



576 HB 359 (196)

|      |    |   |    |
|------|----|---|----|
|      | C. | Regulations Adopted by the Executive . . . . .  | 24 |
| IV.  |    | THE DEVELOPMENT OF NATURAL RESOURCE POLICY IN THE STATE OF ALASKA . . . . .             | 25 |
|      | A. | The Public Trust Concept . . . . .  | 26 |
|      |    | 1. In the Alaska Constitution . . . . .   | 29 |
|      |    | 2. In the Three Branches of State Government . . . . .                                  | 34 |
|      |    | a. Judicial . . . . .   | 34 |
|      |    | b. Legislative . . . . .  | 35 |
|      |    | c. Executive . . . . .  | 39 |
| V.   |    | LOCAL GOVERNMENT POLICY IN ALASKA . . . . .   | 40 |
| VI.  |    | DUE PROCESS AND EQUAL PROTECTION OF THE LAWS . . . . .                                  | 46 |
|      | A. | 1. Purpose . . . . .  | 46 |
|      |    | 2. The Legitimacy of the Legislation . . . . .  | 48 |
|      |    | a. In General . . . . .   | 48 |
|      |    | b. In Particular . . . . .  | 55 |
|      |    | c. The Classification . . . . .   | 56 |
|      |    | d. Fairness . . . . .   | 56 |
|      | B. | Legitimacy of The State Action and the Means Chosen . . . . .                           | 56 |
| VII. |    | THE ASSESSMENT - ROYALTY SHARE OR TAX? . . . . .  | 58 |
|      | A. | The Assessment Is Not a Tax . . . . .   | 58 |
|      | B. | A.S. 16.10.530 Et Seq. Does Not Unconstitutionally Delegate Legislative Power . . . . . | 65 |
|      |    | 1. The Power to Tax or Assess is Not Delegated . . . . .                                | 66 |
|      |    | 2. Any Delegations Are Justified and Constitutional . . . . .                           | 67 |

|       |  |    |
|-------|--|----|
| VIII. | THE COLLECTION OF THE ROYALTY SHARE<br>ASSESSMENT BY A REGIONAL AQUACULTURE<br>ASSOCIATION IS NOT IN VIOLATION OF<br>ARTICLE IX, SECTION 7 OF THE ALASKA<br>CONSTITUTION . . . . . | 71 |
|       | A. State Tax or License . . . . .  | 71 |
|       | B. Savings Clause . . . . .  | 74 |
| IX.   | VAGUENESS . . . . .  | 75 |
|       | A. The Law is Not Vague . . . . .  | 75 |
|       | B. Any Possible Vagueness Has<br>Been Corrected By Executive<br>Interpretation . . . . .   | 75 |
|       | C. Exhaustion . . . . .  | 75 |
| X.    | COMMERCE CLAUSE . . . . .  | 77 |
|       | A. General Background . . . . .  | 77 |
|       | B. Interstate Commerce is<br>Not Impermissibly Burdened . . . . .  | 80 |
| XI.   | PLAINTIFFS HAVE NOT EXHAUSTED<br>ADMINISTRATIVE REMEDIES . . . . .   | 82 |
| XII.  | PLAINTIFFS ARE BARRED BY LACHES . . . . .  | 84 |
| XIII. | THE CONSTITUTIONALITY OF REGIONAL<br>AQUACULTURE ASSOCIATIONS AND THE<br>ASSESSMENT IN A NUTSHELL . . . . .  | 92 |
|       | CONCLUSION . . . . .   | 95 |
|       | AFFIDAVIT OF JACK MILNES   |    |
|       | ADMINISTRATIVE REGULATIONS   |    |

