

**ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES**

March 26, 2001

5:58 p.m.

MEMBERS PRESENT

Representative Gary Stevens, Co-Chair
Representative Peggy Wilson, Co-Chair
Representative Drew Scalzi
Representative Fred Dyson
Representative John Coghill
Representative Beth Kerttula

MEMBERS ABSENT

Representative Mary Kapsner

COMMITTEE CALENDAR

HOUSE BILL NO. 194

"An Act relating to fees for commercial fishing licenses and permits; and providing for an effective date."

- MOVED HB 194 OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 194

SHORT TITLE: ENTRY PERMIT FEES

SPONSOR(S): REPRESENTATIVE(S) STEVENS

Jrn-Date	Jrn-Page		Action
03/19/01	0648	(H)	READ THE FIRST TIME - REFERRALS
03/19/01	0648	(H)	FSH, RES, FIN
03/26/01		(H)	FSH AT 5:00 PM CAPITOL 124

WITNESS REGISTER

MARY McDOWELL, Commissioner
Commercial Fisheries Entry Commission
Alaska Department of Fish & Game
8800 Glacier Highway, Suite 109
Juneau, Alaska 99801-8079

POSITION STATEMENT: Testified in support of HB 194 and answered questions.

STEPHEN WHITE, Assistant Attorney General
Natural Resources Section
Civil Division (Juneau)
Department of Law
PO Box 110300
Juneau, Alaska 99811-0300

POSITION STATEMENT: Testified in support of HB 194 and answered questions.

JERRY McCUNE
United Fishermen of Alaska
211 4th Street
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of HB 194.

SUE ASPELUND, Executive Director
Cordova District Fishermen United
PO Box 939
Cordova, Alaska 99574

POSITION STATEMENT: Testified in support of HB 194, but requested the legislature re-examine the "cap" issue of the bill, after it is passed.

ACTION NARRATIVE

TAPE 01-14, SIDE A
Number 0001

CO-CHAIR PEGGY WILSON reconvened the House Special Committee on Fisheries meeting at 5:58 p.m. [The minutes for the Presentation on LIDAR Technology by Tim Veenstra, Airborne Technologies, Inc., are found in the 5:06 p.m. cover sheet for the same date.]

HB 194-ENTRY PERMIT FEES

CO-CHAIR WILSON announced that committee would hear HOUSE BILL NO. 194, "An Act relating to fees for commercial fishing licenses and permits; and providing for an effective date."

Number 0064

CO-CHAIR STEVENS, sponsor of the bill, pointed out Mary McDOWELL, Commercial Fisheries Entry Commission; Steve White, Department of Law; and Jerry McCune, United Fishermen of Alaska,

as people who have been critical in developing this bill and who will be speaking to the committee.

CO-CHAIR STEVENS explained that HB 194 deals with the Carlson case, which was brought against the Commercial Fisheries Entry Commission [CFEC] because [CFEC] had been charging nonresidents three times more than resident fishermen. The courts have said this is against the law. A differential can only be used if it's based on the amount residents pay in taxes as compared to what nonresidents pay in taxes. Therefore, HB 194 repeals current statute that requires CFEC to charge nonresident fishers three times the amount charged a resident fisher and replaces it with a provision that gives CFEC the authority to charge nonresident fishers the maximum amount allowed by the court.

CO-CHAIR STEVENS commented that Steve White, the state's attorney, has been arguing this case in the superior court, claiming that there are six budget categories that "we" should be able to use to charge outside residents more than in-state residents. In June 2000, the superior court came up with a formula of what "we" could charge [nonresidents], but the court only allowed two of the six budget categories. He noted that [the state] might owe [nonresident] fisherman \$22.5 million due to what they have been charged over the years. He said that Mr. White will be appealing this in the state supreme court as well as attempting to get the other four categories included in the formula. Right now, a [nonresident] fisherman will be charged three times more than an [resident] fisherman, despite being told by the court that [CFEC] can no longer do that. So, this bill would enable the CFEC to stop using the three-to-one [ratio] and begin to use the maximum amount allowed by the courts. The Department of Law is trying to include the four other [budget] categories into this formula.

