IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellant, v. DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellees.	)	Supreme Court No. S-

Super. Case No. 3AN-84-05790CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE PETER MICHALSKI, PRESIDING

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Court Rules

Other Authorities

AUTHORITIES PRINCIPALLY RELIED UPON

AS 09.30.070. Interest on judgments; prejudgment interest

(a) Notwithstanding AS 45.45.010, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

(b) Except when the court finds that the parties have agreed otherwise and except as provided by AS 45.05.111(d), prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property.

(c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages.

AS 16.05.450. Issuance of licenses; disclosure for child support purposes

(a) The commissioner or an authorized agent shall issue a crewmember fishing license under AS 16.05.480 to each qualified person who files a written application at a place in the state designated by the commissioner, containing the reasonable information required by the commissioner together with the required fee. The commissioner shall require the reporting of the applicant's social security number on the application. The application shall be simple in form and shall be executed by the applicant under the penalty of unsworn falsification in the second degree.

(b) The Alaska Commercial Fisheries Entry Commission shall issue a vessel license under AS 16.05.490 to each qualified vessel for which a written application has been filed, at a place in the state designated by the commission, containing the reasonable information required by the commission together with the required fee. The application shall be simple in form and shall be executed by the applicant under the penalty of unsworn falsification in the second degree.

(c) Repealed.

(d) Upon request, the commissioner shall provide a social security number provided under (a) of this section to the child support services agency created in AS 25.27.010, or the child support enforcement agency of another state, for child support purposes authorized under law.

AS 16.05.480. Commercial fishing license; disclosure for child support purposes

(a) A person engaged in commercial fishing shall obtain a commercial fishing license and shall retain the license in possession and readily available for inspection during fishing operations. An entry permit or interim-use permit entitles the holder to participate as a gear operator in the fishery for which the permit is issued and to participate as a crewmember in any fishery. A crewmember fishing license is not transferable and entitles the holder to participate as a crewmember in any fishery.

(b) A person applying for a commercial fishing license under this section shall provide the person's social security number. A person applying for a resident commercial fishing license under this section shall also provide proof of residence that the department requires by regulation.

(c) Repealed.

(d) Upon request, the department or the Alaska Commercial Fisheries Entry Commission shall provide a social security number provided by an applicant for a license under this section to the child support services agency created in AS 25.27.010, or the child support agency of another state, for child support purposes authorized under law.

(e) Except as provided under AS 16.05.470 and AS 23.35.060, fees collected from the sale of crewmember fishing licenses under this section may be appropriated into the fish and game fund.

(f) Repealed by SLA 2001, ch. 27, § 7, eff. Jan. 1, 2002.

(g) A resident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay a fee of $60 for an annual crewmember fishing license. A resident engaged in commercial fishing who is less than 11 years of age and who does not hold an entry permit or an interim-use permit shall pay an annual fee of $5.

(h) A nonresident engaged in commercial fishing who is 11 years of age or older and who does not hold an entry permit or an interim-use permit shall pay a base fee of $60 for an

annual crewmember fishing license, plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law. A nonresident engaged in commercial fishing who is less than 11 years of age and who does not hold an entry permit or an interim-use permit shall pay an annual base fee of $5 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law.

(i) Notwithstanding (g) and (h) of this section, a resident or nonresident engaged in commercial fishing who does not hold an entry permit or an interim-use permit may obtain a seven-day crewmember fishing license under this subsection. During the period for which the license is valid, a person who holds a seven-day crewmember fishing license may not engage in fishing with a rod and reel while present on a commercial fishing vessel. The fee for a seven-day crewmember fishing license is $30.

(j) In this section, “commercial fishing license” includes an entry permit and an interim-use permit issued under AS 16.43 and a crewmember fishing license.

AS 16.43.010. Purpose and findings of fact

(a) It is the purpose of this chapter 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 of participants and vessels into the commercial fisheries in the public interest and without unjust discrimination.

AS 16.43.140. Permit required

(a) After January 1, 1974, a person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued;

(4) if authorized by regulations of the commission, fishing an entire unit of gear in a fishery in which the commission has issued entry permits for less than a unit of gear under AS 16.43.270(d); under this paragraph, a person may not hold more than two entry permits for a fishery; however, the person may not

(A) fish more than one unit of gear in the fishery; or

(B) acquire a second entry permit for the fishery after the person has acquired an entry permit that authorizes the use of an entire unit of gear in the fishery;

(5) consolidation of the fishing fleet for a salmon fishery; however, a person may hold not more than two entry permits for a salmon fishery under this paragraph, but the person who holds two entry permits for a salmon fishery may not engage in fishing under the second entry permit.

AS 16.43.160. Fees

(a) Except as specifically provided in this section, the commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits.

(b) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue.

(c) For an entry permit or an interim-use permit issued or renewed for calendar year 2006 and following years, the annual base fee for issuance or renewal of an entry permit or an interim-use permit may not be less than $30 or more than $3,000. The annual base fee must reasonably reflect the different rates of economic return for different fisheries. In addition to the annual base fee established by the commission under this subsection, a nonresident shall pay an annual nonresident surcharge for the issuance or renewal of one or more entry permits or interim-use permits. The commission shall establish the annual nonresident surcharge by regulation at an amount that is as close as is practicable to the maximum allowed by law.

(d) For an entry permit or an interim-use permit issued or renewed for calendar year 2006 and following years, the holder of a permit whose household income, assets, and financial resources fall within the eligibility standards for the food stamp program under

7 U.S.C. 2011--2025, as amended, is subject to an annual base fee for the issuance or renewal of an entry permit or an interim-use permit that is equal to 50 percent of the annual base fee that the permit holder would otherwise pay under (c) of this section. In addition to the reduced annual base fee under this subsection, a nonresident who qualifies for a reduced fee under this subsection shall pay the annual nonresident surcharge established under (c) of this section.

AS 43.05.225. Interest

Unless otherwise provided,

(1) when a tax levied in this title becomes delinquent, it bears interest in a calendar quarter at the rate of five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District as of the first day of that calendar quarter, or at the annual rate of 11 percent, whichever is greater, compounded quarterly as of the last day of that quarter;

(2) the interest rate is 12 percent a year for

(A) delinquent fees payable under AS 05.15.095(c);

(B) Repealed by SLA 1996, ch. 107, § 46, eff. Oct. 1, 1996.

(C) unclaimed property that is not timely paid or delivered, as allowed by AS 34.45.470(a).

AS 43.05.275. Credit and refund claims

(a) Except as provided in AS 43.20.021, a claim for credit or refund of a tax under this title for which a taxpayer is required to file a return or pay a tax may be filed by the taxpayer

(1) before the later of

(A) three years from the time the return was filed; or

(B) two years from the time the tax was paid; or

(2) within two years from the time the tax was paid, if no return was filed.

(b) If the department and the taxpayer have consented to extend the period for assessment of tax as provided in AS 43.05.260(c)(3), a tax refund claim may be filed at any time before the expiration of the period agreed upon.

(c) A taxpayer who has filed a return, paid the full amount due on the return, and made a claim under this section may, without exhausting administrative remedies, file an action in superior court to recover on the claim if the sole ground for appeal is that a tax statute is

(1) violative of the United States Constitution;

(2) violative of the state constitution; or

(3) preempted by federal statute, regulation, or treaty.

(d) An action may not be brought under (c) of this section if

(1) there is a dispute of material fact;

(2) a factual record is necessary to decide the appeal;

(3) development of a factual record will render it unnecessary to reach a question of constitutional law or federal preemption; or

(4) the taxpayer challenges the assessment of the tax on a ground other than one listed in (c) of this section.

