

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

March 1, 2004
9:05 a.m.

MEMBERS PRESENT

Representative Paul Seaton, Chair
Representative Peggy Wilson, Vice Chair
Representative Cheryll Heinze
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative David Guttenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 478

"An Act relating to the issuance of commercial fishing interim-use permits; and providing for an effective date."

- MOVED CSHB 478(FSH) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 478

SHORT TITLE: COMMERCIAL FISHING INTERIM USE PERMITS

SPONSOR(S): REPRESENTATIVE(S) WILSON

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	FSH, RES
02/27/04	(H)	FSH AT 8:30 AM CAPITOL 124
02/27/04	(H)	Heard & Held
02/27/04	(H)	MINUTE(FSH)
03/01/04	(H)	FSH AT 9:00 AM CAPITOL 124

WITNESS REGISTER

JON GOLTZ, Assistant Attorney General
Natural Resources Section
Civil Division (Anchorage)
Department of Law
Anchorage, Alaska

POSITION STATEMENT: Discussed the possibility of amending HB 478 with regard to landings from international waters and retroactivity; answered questions.

FRANK M. HOMAN, Commissioner
Commercial Fisheries Entry Commission
Alaska Department of Fish & Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: During hearing on HB 478, answered questions about the history of limited entry and interim-use permits; said CFEC supports HB 478 to clarify that its practice for 30 years is what the legislature intended.

ACTION NARRATIVE

TAPE 04-13, SIDE A

Number 0001

CHAIR PAUL SEATON called the House Special Committee on Fisheries meeting to order at 9:05 a.m. Representatives Seaton, Wilson, Samuels, Guttenberg, and Gara were present at the call to order. Representatives Heinze and Ogg arrived as the meeting was in progress.

HB 478-COMMERCIAL FISHING INTERIM USE PERMITS

[Contains discussion of HB 415 at the end of the hearing]

Number 0041

CHAIR SEATON announced that the only order of business would be HOUSE BILL NO. 478, "An Act relating to the issuance of commercial fishing interim-use permits; and providing for an effective date."

CHAIR SEATON asked Mr. Goltz whether he had anything to add to his e-mail of February 27, 2004.

Number 0088

JON GOLTZ, Assistant Attorney General, Natural Resources Section, Civil Division (Anchorage), Department of Law, said he could add a little. Noting that he'd been asked to do some analyses as to whether any amendments to the bill would be desirable to address landings from international waters, he said there is some uncertainty now about how CFEC's laws apply to such situations. He opined that the bill helps a little by

closing a potential gap between when entry permits are issued and when [interim-use] permits are issued, and by clarifying CFEC's authority to issue these permits.

MR. GOLTZ said there still could be a question in some cases, however, as to what CFEC can designate as a fishery; he cited the example of a tuna fishery off the coast of Hawaii. Suggesting those might be broader issues, he said he didn't have a clear picture about what could be changed in this bill to further clarify the issue of international landings without significantly changing the real purpose and focus of the bill.

Number 0278

MR. GOLTZ turned attention to retroactivity, noting that he'd also been asked to look into the possibility of making the bill retroactive to the date of the original limited entry legislation. Although it raises some legal issues, he said it's uncertain how those issues would be applied to the particular court cases that are ongoing and relevant to this issue. As a relatively minor first point, he suggested that if the legislature intends to make this bill retroactive in order to extinguish current claims for reimbursement of past fees paid, then the bill should expressly say that in order to comply with existing AS 01.10.100.

MR. GOLTZ addressed the bigger issues relating to constitutionality. As the person charged with advocating for the state both in the [State v. Dupier Alaska Supreme Court] criminal case and the Sargent and Dupier class action cases currently in court, Mr. Goltz said he'd be pleased to see the bill applied retroactively because it would give him additional arguments in those cases, although he wasn't sure how such arguments would fare. Most important, it would allow him to show that this legislature supports CFEC's longstanding practice in issuing permits in the halibut fishery and other fisheries that aren't limited. It would also allow him to argue that the intent and purpose of the bill is merely curative, he said, to validate that longstanding practice of issuing permits under the current law, and to argue that the practice is consistent with what the intent of the law has been all along.

