

SENATE FINANCE COMMITTEE
LOG NOTES
02/07/01

GENERAL SUBJECT(S): Status of Donald H. Carlson et al. vs. State of Alaska Commercial Fisheries Entry Commission by Dept. of Law, Commercial Fisheries Entry Commission, Office of Management and Budget

The following overview was taken in log note format. Tapes and handouts will be on file with the Senate Finance Committee through the 22nd Legislative Session, contact 465-4935. After the 22nd Legislative session they will be available through the Legislative Library at 465-3808.

Time Meeting Convened: 9:10 a.m.

Tape(s): SFC-01 # 11

	PRESENT:
x	Senator Donley
x	Senator Kelly
x	Senator Austerman
x	Senator Green
x	Senator Hoffman
x	Senator Leman
x	Senator Olsen
x	Senator Ward
x	Senator Wilken

ALSO PRESENT:
STEPHEN WHITE, ASSISTANT ATTORNEY GENERAL, NATURAL RESOURCES SECTION, DEPARTMENT OF LAW

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LOG	SPEAKER	DISCUSSION
001	Co-Chair Donley	Report on status of Donald H. Carlson vs. State of Alaska Commercial Fisheries Entry Commission (CFEC) by the Department of Law
014	STEPHEN WHITE, Assistant Attorney General, Natural Resources Division, Department of law	<p>Happy to brief the Committee</p> <p>He noted that there have been some developments that are important that have fiscal implications for the state.</p> <p>He indicated that he has already briefed the chairman and would like to do the same for the Committee</p> <p>The Carlson case was filed in 1982, so it is a 19 year-old lawsuit and has been to the AK Supreme Court twice, attempted to take to the U.S. Supreme Court once and it has been back to trial court three times.</p>
033		<p>Issue is how much more the state can charge non-residents for commercial fishing licenses and limited entry permits</p> <p>In 1982 five non-residents filed a class action lawsuit against the state claiming that the practice of charging them three times more was unconstitutional under the U.S. Constitution</p> <p>Violated two clauses - commerce clause and the privileges and immunities clause</p> <p>He explained the privileges and immunity clause - state cannot discriminate against another state's citizens, especially, the right to pursue a vocation</p>
058		<p>Referred to handout - requires the state to charge non-residents three times more and the fees shall be based on the economic return for different fisheries</p> <p>He noted that the CFEC has adopted regulations that establish five levels of fees related to the value of the various fisheries - fee differential varies - it goes from \$100 to \$500.</p> <p>He added that there is also a statute that establishes the fee for the crewmember licenses - residents charges \$60 and non-residents \$125.</p> <p>Approximately 11,000 non-residents in this class. He indicated that in 1989 the state won at the trial court - the court said that the fee structure was constitutional</p>

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091	Co-Chair Donley	What trial judge was that?
092	Mr. White	<p>Answered Judge Hunt. He continued that the Supreme Court reversed the decision in favor of the state and sent it back to the trial court. The case could be governed by the commerce clause, but is certainly governed by the privileges and immunity clause.</p> <p>However, a state could take into account the state revenues that pay for the state services. He pointed out that if the resident's broad-based taxes pay for that service and the non-residents don't than the residents can be credited. One is for fees and one is for taxes. Alaskans do not pay broad-based taxes; however, they do have oil revenues that pay for these services- credit that to the residents</p> <p>Supreme court said this in 1990</p>
124		<p>State continued litigating before the trial court. In 1995 the state won again at the trial court. Judge Michalski found that the states fee structure was constitutional.</p> <p>Alaska supreme court said that there was one thing wrong with the approach and he pointed out the formula that the Alaska Supreme Court described:</p> <p>Formula - Maximum fee permissible for non-resident = Fee for a resident permit + (annual fisheries budget divided by the Alaska population factored by the percent state budget from oil revenue)</p> <p>The dollar amount that the formula creates is the amount that the state can charge a non-resident, that year, more than it can charge a resident.</p>
155	Senator Hoffman	Is that general funds?
	Mr. White	<p>Total funds.</p> <p>The U.S. Supreme court held that the commerce clause does not apply, which favored the state's approach</p> <p>Back before the trial court and Judge Michalski and litigating several things - Arguing about whether the state has to pay prejudgment interest, if there are refunds on overpaid fees</p> <p>Argued that the class should not be a class</p>