AS 43.05.280. Interest on overpayments

(a) Interest shall be allowed and paid on an overpayment of a tax under this title at the rate and in the manner provided in AS 43.05.225(1).

(b) Interest shall be allowed and paid as follows:

(1) in the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken;

(2) in the case of a refund, from the date of the overpayment to a date, as determined by the department, preceding the date of the refund check by not more than 30 days, whether

or not the refund check is accepted by the taxpayer after tender of the check to the taxpayer; the acceptance of the refund check does not affect the right of the taxpayer to claim an additional overpayment and interest on the overpayment.

(c) If an overpayment of a tax imposed by this title is refunded within 90 days after the last date prescribed for filing the return of the tax, determined without regard to an extension of time for filing the return, or if the return is filed after the last filing date and the overpayment is refunded within 90 days after the date the return is filed, interest may not be allowed under (a) of this section on that overpayment.

AS 43.10.210. Recovery of overpayments and protested payments

(a) The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if

(1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax; or

(2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

(b) The Department of Administration shall refund the amount of an overpayment to a taxpayer if the Department of Revenue, on audit of the account in question, determines that a remittance by the taxpayer exceeds the amount due.

(c) If the department and the attorney general determine that a licensee has paid a license tax and is prevented from using the license by court order, administrative decision, or other cause beyond the control of the taxpayer, the Department of Administration shall refund the amount of the license tax to the licensee.

AS 45.45.010. Legal rate of interest; prepayment of interest

(a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) Interest may not be charged by express agreement of the parties in a contract or loan commitment that is more than five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the

contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.

(c) to (e) Repealed.

(f) A bank, credit union, savings and loan institution, pension fund, insurance company, or mortgage company may not require or accept any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is $1,000,000 or more and the term of the loan is five years or more, or to a negatively amortizing loan secured by owner-occupied real property originated under a program approved or sponsored by

(1) the federal government, including congressionally chartered national corporations; or

(2) the state if

(A) the real property that secures the loan is not subject to forced sale provided the owner has not violated the terms of the loan agreement including terms regarding

(i) payment of property taxes;

(ii) payment of hazard or fire insurance premiums;

(iii) keeping the property in reasonable repair;

(iv) not vacating the property for a period longer than 12 months;

(B) the owner may not be evicted from the real property that secures the loan unless a term of the loan agreement regarding a matter listed in (A)(i)--(iv) of this paragraph has been violated;

(C) neither the estate nor any heir of the former owner may be compelled to pay a deficiency judgment related to the loan; and

(D) the estate or an heir of the former owner has a right of first refusal and may either pay off the loan balance in full, if the former owner had equity in the property, or pay a sum not to exceed 95 percent of the value of the property at the time of exercise of the right of first refusal as determined by an independent real estate appraiser licensed under AS 08.87.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges, or discount rates, then the provisions of the other statute prevail.

Alaska Rule of Civil Procedure 82. Attorney's Fees

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

	Judgment and, if Awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First	$ 25,000	20%	18%	10%
Next	$ 75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their

respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

STATEMENT OF JURISDICTION

This is an appeal from the final judgment entered by the superior court, the Honorable Peter Michalski, dated March 22, 2010. This Court has jurisdiction to consider this appeal pursuant to AS 22.05.010(b) and Appellate Rule 202(a).

PARTIES

The Commercial Fisheries Entry Commission (CFEC) is the appellant.

The appellees are Donald Carlson, Warren Hart, Gerard Haskins, Earl Weese and Lyla Weese, individually and as class representatives on behalf of all persons similarly situated.

ISSUES PRESENTED

1. The State of Alaska charged nonresident commercial fishery entry permit holders a fee determined to be unconstitutionally high compared to fees paid by resident permit holders. What, if any, is the appropriate prejudgment interest rate to be applied to the overpayment?

   a. Does *Carlson III*'s holding that prejudgment interest was owing pursuant to AS 43.10.210—providing for refund of overpaid taxes and license fees—and AS 43.05.280 apply to the judgment in this case, given that no license fees were overpaid and the only refunds are of entry permit fees?

   b. If *Carlson III*'s holding does apply, should this Court reconsider that holding because the circumstances of this case are exceptional, and the holding is clear error and constitutes a manifest injustice?

2. Alaska Civil Rule 82 was intended to provide for partial reimbursement of the prevailing party's attorneys' fees. In cases involving a money judgment this is accomplished by application of a formula that awards the prevailing party a variable percentage of the judgment and prejudgment interest. Did the superior court abuse its discretion by applying the fee schedule for cases "contested with trial" on the basis of a single, limited-issue, three-day evidentiary hearing held in 2000, and awarding Rule 82 attorneys' fees to class counsel of $7,482,569.73, more than $4,500 an

hour, far in excess of actual attorneys' fees incurred, despite the fact that more than 90% of the class received nothing from the lawsuit?

I. INTRODUCTION

This appeal is the culmination of a 25 year lawsuit challenging the constitutionality of the State's nonresident surcharge on commercial fishing license and entry permit fees. [Exc. 1-8] Although the concept of such a surcharge has been found constitutional, the precise formula for determining the permissible scale of the resident to nonresident differential, established only after four visits to the Alaska Supreme Court, has revealed overpayments over the past 25 years or so of approximately $12.5 million. [Exc. 363-4] By virtue of the apparently inadvertent, and clearly erroneous, application of a punitive interest rate intended for an entirely different situation, however, what ought to be a $12.5 million judgment has become a $74,800,697 judgment. [Exc. 363-4] Because this interest rate was applied to refunds of commercial fishing fees based on a decision to equate fishing licenses with taxes, and because no commercial fishing licensees will actually receive any refund (only permittees will receive refunds), the punitive interest rate is inapplicable to the refund actually ordered. [See Section IV. A.] Alternatively, because this extraordinary judgment of almost $75 million is a clear error constituting a manifest injustice, the State is taking the unusual step of asking this Court to reconsider the law of the case. [*See* Section IV. B.]

In addition, the State is appealing the award of Rule 82 attorneys' fees in this case, which, through application of the wrong Rule 82(b)(1) fee schedule to the already extraordinary judgment, without any downward adjustment pursuant to Rule

82(b)(3), compounds the windfall to the prevailing members of the class by awarding nearly $7.5 million in attorneys' fees. [*See* Section IV. C.]

II. STATEMENT OF THE CASE

A. The History of License and Permit Fees For Commercial Fishing in Alaska

In 1949, the Territory of Alaska imposed a license requirement on commercial fishermen, with a fee of $50 for nonresidents and $5 for residents.[1] The Ninth Circuit invalidated the higher fee for nonresidents in 1951, characterizing it as a "discriminatory tax."[2] This holding was affirmed by the United States Supreme Court in *Mullaney v. Anderson*.[3]

In 1959, the new State of Alaska required any person engaged in commercial fishing to hold a commercial fishing license, which cost $10 for residents and $30 for nonresidents.[4] A gear license was also required through 1977.[5] Generally, there was a 3:1 differential between nonresident and resident gear license fees.[6]

In 1973, the State passed the Limited Entry Act "to promote the conservation and the sustained yield management of Alaska's fishery resource and the

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1 Ch. 66, §2, SLA 1949.

2 *See Anderson v. Mullaney*, 191 F.2d 123, (9th Cir. 1951).

3 342 U.S. 415 (1952).