Number 0473

MR. GOLTZ acknowledged that in making those arguments, he'd expect some opposition; in the criminal case, the opposition would largely be the contention that applying this bill

retroactively would violate the ex post facto prohibitions in the federal constitution. He said he wasn't sure how that issue would play out because the bill doesn't create a new prohibition or penalty that is applied retroactively, but simply clarifies the scope of the interim-use permit. He suggested it's an issue that ultimately would best be resolved by a court.

Number 0521

MR. GOLTZ went on to say in the civil cases, it could be argued that the plaintiffs already have a right to reimbursement for those claims and that any legislation which retroactive eliminates those claim would allegedly violate due process. He said, again, it isn't clear to him how it would be resolved, but he thinks he could make a strong argument that if the bill is applied retroactively, it is simply a clarification or expression of intent about the scope of the original law, not a retroactive application of "a substantive law ... or one that would violate due process in that case."

Number 0580

MR. GOLTZ addressed a final possible issue relating to separation of powers. He explained that a court might be concerned that by clarifying this law while cases are ongoing, the legislature is stepping into a judicial role of interpreting the law and how it should apply to particular cases. While he said there would be strong arguments against that, he cautioned that it's a potential issue when talking about changing the law in the context of cases that already have had rulings and that will have further rulings before they reach a final resolution.

MR. GOLTZ summarized by saying it isn't clear to him that a retroactive application would solve the ongoing cases. Practically speaking, he suggested it would probably complicate the cases because of raising constitutional issues. He added:

But speaking as an advocate, as I have been here, a retroactive bill would give me new arguments to make on behalf of the state's position, and ... from that point of view, I can't see any harm that would be made to the state's case. ... In the event that a court found that the law should not be applied retroactively, due to constitutional concerns, I believe the result would simply be that the court would decline to apply it retroactively, and simply

hold ... that - in that particular case, anyway - the new law has only prospective application.

MR. GOLTZ closed by emphasizing the difficulty of predicting how those issues would be decided.

Number 0728

CHAIR SEATON asked whether the ongoing criminal case involves someone who failed to get a permit.

MR. GOLTZ replied that it involves three individuals; all caught halibut outside of state waters and brought the halibut inside of state waters for landing. None had an interim-use permit from CFEC, and they were cited for not having interim-use permits.

CHAIR SEATON asked whether it's a fair reading that retroactively allowing CFEC to issue permits wouldn't impact the defendants in this case as to whether they were required to have a permit.

MR. GOLTZ said he thinks it's a fair reading, but isn't the only reading. He explained:

The rub comes in because the way the court of appeals decided those cases is ... that those defendants couldn't be required to have a permit because, in fact, the CFEC didn't have the authority to issue them one in that case. And so ... the reasoning about whether or not they are going to be ... convicted on the charge of not having a permit does hinge on whether the CFEC had the authority to issue them a permit.

Number 0872

CHAIR SEATON asked whether, before 1972, fishermen were required to have a gear permit card for any fishery in which they operated.

MR. GOLTZ said he believed so. In further response, he said:

My understanding of the legislative history there is that the gear card requirement continued until 1977. So for the period between '73 and '77, fishermen were required to have both a limited entry ... interim-use

permit and also a gear card for whatever gear they were using. In '77 the legislature deemed that to be an unnecessary, duplicative licensing requirement and dropped the gear license card statute, in reliance on ... the CFEC permits.

