

A TAXING ISSUE: ARE LIMITED ENTRY FISHING PERMITS PROPERTY?

Polonius: Do you know me, my lord?

Hamlet: Excellent well. You are a fishmonger.

Polonius: Not I, my lord.

Hamlet: Then I would you were so honest a man.

-- Shakespeare¹

And it came to pass in those days, that there went out a decree from Caesar Augustus, that all the world should be taxed.

-- Luke 2:1 (King James)

I. INTRODUCTION

For almost twenty years, Alaska fisherman John Lorentzen has derived his income exclusively from fishing in Prince William Sound. In the mid-1980s, Mr. Lorentzen failed to pay his federal income taxes for three successive years. The Internal Revenue Service ("IRS") responded by assessing a tax liability of more than \$60,000 against Mr. Lorentzen. Consequently, a federal tax lien arose against all "property and rights to property" belonging to Mr. Lorentzen.

Normally, this would not be a very exciting story. When a taxpayer fails to pay his taxes, the IRS quickly descends upon the property of the delinquent taxpayer and attaches a federal tax lien. In these days of staggering federal budget deficits, the IRS must be more vigilant than ever in attempting to discover all of a taxpayer's "property and rights to property." In Mr. Lorentzen's case, the IRS decided that his limited entry fishing permit would be included in the property seized. Out of that decision, this note was born.

Naturally, the IRS's decision also spawned litigation. Mr. Lorentzen filed suit against the United States contending that a limited entry fishing permit is not "property" subject to a federal tax lien.² On March 11, 1992,

Copyright © 1992 by Alaska Law Review

1. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2, lines 173-76 (Sylvan Barnet ed., Signet Classic Books 1963).

2. *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992) (order granting summary judgment). The State of Alaska filed briefs as amicus curiae in support of the plaintiffs' position. Memorandum of Amicus Curiae in Support of Plaintiffs' Motion

Judge James K. Singleton issued an order granting summary judgment to the United States after finding that a limited entry fishing permit is "property" or "rights to property" within the meaning of federal tax lien law.³ A written opinion did not accompany the order. However, during oral argument on the issue, Judge Singleton indicated that his conclusions were based on his examination of Alaska state law.⁴ Responding to the United States' contention that he was ignoring a substantial body of case law mandating that the analysis be based on federal law, Judge Singleton stated, "No, I've always seen this as a question of state law and you never have, so at least to that extent, we have not come to an agreement [M]aybe this will be the case where the definitive answer is given and we all lie down."⁵ While agreeing with Judge Singleton's conclusion that a limited entry permit is property for the purposes of federal tax lien law, this note argues that his analysis of the issue and assertion that the issue is governed by state law is incorrect.

The next section of this note provides a broad overview of Alaska's limited entry fishing permit system. Section III considers what kinds of "property" are subject to federal tax liens. Alaska's limited entry fishing permits are more fully scrutinized in Section IV in order to determine whether they meet the definition of "property" as developed in Section III. Finally, this note concludes by arguing that entry permits do have the requisite characteristics of "property" and may be attached by a federal tax lien.

for Summary Judgment, *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992) [hereinafter *Amicus Curiae Memorandum*] (on file with the *Alaska Law Review*).

The potential consequences of this lawsuit are far-reaching. Over 13,000 entry permits have been issued. Affidavit of Bruce Twomley, *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992) [hereinafter *Twomley Affidavit*] (on file with the *Alaska Law Review*). Given the depressed state of Alaska's fisheries, it is conceivable that a significant number of these permits may be subject to a federal tax lien. See Jeffrey A. Gorelick, Note, *The Eleventh Hour for Alaska's Salmon Fishery: A Proposed Regulatory Solution*, 3 *ECOLGY L.Q.* 391 (1973)(discussing fishery conditions).

3. *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992).

4. Oral Argument on Cross-motions for Summary Judgment at 38-39, *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992).

5. *Id.*

II. ALASKA'S LIMITED ENTRY PROGRAM⁶

In 1973, the Alaska Limited Entry Act⁷ was enacted in order to "promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries"⁸ To that end, no commercial fisherman may operate in a distressed fishery without first obtaining an entry permit.⁹ Entry permits entitle the permit holder to fish in a specified fishery using a specific type of gear.¹⁰ Permit holders may transfer their entry permits, provided they adhere to statutory and regulatory guidelines.¹¹

The Alaska Commercial Fisheries Entry Commission ("CFEC") is the agency charged with administering the limited entry program.¹² The CFEC's responsibilities include designating distressed fisheries,¹³ determining the maximum number of entry permits to be issued for each distressed fishery,¹⁴ establishing the qualifications for the issuance of permits,¹⁵ and actually issuing the permits to qualified applicants.¹⁶ The CFEC also provides for the transfer of entry permits to qualified transferees.¹⁷

6. This section is intended to serve as an introduction to Alaska's limited entry system. For an in-depth analysis of the system's structure, and a comparison with limited entry programs in other states, see Robert B. Groseclose & Gregory K. Boone, *An Examination of Limited Entry as a Method of Allocating Commercial Fishing Rights*, 6 UCLA-ALASKA L. REV. 201 (1977).

7. 1973 Alaska Sess. Laws 79 (codified as amended at ALASKA STAT. §§ 16.43.010-.990 (1987 & Supp. 1991)).

8. ALASKA STAT. § 16.43.010 (1987). The Limited Entry Act was necessitated by a variety of biological and economic factors that led to a critical depletion of Alaska's salmon fisheries. See generally, Gorelick, *supra* note 2 (discussing the ecology of the Alaska salmon fishery, the biological and economic consequences of increased use, and a proposed regulatory solution).

9. ALASKA STAT. § 16.43.140 (1987); see also *State v. Ostrosky*, 667 P.2d 1184, 1188-90 (Alaska 1983) (upholding entry provisions of the Limited Entry Act against attacks grounded in article I, section 1 and article VIII, section 3 of the Alaska Constitution), *appeal dismissed*, 467 U.S. 1201 (1984).

10. ALASKA STAT. § 16.43.150(a) (Supp. 1991).

11. *Id.* § 16.43.170; see also *Ostrosky*, 667 P.2d at 1190-91 (upholding transfer restriction provisions of the Limited Entry Act against state and federal constitutional attacks).

12. ALASKA STAT. § 16.43.020 (1987).

13. *Id.* § 16.43.230. For a description of the steps taken by the CFEC in identifying and regulating distressed fisheries, see *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1258-59, 1262 n.6 (Alaska 1988).

