

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILES 86/2

566 SCOM117: JOINT INTERIM COMM. ON LIMITED ENTRY 1979

1 and Game under AS 16.10.400 - 16.10.475.

2 (b) The commission may issue special harvest area entry permits
3 notwithstanding the establishment of maximum or optimum numbers under
4 AS 16.43.240 and 16.43.290.

5 Sec. 16.43.337. TERMS AND CONDITIONS OF SPECIAL HARVEST AREA ENTRY
6 PERMITS. (a) Special harvest area entry permits may be applied for on
7 an annual basis and shall be issued for a term of one year. A permit is
8 nontransferable.

9 (b) A special harvest area entry permit may only be issued for the
10 applicable area designated by the Department of Fish and Game as a
11 special harvest area.

12 (c) The annual fee for a special harvest area entry permit shall
13 be specified by commission regulation under the authority of AS 16.43.-
14 160.

15 Sec. 16.43.339. DISPOSITION OF FISH. Fish caught under the autho-
16 rity of a special harvest area entry permit are the property of the
17 permit holder. The permit holder may sell the fish if the proceeds are
18 used in the manner described in AS 16.10.450.

19 Sec. 16.43.341. AUTHORIZED GEAR. For the purposes of harvesting
20 salmon, a special harvest area entry permit holder may employ any fish-
21 ing gear designated as legal gear in the applicable special harvest area
22 by the Board of Fisheries.

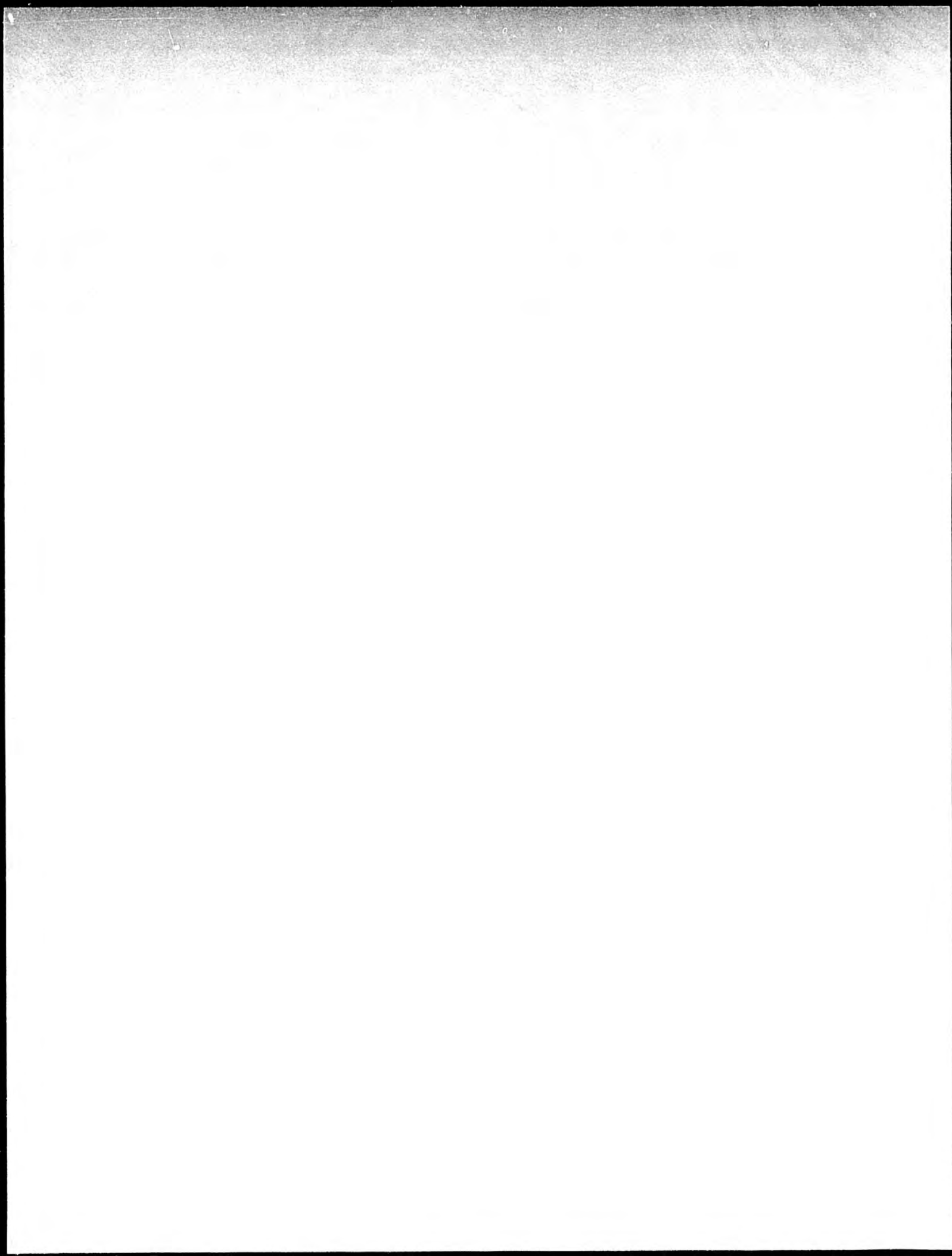
23 Sec. 16.43.343. ADOPTION OF REGULATIONS. (a) Use privileges
24 granted under AS 16.43.335 - 16.43.341 are subject to the regulations of
25 the Board of Fisheries.

26 (b) The commission, after consultation with the Department of Fish
27 and Game, shall adopt regulations which are reasonably necessary to
28 implement AS 16.43.335 - 16.43.341.

29 * Sec. 3. The Alaska Commercial Fisheries Entry Commission shall allow

1 each person who has participated in the operation of gear in the commercial
2 fishery of the upper Yukon River to register his name with the commissioner,
3 regardless of whether that person has held a gear license or a fishwheel
4 registration. The registration allowed by this section is for the purpose of
5 determining the extent of past participation in the fishery and the adequacy
6 of the existing limited entry program to meet the needs of the commercial
7 fishermen in that area. The commission shall establish the registration
8 period and the form of registration. The commission may require a registrant
9 to state the facts in support of his past participation in gear operation.
10 The commission shall prepare a roll of the registrants and submit the roll
11 and any other material related to the purpose of the registration to the
12 legislature not later than 10 days after the convening of the Second Session
13 of the Eleventh Legislature.

14 * Sec. 4. This Act takes effect immediately in accordance with AS 01.10.-
15 070(c).
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TO THE ELEVENTH ALASKA LEGISLATURE

THE UPPER YUKON AND OTHER
FRESHWATER SALMON FISHERIES:

Findings, conclusions, and recommendations

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For introducing me to the
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PLAN

INTRODUCTION

This report is a direct result of expressions of legislative concern that matured in 1979 regarding the social and economic effects of the limitation of entry into the commercial fisheries of certain regions of the state that have only recently developed export commercial markets. These expressions coincided with the Legislature's interest in seeking a complete legal, social and economic review of Alaska's experience of limited entry in common property fisheries. Chapter 51, SLA 1979, established the Legislative Limited Entry Study Committee and declared:

The purpose of the Legislative Limited Entry Study Committee is to complete a legal, social, and economic review of Alaska's experience with limited entry and common property fisheries, and to report its findings and conclusions to the legislature no later than the 10th day of the second session of the 11th Legislature. Sec. 1, paragraph (c).

That Act also included a charge that the "review, findings and conclusions of the . . . (committee) shall include a determination whether limiting entry into the fresh water fisheries in the state has resulted in any unjust discrimination against any persons." Section 1, paragraph (d). In conjunction, Legislative Resolve No. 26 addressed specific concerns that have been raised with regard to the effects of the limitation of entry into the commercial salmon fisheries in the area known as the Upper Yukon. That resolve is included in the appendix of this report in its entirety, but for the purposes of this introduction one part is noteworthy:

Further resolved that the Legislative Limited Entry Study Committee, with the cooperation of the Alaska Commercial Fisheries Entry Commission, is respectfully requested to determine whether controlling entry into the commercial fisheries in the Upper Yukon has resulted in any unjust discrimination and to determine what options are available to the legislature to correct any unjust discrimination.

To provide assistance in this endeavor the Alaska Commercial Fisheries Entry Commission was directed to survey

[e]ach person who has participated in the operation of gear in the commercial fishery of the Upper Yukon. . . regardless of whether that person has held a gear license or a fishwheel registration. Chapter 64, SLA 1979, § 3.

The survey to be conducted by the CFEC was for the purpose of "determining the extent of past participation in the fishery and the adequacy of the existing limited entry program to meet the needs of the commercial fishermen in the area." Id.

Subsequently the Legislative Affairs Agency contracted for my professional services for the purposes of assisting the Legislative Limited Entry Study Committee in meeting the directives expressed by the Legislature. Clause I, (A), STATEMENT OF WORK, in that contract directed that

The contractor shall investigate and research the Upper Yukon and other fresh water fisheries of the state for the purpose of determining whether controlling entry into those fisheries has resulted in any unjust discrimination against any persons and to determine what options are available to the legislature to correct any unjust discrimination.

In order to comply with this statement of work it was necessary to develop a total understanding of all

elements of the Upper Yukon and other fresh water fisheries of the state. It was equally necessary to develop an accurate understanding of the social and economic history of the peoples and cultures involved in the harvesting of salmon resources in those areas. This required enlisting the support of the Alaska Department of Fish and Game, the Alaska Commercial Fisheries Entry Commission and various fishing and cultural organizations as well as actively seeking the assistance of the Canadian Department of Fisheries, the North Pacific Fisheries Council, the Board of Fisheries, the United States Fish and Wildlife Service and other elements of the state and federal government. In addition, it was necessary to retain a law clerk, several staff assistants, an historian, several pilots and airtaxi services, a respected constitutional attorney, (specializing in the areas of the privileges and immunities and the commerce clauses of the federal constitution), as well as the able assistance of staff persons to the Legislative Limited Entry Study Committee and other committees and members of the Legislature. Finally, assistance was received from numerous persons within the private sector. Without the support of all these organizations and individuals the findings, conclusions and recommendations contained in this report could not have been accomplished with the degree of thoroughness that has been achieved.

I have devoted considerable thought to the precise

elements of the Upper Yukon and other fresh water fisheries of the state. It was equally necessary to develop an accurate understanding of the social and economic history of the peoples and cultures involved in the harvesting of salmon resources in those areas. This required enlisting the support of the Alaska Department of Fish and Game, the Alaska Commercial Fisheries Entry Commission and various fishing and cultural organizations as well as actively seeking the assistance of the Canadian Department of Fisheries, the North Pacific Fisheries Council, the Board of Fisheries, the United States Fish and Wildlife Service and other elements of the state and federal government. In addition, it was necessary to retain a law clerk, several staff assistants, an historian, several pilots and airtaxi services, a respected constitutional attorney, (specializing in the areas of the privileges and immunities and the commerce clauses of the federal constitution), as well as the able assistance of staff persons to the Legislative Limited Entry Study Committee and other committees and members of the Legislature. Finally, assistance was received from numerous persons within the private sector. Without the support of all these organizations and individuals the findings, conclusions and recommendations contained in this report could not have been accomplished with the degree of thoroughness that has been achieved.