Number 0978

MR. GOLTZ, in further response to Chair Seaton, noted that in the civil [class action] cases, the argument is specific to halibut, kind of an unusual fishery because federal law, to a large degree, preempts state management of it. The argument essentially is that in light of the recent court of appeals decision - which held that CFEC doesn't have authority to issue interim-use permits in the halibut fishery because limited entry is not pending - the people who bought a halibut interim-use permit should be able to get that money back from the state. In response to a further question, he offered his belief that in both cases, the class [of plaintiffs] is limited to persons who caught halibut in the EEZ [Exclusive Economic Zone] outside of state waters and brought them in. He said he isn't entirely sure whether it (indisc.--coughing) the case, but it is only halibut fishermen.

Number 1135

REPRESENTATIVE GARA asked whether there was any danger that telling the courts what a prior legislature intended would expose the state to additional liability in any of these cases.

MR. GOLTZ replied that he hadn't been able to think of any way in which that would create additional liability. He acknowledged that he'd only been working on the issue of retroactivity for a few days. He added:

What I've been able to discern from my reading on the issue is that to the extent retroactivity proved to be a problem in the court's view, ... it would only speak to whether or not the court would actually apply the statute retroactively in that particular case. ... I am not aware of a situation where this could create liability.

Number 1220

REPRESENTATIVE GARA asked, if the legislature says CFEC should have issued permits that it hasn't been issuing, whether it's

possible someone could claim entitlement to a permit that historically CFEC hasn't issued and claim damages for not being issued a permit that [CFEC] wasn't issuing.

MR. GOLTZ replied that he doesn't see that situation here because, as he sees the bill, it is intended merely to validate and conform the law to CFEC's actual practice for 30 years, and to interpret the statute broadly to say, essentially, that [CFEC] has authority to issue interim-use permits in every fishery that doesn't have a maximum number and so doesn't have entry permits issued for it.

Number 1323

REPRESENTATIVE GARA expressed skepticism that this 2004 legislature, by saying what a prior legislature intended, will be given much weight by the courts in that interpretation. He surmised that the court would say it could figure out the prior legislature's intention equally well. He asked for Mr. Goltz's view on that.

MR. GOLTZ agreed that the foregoing has "a fair bit of weight to it" and that the court would certainly consider that view of the case. He pointed out that this is a bit awkward for him, since he's still in a position of advocating in these particular cases.

MR. GOLTZ, in reply to a question from Representative Wilson, said he doesn't see a significant downside in relation to the cases he's involved with if the bill is retroactive. Although it would allow him to make some arguments in the state's favor that he otherwise wouldn't be able to make, it raises issues and he isn't sure the bill would, in fact, be applied retroactively by a court in those particular cases.

Number 1472

CHAIR SEATON said he's not so concerned about the pending cases, but would be concerned about expanding that to all other nonlimited fisheries. He asked, if a retroactive date is included now, whether it would have more influence on potential cases that haven't yet been filed, for all other fisheries that were interim-use permit fisheries, regardless of whether they impact the current cases.

MR. GOLTZ said he didn't have a comprehensive understanding of the answer, but essentially believes it won't hurt. If someone

could file a claim now but hasn't, he believes that's a significant question that would have to be argued in the context of a particular case before a court. He offered his view that the effect of retroactivity in [HB 478] would be this legislature's statement of intent, in as strong terms as possible, that CFEC's past practice has been the appropriate one. He said he doesn't know that much can be done beyond that.

CHAIR SEATON requested confirmation that this legislation doesn't affect any fishery that would have been actively undergoing the process of limited entry.

MR. GOLTZ said he believes that's correct.

Number 1659

REPRESENTATIVE GUTTENBERG asked whether the policies and procedures for issuing these interim-use permits have been consistent, and whether passage of this legislation would cover all past instances or if would there be different categories or timelines for regulations.

MR. GOLTZ said he thinks the answer is yes. He noted that CFEC has issued interim-use permits for different fisheries at different times, as they have evolved, and that the process has developed; he suggested a CFEC commissioner may be able to discuss how that process has developed. Offering his belief that this bill would relate to those all equally, he said he keeps coming back to CFEC's hope of conforming the statutory language a little more clearly to the actual interpretation and practice all along. "We're not, in the view of the CFEC, changing anything here," he said. "This has been the law the entire time. And we only need to make it even more clear now because of the decision we originally got from the court of appeals."