14. ALASKA STAT. §§ 16.43.100(a)(4), 16.43.240 (Supp. 1991).

15. *Id.* §§ 16.43.100(a)(6), 16.43.250 (1987 & Supp. 1991).

16. *Id.* §§ 16.43.100(a)(7), 16.43.270 (1987).

17. *Id.* § 16.43.100(a)(11) (Supp. 1991).

The CFEC issues the permits on the basis of a detailed point system designed to gauge the hardship an applicant would suffer if denied a permit.¹⁸ This point system ranks applicants by weighing such factors as past participation in the fishery, degree of economic dependence on the fishery, access to alternative employment, and investment in vessels and gear.¹⁹ Once issued, limited entry fishing permits must be renewed annually,²⁰ and failure to renew a permit for a period of two years results in forfeiture.²¹ Moreover, the Alaska Legislature has specifically reserved the right to modify or revoke a limited entry permit without providing compensation.²²

Alaska Statutes section 16.43.150(e) defines an entry permit as a "use privilege."²³ The Alaska Senate recently re-examined the Limited Entry Act and emphasized that, in choosing to establish an entry permit as a "use privilege," "the legislature rejected the idea that an entry permit represent [sic] a property right belonging to the permit holder."²⁴ Unfortunately for Alaska's legislators, the issue is not that simple. As discussed in the next section, the legislature's attempt to attach a label such as "use privilege" to an entry permit does not determine whether such permits are "property" or "rights to property" to which a federal tax lien can attach.

III. AN ANALYSIS OF SECTION 6321 OF THE INTERNAL REVENUE CODE

A. The Framework

Before further exploring the characteristics of a limited entry fishing permit, it is necessary to understand the analytical framework courts employ to determine whether an interest is a property interest for federal tax purposes. Because this is a complex area marked by subtle interaction

18. ALASKA ADMIN. CODE tit. 20, §§ 05.600-.719 (Oct. 1988).

19. *Id.*; see also Groseclose & Boone, *supra* note 6 at 208 (citation omitted) (describing the Alaska entry system); Commercial Fisheries Entry Comm'n v. Templeton, 598 P.2d 77, 79 (Alaska 1979) (applying point system factors).

20. ALASKA STAT. § 16.43.150(c) (Supp. 1991).

21. *Id.* § 16.43.150(d) (forfeiture unless CFEC waives the failure to renew for two years on the basis of good cause).

22. *Id.* § 16.43.150(e).

23. *Id.*

24. Letter of Intent for House Bill 124, S. JOURNAL, 16th Legis., 2d Sess. 3855, 3861 (May 3, 1990) [hereinafter S. JOURNAL Letter of Intent] (on file with the *Alaska Law Review*).

between state and federal law, the analysis requires an excursion into the "tortured meanderings of federal tax lien law."²⁵

Under section 6321 of the Internal Revenue Code, a federal tax lien arises on "all property and rights to property, whether real or personal, belonging to [a delinquent taxpayer]."²⁶ The leading cases defining "property" in the context of section 6321 are *United States v. Bess*²⁷ and *Aquilino v. United States*.²⁸ *Aquilino* clarified and reiterated the *Bess* holding that when evaluating whether a particular interest of a taxpayer is "property" or "rights to property" to which a federal tax lien can attach, state law must be examined to determine the nature of the taxpayer's interest.²⁹ In a frequently cited footnote, the *Aquilino* Court commented:

It is suggested that the definition of the taxpayer's property interests should be governed by federal law. . . . We think that this approach is unsound as it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no interest at all.³⁰

Bess, *Aquilino* and their progeny also establish a framework for determining whether a bundle of rights constitutes a property interest to which a federal tax lien can attach. The first step in this analysis is to ascertain the existence and nature of the legal interests created by the relevant state law.³¹ The second step requires the court to apply federal law consequences to the state-created legal interests in order to determine whether it is "property" or "rights to property" to which a federal tax lien may attach.³² In other words, once state law is applied to define the

25. *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 271 (5th Cir. 1976).

26. 26 U.S.C. § 6321 (1988). The complete text of the statute provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Id.

27. 357 U.S. 51 (1958) (discussing section 6321's predecessor, section 3670 of the Internal Revenue Code of 1939).

28. 363 U.S. 509 (1980).

29. *Id.* at 512-13.

30. *Id.* at 513 n.3.

31. *Bess*, 357 U.S. at 55-57; *Aquilino*, 363 U.S. at 513; see also *United States v. National Bank of Commerce*, 472 U.S. 713, 722 (1985); *Rodriguez v. Escambron Dev. Corp.*, 740 F.2d 92, 96-97 (1st Cir. 1984); *Little v. United States*, 704 F.2d 1100, 1105 (9th Cir. 1983).

32. *National Bank of Commerce*, 472 U.S. at 722. "[O]nce it has been determined that

nature of a taxpayer's legal interests, state law becomes inoperative and the tax consequences pertaining to such rights are solely a matter of federal law.³³

The distinction drawn between the application of federal and state law can be quite confusing. At least one court believed that it was not "clear whether state law merely determines the existence of an interest that must then be classified according to federal law to determine whether it is property subject to the lien, or whether state law controls both the existence and classification of rights."³⁴ If state law determined both the nature and the classification of the legal interest, however, federal law definitions of "property" or "rights to property" would be rendered irrelevant.

Despite the temptation to ignore federal law altogether,³⁵ such an approach would be misguided. State law determines only the *nature* of a taxpayer's legal interests;³⁶ whether those interests are "property" or "rights to property" must be determined by federal law.³⁷ Section 6321 of the Internal Revenue Code "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."³⁸ Indeed, in *United States v. National Bank of Commerce*,³⁹ the United States Supreme Court unequivocally stated that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law."⁴⁰

The Ninth Circuit recognized the need to apply both state and federal law in *Little v. United States*.⁴¹ In *Little*, the court had to determine whether a taxpayer's statutorily granted right of redemption was "property"

state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *Id.* (quoting *Bess*, 357 U.S. at 56-57); accord 21 West Lancaster Corp. v. Main Line Restaurant, 790 F.2d 354, 356 (3d Cir. 1986); *Rodriguez*, 740 F.2d at 97.

33. *National Bank of Commerce*, 472 U.S. at 722 (citing *Bess*, 357 U.S. at 56-57). Note further that *Aquilino* stated that the priority of liens is governed solely by federal law. *Aquilino*, 363 U.S. at 513-14.