4 Former AS 16.05.480(a).

5 Former AS 16.05.540-650.

6 *Id.*

economic health and stability of commercial fishing in Alaska by regulating and controlling entry of participants and vessels into the commercial fisheries in the public interest and without unjust discrimination."[7] The act created a permitting system to regulate commercial fisheries, administered by the Commercial Fisheries Entry Commission (CFEC or commission), and provided that the commission should establish annual fees for the issuance and renewal of commercial fishing permits.[8] These entry permits were required in addition to the commercial fishing license.[9] The original entry permit fees were the same for residents and nonresidents.[10]

In 1978, a revised statutory scheme abolished the gear fishing license entirely and increased the allowable maximum fees for entry permits. At that time, the CFEC introduced a 3:1 differential in the permit fee paid by nonresidents and residents.[11] The State currently requires commercial fishermen to hold an entry permit or to be licensed individually and be working gear with a person with such a permit.[12] Since

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7 AS 16.43.010(a).

8 AS 16.43.160.

9 *See Carlson v. State, Commercial Fisheries Entry Commission (Carlson I)*, 798 P.2d 1269, 1271 (Alaska 1990).

10 *Id.*

11 *Id.*

12 *See* AS 16.05.450 and 16.43.140.

2005, the CFEC has set the nonresident "surcharge" "at an amount that is as close as is practicable to the maximum allowed by law."[13]

B. Significant Legal Precedent

In *Mullaney v. Anderson*, the United States Supreme Court held that the 10:1 differential between the fee charged to nonresidents and residents for commercial fishing licenses by the Territory of Alaska violated the Privileges and Immunities Clause because the Territory had not shown that the ratio bore any relation to the actual difference in costs created by resident and nonresident fishermen.[14]

In *Pacific American Fisheries v. Mullaney*,[15] the federal district court expressed the view that license fee overpayments could be refunded under § 48-7-1, ACLA 1949, (a territorial tax refund statute that was amended[16] and recodified as AS 43.15.010), effectively holding that the "license fee was a tax within the meaning of the refund statute."[17] The *Pacific American* court did not order any refunds to be made,

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13 AS 16.43.160(c). *See also*, AS 16.05.480(h) providing for the same level of nonresident surcharge on a crewmember fishing license.

14 342 U.S. at 417-18.

15 105 F.Supp. 907 (1952).

16 *Principal Mutual Life Insurance Co. v. State*, 780 P.2d 1023, 1028 n.17 (Alaska 1989).

17 *Carlson I*, 798 P.2d at 1280.

however, holding that, because the plaintiff was a commercial fishing company that had paid the license fee for some of its employees, it was not a "taxpayer" under the statute.[18]

C. The History of This Lawsuit

The most crucial aspect of this case's long history is the decision to apply to overpayment of commercial fishing license and permit fees an interest rate statute applicable to tax refunds, AS 43.05.280. The three key elements in determining the proper interest rate to apply are: (1) the rule that interest cannot be awarded against the state unless the state expressly waives its sovereign immunity for that interest award; (2) the Alaska Statutes include an express waiver of sovereign immunity for pre- and postjudgment interest at a simple rate for certain types of awards;[19] and (3) the interest rate statute applicable to tax overpayments, which this Court applied to overpayment of commercial fishing fees, incorporates a uniquely high rate of compounding interest.[20]

In 1984, this class action lawsuit was filed to challenge the nonresident fee differential under the Privileges and Immunities Clause and the Commerce Clause of the federal constitution. [Exc. 1-8] The class comprised "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to

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18 105 F.Supp. at 980-09.

19 AS 09.30.070.

20 AS 43.05.280; AS 43.05.225(1).

the State for commercial or gear licenses or permits."[21] This case has since been considered by the Alaska Supreme Court on four different occasions.

In *Carlson I*, the Court held that the Privileges and Immunities Clause permitted the state to "equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference."[22] The United States Supreme Court had held in *Mullaney v. Anderson*,[23] that the territory's 10:1 differential violated the Privileges and Immunities Clause, but the Alaska Supreme Court found that the record before it was insufficient to allow it to determine whether the 3:1 differential was excessive, so it remanded the case for this determination.[24]

Carlson I also addressed the question of whether the class could obtain a refund of any overpayments if they prevailed on remand. To answer this question, the Court relied on the territorial district court's dictum in *Pacific American Fisheries* that Alaska's tax refund statute, AS 43.15.010(a) (since renumbered AS 43.10.210) applies to overpayments for fishing license fees.[25] This result was supported, the Court concluded,

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21 *Carlson I*, 798 P.2d at 1270.

22 *Id*. at 1278.

23 342 U.S. 415 (1952).

24 798 P.2d at 1278.

25 *Id*. at 1280.

by the title of Article 4 of Title 43, "Refunds of Taxes and Licenses," and subsection (c) of AS 43.15.010, (now AS 43.10.210(c)), which provided for refunds of license fees when the licensee was prevented from using the license.[26] In 1990, when *Carlson I* was handed down, the revenue statutes provided for a simple interest rate of 12% on unpaid taxes.[27]

Finally, almost as an afterthought, the Court addressed the applicable statute of limitations. It noted that "the superior court has been operating under the assumption that a six-year statute of limitations applies to the class' sought after refund," and found instead that, in fact, the two-year statute of limitations for claims for tax refunds established by AS 43.05.275 should apply.[28]

In *Carlson II*,[29] the Court rejected the class's Commerce Clause challenge,[30] but accepted its *per capita* method – rather than the State's *pro rata* method – for calculating the contribution made by residents to the cost of fisheries management for the purposes of the Privileges and Immunities Clause analysis.[31] The Court again remanded the case, directing the superior court to make calculations under the *per capita*

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[26] *Id*.

[27] Former AS 43.05.225. *See also* Governor Hickel's transmittal letter, SB 158, March 1, 1991, at Exc. 206-07.

[28] 798 P.2d at 1280.

[29] 919 P.2d 1337 (Alaska 1996).

[30] *Id*. at 1340.

[31] *Id.* at 1342.

approach.[32] Additionally, while the Court noted that the class sought a refund of all unlawful fees paid since the lawsuit had been filed "with statutory prejudgment interest calculated under AS 45.45.010,"[33] it declined to decide whether that relief was available. It instead requested a determination on remand of whether the filing of the lawsuit was an adequate protest of the payment under AS 43.10.210 and whether prejudgment interest was payable under AS 45.45.010.[34]

On remand, the superior court held that AS 45.45.010 established a maximum interest rate only, and therefore did not determine the availability of prejudgment interest.[35] However, based on the Supreme Court's application of the Title 43 statute of limitations in *Carlson I*, the superior court held that Title 43's interest statute, AS 43.05.280, also should apply, although the court appeared to believe that that would require interest at the rate identified in AS 45.45.010.[36] Neither party challenged

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[32] *Id.* at 1343-44.

[33] 919 P.2d at 1344. AS 45.45.010 provides in relevant part: "(a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section."

[34] 919 P.2d at 1344.

[35] *Carlson III*, 65 P.3d 851, 874 (Alaska 2003).