CHAIR SEATON acknowledged that Representatives Heinze and Ogg had arrived shortly after the hearing began.

Number 1847

FRANK M. HOMAN, Commissioner, Commercial Fisheries Entry Commission, Alaska Department of Fish & Game (ADF&G), addressed Representative Guttenberg's question by saying interim-use permits have been issued from the very beginning, going back to probably 1974. The commission has always issued two types of permits: the entry permit and, for all those fisheries that

were not limited, the interim-use permit. Over the years, as new fisheries have been limited, CFEC has switched from an interim-use permit for that fishery to an entry permit.

CHAIR SEATON asked about the relationship between the gear permits that were issued and the interim-use or entry permits.

MR. HOMAN answered:

I'll try to go back that far. ... I think what happened was, in the early years of the commission, the carryover of the gear license came from pre-limited entry days, and ... it was always the type of permit that was issued ... for fishermen. After limited entry, that continued to be issued, but we also began issuing an interim-use permit and an entry permit. ... This happened for three or four years, until 1977, when ... the situation arose that "why were we issuing these two types of cards, when ... the interim-use permit or the entry permit could substitute for the gear permit." So ... they switched at that time and said ... that the interim-use permit and the entry permit would cover a gear license. And so, I guess, from 1977 ... the state hasn't issued a gear license.

Number 1991

REPRESENTATIVE WILSON asked whether a retroactive date in the bill would be back to 1974 or 1977.

MR. HOMAN said he believed 1974, when [CFEC] first started issuing interim-use permits.

REPRESENTATIVE WILSON asked how much money is at stake if there is a class action lawsuit over this, and whether the department had considered this.

MR. HOMAN indicated it hadn't been considered, but said there are probably thousands of permits.

REPRESENTATIVE WILSON asked whether it would be more than for the Carlson case.

MR. HOMAN said he couldn't guess, but it would be substantial.

Number 2055

CHAIR SEATON offered his belief that the criminal case before the court, which only involves three people, has nothing to do with the purpose of a retroactivity clause here. The other would probably only apply to halibut when it went to individual fishery quotas (IFQs), he suggested, because that's when the federal government first started issuing a federal card for delivery of fish; before that, they were delivered under a state "gear interim-use card." He mentioned 1996 as a possible date when it became effective, not when it was passed.

REPRESENTATIVE OGG recalled that previous to that, the federal government issued permits for halibut, both sport-charter cards and commercial cards.

CHAIR SEATON said before that, delivery was made on the state card, even though there was a federal fishery permit.

Number 2143

CHAIR HEINZE asked how many fisheries aren't subject to limited entry or a moratorium.

MR. HOMAN said it's hard to answer because some fisheries have no activity, but [CFEC] has limited approximately 66 or 67 fisheries, and probably another 125 or more have been identified that aren't limited. The majority of the major fisheries like the salmon fisheries are limited, but there are a lot of miscellaneous fish and crab that haven't been limited.

CHAIR HEINZE requested confirmation that these permits help [CFEC] in tracking the healthiness of the fish stocks.

MR. HOMAN said absolutely; that's where all the data comes from. Because of the permit system and the requirement that the fish tickets contain the permit number, how the resource is faring under the fishery can be determined. It's the basic tool used by ADF&G and CFEC to assess the fishery.

Number 2238

CHAIR HEINZE asked whether [CFEC] is looking at permitting for the 125 or so fisheries that aren't limited now.

MR. HOMAN answered yes, saying it's through the interim-use permit system for all those nonlimited fisheries. The same data is collected from the nonlimited fisheries.

CHAIR SEATON requested confirmation that prior to limited entry, gear cards were used to track the fisheries resources.

MR. HOMAN said that's correct.