I have devoted considerable thought to the precise

and appropriate scope of my role in the preparation and development of this report. It is my firm belief that all too many reports prepared for the purpose of addressing the development of policies in the public and private sectors more accurately reflect the political and philosophical bends of the policy makers rather than legitimate inductive conclusions. In this instance, I believe it appropriate that any findings and logic leading to conclusions that actions initiated by the state have led to "unjust discrimination" is a role to be taken as seriously as that of a hearing officer or a judge. Of course, in this situation I have not only weighed the evidence, I have also gathered it, and in that respect I have attempted to give a full and adequate analysis of all relevant facts regardless of whether those facts satisfied the interests of individuals immediately concerned with the areas in question.

The statement of work also requires the determination and development of options to be presented to the legislature to correct any items of unjust discrimination. With regard to this work requirement I perceive a different role. The Legislature, representing the collective philosophies and judgments of their people, requires the development of options consistent with its role in developing a consensus for addressing the social and economic policy of our state. Here I view my role as one I am more comfortable with through experience, that of an advocate folding in the

direction of legislative prerogatives consistent with the parameters of legislative and constitutional power.

Accordingly, this report is developed in two distinct parts. The first addresses the Yukon River and other fresh water fisheries in a manner that considers all relevant data accumulated, balances that data against the rights and privileges of all persons with regard to the harvest and utilization of salmon, and makes specific findings with regard to the "unjust discrimination" directive. Part two of the report addresses the larger view of factors significantly affecting the Yukon River fishery at the present and in the foreseeable future, how those factors limit the scope of the options available to the legislature, and finally the policy changes recommended.

I. HISTORY AND DEVELOPMENT OF THE YUKON RIVER FISHERIES

The Yukon is an immense watershed. It drains approximately 35% of the State of Alaska and is the fifth largest drainage in North America. The river originates in British Columbia within thirty miles of the Gulf of Alaska and flows over 2,300 miles to its mouth on the Bering Sea, draining an area of approximately three hundred and thirty thousand square miles. Included within the watershed is the vast network of the Porcupine River which drains much of the central and northern Yukon Territory.

The salmon is by far the most important fish in the history of the Yukon River fisheries. Native people who live near the river have used the salmon as a major food source for unrecorded generations. Prior to the influence of the white man, salmon fishing was done by a variety of methods, including dip nets, spears, seines, fish traps, and gill nets. 1/ The Native people who harvested salmon for centuries on the Yukon River are of two great cultures, the Athabascan Indians and the Yup'ik Eskimos. The present dividing line between the two cultures is at the remnants of the village of Paimute about twenty miles downstream from

1/ Michael Carey, Social History of the Yukon River Fisheries Prior to Statehood, p. 1. The Social History was prepared specifically for background information for the findings and conclusions of this report and is contained in its entirety in the appendix.

6(a)



An early vessel owner and gear operator near Anvik (late 1920s). Photo courtesy of University of Alaska.

the current Indian village of Holy Cross. The distribution of Athabascan Indians in the Yukon River drainages upstream from Paimute includes the distinct subcultures of the Ingalik, the Koyukon, the Tanana and the Kutchin.

The subsistence activities of all northern Athabascans reflect the changing economic relationship to their environment in the course of the year. At one time the Athabascan were exclusively hunters and gatherers, yet specific groups differed considerably in the emphasis and the use of the natural resources available to them. Most of these differences involved stressing either hunting or fishing. The Chandalar Kutchin, for example, were typically big game hunters of the high country. In contrast the Yukon Flats Kutchin primarily fished from early June until early September. When the fishing season was over, the Yukon flats people hunted moose and caribou until the river was frozen. In winter game was scarce and the people were forced to scatter in family groups. With these Kutchin, as well as with other Athabascans far down river beyond the great bend in the Yukon, a certain stability was present that was unknown to people almost completely dependent upon hunting. These people hunted caribou, moose, bear and most other subarctic animals, but it was fishing that gave stability to their way of life. Even so, periods of starvation were widely known to all Athabascans, from the big game hunters of the high country to the fishers of the flats and the river basins. Between the boundaries of influence of

the Kutchin and the Ingalik live the Koyukon. The Koyukon hunted and fished in the vast area of central Alaska, covering both the bounty of the middle Yukon to the deprivation of the upper Koyukuk. The Tanana peoples subsist in the Tanana drainage, itself a territory nearly as vast as the upper Yukon.

This western subarctic area was penetrated from two directions by representatives of the European nations. From the east came the English fur traders. Having secured their position in eastern Canada, they followed the continental rivers and lakes to the interior of the Canadian northwest and into the McKenzie and Porcupine River drainages that finally led them to interior Alaska. From the west came the Russians, who, after 1741, explored the coast and ascended the major rivers into the interior. Two major phases of contact followed: the period of early contact by the fur traders, and a later period when the fur trade was fully established and the influence of christian missionaries became a factor in the changing conditions of life for the northern Athabascans. ^{2/}

Prior to these periods of contact the Athabascans were very mobile; small bands of people might cover hundreds

^{2/} James W. Vanstone, Athapaskan Adaptations, Hunters and Fishermen of the Subarctic Forests. HM Publishing, (1974).

of miles within a season. ^{3/} The two key ecological factors in this pattern were that the resources necessary for survival were highly scattered and localized and were subject to marked cyclic or noncyclic variations.

Snowshoe hares may die off everywhere or salmon might not appear in good numbers creating a universal shortage; but the localized shortage is more common such as failure of the whitefish run in a particular creek or movement of the moose out of a certain area.

Nelson, Hunters of the Northern Forest, Chicago Press (1973), p. 275.

More permanent settlements began to appear after contact with the white fur traders. These settlements were often associated with private traplines.

By the early twentieth century this system was well established; traplines were being bought and sold and permanent settlements of one to three families had been established where traplines adjoined navigable rivers.

Id., p. 276.

The beginning of village life as it is today can be traced to several developments. Above the confluence of the Yukon and the Tanana trading outposts such as Fort Yukon and Old Rampart assumed greater importance during the summer months in the latter part of the last century. Missions established downriver had similar influences. Several villages were originally boom towns for mining activity. When the booms died and the white men left the Indian peoples

^{3/} Koyukon from the upper Koyukuk still travelled overland as far as Rampart and Fort Yukon each year when Judge Wickersham first appeared on the Yukon. Wickersham, Old Yukon, Washington Law Book Co. (1938).

gradually took over the towns. The location of schools had immediate impacts on old settlement patterns.

At first the tie between the people and the school was fairly loose, but as the children became established in schools the families found it increasingly impractical to remain away on the trapline.

Id., p. 280.

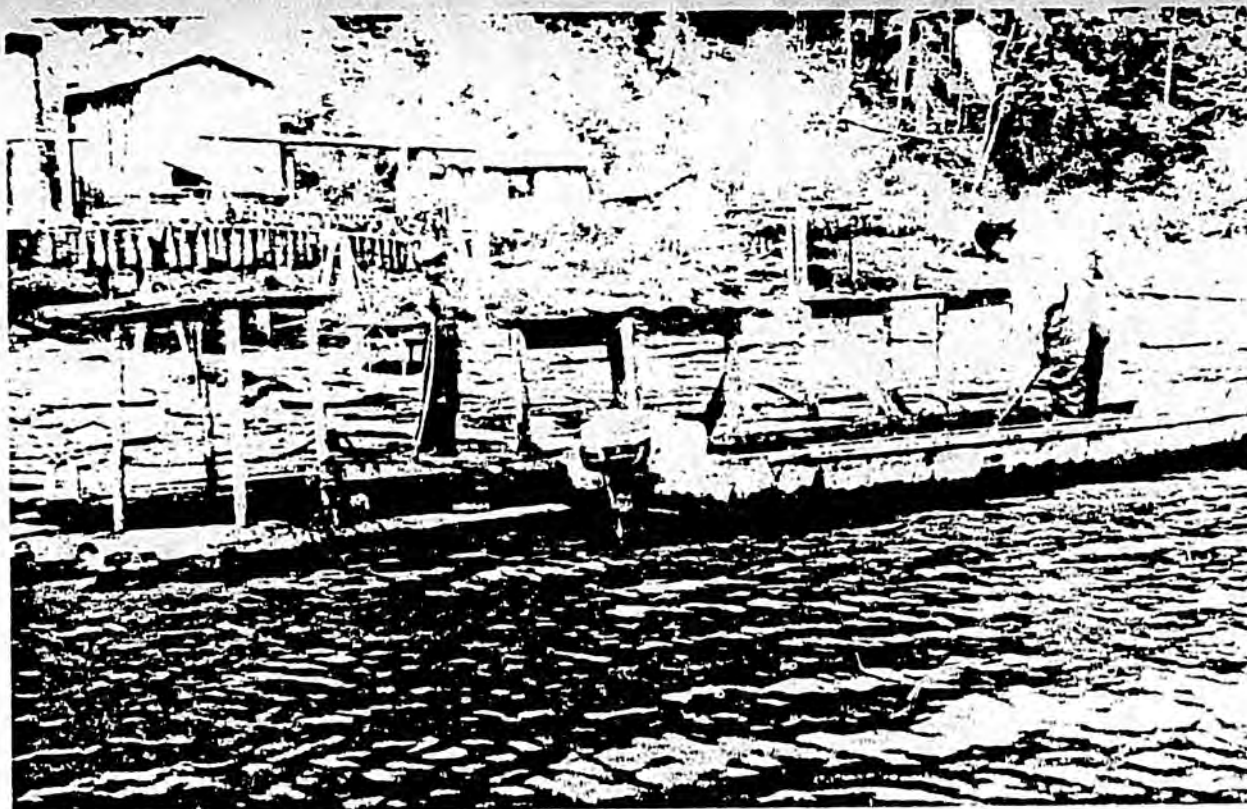
Village life brought changes, but it affected the subcultures somewhat differently. Cf., Id., pp. 284-321. In general, however, the people were tied to villages but were free on the land. Mobility had been curtailed, but the most aggressive hunters and gatherers still brought the most food to their families. The wealth of the land was still available for all who would make the effort.

The importance of the fisheries to the local peoples has been documented since the 1840's, but has perhaps been most poetically captured by Archdeacon Hudson Stuck, an elegant voice on behalf of the Native peoples.

To a degree that is not understood by most people the whole economy of the Yukon country is built upon dried salmon. The Nile is no more basic to the economy of Egypt. . . than the Yukon is to the interior of Alaska, flowing through the midst of it and bringing this noble fish.