34. *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 272 (5th Cir. 1976).

35. In a case recently decided in Alaska, a central argument of both the plaintiffs and the State of Alaska as amicus curiae was that the court must look entirely to Alaska state law in order to determine whether an entry permit is "property" or "rights to property." Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 12-15, *Lorentzen v. United States*, No. A90-446 Civil (D. Alaska Mar. 11, 1992) (order granting summary judgment) (on file with the *Alaska Law Review*); Amicus Curiae Memorandum, *supra* note 2, at 5-15.

36. *National Bank of Commerce*, 472 U.S. at 724 n.8 (citing *Bess*, 357 U.S. at 55).

37. *Id.* at 722.

38. *Bess*, 357 U.S. at 55 (citation omitted) (discussing section 3670 of the Internal Revenue Code of 1939, the predecessor of section 6321).

39. 472 U.S. 713 (1985).

40. *Id.* at 727 (citing *Bess*, 357 U.S. at 56-57).

41. 704 F.2d 1100 (9th Cir. 1983).

or "rights to property" under section 6321.⁴² The court addressed the issue by examining California law to determine what legal interests the taxpayer had in the right of redemption.⁴³ Under California law, the right of redemption was classified as a mere personal privilege.⁴⁴ The court dismissed the state *classification* of "personal privilege" as irrelevant, however, and instead focused on the actual *rights* created under California law.⁴⁵ After determining the nature of the taxpayer's interest, the court then applied a federal test,⁴⁶ concluding that the taxpayer did have "property" or "rights to property" to which a federal tax lien could attach.⁴⁷

Thus, because state law is applicable only insofar as it *creates* legal rights, legislatively enacted labels are not dispositive in determining whether an interest is "property" or "rights to property" under section 6321. As one commentator has observed, state labels should not control "where the realities -- the beneficial incidents of ownership -- belie them."⁴⁸ This was certainly the position of the Ninth Circuit in *Little* when it ignored California's labeling of a right of redemption as a "personal privilege."⁴⁹ Similarly, notwithstanding the expressed intent of the Alaska Legislature,⁵⁰ a determination of whether limited entry fishing permits are subject to a federal tax lien must entail an examination of federal law defining the term "property" in the context of section 6321.

42. *Id.* at 1104-05.

43. *Id.* at 1106.

44. *Id.*

45. *Id.* Specifically, the court drew attention to the fact that a taxpayer could transfer his right of redemption for valuable consideration. *Id.*

46. See *infra* Section III.B (discussing federal test). The present section of this note is concerned only with establishing that courts should, in fact, apply a federal test to state-created interests in order to determine if they are "property" or "rights to property."

47. *Little*, 704 F.2d at 1106.

48. Note, *Property Subject to the Federal Tax Lien*, 77 HARV. L. REV. 1485, 1487 (1964). When a state statute proclaims that a valuable interest is not property, "the courts have generally looked behind the words of the statute to give the Government a lien on this marketable asset which otherwise might slip through its hands." *Id.*

49. *Little*, 704 F.2d at 1106. Similarly, while a liquor license is not classified as property under Pennsylvania state law, it has been held to be property for the purposes of a federal tax lien. 21 West Lancaster Corp. v. Main Line Restaurant, 790 F.2d 354, 359 (3d Cir. 1986). The Ninth Circuit has remarked that, "[w]hile several Ohio courts have refused to label the rights granted to the licensee as 'property rights,' the state has nonetheless chosen to grant the licensee rights tantamount to property rights in all but name." *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1172 (6th Cir. 1990), *cert. denied sub nom. Ohio Dept. of Taxation v. Internal Revenue Serv.*, 59 U.S.L.W. 3394 (U.S. June 10, 1991).

50. See *supra* notes 23-24 and accompanying text.

B. The Definition of Property Under Section 6321

While “[t]he threshold question in any case involving the federal government’s assertion of its tax lien is whether and to what extent the taxpayer had ‘property’ within the meaning of the federal tax lien statute,”⁵¹ there is no settled definition of “property” or “rights to property” under section 6321 of the federal tax code.⁵² Congress chose not to attach a specific meaning because, “in enacting [section] 6321, [it] knew that the forms and varieties of property would remain in flux, and that a definition capable of precisely capturing those valuable interests for the tax gatherers’ harvest would elude it.”⁵³ Moreover, “[t]he language of section 6321 is broad, revealing a congressional intent to reach ‘every interest in property that a taxpayer might have.’”⁵⁴

Despite the lack of congressional guidance, there are several attributes that courts look for in deciding whether an interest is “property” to which a federal tax lien can attach. The two most common of these are whether the interest has pecuniary value⁵⁵ and whether it is transferable.⁵⁶ Nevertheless, the inquiry into whether a taxpayer has “property” or “rights to property” should not be overly formalistic. Courts must recognize that the term “property” cannot be “confined in a jurisdictional straitjacket,”⁵⁷ but must be interpreted in context. That is, even if a legal interest has value and is transferable, it should not be classified as “property” if the interest is so laden with state-imposed restrictions as to render its purported

51. *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 272 (5th Cir. 1976).

52. *21 West Lancaster Corp. v. Main Line Restaurant*, 790 F.2d 354, 357 (3d Cir. 1986). The Third Circuit found that “[t]here is no bright-line rule or mechanical definition to guide us in determining whether [a legal interest] constitutes property or rights to property for federal tax lien purposes. Neither Congress nor the Supreme Court has essayed a broad rule of classification.” *Id.*

53. *Randall*, 542 F.2d at 278. The court went on to note that “Congress did not attempt to define the commercial cosmos. Rather, it was perfectly willing to let contemporary transactions be analyzed to determine whether or not the delinquent taxpayer had any part of a bundle of rights of commercial value, to which the tax lien would then attach.” *Id.*

54. *Don King Prods., Inc. v. Thomas*, 945 F.2d 529, 533 (2d Cir. 1991) (quoting *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985)).

55. *See, e.g., United States v. Bess*, 357 U.S. 51, 56 (1958) (life insurance contract’s cash redemption value is valuable to insured and tax lien could attach, although future proceeds are not of value because the beneficiary is recipient); *21 West Lancaster*, 790 F.2d at 357 (liquor license is valuable, tax lien can attach); *Little v. United States*, 704 F.2d 1100, 1105-06 (9th Cir. 1983) (right of redemption of property sold to state in tax sale is valuable right of second defaulting taxpayer, who acquired the right, and tax lien can attach).