CASES RELIED UPON

| <u>Cases</u>   | <u>Page</u>        |
|--|--------------------|
| <u>Aetna Life Insurance Company v. Washington Life and Dis. I. G. Ass'n.,</u><br>520 P.2d 162 (Wash. 1974) . . . . . | 59, 74             |
| <u>Agricultural Commodities v. Balkcom,</u><br>109 S.E. 2d. 276 (Georgia 1959). . . . .                              | 63, 64             |
| <u>Alaska Public Easement Defense Fund v. Andrus,</u> 435 F.Supp. 664 (D.C. Alaska, 1977). . . . .                   | 33                 |
| <u>Alaska Public Employees Association v. State,</u> 525 P.2d 12 (Alaska 1973) . . . . .                             | 46                 |
| <u>Aleut Community of St. Paul v. U.S.,</u><br>117 F.Supp. 427 (Ct. Claims 1954). . . . .                            | 35 fn              |
| <u>Atlantic City Electric Co. v. Barden,</u><br>368 A.2d 366 (N.J. 1976) . . . . .                                   | 69                 |
| <u>Baldwin v. Fish and Game Commission of Montana,</u> U.S. _____, 56 L.ed<br>2d 354 (1978) . . . . .                | 27, 28             |
| <u>Barry and Barry, Inc. v. Department of Motor Vehicles,</u> 500 P.2d 540 (Wash. 1972) . . . . .                    | 67                 |
| <u>Black &amp; White Taxi Co. v. Standard Oil Co.,</u><br>218 P.139 (Ariz. 1923). . . . .                            | 73                 |
| <u>Boehl v. Sabre Jet Room Inc.,</u><br>349 P.2d 585 (Alaska 1960) . . . . .   | 82                 |
| <u>Boucher v. Engstrom,</u><br>528 P.2d 456 (Alaska 1974) . . . . .  | 50                 |
| <u>Breese v. Smith,</u> 501 P.2d 159<br>(Alaska 1972) . . . . .  | 49                 |
| <u>Buchanan v. Town of Salina,</u><br>58 N.Y.S. 2d. 797 (1945) . . . . .   | 74                 |
| <u>Campbell v. Farmer,</u> 157 S.E. 2d.<br>276 (Georgia 1967) . . . . .  | 63, 64             |
| <u>Carmichael v. Southern Coal and Coke Company,</u> 301 U.S. 514 (1937). . . . .                                    | 59                 |
| <u>Carrol v. Finch,</u> 326 F. Supp.<br>891 (D.C. Alaska 1971). . . . .  | 68                 |
| <u>Ciletti v. Washington,</u> 140 A.2d<br>98 (Pa 1958) . . . . .   | 86                 |
| <u>Concerned Citizens of So. Kenai Peninsula v. Kenai Peninsula Borough,</u> 527 P.2d 447<br>(Alaska 1974). . . . .  | 84, 85, 86, 87, 88 |

|  |                                |
|--|--------------------------------|
| <u>Craig v. Boren</u> , U.S. _____,<br>45 U.S.L.W. 4057(1976) . . . . .  | 47, 52                         |
| <u>Dukesherer Farms, Inc. v. Bald</u> ,<br>251 N.W. 2d 278 (Mich. App. 1977) . . . . .   | 61, 64, 65                     |
| <u>Efros v. Russo</u> , 171 A.2d 370 . . . . .<br>(N.J. 1961)  | 58, 65                         |
| <u>Eisenstadt v. Baird</u> , 405 U.S. 438 (1972) . . . . .   | 49                             |
| <u>Ervien v. U.S.</u> , 251 U.S. 41 (1919) . . . . .   | 31 fn                          |
| <u>Geer v. Connecticut</u> , 161 U.S. 519 (1896) . . . . .   | 33 - 34 fn                     |
| <u>General Motors Corp. v. Washington</u> ,<br>377 U.S. 436 (1964) . . . . .   | 81                             |
| <u>Hafling, et.al. v. Inland Boatman's<br/>Union of the Pacific</u> , P.2d _____,<br>Opinion No. 1743, (Alaska 1978) . . . . . | 46 fn                          |
| <u>Hammer v. Dagenhart</u> , 247 U.S. 251 (1918) . . . . .   | 77                             |
| <u>Henneford v. Silas Mason Co.</u> , . . . . .<br>300 U.S. 577 (1937)   | 81                             |
| <u>Hicklin, et.al. v. Orbeck, et.al.</u> ,<br>565 P.2d 159 (Alaska 1977) . . . . .   | 48, 54                         |
| <u>Hicklin v. Orbeck</u> ,<br>____ U.S. ____, 57 L.Ed 2d 397 (1978) . . . . .  | 27                             |
| <u>Holmstead v. Grinnan</u> , 152 U.S. 412,<br>38 L.Ed 495 . . . . .   | 90                             |
| <u>Hynes v. Grimes Packing Co.</u> ,<br>337 U.S. 86 (1949) . . . . .   | 11                             |
| <u>Illinois Central R.R. Co. v.<br/>State of Illinois</u> , 146 U.S. 387 (1892) . . . . .                                      | 28 fn, 45                      |
| <u>Isakson v. Rickey</u> , 500 P.2d 359<br>(Alaska 1973) . . . . .   | 46, 47, 50, 51, 52, 53, 54, 56 |
| <u>Jennings v. Exitior West Green Reg.<br/>Sch. Dist. Com.</u> , 352 A.2da 634<br>(R.I. 1976) . . . . .                        | 68                             |
| <u>Kelly v. Zamarello</u> , 486 P.2d 106<br>(Alaska 1971) . . . . .  | 75, 82                         |
| <u>Knight v. West Alabama Environmental<br/>IMP Authority</u> , 246 So.2d 903<br>(Alabama 1971) . . . . .                      | 66                             |
| <u>Leary v. United States</u> , 395 U.S. 6 (1969) . . . . .  | 51                             |
| <u>Liberati v. Bristol Bay Borough</u> ,<br>P.2d _____, Opinion No. 1735<br>(Alaska 1978) . . . . .                            | 45                             |