[36] Exc. 19 (July 17, 1998 Memorandum and Order of Superior Court Judge Michalski, at p. 7, providing that "Should the class prevail on its claims, the state will be liable for prejudgment interest pursuant to 43.05.280 at the *rate* established by [AS] 45.45.010.") (emphasis added).

the superior court's application of AS 45.45.010 for the rate of interest in the subsequent appeal, *Carlson III*.[37]

In *Carlson III*, the Court declined to re-evaluate its earlier decision on the applicability of the Commerce Clause;[38] determined the appropriate components of the fisheries budget for purposes of calculating whether the non-resident differential was excessive;[39] and held that by filing the plaintiffs' lawsuit, the plaintiffs met the protest requirement of AS 43.10.210.[40]

The *Carlson III* Court also held that the class could recover prejudgment interest under AS 43.05.280 on any refund due.[41] But the opinion referred only indirectly to the actual *rate* of interest. A footnote quoted AS 43.05.280's first subsection, which incorporates by reference only the rate provided for in AS 43.05.225(1).[42] It is thus impossible to tell whether the Court was aware that the rate prescribed by AS 43.05.225 was unusually high – a minimum of 11% *compounded quarterly*. This rate is high by any standards, but is particularly steep in comparison to the variable simple interest rate found

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37 As the plaintiffs proclaimed in their brief filed on December 6, 2001 in *Carlson III*, at page 37 n.18: "The state has not appealed the trial court finding that the rate of interest is determined by AS 45.45.010." Exc. 329

38 65 P.3d at 859-63.

39 *Id*. 864-69.

40 *Id*. at 869-72.

41 *Id*. at 874.

42 *Id.* at 375, Fn. 153

in AS 09.30.070 (the standard prejudgment interest rate imposed by the Alaska courts) or the maximum 10.5% simple interest rate set in AS 45.45.10 (the interest rate referred to in the Supreme Court's remand order in *Carlson II* and in the superior court's order on remand after *Carlson II*.)[43] [Exc. 19]

In *Carlson IV*,[44] the Court held that exact equivalence of the nonresident surcharge with the greater costs paid by state residents was not required and that "incidental inequality" of up to 50% was constitutionally permissible.[45] The effect of this ruling was to dramatically limit the number of class members who are owed refunds. No crew license holders (and only some permit holders) qualify for refunds under this standard.[46] Of the over 95,000 individual class members the CFEC has identified, only 4.9 percent stand to receive any amount, and the amounts so far calculated for those members vary from $212,639.23 for the highest recipient (No. 1) to as little as $1.60 for the lowest (No. 4704).[47]

On remand, the superior court adopted a Refund Administration Plan and entered final judgment for the class in the amount of $82,290,295.94. [Exc. 363-4] Of this amount, $12, 443,959.18 is principal, $62,356,738.10 is prejudgment interest and

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43 919 P.2d at 1344.

44 191 P.3d 137 (Alaska 2008).

45 *Id*. at 146, 148.

46 *See* CFEC website at http://www.cfec.state.ak.us/mnu_Carlson_Information.htm

47 *Id*.

$7,482,569.73 is Rule 82 attorneys' fees. [Exc 281, 344, 363-4] Those two figures for interest and attorneys' fees account for almost 7/8ths of the total judgment.

In determining the Rule 82 award, the superior court applied the fee schedule for a case contested with trial, based on a three day evidentiary hearing held in June 2000. [Exc. 281] The court declined to make any downward adjustment either to reflect the fact that only a small minority of class members will receive any refund or to avoid increasing the windfall created by AS 43.05.225(1)'s punitive interest rate. [Exc 281, 344, 355]

The Commission appeals.

III. STANDARD OF REVIEW

Whether prejudgment interest applies on a refund of overpayments of permit fees — and, if so, the rate of interest that applies — are questions of law, to which the Court applies its independent judgment.[48] Because this Court in *Carlson III* held that such interest may apply, and indirectly established the rate, the doctrine of the law of the case may also be at issue; and that standard is addressed below in Section III.B.

The court reviews an award of attorneys' fees pursuant to Alaska Civil Rule 82 for abuse of discretion, reversing if the award is "arbitrary, capricious, manifestly unreasonable, or the result of an improper motive."[49]

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[48] *Alexander v. State, Dept. of Corrections*, 221 P.3d 321, 324 (Alaska 2009); *Estate of Gregory v. Gregory*, 487 P.2d 59, 64 (Alaska 1971).

[49] *Mt. Juneau Enters., Inc. v. Juneau Empire,* 891 P.2d 829, 834 (Alaska 1995).

IV. ARGUMENT

A. THE SUPERIOR COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON THE REFUNDS AWARDED TO THE PLAINTTIFS

The basis for this appeal is the Court's ruling in *Carlson III*,[50] which resulted in the application of a statute with an extremely high interest rate, intended for tax overpayments, to overpayments of commercial fishing permit and license fees.

In *Carlson I*, the Court had reasoned (1) that the plaintiffs were entitled to refunds for overpayment of commercial fishing license and permit fees under Alaska's tax refund statute, AS 43.15.010 (since renumbered AS 43.10.210), and (2) that the statute of limitations for tax refund claims, AS 43.05.275, applies to the plaintiffs commercial fishing fee refund claims.[51] In *Carlson III*, the Court extended the rationale of that earlier ruling in deciding that the statute for interest owed by the state to persons who overpay their taxes, AS 43.05.280, applies to the commercial fishing fee overpayments as well.[52] Alaska Statute 43.05.280 incorporates by reference another interest rate statute applicable to tax overpayments, AS 43.05.225(1), which prescribes interest of 11%, compounded quarterly. Although the Court never discussed the actual rate of interest applicable to the refunds of commercial fishing fee overpayments, its decision has resulted in the application of this 11% rate, compounded quarterly, to the

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50 65 P.3d 851.

51 *Carlson I*, 798 P.2d at 1280.

52 *Carlson III*, 65 P.3d at 874.

refunds. The final judgment issued on March 22, 2010, by the superior court calculates the total refund due as $12,443,959.18, and the total prejudgment interest due as $62,356,738.10 – an award of interest more than five times bigger than the refund itself.

A key issue underlying the Court's ruling in the *Carlson III* decision was whether the State expressly waived sovereign immunity to allow an award of such a high rate of interest against it. As the Court acknowledged in that decision, "only the Legislature has the power to direct the assessment of interest against the sovereign."[53] This Court has acknowledged that "it has long been recognized that unless interest is specifically authorized by legislative enactment, it may not ordinarily be assessed against that State in any action."[54] When the Legislature has specifically authorized interest to be assessed against the State, it has always been a rate of simple interest, *except* in particular provisions designed for overpayment of taxes or royalties to the Departments of Revenue or Natural Resources.[55] The *Carlson III* decision applied one of these

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[53] 65 P.3d at 875 (quoting *Stewart & Grindle, Inc. v. State*, 524 P.2d 1245 (Alaska 1974)).

[54] *Stewart & Grindle*, 524 P.2d at 1245 (citations omitted). *See also Danco Exploration, Inc. v. State, Dep't of Natural Resources*, 924 P.2d 432, 434 (Alaska 1996) ("[E]xcept where the constitution directs otherwise, interest may not be assessed against the State except where interest is specifically authorized by the legislature."); *Hawken Northwest, Inc. v. State*, 76 P.3d 371, 382 (Alaska 2003) ("We have consistently stated that prejudgment interest may not be assessed against the state unless specifically authorized by legislation."); *Samissa Anchorage, Inc. v. State, Dep't of Health & Soc. Servs.*, 57 P.3d 676, 679 (Alaska 2002) ("In other words, only the legislature can waive the state's sovereign immunity and authorize an award of prejudgment interest against the state.")

[55] *Compare* AS 09.30.070 (simple interest) with AS 38.05.135, AS 43.05.280 and AS 43.55.020 (compound interest).

statutes to the unrelated issue of overpayment of commercial fishing permit and license fees to the Commercial Fisheries Entry Commission.

