROUND

Historically, salmon were important as a food source in Alaska; while Eskimos, Aleuts and Indians were heavily dependent on salmon, they used the fishery in a manner unlikely to cause damage to it. In the early days of the commercial fishery in Alaska, the resource was considered inexhaustible by those most concerned with its exploitation. The fishing levels during the first years skyrocketed; the number of fish traps increased from 60 to 600 in a period from 1906 to 1920. During the same period the number of gillnet boats rose from 1,000 to 5,000, and the number of seiners increased from 200 to 800. There was a rapid increase in consumer demand for canned salmon from the inception of commercial fishing in the 1880's until the end of World War I. Fishing levels and industry expansion in Alaska reflected this demand. In the twenty year period from 1899-1918 the Alaska salmon pack rose from approximately 1,000,000 cases to over 6,500,000 cases. This growth occurred in the absence of any effective governmental regulation and, had it not been for the sharp drop in demand after the First World War, might have very rapidly destroyed the fishery. Production continued to increase and reached a peak in the late 1930's despite that drop in demand. Then the commercial catch began to decline significantly until in the mid-1960's it reached a level less than half the maximum yields of the late 1930's. Several factors must be considered in evaluating the reasons for that serious continuing decline in production. The first factor was the increase in the number of fishermen.

In the first years of the Alaska commercial salmon fishery a relatively small number of fishermen harvested large numbers of fish. The years thereafter were marked by an enormous increase in the number of commercial fishermen. In the peak fishery period from 1934 to 1939 an average of 8,383 fishermen caught an average of 593,719,000 pounds of

salmon annually, whereas for the period from 1963 to 1967 an average of 16,764 fishermen harvested an average of only 254,771,000 pounds annually. By the mid-1930's the average catch had peaked and had started its precipitous decline. The average catch per fisherman dropped from a high of 89,236 pounds in 1934 to 18,763 pounds by 1966. As a result of these developments, the almost 18,000 fishermen employed in 1966 caught twenty-five percent fewer fish than did 7,408 fishermen in 1930.

The declining size of the average catch of each fisherman and the increased number of fishermen in the fishery were related phenomena. It could be possible for both of those conditions to exist in an economically viable industry if the average catch and the number of fishermen leveled off, but until recently this is not the case in the Alaska fishery. The fisherman in the boom period of the mid-1960's earned less gross real income than his counterpart fishing in the depression period of the mid-1930's, notwithstanding an increase of over 300 percent in the real value price of fish. This situation was caused partially by the fact that, for a given output, the cost of catching each fish increased as the average catch per fisherman decreased. The concerns caused by the declining catch and the increasing cost of catching fish led to the limitation of entry into the fisheries and a plan for efficient aquaculture development. 1/

1/ Cf. R. Cooley, Politics and Conservation: The Decline of the Alaska Salmon (1963); J. Crutchfield & G. Pontecorvo The Pacific Salmon Fishery: A Study In Irrational Conservation (1969).

III. DEVELOPMENT OF AQUACULTURE POLICY IN ALASKA.

A. CONSTITUTIONAL RECOGNITION.

Prior to 1972, Art. VIII, Sec. 15 of the Alaska Constitution provided that "[N]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state." That section was derived from section 1 of the White Act, 48 U.S.C., §221, under which Alaska fisheries were managed prior to statehood. Cf. 1963 Opinion, Attorney General, No. 3. The White Act had been consistently construed to forbid exclusivity in the common property fishery not only to any single group or corporation but also to any special group or number of people. Cf. Hynes v. Grimes Packing Co., 337 U.S. 36 (1949).

In 1972 sec. 15 was amended with the additional clause:

This section does not restrict the power of the state to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

When the resolution calling for the proposed amendment was under consideration by the legislature several significant changes were made. These changes were referred to in a House Resources Committee report:

As received by the committee, the amendment specifies three grounds for restricting entry to a fishery, one of which is "for purposes of conservation of the resource." In our proposed substitute we have altered this to read "for purposes of resource conservation," thereby broadening it to include conservation not only of the fisheries themselves, but of the capital and labor resources which are expended in harvesting them. This is a particularly important point since limited entry finds its primary significance more in the context of economics than biology. We have added the adjective "efficient" before "development of aquaculture" for similar reasons.

1971 House Journal, p. 761. The House Resources Committee substitute was the version eventually adopted by the voters.

The significance of those changes should be emphasized. The conservation of capital and labor resources embodies

economic concepts far beyond biological rehabilitation of the fisheries. Efficiency of the means chosen to achieve biological enhancement became a constitutionally fathered public purpose. As shall be seen, the legislative scheme to promote aquaculture development effectively recognized capital and labor conservation as a primary goal.

B. LEGISLATIVE DEVELOPMENTS.

1. In 1974 the legislature passed into law, with the Governor's signature, a bill authorizing the ownership of salmon hatcheries by qualified nonprofit corporations for the purpose of contributing to the rehabilitation of the depleted salmon stocks. 2/ The bill empowered the Commissioner of Fish and Game to issue permits to nonprofit corporations organized under A.S. 16.10.20 for the construction and operation of a salmon hatchery, "subject to the restrictions he considers desirable or that are imposed by statute or regulation under Secs. 400-470 of this Chapter." 3/ (Underlining supplied.)

2/ SLA Chapter 111. Section 1 of that Chapter laid out the legislative intent of the Act:

"It is the intent of this Act to authorize the private ownership of salmon hatcheries by qualified nonprofit corporations for the purpose of contributing, by artificial means, to the rehabilitation of the state's depleted and depressed salmon fishery. The program shall be operated without adversely affecting natural stocks of fish in the state and under a policy of management which allows reasonable segregation of returning hatcher-reared salmon from naturally occurring stocks."

3/ SLA Chapter 111, Sec. 2, adding Sec. 16.10.400(a) by amendment. The underlined language was later deleted from law by amendment in SLA Chapter 154 (1977), Section 3. See discussion infra.

The Act also listed conditions which must be included in any permit:

Sec. 16.10.240. CONDITIONS OF A PERMIT. The department shall require, in a permit issued to a hatchery operator, that,

(1) salmon eggs procured by the hatchery must be from the department or a source approved by the department;

(footnote 3/ con't)

(footnote 3/ con't)

(2) no salmon eggs or resulting fry be placed in waters of the state other than those specifically designated in the permit;

(3) no salmon eggs or resulting fry, sold to a permit holder by the state or by another party approved by the department, may be resold or otherwise transferred to another person;

(4) no salmon be released by the hatchery before department approval, and, for purposes of pathological examination and approval, the department shall be notified of the proposed release of salmon at least 15 days before the date of their proposed release by the hatchery;

(5) diseased salmon be destroyed in a specific manner and place designated by the department;

(6) adult salmon be harvested by hatchery operators only at specific locations as designated by the department;

(7) surplus eggs from salmon returning to the hatchery be made available for sale first to the department and then, after inspection and approval by the department, to operators of other hatcheries authorized by permit to operate under secs. 400-470 of this chapter;

(8) if surplus salmon eggs are sold by a permit holder to another permit holder, a copy of the sales transaction be provided to the department;

(9) the cost of inspections or examinations conducted by the department under this section before the release of salmon, or when eggs are procured from sources other than the department, or to determine the existence of disease, be borne by the hatchery owner for which the inspection or examination is conducted;

(10) a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but, when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries.

The conditions listed in SLA Chapter 111 (1974), Sec. 16.10.420 have not been enumerated upon nor amended.

The Act provided that fish released into the natural waters of the state by a non-profit hatchery "are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator." 4/

Funds raised by the sale of harvested salmon or eggs by the hatchery operator 5/ were to be utilized for hatchery operating costs, debt service, capital improvements and expansion, with the remaining funds expended on "fisheries research, salmon rehabilitation projects, or other fisheries activities." SLA Chapter 111, Sec. 16.10.450. Other aspects of the bill included provisions for altering, suspending or revoking permits, 6/ public hearings on permit issuances, 7/

4/ The decision to specifically mandate that the hatchery salmon would be available for common use and subject to regulation "in the same way as fish occurring in their natural state" must have been discussed within the framework of Article VIII, Sec. 36 of the Alaska Constitution, which states:

"Section 3. COMMON USE. Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

See discussion, Alaska Constitutional Convention Proceedings, pp. 2458-2466.

5/ "Fish sold by hatcheries for human consumption shall be of comparable quality to fish harvested by commercial fisheries in the area, and shall be sold at priced commensurate with the current market." A.S. 16.10.450.

6/ A.S. 16.10.430, Subsection (b) provides:

"(b) If the commissioner finds that the operation of the hatchery is not in the best interests of the public, he may alter the conditions of the permit to mitigate the adverse effects of the operation, or, if the adverse effects are irreversible and cannot be mitigated sufficiently, initiate a termination of the operation under the permit over a reasonable period of time under the circumstances, not to exceed four years. During the period of time that the operation is being terminated, the permit holder may harvest salmon under the terms of the permit but may not release additional fish."

7/ A.S. 16.10.410.

approval of egg takes, 8/ inspection of the hatchery by the department, 9/ and an annual report to the department. 10/

2. (a). In 1976, the legislature passed two more bills that pertained to aquaculture. 11/ SLA Chapter 161 (1976) provided for the formation of "qualified regional associations for the purpose of enhancing salmon production." A.S. 16.10.380(g). The associations would be deemed qualified if the Commissioner of Fish and Game found that:

A.S. 16.10.380(a):

"(1) it is comprised of associations representative of commercial fishermen in the region;

(2) it includes representatives of other user groups interested in fisheries within the region who wish to belong; and

8/ A.S. 16.10.445:

"EGG SOURCES. (a) The department shall approve the source and number of salmon eggs taken under secs. 400-470 of this chapter.

(b) Where feasible, salmon eggs utilized by a hatchery operator shall first be taken from stocks native to the area in which the hatchery is located, and then, upon department approval, from other areas, as necessary."

9/ A.S. 16.10.460.

10/ A.S. 16.10.470, The report to the Department of Fish and Game included:

- (1) a complete description of all significant hatchery operations;
- (2) statistics on the numbers of eggs and fish handled by the hatchery, whether for production or sale;
- (3) future recommendations for modification of the hatchery program;
- (4) any other relevant data required by the department.

11/ Both bills were requested by the Governor and signed by the Governor. SLA Chapter 161 (1976), which provided for Regional Associations, passed both houses by a unanimous vote of the members present. Senate Bill History, 9th Legislature, pp. 340-341.

SLA Chapter 190 (1976) passed the Senate 19-1 and passed the House 36-0-4 before it was signed by the Governor. Senate Bill History, 9th Legislature, p. 341.

(3) it possesses a board of directors which includes no less than one representative of each user group that belongs to the association."

The Act directed that the Commissioner shall "designate regions of the state for the purpose of enhancing salmon production and shall develop and amend as necessary a comprehensive salmon enhancement plan for each region for both public and private non-profit hatchery systems." SLA Chapter 161 (1976), Section 2. 12/

If a qualified association "has become a non-profit corporation under A.S. 10.20" and "if its proposed hatchery is provided for in the comprehensive plan for that region" then the Act granted the association "a preference right to a permit." Supra, Section 3. 13/

(b). The second bill relating to aquaculture to be passed in 1976 was SLA Chapter 190. This Act created the Fisheries Enhancement Loan Program and declared the following:

"Sec. 16.10.500. DECLARATION OF POLICY. It is the policy of the state, under secs. 500-550 of this chapter, to promote the enhancement of the state's fisheries by means of long-term, low interest loans for hatchery planning and construction."

In order that this policy could be implemented, the Legislature provided for means of securing the loans. 14/ Two means

12/ Section 1 of the Act clearly stated its purpose:

"Section 1. INTENT. It is the intent of this Act to produce salmon for the common property fisheries of the state."

13/ Permits are not to be issued unless "the stream has been classified as suitable for enhancement purposes by the Commissioner." A.S. 16.10.400(f). Until the development of the regional comprehensive plan, no permit for a hatchery may issue "unless the Commissioner determines that such an action would result in substantial public benefits and would not jeopardize natural stocks." A.S. 16.10.400(g).

14/ "All loans must be secured by collateral s factory to the commissioner, including but not limi to a first deed of trust, assignment of lease and leasehold improvements, sale of surplus fish from the hatchery, or assessments from fishermen levied under secs. 530-540 of this chapter." A.S. 16.10.520(c).

provided for were mandatory and voluntary assessments on the sale of salmon. 15/

15/ The mandatory assessment:

"Sec. 16.10.530. ASSESSMENT ON SALE OF SALMON. (a) The commissioner of commerce and economic development, with the advice and approval of the commissioner of fish and game, may establish areas in which an assessment shall be levied on the sale of one or more species of salmon by persons licensed under A.S. 16.05.540-16.05.600. An assessment levied under this section shall be for the purpose of securing repayment of a loan or loans made to a qualified regional association which has formed a nonprofit corporation, or to a local nonprofit corporation established or approved by a qualified regional association, which has obtained a permit under secs. 400-470 of this chapter. The rate and conditions of assessments shall be negotiated between the commissioner and the appropriate qualified regional association in conjunction with the issuance of the loan, and the agreement on the rate and conditions of assessment reached between them shall be incorporated into the provisions of the loan contract.

(b) If conditions warrant alteration of the rate or conditions of assessment, and the alteration would be inconsistent with the agreement negotiated under (a) of this section, the commissioner shall obtain the consent of the appropriate qualified regional association before altering the rate of assessment.

(c) The commissioner and the appropriate qualified regional association must agree on a means of collection of the assessment before a loan is made, and the commissioner may, by regulation, require its collection by buyers of the salmon upon the sale of which an assessment is levied.

(d) The assessment shall terminate when the principal and interest on the loan is paid."

Subsection (a) of this section was substantially amended in 1977 by SLA Chapter 154. Subsection (b) was repealed, Subsections (c) and (d) were amended and new subsections were added. See discussion infra.

The voluntary assessment:

Sec. 16.10.540. VOLUNTARY ASSESSMENT ON SALE OF SALMON.

(a) In place of or in addition to an assessment levied under sec. 530 of this chapter, an association of persons licensed under A.S. 16.05.540 -16.05.600, which consists of at least 51 percent of the persons so licensed and actively participating in a fishery to be benefitted by a hatchery program, may levy and collect an assessment from among its members for the purpose of securing and repaying a loan made under sec. 510 of this chapter.

(footnote con't)

(footnote 15/ con't)

(b) Upon satisfactory demonstration to the commissioner that an assessment levied under this section may reasonably be relied upon to secure and repay a loan to be made under sec. 510 of this chapter, the commissioner may make the loan without requiring an assessment under sec. 530 of this chapter.

(c) If an assessment made under this section fails to satisfy the payments required on the principal and interest due on the loan the commissioner may negotiate with the regional association to levy an assessment under sec. 530 of this chapter.

This section has not been amended.

3. In 1977 the legislature enacted SLA Chapter 154, "An Act Relating to Fisheries Enhancement." 16/

16/ This bill passed the House 36-0-4 and the Senate on reconsideration 18-1-1. The Governor signed the bill with an accompanying message:

"June 23, 1977

The Honorable Hugh Malone
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

I have signed the following bill and am transmitting the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

SENATE COMMITTEE SUBSTITUTE FOR
COMMITTEE SUBSTITUE FOR
HOUSE BILL NO. 264
Resources, amended Senate
(Relating to fisheries enhancement)
Chapter 154, SLA 1977

While this legislation does have a number of technical difficulties that merit consideration during the next legislative session, it nevertheless represents a good example of the administration and the legislature working together to achieve a common goal.

Enactment of this legislation will provide very substantial assistance to the regional associations of user groups who desire to work with the Alaska Department of Fish and Game to develop comprehensive plans for rebuilding the salmon resources of their region.

It is my hope and expectation, that with this additional support for the regional associations, the private, nonprofit program of salmon restoration can go forward at a very positive and effective pace.

Sincerely,

/s/ JAY S. HAMMOND
Governor"

House Journal, 1977, pp. 1701-1702.

The policy was restated to read:

§16.10.500 DECLARATION OF POLICY

It is the policy of this state, under Sections 500 to 550 of this chapter, to promote the enhancement of the state's fisheries by means of grants for organizational and planning purposes to regional associations which have qualified under Section 380 of this chapter, and by means of long term, low interest loans for hatchery planning, construction, and operation.

The Act substantially amended A.S. 16.10. For the purposes of this lawsuit, the relevant amendments, and their effect, are listed below:

(a). Regional Salmon Plan

A.S. 16.10.375 originally directed the Commissioner of Fish and Game to designate regions of the State for the purpose of enhancing salmon production and required that he should develop a comprehensive salmon enhancement plan for each region for both public and private non-profit hatchery systems. 17/

The 1977 Act amended this section to direct that the plans "for public and private non-profit hatchery systems" should be developed by "regional planning teams consisting of department personnel and representatives of the appropriate qualified regional associations," subject to plan approval by the Commissioner. 18/ SLA Chapter 154 (1977), Sec. 2. (Hereafter 1977 Act.)

17/ See SLA Chapter 161 (1976), Section 2 and discussion, supra.

18/ Other sections of A.S. 16.10 were amended to accommodate the regional planning team concept, but always with an eye toward the ultimate authority of the Commissioner:

(a) permits for the hatchery may be issued to a non-profit corporation "after the permit application has been reviewed by the regional planning team." 1977 Act, Sec. 3.

(b) permits may be revoked or suspended "after the regional planning team for the area in which the hatchery is located is notified and granted an opportunity to comment." 1977 Act, Sec. 4.

(b). Preference Rights to a Permit

SLA Chapter 161 (1976) had granted a preference right to a hatchery permit if a qualified regional association had become a non-profit corporation and its proposed hatchery was provided for in the comprehensive plan.

The 1977 Act placed an additional requirement that the fresh water source for the proposed hatchery "exceed one cubic foot per second minimum flow." 1977 Act, Sec. 3.

(c). Revenues From Sale of Salmon and Salmon Eggs

Previously A.S. 16.10.450 had restricted the use of revenues from the sale of salmon and salmon eggs by a non-profit hatchery operator to hatchery operating costs, debt service, captial improvements and expansion, and fisheries research, salmon rehabilitation projects, or other fisheries activities.

The 1977 Act amended that section to also include acceptable expenditures from these revenues as operating costs of the "qualified regional association for the area in which the hatchery is located" and directed that remaining funds shall be expended "on other fisheries activities of the qualified regional association." 1977 Act, Sec. 5.

(d). Annual Reports

SLA Chapter III (1974) required hatchery operators to submit an annual report to the Department of Fish and Game. (See discussion, supra.) That section required only that the operator submit a complete description of all significant hatchery operations, statistics on the number of eggs and fish handled, and any other relevant data required by the Department.

The 1977 Act specified in detail that which was to be included in the report to the Department "and to the

qualified regional association." 19/ Supra, Sec. 6. In addition, the Act required that permit holders must submit "an annual financial report to the Department of Commerce and Economic Development." 20/ Supra.

(e). Grants For Organizational and Planning Purposes.