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		action, but limited to the five individuals
187		<p>Trial in Anchorage during the summer where they explored the issue of what is the state's annual fisheries budget. Presented to expert witnesses six different budget categories:</p> <ol style="list-style-type: none"> 1. Operating budget expenditures - direct salaries 2. Indirect operating expenses - support staff <p>They also asked the court to include the following four categories and the court denied them:</p> <ol style="list-style-type: none"> 3. Capital expenditures - for example, fish hatcheries and harbors 4. Population decrease without commercial fisherman in the state the costs that the state would have to bear would decrease 5. Figures on the amount the state subsidizes the loan program 6. Cost benefit analysis
230		<p>They ran the numbers for fiscal year 1996 and having all of the cost categories being aloud the permissible differential, for that year, would have been \$571, which is more than the maximum differential for any one permit, but with the supreme court denying those categories the actual permissible differential for 1996 was only \$155.</p> <p>Refunds for that year alone - \$931,000. Trying to move through the trial court and get a final judgment so the state can go back and appeal the different issues, such as the four cost categories denied them. By March 15 have a total figure for refunds due.</p> <p>Law also requires to send out a notice to those people and how many are interested in refunds (11,000 known non-resident fisherman)</p>
261		<p>Wanted to bring this to your attention because the liability of the refund and the supreme court headlines on the state - pleading the \$30 million in refunds</p>
277	Co-Chair Donley	Asked Mr. White if he prepared the summary?
	Mr. White	Yes.

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281	Senator Austerman	Going to make any recommendations at this time?
284	Mr. White	He indicated that he spoke with some representatives. At this point the only change is the 3 - 1 ratio to something that incorporates the formula Look at gross budget figures and determine what the permissible differential is and see if that number could be adjusted periodically.
298	Senator Austerman	Recommending that?
300	Mr. White	He thinks that eventually they are going to have to do that. Recommend that, because the structure of formula - the supreme court has given a set formula that flows from the U.S. Supreme Court decisions and that is going to govern the differential in the future; therefore, the sooner they change it the better. Added that if they are paying more now they would stop the potential refunds they would have to pay in the future.
305	Senator Leman	Executive Session?
	Co-Chair Donley	Not unless there is really a need.
309	Senator Leman	He opined that the formula is flawed - flawed in the application He believes that if they want a concept of a reallocation of costs to be in the formula there is a different way to come at it. Happy to share with you. If you can't appeal it to the state than can't appeal to the U.S. Supreme Court.
322	Senator Olson	Final argument on the summer trial court decision?
326	Mr. White	We won on some of the issues and they won some issues - 60/40 split in favor of the class.
334	Senator Olson	How much longer do you think the anguish is going to go on?
337	Mr. White	Trying to push this to the Supreme Court as soon as possible - hope to get a decision by a year from this summer. At that point pretty much all the issues will be clear; it will be a matter of running numbers - good idea about liability at that point.
347	Senator Austerman	Liability going back 18 years?
348	Mr. White	Yes, their liability starts December 1984,

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		so refunds plus interest would go back to that point.
350	Senator Austerman	Have you looked at those numbers? He pointed out that in the last five years there has been a cutting of the budget. He wondered if they expect liability back to that point or within that 18 years would there be a number of years without liability?
355	Mr. White	He indicated that there was a better picture in earlier years in terms of the interest owed, because they had higher commercial fisheries budgets bringing the differential down. Unfortunately for the earlier years they are paying interest on those refunds. It is an individual year basis and they have to reconstruct an estimate and extrapolate what they have spent.
369	Senator Hoffman	Lawsuit on the differential and individual right to pursue a vocation. What implications does this case have on the differential of other licenses that the state has.
373	Mr. White	He noted that it does have implications for a commercial vocational pursuit, but not for sport hunting and sport fishing licenses. The state is able to have different bag limits and seasons for sport hunting and sport fishing.
381	Senator Hoffman	Guiding licenses?
382	Mr. White	Yes, they would be implicated by this.
384	Co-Chair Donley	He wondered if in their research they identified other states that had adopted as restrictive a measure as Judge Michalski in his decision.
387	Mr. White	Didn't find other states that had to follow a formula - only one close was a challenge by Florida in 1983 against Louisiana, but it was settled before it went to trial so there is no legal precedent. Other example would be charging students non-resident fees.
398	Co-Chair Donley	Quite a few other states that charge higher for non-resident commercial fisherman fees than resident?
399	Mr. White	Correct. Some states charge as much as 11 times higher and some states actually

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		prohibit non-residents from participating, but no one has challenged those states. Fisheries are invaluable so the non-resident fisherman does not feel the need to challenge the state, whereas in Alaska the fisheries have such value. He indicated that he made that point to the Alaska Supreme Court.
407	Co-Chair Donley	Thank you for your report.
409		Adjourned at 9:34 a.m.