|  |                            |
|--|----------------------------|
| <u>Lynden Transport, Inc. v. State,</u><br>532 P.2d 700 (Alaska 1975) . . . . .  | 48                         |
| <u>McKart v. United States,</u> 395 U.S. 185<br>(1969) . . . . .   | 82                         |
| <u>Menz v. Coyle,</u> 117 N.E.2d 290<br>(N.D. 1962) . . . . .  | 59                         |
| <u>Metlakatla Indian Community,<br/>Annette Island Reserve v. Egan,</u><br>362 P.2d 901 (Alaska 1961) . . . . .                | 35                         |
| <u>Michigan Employment Security v. Palt,</u><br>144 N.W. 2d 663 (Mich. 1966) . . . . .   | 59                         |
| <u>Mobil Oil Corp. v. Local Boundary<br/>Commission,</u> 518 P.2d 92 (Alaska 1974) . . . . .                                   | 51                         |
| <u>Montana Chapter of Ass'n of Civilian<br/>Technicians v. Young,</u> 514 R.2d 1165<br>(9th Cir. 1975) . . . . .               | 83                         |
| <u>Moore v. State,</u> 553 P.2d 8<br>(1976) . . . . .  | 35, 84, 85, 86, 87, 88, 91 |
| <u>Mulford v. Smith,</u> 307 U.S. 38 (1939) . . . . .  | 80                         |
| <u>Multnomah v. Luihn,</u> 178 P.2d 159<br>(Ore. 1947) . . . . .   | 58                         |
| <u>Nebbia v. New York,</u> 291 U.S. 502 (1934) . . . . .   | 50                         |
| <u>Neizer v. School District of the<br/>Township of Schuylkill,</u> 121 A2d 93<br>(Pa. 1956) . . . . .                         | 86                         |
| <u>NLRB v. Jones and Laughlin Steel Corp.,</u><br>301 U.S. 1 (1937) . . . . .  | 79                         |
| <u>North Slope Borough v. Sohio Petroleum<br/>Corporation, et.al.,</u> P.2d _____,<br>Opinion No. 1750 (Alaska 1978) . . . . . | 46 fn                      |
| <u>Northwestern Mutual Life Insurance<br/>Company v. State Board of Equalization,</u><br>169 P.2d 917 (Cal. 1946) . . . . .    | 65                         |
| <u>Outman v. Kilburn,</u> 116 P.2d 812<br>(N.M. 1941) . . . . .  | 65                         |
| <u>Opinion of the Justices,</u> 379 A. 2d 727<br>(N.H. 1977) . . . . .   | 60, 74                     |
| <u>Orbison v. Welsh ,</u> 179 N.E. 2d 727<br>(Ind. 1962) . . . . .   | 60                         |
| <u>Organized Village of Kake v. Egan ,</u><br>174 F. Supp 500 (D.C. Alaska, 1959) . . . . .                                    | 33, 33(a) fn               |
| <u>Parisi v. Davidson,</u> 405 U.S. 34 (1972) . . . . .  | 82, 83                     |