Number 2291

REPRESENTATIVE GARA asked whether CFEC supports HB 478.

MR. HOMAN answered that [CFEC] definitely supports it, to clarify that its practice for 30 years is what the legislature intended.

REPRESENTATIVE GARA, noting that he is an attorney but still doesn't understand them fully, requested an explanation of the class action claims that this bill, if applied retroactively, might impact, and how it would benefit the plaintiffs.

MR. HOMAN, noting that he hasn't gone into the issue a lot, said the claim was that CFEC didn't have authority to issue IUPs [interim-use permits] that it had issued in the halibut fishery, because it didn't have the ability to limit that fishery. Surmising that they were seeking their money back, he said there are five fee classes, ranging, to his belief, from \$60 to \$300.

REPRESENTATIVE GARA asked whether their position was that they should have been able to engage in the fishery for free, without the permits, and that CFEC, by charging money for permits, had exceeded its authority.

MR. HOMAN deferred to Mr. Goltz, but said he believes that's the basic claim.

Number 2440

MR. GOLTZ said he basically agreed with Mr. Homan's answers. Noting the approximately 3,000 halibut permits in Alaska, he said the alleged class, not yet certified by the court, consists of persons who caught fish only outside of state waters and landed them in state waters. He explained, "We don't know exactly how many people that is, because we believe most people catch halibut both inside and outside of state waters." He said the claim is that these persons complied with the law and the practice of purchasing an interim-use permit for halibut from CFEC in order to catch fish in state waters or to authorize the

landing and selling of their fish in state waters, in compliance with state statutes.

MR. GOLTZ continued, saying [the plaintiffs'] argument is that they shouldn't have had to comply with that law, because the court of appeals has now held that CFEC didn't have authority to issue them an interim-use permit. Thus they're seeking reimbursement of the money paid, although to the best of his knowledge they didn't protest paying it at the time. He said he believes for most of the time period in question, approximately 1996 through 2003, the fee was either \$50 for a resident or \$150 for a nonresident for an interim-use permit for halibut.

Number 2531

REPRESENTATIVE GARA related his understanding, then, that the plaintiffs claim, first, that CFEC had no authority to issue the permits, and, second, that they should have been able to engage in the fishery for free, without a permit.

MR. GOLTZ clarified that the pleadings don't allege that second part, but said he thinks it's an inherent part of their claim "and is something that we hope to point out in the litigation."

REPRESENTATIVE GARA asked whether these claims just apply to interim-use permits for the halibut fishery beyond the three-mile limit.

MR. GOLTZ said he's almost positive that's the only thing alleged in the pleadings, but indicated he'd have to check. He added that he thinks the people who are alleging to be part of this class only allege that they are persons who have harvested halibut outside of state waters, beyond the three-mile limit, but have brought the halibut into state waters for landing. In that circumstance, state law requires that the person have a halibut interim-use permit. One reason is to promote enforcement, he said, since halibut obviously are available in state waters and it wouldn't be clear whether they'd been harvested inside or outside of state waters. Thus the law requires a person to have a permit anytime he/she possesses halibut for commercial purposes inside of state waters or is landing, delivering, or selling them.

Number 2640

CHAIR SEATON, noting that he is a halibut fisherman, offered the following clarification. He said things have gotten complicated

because of the federal IFQ program, which issues a federal card. When a person delivers halibut, a machine like an ATM [automated teller machine] tells how many pounds that person has available, and there is a printout of how many pounds have been delivered and so forth. Since halibut is the only fishery controlled by international treaty, the state doesn't really manage it within state waters; the fishery goes from the shoreline out to 200 miles, and the federal government, through the halibut treaty, manages it.