The 1977 Act declared it to be the policy of the State to promote the enhancement of the State's fisheries by means of "grants for organizational and planning purposes" to qualified regional associations. 21/ Pursuant to this declaration of policy, the Act provided for grants "in amounts not exceeding \$100,000 per region and up to an additional \$100,000 on a 50/50 cash matching basis." 22/

19/ "Sec. 16.10.470. ANNUAL REPORT. (a) A person who holds a permit for the operation of a salmon hatchery under secs. 400-470 of this chapter shall submit an annual report no later than December 15 to the department and to the qualified regional association for the area in which the hatchery is located, to include but not be limited to information pertaining to species, brood stock source, number, age, weight, and length of spawners; number of eggs taken and fry fingerling produced; and the number, age, weight, and length of adult returns attributable to hatchery releases, on a form to be provided by the Department of Fish and Game." (Emphasis supplied.)

20/ "Sec. 16.10.410. (b) A person who holds a permit for the operation of a salmon hatchery under secs. 400-470 of this chapter shall submit an annual financial report to the Department of Commerce and Economic Development on a form to be provided by the Department of Commerce and Economic Development." (Emphasis supplied)

Note that the financial statement is required of all permit holders, not just those seeking financial assistance.

21/ A.S. 16.10.500. This "means" was added to that of long-term, low interest loans for hatchery planning and construction.

22/ A.S. 16.10.510(9). Grants were, in fact, made to the regions. The breakdown may be gleaned from the following committee report:

"HOUSE FINANCE COMMITTEE REPORT
ON
CSHB 264 (FINANCE)

The revised fiscal note for CSHB 264 (Finance) provides funding as follows:

FY 77: \$950,000 in grant funds for the following regions: Ketchikan, Sitka, Bristol Bay, Cook Inlet, Yukon-Kuskokwim and Prince William

Sound. The grant amount provides \$100,000 to each region attempting to organize and to Prince William sound (Already organized). A matching assessment grant of \$100,000 will be made to organized regional associations. It is estimated that three regional associations will qualify for this second grant.

FY 78: \$900,000 in grant funds to provide for six additional regions attempting to organize and three of which might qualify for the matching grant.

Respectfully submitted,

/s/ STEVE COWPER, Chairman
House Finance Committee"

House Journal, 1977, p. 788.

(f). Mandatory Assessment.

(1). Assessment Trigger

Previously A.S. 16.10.530(a) had authorized the levying of the assessment by the Commissioner of Commerce and Economic Development, with the advice and consent of the Commissioner of Fish and Game, at the time of and in conjunction with the issuance of a loan or loans to a qualified regional association.

The Act amended that subsection to direct that the Commissioner levy the assessment "on request of the qualified regional association" after the Commissioner determined that procedural requirements set by statute were met. 23/

(2). Assessment Rate

Originally it was provided that the rate of the assessment "shall be negotiated between the Commissioner and the qualified regional association in conjunction with the issuance of the loan." 24/ That was changed to provide that "[T]he rate . . . shall be stated by the appropriate qualified regional association in conjunction with the request" for the assessment levy.
1977 Art. Sec. 14.

23/ These procedural requirements are discussed infra. The Act also replaced the requirement of advice and consent by the Commissioner of Fish and Game with a requirement to consult with that Commissioner.

24/ A.S. 16.10.530(a). Note A.S. 16.10.530(d) which directs that the Commissioner and the association must agree on a "means of collection of the assessment" and provides that the Commissioner "may, by regulation, require its collection by buyers of salmon upon the sale of which an assessment is levied."

(3). Approved use of assessment revenues

The Act provided that the "assessment . . . shall be for the purpose of providing revenue for the qualified regional association for the area in which the assessment is made." Supra. The original authorized use was "for the purpose of securing repayment of a loan or loans." SLA Chapter 190 (1976), Sec. 1.

(4). Procedural safeguards required by law

Originally, when the Commissioner was empowered to levy the assessment in his discretion for the purpose of securing repayment of a loan, there were no procedural safeguards mandated by law. When the 1977 Act changed the assessment trigger to a request from the qualified association and authorized a broader use of the assessments, the following procedural safeguards were adopted:

"(e) Before an assessment is made under this section, the qualified regional association for the area in which the assessment is to be levied shall hold an initial public meeting to explain and discuss the necessity for the assessment and to explain the registration procedure established under (f) of this section. Reasonable public notice of the meeting shall be sent to all limited entry permit holders actively participating in a fishery in the area, posted in at least three centrally located public places in the area, and published in at least one newspaper of general circulation at least one time a week for three consecutive weeks in the area, if one exists. The notice shall briefly state the amount of the assessment and a short general description of the purposes for which the assessment money will be used. A ballot shall be mailed to all limited entry permit holders actively participating in a fishery in the area at least 20 days before the initial public meeting and contain a copy of the notice and ask the question whether an assessment shall be imposed. At the public meeting the returned ballots shall be counted by a special committee appointed by the regional association for that purpose, and a vote by written ballot shall be taken on the question from among the limited entry permit holders present at the initial public meeting. After the vote is taken at the initial meeting a second public meeting shall be held, upon the limited notice of publication in a newspaper of general circulation, each day for five consecutive days and the mailing of personal notice to all limited entry permit holders who actively participate in a fishery in the area at least 14 days before the second public

meeting, to give those who did not vote by written ballot at the initial public meeting an opportunity to vote. A majority vote for the assessment is required from the combined total of the returned ballots and the votes by ballot cast at both public meetings, before an assessment may be imposed. No person may vote twice.

(f) The qualified regional association shall establish standard registration procedures for voting on assessments under this section."

5. Termination of the assessment

SLA Chapter 190 (1976) required that the assessment "terminate when the principal and interest on the loan is paid." The 1977 Act amended this to require termination "upon request of the qualified regional association when all financial obligations relating to the assessment have been met." Supra, Sec. 15.

C. REGULATIONS ADOPTED BY THE EXECUTIVE.

Emergency and permanent regulations relating to the assessment on the sale of salmon have been adopted by the Commissioner. Those regulations, emergency and permanent, are enclosed in their entirety in the appendix for reference. However, it can be said in general that the regulations require additional specificity regarding requests or institution of the assessment, review and approval of initial requests, collection of the assessment, and submission of initial and final reports.

IV. THE DEVELOPMENT OF NATURAL RESOURCE POLICY IN THE STATE OF ALASKA

Beginning with the opening keynote address to the Alaska Constitutional Convention by E. L. Bartlett, 25/ Alaska's public policy development has struggled with the promises from and the challenges created by our natural resource wealth. The Convention focused frequently on Alaska's mineral wealth, but heeded the call of Bartlett to forge an aggressive policy toward the fisheries:

"The question of resources policy is not to be confined, of course, solely to the issue of mineral policy. Upon statehood, Alaska becomes the master of her own destiny on controlling the fisheries resources within her waters. Slavish adherence to old concepts, concepts which have brought only depletion and portents of ruin, will result only in the complete destruction of a once mighty industry. While the major future wealth of Alaska may be underground, the fisheries and marine resources of this area are matters of the highest importance and deserve the most careful consideration by this Convention and by future state legislatures."

Alaska Constitutional Convention Proceedings,
Appendix II, p. 6. 26/

25/ Bartlett was Alaska's Territorial delegate in Congress.

26/ Bartlett challenged the delegates to be bold in this area while drafting the natural resources article:

"In the drafting of resources policy the Convention should not fear to consider and adopt a bold course of action. No other state entering the Federal Union has ever been so dependent upon its water and mineral resources. Never was the issue of resources policy been to vital. Devising basic policy suitable to the demand of this and future times may well require that older conceptions of resources policy be drastically revised or even discarded.

We write on a clean slate in the field of resources policy. Only a minute fraction of the land area is owned by private persons or corporations. Never before in the history of the United States has there been so great an opportunity to establish resources policy geared to the growth of a magnificent economy and the welfare of a people." Supra, p. 7.

At the time of the Convention "almost absolute control over the salmon resources had been concentrated in the hands of a few large nonresident canning concerns, and the fishery was managed strictly for their benefit." 27/ The delegates struggled with many issues regarding the fisheries and natural resources in general, and finally produced a well-balanced article mandating aggressive functions for the State in providing for the utilization, development and conservation of Alaska's natural resources while, at the same time, obligating the State with protecting those resources. The approach taken is familiar to jurists and scholars as the public trust concept.

A. THE PUBLIC TRUST CONCEPT

The Public Trust concept of managing resources is not new. Its roots are in Roman jurisprudence, developed in a society with heavy commerce, with important urban concentrations, and with a legal heritage from the sea-dependent Greeks. It was considered basic natural law that the air, water, and living resources of the rivers and the sea were held in trust for common use. 28/ One of the main thrusts of the Magna Carta was the assertion of public rights in land and resources previously held by the King as private and alienable. 29/

27/ Fischer, Alaska's Constitutional Convention, University of Alaska Press, 1975, p. 132. See also, Ernest Gruening, The State of Alaska, New York: Random House, 1954, and George W. Rogers, The Future of Alaska, Baltimore: The Johns Hopkins Press, 1962.

28/ Cf. Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale Law Journal 762, 763 (1970). Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 1970 Michigan Law Review 471.

29/ Cohen, The Constitution, The Public Trust Doctrine, and the Environment, 1970 Utah Law Review 388, 389. Indeed, serfdom embodied the concept of the feudal lords "owning" the land and resources. Magna Carta, part of the great struggle to break the shackles of serfdom, tried to reassert the principle that the resources were held by the crown in its sovereign capacity as a trustee, and not as a private landlord.

In this country, attempts have occasionally been made to discredit the concept. Recently, in Hicklin v. Orbeck, ____ U.S. ____, 57 L.Ed. 2d 397 (1978) and Baldwin v. Fish and Game Commission of Montana, ____ U.S. ____, 56 L.Ed. 2d 354 (1978), appellants attacked application of state law, based in part on the public trust doctrine, as having no remaining vitality. In Baldwin, supra, Justice Blackmun answered this attack:

"Many of the early cases embrace the concept that the States had complete ownership over wildlife within their boundaries, and, as well, the power to preserve this bounty for their citizens alone. It was enough to say 'that in regulating the use of the common property of the citizens of [a] state, the legislature is [not] bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.' Corfield v. Coryell, 6 F.Cas. 546, 552 (No. 3230) (CCEDPa. 1825). It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people. In Corfield, a case the Court has described as 'the first, and long the leading, explanation of the [Privileges and Immunities] Clause,' see Austin v. New Hampshire, 420 U.S., at 661, Mr. Justice Washington, sitting as Circuit Justice, although recognizing that the States may not interfere with the 'right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal,' 6 F. Cas., at 552, nonetheless concluded that access to oyster beds determined to be owned by New Jersey could be limited to New Jersey residents. This holding, and the conception of state sovereignty upon which it relied, formed the basis for similar decisions during later years of the 19th century. E.G., McCready v. Virginia, 94 U.S. 391 (1876); Geer v. Connecticut, 161 U.S. 519 (1896). See Rosenfeld v. Jakways 67 Mont. 558, 216 P.776 (1923). In Geer, a case dealing with Connecticut's authority to limit the disposition of game birds taken within its boundaries, the Court roundly rejected the contention 'that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own.' 161 U.S., at 530.

"In more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute. States may not compel the confinement of the

benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Nor does a State's control over its resources preclude the proper exercise of federal power. *Douglas v. Seacoast Products, Inc.* 431 U.S. 265 (1977); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Missouri v. Holland*, 252 U.S. 416 (1920). And a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385 (1948). See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

Appellants contend that the doctrine on which *Corfield*, *McCready*, and *Geer* all relied has no remaining vitality. We do not agree. Only last Term, in referring to the 'ownership' or title language of those cases and characterizing it 'as no more than a 19th-century legal fiction,' the Court pointed out that that language nevertheless expressed "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Douglas v. Seacoast Products, Inc.*, 431 U.S., at 284, citing *Toomer v. Witsell*, 334 U.S., at 402. The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulations and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Baldwin*, supra, 56 L.Ed. 2d pp. 360-361.

The focus of the Public Trust Doctrine in the past has primarily involved the protection of and access to the trust resources. ^{30/} This focus can be explained to a great extent by history: protecting the rights of the citizens from imperial use and grants of public resources.

The Public Trust concept in Alaska has not been so narrowly focused. The protections have been promised by specific constitutional obligations, as well as lodging in the legislative branch the power and obligations to apply the concept as our society evolves. (See discussions infra.) The concept has evolved in the executive, judicial and legislative branches with a similarly broad focus.

^{30/} For example, in *Illinois Central R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892), the Illinois legislature made extensive grants of submerged land, in fee simple, to the Illinois Central Railroad. Four years later, a new legislature repealed the grant. The Supreme Court held that the express conveyance of trust lands was beyond the power of the state legislature. *Supra*, p. 452.

1. In the Alaska Constitution

At the time of the Convention the delegates were aware of several policy considerations which were not always in concert. Wise use and development of all natural resources was considered necessary and healthy, but the delegates were also well aware of the problems addressed by Bartlett. 31/

Consequently, the Committee on Resources submitted several drafts of a proposed article to the Convention. It is important to review the evolution of those proposals in detail.

Article VIII of the Alaska Constitution provides in relevant sections:

Sec. 1 Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Sec. 2 General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

31/ The natural resource article was the subject of much attention from the staff:

"Recognizing that the issue of Alaska's land and resources was the most important issue facing the convention delegates, Public Administration Service made a special effort to provide a working base in its staff paper on 'The Alaskan Constitution and the State Patrimony.' After detailing land grants, resources, and responsibilities that would pass on to Alaska with statehood, the PAS paper attempted to set out a basis for delegate discussions by departing from its own established policy and developing a suggested land and resources article. In these suggestions, accompanied by explanatory discussions, PAS tried to compensate for lack of useful precedents and to provide a starting point for delegates. However, since the consultant proposals did not coincide with committee members' ideas, there was little resemblance between the PAS draft and the resources article as finally adopted." Fischer, supra, fn. p. 132.

Sec. 3 Common Use. Whenever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use.

Sec. 4 Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Sec. 6. State Public Domain. Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

Sec. 10. Public Notice. No disposals of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

Sec. 17 Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation. (Emphasis supplied).

Committee Proposal No. 8, Sec. 7, entitled State Public Domain, was the first committee proposal and was far more specific than the adopted section:

"Lands and interest therein possessed or acquired by the state, including submerged and tidal lands, and not used or intended exclusively for governmental purposes or for reserved sites and areas constitute the state public domain. Such lands and interests therein are to be held in trust for the people of the state. These lands and interests may be disposed of only in accordance with provisions of applicable acts of Congress, including the Act admitting Alaska to the Union, this constitution and the laws of the state.

The legislature shall make provision for the selection, classification and administration of lands in the state public domain, and the several uses thereof, in such a manner as will give maximum use and public benefit." The Alaska Constitutional Convention Record, Vol. 6, pp. 77-78. (Emphasis supplied.)

The quoted language from the first proposal is similar to constitutional language in several western states placing all or part of the domain of lands granted from the Federal

Government in trust. 32/

By the final adoption of Article VIII, the emphasized language from Sec. 7 of the first proposal had been deleted. There is no specific explanation for the deletion. Yet, prior to the exclusion of the emphasized language from Section 7, the section on Uniform Application did not contain any language that laws and regulations governing the disposal of natural resources should apply equally. *Supra*, Vol. 6, p. 77. That language was added at the same time the specific reference to a public trust was deleted. *Supra*, Vol. 6, pp. 92-97. The amendment to the section on Uniform Application broadened the scope of protection to include the public interest in disposal of the resources as well as their utilization, thereby obligating that disposal of trust resources must bear equally upon all persons similarly situated.

In the first proposal which contained the public trust language, in then Sec. 7, then Sec. 1 provided:

"The State of Alaska has the power to provide for the utilization, conservation and balanced development of all the natural resources, including aesthetic features, of the land and waters belonging to the state for the maximum benefit of its people." Alaska Constitutional Convention, Vol. 6, p. 76. (Emphasis supplied.)

When the specific reference to the public trust was deleted, the above section had been amended to command that "[T]he State of Alaska shall provide for the utilization, conservation and development of all the natural resources." *Supra*, p. 92. (Emphasis supplied.) Subsequent amendments specifically obligated the legislature to provide for "the utilization,

32/ See Washington Const., Article 16, Sec. 1; Utah Const., Article 20, Sec. 1; New Mexico Const., Art. 13, Sec. 1. Some states implemented this language through a recognition that the resources should be held in trust, in others the statehood enabling acts contained directives to that result. See Ervien v. U.S., 251 U.S. 41 (1919).

development, and conservation of all natural resources . . .
for the maximum benefit of its people." Article VIII, Sec.
2. 33/

It is clear that the delegates, rather than generally obligate the State to utilize, develop and conserve land and mineral resources pursuant to trust obligations, chose to direct future legislatures to carefully pick and choose the management and protection process. 34/

33/ The committee realized

"that policies which promoted maximum use and development could be inconsistent with maximum benefit to the people or with the general public interest, as defined by Bartlett and others concerned about exploitation and destruction of resources and the environment." Fischer, supra, fn. 26, p. 133.

Again, this understanding had been forcefully urged by Bartlett:

"Many states have included in their constitutions statements that the natural resources of the state should be 'developed for the benefit of the people' of the state. Such pious generalities, without further concrete policy statements, have proved wholly inadequate as effective barriers against dissipation of resources, fraud, and corruption. Alaskans will not want, and above all else do not need, a resources policy which will prevent orderly development of the great treasures which will be theirs. But they will want, and demand, effective safeguards against the exploitation of the heritage by persons and corporations whose only aim is to skim the gravy and get out, leaving nothing that is permanent to the new state except, perhaps, a few scars in the earth which can never be healed. . . a failure to write into fundamental law basic barriers to minimize fraud, corruption, nondevelopment, and exploitation may well be viewed fifty years from now as this Convention's greatest omission." Alaska Constitutional Convention Proceedings, Appendix II, p. 7.

34/ The delegates were well aware of numerous cases struggling with this policy concept in regard to the public domain and resources contained therein. Cf. The Alaska Constitution and the State Patrimony: The Constitution and Natural Resources, Public Administration Service, 1955.

Submerged lands within the territorial sea of Alaska are held in trust for certain purposes. See Brief of Amicus Curiae, Moore v. State, file no. 2551, Alaska Supreme Court.

The legislature has chosen to place fiduciary obligations on the management of school lands; to dedicate certain royalties to a mental health trust; to present a permanent trust fund amendment to the voters. See Section 2, supra.

A necessary fundamental distinction between lands and resources held by a state in trust and all other lands and resources held by a state is that in holding the former the state acts "not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common." Organized Village of Kake v. Egan, 174 F.Supp. 500, 504 (D.C. Alaska, 1959). The necessity for such a distinction was recognized in Winston Bros. Co. v. State Tax Commission, 62 P.2d 7 (Or. 1936). In language distinguishing those lands to which the state had title in a proprietary capacity from trust lands beneath navigable waters, the court made clear:

"Until disposed of by the state, the state held title to these lands in its proprietary capacity and, after they had been disposed of by the state, their grantees took them free from any right therein (citations). As to the other class, . . . although the title passed to the state by virtue of its sovereignty, its rights were merely those of a trustee for the public. In its ownership thereof, the state represents the people, and the ownership is that of the people in their united sovereignty . . . Being subject to this trust, they are public juris, in other words they are held for the use of the people at large . . . [t]herefore, the state can make no sale or disposal of the soil underlying its navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing, but must hold them in trust for the public." Winston Bros., supra, p. 9.