|  |            |
|--|------------|
| <u>People v. George</u> , 250 N.W. 2d 491<br>(Mich. 1977) . . . . .                                      | 59         |
| <u>Rainwater v. Haynes</u> , 428 S.W. 2d 254<br>(Ark. 1968) . . . . .                                    | 64, 65 fn  |
| <u>Ravin v. State</u> , 537 P.2d 494<br>(Alaska 1975) . . . . .  | 48, 49, 54 |
| <u>Schechter Poultry Corp. v. United States</u> ,<br>295 U.S. 495 (1935) . . . . .                       | 78         |
| <u>Scott v. Donnelly</u> , 133 N.W. 2d 418<br>(N.D. 1965) . . . . .                                      | 62         |
| <u>State Farm Auto Insurance Company v.<br/>Board of Trustees</u> , 79 S.2d 512 (Alabama 1973) . . . . . | 60         |
| <u>State ex rel, Davis Smith Company v.<br/>Clausen</u> , 117 P. 101 (1911) . . . . .                    | 60         |
| <u>State v. Donald</u> , 158 N.W. 317<br>(Wis. 1916) . . . . .   | 74         |
| <u>State v. Lewis</u> , 559 P.2d<br>630 (Alaska 1977) . . . . .  | 50         |
| <u>State v. Reefer King</u> , 559 P.2d 56<br>(Alaska 1977) . . . . .                                     | 52         |
| <u>State v. Reisman</u> , 375 P.2d 1002<br>(Wash. 1972) . . . . .  | 69         |
| <u>State v. Wakefield Fisheries, Inc.</u> ,<br>495 P.2d 166 (Alaska 1972) . . . . .                      | 52         |
| <u>State v. Rodman</u> , 59 N.W. 109<br>(Minn. 1894) . . . . .   | 33(a) fn   |
| <u>Sunshine Anthracite Coal Co. v.<br/>Atkins</u> , 310 U.S. 381 (1940) . . . . .                        | 79         |
| <u>Swisher v. Brown</u> , 402 P.2d 621<br>(Cal. 1965) . . . . .  | 69         |
| <u>Truax v. Corrigan</u> , 257 U.S. 312 (1921) . . . . .   | 51         |
| <u>United States v. Butler</u> , 297 U.S. 1<br>(1936) . . . . .  | 79         |
| <u>United States v. Darby</u> , 312 U.S. 100<br>(1941) . . . . .   | 79         |
| <u>U.S. v. Rock Royal Cooperative, Inc.,<br/>et.al.</u> , 307 U.S. 533 (1938) . . . . .                  | 80         |
| <u>Vlandis v. Kline</u> , 412 U.S. 442 (1973) . . . . .  | 53         |
| <u>Walker v. Alaska State Mortgage<br/>Association</u> , 416 P.2d 245 (Alaska 1966) . . . . .            | 69         |

|   |            |
|---|------------|
| <u>Weinberger v. Wiesenfeld,</u><br>95 S. Ct. 1225 (1975)   | 46, 47, 51 |
| <u>Wickham v. Trapani,</u> 246 N.Y.<br>Supp. 2d 137 (N.Y. 1964),<br>affirmed 272 N.Y. Supp. 2d 6<br>(N.Y. 1966) | 61         |
| <u>Wilson v. Connecticut Product Develop-</u><br><u>ment Corp.,</u> 355 A. 2d 72 (Conn. 1974)                   | 67         |
| <u>Winston Bros. Co. v. State Tax</u><br><u>Commission,</u> 62 P.2d 7 (Or. 1936)                                | 33         |

AUTHORITIES RELIED UPON

Cases

- Alaska Constitutional Convention Proceedings . . . . 25, 30, 31, 32 fn, 36, 72
- Cohen, The Constitution, The Public Trust Doctrine and the Environment, 1970 Utah Law Review 388 . . . . . 26 fn
- Cooley on Taxation, 4th Ed. . . . . 59, 64, 65 fn
- R. Cooley, Politics and Conservation: The Decline of the Alaska Salmon (1963) . . . . . 10
- J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fishery: A Study in Irrational Conservation (1969) . . . . . 10
- Fischer, Alaska's Constitution Convention (1975) . . . . . 26 fn, 29 fn, 32 fn, 40-44
- Gruening, The State of Alaska (1954) . . . . . 26 fn
- Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harvard L.Rev. 1 . . . 47, 52
- Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale Law Journal 763 (1970) . . . . . 26 fn
- Rogers, The Future of Alaska (1962) . . . . . 26 fn
- Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 1970 Michigan Law Review 471. . . . . 32 fn
- Schwartz, American Constitutional Law (1963) . . . 78-79
- The Alaska Constitution and The State Patrimony: The Constitution and Natural Resources, Public Administration Service (1955). . . . . 32 fn

## INTRODUCTION

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

I. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

## II. HISTORIC BACKGROUND

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

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

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

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

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

### III. DEVELOPMENT OF AQUACULTURE POLICY IN ALASKA.

#### A. CONSTITUTIONAL RECOGNITION.

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

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

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

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

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

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

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

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

B. LEGISLATIVE DEVELOPMENTS.

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

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

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

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

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

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

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

(footnote 3/ con't)

(footnote 3/ con't)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7/ A.S. 16.10.410.