CHAIR SEATON, emphasizing the duality of the system, explained that a person also must have an entry-permit card, which is used to stamp the fish ticket; this [provides data on] what size of fish were caught and so forth. The biological information is only recorded on the state fish ticket, whereas the federal permit records how many pounds have been delivered and how many remain to be caught that year. He suggested that's the reason for the confusion: people who had the plastic card from the federal government thought they didn't need one from the state anymore, and yet the state card is needed for a fish ticket in order to deliver fish within the state. He continued:

That fishery alone is segregated. And as I'm understanding it, it's not even the IFQ fisheries together, because there's a sablefish [fishery], which is not under international treaty. You still have a card, but ... the state manages sablefish within state waters. ... It's a very complex situation. ...

The big thing that we need the clarification for is that the state has the authority to issue interim-use permits for fisheries which are not currently pending for limited entry. And that's the big question here. And I don't really see it as a question because I see the interim-use card as the replacement for the gear card to give us tracking of fish and our fisheries resource. And if we didn't have that, we would be sitting out here managing fisheries without ... any data or information.

MR. HOMAN, in response to Chair Seaton, indicated he had nothing to add and commended him for the foregoing explanation.

Number 2804

REPRESENTATIVE OGG told Mr. Goltz he appreciated the clarity and research. He asked what the ballpark figure is for the total liability in the civil [class action suits].

MR. GOLTZ replied that it isn't known yet, because it isn't known how big that class is. "If the cases do go forward, we're going to have to do some discovery to find out who needs to be in that class," he added. With regard to the Carlson case mentioned earlier, he said he didn't believe it was close to that, but reiterated that it's undetermined yet. Expressing hope that that the cases wouldn't go forward, he explained, "If we can prevail in the supreme court on the criminal action that's currently pending, I think ... that the wind will be taken out of the sails eventually ... of the civil claims, because they won't have that court of appeals ruling to rely on anymore."

CHAIR SEATON reiterated that the halibut-related claims are probably fairly limited because most people fish in both state and federal [waters]. He said the bigger question is that if CFEC doesn't have authority to issue these [permits] unless there is a pending limited entry in a fishery, there'd be no way to track biological data and wouldn't be any fish tickets; something like a gear card would have to be instituted again in order to have a fish-ticket tracking system.

Number 2904

CHAIR SEATON closed the public hearing.

REPRESENTATIVE OGG said he'd been weighing the testimony to see whether retroactivity would do more or less harm, and thinks there'd be less harm because of "what could be out there."

Number 2922

REPRESENTATIVE OGG moved to adopt [Amendment 1], to add a new Section 2 after line 12 that makes the bill retroactive to January 1, 1974. A newly renumbered Section 3 would say that the Act takes effect immediately.

Number 2987

REPRESENTATIVE GARA announced that he opposed making the bill retroactive for two reasons, although he clarified that it wasn't the most important thing in the world to him. He

suggested the need to get out of the habit of having bills that affect pending litigation be made retroactive.

TAPE 04-13, SIDE B

Number 2998

REPRESENTATIVE GARA explained that he isn't particularly sympathetic to the class action claims, and even if the committee does nothing about retroactivity, he suspects that the courts might be skeptical also. He said he doesn't like the idea of the [legislature's] taking sides, even if well motivated, but also doesn't think it will amount to anything, since it is the court's duty to decide what the legislature intended by the 1974 law. He surmised that the court would give no weight to what a legislature says 30 years later about a previous legislature's intent. He suggested the better argument is the one he's heard that the state will take in these cases, but reiterated that the courts are there to make that call. Saying it looks unseemly and won't amount to a hill of beans anyway, he spoke against adopting a retroactivity provision, and for just letting these cases proceed.

Number 2886

REPRESENTATIVE GUTTENBERG agreed with both Representative Ogg and Representative Gara. He said although this appears to validate what has been done for 30 years, he doesn't know the 1974 legislature's intent. He said it seems the state also has an inherent interest in collecting biological information, and if the federal government doesn't do it, it seems there would be a constitutional requirement to manage the fisheries by collecting that data.

REPRESENTATIVE WILSON said she, too, was pulled in both directions, but would ask the department what it wanted.