Carey, Social History of the Yukon River Fisheries, p. 4.

Apparently the first actual commercial operations in the Yukon can be traced to the Klondike gold rush. Significant commerce in fresh fish was established locally in the Yukon Territory. By the early 1900's the fish wheel had been introduced to the river by miners and had proved so



Unloading fish at the cutting tables, probably in the 1930s.
Photo courtesy of the University of Alaska.



"There is no commoner site along the Yukon." Photo courtesy of
the University of Alaska.

efficient that it surpassed all other fish catching devices in importance. Fish camps along the river were common then and are still common today.

There is no commoner site along the Yukon than the cluster of white tents in some picturesque nook among the hills of the right bank, and with one or more high, barn like smokehouses, which omit a faint blue vapor. There will be a fish wheel turning along the rocky shore and a number of open air racks, more or less protected from the weather, in which the salmon are hung for a time until partially dried and ready to be smoked. The picture is, of course, not complete without the native men, women, and children of the summer camp, nor without the invariable row of dogs tethered to stakes driven near the waters edge.

Id., p. 6, n. 7.

In 1914, Bureau of Fisheries Agent H. O. Smith made a trip from St. Michael to Whitehorse and submitted what appears to be the first formal report on the Yukon River fisheries. At that time Smith estimated that Nulato was the fishing center of the Yukon, that from Nulato to Ruby fishing was carried on more systematically than further downstream and that catches were heavier in that region of the river.

SLED DOG ECONOMY

For many years the markets for fish were either local, intrastate or international (into the Yukon Territory). The demands of those markets were primarily for dried fish as dog food. The dogs provided a mainstay for travel in the north.

The winter is the only time for travel except along the waterways of Alaska, and winter travel is impossible without the dog team. Dogs are

equally indispensable as draft animals and pack animals. Transportation of the winter mails over thousands of miles of the interior of Alaska must be accomplished by dog team. . . Fort Gibbon alone needs forty tons of dried salmon each year to feed the dogs they find indispensable in their work. Prospectors need them to carry their supplies into the hills. Woodchoppers require them to haul in their wood. Indians must have them in their long hunting and trapping expeditions, and without them can neither secure meat for their families nor fur to exchange for the other necessities of life.

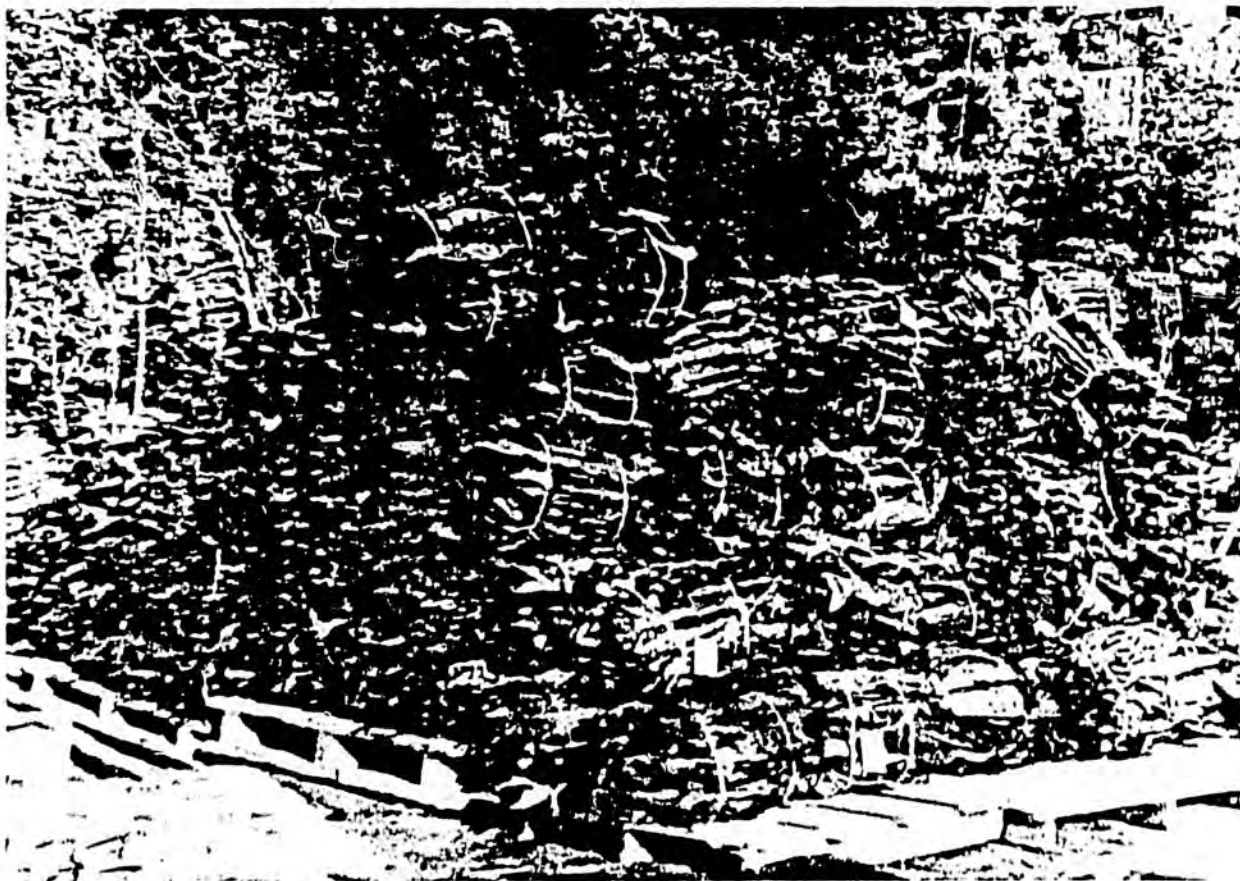
Id., p. 18, citing from a 1920 report.

The king salmon was important and prized for human consumption, but unquestionably, however, the chum furnishes by far the larger share of dried salmon. Along some stretches of the river almost complete dependence is placed on this species, locally known as the dog salmon and 'silvers', which form the stable dog food throughout the Yukon country. All the traders handle them and may deal in from 5 to 50 tons in a year.

Id., p. 19.

The necessity of dry salmon as the equivalent of hay and grain for work animals was the first of a number of factors that introduced the Yukon River people to a pattern of sporadic and usually unpredictable fluctuations in the market demand for fish. 1928 reflected the first example of a trend that continues to this day, the fluctuating, but also the general decline, in the importance of the sled dog in the Yukon economy.

Nearly all of the Traders carried over most of their dog salmon from last fall. There is very little dog team travel along the Yukon and Tanana last winter. In former years every one (sic) coming from Nome used dog teams, but this winter there is a regular airplane service to Fairbanks and Nome and all travel was that way. There was also another line of planes between Fairbanks and Iditarod, McGrath, and Takotna. This line also did away with a lot of dog teams. None of the traders would contract for any fish this fall.



Bales of dried fish awaiting a steamboat or barge - perhaps Dominic Vernettis's, a Koyukuk trader who bartered goods for dried salmon. See, Social History, Appendix A. Photo courtesy of John Deacon. Date unknown.

Id., p. 29, citing from a 1928 report.

By 1931 the emergence of air travel had led to a significant slump in the demand for dried fish in the upper Yukon region. Other influences contributed to increases and decreases in market demands. For example, when fur prices were high there was a greater demand for dried salmon to fuel the dog teams that were necessary to run the trap lines. Consequently, the local people supplemented their subsistence economy with the commercial harvest and sale of fish or fish products as markets appeared.

If there is a market for dried fish, they [Natives] will prepare for more, for instance, where a local trader will buy it, or take it in payment for debts.

Id., p. 30.

WAGES

If other opportunities were available that were more stable means for supplementing the subsistence base, the fishing effort often declined for a period of time. For example, in 1939, very few persons could be found fishing in the lower Yukon River village of Marshall.

Most of the Natives were working on the [CCC] projects not bothering to fish. Most of the camps between Marshall and Holy Cross were deserted, but the people at these places all had plenty of fish that were caught during July when the chums were running heavily. Most of the Natives at Holy Cross were working on the CCC projects also.

Id., p. 39, n. 64.

Again, in 1941, the run was exceptionally good and the fish were in excellent condition, but many fishermen

were busy working for wages.

The people who fished reported good catches, but many people from Kaltag, Nulato, Koyukuk, Galena, Ruby and Kokrines were attracted to construction work at Galena and Tanana air bases. 'Those men were all receiving work at \$7.50 per day for brush cutting so consequently could not be bothered to fish.'

Id., p. 35, citing a 1941 report.

The factors of fluctuating demand and alternative opportunities combined to set the patterns that existed until 1975 in some parts on the river, and still exist in other parts today. That pattern is one of people periodically fishing commercially when there is a market available and there is an absence of a more stable means to supplement the subsistence economy. As a result, the investigation of the upper Yukon fisheries reveals very little factual data which might infer that any "professional fishermen" participated in the commercial harvest and exchange of salmon in that region. 4/

4/ A number of persons reside in the region who are permitted to fish commercially in other regions of the state. All gear types are represented in this group and many of the permits were preceded by gear licenses. C.f., Langdon, Transfer Patterns in Alaskan Limited Entry Fisheries, January 17, 1980.

Much attention is addressed to the term "professional fisherman" in literature discussing limited entry and common property fisheries. The terminology appears to have successfully evaded a precise definition. I interpret the term to mean a person who efficiently harvests fish in a fishery that provides the opportunities for adequate capital retention to maintain vessels and gear, reinvest in more efficient vessels and gear, and pursue research and development of new vessels, gear and techniques. See, A.S. 16.43.380(2).

SUBSISTENCE

Subsistence fishing still occupies the position of a most important source of food for the people of the Yukon. It is clear that subsistence requirements and dependency have remained consistently important. 5/

Dependency on salmon as a source of food appears to be at a very high level throughout the main stem of the Yukon. . .

Carey, p. 49, citing a 1958 annual report.

-
- 5/ "The Legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents." Sec. 1, Chapter 151 SLA 1978.

It is occasionally suggested that this language is in conflict with the constitutional reservation of fish, wildlife and waters in their natural state "to the people for common use." Art. VIII, Sec. 3, Alaska Constitution. That section must be read in conjunction with the directive that "[L]aws and regulations governing the use or disposition 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." Art. VIII, Sec. 17, Alaska Constitution, (emphasis supplied).

Section 17 clearly authorizes the legislative branch to classify beneficial uses of natural resources as long as the classified uses "apply equally to all persons similarly situated." Should sec. 3 on common use be interpreted as more restrictive, it should be noted that the classification of subsistence as a primary beneficial use is constitutionally indistinguishable from an act appropriating public funds to construct a dam on the Susitna River. The waters of the Susitna, occurring in their natural state, are reserved to the people for common use. Clearly, the legislature may, by the act of funding hydroelectric development on the Susitna, declare that use of those waters as the most beneficial.