56. *See, e.g., 21 West Lancaster*, 790 F.2d at 357; *Little*, 704 F.2d at 1105-06; *Randall*, 542 F.2d at 278 (tax lien could attach to taxpayer’s transferable interest in machinery in which he did not have full title because he had only partially performed his obligations under the sales contract).

57. *Randall*, 542 F.2d at 277.

value and transferability mere illusions. For example, a statute might purport to allow the transfer of a legal interest, but at the same time impose so many limitations as to make any such transfer practically impossible.⁵⁸ Such a statute should not give rise to the level of transferability needed to find "property" or "rights to property" subject to a federal tax lien.

The United States Supreme Court recognized the need to consider economic realities in *United States v. Bess*,⁵⁹ where it was confronted with the issue of whether an insurance holder has a property interest in the future proceeds of his life insurance policies.⁶⁰ Even though the proceeds were worth more than \$60,000,⁶¹ thus valuable, and the insurance holder could change the beneficiary of the policies at any time,⁶² thus transferable, the Court did not find the proceeds to be "property" or "rights to property" of the insurance holder. In holding that the taxpayer did not have a property interest in his beneficiary's potential proceeds, the Court observed that "[i]t would be anomalous to view as 'property' subject to a federal tax lien proceeds never within the insured's reach to enjoy."⁶³

The *Bess* opinion seems to suggest that when determining whether taxpayers have "property" or "rights to property," courts should ask whether the taxpayers will be able ultimately to enjoy the value of their legal interests. Courts must be flexible in their analyses and recognize that "[w]e locate property not through the nomenclature of title, but through the realities of the marketplace."⁶⁴ Thus, a threshold issue in the analysis of Alaska's limited entry fishing permit program is whether a market for entry permits exists that allows permit holders easily to convert their entry permits into cash.⁶⁵

C. The Liquor License Cases

Limited entry fishing permits are a unique statutory creation. Perhaps the most analogous legal interests are state-issued liquor licenses. The

58. *But see* *Chicago Mercantile Exch. v. United States*, 840 F.2d 1352 (7th Cir. 1988) (tax lien could attach to seat on a commodities exchange despite the fact that transfer was severely restricted by Commodities Exchange Act; IRS would be subject to the transfer restrictions).

59. 357 U.S. 51 (1958).

60. *Id.* at 55. The Supreme Court has also appealed to "common sense" in determining whether a legal interest is "property" or "rights to property." *United States v. National Bank of Commerce*, 472 U.S. 713, 725 (1984).

61. *Bess*, 357 U.S. at 52.

62. *Id.*

63. *Id.* at 55-56.

64. *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 278 (5th Cir. 1976).

65. *See* discussion *infra* Section IV.A.2.

Alaska Supreme Court recognized this analogy when it remarked, "An entry permit is a government license having value issued to a limited number of people. As such it resembles a liquor license"⁶⁶ Substantial case law exists concerning whether a liquor license should be classified as "property."⁶⁷ An examination of some of these cases will serve as a useful guide in formulating an analysis of whether limited entry permits are "property" or "rights to property" to which a federal tax lien can attach.⁶⁸

In *21 West Lancaster Corporation v. Main Line Restaurant*,⁶⁹ the Third Circuit analyzed the status of a liquor license under the Pennsylvania Liquor Code to determine whether the license should be deemed "property" subject to a federal tax lien.⁷⁰ Under Pennsylvania law, a liquor license could neither be pledged as a security interest⁷¹ nor subjected to execution by a judgment holder.⁷² However, the court found that these state restrictions did not play a role in determining whether a license should be characterized as "property" under federal tax lien law.⁷³ Rather, in holding that the license was "property" within the meaning of section 6321 of the Internal Revenue Code, the court focused on the ease with which a licensee could transfer his liquor license.⁷⁴

66. *State v. Ostrosky*, 667 P.2d 1184, 1194 (Alaska 1983).

67. *See, e.g., In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1172 (6th Cir. 1990), *cert. denied sub nom. Ohio Dept. of Taxation v. Internal Revenue Serv.*, 59 U.S.L.W. 3394 (U.S. June 10, 1991); *21 West Lancaster Corp. v. Main Line Restaurant*, 790 F.2d 354 (3d Cir. 1986); *Bogus v. American Nat'l Bank of Cheyenne*, 401 F.2d 458 (10th Cir. 1968); *Paramount Fin. Co. v. United States*, 379 F.2d 543 (6th Cir. 1967).

68. There are numerous cases discussing whether other kinds of licenses are "property." *See, e.g., United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit is not "property" under the wire or fraud statutes), *cert. denied*, 59 U.S.L.W. 3770 (U.S. May 13, 1991); *United States v. Martinez*, 905 F.2d 709, 713-15 (3d Cir. 1990) (state-issued license to practice medicine held to constitute "property" under federal mail fraud statute), *cert. denied*, 59 U.S.L.W. 3420 (U.S. Dec. 10, 1990); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (federal pilot license not "property" before government issuance); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license, in city government's hands, "is a promise not to interfere rather than a sliver of property").

69. 790 F.2d 354 (3d Cir. 1986).

70. *Id.* at 357.

71. *Id.* at 358 (citing *In re Revocation of Liquor License No. R-2193*, 456 A.2d 709, 711 (Penn. 1983)).

72. *Id.* at 357 (citing *1412 Spruce Inc. v. Pennsylvania Liquor Control Bd.*, 474 A.2d 280, 283 (Penn. 1984)).

73. *Id.* The court added that state court decisions "defin[e] the nature of the legal interest under state law rather than its characterization under federal law." *Id.* at 359 (citation omitted).