By retreating from the specific trust language in Sec. 7, while adding additional safeguards, the framers surely left the task of defining any trust obligations regarding land and mineral resources with the legislature. However, with regard to fish, wildlife and waters, the delegates held fast to their original decision to reserve these resources for common use. ^{35/} Cf. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677 (D.C. Alaska, 1977).

^{35/} In Geer v. Connecticut, 161 U.S. 519 (1896), while struggling with the question of the sovereignty over the wildlife resources of the State of Connecticut, Justice White concluded:

"The power lodged in the state, resulting from the common ownership, is to be exercised like all other powers of the state, as a trust for the benefit of the people and not as a prerogative for the advantage of the government as distinguished from the public good." Supra, p. 529.

The Geer court cited a view that had been recognized earlier by the Supreme Court in Minnesota:

"We take it to be correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common." State v. Rodman, 59 N.W. 1098, 1099 (Minn. 1894). (Emphasis supplied.)

Such a view has been maintained throughout the land to this day. Organized Village of Kake v. Egan, 174 F. Supp. 500 (D.C. Alaska 1959).

In summary, the constitutional framers carved out an aggressive role for the legislature with regard to all natural resources of Alaska. At the same time, the air, water, fish and game resources were reserved to the people. This balance creates a necessary process of activist leadership for the benefit of the full complement of Alaskan society with our living resources. It is a role for a legislative body which is unique in democratic governments. It is a role contemplated by the framers to compliment and interact with other aspects of Alaskan government structure -- most notably local government and state and local finance. 36/

2. In the Three Branches of State Government

a. Judicial.

During the time of the Alaska Constitutional Convention, public opposition to fish traps had built tremendously. 37/ It had become obvious that the fishery resource was being depleted. Indeed, this public opposition had generated a lot of sentiment for Statehood. Part of the work product of the Convention was an ordinance providing for the abolition of the traps. 38/

36/ See Delegate Proposals Nos. 5 (Delegate Robertson); 7 (Delegate Johnson); 18 (Delegate Hellenthal); 26 (Delegate Marston); 30 (Delegate Hurley). It is defendant's position that the framers did not intend the separation between state and local functions to preclude the state from fulfilling its trust to develop and protect the common property resources.

37/ Fish traps were unquestionably the most productive method of catching salmon ever used.

38/ Ordinance No. 3:

"As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

The effect of that ordinance on the Metlakatlan Indians was challenged in Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901 (Alaska 1961). The confrontation of policies was between that of the new State's obligation to protect and preserve the natural resource and the rights of the Indians to fish with traps on the reserve granted them by the federal authority. The court recognized the role of the executive and legislative branches in the State with regard to the resource:

"These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state." Metlakatla Indian Community, supra, p. 915. (Emphasis supplied.) 39/

The reflection by the court that the State was not only empowered, but entrusted to protect the fishery is noteworthy. It appropriately identifies the nature of the relationship between the citizens, the State, and the resources held in trust.

b. Legislative.

In 1976, the legislature dealt with a number of resource management pieces of legislation. Concerned about the increasing pressures on Alaska's mineral and living resources, legislative proposals took several forms. For example, a lawsuit was then pending before the Alaska Supreme Court regarding a statutory and constitutional challenge to an executive decision in late 1973 to lease submerged lands in Kachemak Bay for competitive oil and gas development. Moore v. State, 553 P.2d 8 (1976). The Legislature responded with SLA Chapter 113, (1976), "An Act Relating to the Reacquisition of Oil and Gas Leasehold Interests in Kachemak Bay."

1976 saw a proposed constitutional amendment by members of the House providing for an individual constitutional right to a healthful environment. The resolution

39/ See also, Kake v. Egan, 174 F. Supp. 500 (D.C. Alaska 1959); Aleut Community of St. Paul v. U.S., 117 F. Supp. 427 (Ct. Claims 1954).

passed the House but failed to pass the Senate. The House Rules Committee Report and Commentary on Rules Committee Substitute for House Joint Resolution No. 10, Amending the Inherent Rights Section of the Constitution of the State of Alaska, is instructive:

The primary purpose of the amendment is constitutional recognition of the economic and noneconomic values in managing our unique Alaskan environment. This recognition, which is essential to human wellbeing also includes a necessity of maintaining a viable economy as part of a healthy human habitat. Accordingly, the degree of environmental protection which the state should afford as trustee of Alaska's air, water, lands, and natural resources is one which will reduce environmental incursions or degrogations to a minimum without eliminating the basis for a viable economy. The proposed constitutional amendment shall allow a balancing of environment, social, and economic concerns.

1976 House Journal, p. 469.

Later, in that same session, the Legislature specifically recognized that certain State lands were to be managed in a fiduciary capacity. SLA Chapter 267 (1976), "An Act Relating to the Rental and Leasing of State Land," amended several sections of Title 38 relating to the sale, lease, or other disposal of lands. Section 2 of that law states in relevant part:

No sale, lease, exchange or other disposal of school lands may be made without the approval of the state Board of Education. The state Board of Education shall act as trustee of school lands. The board may retain private counsel or other professional assistance when necessary to carry out its duty as a trustee.

In order to make absolutely clear the intent of the law, the Senate Resources Committee adopted the following letter of intent:

The purpose of designating school lands as a trust is to insure that their management for the purposes of supporting public education be treated as a fiduciary responsibility. The board of education is made trustee and is authorized to retain professional assistance as needed to assist it in meeting its responsibility.

In singling out school lands in this manner, there is no intent whatsoever to limit the application of trust concepts and trust law to other

lands of the State, or to transactions involving other lands of the State, when application of trust concepts and trust law would, in the opinion of the courts, be proper.

1976 Senate Journal, p. 1461.

The amendments to Title 38 and the letter of intent clearly reflect that the legislature was defining specific trust obligations with regard to certain state lands in the manner and within the scope that the constitutional framers intended.

The 1976 aquaculture Act amending A.S. 16.10 adding new sections relating to regional plans for salmon enhancement and the establishment and qualification of regional aquaculture associations, clearly stated that "It is the intent of this Act to produce salmon for the common property fisheries of the state." SLA Chapter 161 (1976), § 1. The 1977 Act amending A.S. 16.10.530 to provide for mandatory assessment elections stated that "It is the policy of the state, under §§ 500-550 of this Chapter, to promote the enhancement of the State's fisheries by means of grants for organizational and planning purposes to regional associations . . . and by means of long term, low interest loans for hatchery planning, construction, and operation." SLA Chapter 154 (1977), §7. The stated intent of these two laws providing the basic framework for the evolution of SSRAA, clearly suggests that the purpose of §530 and of the regional associations is not to raise revenue but rather to fulfill the legislatures constitutional obligation to rehabilitate and develop the fisheries, and to exercise the broad police powers available in order to fulfill the constitutional trust. Dictating the trust obligation with regard to school lands became a matter of placing fiduciary responsibilities on the Board of Education. Fulfilling the trust obligation with regard to fisheries resources necessitated a role of action as well as protection.

In 1978, the legislature passed SLA Chapter 179, "An Act Relating to the Renewable Resources Fund." The Act

created a public corporation for the purpose of facilitating the rehabilitation, enhancement and development of the State's renewable resources. The House Finance Committee's letter of intent, in relevant parts, reflects the understanding of the legislature's constitutional role:

"An integral part of the bill is the concept of achieving an appropriate use of the resources. As trustees of our renewable resources the state is constitutionally directed to seek the most beneficial uses. ARRC investment decisions should consider both expected financial returns and the effects of resource development on both the target resource and on other resources. Achieving appropriate resource use at the inception of economic activity will greatly benefit the state and its residents by avoiding longer-run regulatory and rehabilitation burdens resulting in more stable economic activity based on all of the state's renewable resources." House Journal, April 11, 1978, p. 830.

More specific purposes of Chapter 179 direct a public corporation to "sponser research and development of technologies and innovations for the rehabilitation and enhancement of the state's renewable resources to achieve an appropriate use of the resources." A.S. 37.12.040(2). A board of trustees is established as the governing body of the corporation. A.S. 37.12.060. Here the Legislature is clearly adding another dimension to the state's role as trustee. The law creates a public corporation which is essentially a venture capital fund with broad flexibility and investment powers. However, it cannot be said that the purpose of the law is to raise revenues or even to make money, like the aquaculture laws its purpose is to generate a healthy economy in renewable resource areas and is balanced against the constitutional obligations not to impair the productivity of the resource. 40/

40/ A further dimension can be found in A.S. 37.14.010, et sec., establishing a mental health trust fund. See A.S. 37.14.050, dedicating 1 1/2% of the total revenue derived from management of state land, including amounts paid to the state in proceeds of sale or annual rent of surface rights, mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses to the fund.

c. Executive.

Aspects of the constitutional role have also been recognized by the executive. For example, in a 1978 transmittal letter to the legislature accompanying sponsor substitute for Senate Bill No. 59, (SLA Chapter 108 (1978)), "An Act Relating to Forest Resources and Practices," Governor Hammond referred to a section on regulatory and administrative standards which directed that "there shall be no significant impairment of the productivity of the land and water with respect to renewable resources." A.S. 41.17.060(b)(5). Governor Hammond commented that:

Paragraph (5) recognizes the fundamental public trust obligation of the state to ensure that the capability of the land to produce renewable resources is not impaired. While a particular species of tree or wildlife may have little relative value now, the future may find it suddenly in great demand. If the land is incapable of producing it to the demand level, an important land management option is lost, to the detriment of the public welfare. 1978 Senate Journal, p. 663.

The role discussed above by the other branches of State government was equally alive with the formulation of aquaculture policy in Alaska. Originally focused on rehabilitation of the State's depleted and depressed salmon fishery, and producing salmon for the common property fisheries of the State, the later intent was not only to rehabilitate, but also to enhance. To enhance salmon production by artificial means from general revenues would benefit a select class of citizens, commercial fishermen, at the expense of the entire class of tax-paying citizens. 41/ At this point of demarcation that the legislature chose to provide for the class directly benefitting from the policy to contribute to their benefit by the assessment. This course was set consistent with the constitutional roles discussed above.

41/ Direct appropriations by the legislature or bond issues for creation of hatcheries to enhance salmon production effectively subsidize an industry without conferring equal benefits on all citizens. Although no challenge has yet been made to the recent bond issues (1976 and 1978, totaling over \$50,000,000, there is an apparent violation of Article VIII, Section 17.

V. LOCAL GOVERNMENT POLICY IN ALASKA.

A. The constitutional policy for local government in Alaska has been discussed best by Victor Fischer ^{42/} in his book, Alaska's Constitutional Convention, University of Alaska Press, 1975. Rather than recreate a similar discussion or cite the court to the publication, relevant portions for the purposes of this case are enclosed here:

"In providing for the legislative, executive, and judicial branches of government, delegates dealt with subject matter with which they were familiar and on which they had definite opinions. On the other hand, local government was a subject for which there was little Alaska experience to provide a useful point of departure and which provided few useful models. The local government committee, therefore, determined early that innovation was the key to structuring a local government system for Alaska.

Under territorial status, local institutions had undergone only limited development; there was little self-determination at the territorial and even less at the local level. Federal law prescribed the powers of the territorial legislature, severely limiting the scope and types of local government and restricting the powers that could be exercised by cities. For example, counties could not be established, bonding criteria were strictly delimited, and home rule could not be extended to cities.

* * *

Since there were no direct precedents, the committee decided that the local government article should consist of general statements and policy, rather than detailed prescriptions and criteria. The first draft article presented to the convention stated the general purpose was to provide a maximum of self-government to people in all parts of Alaska. To meet this goal, two basic local government units were established--boroughs and cities. This framework was designed to accommodate today's needs and tomorrow's growth and development. The committee then set forth the principles underlying the proposed local government system:

^{42/} Fischer, delegate to the convention, former legislator and Director of the Institute of Social Economic and Government Research, University of Alaska, is a recognized expert in the field of local government.

1. Self-Government. The proposed article bridges the gap now existing in many parts of Alaska. It opens the way to democratic self-government for people now ruled directly from the capital of the territory or even Washington, D.C. The proposed article allows some degree of self-determination in local affairs whether in urban or sparsely populated areas. The highest form of self-government is exercised under home rule chapters which cities and first class boroughs could secure.
2. One basic local government system. The proposed article vests all local government authority in boroughs and cities. It prevents creation of numerous types of local units which can become not only complicated but unworkable.
3. Prevention of overlapping taxing authorities. The proposed article grants local taxing power exclusively to boroughs and cities. This will allow consideration of all local needs in the levying of taxes and the allocation of funds. It will lead to balanced taxation. Single interest agencies with taxing authority often do not realize needs other than their own.
4. Flexibility. The proposed article provides a local government framework adaptable to different areas of the state as well as changes that occur with the passage of time. It allows classification of units on the basis of ability to provide and finance local services. It allows optional administrative forms, adoption of home rule charters, boundary changes, etc.
5. State interest. The proposed articles recognize that the state has a very definite interest in and concern with local affairs. For example, the credit of the state is indirectly involved in local financial matters, and local units are the agencies through which many state functions are performed. The proposal therefore gives the state power to establish and classify boroughs, to alter boundaries of local units, to prescribe powers of noncharter governments, to withhold authority from home rule boroughs and cities, and to exercise advisory and review functions.

The Borough Concept

As the committee was evolving these principles, its members agreed that some type of unit larger than the city and smaller than the state was required to provide both for a measure of local self-government and for performance of state functions on a regionalized basis. They also agreed that any form of local government for Alaska that would be similar to counties would need a broader scope, should have authority to perform all services and should provide a maximum amount of local self-government. The result was the borough concept--an areawide unit that while different from the traditional form of the county,

was in effect a modernized county adapted to Alaska's needs. As seen by delegates, the inadequacies of conventional counties were limited functional jurisdiction, frozen boundaries, an overabundance of constitutionally established elective offices, inadequacy of fiscal powers, and lack of specifically local (as against state) government authority. They noted also that numerous special districts were being created to fill service gaps left by counties and municipalities, resulting in a multiplicity of overlapping tax jurisdictions.

To overcome such deficiencies, the initial principles set forth by the committee for consideration in the formation of the new areawide government units included these guidelines:

Provisions should be made for subdividing all Alaska into local units (boroughs) based on economic, geographic, social, and political factors; initially, not all need be organized.

Units should be large enough to prevent too many subdivisions in Alaska; they should be so designed as to allow the provision of all local services within the boundaries of a single unit, thus avoiding multiplicity of taxing jurisdiction and overlapping, independent districts.

The state should have power to create, consolidate, subdivide, abolish, and otherwise change local units.

Creation of units should be compulsory, with provision for local initiative.

Boundaries should be established at the state level to reflect statewide considerations as well as regional criteria and local interests, and must remain flexible in order to permit future adjustment to growth and changing requirements for the performance of regional functions.

Units should cover large geographic areas with common economic, social, and political interests.

Local units should have the maximum amount of self-government and have authority to draft and adopt charters; organized units should have the authority to perform any function, to adopt any administrative organization, and to generally undertake any action that is not specifically denied by the legislature.

* * *

Unlike the organized borough, legally a municipal corporation, unorganized boroughs were to be instrumentalities of the state. The legislature was to have the same authority within these boroughs as the governing bodies (assemblies) of

organized boroughs. By permitting the legislature to act as the borough assembly, the general prohibition against local legislation was overcome, and laws could be enacted for differential performance of functions in accordance with the needs of different regions.

Service areas were authorized to be established by organized boroughs (and by the legislature in unorganized boroughs) as another method of meeting requirements for different services. Initially, service areas were conceived as a means of providing services within a limited part of the borough in which taxes, assessments, and charges could be levied to cover the cost of such services. The approach was subsequently expanded to include areawide services that might be administered by special instrumentalities such as health or school districts. In all cases, however, service areas were to be creatures of boroughs and function under borough fiscal control.

* * *

State-Local Relations

In general, the constitutional convention saw the role of the state as critical in making the local governmental system work. Several factors strongly argued for a continuing state responsibility for local affairs, such as:

The lack of any general government beyond the city.

A tradition of territorial government responsibility for services beyond incorporated communities.

The varying levels of local government capability and of the requirements for local services throughout Alaska.

The realization that further detailed study and planning was necessary to establish a new governmental system.

Therefore, in addition to dealing with local government organization, Article X includes the following provisions for state authority and responsibility:

Responsibility is vested in the legislature for establishing procedures and standards under which boroughs will be created and classified.

The legislature is established as the governing body for unorganized boroughs and has responsibility for provisions of services in such boroughs.

A state-level local boundary commission is given responsibility for changes in local government boundaries, subject to disapproval by the legislature.

An executive agency is established in state government to deal with local affairs.

Authorization is granted for joint exercise of powers by local governments and the state.

Supra, pp. 116-124, footnotes omitted.

B. Providing for the utilization, development, and conservation of the fisheries resources is clearly a state as opposed to a local government function. This principle was not challenged from the outset of the Constitutional convention. See Volume 8, Constitution and Local Government, Public Administration Service Staff Paper, p. 54:

Local units, on the other hand, pave city streets, put out fires, operate water and sewer systems, collect garbage and refuse, put in sidewalks, enact and enforce zoning systems, and exercise a number of regulatory functions with respect to local business activity, traffic, transportation facilities and other matters. Supra, p. 55.

The necessary jurisdictional boundaries of the regional aquaculture associations in southeast Alaska, surrounding in water a multiplicity of local governments but primarily the unorganized borough, are not in concert with any local government boundaries. It is impracticable for the framework of local governments in southeast Alaska to be the vehicle for efficient aquaculture development. Though not stated explicitly, this finding is clearly implicit in the legislative policy. The legislature has implicitly carved out an area or areas that are out of bounds of the municipal governments. Such areas "implicitly carved out" are a prohibition within the scope of the word "prohibit" as used in Article 10, §11, Alaska Constitution. In Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), the Court chose the language "implicitly carved out" rather than implied preemption, but for the purposes of our analysis here the result is the same. With A.S. 16.10 et seq. the legislature has clearly established that standards for choosing the boundaries of the region are to be based upon user groups within the region, and the resources they harvest, rather than a functionally and

constitutionally inequipped melange of municipal governments.

Article 9, §9, Alaska Constitution prohibits local debts other than capitol improvements. Such a limitation on regionally oriented salmon enhancement would functionally prevent financing mechanisms such as the Spokane Bank for Cooperatives from providing interim or long-term financing. In effect, the legislature chose the most efficient and best equipped mechanism to meet the desired purposes of aquaculture development. The mandate of local government representation on the board of directors of the regional associations provides opportunity for policy interplay with local governments.

The legislature cannot delegate any power of control over the enhancement or rehabilitation of a common property resource. See. Libcrati v. Bristol Bay Borough, ___ P.2d ___, Opinion No. 1735, Justice Rabinowitz, Dissenting; Illinois Central R. R. Co. v. State of Illinois, supra, fn. 30. The legislature has effectively created the only scheme which allows regional involvement while retaining the obligatory role of ensuring the productivity of the resource through executive oversight. The regional aquaculture associations in no sense imperissibly conflict with local governments.

VI. DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

A. Defendant SSRAA believes that plaintiffs' major complaint is that the legislature has entered the field of fisheries management with a statutory scheme for fisheries enhancement that identifies commercial fisherman as a class which must bear a major portion of the financial burden. In brief, the plaintiffs major complaint is an equal protection issue. In order to analyze the issue it is necessary to discuss the modified rational basis test applied in Alaska.