REPRESENTATIVE HEINZE said she feels the same way, but unlike Representative Gara, doesn't see this as [the legislature's] taking sides. She sees this as clarification, she said, but acknowledged the argument against the ability to clarify what happened 30 years ago. She expressed the need for direction on Amendment 1.

Number 2780

CHAIR SEATON remarked that he is generally opposed to retroactive clauses when changing the law, but doesn't believe

that's what is being done here, since it says that what the state has been doing in managing the fisheries, collecting the biological data, and requiring this card in place of a gear card is the logical extension of what needs to be done to manage the fisheries. He surmised that what is done here won't impact either of the court cases, which are specific: one involves people who failed to get a permit, which this bill doesn't cover, and the other relates to a specific federal fishery that has a dual-management scheme.

CHAIR SEATON said he does see a problem, however, if the question arises about whether the state has the ability to issue any permit for a fishery that's not limited or that has an application [pending] for limitation; that has huge consequences with regard to the state's ability to manage the fisheries, because there is no system or permitting availability. Chair Seaton said he is leaning towards the retroactive clause, which will establish "not only that we want to go forward, but that we agree that collecting our biological data and managing our fisheries as we do, with a limited entry interim-use permit system, is the right and proper thing that we need to do for our fisheries." He specified that he'd support Amendment 1 for that reason, not for anything to do with the pending court cases, and agreed with Representative Gara that the courts wouldn't listen, or at least listen very hard, in those cases.

Number 2660

REPRESENTATIVE WILSON concurred. She estimated that under the class action suit, the most any fisherman could get back - if \$150 had been paid for seven years - would be a little more than \$1,000. She suggested the attorneys and not the fishermen would benefit from that. She proposed the need to look at this with regard to the best way to clarify this and to possibly help [in the pending court cases], as Mr. Goltz had said. She concluded that she would vote for Amendment 1.

Number 2607

REPRESENTATIVE GARA pointed out that passage of the bill without a retroactivity provision gives CFEC the power to issue the necessary permits, and it can use all the fisheries data from the past. The only question in deciding whether to make it retroactive is whether to have the chance to impact the pending litigation, he said, reiterating that he doesn't believe it will have any impact or should do so.

CHAIR SEATON clarified that his point isn't the pending litigation with regard to halibut, but the possibility that reimbursement will be sought as well from [participants] in all other fisheries across the state that had an interim-use permit that wasn't associated with pending limited entry; those cases aren't currently before the court in any way.

REPRESENTATIVE HEINZE said she was trying to figure out the reason for going ahead with the bill without an amendment providing retroactivity.

MR. HOMAN agreed this clarifies that this upholds a practice that CFEC has been using for 30 years. If it stands as the court of appeals has read the statute, [CFEC] couldn't issue IUPs to any fishery it didn't limit. He concurred with Chair Seaton that the potential would exist for all those fisheries that [CFEC] hasn't limited, or may never limit, to have a claim.

CHAIR HEINZE said she'd support [Amendment 1].

[Chair Seaton explained Amendment 1 to Representative Samuels, who had just returned.]

Number 2428

CHAIR SEATON referred to comments made earlier by Mr. Goltz about possible additional language. He asked whether Representative Ogg just wanted Amendment 1 to say it's retroactive to that date or to include other language.

REPRESENTATIVE OGG offered his impression that Mr. Goltz wasn't asking for additional language, but that the retroactive clause would allow him to argue those points. Representative Ogg added that he'd hesitate to say what the supreme court would rule; he noted that Mr. Goltz had indicated he didn't know, either, but had said this wouldn't hurt his argument and [may] help.

REPRESENTATIVE OGG went on to say he thinks it is a proper power of the legislature - although it should be used sparingly - to make a decision in these matters when it finds something is unclear, and will write a statute [counter to] a ruling made by a court that the legislature finds abhorrent, for example. He suggested this is a sparing use, to ensure that what has been done over many years is proper.