74. *Id.* The court recognized that "the right to sell a license is not absolute, since the state Liquor Control Board may deny a transfer." *Id.* at 358 n.3. Nevertheless, sales of liquor licenses occurred with great enough frequency to allow for a finding that they are transferable to an extent satisfactory under section 6321. *Id.*

In *In Re Terwilliger's Catering Plus*,⁷⁵ the Sixth Circuit specifically relied on *21 West Lancaster* and held that an Ohio liquor license is "property" under federal tax lien law.⁷⁶ The opinion in *Terwilliger's* focused on the ability of a licensee to transfer, sell, devise and renew his license.⁷⁷ The court also rejected the state's contention that the federal government's lien could attach only to the portion of the liquor license's value that remained after the state's own tax claim was satisfied.⁷⁸

By refusing to enforce the state lien over the federal lien, the Sixth Circuit specifically rejected⁷⁹ the Ninth Circuit's decision in *United States v. California*.⁸⁰ That case involved the California Department of Alcoholic Beverage Control's refusal to transfer a state liquor license, which had been seized pursuant to a federal tax lien, until all delinquent state taxes had first been paid.⁸¹ The court ruled for the state:

Here the license existed because the state had issued it. If the licensee acquired something of value, it was because the state had bestowed it upon him. Whatever value the license, as property, may have had to a purchaser depended upon its transferability. If it was transferable, it was because the state had made it so. If the state had seen fit to impose conditions upon issuance or upon transfer of property it has wholly created, that is the state's prerogative so long as its demands are not arbitrary or discriminatory. The federal government has no power to command the state in this area. It has no power to direct that property be created by the state for purposes of federal seizure.⁸²

In other words, where a taxpayer's power to transfer a state-created license is limited by state law, the federal government's ability to transfer the license is subject to the same restrictions.

The U.S. District Court for the District of Alaska recently relied on *United States v. California* in *United States v. Alaska*.⁸³ While agreeing

75. 911 F.2d 1168 (6th Cir. 1990), *cert. denied sub nom.* Ohio Dept. of Taxation v. Internal Revenue Serv., 59 U.S.L.W. 3394 (U.S. June 10, 1991).

76. *Id.* at 1171.

77. *Id.*

78. *Id.* at 1177.

79. *Id.* The Sixth Circuit stated that "[w]hile our result in this case is not necessarily inconsistent with the decisions of the Ninth Circuit, other than *United States v. California*, to the extent they reach a contrary result, we decline to follow them." *Id.*

80. 281 F.2d 726 (9th Cir. 1960).

81. *Id.* at 727-28. California law at that time provided that "[t]he department [of Alcoholic Beverage Control] may refuse the renewal or transfer of any license when applicant is delinquent in the payment of any state taxes due . . ." *Id.* at 727 (quoting CAL. [BUS. & PROF.] CODE § 24049 (West 1957)).

82. *Id.* at 728.

83. No. A89-475 Civil 1, 10-11 (D. Alaska June 14, 1991) (order granting summary judgment), *vacated in non-relevant part*, *United States v. Alaska*, No. A89-475 Civil (D. Alaska Sept. 19, 1991) (*sua sponte* order on motion for reconsideration) (both on file with

with the IRS's contention that an Alaska liquor license is "property" subject to a federal tax lien,⁸⁴ the court held that the IRS could not sell its interest in the liquor license without first receiving the approval of the Alaska Beverage Control Board pursuant to Alaska Statutes section 04.11.360(4).⁸⁵ The court emphasized that all holders of liquor licenses, be they the IRS or private individuals, are bound by state laws defining the transfer rights of a licensee.⁸⁶ This led the court to conclude that "[t]he position of the I.R.S. is one of an ordinary creditor who takes an interest in the license subject to the right of the ABC Board to deny a transfer of the license pending satisfaction of creditors' claims."⁸⁷

In the area of state-issued liquor licenses then, courts have applied the federal test of transferability and value⁸⁸ to determine if they are property subject to a federal tax lien. The additional analysis in *United States v. California* and *United States v. Alaska* should not be misconstrued to indicate otherwise. They do not hold that a state can choose to exempt property from a federal tax lien.⁸⁹ Rather, both cases were concerned with the federal government's ability to transfer a property interest after a federal tax lien had already attached. The courts held that the federal government must adhere to state restrictions on the transferability of state-created property interests. Thus, even if a legal interest is deemed "property" to which a federal tax lien may attach, the IRS must still adhere to state restrictions on the transferability of that property interest. Similarly, the United States Supreme Court has ruled that "the Government lien under [section] 6321 cannot extend beyond the property interests held

the *Alaska Law Review*).

84. *Id.* at 9. This conclusion was based on two characteristics of an Alaska liquor license: (1) the seller of a license retains a security interest, ALASKA STAT. § 04.11.670 (1987), and (2) the license does not automatically expire upon the death of the licensee. ALASKA STAT. § 04.11.030 (1987). *United States v. Alaska*, No. A89-475 Civil at 9.

85. This section provides: "An application requesting approval of a transfer of a license to another person under this title shall be denied if . . . the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title . . ." ALASKA STAT. § 04.11.360(4) (1987).

86. *United States v. Alaska*, No. A89-475 Civil at 12. The U.S. Bankruptcy Court for the District of Alaska has reached a similar conclusion: "While the liquor license is 'property' subject to a federal tax lien, the State of Alaska has imbued it with certain characteristics which subordinate the federal tax lien to liquor license creditors under state law." *In re Stone*, 121 Bankr. 25, 27 (D. Alaska 1990). Thus, while the federal tax lien does attach to an Alaska liquor license, it "has no value without the transfer of the license." *Id.* at 29.

87. *United States v. Alaska*, No. A89-475 Civil at 12.

88. See *supra* Section III.B (discussing federal test).

89. Indeed, the United States Supreme Court has made very clear that the states have no power to define what property can be attached by a federal lien. See, e.g., *United States v. Mitchell*, 403 U.S. 190, 204-05 (1971); *United States v. Bess*, 357 U.S. 51, 56-57 (1958).

by the delinquent taxpayer.”⁹⁰ As one commentator has wryly noted, “the tax collector not only steps into the taxpayer’s shoes but must go barefoot if the shoes wear out.”⁹¹

IV. AN ANALYSIS OF LIMITED ENTRY FISHING PERMITS

A. The Determination of Whether Limited Entry Permits Are Property Must Be Made in the Context of Section 6321 of the Internal Revenue Code

In *Wik v. Wik*,⁹² the Alaska Supreme Court held that “limited entry permits are to be treated as ordinary personal property for the purposes of inheritance.”⁹³ The court noted that “[t]he question is not whether permits have all the inherent attributes of personal property, but rather whether the legislature intended permits to be *treated* as property for purposes of inheritance.”⁹⁴ In other words, whether limited entry fishing permits are “property” must be determined in the context of the relevant issue.⁹⁵ For the purposes of this note, the issue is whether the permits are “property” or “rights to property” under section 6321 of the Internal Revenue Code. This is a question of federal law, and state court rulings that entry permits are property in a context other than federal tax law do not control the federal tax lien analysis.