CO-CHAIR STEVENS remarked that HB 194 shows the court that "we are acting in good faith." It doesn't make sense to continue to use the three-to-one ratio that is in the statutes. He said the formula will "enable us to solve the question the court has ruled [on] and still leave us some flexibility to charge as much as we can to nonresidents."

Number 0516

MARY McDOWELL, Commissioner, Commercial Fisheries Entry Commission, Alaska Department of Fish & Game, stated that CFEC is very supportive of this legislative effort to address the fee issues raised by the Carlson lawsuit. She referred to Co-Chair

Stevens's remarks and said this bill does not resolve the Carlson case, because it's not retroactive. The Carlson case involves looking at what the [CFEC] has charged [nonresidents] over the last 18 years and developing a formula for what is "allowable in each of those 18 years." At some point the court will rule on what [CFEC] owes in a refund, if anything. She reiterated that the current dilemma is that CFEC is still charging "three to one," so additional "potential debt" is still accruing.

MS. McDOWELL commented that if the superior court ruling is not overturned, there will be an additional debt of \$1.13 million each year in overcharges plus interest. This would eventually be paid, if [CFEC] doesn't get the decisions overturned. She said about 250 members are added to the "Carlson class" every year, under the fees for the current statute. The effort here is to "stem the hemorrhaging." This bill would stop the accrual of additional debt, if the superior court ruling stands. But if the plaintiff prevails, the debt will increase. This is "splitting the difference," assuming that [CFEC] would put fees in place right now that would comply with the superior court ruling. If the superior court ruling stands, this bill would allow [CFEC] to establish fees that would, "all things being equal," keep [CFEC] from accruing additional debt.

Number 0740

REPRESENTATIVE KERTTULA asked if the bill passed, and did not contain everything that the plaintiff wanted, whether "we might have a better chance of negotiating than to stop the case."

Number 0766

STEPHEN WHITE, Assistant Attorney General, Natural Resources Section, Civil Division (Juneau), Department of Law, stated that he did not think settlement was a viable option in this case since the plaintiffs want much more than \$22.5 million. The plaintiffs' goal is to make "everything we've ever taken, [and] collected in additional fees," unconstitutional. He does not believe there is any "middle ground" between the state and the plaintiffs. If this bill is passed this session, he will be able to go before the supreme court and say that as soon as [the state] found out it had liability, it took the appropriate steps to change its practices to comply with the court. This [bill] is going to be beneficial in showing "good-faith effort."

MR. WHITE said there will be arguments saying the state should be penalized, that it should be paying not only "all these people, but all the people who dropped out of the class, that we should be paying all the refunds owed to them to some other purpose." Mr. White said there is a real strategic advantage to having this bill before the legislature and adopted before going to the supreme court.

Number 0875

CO-CHAIR STEVENS asked Ms. McDowell how there could be a potential of the state owing more than \$22.5 million.

MS. McDOWELL reiterated that the superior court's decision was to allow two out of the six [budget] categories that [CFEC] asked for. However, the other side is saying, "we shouldn't of even gotten those two [categories]."; they believe that there should be no differential allowed at all.

MR. WHITE remarked that [the state] has appealed on eight different legal points, and the other side has cross-appealed on several [of those] legal points. If their cross-appeals were successful, they "would take all that we gained from the superior court and nullify it such that [what the state owes] would be much higher than \$22.5 million."

Number 0945

REPRESENTATIVE WILSON wondered what would happen to the three-to-one ratio if this bill were put into effect.