This unique and extremely high rate of compounded interest indicated by the *Carlson III* decision should not apply to the final judgment issued by the superior court for two reasons. First, this Court's decision in *Carlson IV* resulted in a change to the composition of the plaintiff class that renders the tax interest rate statute inapplicable. Whereas the plaintiff class at the time of the *Carlson III* decision was composed of commercial fishing permittees and licensees, as a result of the *Carlson IV* decision only a small subset of permittees qualify for any refund at all. No licensees will receive any refund. Since the Court's rationale for applying tax statutes under Title 43 was its decision to equate fishing license fees with taxes, the subsequent removal of any licensees from the plaintiff class renders the tax statutes, with their specific high rate of interest, inapplicable to the refund that was ultimately ordered. Only permit fee refunds will be awarded, and the legislature did not clearly waive sovereign immunity for an award of interest on permit fee refunds; therefore the interest rate indicated in *Carlson III* should not apply to the judgment.

Second, the Court's sovereign immunity analysis in *Carlson III*, on which it relied heavily in applying the tax refund statute to commercial fishing fee refunds, was clearly erroneous. Because this case presents exceptional circumstances, and enforcement of the decision would result in manifest injustice, the Court should reconsider its ruling on interest in *Carlson III*.

1. The Superior Court Erred in Awarding Prejudgment Interest, Because the State Has Not Waived Sovereign Immunity for Interest on Overpayment of Entry Permit Fees.

Although this Court held in *Carlson III* that the State would owe prejudgment interest on any refund in this case, this holding should not apply to a final judgment based only on entry permit fees. When *Carlson III* was decided, this case involved a class of approximately 95,000 commercial fishermen, the vast majority of whom had paid nonresident fees for commercial crewmember licenses.[56] In *Carlson I*, the Court reached its conclusion that overpayments could be refunded pursuant to AS 43.15.010 (now AS 43.10.210), by equating fishing license fees with taxes, citing the federal district court's dictum in *Pacific American Fisheries*, and the title of Article 4 of Title 43, "Refunds of Taxes and License Fees."[57] This holding, that Title 43 authorized a refund of license fees led naturally to the Court's decision in *Carlson III* to apply Title 43 interest provisions as well.

But ultimately, the State is not required to refund any *license* fees under the terms of the judgment, because it did not impose a constitutionally impermissible surcharge on commercial fishing *license* fees.[58] The class members who overpaid are a small subset of non-resident entry *permit* holders. This is a critical distinction, and the

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[56] *See* CFEC website for information regarding size of class and number of classmembers who had crew licenses only; http://www.cfec.state.ak.us /mnu_Carlson_Information.htm

[57] 798 P.2d at 1280.

[58] *See* http://www.cfec.state.ak.us/mnu_Carlson_Information.htm

superior court erred when it found no legally significant difference between licenses and permits exists. [Exc. 353] License fees, which function essentially as a tax on participation, have some logical connection to Title 43. Entry permit fees, on the other hand, are entirely a creature of Title 16. They do not function as a tax on participation, but serve a regulatory purpose, as explained in the language of the statute itself: "It is the purpose of this chapter 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 of participants and vessels into the commercial fisheries in the public interest and without unjust discrimination."[59] While anyone may buy a license, which is a revenue-producing device, entry permits are designed to provide a means for the State to monitor and often limit the number of commercial fishing operations in order to assure sustained yield of Alaska's fish resources. [60] An entry permit, therefore, is simply not the same as a tax.

Moreover, the Legislature provided specifically for interest payments on delinquent permit fees in AS 16.43.160(b); *and it did not provide for interest on refunds of permit fees*. This Court employs the maxim of statutory interpretation known as *expressio unius est exclusio alterius*, "which means that to express one thing is to imply

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[59] AS 16.43.010(a).

[60] *See e.g.*, *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1265 (Alaska 1980) (finding that purposes of Limited Entry Act included "1) enhancing the economic benefit to fishermen since too many involved in the industry prevented those relying on fishing for a livelihood from securing adequate remuneration; 2) conserving the fishery; and 3) avoiding unjust discrimination in the allocation of a limited number of entry permits.")

the exclusion of others."[61] When the Legislature provides for interest in a title of the Alaska Statutes, it has clearly considered and determined it to be appropriate; if it had intended in addition that interest should be awarded against the State, it would have done so in the same place. This is hardly "unduly technical"[62] or "a mere matter of form."[63] Because the Legislature did not authorize interest on refunds of entry permit fees in Title 16, it has not waived sovereign immunity with regard to that interest, and because *Carlson III*'s holding was predicated on the assumption that license fees were at stake, that holding is inapplicable to the permit refunds that are all that remain in this case. This is especially true when the interest rate involved is punitive and expresses a public policy determination by the Legislature about tax disputes rather than reflecting economic or compensatory rationales.[64]

2. In the Alternative, this Court Should Reconsider Its Decision in *Carlson III* Relating to Prejudgment Interest

Even if the Court believes that *Carlson III*'s holding regarding prejudgment interest applies to a judgment refunding only permit fees, it should nevertheless reconsider the law of the case and reverse its earlier holding.

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61 *Trapp v. State, Office of Public Advocacy*, 112 P.3d 668, 674 n.16 (Alaska 2005) (citing *Ellingstad v. State, Dep't of Natural Res.*, 979 P.2d 1000, 1006 (Alaska 1999)).

62 *Carlson III*, 65 P.3d at 875 (quoting *Danco*, 924 P.2d at 434.

63 *Id*.

64 This distinction is discussed further *infra* in Section B.2.(b).

The law of the case "is both a doctrine of economy and of obedience to the judicial hierarchy" that applies to previously litigated issues.[65] The law of the case does not apply, however, in "'exceptional circumstances presenting a clear error constituting manifest injustice.'"[66]

a. This case involves exceptional circumstances.

Strict adherence to the law of the case has purpose when a court has actually considered and decided issues based on a deliberate application of the law and a clear understanding of the facts presented. That does not describe the steps that cumulatively have led to the application of prejudgment interest to entry permits in this case.

This lawsuit was originally filed in June 1984 on behalf of the class of nonresident fishermen who had paid nonresident surcharges on commercial fishing licenses, gear licenses or entry permits. The litigation has lasted more than 25 years and has included four previous visits to the Alaska Supreme Court and two failed petitions for certiorari to the United States Supreme Court. One result of the protracted nature of the litigation and the repeated appeals and remands to the superior court is that certain assumptions and rulings made early in the case have had an entirely unanticipated effect on the final judgment.

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65 *Dieringer v. Martin*, 187 P.3d 468, 473-74 (Alaska 2008) (citing *Petrolane Inc. v. Robles*, 154 P.3d 1014, 1026 (Alaska 2007) (quoting *Carlson III*, 65 P.3d at 859)).

66 *Id*.

In the first appeal, this Court accepted the seemingly uncontroversial assumption that the license fees at issue were "taxes" and therefore that a statute providing for recovery of overpayment of taxes and license fees – AS 43.10.210 – should apply in this case. When the Court made that ruling, it was considering only whether overpayments of license fees could be refunded. But based on that ruling, and others that seemed to follow inexorably from it, the State now finds itself liable for more than $60 million in prejudgment interest under a punitive interest rate statute that did not exist when the ruling was issued. This extraordinary result calls for this Court to re-examine the bases of its prejudgment interest holding in this case.

b. The punitive interest rate provided for in AS 43.05.225(1) is inapplicable to overpayments of commercial fishing license and permit fees authorized under Title 16.