This note has previously discussed the basic statutory framework governing Alaska’s limited entry fishing permits.⁹⁶ In order to determine whether such permits are “property” under section 6321, however, a closer examination of the specific attributes of entry permits is needed. The

90. *United States v. Rodgers*, 461 U.S. 677, 690-91 (1983) (citations omitted).

91. *Id.* at 691 n.16 (quoting 4 BORIS BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 111.5.4, at 111-12 (1981)).

92. 681 P.2d 336 (Alaska 1984).

93. *Id.* at 337. An entry permit is devised pursuant to Alaska Statutes section 16.43.150(h), which provides:

Unless an entry permit holder has expressed a contrary intent in a will that is probated, the commission shall, upon the death of the permit holder, transfer the permanent permit by right of survivorship directly to the surviving spouse or, if no spouse survives, to a natural person designated by the permit holder on a form provided by the commission. If no spouse survives and if the person designated on the form, if any, does not survive, the permit passes as part of the permit holder’s estate.

ALASKA STAT. § 16.43.150(h) (Supp. 1991).

94. *Wik*, 681 P.2d at 338 n.4.

95. In another context, the Alaska Supreme Court held that the interest of an entry permit applicant constitutes a property interest entitled to due process protection. *Estate of Miner v. Commercial Fisheries Entry Comm’n*, 635 P.2d 827, 832 (Alaska 1981).

96. *See supra* Section II.

remainder of this section thus examines whether limited entry permits have the requisite characteristics of "property."⁹⁷

1. *Are Limited Entry Fishing Permits Valuable?* The most obvious source for information regarding entry permits is the agency charged with operating Alaska's limited entry system, the Commercial Fisheries Entry Commission ("CFEC").⁹⁸ Every month, the CFEC publishes a report estimating the values of entry permits for each of the state's fisheries.⁹⁹ That the CFEC publishes such a report in itself indicates that entry permits are, in fact, valuable.¹⁰⁰ Moreover, an examination of the monthly valuations reveals that throughout 1990, most entry permits were worth in excess of \$100,000, and some were valued as high as \$500,000.¹⁰¹ Such figures clearly indicate that limited entry fishing permits have significant value.

2. *Are Limited Entry Fishing Permits Transferable?* In order to facilitate the buying and selling of entry permits, the CFEC distributes a pamphlet entitled "Permit Transfers."¹⁰² The pamphlet explains in lay terms the procedural steps required to transfer a permit. While the CFEC itself does

97. See *supra* Section III (section 6321 "property" inquiry should focus primarily on entry permits' value and transferability).

98. See *supra* notes 12-22 and accompanying text.

99. COMMERCIAL FISHERIES ENTRY COMM'N, STATE OF ALASKA, 1990 ESTIMATED MONTHLY PERMIT VALUE REPORT: YEAR END 1990 (1991) [hereinafter PERMIT VALUE REPORT] (on file with the *Alaska Law Review*).

100. Judicial opinions have also recognized that limited entry permits have value. See, e.g., *Bronsan v. Bronsan*, 817 P.2d 478, 479 (Alaska 1991) (at time of divorce, spouse's entry permit worth \$240,000); *Anderson v. Anderson*, 736 P.2d 320, 324 (Alaska 1987) (parent may execute on former spouse's entry permit in order to satisfy past due child support); *Brown v. Baker*, 688 P.2d 943, 948 (Alaska 1984) (permit constitutes a valuable license to participate in the fishery); *State v. Ostrosky*, 667 P.2d 1184, 1191 n.8 (Alaska 1983) (quoting average prices of entry permits), *appeal dismissed*, 467 U.S. 1201 (1984).

101. PERMIT VALUE REPORT, *supra* note 98. The Commission estimates the values by surveying the transfer prices paid for entry permits. *Id.*

102. COMMERCIAL FISHERIES ENTRY COMM'N, STATE OF ALASKA, PERMIT TRANSFERS [hereinafter PERMIT TRANSFERS] (on file with the *Alaska Law Review*). The chairman of the CFEC, Bruce Twomley, has stated:

This pamphlet was produced by a member of the CFEC licensing staff to assist in explaining the permit transfer process to permit holders. The member of the CFEC licensing staff who produced the pamphlet is not an attorney and is not authorized to render legal opinions for the CFEC. The pamphlet does not represent an interpretation by the CFEC of its governing statutes and regulations. To the extent that the pamphlet implies that a limited entry fishing permit is freely transferable without restriction, it contains a legal conclusion which is not consistent with the CFEC's governing statutes and regulations.

Twomley Affidavit, *supra* note 2, at 3.

While the pamphlet obviously should not be used as an authoritative legal interpretation of the Limited Entry Act, it is useful for establishing that there is a recognized market for entry permits.

not attempt to bring together potential buyers and sellers, it recognizes that “[p]ermits are frequently advertised in the various fishing industry journals and newsletters, as well as local newspapers. Permits may also be located through permit brokers who may also assist with financial arrangements, escrow accounts and completion of required paperwork.”¹⁰³ Clearly, as those who are intimately involved in the day-to-day operations of the limited entry system recognize, trafficking in entry permits has become a profitable venture.

While it may be obvious that a market for limited entry fishing permits exists, the inquiry into the transferability of the permits cannot end here. Rather, the statutory framework governing the transfer of entry permits must be examined in order to determine if it contains restrictions that operate to limit a permit holder’s ability to transfer the permit freely. If such restrictions are too stringent, then the permit holder’s ability to transfer his permit might not rise to the level of transferability needed for the interest to be considered “property” under section 6321 of the Internal Revenue Code.¹⁰⁴

The transfer of limited entry fishing permits is governed by Alaska Statutes section 16.43.170.¹⁰⁵ In relevant part, the statute provides:

(a) [Except as otherwise provided], entry permits . . . are transferable only through the [CFEC] as provided in this section and [Alaska Statutes section] 16.43.180¹⁰⁶ and under regulations adopted by the commission. An involuntary transfer of an entry permit in a manner inconsistent with the statutes of this state and the regulations of the commission is void.

(b) Except as provided in (c)¹⁰⁷ . . . of this section, the holder of an entry permit may transfer the permit to another person or to the commission upon 60 days notice of intent to transfer under regulations adopted by the commission. . . . If the proposed transferee, other than the commission, can demonstrate the present ability to participate actively in the fishery and the transfer agreement does not violate any provision of [Alaska Statutes section] 16.43 or regulations adopted thereunder, the commission shall approve the transfer and reissue the entry permit to the transferee provided that neither party is prohibited by law from participating in the transfer.¹⁰⁸

While section 16.43.170(a) does require the CFEC to approve all transfers, subsection (b) makes clear that the CFEC’s involvement is

103. PERMIT TRANSFERS, *supra* note 101.

104. See *supra* Section III.B.

105. ALASKA STAT. § 16.43.170 (Supp. 1991).

106. *Id.* § 16.43.180(a) (1987) (allowing emergency transfer of entry permits when “unavoidable hardship prevents the permit holder from participating in the fishery”).