MS. McDOWELL explained that the [superior] court has not said that the three-to-one ratio is unconstitutional, but that the "spread" between what is charged a resident and a nonresident is a problem. For example, for years, nonresidents have been charged the three-to-one ratio for crewmember licenses. The charge has been \$30 [resident fee] to \$90 [nonresident fee]. Last year it was changed to \$60 [resident fee] and \$125 [nonresident fee]. But, under the current ruling, [the state] will not owe a refund on this because the "spread" is a small enough dollar amount within the allowable differential. The [allowed] differential for the last two years has been approximately \$100. It varies from year to year.

MS. McDOWELL stated that under the provisions of HB 194, an established resident fee would serve as a base. She said that CFEC has five fee classes based on the earning potential in the

various fisheries. Under this bill, the "top fee" that could be charged to a resident would be \$300, which is \$50 more than is allowed now. Therefore, CFEC would probably increase all five fee classes by 20 percent, which would then serve as base fees.

MS. McDOWELL went on to say that under the bill, for every nonresident permit, CFEC would add the "allowable maximum" that the court formula would allow for that year. In short, [CFEC] would obtain all of the resident base fees plus the differential. She noted that under this bill, nonresidents who are in lower fee classes would end up paying more than they do now because of the "extra differential" put on.

Number 1118

MS. McDOWELL stated that this bill also clarifies how crewmember licenses that are part of the Carlson case are dealt with in statute. The current \$60 resident fee for crewmember licenses remains in the bill. But the bill also authorizes the Alaska Department of Fish & Game, which deals with crewmember licenses, to add on the nonresident differential, if it chooses to do so.

MS. McDOWELL noted that this bill also deals with the \$5 child crewmember license that was established by the legislature last year for both residents and nonresidents. This bill would allow the Alaska Department of Fish & Game to add a nonresident differential to this \$5 fee.

MS. McDOWELL referred to the CFEC permit renewal, which includes annual renewal of limit entry and interim-use permits, which are permits needed to operate a vessel in a non-limited fishery or a limited fishery that is still being adjudicated. The cost of these permits would be the base fee plus a differential for nonresidents.

Number 1219

MS. McDOWELL explained that the bill also deals with poverty fees. For decades, [Alaska] Statute has had a provision that provides a \$15 resident license and a \$45 nonresident license to those renewing their permits, who are below poverty level. She said one difficulty with this provision is that for every poverty permit issued, the CFEC has to donate an insurance premium to the fishermen's fund. This premium is slightly higher than what is actually collected on the poverty fees. So, there is a net loss with every poverty permit. This bill proposes that in lieu of the \$15 and \$45 poverty fees, permits

for those below the poverty level would be half of what the person would normally pay for a regular license.

MS. McDOWELL commented that at the lower fee classes, the price doesn't change dramatically for poverty permits. Most of the permits renewed at the poverty fee level are in the lowest fee class, primarily in the rural small-boat fisheries. She said 700 out of 894 poverty permits issued in 2000 were in the \$50 resident fee class. Under this bill, those permits would increase to \$30 from \$15. In the higher fee classes, nonresidents would pay considerably more [under this bill]. She mentioned that there were only 32 nonresident high-fee permits in 2000. Regulations were tightened about two years ago in order to "weed out abuse" from nonresidents applying for poverty fees. In short, she said there would be some increase of fees for poverty fees in this bill but minimal for the lower fee class.

CO-CHAIR WILSON remarked, "So altogether we'd be bringing in more than we are now."

MS. McDOWELL replied that more funds would come from poverty fee permits. But she indicated that it was difficult to comprehend the total fiscal impact of the bill; it was a difficult fiscal note to write because there's no place on a fiscal note to show savings of liability. The fiscal note shows a potential loss of around \$470,000 in incoming revenue for FY 02 due to the fees given from the superior court ruling. However, the state can recoup that loss by the way refunds to nonresidents are calculated.