The Court should reconsider its *Carlson III* holding that the State must pay prejudgment interest under AS 43.05.225(1) on overpayments of license and permit fees under Title 16 because it rests on a clearly erroneous interpretation of both the applicable statutes and the case law regarding sovereign immunity from interest payments.

i. <u>The State Has Not Authorized Interest Payments Under Title 16.</u>

In *Carlson III*, the State argued that Title 16 – under which the license and permit fees at issue in the case had been charged – does not provide for prejudgment interest and that the State had therefore not waived its sovereign immunity with respect to interest on overpayments. The case law is unequivocal on this point, as the *Carlson III* court conceded: "only the Legislature has the power to direct the assessment of interest

against the sovereign."[67] This Court has acknowledged that "it has long been recognized that unless interest is specifically authorized by legislative enactment, it may not ordinarily be assessed against that State in any action."[68]

The only interest payments the Legislature authorized in connection with commercial fishing licenses and entry permits is the interest the CFEC may charge on delinquent entry permit fees.[69] No statutory authority exists for any other interest on commercial fishing licenses or entry permits.

Nevertheless, the *Carlson III* Court dismissed this legally insurmountable problem, citing *Danco Exploration, Inc. v. State, Dep't of Natural Resources* for the proposition that "we have also held that 'it would be unduly technical to deny [a claimant bringing suit against the state] interest based on a mere matter of form.'"[70] The Court also noted in support of its approach that "the Ninth Circuit allowed prejudgment interest under the territorial predecessor to AS 43.10.210(a)."[71] But neither of these authorities support *Carlson III*'s ruling that it could impose prejudgment interest on the State for overpaid fees despite the lack of explicit authorization for interest in Title 16.

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67 65 P.3d at 875 (quoting *Stewart & Grindle,* 524 P.2d at 1245.

68 *See*, above, footnote 48.

69 AS 16.43.160(b).

70 65 P.3d at 875 (quoting *Danco* 924 P.2d at 434).

71 65 P.3d at 875 (citing *Mullaney v. Hess,* 189 F.2d 417, 420 (9th Cir.1951)).

First, *Carlson III* misstated the holding in *Danco.* The language quoted as a holding – that "it would be unduly technical to deny [a claimant] interest based on a mere matter of form" – is in fact not a holding at all, but is the Court's characterization of Danco's argument. In full, the Court stated: "Since Danco did not purport to bring this claim under section [AS 09.50].250 its claim must be that it could have done so, and that it would be unduly technical to deny it interest based on a mere matter of form."[72] The Court then *rejected* Danco's claim for interest, holding that it could not, in fact, have brought its claim under AS 09.50.250 and, therefore, was not entitled to interest under AS 09.50.280. The Court therefore did not adopt in *Danco* the holding upon which it relied as precedent in *Carlson III.*

Similarly, the Ninth Circuit's decision in *Mullaney v. Hess* actually offers support for the State's claim to sovereign immunity. When the court in *Hess* held that "interest is recoverable on tax refunds in [the] absence of express statutory authority," it explicitly distinguished the cases that the trial court had relied upon to find that interest was not owed.[73] One of those cases, *United States v. Nez Perce County Idaho,*[74] was distinguishable, the Ninth Circuit said, because the court in that case had denied interest under the doctrine of sovereign immunity.[75] In other words, in *Mullaney v. Hess,* the

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[72] 924 P.2d at 434.

[73] *Mullaney v. Hess*, 189 F.2d at 421.

[74] 95 F.2d 232 (9th Cir.1938).

[75] *Mullaney v. Hess*, 189 F.2d at 421.

Ninth Circuit expressly excluded considerations of sovereign immunity from its analysis that interest was recoverable absent express statutory authority.

The *Carlson III* Court also ignored an intervening territorial statute enacted in 1957 that explicitly excluded prejudgment interest against the state. Section 8 of Chapter 170, Session Laws of Alaska 1957, declared "[t]he Territory shall not be liable for interest prior to judgment or for punitive damages."[76] This Court later found that this statute, and its codification into state law, "were intended by the Legislature to include all civil claims and that it was the intent of the Legislature not to permit interest on any claim against the state prior to the date of a judgment."[77] Although the Legislature subsequently amended the law to permit interest against the state in certain circumstances it did not do so in Title 16, and the *Carlson III* Court's reliance on the territorial era holding of *Mullaney v. Hess* was improper because it had been superseded by statute.

Thus, the authorities that the Court relied upon in *Carlson III* do not support the holding that the state may be held liable for interest even absent an explicit statutory provision for interest against the state. Moreover, it is especially important to observe the prevailing rule requiring explicit statutory authorization when, as here, such a policy-based, punitive rate is involved.

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[76] SLA 1957, ch. 170, §8.

[77] *Wright Truck and Tractor Service, Inc. v. State*, 398 P.2d 216, 220 (Alaska 1965).

ii. The application of the tax refund statute, AS 43.10.210, and the statute of limitations in AS 43.05.275 to the overpayments in this case do not require that AS 43.05.280 also be applied to those overpayments.

Similarly misplaced is the *Carlson III* statutory analysis, which reasoned that, because in *Carlson I* the Court had applied the statute of limitations from Title 43 to any refunds due, it should also apply Title 43's interest statute. The Court's primary basis for this decision was its desire to be consistent:

> The introductory language of AS 43.05.275 [establishing the statute of limitations], applied to the present case in *Carlson I*, is fundamentally the same as the introductory language at issue in AS 43.05.280 [authorizing interest on overpayment of taxes] in that both apply to a tax under this title. It is hard to imagine applying section .275 and not section .280 to the present case even if one interprets the latter more strictly than the former. Alaska Statute 43.05.280 applies to all overpayment of taxes under Title 43. This statutory section should therefore apply to the provisions for recovery of overpayments laid out in AS 43.10.210. Because AS [43.10.210] serves as the primary justification for providing the class with a refund, the prejudgment interest available under AS [43.05.280] in other actions extends to the recovery of prejudgment interest for overpayment of commercial fishing fees, even though these are ostensibly created under Title 16.[78]

But the premise relied upon – that the introductory language of both statutes is fundamentally the same – is incorrect and misses the fact that the scope of covered payments is not the same for each statute.

Alaska Statute 43.10.210 provides for refunds of overpayments of all taxes and license fees regardless of originating chapter – and contains no limiting language

[78] 65 P.3d at 875. *Carlson III* reverses the statutory citations in this sentence, but because the refund statute is AS 43.10.210 and the interest statute is AS 43.05.280, appellants have corrected this in the quotation for the sake of clarity.

restricting its application to taxes and licenses "under this title." In other words, nothing in AS 43.10.210 indicates that it is applicable only to taxes or license fees authorized in Title 43. Rather, AS 43.10.210 authorizes refund of all overpayments of taxes and license fees, regardless of the title of the Alaska Statutes that created the tax or license fee.

Similarly, in establishing the timeframes within which refunds of taxes may be paid, AS 43.05.275 applies to "a claim for … refund of a tax under this title…" Because tax refunds *are* authorized in Title 43 – in AS 43.10.210 – for overpayment of any tax (or license fee), whether or not found in Title 43, AS 43.05.275 is properly understood to apply to all refunds authorized in Title 43. In other words, if a refund is authorized by AS 43.10.210, the statute of limitations established in AS 43.05.275 applies.

In contrast, AS 43.05.280 – the interest statute – applies to "*overpayment* of a tax under this title." Because no statute in Title 43 authorizes *overpayment* of a tax, this language in section .280 must refer to overpayments of *taxes authorized in Title 43.* Section .280 therefore applies to a more limited range of overpayments than does AS 43.10.210: overpayments of Title 43 taxes. It does not apply to overpayment of a non-Title 43 permit fee.