Number 2291

MR. GOLTZ, in reply to a question from Chair Seaton, said he doesn't think additional language is necessary, and that the retroactive date is sufficient and would go a long way to make the point that the intention of the amendment is to be consistent with the way the law has been intended all along.

Number 2221

REPRESENTATIVE OGG requested that the foregoing statements by Mr. Goltz be included in the record to support why Amendment 1 is being added. He emphasized Mr. Goltz's statement that the intention isn't to change the law, but to clarify what was always there.

REPRESENTATIVE GARA maintained his objection to Amendment 1.

A roll call vote was taken. Representatives Heinze, Samuels, Ogg, Guttenberg, Wilson, and Seaton voted in favor of Amendment 1. Representative Gara voted against it. Therefore, Amendment 1 was adopted by a vote of 6-1.

Number 2151

REPRESENTATIVE GUTTENBERG asked whether there is an inherent problem in using the word "interim", since the state has the ability to issue a permit in any fishery.

MR. HOMAN replied that he doesn't see it as a problem. Initially, when the permits were established, the entry permit was for those that were limited, and the [interim-use permit] was for those that weren't; over the years, that's been the pattern. He said he supposed it could be read as being "on the way to do something else," but it has always been the practice that "interim" covered everything other than the entry permit.

REPRESENTATIVE GUTTENBERG said he wondered whether the pending lawsuits are because people thought this was an interim use for something that hadn't happened. Remarking that the state certainly has a right and an obligation to have permits, he suggested perhaps Mr. Goltz could address that better.

CHAIR SEATON pointed out that in this case it's different because of the dual-permitting system for halibut. He elaborated:

That's specifically what this is addressing, ... not an interim nature. Interim-use permits are used in

two ways. One is if you have a limited entry system and people are qualifying by number of points and there's appeals; they're given those interim-use [permits] until there's a final determination as to whether they qualified for ... a limited entry permit. And then they're also used for all other fisheries for which there has not been the determination ... for going to a limited entry system. So ... I can see there's a little confusion, but they've been used this way all along.

Number 2013

MR. HOMAN added:

We always have looked at the interim-use permit as the permit that was issued before you decided whether there was going to be a limitation or not a limitation. So ... it could be used for quite a number of years because ... you may never make that decision; ... if a fishery doesn't look like it needs to be limited, then ... the interim-use permit ... will stay out there. ... You could read it to be that way, as well, that ... interim-use permits are there because no decision has been made on that fishery; ... it remains open until you limit it. So ... if you never limit it, then the interim-use designation stays there.

CHAIR SEATON requested confirmation of his understanding that in CFEC's view, these other fisheries are all really pending as being available for limited entry, even though there's no application for limited entry; thus it's under that kind of jurisdiction that the interim-use permit is being offered.

MR. HOMAN replied that the commission has the authority to limit any fishery if the conditions warrant it. But without that limitation, that designation stays on those fisheries as "interim use."

Number 1890

REPRESENTATIVE OGG moved to report HB 478, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 478(FSH) was reported from the House Special Committee on Fisheries.

Number 1852

CHAIR SEATON briefly turned attention to HB 415. He reported that he'd contacted the chair of the Board of Fisheries about the timeframe for addressing the issues in HB 415, either on a regional or statewide basis; he indicated the board would get back with the committee this week on that. He also noted that [Stephen White of the Department of Law] will be providing a legal opinion this week.

Number 1803

REPRESENTATIVE GARA asked Mr. Goltz to provide his office with the supreme court opinion, if one is issued ultimately, relating to the legislature's statement of intent [in HB 478] as to what the 1974 legislature meant. He suggested it would be good to start developing data on the impact of these retroactivity clauses and how the supreme court views them.

MR. GOLTZ agreed to do that.

CHAIR SEATON asked that the information be provided to all the committee members. [CSHB 478(FSH) was reported from committee.]

ADJOURNMENT

Number 1747

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 10:17 a.m.