1. Purpose

In applying this modified rational basis test, we must first look at the purpose of the challenged legislation. Isakson v. Rickey, 500 P.2d 359, 363 (Alaska 1976). There the Court looked to "the statement of purpose of the [entire Act] itself upon the assumption that the provision [in question] was enacted to further that expressed purpose." Supra. Where such a preamble of purpose does not exist, or is inadequate, resort may be had to "the legislative history." Supra. Legislative history has been defined to include reports of conference committees, Alaska Public Employees Association v. State, 525 P.2d 12, 15 (Alaska 1973) statements by "a bill's sponsor in the course of legislative deliberations;" Alaska Public Employees Association v. State, supra, at 16; and hearings held by the legislative body, Weinberger v. Wiesenfeld, 95 S.Ct. 1225, 1234 (1975). The purpose may, of course, be determined from the "Act viewed as a whole." Isakson v. Rickey, supra at 364. 43/ Whatever aids are used, the purpose determined by the Court

43/ The Alaska Supreme Court has also recently recognized the value of letters of intent. See Hafling, et al. v. Inland Boatman's Union of the Pacific, P.2d, Opinion 1743, (Alaska 1978). See also, North Slope Borough v. Sohio Petroleum Corporation, et al., P.2d, Opinion No. 1750 (Alaska 1978).

must be the actual purpose.

This Court need not in equal protection cases accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history could not have been a goal of the legislation.

Weinberger v. Wiesenfeld, supra, 1233, n. 16. In discussing the proffered purpose of an Oklahoma law struck down on equal protection grounds, the Supreme Court accepted the purpose or "objective" of the legislation as enhancement of traffic safety but noted: 44/

That this was the true purpose is not at all self-evident. The purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments. The District Court acknowledged the non-existence of materials necessary 'to reveal what the actual purpose of the legislature was,' but concluded that 'we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally.' Similarly, the attorney for Oklahoma, while proposing traffic safety as a legitimate rationale for the 3.2% beer law, candidly acknowledged at oral argument that he is unable to assert that traffic safety is 'indeed the reason' for the gender line contained in §245. For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post-hoc rationalization. (Citations omitted).

Craig v. Boren, ____ U.S. ____, 45 U.S.L.W. 4057, 4060, n. 7 (1976). Thus, as stated in Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection," 36 Harv. L. Rev. 1, 20 (1972), and quoted in Isakson v. Rickey, supra, at 362,

Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished.

44/ Although the legislation identifies the burdened class as all commercial fishermen actually harvesting the resource it is defendant's position that the vested interest of numerous members of the class in the continuing increased benefits from aquaculture production prevents plaintiffs from representing a putative class that broad in scope.

Nowhere is the ascertainment of the purpose of legislation more accurately depicted than in Isakson, where the sole issue separating the majority from the dissent was the purpose of the legislation. Compare, Isakson, supra, at 364, and id, Connor dissenting, at 366.

2. The Legitimacy of the Legislation

a. In General.

Whether the legislature can act at all in a given field becomes a function of the equal protection analysis. As the Alaska Supreme Court recently stated:

Since the distinction made by Alaska Hire between residents and non-residents bears a close correlation to the state's interest in providing economic benefit to residents, the subject of dispute is whether this interest is a permissible one for the state to promote.

Hicklin et al. v. Orbeck et al., 565 P.2d 159, 167, (Alaska 1977). In that case the legitimacy of the legislation was questioned as infringing on Article IV, §2 of the United States Constitution, the privileges and immunities clause. In Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), the Alaska Supreme Court invalidated an act discriminating between in-state and non-resident corporations. Since the privileges and immunities clause does not apply to corporations, the Court found that:

While any of these reasons may have, to the extent that we can tell from the scanty evidence available, motivated the legislature to enact the subject amendments, none of them explain, let alone justify, discrimination against non-residents.

Lynden Transport, Inc. v. State, supra, at 708.

Similarly, in Ravin v. State, 537 P.2d 494, 509 (Alaska 1975) the Alaska Supreme Court, in finding that the proscription of marihuana was sufficiently protected by privacy when used by adults in the home, noted:

. . . the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others of the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state

cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.

Ravin found no close and substantial relation between the legitimate proscription of marihuana because it affected drivers and the general proscription of marihuana as it affected adults using the substance in their home. Supra, at 511. The Court, thus used privacy as a means of showing the legislation in question, as applied, was illegitimate. Similarly, in Breese v. Smith, 501 P.2d 159 (Alaska 1972), privacy was used to show no legitimate governmental interest in regulating hairstyles since hairstyles are a highly personal matter in which the individual is traditionally autonomous. See, also, Fisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972).

Traditional limits on the police power of the State, the power to legitimately enter a field, have been defined:

Thus has this Court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, and the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or

for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

Nebbia v. New York, 291 U.S. 502, 524-525 (1934). From this it is clear then that the potential of the legislature to act under its police powers is circumscribed by precisely the same test as that used in Isakson v. Rickey, supra. Indeed, it has been noted that the same test applies in Alaska for local and special legislation attacks on the ability of the legislature to act. Boucher v. Engstrom, 528 P.2d 456, 463, n. 25 (Alaska 1974); State v. Lewis, 559 P.2d 630, 643 (Alaska 1977).

Finally it must be noted that the Fourteenth Amendment to the United States Constitution in relevant part reads:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In testing legislation for the equal protection of the laws, the legitimacy of the legislature to act at all in the field is a necessary function because the two clauses, equal protection and due process, necessarily overlap, just as they appear together in the Fourteenth Amendment.

The [equal protection] clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause . . . of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law;' 'this is a government of laws and not of men;' 'No man is above the law;' are all maxims showing the spirit in which legislature, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend upon the spirit of equality which might be insisted on by local public opinion, they therefore embodied that spirit in a specific guaranty.

Taft, C.J. in Truax v. Corrigan, 257 U.S. 312, 331, 66 L.Ed. 254 (1921), discussed in 22 Col. L. Rev. 252 (1922). Indeed, it is under the Fifth Amendment due process clause that violations of equal protection are struck in federal legislation.

[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Schneider v. Rush, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222 (1964); see also, Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. [citations omitted].

Weinberger v. Wiesenfeld, 95 S.Ct. 1225, 1228, n. 2 (1975).

Once discrimination is admitted, the equal protection analysis demands that the various constitutional infirmities be considered as a whole, for while discrimination may be allowed if it bears "a fair and substantial relation" to the legislation, such legislation must be legitimate and constitutionally permissible in itself.

The degree of judicial power this Court possesses to inquire into the legislative legitimacy is fairly broad. "The question of benefit [of the legislation by the persons burdened] is not irrelevant . . ." Mobil Oil Corp. v. Local Boundary Commission, 518 P.2d 92, 101 (Alaska 1974), and

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration.

Leary v. United States, 395 U.S. 6, 36 L.Ed.2d 57, 82 (1969).

In Isakson v. Rickey, the legitimacy of the legislation was unquestionable because the people of Alaska had approved a constitutional amendment allowing just such legislation to be passed. Indeed, on the first page of the opinion it is stated:

In August, 1972, the people of Alaska voted overwhelmingly to amend the State Constitution to permit the adoption of a limited entry program for the commercial fisheries. [footnote omitted] In

January of 1973, the Governor proposed legislation for a limited entry program to the state legislature.

Isakson v. Rickey, supra, at 360.

In State v. Reefer King, 559 P.2d 56 (Alaska 1976) the legitimacy of the legislative tax discrimination had already been upheld in State v. Wakefield Fisheries, Inc., 495 P.2d 166 (Alaska 1972). Since the statute attacked "reflects a similar sort of legislative judgment" as that already upheld (State v. Reefer King, supra, at 65), ". . . it was not arbitrary" for the legislature to amend the statute as it did, and the only relevant question was whether the discrimination involved bore "a fair and substantial relation" to the legislative "judgment." Supra.

In an article by Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, is support for the thesis that intensified scrutiny should be applied to legislative means chosen and not ends. However, Gunther ends his article by stating at 48:

Indeed, perhaps the greatest difficulty in applying the model will be to delineate the boundary between the narrow value judgments required in evaluating means and the broad ones implicit in choosing among ends, such as Baird's excessively intense concentration on actual state objectives. The lines between means and ends will be drawn primarily in such terms of breadth of value judgments; it will present the most difficult questions of degree.

In a recent United States Supreme Court decision involving equal protection, the Court found that

. . . appellee's statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge. (emphasis added.)

Craig v. Boren, supra, 45 U.S.L.W. at 4060. The Court there noted that the statistical method used by the State in attempting to show the achievement of a legitimate purpose

was "one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." Supra. Obviously the requirement of a relationship between purpose and means, that the means closely serve the ends, coupled with a reference to "the normative philosophy" of the equal protection clause, indicates a greater scrutiny of legislative purposes and ends than Gunther five years previously would have required.

Similarly the Alaska Supreme Court, in the cases which have evolved since the adoption of an intensified scrutiny test, have consistently moved toward an analysis of purpose or ends of the legislation attacked that is less deferential than Gunther.

In Isakson v. Rickey, supra, at 365, the doctrine of irrebuttable presumption was used to strike the legislation in question. In Vlandis v. Kline, 412 U.S. 442, 452, 37 L.Ed.2d 63 (1973), the judicial usage of an irrebuttable presumption was applied to the right to travel, considered fundamental and requiring strict scrutiny of ends as means and, of course, the legitimacy of purpose. An irrebuttable presumption necessarily requires a strict scrutiny of the ends and the purpose of the legislation because while, as a means, it may bear a fair and substantial relation to the purpose of the legislation (See, Isakson v. Rickey, supra, at 366 et seq., Connor, J. dissenting), it may, as the Alaska Supreme Court determined, be an illegitimate legislative purpose of the particular statute when viewed against the purpose of the Act as a whole.

Appellees contend that it was this rush for gear licenses which provoked the legislature to insert the contested provision that only holders of gear licenses issued before January 1, 1973, could submit applications to the Commission for an entry permit. They maintain that this justified the classification. This argument assumes that more gear licenses meant more gear in already depleted fisheries, and that a heavy influx of gear into certain areas before entry permits were required in January of 1974 would result in detrimental

economic and biological ramifications. While we agree with these assumptions, it is our view that the means for stopping the hear rush and its consequent harmful effects was accomplished by a provision already in the Act.

Isakson v. Rickey, supra, at 363-364.

Finally, in Hicklin v. Orbeck, supra, after noting the distinction in the Alaska Hire law between the residents and non-residents bears "a close correlation" to the state purpose of providing economic benefit to residents, the Alaska Supreme Court discussed the nature of fundamental and non-fundamental rights within the context of the right to work.

The differences between rights which are 'fundamental' and those which are not are analyzed at length in San Antonio School District v. Rodriguez, 411 U.S. 1, 98-110, 36 L.Ed.2d 16, 81-88 (1973) (Marshall, J. dissenting), and "Developments in the Law - Equal Protection," 82 Harv. L. Rev. 1065, 1127-31 (1969). Both Justice Marshall and the Harvard commentators reach the conclusion that rights are considered 'fundamental' simply because they are believed to be more important than other personal and economic interests. 411 U.S. at 100, 36 L.Ed.2d at 82; 82 Harv. L. Rev. at 1128. A balance of the state's interests and those of the individual is implicit. 411 U.S. at 108, 36 L.Ed.2d at 87; 82 Harv. L. Rev. at 1132.

Justice Marshall, citing his San Antonio dissent, dissented in Mass. Board of Retirement v. Murgia, supra. But he did not believe that the right to work was a fundamental right invoking strict scrutiny; he urged that laws infringing that right be tested by the standard used in cases such as Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225 (1971), this is the standard we adopted in Isakson v. Rickey, 500 P.2d 359 (Alaska 1976). His objection was to the use of the extremely differential standard of City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed.2d 511 (1976), which we no longer use in testing laws against the Alaska Constitution. 427 U.S. 307, 317-23, 49 L.Ed.2d 520, 527-31.

Hicklin v. Orbeck, supra, p. 166, n. 12.

As stated by Mr. Justice Connor and Chief Justice Boochever in their concurring opinions in Ravin v. State, supra, 537 P.2d at 575:

I would apply a single flexible test depending first upon the importance of the right involved. Based on the nature of that right, a greater or lesser burden would be placed on the state to show the relationship of the intrusion to a legitimate governmental interest.

The scrutiny which this Court must apply, whether the words used are "fair and substantial," "close and substantial," "substantially further" or "intensified scrutiny" is to question the legitimacy of the legislation by the burden it places on the discriminated class. The higher the burden and the more important the constitutional rights such burden infringes, the closer the scrutiny that must be given the legitimacy of the legislature to act in the first place. Less drastic alternatives, irrebuttable presumptions and actual, rather than hypothesized purposes, are central to determining whether the legislature could act at all, and the constitutional provisions which the Act infringes indicate the importance of the burden the Act places on the discriminated class.

b. In Particular.

The stated purposes of the legislation are to:

(1) produce salmon for the common property fisheries of the state; and to

(2) promote the enhancement of the state's fisheries by means of grants for the organization of qualified regional associations and long-term, low interest loans for hatchery planning and construction.

Beyond the stated purposes it can also be fairly said that the overall purpose is to provide for continuing efficient aquaculture development in Alaska.

As discussed in the previous section on the development of natural resource policy in Alaska, the legislature is constitutionally obligated to provide for the utilization, development and conservation of all natural resources of the state. In the constitutional amendment providing for limited entry into the fisheries for specific purposes, one of those purposes was the efficient development of aquaculture. Clearly, the legislature is authorized to enter the field

of fisheries development with an efficient aquaculture development plan.

c. The Classification

The obvious classification created by the legislation is all commercial fishermen actually harvesting the resource in those regions which have qualified regional associations. 45/

It is clear this classification is reasonable and neither overinclusive nor underinclusive. There is a direct and substantial relationship between a commercial fisherman actually harvesting the resource and the benefits derived from increased salmon production of the common property fisheries. No such direct and substantial relationship exists with any other user group. 46/

d. Fairness

The test enunciated in Isakson v. Rickey is that the classification must bear a fair and substantial relation. Clearly, the relation between commercial fishermen actually harvesting the resource and fisheries enhancement is fair.

B. LEGITIMACY OF THE STATE ACTION AND THE MEANS CHOSEN

The state action is the adoption of a statutory framework for efficient aquaculture development. As discussed previously, efficient aquaculture development is a constitutionally legitimate purpose for legislative action in Alaska. It is defendant Southern Southeastern Regional Aquaculture Association's position that the constitutional efficacy of the means chosen by the legislature not only satisfies the close and substantial relationship test but also is the most

45/ Although the legislature identifies the burdened class as all commercial fishermen actually harvesting the resource, it is defendants' position that the vested interest of numerous members of the class in the continuing increased benefits from aquaculture production prevents plaintiffs from representing a putative class that broad in scope.

46/ It is defendant's position that burdening a group larger than commercial fishermen with fisheries enhancement would be overinclusive to constitutional proportions.

capital and labor efficient means to effect the purposes of the salmon enhancement policy.

The legislature chose a means that blends the executive efficiency of the private sector with the constitutional policy safeguards of the public sector. The regional associations participate in the planning stages of salmon enhancement programs, yet the state is not yielding nor neglecting its role as trustee of the common property resource. The execution of appropriate phases of the enhancement programs are handled not by a bureaucracy of public employees but rather by a publicly responsive non-profit corporation which operates with private sector efficiency and has the capabilities of securing development assistance through the financial community. 47/ The statutory program manifests a legislative finding that the most capital and labor efficient means of aquaculture development is the means chosen in law. That the legislature chose to provide for a royalty share assessment, subject to regional and executive approval for the purpose of partially funding or securing the necessary debt, capital improvements and operating costs for salmon enhancement reflects a finding that the select class of persons most directly benefiting from enhanced salmon production should bear a proportionate share of the cost. That finding also reflects a legislative judgment that the assessment is the most capital and labor efficient, as well as the least discriminatory manner in which to meet the stated and implicit purposes of the aquaculture program.

47/ Indeed, the key to financial assistance from the private sector is the section 530 assessment.

VII. THE ASSESSMENT - ROYALTY SHARE OR TAX?

A.S. 16.10.530 allows the Commissioner of Commerce, after request of a qualified regional association, to levy an assessment on the sale of "one or more species of salmon caught by persons licensed under A.S. 16.05.540 - 16.05.600 in the area for which the assessment is to be levied." A.S. 16.10.530(9). Plaintiff contends that the "alleged assessment constitutes a delegation of the taxing power of the State of Alaska to an entity other than a city or a borough in contravention of Art. X, § 2, of the Alaska Constitution". (See complaint, page 5(b)). Defendant submits that this assessment is not a tax but rather the assessment of a royalty share of the resource, and that the statutory provisions at issue do not involve an unconstitutional delegation of legislative power.

A. THE ASSESSMENT IS NOT A TAX.

Taxes are annual, recurring pecuniary burdens posed by legislative authority upon individuals or property to support the government. Efros v. Russo, 171 A.2d 370, 371 (N.J. 1961). A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government, the administration of the law or the payment of public expenses. Any payment exacted by the state or its municipal subdivisions as a contribution toward the costs of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. 51 Am.Jur. Taxation §3, p. 35.

Taxation proceeds upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses, and that for those means it has the right to compel all citizens and property within its limits to contribute. Multnomah v. Luihn, 178 P.2d 159

(Ore. 1947).

A tax is "in no way dependant upon the will or expressed consent of the person taxed". Menz v. Coyle, 117 N.E.2d 290 (N.D. 1962). Michigan Employment Security v. Falt, 144 N.W.2d 663 (C.A. Mich. 1966); "Cooley on Taxation", 4th Ed. 41 §3. It is an imposition upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the conditions to be remedied. It is not an assessment of benefits; rather it is a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is entitled is that derived from his enjoyment of the privileges of living in an organized society. People v. George, 250 N.W.2d 491 (Mich. 1977) quoting from Carmichael v. Southern Coal and Coke Company, 301 U.S. 514, 515, 81 L.Ed. 45, 49 (1937).

In Aetna Life Insurance Company v. Washington Life and Dis.I.G.Ass'n., 520 P.2d 162 (Wash. 1974), plaintiff challenged the constitutionality of the Washington Life and Disability Assurance Guaranty Act and the assessments levied thereunder. The primary purpose of the Act was to accumulate funds arising from assessments upon all insurers authorized to transact life or disability insurance business in the State of Washington. These funds are then used to insure the performance of contractual insurance obligations of insolvent insurers.

Appellant argued that these assessments amounted to an unconstitutional tax. The court disagreed, holding that money which does not reach the general fund is not a tax:

"The assessments made under the Act were not State revenue funds. They did not rebound to the benefit of any state or municipal treasury. Rather they were trust funds assessed by a private association to be retained in private bank accounts to carry out the purpose of the Act. This court has characterized assessments under the Industrial Insurance Act saying that 'it is manifest that it is not a tax in the sense that the word is used in

the section of the constitution to which reference is here made. No assessment to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government but to recompense employees of the industry upon whom the burden is imposed for injuries received by them while engaged in pursuit of their employment' ". at 171 Citing State ex rel, Davis Smith Company v. Clausen, 117 P. 101, 116 (1911). See also State Farm Mutual Auto Insurance Company v. Board of Trustees, 79 S.2d 512 (Alabama 1973).