This high level of dependency had continued even though it was clear to observers that there had been an increase in opportunities to supplement the subsistence economy in the 1950's, such as "fire fighting or road construction or work with the CAA and Air Force, as well as an increase in welfare and other forms of relief payments." Carey, p. 49. Fish was still the principle item of food in every outlying village in the 1950's, as it had been before World War II. However, the increased employment opportunities did affect the commercial exchanges of fish products.

It is interesting to compare the amount of gear used now in the personal use and dog food fisheries with years ago. The number and location of fish wheels were plotted several times this summer on the Yukon and Tanana Rivers. A total of 111 fish wheels were found between Fairbanks and the Kwiguk Slough. . . The average number found by C.F. Townsend for the years 1929 to 1941 was 212 for the same area. . . The average number of small salmon--those other than kings--dried annually in this area was 511,000 for the period 1929 to 1941. My estimate for 1953, based upon personal observations and estimates made by individuals in most every area is 380,000.

Carey, p. 45, citing a 1953 annual report. Increased air travel was resulting in a decrease in the need for a large number of dogs, and a concomitant decrease in the need for dried fish products. Other elements, such as the decline in fur prices during the 1950's had an impact on the number of dogs kept. 6/

6/ Carey, p. 46. It is also interesting to note that a certain local economy developed wherever prisoners were housed in the territorial days. Before statehood many prisoners restrained in available institutions in certain areas were fed with fresh and dried fish products. As a result, local fishermen had opportunities to supplement their subsistence income through the sales of fish to representatives of the federal government.

USE CONFLICTS

The continuing importance of the subsistence fisheries despite commercial market demands and fluctuations has led to controversy on the Yukon since early territorial days. In the spring of 1918, the Carlisle Packing Company of Seattle expanded its operations into the lower Yukon. Carlisle's floating cannery had a profound psychological impact on the resident fishermen. Its existence led to events which forged political positions regarding the regulation of the fishery that exist to this very day. Perhaps because the middle river peoples had developed such a significant reliance upon the fishery for their livelihood, some upper Yukon residents and supporters reacted immediately in 1918 when it became known that the salmon cannery industry was moving into the lower river. The major voices advocating for the native peoples were the Episcopal and Catholic missionaries. Several hearings followed and a quota on commercially harvested salmon was the result. Carlisle Packing Company subsequently circumvented the spirit and intent, if not the letter, of the quota and a disastrous fishing season followed upriver. The Commissioner of Fisheries sent two investigators (Gilbert and O'Malley) to spend the season on the Yukon. The investigators recommended that all commercial fishing for export cease for the Yukon and its tributaries. That recommendation was followed by the Secretary of Commerce in December, 1920, and commercial fishing was prohibited indefinitely in all suggested areas

after September 1, 1921. The primary interest behind those advocating closure of the Yukon to commercial fishing was protection of the subsistence livelihood.

The principle should be adopted with regard to the interior rivers of Alaska that no commercial interests should be permitted to exploit them until it should be demonstrated that a portion of the salmon run could be spared without detriment to the run itself and without encroaching on the supply needed by the populations that inhabit the valleys of the rivers. If there is any question whether the salmon in a given stream is adequate to supply the demands of commercial operations as well as needs of the local inhabitants, the doubt should be at once resolved in favor of the people.

Carey, p. 22, citing a 1920 report of Gilbert and O'Malley. The concepts and tools developed during the Carlisle controversy, with slight deviations, remain in effect today: allocations, quotas, alternating periods, and subsistence preference over commercial interests.

STATEHOOD

Since statehood the fisheries have expanded considerably in all areas of the Yukon, including that portion of the Yukon in Canada. Since 1961 the fisheries have developed differently for different stocks. For example, commercial fishing effort for king salmon has increased dramatically since 1961, even though the king salmon is still coveted by the people along the river as an eating fish. In contrast, prior to the mid-1960's, summer chums were used primarily for subsistence and dog food purposes (including the sale of dried dog salmon). In the mid-1960's the demand for dog food again declined, this time attributable

to the advent of the snowmachine replacing the dog sled as a primary means of transportation. 7/ As a result of the declining need for dog food, 1967 witnesses the beginning of a gradual liberalization of commercial fishing regulations regarding summer chums. For fall chums, the greatest expansion has occurred since 1968. Fall chums were not sought by commercial effort in the lower Yukon area until recently. They were harvested upriver because of their good quality, bright, silvery appearance, large size, robust body shape and high oil content (which is related to their upriver spawning destinations). Today fall chums are in great demand and are harvested in all fishing subdistricts. 8/ With the decline of the market for dried salmon, the history of commercial fishing in the upper river between the mid-1960's and the mid-1970's focuses on cash buyers who purchased from specific sites and villages in certain years. Several villages from Holy Cross to Galena, for example, were totally without a market for the sale of their fish at times during the late 1960's and early 1970's. Other areas, such as Tanana and Rampart, are closer to urban centers and

7/ Although it appears that dog sled use is increasing again for purposes of work and recreation, it is not contemplated that the use will ever again regain its position of importance in rural Alaska.

8/ It is reported that summer chums spawn primarily in run off streams, while fall chums spawn primarily in spring fed streams. Major spawning tributaries of summer chums include the Andreafski and Anvik Rivers and several others within the Koyukuk River drainage. Spawning streams for the fall chums are the Tanana River, Toklat River, Delta River and the Porcupine, including the Sheenjek and Fishing Branch Rivers.

enjoyed a more consistent influx of cash buyers, even though major commercial demands for export were still wanting. The late 1960's and early 1970's were years of major forest fires in interior Alaska, and the early to mid-1970's reflected mobilization and construction of the Alaska Pipeline and its attendant local hire policy that recruited many persons out of the villages. Consequently, the late 1960's and early 1970's reflected another turn in the old pattern: persons drifting away from fishing as a means to supplement the subsistence base because of more stable opportunities elsewhere. 9/

MARKET STIMULATION

The commercial catches by subdistricts and species for the years 1960 through 1975 reveal elements of market stimulation. In the upper Yukon area the catch of commercially harvested king salmon was fairly stable from 1960 to 1973. The years 1974 and 1975 evidenced a significant increase in the commercial harvest of king salmon. The increase evidenced in those years has since remained fairly stable. See, Tables. In contrast, the commercial harvest

9/ This generalization about the unavailability of market purchasers is not consistent on the river. For example, in Galena, Sidney Huntington is generally considered to be responsible for developing that commercial fishery in the mid to late 1960's. Sidney began selling his fish to purchasers in Anchorage. In the early stages of his fish buying and selling activities it was necessary for him to pay the freight to Anchorage. He recalls as a significant breakthrough the day when fish were purchased FOB Galena rather than Anchorage. Today Sidney is still the main fish buyer in that region, and, characteristically, is one of the most outspoken critics of the effects of limited entry on the river.

20(a)



Cleaning fish and stripping roe at the cutting table (1979 photo). The table and the camp where it was located bear a striking resemblance to camps forty years in the past. See, p. 11(a). Photo by Katherine Brown.

TABLE NO. 2

Actual number of commercial salmon fishing vessels by subdistrict, Yukon district, 1971-1978 1/

KING SALMON SEASON									
Year	Lower Yukon Area				Upper Yukon Area				Total
	334-10	334-20	334-30	Subtotals	334-40	334-50	334-60	Subtotals	
1971	405	154	33	592	---	---	---	---	---
1972	426	153	35	614	---	---	---	---	---
1973	438	167	38	643	---	---	---	---	---
1974	396	154	42	592	27	31	20	78	670
1975	441	149	37	627	93	52	36	181	808
1976	453	189	42	684	80	46	29	155	839
1977	392	188	46	626	87	41	18	146	772
1978	429	204	22	655	80	45	35	160	815
FALL SEASON									
Year	Lower Yukon Area				Upper Yukon Area				Total
	334-10	334-20	334-30	Subtotals	334-40	334-50	334-60	Subtotals	
1971	352	---	---	352	---	---	---	---	---
1972	353	75	3	431	---	---	---	---	---
1973	445	183	---	628	---	---	---	---	---
1974	322	121	6	449	17	23	22	62	511
1975	428	185	12	625	41	33	33	110	735
1976	422	194	28	644	18	36	44	98	742
1977	337	172	37	546	28	34	32	94	640
1978	429	204	28	661	24	43	30	127	788
COMBINED SEASONS									
Year	Lower Yukon Area				Upper Yukon Area				Total
	334-10	334-20	334-30	Subtotals	334-40	334-50	334-60	Subtotals	
1971	473	154	33	660	---	---	---	27	687
1972	476	153	35	664	---	---	---	2/	664
1973	529	205	38	772	---	---	---	47	819
1974	485	190	42	717	28	43	27	98	815
1975	491	197	39	727	95	57	46	198	925
1976	482	220	44	746	96	62	56	214	960
1977	402	208	54	664	96	53	39	188	852
1978	472	221	29	722	82	53	38	173	895

1/ Actual number of fishing vessels refer to those boats which made at least one delivery. Data presented shows the number of vessels that operated in each subdistrict. Some individual fishing vessels in the lower Yukon area may have operated in more than one subdistrict during the year.

TABLE NO. 3

Estimated mean prices paid to fishermen, Yukon
district, 1961-1978 1/

Price Per Fish

<u>Year</u>	<u>King</u>	<u>Coho</u>	<u>Chum</u>
1961	\$3.50	\$	\$
1962	3.50		
1963	3.50		
1964	3.75	.50	.25
1965	4.50		.35
1966	4.50	.50	.35
1967	4.50	.50	.35
1968	4.64	.50	.50
1969	4.60	.55	.50
1970	5.00	.84	.61
1971	5.34	.82	.64
1972	5.90	.92	.75
1973	7.45	1.27	1.18
1974	9.00	1.75	1.40
1975	9.24	1.50	1.36
1976	11.28	1.63	1.50
1977	20.00	3.76	2.67
1978	20.71	3.05	2.56

Price Per Pound

<u>Year</u>	<u>King</u>	<u>Coho</u>	<u>Chum</u>
1964	.17		.03
1965	.20		.05
1966	.20		.05
1967	.19	.07	.05
1968	.18		.06
1969	.19	.08	.08
1970	.22	.12	.09
1971	.24	.12	.10
1972	.24	.13	.11
1973	.30	.18	.16
1974	.38	.25	.21
1975	.42	.21	.20
1976	.52	.24	.22
1977	.86	.49	.38
1978	.87	.43	.36

1/ Information not available for some species.

of chum salmon increased dramatically from 1,200 fish harvested in 1972, to 13,000 harvested in 1973, to 107,000 harvested in 1974, to 252,000 harvested in 1975. Commercial licenses, gill net licenses and the numbers of fish wheels registered and operating in the upper Yukon reflected similar increases, although gear licenses and fish wheel registrations began to rise in the early 1970's prior to the dramatic increase in the harvest and sale of commercially caught fish in 1974 and 1975. See, tables. The value of fish paid to fishermen in the Yukon districts during the years 1961 to 1978 reflected a gradual increase in prices through 1972. In 1973 the fisheries experienced a jump in price ranging from a 50% increase in chum salmon to a 25% increase in king salmon. In 1974 similar increases from 25% to 33% were experienced. In 1975 the prices for chums and cohos actually dropped from that of previous years while the prices for kings increased slightly.