Thus, in a universe of overpayments of taxes that includes taxes authorized by both Title 43 and other titles, AS 43.10.210 authorizes the taxpayer to recover all overpayments. And Alaska Statute AS 43.05.275 establishes the statute of limitations for all such refunds – "claim[s] for a refund…under this title." But, AS 43.05.280 does not

occupy a congruent universe because it authorizes interest only on overpayments of taxes created by Title 43, not on permit fees created under Title 16.

Therefore, contrary to *Carlson III*'s analysis, it is not inconsistent and is entirely appropriate to apply the statute of limitations from AS 43.05.275 to the refunds at issue in this case, but not to apply AS 43.05.280 to those refunds.

The logic of this result is also apparent from the punitive interest rate provided for in AS 43.05.280: "Interest shall be allowed and paid on an overpayment of a tax under this title at the rate and in the manner provided in AS 43.05.225(1)."[79] Although *Carlson III* quoted this provision, it did not specify what "the rate … provided in AS 43.05.225(1)" actually was; nor is it clear that either the court or the parties appreciated the impact that section .225(1)'s unique interest provision would have on the judgment in this case.[80] This statute establishes an interest rate on delinquent taxes "at the rate of five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District as of the first day of that calendar quarter, or at the annual rate of 11 percent, *whichever is greater*, *compounded quarterly* as of the last day of that quarter." (Emphasis added).

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[79] AS 43.05.280(a).

[80] For the purposes of illustration, compare the impact of a rate of 11% compounded quarterly to a simple 10.5% interest rate (as suggested by AS 45.45.010) on a million dollars over the 25 year life of this litigation. 10.5% simple interest would turn $1 million into $3.625 million after 25 years. In contrast, 11% compounded quarterly would turn $1 million into just over $15 million after 25 years.

The Legislature did not intend this statutory scheme for interest payments to be applied to overpayment of license fees created in Title 16. The interest rate imposed by AS 43.05.225(1) is punitive, both because the minimum rate of 11% is considerably higher than the Federal Reserve Discount Rate has been at any time in the last decade, but more importantly because of the effect of compounding the interest quarterly.[81] The steep interest rate serves a valid public purpose in the context in which it was intended — to encourage speedy resolution of tax disputes by making delay prohibitively expensive. [Exc. 206-07]. It is common for governments to assure that the cost to taxpayers of "borrowing" owed taxes is much higher than the rate of borrowing from market lenders, to motivate taxpayers to voluntarily pay their taxes. This is particularly important in Alaska, where relatively few taxpayers fund most of the state government.[82] In this context, it is fair to impose an equal interest rate burden on the tax collector if the taxpayer ultimately is found to have overpaid. Thus, under AS 43.05.225(1) and AS 43.05.280(a), the interest rate is the same for both taxpayer and tax collector.

This motivational purpose has no application in the context of Title 16 license fees, however. While taxpayers who are expected to pay taxes periodically and

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[81] The compound interest provision of AS 43.05.225(1) dates to 1991, nearly seven years after this lawsuit was filed. The other interest statutes referred to in this case – AS 09.30.070, AS 45.45.010 and AS 16.43.160(b) – all provide for simple interest. *See Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956 (Alaska 1983) (AS 09.30.070); *Thomson v. Gregory*, 487 P.2d 59 (Alaska 1971) (AS 45.45.010); AS 16.43.160(b) provides for interest not greater than AS 45.45.010.

[82] *See*, *Carlson I*, 798 P.2d at 1278 (recognizing that 86% of State revenues in fiscal year 1986 came from petroleum producers).

voluntarily may require the threat of a hefty interest rate to make a timely, full payment, an entry permit or license applicant will not. These applicants must pay in advance to obtain a permit or license, and their desire to be licensed or permitted will be a sufficient motivation to pay the fees. They will never be in the position of owing back taxes. A high interest rate, compounded frequently, therefore makes no sense in a context where a taxpayer will never be tempted to "borrow" from the government by delaying payment. The Legislature simply would have had no reason to include these fees in AS 43.05.225(1)'s interest rate.

And this interest rate has no place in constitutional litigation of this nature, again because the objective of encouraging a quick resolution is not served. While the Legislature might in some instances determine that public policy supports a compensatory or remedial interest rate, it would have no reason to apply a punitive rate to the State for litigating its attempt to have non-residents bear their burden of the State's management of its fisheries. The State acted in protection of a resource that is valuable and susceptible to overharvest, and it was largely vindicated by the small number of class members who ultimately were found to have overpaid.

Although the distinction between the introductory language in AS 43.05.275 and AS 43.05.280 may seem slight – "unduly technical" and "a mere matter of form" – the State believes that this reading is not only appropriate, but essential, in the larger context of all these statutes. If it seems unlikely that the Legislature intended in AS 43.05.280 to carve out a smaller category of overpayments than that described in AS 43.10.210 upon which to impose interest, it is surely even more unlikely

that it intended (in 1991 when this lawsuit was already proceeding through the courts) to impose a punitive interest rate on the State (with no potential reciprocal advantage to the State) for what was essentially an inadvertent miscalculation of what was permissible for commercial entry permit fees under the Privileges and Immunities Clause. The length of this litigation and the issues considered by this Court in *Carlson III* and *Carlson IV* demonstrate that it was far from clear what the Constitution allowed. The Legislature cannot have intended to penalize the State so severely for a relatively small miscalculation.

c. The prejudgment interest awarded in this case represents a manifest injustice.

The judgment for the class in this case is $74,800,697.28 (not including attorneys' fees and costs) of which only $12,443,959.18 is principal. The remaining $62,356,738.10 is interest, more than five times the amount of the principal. Because the interest rate applied is so far above the standard prejudgment *simple* interest rate provided for in AS 09.30.070, which has ranged from 10.5% per annum when this litigation was filed in 1984 and 3.5% per annum today,[83] this result represents an extraordinary windfall for the class of nonresident entry permit holders of almost $50 million,[84] and a manifest injustice to the State and Alaskan taxpayers.

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[83] *See* Alaska Court System webpage on interest, at http://courts.alaska.gov/int.htm

[84] This calculation first recognizes that not all of the $12,445,614.49 in overpayments "accrued" in 1984 but instead accumulated over the 20-year period 1984-2004. It also assumes that for those claims which arguably accrued before August 7, 1997, the rate of 10.5% per annum simple interest applies and for those claims which accrued on or after August 7, 1997, this year's rate of 3.5% per annum simple

Because the punitive nature the interest rate imposed in AS 43.05.225(1) is appropriate only in the reciprocal context of Title 43 taxes and its application to overpaid permit fees so unwarranted under the statutes and case law, the State respectfully asks this Court, first, to find that the holding in *Carlson III* applying this interest rate in this case was clear error resulting in a manifest injustice, making a departure from the doctrine of the law of the case appropriate; and second, to reverse the superior court's award of prejudgment interest.