In the Opinion of the Justices, 379 A.2d 782 (NH 1977), House Bill 439 created a "tax" of 1 cent per barrel on oil terminal facilities with a capacity over 50 barrels. The purpose of the "tax" was to establish a fund to finance the activities of the pollution control commission. The court held that this "tax" is not a tax as it too did not become a part of the general fund:

"The 'tax' exacted by House Bill 439 is more in the nature of a charge of facilities to reimburse the state for maintaining, and if necessary, employing pollution control for their benefit. Monies collected from this tax do not go into the general fund revenues, but in fact the tax abates when the pollution control fund is sufficiently capitalized, thus House Bill 439 imposes no 'tax' in the sense employed by the Constitution; hence it need not be apportioned." supra, 787.

In Orbison v. Welsh, 179 NE.2d 727 (Ind. 1962) an Indiana statute provided for the operation and maintenance of a port from the proceeds of tolls that it charges levied by a port commission. The fees were to "provide sufficient revenue to pay the cost, operation, etc. including the administration expenses of the commission". Net revenue over and above this amount were to be paid into the state general fund. Nevertheless the court held that these tolls were not taxes either:

" . . . [T]his court has held in numerous decisions that the 'raising revenue' used in Art. 4, §17 . . . does not apply to other purposes which may incidently create revenue. . . . The purpose of the act in question is not to levy taxes but as set out in the statute to promote the agricultural industrial and commercial development of the state and to provide for the general welfare by the construction and operation of a modern port on Lake Michigan.

* * *

The payment of a tax is compulsory and not optional, and it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens alike. . . . Under the statute the tolls, rentals and fees are to be paid by the users of the port or its facilities but this is merely compensation for the use of the property and the improvement of the port and can in no sense be considered a tax". supra, at 743.

In Wickham v. Trapani, 246 N.Y.Supp.2d 137 (N.Y. 1964); affirmed 272 N.Y.Supp.2d 6 (N.Y. 1966), a referendum was held pursuant to New York law for the establishment of an apple marketing order. The order provided for an assessment on apple growers to create a fund to promote New York apples. Defendant asserted that the assessment was a tax, the New York Supreme Court said it was not:

"Indeed, the assessment here involved does not appear to be a tax at all, but merely a fund raising measure, incidental to a valid regulation and this is true even though the assessment may be 'part' of the regulatory order. See U.S. v. Butler, 297 U.S. 1, 59, 56, Sup. Ct. 312 A.D.L.Ed. 477, moreover, we view the expenditure of the funds raised by assessment rebounding primarily to the benefit of appellant and all other apple producers from anticipated expansion of markets for their product. That other classes involved in apple marketing may also be benefited is or could be found to be incidental. (at 272 N.Y.Supp.2d 6, 9).

Finally, the court should note carefully the Michigan decision of the Michigan Supreme Court in Dukesherer Farms, Inc. v. Bald, 251 N.W.2d 278 (Mich. App. 1977). In that case, a Michigan statute allowed producers to commission the Department of Agriculture for particular marketing programs; funding to be derived from special assessments collected "from each producer of any marketable agricultural commodity directly affected by marketing programs." The statute said the assessments were to be used to defray program and administrative costs.

The court stated that the key to determining the constitutionality of this marketing act was to decide whether the funds collected in support of its marketing program were assessments or taxes. In holding that the funds were assessments, the court noted that taxes are imposed for a public

purpose; they are a means of raising revenue for the general benefit of the public as a whole. Assessments, on the other hand, are exactions required in addition to the general levy and "demand that special contribution, in consideration of special benefits, shall be made by the person receiving it". The court recognized that these assessments to benefits do benefit the general welfare of the state but felt that they were not taxes because of the distinct benefit was conferred on the cherry producers. Supra.

Thus, case after case, courts have emphasized that taxes are involuntary exactions which return to the general fund for general public expenses, and that assessment similar to those challenged in the case at bar, which are primarily designed to benefit those assessed, simply do not fit within this definition. There are, however, several cases contrary to this conclusion. In Scott v. Donnelly, 133 N.W.2d 418 (ND 1965) for example, a North Dakota statute authorized a collection of 'fees' not to exceed "1% per 100 weight of potatoes shipped" to be fixed and collected by the North Dakota Potato Development Commission. The purpose of the fee was to promote the marketing of potatoes. The Donnelly court called the fee an excise tax not a regulatory fee, the primary purpose was for revenue, the benefit accruing to the people of the state in general, and the potato growers throughout the state in particular.

The court should note however, that the Donnelly court was concerned with several provisions of that statute which are not at issue here. First, the board was given the power to determine and prescribe taxing areas. Yet, once the areas were prescribed, the expenditures of the proceeds of the tax were not limited in areas for the benefit of the potato growers throughout the state. In the case at bar, the assessment is for the benefit of the association which

requested it. Second, liability to pay the "tax" in Donnelly could be extended to certain taxpayers elsewhere in the state including all persons engaged in the production, processing or handling of potatoes sold or shipped within that state. In the case at bar liability for the assessment is limited to those members of the association commercially harvesting salmon within the appropriate area. Third, the Donnelly court was concerned that neither the growers nor the taxpayers in general had a voice in determining the purposes for which the tax proceeds might be spent either through a government body of their own choosing or by referendum. As we have seen A.S. 16.10.300 et seq. requires the association to determine the rate, scope and purpose of the assessment, subject to executive approval.

The Georgia Supreme Court has advanced the Donnelly theory in Agricultural Commodities v. Balkcom, 109 S.E.2d 276 (Georgia 1959) and Campbell v. Farmer, 157 S.E.2d 276 (Georgia 1967). In Balkcom, supra, the Georgia legislature empowered the Agricultural Commodities Authority to levy and collect from peanut producers an "assessment" of "not less than 25 cents nor more than one dollars per ton" on peanuts for advertising and promotion. The act authorized a purchaser of peanuts to collect from the producer and remit the money to the authority within a specified amount of time. No assessment was effective until ratified by two thirds of the producers voting in a referendum. The Court held that the "assessment" was in fact a tax:

"A tax is a rate of sum of money assessed in the person, property, etc. . . . but a license issued under the police power of the authority granting it, permitting the performance of an act which except for payment of a prescribed fee, would be prohibited; if the fee required for the license is intended for revenue, it is an exercise of the power of taxation."

The court went on to invalidate the statute because they concluded that such a tax is prohibited by the Georgia

constitution - "The state can never do indirectly that which it cannot lawfully do directly." In Campbell, supra, the legislature tried again following the adoption of an appropriate constitution amendment. The Georgia Supreme Court relying on Balkcom, supra, held that the assessments were still taxes.

It is the position of the defendant that this court should first apply the Dukesherer reasoning, focusing initially on the fact that no money reaches the general fund for general public expenses; and that the act's stated purpose is to promote fisheries enhancement thereby conferring a direct benefit on those assessed (fisherman) and only a broad secondary effect on the public as a whole.

Dukesherer is consistent with a wide range of authorities which unequivocally hold that taxes must remit to the general fund for general public expenses and are in no way dependent upon the will or consent of the persons taxed. As is discussed supra, the assessment here is not for general expenses, and may not be levied unless requested by a majority of those affected.

Defendant urges that Donnelly and Campbell have mischaracterized the old axiom that money acquired as "revenue" is tax money. It is not "revenue", at least for purposes of Donnelly analysis because no money is returned to the general fund. See cases, supra and Rainwater v. Haynes, 428 S.W.2d 254 (Ark. 1968); Cooley on Taxation, Vol. 1, subsection 26 at 94, section 27 at 98. 48/

Defendant Southern Region urges the court to then consider that in all other cases analyzing assessments, a common property resource, with limited commercial entry, is not involved in the question.

48/ "But a charge of a fixed sum which bears no relation to the cost of inspection which is payable into the general revenue of the state this a tax rather than an exercise of police power". Cooley at §27, p. 98.

The classic assessment situation is an assessment on real property for the purpose of guaranteeing the debt required for road and sidewalk improvements abutting the property. The assessment levied is generally a percentage of the appraised value of the property. It is an assessment of benefits. ^{49/} Here the benefits are two-fold: (a) the benefits of the privilege of commercially harvesting the common property resource with limited commercial entry, and (b) the benefit received from the increase salmon production of efficient aquaculture development. The assessment is equal to a fixed percentage of the fair market value of a common property resource when reduced to capture, as determined by the value received at the point purchased. The assessment essentially exacts a royalty share of the fair market value of the resource reduced by harvest to private possession for the purpose of guaranteeing the reception of public funds (matching grant) and private financing. This analysis is consistent with the Dukesherer case. See also Efros v. Russo, 171 A.2d 370 (New Jersey 1961); Northwestern Mutual Life Insurance Company v. State Board of Equalization, 169 P.2d 917 (California 1946); Outman v. Kilburn, 116 P.2d 812 (New Mexico 1941). Here, money collected results in improved fisheries and enhanced livelihood for those participating. The statute is not a lefthanded taxing mechanism, rather it is a modern equitable devise, endorsed by several states, to help people help themselves.

B. A.S.16.10.530 ET SEQ. DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER.

In the case at bar, we are concerned with two forms of delegation; the delegation to the qualified regional association of the power to determine the rate, scope, purpose and ration of the assessment, subject to executive

^{49/} Assessments are not taxes. McCoy v. City of Florence, 409 S.W.2d 511 (Kentucky C.A. 1966) City of Idabel ex rel. Wood Roof v. School District No. 5 of McCurtain County, 430 P.2d 285 (Okla. 1967); Rainwater v. Haynes, 428 S.W.2d 254 (Ark. 1968); Cooley on Taxation, Vol. I.

approval and the power of the commissioners to specify areas applicable and to determine whether the proposed assessment is procedurally sound and reasonable.

1. The Power to Tax or Assess is Not Delegated.

The legislature cannot delegate its lawmaking powers, but it can delegate the power to fill in the blanks;

" . . . [T]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislatures depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the legislative halls. Knight v. West Alabama Environmental IMP Authority, 246 S.2d 903, 909 (Alabama 1971) citing Porter v. Davis, 160 So. 93 (Alabama 1936). See also Cohen v. Mississippi State University of Agriculture and Applied Science, 256 S.2d 954 (D.C. Miss. 1966); Randolph v. U.S., 274 F.Supp. 200 (D.C. MC. 1967) affirmed 88 Sup. Ct. 695, 389 U.S. 570 19 L.Ed.2d 785; Quincy College Seminary Corp. v. Burlington Northern, Inc., 328 F.Supp. 808 (D.C. Ill 1971) affirmed 405 U.S. 906, 92 Sup. Ct. 939, 30 L.Ed.2d 177.

Clearly the taxation power has not been delegated.

The legislature has empowered the Commissioner of Commerce and Economic Development to make certain findings relevant to the manner in which an assessment is levied and its reasonableness. The reasonableness of the assessment depends primarily on the type of enhancement and rehabilitation pursued. For example, in southern southeast central incubation facilities requiring egg takes, egg plants, and transportation are the primary focus of the regional salmon enhancement plan. Whereas, in northern southeast as well as the Cook Inlet region, completely different salmon enhancement plans are being pursued, also utilizing techniques of stream rehabilitation and bypasses into previously unproductive areas. Obviously, the type of enhancement is strongly dictated by geography and the species involved. 50/

50/ Silver and red salmon, for example, spawn primarily in lakes, pink salmon in fast moving mountain streams, king salmon spawn in larger, siltier rivers.

The means chosen by the legislature reflects the judgment that the complexity of the economic analysis necessary to determine the most cost efficient and least discriminatory method of achieving the legislative policy of salmon enhancement is best determined by the users themselves, subject to approval by the executive. No power of taxation or of assessment has been delegated.

2. Any Delegations Are Justified and Constitutional.

The court in Barry and Barry, Inc. v. Department of Motor Vehicles, 500 P.2d 540 (Wash. 1972) has delineated the constitutional boundaries of the delegation doctrine:

"The delegation of legislative powers is justified constitutional, and the requirements of the standard doctrine are satisfied when it can be shown 1) that the legislature provided standards or guidelines that define in general terms what can be done in the instrumentality or administrative body which is to accomplish it and 2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of the discretionary power.

In Wilson v. Connecticut Product Development Corp., 355 A.2d 72 (Conn 1974) the court discusses the modern trend in delegation questions:

"As the complexity of economic and governmental conditions has increased over the years, courts have tended to approve ever broader standards to facilitate operational functions of administrative agencies . . . The modern trend holds statutory standards are constitutionally sufficient so long as they are declared as definite as is reasonably practical under the circumstances, cases cited at 77 (emphasis added). See also Westervelt v. Natural Resources Commission, 263 N.W.2d 564 (Mich. 1978) and Automotive Service v. Secretary of State, 267 N.W.2d 698 (Mich. 1978); In Re Johnson, 554 S.W.2d 775 (Texas 1977); See also People v. Mosely, 566 P.2d 331 (Colorado 1977) U.S. v. Paster, 557 F.2d (C.A. N.Y. 1977).

The legislature may also delegate power to private persons:

"In order to meet a reasonableness test, a statute delegating power to private person must satisfy both underlying concerns of the nondelegation doctrine. First, the legislature itself must have decided the fundamental policy question relevant to the legislative scheme. . . . Second, such

power may not validly be delegated by the legislature to a private body where the exercise of such power is not accompanied by adequate legislative standards or safeguards against arbitrary or self motivated action on the part of such private body." Jennings v. Exitor West Green Reg. Sch. Dist. Com., 352 A.2d 634, 638 (R.I. 1976) See also Carrol v. Finch, 26 F.Supp. 891 (D.C. Alaska 1971); Humane Society of U.S., New Jersey Branch, Inc. v. New Jersey Fish and Game Council, 322 A.2d 841 (N.J. Super. C.H. 1976); Arlington v. Board of Conciliation and Arbitration, 352 N.E.2d 914 (Mass. 1976).

DELEGATION TO ASSOCIATION

As outlined supra two delegation questions need be addressed. First, does A.S. 16.10.530(a) "declare legislative policy, establish primary standards or lay down an intelligible principal to which the instrumentality must conform?" Second, is the exercise of this power "accompanied by adequate legislative standard safeguards against arbitrary or self motivated action on the part of a private body?"

A.S. 16.10.500 declares that "[I]t is the policy of the state under §§ 500 - 550 of this chapter, to promote the enhancement of the state's fisheries by means of grants for organizational and planning purposes to regional associations which have qualified under §380 of this chapter, and by means of long term low interest for hatchery planning, construction and operation". A.S. 16.10.530 authorizes the Commissioner of Commerce, on request of a qualified regional association, to levy an assessment on a sale of one or more species of salmon by person licensed under A.S. 16.05.540 - A.S. 16.05.640. The rate and conditions of the assessment, including species covered, are to be submitted in conjunction with request by the regional association. A.S. 16.10.530(c) states that the Commissioner and association must agree on an appropriate means of collecting the assessment. A.S. 16.10.530(d) states that the assessment will terminate upon the request of the association "when all financial obligations relating to the assessment have been met".

Thus, the legislature has defined the purpose of A.S. 16.10.530 - enhancement of the state's fisheries through

hatchery and other enhancement organization planning, construction and operation - but has left the details of these plans to the qualified regional associations; subject to executive approval.

It is not necessary that the legislature supply a specific formula for the guidance of an administrative agency in a field where flexibility and adoption of legislative policy to infinitely variable conditions constitute the essence of the program. The modern tendency is to permit liberal grants of discretion in order to facilitate the administration of laws dealing with involved economic and governmental conditions. Swisher v. Brown, 402 P.2d 621, 627 (Cal 1965). See also State v. Reisman, 374 P.2d 1002 (Wash. 1972); Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966).

Consequently, the determination of the adequacy of standards to guide an agency or other entity cannot be made in the abstract; consideration must be given to the nature of the subject matter regulated. Atlantic City Electric Company v. Earden, 368 A.2d 366 (N.J. 1976). In the case at bar, the variables associated with the operation and development of hatcheries are infinite and highly complex; incapable of meaningful legislative orchestration.

The statute at bar also establishes important checks on the arbitrary exercise of power by the regional association. A.S. 16.10.530(e) provides that the assessment cannot be levied until the qualified association has held two public hearings. Reasonable notice is required. Ballots are to be mailed to all limited entry permits holders actively participating in a fishery at least twenty days before the initial public hearing. After a vote is taken at the initial hearing the second meeting is required following newspaper notice and full notice to active limited entry permit holders 14 days before the second public meeting. The votes of the

second are to be counted with the votes of the first meeting. The appendix reveals voluminous examples that these safeguards were diligently followed.

VIII. THE COLLECTION OF THE ROYALTY SHARE ASSESSMENT BY A REGIONAL AQUACULTURE ASSOCIATION IS NOT IN VIOLATION OF ARTICLE IX, SECTION 7 OF THE ALASKA CONSTITUTION.

Plaintiffs contend that the collection of the royalty share assessment by the regional associations is a dedication of the proceeds of a state tax or license for a special purpose in violation of Article IV, Sec. 7 of the Alaska Constitution which provides in relevant part:

Section 7. Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose,

It is the position of defendant SSRAA that the royalty share assessments are not the proceeds of a state tax or license, are not dedicated to a special purpose and, alternatively, the savings clause of the last sentence of the present section 7, constitutionally excepts the assessments from any general prohibition.

A. State Tax or License

1. Defendant believes that a ruling by this court that the royalty share assessed is not a tax is dispositive of this issue. The critical language for the purpose of review are the first eight words of the section: "The proceeds of any state tax or license."

At the Constitutional Convention the framers had experience with a variety of dedicated funds during territorial days. 51/

At that time, however, the delegates were singularly unexperienced with revenues raised from sources other than taxes or license fees. With that in mind it is worth reviewing the progress of Sec. 7 through the convention in detail.

51/ Cigarette taxes dedicated to school construction; marine fuel taxes to water and harbor facilities; highway motor fuel taxes to the highway fund; and aviation fuel taxes to airport construction. Cf. 1960 Opinion of Attorney General No. 31.

The section first appeared in the committee minutes on November 24, 1955, as follows:

All tax revenues shall be deposited in a general fund to be established and maintained by the state. This provision shall not prohibit the continuance of any special fund for special purposes existing at the effective date of the constitution.

Minutes, Committee on Finance and Taxation, (Hereafter, Committee Minutes).

On December 9, 1955, the section was amended to read, in relevant part, as follows:

All revenues shall be deposited in the State treasury without allocation for special purposes, except where state participation in Federal programs will thereby be denied.

Committee Minutes.

The section was sent to the Convention floor with a proposed amendment to change the first clause of the section to read:

"All public revenues shall be deposited in the State treasury . . ." Constitutional Convention Proceedings, p. 2297 (Hereafter Proceedings)

The section was subsequently withdrawn from floor deliberation at the request of the chairman of the Committee on Finance and Taxation. Proceedings, 2318.

When the section was again submitted for deliberation by the delegates it was changed to read substantially the same as the form in which it passed:

"The proceeds of any state tax or license shall not be dedicated to any special purpose. . . ." Proceedings, p. 2361.

The significance of the retreat from the broad language of "all public revenues" to that of "the proceeds of any tax or license" is emphasized when reviewing another section of the constitution regarding the dedication of revenues. Article VI, Sec. 7 directs that "[T]he initiative shall not be used to dedicate revenues. . ." That section remained substantively unchanged throughout the convention. Cf. Proceedings, Vol. 6, p. 19.