None of the information regarding the increase in gear licenses, fish wheels, and fish prices adequately explains the remarkable increase in fish commercially harvested in 1974 and 1975. Clearly there was market stimulation beyond the increase in the price of fish. The market stimulation led to a significantly increased presence of fish buyers on the Yukon River and a significant increase in the availability of fish. These buyers were purchasing fish primarily destined for international markets, and their

presence can most certainly be linked to two previous actions by the state. Those actions, a combination of executive and legislative decisions were the legalization of the sale of roe from subsistence caught salmon for the years 1974 through 1977, and the increased quotas for commercially harvested salmon, beginning in 1974. 10/

Sale of subsistence caught salmon roe was first authorized in 1974 through emergency regulation by the Commissioner of Fish and Game. In 1975, the Legislature adopted an Act that legalized subsistence salmon roe sales in the A-Y-K region. The regulation and the Act were clearly balanced between the desired purpose of providing supplemental income to subsistence fishers and the legitimate interests of the state in preventing the waste of salmon, but a predictable result was the substantial increase in fish product purchasers. The subsistence catch of chum salmon that had declined throughout a majority of the A-Y-K region during 1966 to 1973 (due to a decreased effort resulting from fewer sled dogs) reversed itself and increased substantially during the period 1974 to 1977. Those years coincide with the remarkable increase in the commercial harvest of salmon in the same regions.

The liberalized quota that coincided with the

10/ Another significant regulatory change occurred in 1973, but it had no visible impact on the market. Prior to 1973 a person could operate more than one fishwheel under fishwheel registration numbers issued to them by the Department of Fish and Game. In 1973 this regulation was changed to require that only one wheel could be operated under any registration number.

subsistence roe sales provided a substantial boost in the market availability of salmon in the round, as well as salmon stripped of roe. Buyers purchased salmon and roe from commercial harvesters and roe from subsistence harvesters. The resultant effort increase was predictable, but the effort increase was not restricted to commercial harvest. Persons who harvested and exchanged fish commercially before to supplement their subsistence life were not obliged to register or secure a license as a commercial fisherman. It is apparent that many persons were satisfied with the additional income from the sale of subsistence roe.

THE DECISION TO LIMIT ENTRY

In March of 1976 a manual of instructions for completing entry permit applications in the Arctic, Yukon and Kuskokwim salmon fisheries was distributed. The cover letter from the acting Chair of the Alaska Commercial Fisheries Entry Commission, dated February 23, 1976, opened with the following paragraph:

The commercial salmon fisheries of Kotzebue, Norton Sound, the Yukon River and the Kuskokwim River are now under limited entry. All gear operators in these fisheries who intend to commercially fish for salmon in 1976 or at any future time must apply now for a permanent entry permit. These instructions will explain who may apply and how to complete the application form.

Further explanation noted that fishermen "must submit an application by May 10, 1976, if you intend to fish commercially as a gear operator at any future time." Regarding the question of eligibility the instructions emphasized that

To be able to apply for an entry permit a fisherman must have fished commercially with a gear license at least one year from 1960 to 1975. In the upper Yukon River fishwheel fishery, where gear licenses have not been required, the person who was issued the registration number for his fishwheel and operated the fishwheel commercially may apply. THIS COMMISSION WILL NOT ACCEPT YOUR APPLICATION IF YOU DO NOT MEET THE ELIGIBILITY REQUIREMENTS. (emphasis in text).

With regard to the allocation of points for past participation in the fishery the pamphlet emphasized:

IMPORTANT: You may claim points from any year from 1970 through 1975 only if you held a gear license and took salmon in that year.

With regard to the allocation of points for income dependence it was similarly emphasized:

IF YOU FISHED WITH A GEAR LICENSE DURING 1974 AND/OR 1975 you may claim income dependence points.

The instruction booklet did not discuss the maximum number of permits to be issued--that decision had already been made. The criteria for determining permit issuance had also been established. The instruction booklet was attempting to give notice that applications had to be filed, which applications would be accepted and how permit points would be calculated. Notice on the critical issues of maximum number of permits and permit issuance criteria was attempted through a variety of methods prior to the decision to limit entry.

The decision to limit entry into the Arctic, Yukon and Kuskokwim salmon fisheries was accomplished by the Commercial Fisheries Entry Commission through the adoption

of regulations. In order to understand the effects of the decision to limited entry into these fisheries, and the adequacy of the instruction pamphlet quoted from above, it is necessary to review briefly A.S. 16.43 and the system it spawned. In early 1973 then Governor Egan submitted his limited entry program for Alaska's fisheries to the legislature. That proposal, expressed in Senate Bill No. 39, presented the concept of an entry commission as a regulatory and quasi-judicial agency of the state nearly identical to the system we now have. However, the process and standards of application stressed in SB 39 were significantly altered prior to passage by the legislature. In the original bill the commission would have been empowered to determine "the maximum number of units of gear for each type of gear and for each administrative area." That determination of the maximum number required the balancing of several general standards, primarily considering the level of income as opposed to biologic manageability. The bill envisioned that the commission would then adopt regulations setting forth the qualifications for entry permits for each administrative area and unit of gear and then would have the power to revise the maximum number of units of gear after it was established that there had been longterm changes in biological and/or market conditions.

The law that finally passed, chapter 79, SLA 1973, is somewhat different. It distinguishes between "distressed

fisheries" and fisheries which have "reached levels of participation which require the limitation of entry in order to achieve the purposes of this chapter." A.S. 16.43.230-240. It also distinguishes between "maximum number of entry permits" and "optimum number of entry permits." The formula for determining the optimum number of entry permits was quite similar to the formula originally conceived in Senate Bill 39 for the maximum number of units of gear. For "distressed fisheries" the maximum number of entry permits was designated in law as "the highest number of units of gear fished in that fishery during any one of four years immediately preceeding January 1, 1973." A.S. 16.43.240(a). No standards were placed on the Commission for determining the maximum number of entry permits for a fishery that had "reached levels of participation which require the limitation of entry in order to achieve the purposes of this chapter." See, A.S. 16.43.240(b).

The Act does not provide the flexibility that the original bill would have granted to the commission for the purpose of revising the maximum number of permits or units of gear in a given area. The Act envisions that the optimum number of entry permits will be significantly less than the maximum number of entry permits in distressed fisheries, but anticipates that in fisheries that have "reached levels of participation which require the limitation of entry in order to achieve the purposes of this chapter" the optimum and

maximum number of permits would not be that dissimilar. In any event, the only procedure in the Act providing for reduction of the number of permits must, of necessity, follow a determination of the optimum number that could then be reduced through the administration of a buy-back program. See, A.S. 16.43.290-320. The result of these changes effectively restricts any increase in the maximum number of permits after the initial determination and most certainly relieves the Commission of any power to increase the number of permits subsequent to an initial determination, if that initial determination was accurate.

The limitation of entry into the commercial fisheries of the A-Y-K was accomplished by the Commercial Fisheries Entry Commission pursuant to the broad range of authority in A.S. 16.43.240(b)

When the commission finds that a fishery not designated as a distressed fishery under sec. 230 of this chapter has reached levels of participation which require the limitation of entry in order to achieve the purposes of this chapter, the commission shall establish a maximum number of entry permits for that fishery.

Although the Commission could have established its own formula for determining the maximum number of entry permits for those fisheries, it chose to closely follow the legislative intent reflected in A.S. 16.43.240(a), and set the maximum number of entry permits as approximately equivalent to the maximum number of units of gear fished in those fisheries during the year 1975. The decisions establishing

and computing the formula for the maximum number of permits, as well as the establishment of the criteria for issuance of permits, imposed a commercial fishery concept upon the upper Yukon that was not a good fit with regard to the history of the fisheries and the people who depended upon them for a living. The poor fit can be traced to the information (and lack of information) that formed the basis for the Commission's decision.

BACKGROUND AVAILABLE TO THE CFEC PRIOR TO ITS DECISIONS

A. BRIEFING MATERIAL

In March, 1974, the Commission was presented with a packet of briefing material on the A-Y-K. That briefing material consisted primarily of information derived from several other sources, including management reports of the Department of Fish and Game, and a number of memoranda and reports that had been published for other governmental units. Some material contained in the briefing was a result of research initiated by and prepared for the Commission. The vast majority of the information contained in the briefing material was more relevant to managing the biological health of the fishery rather than to the economic health of the fishery.

Some information apparently had little effect upon either the decision to limit entry, the formula for establishing the maximum number of permits or the criteria for the issuance of entry permits. Other information considered

29(a)



Vessel and gear at a set net site, used for both subsistence and commercial harvest (1979 photo). Note that the vessel is quite similar to that shown on p. 11(a). Over forty years separate the scenes. Photo by Katherine Brown.

is demonstrably misleading.

Although bits and pieces of the information pointed to the sporadic nature of the A-Y-K fisheries, and a person who was personally acquainted with Yukon might have been able to conclude that commercial harvest there developed primarily to supplement a subsistence economy, only one small paragraph in the briefing material made a clear reference to this factor.

The fisherman participation tables show that turnover is high in A-Y-K fisheries. This is equally true in the rest of Alaska though the cause may be different. Most of the fishermen actually fish every year, but some years they fish only for subsistence, and other years they buy a commercial license to sell some fish. Id., p. 117.

At one other point in the briefing material the interaction between the subsistence and commercial fisheries was referenced.

Although subsistence hunting and fishing are old patterns of life, they are accomplished with modern tools. Cash income is largely invested in the equipment used for subsistence activities. Commercial and subsistence fishing are complementary activities since the sale of fish pays for the boat and gear that the family needs for subsistence fishing and for general transportation. From another point of view, one could allocate part of the cost of boat and gear to commercial fishing and part to subsistence fishing and/or transportation. Id., p. 125.

The two related paragraphs are the only reference to what is perhaps the most important element of the fisheries that should have been considered by the Commission prior to its decisions to limit entry, establish the maximum number of permits and establish the criteria for permit issuance.

The Commission can hardly be faulted for its failure to understand from these two paragraphs that the fisheries it was seeking to regulate necessitated entirely different criteria and standards to accomodate their particular nature, but the Commission can certainly be faulted for its failure to adequately develop data.

One important example of misleading information can be found early in the briefing material.