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

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

A.S. 16.10.380(a):

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

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

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8/ A.S. 16.10.445:

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

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

9/ A.S. 16.10.460.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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15/ The mandatory assessment:

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

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

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

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

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

The voluntary assessment:

Sec. 16.10.540. VOLUNTARY ASSESSMENT ON SALE OF SALMON.

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

(footnote con't)

(footnote 15/ con't)

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

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

This section has not been amended.

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

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

"June 23, 1977

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

Dear Mr. Speaker:

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

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

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

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

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

Sincerely,

/s/ JAY S. HAMMOND  
Governor"

House Journal, 1977, pp. 1701-1702.

The policy was restated to read:

§16.10.500 DECLARATION OF POLICY

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

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

(a). Regional Salmon Plan

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

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

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

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

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

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

(b). Preference Rights to a Permit

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

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

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

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

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

(d). Annual Reports

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

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

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

(e). Grants For Organizational and Planning Purposes.

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

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

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

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

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

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

"HOUSE FINANCE COMMITTEE REPORT  
ON  
CSHB 264 (FINANCE)

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

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

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

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

Respectfully submitted,

/s/ STEVE COWPER, Chairman  
House Finance Committee"

House Journal, 1977, p. 788.

(f). Mandatory Assessment.

(1). Assessment Trigger

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

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

(2). Assessment Rate

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

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

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

(3). Approved use of assessment revenues

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

(4). Procedural safeguards required by law

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

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

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

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

5. Termination of the assessment

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

C. REGULATIONS ADOPTED BY THE EXECUTIVE.

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

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

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

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

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

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

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

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

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

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

A. THE PUBLIC TRUST CONCEPT

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

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

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

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

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

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

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

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

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

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

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

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

1. In the Alaska Constitution

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

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

Article VIII of the Alaska Constitution provides in relevant sections:

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

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

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

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

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

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

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

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

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

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

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

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

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

Government in trust. 32/

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

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

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

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

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

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

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

33/ The committee realized

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

Again, this understanding had been forcefully urged by Bartlett:

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

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

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

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

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

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

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

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

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

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

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

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

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

2. In the Three Branches of State Government

a. Judicial.

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

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

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

38/ Ordinance No. 3:

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

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

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

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

b. Legislative.

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

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

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

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

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

1976 House Journal, p. 469.

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

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

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

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

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

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

1976 Senate Journal, p. 1461.

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

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

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

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

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

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

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

c. Executive.

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

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

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

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

V. LOCAL GOVERNMENT POLICY IN ALASKA.

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

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

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

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

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

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

#### The Borough Concept

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

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

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

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#### State-Local Relations

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

The lack of any general government beyond the city.

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

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

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

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

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

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

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

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

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

Supra, pp. 116-124, footnotes omitted.

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

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

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

constitutionally inequipped melange of municipal governments.

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

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

VI. DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

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

1. Purpose

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

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

must be the actual purpose.

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

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

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

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

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

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

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

2. The Legitimacy of the Legislation

a. In General.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Isakson v. Rickey, supra, at 360.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. In Particular.

The stated purposes of the legislation are to:

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

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

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

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

of fisheries development with an efficient aquaculture development plan.

c. The Classification

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

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

d. Fairness

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

B. LEGITIMACY OF THE STATE ACTION AND THE MEANS CHOSEN

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

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

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

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

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

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

## VII. THE ASSESSMENT - ROYALTY SHARE OR TAX?

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

### A. THE ASSESSMENT IS NOT A TAX.

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

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

(Ore. 1947).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clearly the taxation power has not been delegated.

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

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

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

2. Any Delegations Are Justified and Constitutional.

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

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

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

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

The legislature may also delegate power to private persons:

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

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

#### DELEGATION TO ASSOCIATION

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

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

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