Number 1416

MR. WHITE commented that it is a loss in revenue, but it's "really revenue that we would have to pay back." An agreement has also been made with the class [who are suing in the Carlson case]: for an individual who might have paid more than the permissible differential for some years and less than the differential in others, the underpayments will be able to be offset against the overpayments, and the difference will be paid. He gave the following example: in 2002, the fees will be based upon decisions of the superior court. He said if this was appealed and the supreme court agreed to set a higher amount that [CFEC] could charge for 2002, "we" don't lose the amount that "we" were unable to charge [nonresidents]. This would be due to the offset against what would have been owed those people from earlier years. In short, there is "no net loss to the

state in that regard, it's just a loss of direct revenue to see if"

Number 1520

REPRESENTATIVE KERTTULA asked if the three-to-one ratio is being charged now and if the funds are being segregated.

MR. WHITE said no.

MS. McDOWELL said, "Charge it and it goes into the general fund, [where] it's accounted for as fee-supported services."

REPRESENTATIVE KERTTULA said, "If we win, then it's just the offset."

Number 1552

REPRESENTATIVE SCALZI commented that in regard to the "legal aspects" of this bill, the argument that has been heard from the "other side" is that going forward with this bill, is admitting guilt, which would weaken the case. He asked Mr. White to address this issue.

MR. WHITE remarked that the formula being adopted in this bill is no longer a legal issue, regardless of what the supreme court does. By adopting the formula, he said:

We're just dealing with the reality; we're not conceding anything. We're not challenging the formula. The only thing we're challenging is what dollars we can put in the formula. ... We're not giving up anything that's in dispute by doing what the court has said that we need to do at this point.

REPRESENTATIVE SCALZI commented that this case is not unique. Throughout the United States, similar resident/nonresident issues have been brought up. He mentioned that "other people" are watching this particular case.

MR. WHITE concurred with these comments. He said no other states have challenged commercial fishing fees in this way, even though other states charge much more [for nonresidents.] He suggested that those fisheries "aren't valuable enough for people to sue about." However, Mr. White said he is sure this case is being watched in other states with much concern.

Number 1660

REPRESENTATIVE COGHILL remarked that it seems the differential is being borne by struggling fisheries, which is significant. He wondered if it was wise to let the court set the [permit] fees, and how long it would take the court to do so.

MR. WHITE answered that the court is interpreting a federal constitutional provision based upon a 1948 case that explains how nonresidents can be charged more in certain circumstances. He said [Alaska's] supreme court is the first court that has actually "fleshed that out" and has said, "You can charge based on taxes that the residents pay and the nonresidents don't pay" He believes the courts have been fundamentally following U.S. Supreme Court precedent, he said, and the only issues that remain are the budgetary issues, which will be determined in court.

REPRESENTATIVE COGHILL remarked that this puts the court in the "driver's seat." He wondered if this is where "we want to lead it."

Number 1782

MR. WHITE replied that at the end of this lawsuit, the court will decide upon a formula to figure out what amount to charge nonresidents. This formula will vary from year to year, depending on the following variables; population, percentage of oil revenues that go into the general budget, and the state's expenditures for commercial fisheries. These are outside the court's control, and are actually factors that Alaskans control. So, to some extent, the amount that nonresidents will be charged will be determined by [Alaskan residents], not by the courts.

Number 1975

MR. WHITE said he was not aware of any other situations in which nonresidents are being charged significantly more for commercial opportunities.

REPRESENTATIVE DYSON remarked that residents [of Alaska] seem to get a "real advantage" for loans when buying boats and permits. He wondered if the courts are likely to say that "we" can't discriminate in favor of Alaska residents for loans.

MR. WHITE indicated that this would not happen, because when the state acts as a lender, it almost becomes a private financial

institution. The state can set its own criteria and favor its own residents because the state is mainly distributing money that belongs to the residents, from oil revenues. This [HB 194] is different because people are being charged for the "ability to pursue a livelihood." The courts have said "we" have a lot more latitude to favor our residents over nonresidents, because "it's commercial." The U.S. constitution says [the state] has to treat everyone (residents and nonresidents) equally except for services that are paid for only by residents, such as by our oil revenue.