107. *Id.* § 16.43.170(c) (Supp. 1991) (if number of outstanding permits for a fishery is greater than the optimum number established by the CFEC, a permit holder may transfer the permit only to the Commission).

108. *Id.* § 16.43.170.

actually quite minimal.¹⁰⁹ The CFEC will find that a proposed transferee has the "present ability to participate" and approve the transfer so long as "the person is physically able to harvest fish in the fishery and has reasonable access to commercial fishing gear of the type utilized in the fishery."¹¹⁰ Similarly, although the sixty-day waiting period provided for in subsection (b) may seem onerous, it merely delays rather than prevents the transfer of permits.¹¹¹ Indeed, the Alaska Supreme Court has recognized the limited involvement of the CFEC:

By not requiring the Commission to get involved in transfers to an extent beyond the simple processing of transfer applications and the certification that the proposed transferee has the present ability to fish, the Act eases the Commission's administrative burden, and allows it to focus its attention on other necessary duties, such as the setting of optimum numbers for limited fisheries and the decision whether presently open fisheries should be limited.¹¹²

While the CFEC's actual involvement in a transfer is minimal, the statute nevertheless states that the CFEC must approve all transfers and that any involuntary transfer is void.¹¹³ This might suggest, pursuant to the analyses in *United States v. Alaska*¹¹⁴ and *United States v. California*,¹¹⁵ that even if the IRS can attach a permit, it, like an individual, cannot compel the sale of the permit without approval from the CFEC, and therefore the federal tax lien would become worthless. That is, if the permit holder is bound by state restrictions on transferability, the

109. *Id.* § 16.43.170(b); see *State v. Ostrosky*, 667 P.2d 1184, 1194-95 (Alaska 1983), *appeal dismissed*, 467 U.S. 1201 (1984).

110. *Ostrosky*, 667 P.2d at 1191 n.7 (citation omitted). It might be tempting to argue that the "present ability" requirement prohibits the Internal Revenue Service from seizing an entry permit because the IRS is not physically capable of harvesting fish. This argument fails, however, because the "I.R.S. acquires whatever rights the taxpayer himself possesses." *United States v. National Bank of Commerce*, 472 U.S. 713, 725 (1985). Because the taxpayer has the right to possess the entry permit, the IRS may reach that possessory interest.

111. The legislature enacted the 60-day waiting period in order to "ensure against intemperate transfers" by fishermen who are dependent on the permits for their livelihood. S. JOURNAL Letter of Intent, *supra* note 24, at 3860. According to the CFEC's Permit Transfer pamphlet:

When Limited Entry was first enacted, the legislature was concerned that some permit holders, not understanding the nature or value of their permits, might transfer permits away on the spur of the moment. The waiting period acts as a "cooling off" period, preventing permit holders from inadvertently transferring permits and losing the right to fish.

PERMIT TRANSFERS, *supra* note 101.

112. *Ostrosky*, 667 P.2d at 1194-95.

113. ALASKA STAT. § 16.43.170(a) (Supp. 1991).

114. No. A89-475 Civil (D. Alaska June 14, 1991) (order granting summary judgment), *vacated in non-relevant part*, *United States v. Alaska*, No. A89-475 Civil (D. Alaska Sept. 19, 1991) (sua sponte order on motion for reconsideration).

115. 281 F.2d 726 (9th Cir. 1960).

IRS, which stands in the shoes of the delinquent taxpayer, is similarly bound.¹¹⁶

While this argument may be superficially attractive to permit holders in danger of having their permit attached by a federal tax lien, it does not survive more careful scrutiny. While a state may impose conditions on the transfer of a state-created license, those conditions cannot be "arbitrary or discriminatory."¹¹⁷ Thus, the state cannot impose conditions on a transfer from the federal government that are not imposed on all other permit transfers. In *United States v. California* and *United States v. Alaska*, the state liquor boards would not approve the transfer of liquor licenses until the creditors of the original licensees were paid off.¹¹⁸ No such condition applies to the transfer of limited entry fishing permits. The only meaningful condition the state does impose on the transfer of an entry permit is the requirement that the proposed transferee have the "present ability" to fish.¹¹⁹ The IRS is bound by this restriction. It may only transfer the permit to an individual who has access to fishing gear and is physically capable of harvesting fish. However, so long as these conditions are met, the CFEC cannot refuse to issue the permit to the transferee of the IRS. If the federal government adheres to the same transferability restrictions that are required of all other permit holders, the CFEC should not be able to prevent an IRS sale.

Similarly, the "no involuntary transfer" language of the statute¹²⁰ does not prevent the finding of transferability in the hands of the IRS. While the transfer in interest from the delinquent taxpayer to the federal government is certainly involuntary, the transfer cannot be prohibited because states may not dictate what property is subject to a federal tax lien.¹²¹ Moreover, the state may not claim that the sale of an entry permit attached by a federal tax lien is void as involuntary. When the IRS "steps into the taxpayer's shoes," it acquires the same rights to the legal interest as the taxpayer had. Just as the individual holder of an entry permit may choose to voluntarily transfer that permit, if a federal tax lien attaches, so too may the IRS.

116. See *supra* Section III.C (discussing *United States v. Alaska*, *United States v. California* and limits on transferability).

117. *United States v. California*, 281 F.2d at 728.

118. *Id.*; *United States v. Alaska*, No. A89-475 Civil at 9-10.

119. ALASKA STAT. § 16.43.170(b) (Supp. 1991).

120. *Id.* § 16.43.170(a).

121. See *supra* Section III. Indeed, Justice Powell has noted that the contention that state law limits the federal government's power to levy is a "strawmen that the Court long ago rejected." *United States v. National Bank of Commerce*, 472 U.S. 713, 745 n.10 (1985) (Powell, J., dissenting) (citing *United States v. Bess*, 357 U.S. 51, 56-57 (1958)).