The term "all public revenues" has a reasonably clear meaning as does the term "the proceeds of any state tax or license." The meanings are clearly not identical. To argue that royalty shares or assessments are included in "the proceeds of any state tax or license" is to argue that the language in the constitution does not mean what it says and that the convention went through an amendment exercise for no reason. All fundamental canons of constitutional interpretation reject such an approach.

2. Clearly the royalty shares assessed from those commercially harvesting common property resources by a regional association is not a state tax or license. It is not of a state but a regional nature.

In Black & White Taxi Co. v. Standard Oil Co., 218 P. 139 (Ariz. 1923), the governor of Arizona sought to veto a provision giving half the gas tax to the county under a constitutional provision giving him the power to veto individual line items in appropriation bills. The court held that the governor had no authority to veto this provision for this reason:

"An appropriation or items of appropriation that the Governor may decline to approve are of funds belonging to the State . . . the fifty percent of the 3 cents gasoline tax that goes to the county is not levied for a State purpose and does not become the State's money. It is collected by the gasoline dealers and by them remitted to the Secretary of State, who pays one half thereof to the State Treasurer . . . and remits the other one half to the Treasurers of the different counties from which it has been received. It is the counties' money, levied for a county purpose; it is as though the legislature had directed the county authorities to collect one and one half cents tax per gallon on gasoline and apply it to the maintenance of the county's roads and highways, or as though the legislature had directed the county authorities to make a tax levy upon the property of the county to be used in building, improving, repairing, and maintaining a public court house, or a county hospital for the indigent sick and disabled, or any other public purpose or use . . . the item or items that may be disapproved [by the Governor] are items of money, to be paid out of the State's money levied and collected for the purposes of the State and not expenditures the legislature may authorize and direct its political subdivisions to make." Supra, p. 144.

See also, Buchanan v. Town of Salina, 58 N.Y.S.2d 797 (1945); State v. Donald, 158 N.W. 317 (Wis. 1916); Opinion of the Justices, supra; Aetna Life, supra.

B. Savings Clause.

Should this court construe the royalty share to be a state tax, defendant urges the following analysis on this court for the purpose of resolving the issue.

As originally adopted the last clause of Art. IV, Sec. 7 read as follows:

This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this constitution by the people of Alaska."

That clause was amended at the general election held in November, 1976 to read:

This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska."

A.S. 16.10.530 was adopted in 1976 by the same legislature that presented the permanent fund amendment to the voters.

The change in the savings clause by the same legislature that adopted Sec. 530 has no meaning if it is construed merely to allow valid dedication to continue since for a dedication to be valid it must either be a dedication other than the proceeds of a state tax or license or the dedication of a tax or license made prior to the date of the constitution. No change in the constitution was needed to accomplish this. A fundamental canon of constitutional construction is that no part of an enactment is to be considered meaningless if a reasonable meaning can be found.

IX. VAGUENESS.

Plaintiffs allege that the statutory framework for the assessment is unconstitutionally vague because it is not clear who should pay the assessment. It is defendant SSKAA's position that the law is not vague, any possible vagueness has been cured by executive interpretation, and finally that plaintiffs are precluded from raising this issue because they have failed to exhaust their administrative remedies.

A. The Law is Not Vague.

The previous argument in the section on equal protection and the due process of the laws clearly reveals that the levy of assessment is not over-inclusive nor under-inclusive. Plaintiffs' allegation is thus reduced to the question of whether the law is sufficiently definite to determine who the assessment is levied against. The law clearly states that the assessment "shall be levied on the sale of one or more species of salmon caught by persons" commercially harvesting salmon in the qualified region. A.S. 16.10.530(a). The law further states that the "commissioner may, by regulation, require its collection by buyers of the salmon upon the sale of which an assessment is levied" A.S. 16.10.530(c). These sections make it clear that the assessment is levied against the person harvesting the salmon. See also A.S. 16.10.540(a).

B. Any Possible Vagueness Has Been Corrected By Executive Interpretation.

It is a long established rule that administrative or executive interpretation of a statute is weighed by a court in determining whether that statute is constitutionally infirm. Cf. Kelly v. Zamarello, 486 P.2d 106 (Alaska 1971); C.J.S.2d, Statutes. A review of 3 AAC 88.040 (Collection of Assessment) leaves no room for imagination.

C. Exhaustion

It is abundantly clear that plaintiffs have not petitioned, requested action from, no objected to the

Commissioner of Commerce and Economic Development about any aspect of the assessment process. Such a failure to utilize the administrative remedies available prohibits certain allegations raised for the first time in the judicial branch. Plaintiffs' vagueness argument could have been and should have been addressed to the Commissioner. Failure to do so estopped plaintiffs from raising any argument that the statute is indefinite to the level of constitutional concerns.

X. COMMERCE CLAUSE.

Defendant SSRAA believes it appropriate to conclude the substantive analysis of plaintiffs' allegations in this memorandum with a discussion about the commerce clause. The issue could be dealt with summarily but an important contrast between economic policy by Congress subjected to commerce clause and other challenges and the challenges in this case should be considered. Plaintiffs sweeping allegation that A.S. 16.10 is in violation of the commerce clause of the Federal Constitution will be dealt with following a brief discussion of the evolution of the commerce clause in the judicial branch.

A. General Background

The evolution of judicial interpretation of the commerce clause closely parallels the evolution of social and economic affairs of the nation. The first century and a half of the republic was dominated by the doctrine of laissez-faire. The government's main task apart from defense was to keep and maintain fair-play while private interests asserted themselves freely within the market. The invasion of federal power into areas of state jurisdiction was only justified when the exercise of state power had to yield to the doctrine of laissez-faire. Thus, in Hammer v. Dagenhart, 247 U.S. 251 (1918), commonly known as the child labor case, the Supreme Court held that the federal government could not prohibit the shipment in interstate commerce of goods produced by child labor because the effect of such prohibition was to regulate manufacturing carried on within individual states. However, if the exercise of state power infringed upon private market enter-play, the Court was quick to strike down that action pursuant to the commerce clause. This led to the development of a doctrine known by scholars and jurists as dual federalism. A line had to be drawn, in cases such as those involved in the regulation of commerce, dividing the area in which the national

government could operate from that over which the state had exclusive jurisdiction. Today scholars point to the development of a new federalism. Cf. Clark, The Rise of a New Federalism, (1938). They acknowledged the expanded role of government in American life as the root of the new federalism, and point to great economic depression which began in 1929 as the turning point in executive, legislative and judicial policy.

The doctrine of laissez-faire, upon which the operation of governmental authority had been essentially based since the founding of the republic, proved wholly inadequate to meet the problems presented by the depression. Congress moved with the adoption of the legislative measures which sought to regulate most of the critical aspects of the economic system - most of which was previously considered beyond the scope of federal regulatory power. An early legislative enactment was the National Industrial Recovery Act of 1933, granting broad powers of business and industrial interaction with consumers and labor. In Schechter Poultry Corporation V. United States, 295 U.S. 495 (1935), the Court struck down the act:

Where the effect from intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, federal authority would embrace practically all the activities on the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Supra, p. 546.

It is generally considered today that the Schechter Poultry case involved one of the last important applications by the Supreme Court of the concept of dual federalism. One commentator has noted:

The need for national regulation of the economic system, which had induced the legislative and executive branches of the federal government to discard the laissez-faire policies that had controlled their action prior to 1929, was bound also

to have its effect on the jurisprudence upon the Supreme Court. It is true that there was a certain delay before the court began to adjust its case law to the change that was demanded by the great depression. Thus, while the 'new deal' measures to deal with the economic crisis were enacted as early as 1933, it was not until 1937 - two years after the Schechter decision - that the American court began to remove the restrictions upon federal action which had been imposed by the strict adherence to dual federalism. Such a lag appears to be inherent in the functioning of any judicial tribunal which is compelled by changing external conditions to make fundamental modifications in its case law. It constitutes perhaps the prime weakness of the American system of judicial review, the basic conservatism of the judiciary often makes it difficult for its members to make the necessary accommodation before it is too late. Schwartz, American Constitutional Law, p. ____, (1963).

Within six years the court had retreated from and then expressly overruled the prior decision in the child labor case. Cf. National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); Sunshine Anthracite Coal Co. v. Atkins, 310 U.S. 381 (1940); United States v. Darby, 312 U.S. 100 (1941).

Another example of the retreat from dual federalism involved the Agricultural Adjustment Act of 1933. Under the Act, a processing tax was levied upon different agricultural commodities, and the proceeds from this tax were used to compensate farmers who agreed before hand to raise less or none of such commodities. The prime purpose of this exercise power to tax was the regulation of agricultural production, rather than securing of revenue. In United States v. Butler, 297 U.S. 1 (1936), the Act was struck down as an improper exercise of the taxing powers. There was a strong dissent by Justices Stone, Brandeis and Cardozo:

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. They may give monies to sufferers from earthquakes, fire, tornado, pestilence or flood, but may not impose conditions - health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left with the states, who are unable or unwilling to supply the necessary relief. Supra, p. 85.

Three years later, in Mulford v. Smith, 307 U.S. 38, 48 (1939) the dissents noted above became the law when the Court upheld the Agricultural Adjustment Act of 1938 which did not differ in substance from the act held unconstitutional in 1936. In United States of America v. Rock Royal Cooperative, Inc., et al., 307 U.S. 533 (1938), the demise of laissez-faire was plain. That case involved various parts of the Agricultural Marketing Agreement Act of 1937 as well as a scheme adopted by the Secretary of Agriculture in connection with the establishment of a plan for fixing uniform prices of milk in certain areas. The scheme created an equalization pool that required producers to pay into the common fund any surplus over a uniform price. The law provided for a vote by the producers to approve any such scheme. The law was challenged on due process grounds, vagueness grounds, delegation grounds, violation of the commerce power and delegation of legislative power to the producers. The court rejected all of these arguments.

B. Interstate Commerce is Not Impermissibly Burdened.

These cases set the foundation for the new federalism, upon which plaintiff apparently rest their allegation that A.S. 16.10 violates. Defendant SSRAA developed that short background for the purpose of pointing out the marked similarities between the constitutional challenges to the new deal legislation and the constitutional challenge resting before this court in this lawsuit. The tragedy of the great depression forced the Supreme Court to discard the shackles of past judicial interpretation of federal and state power, in order to give the Congress and the executive the flexibility necessary for economic recovery. In order to do this the court had to deal with litigious plaintiffs and multiplicitous constitutional challenges carrying over from the 19th century. The tenacity that laissez-faire capitalism displayed in the face of new and far reaching economic policy by the legislative

and executive branches is understandable. The tenacity of plaintiff fishermen in this lawsuit is equally understandable.

A.S. 16.10 et seq. places no impermissible burdens on interstate commerce. The assessment is in no sense exclusionary. Henneford v. Silas Mason Co., 300 U.S. 577 (1937). It levies a share of the common property resource reduced to capture by commercial harvest prior to the introduction of the fish into commerce. The assessment in no way discourages commerce and the purposes of the aquaculture development will in fact increase commerce between the states and effectively increase the opportunity for nonresidents to travel here and participate in the commercial harvest. General Motors Corp. v. Washington, 377 U.S. 436 (1964). Members of SSRAA are not discriminated against and, in fact, at least one member of the board lives in Seattle and actively participates in management of the corporation. The burden plaintiffs allege are burdens shared by all persons most directly benefited from the fisheries enhancement and are in no sense burdens upon the streams of commerce. However, as noted in this brief, the equal protection and commerce claims of the plaintiffs effectively put the complaint in perspective.

XI. PLAINTIFFS HAVE NOT EXHAUSTED ADMINISTRATIVE REMEDIES.

It is fundamental that plaintiffs seeking judicial review of administrative action must normally first exhaust their administrative remedies. See generally McKart v. United States, 395 U.S. 185 (1969). The doctrine of exhaustion helps delimit the respective roles of the executive and judicial branches. It gives the agency the first chance to exercise discretion or apply its special expertise, and promotes efficiency in both judicial and administrative processes. McKart, supra, 395 U.S. at 193-194. Its purpose is to allow an agency to perform functions within its special competence and to "correct its own errors so as to moot judicial controversy." Parisi v. Davidson, 405 U.S. 34, 37, 31 L.Ed.2d 17 (1972).

Plaintiffs' failure to attempt administrative resolution of their claims short-circuits the system by denying to the agency charged with administering this statute the opportunity to apply its expertise. An administrative agency often has wide latitude to construe its enabling legislation, Cf. Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960); Kelly v. Zamarello, 486 P.2d 906, 908-911 (Alaska 1971) and of course would do so in such a manner as to resolve doubtful questions of constitutionality where present. Plaintiffs' resort to the court might have been obviated had the administrator been asked to consider their challenges and perhaps construe the statutes to satisfy them. This is especially true to the extent plaintiffs are claiming a vagueness problem of constitutional proportions. Defendant asserts that there is no such problem, and that the statute is quite clear on the point plaintiffs seek to obfuscate. Assuming arguendo that it were vague, proper administrative action could rectify the problem. Plaintiffs were remiss in not seeking such.

If plaintiffs were challenging reasonableness of the assessment, e.g., or the method by which the election

was conducted, exhaustion would obviously be required. Such claims are completely without merit on the facts of this litigation, however, and plaintiffs have eschewed them.

A more interesting situation is posed by the fact that plaintiffs' claims are at least in part based on allegations of unconstitutionality. The mere fact that such issues are raised, however, does not obviate exhaustion requirements. See Montana Chapter of Ass'n. of Civilian Technicians v. Young 514 F.2d 1165, 1167-1168 (9th Cir. 1975). Where relief may be granted on nonconstitutional grounds, exhaustion is still required.

Plaintiffs at bar failed to present their claims to the administrator to allow possible resolution which would avoid necessity for judicial intervention. They should therefore be estopped from asserting such claims now, and their case should be dismissed, or alternatively, the matter should be remanded to the Commissioner for appropriate consideration and action.

Defendant observes that another available remedy which plaintiffs totally ignored is provided in A.S. 44.62.220. That section grants to any "interested person" the right to "petition an agency for adoption or repeal of a regulation". By failing to avail themselves of this administrative remedy, plaintiffs are denying the Commissioner opportunity to "correct his own (alleged) errors so as to moot judicial controversy," Parisi, supra, and to apply his expertise to effectuate the intent of the legislature through appropriate construction of the statute. For this reason, also the plaintiffs should be estopped and their cause dismissed, or alternatively the court should defer to appropriate administrative procedures.

XII. PLAINTIFFS ARE BARRED BY LACHES

As a result of plaintiffs' unreasonable delay in initiating and prosecuting this action, defendant SSRAA would be unfairly prejudiced should the court grant the relief sought. Plaintiffs are therefore estopped from asserting their claims due to laches. Accordingly, defendant asks this court to exercise its discretion to dismiss the action.

Prejudice to the defendant (as well as delay by plaintiffs) is demonstrated in detail below. It consists primarily of expenditures of funds and organizational efforts in reliance upon continued unhampered operation of the salmon enhancement program. As part of their complaint plaintiffs seek to recover monies collected pursuant to the assessment election. These funds have largely been spent or committed by the regional aquaculture associations. To the extent plaintiffs seek such damages, failure to timely assert their rights seems clearly to preclude recovery. However, the question of damages is irrelevant to this motion for summary judgment, and its consideration is best deferred since it may well be moot. Defendants request that the court bifurcate these proceedings, determining the question of liability first, and then, if need be, the question of damages. Accordingly defendant's argument on laches is addressed to dismissal of the action. Issues related more specifically to damages will be briefed subsequently should that become necessary.

The traditional equitable doctrine of laches is applied and discussed extensively in two leading Alaska cases, Moore v. State, 553 P.2d 8 (Alaska 1976), and Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447 (Alaska 1974). Two criteria must be met before laches will be applied to bar a claim. "The defendant must show the plaintiff was guilty of inexcusable delay, resulting

in undue prejudice to the defendant." Moore, supra, 553 P.2d at 15. While the court refers to these as "independent" tests, they in fact appear to be inversely related. A showing of severe prejudice might justify application of laches though the causative delay is relatively short. Concerned Citizens, 527 P.2d at 457. An indefinite inexcusable delay, on the other hand, will not justify barring a claim due to laches where the defendant has suffered no resulting prejudice.

In Moore, the plaintiffs brought suit challenging the legality of the sale of certain offshore oil and gas leases in Kachemak Bay. The trial court held plaintiffs' claim were barred by laches and dismissed the action on defendants' motion for summary judgment. The Alaska Supreme Court reversed on this issue, finding that plaintiffs' three week delay in filing the action after the issuance of the first drilling permit did not cause sufficient prejudice to justify preclusion of the suit.

In Concerned Citizens, the Supreme Court upheld a trial court grant of summary judgment based on laches. In that action, the taxpayer plaintiffs sought dissolution of a hospital service district on constitutional and other grounds. The suit was not brought until four years and ten months after the voters had approved delegation of the Borough's hospital powers on April 8, 1969 - the point at which the court held plaintiffs' claims arose. Between that date and June 5, 1973 a hospital board was authorized, a long term lease was negotiated for operation of a former city hospital, and plans were laid for enlarging the facility. 527 P.2d at 447. On June 5, 1973, nine months before the complaint was filed - voters authorized issuance of bonds for construction of a new hospital. Between then and February 13, 1974, when the complaint was filed, defendants obtained federal and state grants and loans and contracted for architectural and other services. Ibid.

Before proceeding to specifics of the case at bar defendant wishes to dispose of a threshold issue raised in plaintiffs' pleadings -- the claim that laches may not be interposed as a defense where constitutional claims are made. This is without merit. In Concerned Citizens, e.g., plaintiffs claimed the organization of the service area violated constitutional provisions, 527 P.2d at 449, and the Supreme Court expressly noted that it was barring a constitutional claim for laches. Id. at 458 n. 32. See also, Neizer v. School District of the Township of Schuylkill, 121 A.2d 93 (Pa. 1956); Ciletti v. Washington, 140 A.2d 98 (Pa. 1958), app. disp'd. 358 U.S. 130, 3 L.Ed.2d 225. In Neizer plaintiff taxpayers sued on constitutional grounds to enjoin a school district from paying rent to an authority created for the purpose of building and equipping school facilities and renting the same to the district. The action was barred by laches. In Ciletti, the court barred plaintiffs' suit due to laches where they waited five months to challenge creation of a sewage treatment authority. Reference to the lower court opinion in Ciletti, 107 A.2d 871 (1954), reveals that plaintiffs raised a number of constitutional challenges to the validity of the statutes and ordinances at issue. Plaintiffs apparently conceded the constitutionality of the enabling statute at trial, but continued to press other constitutional claims including challenges to alleged unconstitutional delegations of power to private corporations hired by the authority. Id., at 872. These claims were all held barred due to laches.

Application of the doctrine of laches depends on the facts and equitable considerations of each case, Moore, supra, 553 P.2d at 16. Defendant believes the following will demonstrate to the court ample grounds for a finding of laches. SSRAA reserves the right however to supplement

matters presented herein with information requested in pending discovery motion, should the court find such further documentation necessary or desirable.

The two key determinants of laches -- delay by plaintiffs and prejudice to defendants -- must be analyzed with reference to a particular time frame. Moore provides guidance in determining the relevant period for measuring prejudice attributable to delay.

"The point in time at which plaintiffs must exercise their remedies in court or lose their right to assert their cause of action depends on the facts and equitable considerations of each case, including the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice. ... (O)ur concern is ... with when, in light of any resulting prejudice to defendants, it became reasonable to expect plaintiffs to act upon the (alleged) wrong."