Number 1999

MS. McDOWELL noted that while there is an "upside" (recoup and save potential additional liability) to the decline in revenues showed in the fiscal note, there is also a "downside." The downside is that those revenues generated by [CFEC's] fees are fee receipts that come into the CFEC. Right now, the Division of Commercial Fisheries funds CFEC's budget and receives any excess of the commission's funds. This is important, especially to fishermen who are very supportive of this. Even though the state will recoup this money, it is a cut to the budget. There is concern about this, and hopefully "we will prevail at the supreme court." At that point, if the fee differential can grow under the supreme court decision, "our revenues will kick back up, and that money will again be available to [Alaska Department of] Fish & Game." She suggested that once a final supreme court decision is made, this issue be revisited to see what the fees would be. Right now, fishermen have agreed to support this hike in fees from \$250 to \$300, which is "a painful thing for them to support even that much." The fishermen support it because they recognize the need for CFEC to keep revenues up. She said with the base fees "set at \$300 as a cap, we don't recoup, under [the] superior court decision, all that we lose that we receive for those programs."

Number 2104

REPRESENTATIVE WILSON wondered if there was any possibility that the state will win this case when it is appealed.

MR. WHITE indicated that he was fairly confident that the state will win several points on the appeal, which should significantly reduce, if not eliminate, the debt. He reiterated that he will be appealing four budget issues, and the issue of whether pre-judgment interest should be paid, for the time that [nonresidents] overpaid. Even though the superior courts ruled

this, he said he would argue that [the state] doesn't have to pay that because the law does not provide for prejudgment interest. He indicated that if this point were appealed, the bill would be "cut by half" if he added additional budget categories. But, at this point, there is no precedent. There will be many arguments regarding non-legal issues such as "good faith," since this is such a unique case. He said it is difficult to predict the outcome of this case, because this is at the "leading edge" of this kind of litigation.

Number 2194

CO-CHAIR STEVENS remarked that several assistant attorneys general have handled this case. He wondered if Mr. White could promise he would stay with the case.

MR. WHITE stated that he expects to get a definitive ruling by next summer, when hopefully [the state's] liabilities will become very clear. He said, "It's just a matter of if we still have liabilities of putting the formula through the last 20 years and getting the cut check." But in any event, he will be here to "carry it through to the end," he concluded.

JERRY McCUNE, United Fishermen of Alaska (UFA), stated that UFA has agreed to the "\$300 hike or a 20 percent increase" on resident fees, in order to be able to charge "a little bit more" on the others' side. However, this is only UFA's opinion. He mentioned that the committee will probably hear from individuals about this bill; even though [UFA] attempted to contact non-UFA groups via e-mail and other means about this issue, he said he "couldn't get to everyone in the world." He said UFA supports this legislation and thanks the sponsors. [This bill] is a good approach to solving this dilemma right now. It will help get out of this 10.5 percent interest rate and hopefully prevail on the other four issues currently in the court. Then the fees can be finalized according to the court.

Number 2306

SUE ASPELUND, Executive Director, Cordova District Fishermen United (CDFU) testified via teleconference:

Thanks for this opportunity to testify. I would like to reiterate CDFU's support for this legislation. Our biggest concern with the whole situation is the lost revenue to the Division of Commercial Fisheries, ... because of the timing and the fact that we're not able

to get out and really get the pulse of the fleet on the maximum amount due.

We also voted to support the \$300 increase. However, as Mary McDowell discussed, once this is through the court system and finalized, we would certainly hope that the legislature would perhaps re-examine the cap issue, so that if we find out that the catch [of] commercial fisheries [is] going to be as substantial as we fear, ... we have the opportunity to get to the (indisc.) and perhaps support a higher cap so that we minimize the damage (indisc.) Thank you.

Number 2404

REPRESENTATIVE SCALZI made a motion to move HB 194 out of committee with individual recommendations and attached fiscal notes. There being no objection, HB 194 moved from the House Special Committee on Fisheries.

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 6:34 p.m.