2/07/01

CARLSON

V.

STATE,

CFEC

SFIN

FILE

MAIN STATUTE AND REGULATION AT ISSUE: *CARLSON V. STATE*

AS 16.43.160(b)

Annual fees established under this section (for entry or interim use permits) shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

20 AAC 05.240(4)

…the resident and non-resident annual fees are:

FEE CLASS	ANNUAL FEE	
	Resident	Non-resident
I	$250	$750
II	$200	$600
III	$150	$450
IV	$100	$300
V	$50	$150

Submitted by Dept of Law 2/6/01

ALASKA SUPREME COURT'S FORMULA FOR CALCULATING THE MAXIMUM PERMISSIBLE FEE FOR A NONRESIDENT COMMERCIAL FISHING LICENSE OR PERMIT:

MAXIMUM PERMISSIBLE FEE FOR A NONRESIDENT PERMIT/LICENSE	=	FEE FOR A RESIDENT PERMIT/ LICENSE	+	(ANNUAL FISHERIES BUDGET/ALASKA POPULATION) X (% STATE BUDGET FROM OIL REVENUES)

CARLSON V. CFEC
STATUS – FEBRUARY 2001

I. LEGAL ISSUE: Whether the state may charge nonresident commercial fishers more than it charges resident commercial fishers for commercial fishing licenses and permits.

II. FACTUAL BACKGROUND: Alaska statutes require the state to charge nonresident commercial fishers three times as much as it charges similarly situated resident fishers for limited entry permit fees (AS 16.43.160(b)) and charge $65 more for nonresident crewmember license fees (AS 16.05.480). The permit fees must reflect the different rates of economic returns for the fisheries and, thus, CFEC has adopted a 5-tier fee schedule. The lowest-value fees have a $100 difference between residents and nonresidents, and the highest-value fees have a $500 difference. 20 AAC 05.240(4).

III. PROCEDURAL HISTORY OF CASE: In 1982, Carlson and other nonresident commercial fishers sued CFEC alleging that the resident-nonresident fee differential violates the Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution. Their suit was later certified as a class action, capturing as plaintiffs approximately 11,000 nonresident fishers who have paid the higher fees.

In the nineteen years that this case has been litigated, the state has twice prevailed before the superior courts, only to have the summary judgments twice reversed and remanded on appeal to the Alaska Supreme Court. After the second remand, in 1995, the plaintiffs filed a petition for cert. before the U.S. Supreme Court. They asked the Court to review the formula that had been developed by our court, and they asked it to review our court's holding that the Commerce Clause is not applicable to their challenge. The Court denied the petition.

In the second appeal to the Alaska Supreme Court, the Court announced that the plaintiffs' claim is governed only by the Privileges and Immunities Clause. Under that clause, a state must treat residents and nonresidents, when they are pursuing their vocations, with substantial equality. Caselaw, in the context of *Carlson*, holds that any difference in commercial license and permit fees may only be based on the amount that residents pay for the pertinent state services - commercial fishery management - through taxes that are not also paid by nonresidents. Since Alaska residents currently pay no broad-based state tax, the Court said that petroleum revenues, because they belong only to residents, may be used in lieu of resident tax revenues.

Thus, the formula established by the Court begins with the state's expenditures for commercial fishery management, then applies a factor that reduces them to only the portion that is derived from petroleum revenues. When the "petroleum-only fishery expenditures" are divided by the number of Alaska residents, the result is a dollar amount. That dollar amount is the *maximum* difference that the state can charge between resident and nonresident license and permit fees.[1] Because the state's

[1] For example, if, in a given year, the state spends $100 million to support commercial fisheries, and

commercial fishing expenditures have varied from year to year, the permissible differential is also different for each year.

When the case was remanded to apply the formula, the parties decided to litigate several refund issues first. Contrary to our position, the superior court held that, if the fees paid by nonresidents are higher than the formula would allow, all members of the class would be entitled to refunds of the difference. Also, the court held that refunds would qualify for pre-judgment interest. We petitioned for review of the refund rulings, but the Alaska Supreme Court denied our petition.

In a court trial in June 2000, the superior court ruled that some, but not all, of the budget categories identified by the state may be counted when calculating the annual expenditures for commercial fisheries management. Among others, the court ruled that the state's expenditures for hatcheries, harbors, and other capital improvements may not be considered as expenditures that support commercial fisheries. Also the court ruled that the state may not count the state's loan subsidies to fish hatcheries nor the costs of general governmental services used by commercial fishers.

IV. ATTORNEYS & JUDGES: No less than five AGGs, in succession, have represented the state. The plaintiffs have been represented by Loren Domke since 1982. He is occasionally assisted by the firm of Jones, Day, et al. of Washington, D.C. Judge Hunt was originally assigned to the case; it is presently before Judge Michalski.

V. WHAT HAPPENS NEXT: At the June 2000 trial, the state calculated the potential refunds due class members for just one year, 1996. Under rulings made by the trial court, for that year alone, the state would have to repay overpayments and prejudgment interest of $1.37 million.

Under an agreement with the class, the state is mailing out notices of possible refund to all class members. The state is also calculating refunds that would be due for all other years. Once those amounts are totaled, the trial court will enter a judgment against the state for that amount. That is likely to occur in April or May of 2001. At that point, the parties may appeal various issues to the Alaska Supreme Court. The state will appeal, and it is expected that the Supreme Court will rule sometime in the latter half of 2002.

VI. STATE'S POTENTIAL FINANCIAL LIABILITY: If the plaintiffs prevail on their theory that the Commerce Clause allows absolutely no resident/nonresident fee differential (highly unlikely), the state would owe refunds and interest that total more than $30 million. But even under current rulings by the Alaska Supreme Court and the trial court, which allow some but not all the present differentials, the amount owed to the class members would be tens of millions of dollars.

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half of that is derived from oil revenues ($50 million), then each of Alaska's 500,000 residents pays $100 of his/her portion of oil revenues to support commercial fishing. A resident fisher pays his/her permit fee plus the $100, while a nonresident pays only his/her permit fee. To equalize those payments for that year, the state may charge a nonresident $100 more than it charges a resident for the same type of permit.