An individual usually works his gear alone, so that the number of actively fishing fishermen is almost always equal to the number of fishing vessels operated. The few exceptions are technical violations of the regulations, that is, a family member will deliver fish on another member of the family's license. Id., p. 3.

While it might be true that drift netters often work their gear alone, the statement made certainly does not apply to the operation of set nets and fishwheels. Since the upper Yukon is exclusively a set net and fishwheel fishery that statement is seriously misleading to that fishery. In fact there are and were a number of persons often participating in the operation of individual units of gear in the form of set nets and fish wheels for the purpose of commercial harvest in the upper Yukon region.

B. PUBLIC HEARINGS

The Commission held public hearings on the Yukon in 1975. Discussion at those hearings reveals concern on behalf of the local fisherman regarding various aspects of the limitation of entry. The concerns expressed pinpointed

subsequent problems with amazing accuracy. The Commission's responses to the concerns expressed reveal a superficial understanding of the fishery at that time. For example, persons operating commercial fish wheels were never required to have a gear license. Fishwheel registration was a recent requirement and it was not until 1973 that a fish wheel registration number was restricted to one wheel. In spite of this crucial factual distinction from other fisheries, the acting chairman of the Commercial Fishery's Entry Commission, conducting the hearing at Galena on July 14, 1975, was unaware that a fish wheel could be operated commercially without a gear license. See, CFEC Transcripts, Galena Hearing, July 14, 1975, p. 10. Other discussions revealed concerns that apparently were not seriously considered by the Commission.

1. The Sporadic Nature of the Fishery

At Galena there was a great deal of discussion about the very recent boom in the fishery. However, there was very little reference to the fact that markets for fish had sustained a small commercial harvest for some time.

STOVALL (Acting Chairman): What I am saying is this: You have all these people down there who have fished for a long time. (Lower Yukon) You have this group of people up here who have not fished for very long. I want to split the river because that guy down there that has fished for ten years has a lot more experience and time than the guy up here that has fished two.

Galena Hearing, pp. 26-27.

Clearly, the acting chair did not reveal an

understanding about the particular historic development of the fishery in that region. Other discussions at other hearings reveal similar misinformation. Participants appear to have been literate fishermen who understood the law somewhat and could discuss the difference between gear licenses, commercial licenses and fish wheel registrations. There was, however, very little dialogue with regard to the fact that the markets had come and gone before. Finally, the upriver meetings held by the Commission were at Galena and at Tanana, two of the major centers for fisheries commerce on the river. Experiences of the fishermen in Galena and Tanana do not reflect the experiences in many other parts of the upper Yukon. As discussed previously, many smaller villages had, and still have, markets that suddenly disappear for an entire season. One person, however, stated it very well at Tanana:

I probably can shed some light on the reasons, local people didn't fish commercially in the past because there was not that much market for it. You could catch dog fish and sell it to the stores but then in later years year could not . . . it began to be a lot of work. It was much better to work for wages if you can't make a living on fishing. But, in recent years the caucasians begin to come in and start buying fish and deliver to the fishery. This is why more and more people are beginning to see that it is profitable to fish commercially. This is why you begin to see more and more people apply for fishing license that never applied in the past.

Tanana Hearing, November 18, 1975, p. 32.

2. The Effects of a Limited Entry Fishery.

Although many people attending the hearing

apparently understood, after discussion, the nature of a limited entry fishery, some people expressed concerns about whether other persons who did not understand what was transpiring would be unjustly excluded from the fishery. Salient examples follow:

There's people sitting here in this room that have fished every year, they fished commercial, subsistence, mostly subsistence. They fished all their life . . . no commercial license. You have to find some way of getting issued to them. There's a man here fish for seventy years and never owned a commercial license until last year. The only reason he got one, he had a lot of fish and wanted to sell some so he got a commercial license.

Galena Hearing, July 14, 1975, p. 6

* * *

Some people just got a license, a commercial license is not a gear license. Not realizing that a gear license is the most important thing to have.

Galena Hearing, p. 9.

* * *

QUESTION: It seems to me that the subsistence fisherman is usually the guy that really needs the money.

STOVALL: If this is true then why has he not been a commercial fisherman previously?

QUESTION: Because it hasn't been known what the commercial fishery is.

RICKEY: You mean he hasn't had the opportunity to get rid of his fish as a commercial product?

QUESTION: The way we operated prior to the last two years we've -- we've never told anybody how we did it or anything.

Tanana Hearing, p. 18. The transcripts reveal that these

comments were commonly responded to by directing questions to "the people who commercial fish . . . how many fishermen can they stand in the fishery commercially?" Id.

The transcripts of the hearings also reflect that the Commission did not clearly identify the maximum number range to be set:

QUESTION; The area here, has it reached the upper limit?

STOVALL: We don't know yet, we are still looking at figures and Jim has to do some economic work. Actually to lay it right on the line the Fish and Game comes along and says we can manage this thing with two hundred to three hundred units of gear and we use those figures. Jim uses them for the economics of the thing. You crank this all out. The combination of the two may come out to where instead of three hundred we might go to three fifty because this is the only way the economy can stay alive. People have to live. We don't know. We haven't quite reached that point. I suspect that probably it will be fairly close to the figure that we are looking at right now, but we don't know. Maybe we can just look at everybody that has a gear license as of this date will get a permit. But, we don't know yet. We should know within two or three months.

Galena Hearing, July 14, 1975, p. 32.

It seems clear that the people attending the hearing were articulating the concerns they had reflecting the particular nature of the Yukon River fishery, but that the commissioners and staff of CFEC were not adequately absorbing the message.

CORRESPONDENCE AND OTHER INPUT

Considerable comment to the Commission regarding the proposed regulations establishing the maximum number of

permits and the criteria for issuance of permits was provided by the Alaska Department of Fish and Game. Criticism or concurrences by the Department occasionally followed a particular philosophical line, but more often were addressed to separate questions regarding each fishery on an ad hoc basis. Several memoranda from the Department emphasized that:

The staff feels that there should be a separate point system for each fishery that would reflect on the history of development in each fishery.

* * *

We recommend that the CFEC reevaluate their proposed regulations for the 1976 A-Y-K salmon fisheries. The entire program should be redrafted to take into account the variable nature of the different fisheries in the A-Y-K region rather than presenting a generalized program that is too all inclusive.

See, October 23, 1975, memorandum to the CFEC.

The Department was also critical of the point system for permit issuance proposed by the Commission (and substantially similar to the regulations adopted) which they believed to be too liberal in its scope and not necessarily applicable to each separate fishery. With regard to the maximum number of permits recommended, the Department memoranda reveal the vacuum in relevant information about the upper Yukon fishery. For example, the Commission originally proposed to set the maximum number of gill net permits for the upper Yukon at 45. To this the Department responded:

Upper Yukon Gill Net - 45. A total of 45 gill net permits for the recently developed upper Yukon fishery appears to be too low. (139 gill net licenses were issued in 1975). Although we don't have any reliable data on how many gill nets were actually fished in 1975 a more reasonable level of gill net permits would be approximately 80.

Id.

Other correspondence makes it clear that the maximum number of permits established by the Commission was arrived at by discounting the number of gear licenses and registration numbers in 1975 by a calculated percentage difference between gear registered and gear actually fished. Reexamination in 1979 of their initial determination has led the Commission to conclude that a miscalculation occurred in the original approximation. See, COMMISSION DECISIONS, Infra.

THE COMMISSION'S DECISIONS

The Commission established the maximum number of entry permits for the upper Yukon gill net fishery at 99 and the maximum for the fishwheel fishery at 126. The Commission has since taken the position that the adoption of 99 in the published regulations for the gill net fishery was based upon a computer program error, and has been working on the corrected computer number which has lowered that number to 63. 11/ The point system for issuance of the permits is

11/ Recently the CFEC has checked the information used in 1976 to establish the maximum number of permits against the information that has become available through the application process. The Commission took a list of all people credited in 1975 with participation from a computer file used in 1976 to tabulate units of gear

n. 11 continued.

fished and compared that list with people who, on their permit applications, showed 1975 participation claims which were verified by the Commission. The Commission discovered 42 additional verified claims of 1975 participation: 30 among fishwheel applicants and 12 among gill net applicants.

Most of the people with new 1975 credit had no fish tickets, but based their claims of past participation on licensing plus affidavits from people who bought fish from the applicants. Sometimes income tax returns also gave evidence of commercial fishing. Other people had sold salmon roe and appeared on Fish and Game lists of salmon roe sellers. Their points were verified under a Commission policy that persons who held appropriate commercial licenses and sold roe received points. Still others actually received points printed on their applications on the basis of late changes to the Commission's computer file which were not in time for the maximum numbers determination.

Currently a number of applicants, who have not been issued permits, claim points for 1975 participation. Their claims have not yet been verified by the Commission as of January 31, 1980. 12 of those persons have applied for upper Yukon gill net permits and 28 have applied for upper Yukon fish wheel permits. If these unverified claims of participation are subsequently verified, then those numbers should be added to the current number of 42, by which the maximum number established in 1976 must be adjusted.

identical to the other fisheries in A-Y-K, except Kotzebue, and breaks down as follows:

PAST PARTICIPATION

<u>YEAR FISHED AS A GEAR LICENSE HOLDER</u>	<u>POINTS AWARDED</u>
1975	4
1974	3
1973	3
1972	3
1971	2
1970	1
	<u>16</u>

INCOME DEPENDENCE

<u>CRITERIA</u>	<u>1975 POINTS</u>	<u>1974 POINTS</u>
Income Dependence Percentage In Excess of 60% or Non- Fishing Occupational Income Less Than \$3,000.00	4	2
Income Dependence Percentage in Excess of 30% or Non- Fishing Occupational Income Less Than \$6,000.00	2	1

Points were also awarded for economic dependence, and for investments in vessels, gear or fishwheels: 1 point each. A minimum of 10 points is necessary in order to be awarded a permit. At a glance it is possible to determine that the person who had a nonfishing occupational income of less than \$3,000.00, who fished as a gear license holder in 1975, and who owned either a gill net or a fishwheel, was automatically

eligible for a permit. 12/

When the Commission established criteria for income dependence they focused on the key years of 1974 and 1975. Annual catch value, a factor in determining income dependence percentage, is defined as "the gross amount actually received for the calendar year from harvesting the fishery resource commercially while participating as a gear license holder." 20 AAC 05.660. The combined effect of the formula and the definition, in conjunction with the practice of many commercial gear license holders to fish subsistence during periods closed for commercial harvest, made it impossible for the Commission to segregate those amounts accrued from the sale of subsistence salmon roe from other amounts contributing to the annual catch value. Persons who held gear licenses in 1974 and 1975, or had fish wheel registration numbers during those years, had the revenues counted from the sale of subsistence caught salmon roe toward their income dependence percentage because it was impossible to calculate otherwise.