The Supreme Court goes on to enumerate two specific factors to be used in evaluating plaintiffs' delay:

"(One) is when, under the circumstances, it became no longer reasonable for plaintiffs to assume that defendants would comply with the law. We will also look to that point in time when there were positive steps taken by defendants which made their course of conduct irrevocable, and would have galvanized reasonable plaintiffs into seeking a lawyer."

How do these tests apply to the facts of this case? In both instances they demonstrate that plaintiffs are guilty of laches.

With respect to the first test, plaintiffs could not reasonably have presumed defendants would comply with the law as they view it at any point after passage of the legislation. It is plaintiffs' contention that the statute itself is constitutionally infirm, so that nothing defendant might do could remedy its illegality. Thus there is a substantial argument that the point from which to measure plaintiffs' delay is June 19, 1976, when the statutory scheme became law. This would be consistent with the holding in Concerned Citizens, supra, where the Supreme Court stated, "All the claims which appellants attempted to argue before

the superior court could have been asserted in April 1969." 527 P.2d at 458. (The date voters approved an ordinance creating a hospital service area and delegating assembly powers to it). In Moore, unlike the instant case or Concerned Citizens, plaintiffs did not challenge the validity of the statutes and regulations at issue, only their application. Thus it could not be assumed until these were actually illegally applied that defendants would not comply with the law -- indeed plaintiffs were entitled to presume the officials would proceed in accordance with the law. 553 P.2d at 18. As noted, such was not the case here, and nothing short of failure to implement the statute would save state officials from violating plaintiffs' version of the constitution. Plaintiffs have shown no evidence, nor did any exist, to support a finding that state officials did not intend from the outset to fully implement the law.

Application of the second test, however, points to a somewhat different time period. Defendant is willing to concede that the most reasonable and meaningful date to use with reference to the second test is July 1977, when the mandatory assessment for the Southern Region was approved by the Commissioner of Commerce. Persuasive arguments could be made that the relevant point in time when the positive steps taken by defendants made their course of conduct irrevocable came much earlier - when the region was formed, e.g., or when the Executive Director was hired, or particularly when the assessment vote was taken. But defendant contends that there can be no reasonable dispute that approval of the mandatory assessment marked such a point in time, plaintiffs' actions bear this out, for they were in fact "galvanized into action and motivated to hire counsel" by this event. See Moore, 553 P.2d at 16. The principal plaintiff, Wayne Alex, stated that he found out in late July or early August that the assessment had actually been instituted. (Depo. of Wayne Alex, p. 37). At that point, he was galvanized. He

obtained a copy of the law and information about it (ibid.), he pulled his membership card from United Fishermen of Alaska (UFA), which had lobbied for the plan (id., 14), and went to see an attorney, Bill Buddy (id., 43), began trying to organize fishermen in opposition to the law (id., 47), and sent out letters to certain permit holders seeking financial and political support (id., 69).

Plaintiff John C. Martin likewise took action after the election results came out. As a member of the Board of Directors of PFI in Petersburg, Martin favored having the cannery refuse to collect the assessments. (Depo. of John C. Martin, at 27). The cannery (PFI) supplied a form fishermen could fill out to protest the assessment (Id. 26).

These men were and others were aware of the assessment program in varying degrees before the assessment vote, but their interest and concern crystalized into action at that point and the test is satisfied.

Given July 1977 as the time at which plaintiffs should have acted, we must assess the prejudice which defendant suffered as a result of their delay in filing the Complaint until March 15, 1978. The following activities, commitments and expenditures by SSRAA occurred between July 1977 and the time plaintiffs filed their complaint.^{52/}

(a) \$100,000 was committed to secure an engineering contract with the firm of CMH2 Hill; (b) \$260,000 in grants were received from the state, \$100,000 of which was awarded specifically on the basis of passage of the mandatory assessment, and these monies were committed; (c) thousands were spent for site selection, and helicopters and boats were employed throughout Southeast for this purpose, biologists

^{51/} Defendants contend the date it received notice of the suit by being served is the relevant time for terminating the period of laches -- the extra week, however, is of little actual significance.

were sent to various towns, and eggs were taken from numerous streams; (d) SSRAA and auxiliary personnel were employed and engaged in extensive planning and research functions premised on assessment income.

To allow this belated attack on the program after defendant made such substantial commitments during a period in which plaintiffs unreasonably delayed action would work a gross injustice on defendant. The defense of laches "is one of great public utility ... (which) induces confidence in what is, and willingness to improve property in possession." Holmstead v. Grinnan, 152 U.S. 412, 38 L.Ed 495. Plaintiffs failure to challenge the salmon enhancement program at its inception, or at least at the stage of the assessment vote approval when they demonstrably could have, estops them from asserting any right to dismantle the now growing, viable entity which is SSRAA.

As noted above, this case is similar to Concerned Citizens. There the Authority which plaintiffs sought to dismantle, though formed for several years, undertook its major actions cited by the court to prove prejudice within nine months before plaintiffs filed their complaint. These included issuance of construction bonds, securing of federal and state grants and loans, and awarding of an architectural design contract.

The prejudice to defendant SSRAA is likewise similar to that found by the court in Ciletti, supra, 107 A.2d at 872, where laches was found based on plaintiffs' five month delay in filing suit. The court noted the sewage authority which plaintiffs there sought to dismantle had sold sewage bonds, agreed to provide services, employed a consulting engineer, and contracted with private companies to receive certain services.

One final factor deserves mention with respect to plaintiffs' laches. The Moore case expressly makes the public interest an element of the laches equation.

"In determining whether laches was properly applied in the case at bar, we cannot overlook the fact that under Section I of Article VIII of our Constitution, the public also has an interest in the proper development of Alaska's resources." 533 P.2d at 19.

The Alaska legislature has made a judgment that the statutes codified in A.S. 16.10 et seq. represent the best method of development of our common property fisheries resource. This creates a strong presumption that the public interest is represented and served by this salmon enhancement program. This Court should therefore consider the public interest as a factor supporting a finding of laches here.

Considering this important public interest, and the serious prejudice to defendant resulting from plaintiffs' unnecessary delay, this court should grant summary judgment for defendants on the basis of laches.

XIII. THE CONSTITUTIONALITY OF REGIONAL AQUACULTURE ASSOCIATIONS AND THE ASSESSMENT IN A NUTSHELL.

Defendant realizes that this court is being confronted with issues of first impression. It is for that reason that this memorandum contains extensive background material in order that the issues can best be understood in the light of constitutional, executive and legislative policy as well as the judicial interpretations given those policies. This section is devoted to placing the issues in a nutshell with the positions of the opposing parties.

It is defendant SSRAA's position that the regional aquaculture program and the mandatory assessment contained in A.S. 16.10.375 - 620 is a legitimate purpose for legislative intervention, that the means chosen bears a close substantial relationship to the purposes stated, is not vague, is not the delegation of a taxing power in violation of Art. 10, § 2, Alaska Constitution, does not establish a dedicated fund in violation of Art. 9, § 7, Alaska Constitution, and in no way impermissibly interferes with interstate commerce. Further, the regulations and orders adopted by the executive pursuant to the law were lawful. Finally, it is defendant's position that plaintiffs are precluded from raising certain issues for the first time in the judicial branch when they have not sought administrative remedies, and are precluded in seeking certain relief by the doctrine of laches.

The real issues in this case are the most elusive ones to identify because of the multiplicitous allegations raised by plaintiffs. The first real issue is equal protection and fortunately there is substantial recent case law and commentaries from which the section in this memorandum was drawn and from which the court can draw its conclusions. The second real issue involves interplay between Art. 8 of

the Alaska Constitution (Natural Resources) and Art. 10 (Local Government). Plaintiffs urge a construction of Art. 10, § 2 that is narrow and rigid. They allege that a taxing power is delegated to an institution other than a borough or city. Defendant believes that the assessment is not a tax and, in any event, no power to tax or levy an assessment has been delegated.

One thing should be clear at this juncture. The legislature can delegate the power to tax or levy assessments in any manner it chooses in the unorganized borough. Art. 10, § 6. Regardless of how the assessment is interpreted, if a regional aquaculture association operates exclusively in the unorganized borough the provisions of A.S. 16.10.375 - 620 are constitutionally firm. It is defendant's position that current qualified regional aquaculture associations in Southeast Alaska may tax or levy an assessment, notwithstanding the presence of local government jurisdictions. The obligation to provide for the rehabilitation and enhancement of the common property fisheries of the state is clearly a state function and in no sense can be delegated to local government. Given that the legislature cannot delegate to local governments fisheries enhancement, it chose the only constitutionally permissible means to provide for regionally oriented fisheries enhancement while at the same time engrossing contemporary public interests such as user input and control, executive oversight for a complex subject matter, equitable distributions of the burdens, and labor and capital resource conservation.

The essence of plaintiff's position, then, is that the only permissible means for the legislature to provide for fisheries enhancement is through absolute and continuous state involvement funded by general income tax revenues. 52/

52/ It is defendant's position that funding fisheries enhancement through general tax revenues, if not unconstitutional is a graphic example of a hidden subsidy that inequitably distributes public wealth to an exclusive class harvesting a common property resource.

We believe that the constitutional framers in no sense intended the division between state and local functions to mean that the presence of a local government in or near a region of fisheries commerce precluded the legislature from establishing the means for fisheries rehabilitation and enhancement that it chose. The position plaintiffs urge has similarities to the dual federalism that for so long hamstrung the commerce and taxing powers of congress. The framers surely did not intend that the presence of local government jurisdictions was a license to balkanize rehabilitation and enhancement of common property resources. The framers also surely did not intend to cripple future legislatures dealing with resource development economics by restricting their powers to the limited scope urged.

The position plaintiffs' urge is archaic in a constitutional and a public policy sense. It would effectively limit the legislature to recreating the policies and ideas of the past through instant replays, regardless of their effectiveness and efficiency, rather than recognizing the flexibility necessary for the economic transition into the 21st century.

CONCLUSION

For all the reasons stated above, defendant SSRAA respectfully requests that this court enter judgment as a matter of law against the plaintiffs in this action.

DATED this 15th day of February, 1979.

Douglas Pope
Attorney for Defendant SSRAA

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT, AT JUNEAU

WAYNE ALEX, WILLIAM A. THOMAS,)
JR., ED MAKI, JOHN C. MARTIN,)
WARREN S. WESTROM, DICK WORKMAN,)
MARK W. WHITE, CARL SINS, BRUCE)
R. GILBERT, FRED CHAMBERS, DOUGLAS)
D. KARNS, HAROLD D. BIELESKI and)
LEO R. ALBECKER, JR.,)
Plaintiffs,)
vs.)
SOUTHERN SOUTHEAST REGIONAL)
AQUACULTURE ASSOCIATION, ET AL.,)
Defendants.)

No. 1JU-78-191 Civil

AFFIDAVIT OF JACK MILNES

STATE OF ALASKA)
THIRD JUDICIAL DISTRICT) ss.

JACK MILNES, upon oath, says:

1. My name is Jack Milnes and I am the Executive Director of Southern Southeast Aquaculture Association, Inc. I have served in that position since August 15, 1976, and my duties are set out in the by-laws. At the time I became Executive Director for the corporation the only staff was part-time secretarial help, and my early chores were to solicit directors from the various representational user groups, and to gain acceptance of the corporation as a qualified regional aquaculture association. Pursuant to my duties as set out in by-laws, I began collecting records and other physical materials in a corporation filing system relevant to all phases of my responsibility and all necessary activities of the corporation. Those materials appended to this affidavit have been selected from those files and records kept as a part of the corporation business and are attached herewith for the purposes of explaining certain points in more detail.

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Anchorage, Alaska
272-6225

2. In August of 1976 the corporation had approximately Ten Thousand Dollars (\$10,000.00) of cash on hand from contribution and donations by various users, processors, and other interested persons.

3. On August 26th, I began traveling to various towns in Southeast Alaska and informing fishermen of the purposes of the aquaculture association, and to solicit voluntary contributions in the form of direct contributions, and voluntary assessments. The first was to Wrangell on August 26 and 27, then I traveled to Juneau for the period of August 31 through September 3rd. On September 20, 21, 22, 23, 24, and 25 I traveled to Haines, Skagway, and Juneau, with Larry Dalton, President of the Southern Association. Other people present on the trip were James Beaton and several other directors who met us along the way in various towns. In this latter trip we began distributing a small brochure which contained information regarding proposed releases from hatchery sights and estimated returns, hatchery costs, estimates, approximate duration and magnitude of the proposed assessment, projected assessment return calculations, and a form for those fishermen interested in contributing to the Southern Region by agreeing to assess themselves Three Percent (3%) of their gross salmon catch in Districts One through Eight. (See Appendix) As I traveled to these various communities, meetings were organized ahead of time where various fishermen from the different areas would attend, look at the brochure, fill out the agreement for a voluntary assessment if they were so interested, and would engage with me in a dialog and discussion regarding the pros and cons of hatchery development and funding mechanisms. I had prepared some material for discussion that I tried to cover at each meeting. A standard dialog is reflected in the appendix and memorandum dated October 1976 and entitled

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"Narrative to Accompany the Pamphlet which discusses the Reasoning Behind and Request for Assessment by each Fisherman." The narrative attached to this affidavit in the appendix was actually prepared for other persons to utilize in their discussions to various user groups about the reasoning behind and the request for the assessment, but it also adequately reflects what I attempted to cover at each meeting. Preceding the above referenced "Narrative" in the appendix is a graph entitled "SSRAA's Target". That graph was used frequently during these meetings and was reproduced in different forms and distributed.

During this period we also sought support from other organizations and local governments. For example, the Alaska Trollers Aquaculture Corporation agreed to consolidate with us, and the Ketchikan Chamber of Commerce assisted us in securing donations. Local merchants petitioned the city and borough governments to give us as much support as permissible. The reaction was quite favorable.

Also included in the appendix, is a memorandum dated December, 1976, entitled "Viewpoints from Southeast Alaska". That memorandum was prepared by me and delivered to members of Governor Hammond's staff at their request, for the purpose of providing a brief history of activities to date, capital shortfalls, and to discuss various problems and concerns then known or perceived in the aquaculture programs, and to suggest some solutions.

4. Meanwhile, in November 2, 1976, pursuant to our request, the Alaska Department of Fish and Game recognized Southern Southeast Regional Aquaculture Association, Inc. as a qualified regional association under the terms of Chapter 161 of the 1976 session laws. The region covered the same geographic boundaries as Fish and Game regulatory districts 1 through 8 in Southeastern Alaska. (See November 2 letter

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and map in appendix). By the end of October, 1976, a significant portion of the cash on hand of the corporation had been expended for preliminary hatchery site selection.

A preliminary application for a private nonprofit hatchery at Beaver Falls had been submitted to the Commissioner of Fish and Game. Submitted with the application and also to the Department of Commerce, Division of Business Loans were the signature and comments of those persons agreeing to a voluntary assessment. The assessment volunteers were considered essential to any successful financing. (See October 8, Memorandum and Application).

5. 1977 In late February of 1977, the board of directors' Executive Committee met with Phil Daniels for the purpose of discussing current legislative proposals regarding the aquaculture program pending in the legislature. Phil Daniels, a United Fishermen of Alaska representative, advised the board about the proposed legislative changes providing for a change in the funding mechanisms as well as mechanisms for mandatory assessment. Shortly thereafter, the full board resolved to proceed with a mandatory assessment election in order to meet compliance with legislation pending before the legislature. An elections committee was appointed, and a calendar of events established to conform with the election procedures in the proposed law. The committee drew up procedural rules for voting, and made substantial preparations for full and adequate notice of the proposed election to all limited entry permit holders in Southeast Alaska. In the appendix, are included numerous copies of actual notices posted in public places, newspaper notices of the pending election, affidavits of publication, and other evidence of various efforts taken by the corporation to insure the largest possible turn out for the election. Also included in the appendix are copies of the various election materials mailed to each limited entry permit holder in Southeast

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Alaska. For example, a small brochure entitled "Fisheries Permit Holders: Want More Fish?" contained information about the board of directors of the corporation, proposed hatchery facilities, projected costs, and encouraged votes. The law was precisely followed prior to and during the election. The corporation hired the Ketchikan accounting firm of Walter W. Shuham to audit and tabulate the results of the election. On June 1, 1977, the certified public accountant advised the association that of 1,052 ballots by qualified fishermen received in accordance with established voting procedures the number of votes cast for the proposal were 592 and the number of votes cast against the proposal were 446. 14 votes cast were not counted because the envelopes contained two or more ballots or the general meaning of the ballot was unclear and the result of the ballot would not affect the outcome of the election. On June 30, 1977, the corporation requested that the Department of Commerce approve the mandatory assessment vote, and establish on an emergency basis, a mandatory assessment. On July 15, 1977, the Commissioner of the Department of Commerce and Economic Division made a finding of an emergency and noticed adoption of emergency regulations. The notices of adoption of emergency regulations, which fleshed out provisions of the statute regarding requests for institution of assessment, review and approval of initial and final requests, and other related matters, were posted in every fishing village and town in Southeast Alaska. Although the Commissioner gave notice to the processors and other fish buyers, pursuant to A.S. 16.10 that they were to begin collecting the assessment, the processors collected but declined to transmit the assessment funds to the regional association without first obtaining a court order or specific authorization from fish sellers from whom the assessments were collected. Cf. State of Alaska

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and Southern Southeast Aquaculture Association, Inc. v. Annette Island Packing Company, et al., civil action number 77-10006, Juneau. However, some fish buyers did collect and forward the assessment and by November 11, 1977, Southern Southeast Regional Aquaculture Association had received some \$49,000.00 in assessments. (See appendix.) On December 28, 1977, in the above cited case, the State of Alaska, SSRAA, and the various defendant processors filed a release and indemnity agreement in Superior Court. Pursuant to that release and indemnity agreement over \$545,000 was released to SSRAA by the processors.

In 1977, another \$17,000.00 was expended on the hatchery sites selection process.

6. Meanwhile, the board was actively proceeding with plans for hatchery sites and the hatchery facility at Witman Lake on Ravila Island near Ketchikan. (See project Management Request for Proposal, appendix) On December 15, 1977, the final request for the \$100,000.00 matching grant, pursuant to A.S. 16.10.510, was sent to the director of the Division of Business Loans, Department of Commerce and Economic Development.

7. 1978. In early 1978 the corporation contracted with CH2M-Hill, an engineering consultant, for design and engineering of the Witman Lake hatchery facility. The design of the facility and its specifications were supervised by Milo Bell, Professor Emeritus, Fisheries, University of Washington, SSRAA's senior technical advisor. Pursuant to the contract, CH2M-Hill was advanced \$100,000.00. In early March, 1978, the board authorized the executive director to arrange, with the State of Alaska, for its long term hatchery construction and operation financing, as authorized by A.S. 16.10.

8. Interim financing for the construction of the

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hatchery was secured through the Spokane Bank for Cooperatives. Construction began at the Herring Cove-Witman Lake hatchery site in June. Land was cleared and graded, the lake was drained and necessary repairs were begun on the dam valves. Construction required installation of over 3,000 feet of up to 24" pipe for the purpose of feeding the hatchery. The pipeline made a fall of over three hundred feet while restrained to a narrow fifty foot corridor on national forest land, and required the expertise of a major construction company; Palmer Wright-Schugart.