B. Other Characteristics of Limited Entry Fishing Permits

Notwithstanding the relative ease with which limited entry fishing permits can usually be sold, the ability of permit holders to exercise control over their permits is still not absolute. With limited exceptions, a permit can neither be pledged as a security interest nor seized pursuant to a court order.¹²² The Resources Committee of the Alaska Senate recently spoke of the purposes underlying these restrictions:

The legislature recognized that a fisherman's earnings were seasonal and subject to many variables from year-to-year beyond control (for example, weather, predation, and interception). If creditors with short term objectives were allowed to treat an entry permit as a fungible item of property and to seize and force its sale, a fisherman without other means of earning a living, together with those dependent upon him, could well be left destitute. In Alaska, where many communities in remote areas of the State depend upon commercial fishing as the primary basis for their cash economy, this is a very real possibility.¹²³

While the goal of protecting citizens who are dependent upon Alaska's fisheries to earn a living is certainly worthy, these state restrictions still cannot affect the federal government's power to attach a federal tax lien.¹²⁴ As detailed above, state law merely defines a legal interest,¹²⁵ the federal tax consequences of that interest are determined by federal law.¹²⁶ While a state may properly exempt a state-created interest from the reach of private creditors, it cannot command the federal government in this area.¹²⁷ If limited entry fishing permits have the necessary attributes of "property" or "rights to property" under section 6321, Alaska's attempt to insulate such permits from creditors cannot prevent a federal tax lien from attaching.

Undoubtedly, the state legislature did intend to retain ultimate control over entry permits.¹²⁸ To that end, it enacted Alaska Statutes section

122. ALASKA STAT. § 16.43.150(g) (Supp. 1991). The statute provides:

[Except as otherwise provided by statute], an entry permit may not be

(1) pledged, mortgaged, leased, or encumbered in any way;
 (2) transferred with any retained right of repossession or foreclosure, or on any condition requiring a subsequent transfer; or
 (3) attached, distrained, or sold on execution of judgment or under any other process or order of any court.

Id.; see *Anderson v. Anderson*, 736 P.2d 320, 321-22 (Alaska 1987).

123. S. JOURNAL Letter of Intent, *supra* note 24, at 3860.

124. 21 West Lancaster Corp. v. Main Line Restaurant, 790 F.2d 354, 358 (3d Cir. 1986).

125. See *supra* Section III.A.

126. See *supra* Section III.A.

127. *United States v. Mitchell*, 403 U.S. 190, 204-05 (1971).

128. S. JOURNAL Letter of Intent, *supra* note 24, at 3860.

16.43.150(e), which provides that “[a]n entry permit constitutes a use privilege which may be modified or revoked by the legislature without compensation.”¹²⁹ As of the end of 1990, only 357 permits had been revoked by the CFEC out of a total of 13,025 issued since the limited entry program began.¹³⁰ These revocations were all pursuant to Alaska Statute section 16.43.150(d),¹³¹ which calls for the forfeiture of an entry permit if the permit holder fails to renew his license for two consecutive years.¹³² In other words, there is no record of the CFEC ever attempting to revoke an entry permit without compensation for a reason other than the failure to adhere to the statutorily required renewal procedure.¹³³

V. CONCLUSION

Although permit holders might not have unfettered control over their entry permits, they certainly have a substantial “bundle of rights of commercial value.”¹³⁴ Limited entry fishing permits are valuable and transferable. While certain minimal statutory standards must be met before a permit can be transferred, those limitations have not hindered the development of an active market replete with buyers and sellers of entry

129. ALASKA STAT. § 16.43.150(e) (Supp. 1991).

130. Twomley Affidavit, *supra* note 2, at 3.

131. *Id.*

132. ALASKA STAT. § 16.43.150(d) (Supp. 1991). The statute provides:

Failure to renew an entry permit for a period of two years from the year of last renewal results in a forfeiture of the entry permit to the commission, except as waived by the commission for good cause. An entry permit may not be renewed until the fees for each preceding year during which the entry permit was not renewed are paid. However, failure to renew an entry permit in a year in which there is an administrative closure for the entire season for a specific fishery is good cause not to renew the entry permit. The commission shall waive the payment of fees for that year.

Id.

133. Indeed, an attempt to revoke a license without providing compensation might well violate the Fifth Amendment of the United States Constitution, which mandates that “government action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Similarly, the Alaska Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” ALASKA CONST. art. 1, § 18. The Alaska Supreme Court has ruled that “[t]his section is to be liberally construed in favor of the property owner.” *8,960 Square Feet, More or Less v. Department of Transp. & Pub. Facilities*, 806 P.2d 843, 845 (Alaska 1991) (citations omitted). Perhaps in recognition of the potential unconstitutionality of uncompensated takings, the Alaska Legislature has provided for a buy-back program whereby the CFEC purchases outstanding permits at market value when the number of permits in a fishery exceeds the optimum number. ALASKA STAT. § 16.43.310-.330 (1987).

134. *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 278 (5th Cir. 1976). *See supra* Section II.B.

permits. Moreover, even though the federal government is subject to the same restrictions on transferability as any other permit holder, no statutory impediments exist that would prevent the IRS from selling an entry permit to an otherwise qualified transferee.

In enacting a system of essentially free transferability, the Alaska Legislature hoped to comport with its stated objectives of promoting and protecting Alaska's commercial fishing industry.¹³⁵ As the Alaska Supreme Court observed:

Free transferability . . . is meant to prevent hardship when a permit holder dies or becomes disabled; allow gear license holders to move from one fishery or type of gear to another; advance the causes of conservation, aquaculture and adherence to fish and game laws by giving gear license holders a stake in the resource; increase the number of permits that are transferred; and ease administrative burdens on the state.¹³⁶

These are certainly worthwhile goals, and perhaps the transferability of entry permits is the only way in which they can be realized.¹³⁷ Ultimately, though, by allowing permit holders to so easily transfer these valuable entry permits, the legislature unwittingly created "property" or "rights to property" subject to a federal tax lien.

Jon David Weiss

135. ALASKA STAT. § 16.43.020 (1987).

136. *State v. Ostrosky*, 667 P.2d 1184, 1195 (Alaska 1983).

137. However, see the dissenting opinion in *Ostrosky*, 667 P.2d at 1195-98 (Rabinowitz, J., dissenting), in which Justice Rabinowitz outlines an alternative system of "free transferability plus expiration" that he argues would meet these same goals. Even Justice Rabinowitz's proposal, though, would continue to allow permit holders to transfer their permits for valuable consideration. *Id.* at 1197 n.4. Thus, permits would still not escape being classified as "property" within the meaning of section 6321.