EFFECTS OF LIMITING ENTRY INTO THE FISHERY

A. EFFECTS ON YUKON RIVER PEOPLE

The limitation of entry into the Yukon River salmon fisheries has the potential to be one of the most

12/ It is important to note that "nonfishing occupational income" does not include any sum derived from sources other than a job or profession. For example, an urban person from Fairbanks with a large income derived from property rentals and from no other source could have built a wheel or purchased a gill net, secured a gear license, sold one fish in 1975, and would have been eligible for a permit.

devisive elements introduced into the villages in the last half of this century. The potential devisiveness resides in the very nature of the current limited entry framework as a special privilege of fishery. Many Athabascans in the villages, and other people who have migrated there, are hard working individuals who have maximized the utilization of the resources available to them to feed and house themselves and their families and to improve their standing in the economy in which they have participated. Others of less physical or mental ability or motivation were not as successful at providing for themselves or their families. Yet that is the way it has always been for the Yukon River peoples. In the boreal forest the key to success in hunting, trapping and fishing is the knowledge of the terrain. Knowing where to find the trails, lakes, hills, valleys, forests, and meadows and the most stable concentrations of edible plants, game and fish provided the thin margin between survival and the periods of starvation that plagued the land. Even during the fur trade era the ownership of traplines was based upon uninterrupted use and was therefore not permanent. The only barriers were the ability and motivation of the individuals and the availability of areas to utilize.

It is true that some families fared better than others but none were arbitrarily denied the opportunity to provide. Commercial fishing itself presents a potentially

devisive element because of the use conflicts, however, a strong respect for subsistence utilization is in evidence as well as a strong desire by all peoples in the villages to protect the biologic productivity of the salmon. The devisive element of limited entry is seen in the clear distinction between the haves and the have nots that is developing in the important fishing villages. The families that are faring better today often have been permitted to enter into the commercial fisheries, a significant departure from the cultural tradition that provided opportunities for survival but not guarantees for prosperity.

This element of devisiveness is further amplified by the present system of permit transfers through free market sales. Currently, the price of the gill net permit in the upper Yukon averages around \$5,000.00 and the price for a fish wheel permit averages around \$12,500.00. That amount of capital is a substantial barrier to participation for many people in the upper Yukon region. The current report by Dr. Steve Langdon, TRANSFER PATTERNS IN ALASKAN LIMITED ENTRY FISHERIES, January 17, 1980, reveals the following information:

	<u>TOTAL NO. OF PERMITS</u>	<u>NO. OF PERMIT TRANSFERS</u>	<u>NO. OF FAMILIAL TRANSFERS</u>	<u>FAMILIAL TRANSFERS AS % OF PERMANENT TRANSFERS</u>
Gill Net	49	11	6	54.5%
Fishwheel	113	21	6	28.6%

Id., p. 15. Even though there is a high percentage of

familial transfers in the upper Yukon area, Dr. Langdon's study definitely detects a gross loss of permits by rural Alaskans in the A-Y-K fisheries, including the upper Yukon. Dr. Langdon feels that this trend will continue.

To a great extent, demand for A-Y-K permits by urban, non-local, and non-resident persons has been limited due to the distance from these areas to the A-Y-K fisheries, lack of profitability, and lack of knowledge about those fisheries. As a result, little attrition in permit holdings by rural residents has occurred to date. To the extent that these conditions change in terms of easier access, higher profitability, and greater dissemination of information about these fisheries, then the probability of outflow of permits will increase.

Id., p. 72. Dr. Langdon believes that the attrition is a threat to the rural economic base.

If it were the case that the rural population had declined in the recent past, if it were the case that an expanding rural population was migrating to urban centers. . . at a higher rate than the rate of natural increase, if it were the case that employment opportunities in the local regions and on a statewide basis were expanding more rapidly for rural persons than the rate of loss of permits, then one might be able to argue that the decline merely represents natural attrition due to a greater integration of the rural population into the Alaska economy. Since most of these ameliorating conditions do not appear to be taking place, the outflow of permits that has occurred and that eventually can occur must be regarded as a significant threat to the rural Alaskan economic base and the wellbeing of rural Alaskans.

Id., pp. 72-73. Dr. Langdon is persuasive when concluding that marginal fishermen, substantially below average in net earnings, are likely to transfer their permits for a price equivalent to the average potential earnings from the fishery.

Id., pp. 65-68. If this trend continues, then the only

opportunity for local peoples who have had income dependence but do not have the adequate number of points for issuance of a permit, is to seek permits on the increasingly competitive free market. That burden amplifies the developing distinction between the haves and the have nots in the villages. It has the effect of preventing ready, willing and able persons, who do not have adequate financial resources to compete on the free market for the permits, and who may in fact have an income dependence on the fishery, from providing a livelihood for them and the persons who are dependent upon them or for supplementing their subsistence base. Finally, it encourages rather than discourages public assistance, a tradeoff that some people apparently feel is acceptable.

The staff feels that economic dependence was superficially analyzed or simplified to such a great degree that it makes it too easy to qualify for points and ultimately a permit. Many individuals are not truly dependent upon the fishery as a source of income because of welfare, food stamps, etc.

October, 23, 1975, memo from the Alaska Department of Fish and Game to the CFEC, p. 2.

B. EFFECT ON ALL PERSONS WISHING TO COMMERCIALY HARVEST SALMON

All persons wishing to commercially harvest salmon, from urban and rural area alike, who have not developed an economic dependence upon the fishery prior to the date of the limitation of entry, have no choice but to purchase permits on the open market. There is no incentive to

participate in the fishery other than as a limited entry permit holder. While those persons are apparently least affected by the decision to limit entry, and the manner in which it was accomplished, it is also true that this class of persons will suffer greater hardship as time progresses.

II. THE RIGHTS AND PRIVILEGES OF ALL PERSONS WITH RESPECT TO THE HARVEST AND UTILIZATION OF SALMON IN THE FRESHWATER FISHERIES

It is against this factual background that the rights and privileges of all persons who have previously harvested and who wish to harvest salmon commercially in the Yukon drainages must be considered. The appropriate point of departure for this discussion is Alaska's Constitutional Convention.

A. 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, 13/ 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

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

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 high importance and deserve the most careful consideration by this Convention and by future state legislatures."

Alaska Constitutional Convention Proceedings, Appendix II, p. 6. 14/

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." 15/ The delegates struggled with many issues regarding the fisheries and natural resources in general, and finally produced a well-balanced article mandating aggressive

14/ 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 has the issue of resources policy been so 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.

15/ 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.

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.

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. ^{16/} One of the main thrusts of Magna Carta was the assertion of public rights in land and resources previously held by the King as private and alienable. ^{17/}

In this country, attempts have occasionally been made to discredit the concept. Recently, in Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed. 2d 397 (1978) and Baldwin v.

^{16/} 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 571.

^{17/} Cohen, The Constitution, The Public Trust Doctrine, and the Environment, 1970 Utah Law Review 338, 389. Indeed serfdom embodied the concept that the feudal lords "owned" the land and resources. Magna Carta, part of a 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.

Fish and Game Commission of Montana, 436 U.S. 371, 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. 1925). 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 conclusions 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 trust

resources. 18/ 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 concept in Alaska has not been so narrowly focused. 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.

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. 19/

- 18/ 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.
- 19/ 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, the 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

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.

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
n. 19 continued.

attempted to set out a basis for delegate discussions by departing from its own established policy in 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.

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. 20/

20/ 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 effect. See Ervien v. U.S., 251 U.S. 41 (1919).

By the final adoption of Article VIII, the emphasized language from Sec. 7 of the first proposal (land in trust) 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. Id., Vol. 6, p. 77. That language was added at the same time the specific reference to a public trust was deleted. Id., Vol. 6, pp. 92-97. The amendment to the section of 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, 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, development, and conservation of all natural resources . . . for the maximum benefit of its people."

Article VIII, Sec. 2. 21/

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

21/ 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 position 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.

choose the management and protection process. 22/

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

22/ 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.

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. 23/ Cf. Alaska Public

23/ 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 of 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).

Easement Defense Fund v. Andrus, 435 F.Supp. 664, 677 (D.C. Alaska, 1977).

During the time of the Alaska Constitutional Convention, public opposition to fish traps had built tremendously. 24/ It had become obvious that the fishery resources were 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. 25/

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 resources 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

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

25/ 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." (Emphasis supplied).

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). ^{26/}

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 resource held in trust.

B. EQUAL PROTECTION AND DUE PROCESS OF THE LAWS

The general standard for review of equal protection questions arising under the state constitution has been the subject of extensive discussion in several recent cases. In State v. Erickson, 574 P.2d 1 (Alaska 1978), the court abandoned a traditional two tier approach to equal protection analysis which had been followed in prior cases and adopted a new single test for evaluating equal protection claims under the Alaska Constitution.

Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relationship to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, results of this test will be essentially the same as requiring a 'compelling state interest'; but, by avoiding outright categorization of fundamental and nonfundamental

^{26/} 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).

rights, a more flexible, less result-oriented analysis may be made. *Id.*, p. 12.

An initial three step analysis is necessary when applying the equal protection test.

First, we must ascertain what the purposes of the challenged legislation are and whether they are within the legitimate police power of the state;

Second, we must examine the means used to accomplish the legislative objectives and establish whether the means substantially further the legislative goals;

Third, we must balance the importance of the state's interest in the means actually chosen to accomplish the legislative purpose against the nature of the constitutional right which has been infringed. Thomas v. Bailey, 595 P. 1, 14 (Alaska 1979).

These analyses begin by considering the purposes of the challenged legislation as a whole as well as the circumstances which surrounded its enactment. 27/

27/ The first look must be at the purpose of the challenged legislation. In Isakson v. Rickey, 500 P.2d 359, 363 (Alaska 1976), the court looked "to the statement of purposes of both the [entire act] itself upon the assumption that the provision [in question] was enacted to further that express purpose." *Id.* Where such a preamble of purpose does not exist, or is inadequate, resort may be had to the "legislative history." *Id.* Legislative history has been defined to include reports of conference committees, Alaska Public Employees Association v. State, 525 P.2d 12, 15 (Alaska 1970); statements by a "bills sponsor in the course of legislative deliberations;" *Id.*, at 16; and hearings held by the legislative body, Weinberger v. Wiesenfeld, 95 S.Ct. 1225, 1234 (1975). The Alaska Supreme Court has also recently recognized the importance of letters of intent. Cf. North Slope Borough v. Sohio Petroleum Corp., et al., 585 P.2d 534, (Alaska 1978).

Scrutiny of the closeness between the means chosen and the permissible state objective, and the degree of scrutiny of the particular means selected as opposed to other means less restrictive of constitutional rights, vary in intensity under the Erickson test. Where fundamental rights or suspect categories are involved strict scrutiny is applied requiring a "compelling state interest" in the means chosen. Where fundamental rights or suspect categories are not involved the intensity of scrutiny applied is governed by the "rational basis" test articulated in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id., p. 362. (emphasis supplied). 28/

The general equal protection guaranty contained in Art. I, sec. 1, of the Alaska Constitution has a partner embodied in Art. 8 of the state constitution relating to natural resources.