9. In July, construction began on the Beaver Falls temporary hatchery. That temporary hatchery was completed in September, and was ready for eggs. The building is 40' by 50' and contains 2,560 Heath incubating trays. Each tray can handle 10,000 eggs. The total capacity at the Beaver Falls temporary hatchery is 25,600,000. The purpose for building the temporary hatchery was primarily to prevent a year delay in production.

10. During 1978, the corporation also became heavily involved in the regional planning process. The corporation's involvement in the regional planning team broke down into general areas, public involvement, and technical planning. Corporation expenses in 1978 exceeded \$112,000.00 in conjunction with this process.

11. Other significant aspects of the corporate process on which energies were focused in 1978 included board development, rehabilitation, and stream surveys. Board development involved the preparation of the board for the necessary activities to meet multi-million dollar commitments.

12. Currently there exist five recognized regional aquaculture associations in the State. They are Southern Southeast Regional Aquaculture Association, Northern Southeastern Regional Aquaculture Association, Prince William Sound Regional Aquaculture Association, Cook Inlet Regional

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Aquaculture Association, and Imaprik Regional Aquaculture Association in Dillingham. Organizational efforts are proceeding in other areas. Of the recognized aquaculture associations, three have implemented assessments pursuant to A.S. 16.10.530. Those are the Southern and Northern Regions in Southeast Alaska, and Cook Inlet Regional Aquaculture Association. The three section 530 assessment associations have specific rehabilitation and enhancement programs currently under way partially funded or guaranteed by the mandatory assessment. Prince William Sound Regional Aquaculture Association has a hatchery completed and fish returning. Imaprik Regional Aquaculture Association has been recognized by the Commissioner and has received the first \$100,000.00 grant for organizational purposes. In the Southern region 800,000 Coho eggs have been incubated at Beaver Falls.

13. The law requires that boards of directors of each corporation include representatives of various user groups, including sport fishermen, processors, commercial fishermen, subsistence fishermen, and representatives of local communities. The blend of representatives required by law necessitate varying sizes in the board of directors in the different regions. For example, the by-laws of the Southern regional require 21 members on the board, whereas in Prince William Sound there are approximately 70 members on the board. In Southern Southeast board members are actively involved in management of the corporation. The board is composed of five committees, and every member of the board is assigned to a committee. Those committees are the Executive Committee, the Ways and Means Committee, The Personnel Committee, the Regional Planning Team and the Nomination and Board Development Committee. The Executive Committee is established in the by-laws, the other committees are working committees established at the direction of the

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board for the purpose of providing well researched recommendations to the board. Each committee is staffed with professional advisors pursuant to budget approval by the full board. Other than these standing committees there is from time to time special committees. For example there is currently a long range planning committee developing a five year plan for the corporation. The Regional Planning Team is developing specific plans for rehabilitation and enhancement projects which reflect the collective decision of the corporation and the Alaska Department of Fish and Game with primary focus on the social and economic benefits to the people of the region. The Personnel Committee recommends an employee wage and benefit policy to the full board, suggests performance standards and plans for the long-term requirements for the corporation. The Ways and Means Committee integrates proposed annual plans with the available budget, hires the outside auditors and supervises the financial controls of the corporation. The Nominations and Board Development Committee is responsible for the annual election of the board, and skills development for directors.

14. Fishermen elect 55% of the board. Members of other user groups, including subsistence fishermen and processors, are appointed by the full board of fishermen. The representative of the local communities is a former member of the Ketchikan Gateway Borough Assembly. He has been active as a board member in the affairs of the corporation and makes recommendations to the borough assembly on behalf of the regional association. The Beaver Falls temporary facility and the Whitman Lake hatchery required agreements with Ketchikan Public Utilities, a city owned public utility, which provides power and water to both the City and the Borough. The projects also required cooperation from the Cape Fox Village Native Association and Sealaska.

15. Board meetings are primarily held in Ketchikan,

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but the board members are flown in from various communities in Southern Southeast Alaska and Seattle. The corporation publishes a newsletter (see appendix), and holds public meetings in the various communities on a periodic basis. As part of regional planning the board expects to hold twice yearly meetings in the various communities for the purpose of public input to specific project proposals.

16. A necessary part of hatchery development is securing permits from various government agencies. Federal, state and local permits are required for access, water, egg takes and other essential aspects of salmon enhancement. (See examples in appendix). These permits are required of any public or private organization seeking to use public land or water.

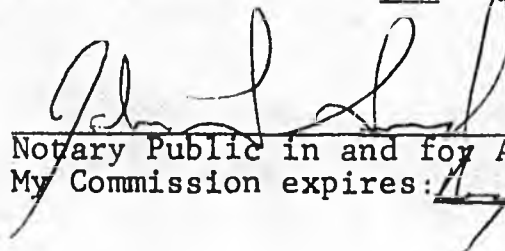
17. Representatives of the corporation travelled to Washington, D.C. in 1978 to testify in Congress on the impact of D-2 legislation on fisheries enhancement. Prior to that testimony, the federal legislation would have effectively prohibited most salmon rehabilitation and enhancement projects on federal land by excluding the necessary permanent facilities, bypasses and other structures. After the effort by representatives of the corporation and others at our urging, the legislation was amended to provide for adequate flexibility.

DATED; Feb 10, 1979



JACK MILNES

SUBSCRIBED AND SWORN to before me this 10 day of February, 1979.



Notary Public in and for Alaska
My Commission expires: Aug 12, 1982

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**CHAPTER 88.
ASSESSMENT ON SALE OF SALMON**

Section

- 10. Eligibility
- 20. Requests for institution of assessment
- 30. Review and approval of initial and final requests
- 40. Collection of assessment
- 50. Submission of initial and final requests
- 60. Prior action by a regional association
- 900. Definitions

3 AAC 88.010. ELIGIBILITY. Only a qualified regional association as defined in AS 16.10.380 is eligible to participate in the institution of an assessment under AS 16.10.530. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.380
AS 16.10.510(4)
AS 16.10.530

3 AAC 88.020. REQUESTS FOR INSTITUTION OF ASSESSMENT. (a) A qualified regional association desiring to institute an assessment under AS 16.10.530 shall submit to the commissioner an initial request and, after approval of it, a final request.

(b) An initial request must consist of

(1) a letter of intent (including certification by the board of directors of the regional association) to seek an assessment, which letter must propose and describe

(A) the area to be covered by the assessment;

(B) the species of salmon to be included;

(C) the conditions of the assessment;

(D) the period during which the assessment will be in effect;

(E) the rate(s) of the assessment;

(F) designation of categories of salmon gear within the area to be subject to the assessment;

(G) detailed procedures for collection of the assessment, including timing, means, and method of cash transfers;

(H) designation of the trust account into which assessment funds will be deposited;

(I) procedures to be used in the implementation of any approved changes in the assessment, including increases, decreases, and discontinuation;

(J) procedures to be used by the regional association to comply with the terms and conditions of AS 16.10.530(c) and (f);

(K) procedures to be used by the regional association to comply with other provisions of applicable laws and regulations;

(2) a review of historic catch levels of salmon and present processing capabilities within the area to be covered by the assessment (catch and production statistics and other data supplied by the Department of Fish and Game may be used); and

(3) a statement of the purpose of the assessment, including, but not limited to, a description of the objectives to be accomplished by the regional association.

(c) A final request must be submitted by the regional association after approval by the commissioner of the initial request. The final request must consist of

(1) finalization of all proposals set forth in the initial request and a final description of them including the trust account agreement (which agreement must permit inspection of the account by the commissioner);

(2) evidence of compliance with AS 16.10.530(c), (e) and (f), including certification of election results. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.510(4)
AS 16.10.530(a)

3 AAC 88.030. REVIEW AND APPROVAL OF INITIAL AND FINAL REQUESTS. (a) Upon receipt of an initial request, it will be reviewed by the commissioner for consistency with the intent and provisions of applicable laws and regulations. Factors which will be considered include, but are not limited to

(1) the recommendations of the

commissioner of fish and game, who will be consulted by the commissioner with respect to the initial and final request;

(2) the reasonableness of the assessment in view of the projected activities of the regional association as described and proposed in the materials submitted under sec. 20 of this chapter; and

(3) the likelihood of promoting, through the assessment, the interest of the public in fostering salmon enhancement efforts.

(b) If an initial request is approved by the commissioner, the commissioner will notify the regional association by letter and solicit submission of a final request after the prerequisite activities and procedures have taken place.

(c) Upon receipt of a final request, will be given a final review by the commissioner for consistency with the intent and provisions of applicable laws and regulations. If the final request is approved by the commissioner, the commissioner will notify the regional association by letter and take the actions described in sec. 40(a) of this chapter.

(d) If an initial or final request is disapproved by the commissioner, he will notify the regional association of the reasons for the disapproval. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.510(4)
AS 16.10.530

3 AAC 88.040. COLLECTION OF ASSESSMENT. (a) Upon approval of a final request from a regional association, the commissioner will give notice of the implementation of an assessment. Notice will be published in advance of the effective date at least twice in a newspaper of general circulation in the area of assessment. The notice will specify the area in which the assessment will be effective, the rate(s) of the assessment, the effective date, the purpose of the assessment, persons and species subject to the assessment, collection procedures, procedures for forwarding funds collected, and other details with respect to implementation of the assessment. The commissioner will, in his discretion, use other means to inform the public of a forthcoming

assessment if he considers it necessary to reach persons who will be affected by it.

(b) Buyers of salmon shall collect, deduct, or withhold the assessment from fishermen at the time they purchase salmon or initiate a transaction to purchase salmon from a fisherman. For purposes of this section, completion of a fish ticket constitutes initiation of a transaction. Any subsequent consideration paid to fishermen for salmon taken is subject to the assessment and the appropriate amount must be collected and forwarded in accordance with the provisions of this section.

(c) Buyers of salmon shall accumulate assessment funds collected and shall forward those funds to the applicable trust account at times or intervals specified by the commissioner.

(d) Buyers of salmon shall keep records of assessment funds collected and forwarded (including the sources of those funds) in a manner recommended by the regional association and approved by the commissioner. The commissioner will, in his discretion, inspect and audit those records at any time consistent with AS 16.05.815. A regional association may request an inspection of assessment funds records by the commissioner, except that the cost of the inspection shall be borne by the association and the association shall not have access to individual financial records of fishermen and buyers of salmon.

(e) The commissioner will, in his discretion, require regional associations to include in their annual financial reports specified information relating to their participation in an assessment program. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.470(6)
AS 16.10.510(4)
AS 16.10.530

3 AAC 88.050. SUBMISSION OF INITIAL AND FINAL REQUESTS. Regional associations shall submit initial and final requests for the institution of an assessment and related documents to the Division of Business Loans, Department of Commerce and Economic Development, Pouch D, Juneau, Alaska 99811. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.510(4)

3 AAC 88.060. PRIOR ACTION BY A REGIONAL ASSOCIATION. A regional association which has taken action relating to the institution of an assessment before the effective date of this chapter, which action is determined by the commissioner to be in substantial conformity with provisions of this chapter, will, in the discretion of the commissioner, be considered to have complied with all or part of this chapter for purposes of its application. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.510(4)
Sec. 18, ch 154, SLA 1977

3 AAC 88.900. DEFINITIONS. As used in this chapter

(1) "commissioner" means the commissioner of commerce and economic development or his designee; and

(2) "buyer of salmon" means any person, company, firm, partnership, or other organization or entity which purchases unprocessed salmon from the holder of a permit issued under AS 16.43 when such salmon were taken from an area in which an assessment is in effect. (Eff. 5/24/78, Reg. 66)

Authority: AS 16.10.510(4)
AS 16.10.530

PART 8. MISCELLANEOUS

Chapter

90. Emergency Rent Review

CHAPTER 90. EMERGENCY RENT REVIEW

Section

- 10. Application of chapter
- 20. Procedure for increase in rent
- 30. Rental complaints by tenants
- 40. Notice of filing a complaint
- 50. Retroactivity
- 60. Emergency Rent Review Board
- 70. Operation of the board
- 80. Hearings on rent complaints
- 85. Hearings on evictions
- 90. Objections to adverse recommendations
- 100. Orders of commissioner of commerce and economic development
- 110. Standard for review of proposed increases in rent
- 115. Procedure for eviction
- 120. (Repealed)
- 125. Eviction complaints by tenants
- 130. Retaliatory conduct prohibited
- 140. No waiver of rights
- 145. Standard of review for evictions
- 150. Definitions

3 AAC 90.010. APPLICATION OF CHAPTER.

This chapter applies to all residential housing accommodations, as defined in sec. 150 of this chapter, if the property is located in an area declared by the governor to be in a state of housing emergency, pursuant to AS 34.06.020. Except as provided in sec. 115 of this chapter, nothing in this chapter affects application of the Uniform Residential Landlord and Tenant Act (AS 34.03). The following are exempt from the provisions of this chapter:

(1) the first rent assessed and collected upon the initial occupancy of a residential housing accommodation;

(2) evictions from or rent charged for transient occupancy in hotels, motels, and motor inns, as defined in sec. 150 of this chapter;

(3) evictions from or rent charged in federal

CHAPTER 40.
PRIVATE NONPROFIT
SALMON HATCHERIES

Article

1. General
2. Special Harvest Areas

ARTICLE 1.
GENERAL

Section

5. General
10. Modifications of applicable regulations
15. Prohibitions

5 AAC 40.005. GENERAL. (a) The harvest of salmon inhabiting the water of the state, regardless of whether the salmon are naturally or artificially propagated, may be conducted only pursuant to regulations adopted by the Board of Fisheries.

(b) The harvest of salmon returning to a private nonprofit salmon hatchery will be governed by regulations adopted by the Board of Fisheries. The board will, in its discretion, develop harvesting regulations after review of the harvest plans or other materials, information and testimony (if any) presented by the regional associations, hatchery operators, the Department of Commerce and Economic Development, fishermen and other interested parties.

(c) Where hatchery returns enter a terminal location and can be harvested without significantly affecting wild stocks, a special harvest area will be designated and described by regulation adopted by the board. The board will, in its discretion, adopt additional regulations applicable to other matters necessary to accomplish the harvest in an orderly manner.

(d) A private nonprofit hatchery permit holder and his agents, contractees, and employees may harvest salmon for the hatchery only in the applicable special harvest area. This does not prevent a special harvest area from being open to commercial, sport, or subsistence fishing or any combination thereof to the extent provided in regulations adopted and orders issued under this chapter. Harvesting of salmon within the special harvest area, whether by the hatchery operator

or the common property fisheries, will be opened and closed by regulation or emergency order.

(e) Special harvest area boundaries set out in this chapter may be altered by emergency order if necessary for proper management of natural stocks and hatchery stocks.

(f) Hatchery permit holders, their agents, contractees, and employees shall comply with all terms and conditions of the hatchery permit, applicable regulations and orders, and any additional requirements imposed by the commissioner to implement this chapter.

(g) Agents, contractees, and employees of a hatchery permit holder may harvest salmon for the hatchery in the special harvest area only if in possession of a written authorization from the hatchery permit holder and pursuant to its terms. The activities of persons in a special harvest area who are not a hatchery permit holder or an agent, contractee, or employee of the holder acting under the terms of a written authorization are governed by regulations governing commercial, sport, and subsistence fishing.

Authority: AS 16.05.050
AS 16.05.060
AS 16.05.251(2)-(7) and (12)
AS 16.05.920
AS 16.10.420-440

5 AAC 40.010. MODIFICATIONS OF APPLICABLE REGULATIONS. (a) Hatchery permit holders shall, with respect to salmon harvested by them (or their agents, contractees, or employees), comply with applicable provisions of 5 AAC 39.130(a) and (b) as though they were a purchaser of fish.

(b) Hatchery permit holders harvesting salmon within a special harvest area, to the extent those salmon are used as egg sources for brood stock, will be exempted by the commissioner from the provisions of AS 16.05.831 if the permit holder so requests. The commissioner may condition the exemption on terms he considers necessary to carry out the intent of AS 16.05.831.

(c) Hatchery permit holders conducting a hatchery harvest of salmon within a special harvest area are exempt from the provisions of 5 AAC 39.290.

(d) Fishermen taking salmon in a special harvest area under authorization from the hatchery permit holder and operating under an interim-use permit are exempt from the provisions of 5 AAC 39.120.

Authority: AS 16.05.050
AS 16.05.060
AS 16.05.251(2)-(7) and (12)
AS 16.05.831
AS 16.05.920
AS 16.10.420-440

5 AAC 40.015. PROHIBITIONS. It is unlawful for any person to violate the provisions of this chapter.

Authority: AS 16.05.050
AS 16.05.060
AS 16.05.251(2)-(7) and (12)
AS 16.05.831
AS 16.05.920
AS 16.10.420-440

ARTICLE 2. SPECIAL HARVEST AREAS

Section

30. Sheldon Jackson Special Harvest Area
35. Prince William Sound Aquaculture Corporation Special Harvest Area—San Juan

5 AAC 40.030. SHELDON JACKSON SPECIAL HARVEST AREA. (a) There is established under the provisions of sec. 5 of this chapter the Sheldon Jackson Special Harvest Area, consisting of all water of Crescent Bay and Eastern Anchorage enclosed by a line beginning at the northern end of John O'Connell Bridge and proceeding to the south end of the bridge, then to the northeasternmost points of Aleutski Island, Turning Island, Kutkan Island, Morne Island and Twin Islands, then to the westernmost points of Ring Island and of Dove Island, then west to the southeastern corner of Cannon Island.

(b) A hatchery permit holder harvesting salmon within the special harvest area is exempt from the provisions of 5 AAC 33.310. Fishing periods for the hatchery permit holder will be opened and closed by emergency order by gear type.

(c) Notwithstanding 5 AAC 33.330, legal gear

for hatchery permit holders is a purse seine. However, if the commissioner determines that purse seine gear is unavailable to the hatchery permit holder or if the use of purse seines only would jeopardize the financial solvency of the corporation, the commissioner may open the special harvest area for hatchery harvest with beach seine or hand purse seine.

Authority: AS 16.05.050
AS 16.05.060
AS 16.05.251(2)-(7) and (12)
AS 16.05.920
AS 16.10.420-440

5 AAC 40.035. PRINCE WILLIAM SOUND AQUACULTURE CORPORATION SPECIAL HARVEST AREA — SAN JUAN. (a) There is established the Prince William Sound Aquaculture Corporation Special Harvest Area — San Juan consisting of all water of Sawmill Bay, Evans Island, west of 148° 01' 50" W. long.

(b) A hatchery permit holder harvesting salmon within the special harvest area is exempt from the provisions of 5 AAC 24.310-320 and 5 AAC 24.350(15), except as may be specifically provided by emergency order. The hatchery permit holder may harvest salmon within the special harvest area by purse seines seven days per week from 6:00 a.m. July 17 through 6:00 p.m. September 15 unless closed or modified by emergency order.

(c) Notwithstanding 5 AAC 24.330, legal gear for the hatchery permit holder in the special harvest area is a purse seine. However, if the commissioner determines that purse seine gear is unavailable to the hatchery permit holder or if the use of purse seines only would jeopardize the financial solvency of the corporation, the commissioner may open the special harvest area for hatchery harvest with beach seine or hand purse seine.

Authority: AS 16.05.050
AS 16.05.060
AS 16.05.251(2)-(7) and (12)
AS 16.05.920
AS 16.10.420-440