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. Alaska Constitution, Art. 8, § 17.

28/ Isakson also concluded that "we will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard." Id. p. 362.

This section was recently addressed by the Supreme Court for the first time in Thomas v. Bailey, supra, (the homestead initiative case).

Inclusion in the state constitution of this separate equal protection guaranty relating specifically to the disposal of natural resources evidences the constitutional framers' particular concern that the benefits from development of Alaska's large store of natural resources be shared by all persons similarly situated with respect to those resources and the purposes to be served by their disposal. This express indication of the importance attached to the interests of the people in the state's resources is thus an independent reason for rigorous scrutiny under Erickson of classifications differentiating between groups of residents when distribution of natural resources is at stake. Id. p. 17, fn. 25, Justice Rabinowitz concurring. (emphasis supplied).

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

[T]he 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 a violation of the other, but the spheres of the protection they offer are not coterminous. Truax v. Corrigan, 257 U.S. 312, 331 (1921).

Indeed, it is under the Fifth Amendment due process clause that violations of equal protection are struck in federal legislation.

While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." . . . (citations) . . . 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. Weinberger v. Wiesenfeld, supra, 95 S.Ct. 1228, n. 2 (1975).

The Alaska Supreme Court has had several recent opportunities to interpret various portions of the Limited Entry Act pursuant to equal protection scrutiny. In Yunker v. Alaska Commercial Fisheries Entry Commission, 598 P.2d 917, (Alaska, 1979), appellant raised an equal protection challenge to the point classification system on two bases: that it unjustly discriminated against applicants who were not gear license holders in the years preceding the Act, and that it unfairly discriminated against those fishermen who expected to work during the offseason. The court dismissed the first claim because Yunker did not have a personal stake in the outcome; he did not lose points because he lacked a gear license, but rather because he did not participate or depend upon the fishery. With regard to the second claim the court ruled that the regulations complained of were "not facially unconstitutional." (emphasis supplied). Id., p. 922.

The income percentage bears a fair and substantial relation to the object of the act. It would seem axiomatic that an applicant with a higher income dependence percentage has a greater degree of dependence upon the fishery for income, and would therefore tend to suffer greater hardship by exclusion than would an applicant with a lower income dependence percentage, who has a greater reliance on alternative occupations and is less dependent upon the fishery. . . . It cannot reasonably be argued that the percentage of income derived from the fishery is substantially unrelated to the hardship that an applicant would suffer by exclusion from the fishery.

Id. 29/

A more recent case is Commercial Fisheries Entry Commission, et al, v. Apokedak, ___ P.2d ___, Opinion No. 2011, February 5, 1980. At issue were equal protection challenges to the legislative requirement that only persons who had harvested fishery resources commercially as gear licensees were eligible to apply for entry permits, and to the Commission's regulation requiring a gear license for income dependence points. As in the Yunker case, the court declined to address the constitutional validity of the gear license requirement for obtaining income dependence points, but the court squarely addressed the issue of the constitutionality of the gear license requirement and ruled that it did not violate the equal protection clauses of the federal or state constitutions. The court carved out an exception to the equal protection standards for what it denominated "economic legislation."

There no longer can be any question that when economic legislation is challenged, the court will defer to the judgement of the legislature concerning the desirability of particular statutory classifications.

Id., pp. 17-18. Thus the court declined to apply compelling state interest standards to economic legislation and instead

29/ The court emphasized that it did not "intimate any view as to the constitutionality of the gear license requirement of the income dependence regulation." Id., p. 922, n. 14.

applied the modified rational basis test.

In determining whether the gear license requirement bears a fair and substantial relationship to the purpose of preventing unjust discrimination in allocating entry permits, we also note that those who had gear licenses had either to own or lease gear, and, as a result, often would be owners of vessels as well. The license requirement therefore is a rough way of designating a group having most to lose by being excluded from the fishery. In this regard, the gear license requirement furthers the legislative purpose of preventing unjust discrimination because it seeks to protect those having the most to lose by exclusion from the fishery.

Id., p. 32.

C. OTHER RIGHTS, PRIVILEGES AND CONSTRAINTS

Closely aligned with the beneficial rights flowing from resources held in trust, and the rights to equal protection and due process of the laws, are the privileges and rights advanced by that section of the Alaska Constitution specifically addressing the limitation of entry into any fishery. That section states as follows:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state. 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.

Art. VIII, sec. 15, Alaska Constitution. The second sentence was added by amendment in 1972. If any single element of this section is clear it is that the state shall not create or authorize any "exclusive right or special privilege of fishery." The present concepts of property rights

that pervade A.S. 16.43. et seq. cannot be easily reconciled with this prohibition. Current law allows free transfer of a permit, at any price set by the buyer and seller, to any person with the present ability to actively participate in the fishery. There is no requirement that a person utilize the permit. An authorization to enter a common property fishery, that is freely transferable and may be used for speculative purposes, suggests a special privilege of fishery.

The property-like status of a permit leads to constitutional concern from other directions.

This situation has the effect of creating another classification: on the one hand, a person with abundant financial resources; and on the other, a person of considerably more modest means. It seems to me that the act is having the ultimate effect of favoring the well to do over the poor. In my opinion, this discrimination is basically unfair or unjust, and does not conform to the principle in Art. I, § 1, of our constitution which requires equality of treatment of persons in the state.

CFEC, et al., v. Apokedak, supra, Justices Dimond, Burke, concurring, p. 35. I do not believe that the present system of transferability is incurable of its constitutional problems. However, it's current effect as applied to the facts appertaining to the upper Yukon River fisheries, does not meet the constitutional constraints of Art. VIII, § 15 (no exclusive right of fishery), and the equal protection and due process clauses of the state and federal constitutions. While the Apokedak case provides substantial support for this conclusion, it also provides optimism for well considered

reform.

Legislatures may implement their programs step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Id., pp. 20-21. 30/

30/ During the preparation of this report the assistance of Robert H. Wagstaff, Esq., Anchorage, Alaska, was solicited for the purpose of developing the conclusions. Mr. Wagstaff has extensive experience at the trial and appellate level with the federal issues regarding the commerce clause, the privileges and immunities clause, and the equal protection and due process clauses of the state and federal constitutions. The memorandum prepared by Mr. Wagstaff is set out in its entirety in the appendix of this report. I do not entirely agree with Mr. Wagstaff's conclusions, although I do agree with a number of them. Some of my conclusions were addressed to the Legislative Limited Entry Study Committee on December 12, 1979, in Anchorage, Alaska.

Other than the concerns with regard to free transferability, I believe that there are several other aspects of the limited entry act which merit substantial concern.

OPTIMUM NUMBER OF PERMITS A.S. 16.43.290-300 directs the Commission to establish the optimum number of entry permits for each fishery based upon a reasonable balance of several general standards. The reasoning behind the interest in development of an optimum number of permits is the belief that many of the common property fisheries have long suffered from over capitalization, a situation (it is argued) in which the sum of individual efforts to achieve efficiency leads to inefficiency of the total fleet. In an overcapitalized fishery, profits are marginal, the probability of business failure is high and the fishing strategies which lead to overcapitalization tend to defeat the intended conservation effect of gear restrictions, quotas, minimum size, and other regulations. In these fisheries, "optimum number" envisions that it may be appropriate to consider the optimum effort allowable to maximize the net economic yield. This line of theory is stated forcefully in Crutchfield and Pontecorvo, The Pacific Salmon Fishery: The Study of Irrational Conservation, John Hopkins Press (1969). The theory, at its most extreme, visualizes concentrations of wealth

n. 30 continued.

in a very few, apparently justifiable by the overall efficiency of the effort. To the extent this theory, and A.S. 16.43.290-300, are relying upon the grant of authority in Art. VIII, sec. 15, they are leaning on a very slender reed. It falls within the legitimate interest of the state to set a ceiling on the number of permits in a given area in order to accomplish the dual purposes of resource conservation and preventing economic distress among fishermen. It is not a legitimate power of the state to determine that a select few shall derive great wealth from a common property fishery. While a precise line cannot be drawn, serious application of the optimum number of permit standards at some point almost certainly will fall before a meaningful constitutional challenge.

MAXIMUM NUMBER OF PERMITS. The chief area of concern with regard to the establishment of the maximum number of entry permits (A.S. 16.43.240) is the rigidity of the formula. As discussed previously these sections effectively restrict any increase in the maximum number of permits after an initial determination and most certainly relieve the Commission of any power to increase the number of permits subsequent to an initial determination, if that initial determination was accurate.

A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist. . .

Leary v. United States, 395, U. S. 6 (1969). See, also, Apokedak, supra, pp. 37-38, Justices Dimond, Burke, concurring.

ISSUES FUNDAMENTAL TO THE ACT. While the optimum number of permit sections are not clearly fundamental to the purposes of the limited entry Act, most certainly the concepts of free transferability and the maximum number of permits are. Should these sections ever be subject to a successful constitutional challenge the entire act is in danger. Appellate courts, when sustaining a challenge to one section of an act, commonly consider whether the section that does not withstand constitutional muster is fundamental to the purposes of the entire act. If it is clear that the

n. 30 continued.

challenged section is fundamental to the purposes of the act, and it is also that clear the court cannot cure the defect, then appellate courts often rule that the entire act must fall. If it is the legislature's desire to maintain a limited entry system in the common property fisheries, then it must review A.S. 16.43 to ensure the commission has adequate emergency powers to regulate transferability and that the Commission has enough flexibility and discretion to authorize a more flexible formula for establishing the maximum number of permits if necessary.

Since the limited entry permit cannot constitutionally grant an exclusive right or special privilege of fishery, then it follows that the permit is not property right which, if taken, entitles the owner to any right of compensation. It is in essence exactly what A.S. 16.43.150(e) states that it is, to wit: "an entry permit constitutes a use privilege that can be modified or revoked by the legislature without compensation." See, Memorandum, Robert H. Wagstaff, Appendix.

D. COMMENTS ON UNJUST DISCRIMINATION

The findings and conclusions in this report have been directed to determine whether limiting entry into the Yukon and the other fresh water fisheries of the state has resulted in any unjust discrimination against any persons. Discrimination means to show preference for or prejudice against a person or class of persons. For the purposes of the findings and conclusions in this report I perceive there to be three classes of discrimination that are unjust. First, discrimination that is not conformable to law is most certainly unjust. This would include legislative and executive action not in conformance with the constitutional rights and privileges of all persons as well as executive acts that do not conform to the direct letter or intent of the law or exceed the authority delegated by law. Second, discrimination predicated upon inaccurate data is unjust. This would include legislative and executive actions not