Even if the Court finds that this situation is not exceptional enough to warrant overturning the law of the case that prejudgment interest is owed at all, the State respectfully suggests that it ought to reconsider the question of the appropriate interest rate. The rate issue was not briefed or explicitly considered in *Carlson III*. The footnote in *Carlson III* references the statute but does not indicate that the substance of that statute – the actual interest rate, the compounding, or its punitive effect – was part of the Court's analysis. Given that the interest rate in AS 43.05.225(1) is uniquely designed to address a situation confined to Title 43, the Court could rationally conclude that the Legislature did

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interest applies. *See* Alaska Court System webpage on interest, at http://courts.alaska.gov/int.htm. The "blended" rate between those two amounts is about 7%, but an 8.58% rate averaged from the rates for each of the years 1985-2009 might also be used for illustration purposes. It is also recognized in this estimate that the total sum of $12,445,614.49 in principal did not reach that amount until 2004. Principal instead started at zero dollars in December 1984 and was at maybe half (about $6.2 million) its eventual sum by the end of 1994. Therefore, the amount of simple interest for that 24-year period, whether figured at the 7% or 8.58% rate, is about the same as the amount of principal eventually reached in 2004, for a total sum of principal plus simple interest of about $25,000,000. That total sum is roughly double the amount of principal – as compared to approximately five times the amount of principal which results from applying the rate of *11% compounded quarterly*.

not intend to authorize this punitive interest rate in a case like this and apply the general pre-judgment interest rates established in AS 09.30.070 instead.[85]

B. THE SUPERIOR COURT ABUSED ITS DISCRETION IN AWARDING MORE THAN SEVEN MILLION DOLLARS IN RULE 82 ATTORNEYS' FEES TO CLASS COUNSEL

The superior court awarded class counsel in this case approximately $18.9 million in fees against the common fund, offset by nearly $7.5 million in Civil Rule 82 attorneys' fees payable by the State. [Exc. 281, 344] Because only a small fraction of the total class, constituting a limited category of claimants, won a substantial money judgment in this suit, and the State prevailed on many of the issues litigated, this award was an abuse of discretion. In particular, the superior court erred when it applied the Rule 82(b)(1) formula for cases "contested with trial" to the judgment rather than the formula for cases "contested without trial," based solely on a three day proceeding this Court correctly characterized as "an evidentiary hearing" in *Carlson III*.[86] In addition, the extraordinary size of the judgment in relation to the hours worked by class counsel make an unadjusted Rule 82(b)(1) award unconscionable.

Indeed, the formula established in Civil Rule 82(b)(1) provides no protection for a defendant in a case like this, where the judgment – if upheld – constitutes an extraordinary windfall for both the lucky members of the class who are eligible for

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[85] If the Court reverses on the basis of interest, it must also reverse the superior court's awards of attorney fees (discussed *infra*), because roughly 5/6ths of the total "judgment" of principal plus interest to which the court below applied the 10% "contested with trial" schedule provided in Civil Rule 82(b)(1) constituted interest.

[86] 65 P.3d at 858.

refunds and for class counsel. The only defense against this lies in Rule 82(b)(3)(k), under which the court can and should vary the award where warranted by "other equitable factors deemed relevant." By mechanically applying the (wrong) standard Rule 82(b)(1) formula to the windfall sum of the judgment, and ignoring Rule 82(b)(3)(k), the superior court repeated the windfall to the class created by the extraordinary interest rate and imposed a punitive award against the defendant that is far in excess even of full reasonable fees. This was an abuse of discretion and the State respectfully asks this Court to reverse the award.

1. The trial court abused its discretion by applying the formula for cases "contested with trial" when no trial was held in this case.

In performing the calculation provided for under Civil Rule 82(b)(1), the superior court applied the formula for cases "contested with trial." However, the only proceeding in the case that even remotely resembled a "trial" was actually an evidentiary hearing lasting just three days – in the context of 25 years of litigation – to assist the superior court in determining the appropriate components of the fisheries budget to be used in the calculations. The hearing relied mostly on written materials. It could just as easily have been submitted to the court on the written record. The Alaska Supreme Court in *Carlson III* described that proceeding thus: "Left undecided was the issue of what comprised the different components of the formula derived in *Carlson II*. This was

resolved by the superior court at an *evidentiary hearing held June 12-14*, 2000."[87]

Black's Law Dictionary defines "trial" as "a judicial examination and determination of issues between parties to [an] action."[88] In the context of Civil Rule 82's significantly increased award of fees in an action "contested with trial," the term surely contemplates the presentation to a factfinder of an entire case for the purposes of reaching a final determination on the merits, not as here, the presentation of a limited, albeit mixed, question of law and fact. Essential facts for a determination on the merits for each nonresident were simply not considered at this proceeding. The outcome of the hearing was merely a formula for calculating the fisheries budget. Before any final judgment could be made about whether refunds were owed and to whom, a great deal of additional factual information was required, including evidence of who made what payments in which years. And other important legal issues were also yet to be decided as evidenced by *Carlson III* (2003) and *Carlson IV* (2008). Thus, this evidentiary hearing was simply not analogous to the trial contemplated by Rule 82.

The difference between the fee award produced by using the "contested with trial" rather than "contested without trial" formula is more than $5.5 million (mostly attributable to the difference between using 2% versus 10% after the first $500,000 of

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[87] 65 P.3d at 858 (emphasis added). As a result of that hearing this Court partly adopted the State's methodology and partly adopted the plaintiffs' methodology, and the parties partly agreed on methodology, in a relatively simple proceeding. *Id*. Similarly, *Carlson I* was an appeal from summary judgment rulings (798 P.2d at 1273-74), as were *Carlson II* (919 P.2d at 1338-39), and *Carlson IV* (191 P.3d at, 141.

[88] BLACK'S LAW DICTIONARY 1348 (5th ed.1979).

monetary judgment).[89] It was an abuse of discretion for the superior court to make such an award on the basis of a three-day evidentiary hearing that helped resolve just one discrete piece of the case. Rather, the circumstances of this case dictate that a downward adjustment—even of the sum suggested by the "contested without trial" formula—was required.

2. Although a small fraction of the class has won a large money judgment, the State prevailed on many contested issues in this litigation.

Although some members of the class stand to receive substantial amounts from this lawsuit, the class as a whole will receive far less than it sought, and relatively few members will receive anything. Most have not prevailed. Plaintiffs' Complaint filed by Mr. Domke and the Bogle & Gates law firm on June 21, 1984 sought full refunds of all nonresident crewmember license and commercial fishing permit fees going back to statehood, plus interest, without an offsetting allowance of any type. In contrast to that filing, the anticipated refunds in this case, including interest, are based on a period half that long. They also amount to lower principal sums, due to differential credits the State argued for and this Court and the lower court ordered.

Only 4,705 of the 11,896 nonresident commercial fishing permit holders in the class can claim a positive refund at all.[90] And of the 88,649 *Carlson* class members who were identified by the CFEC as holding crewmember licenses at some point between

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[89] The difference between the two schedules for the first $500,000 of judgment is just $18,000.

[90] *See* CFEC list of class members owed refunds at http://www.cfec.state.ak.us/carlson/exhibit1.pdf.

1988 and 2004, only 5,330 (6%) also held limited entry permits at some point and could even possibly be considered for refunds under the standards eventually set by the court, whereas 83,319 did not. [Exc. 204-05]

Therefore, of the 95,215 *Carlson* class members considered for the 20-year qualification period, only 4,705 members (4.9%) stand to receive any amount under the court rulings, and some of those amounts are relatively small and all are mostly interest. The amounts, including interest, so far calculated for that 4.9% of the plaintiffs vary disparately from $212,639.23 ($32,178.30 in principal and $180,460.93 in interest) for the highest recipient to as little as $1.60 for the lowest.[91] The vast majority of the plaintiffs in this case will receive nothing in recovery.

In addition, the State prevailed on a number of key issues in this litigation, including the Commerce Clause question and significant components of the fisheries budget affecting the overall calculations, a fact apparently ignored by the superior court.[92]

Under these circumstances, and given the size of the award suggested by the formula under Rule 82(b)(1) applied to the judgment in this case, the superior court

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[91] *See id.*

[92] *See Carlson II*, 919 P.2d at 1340-41 (rejecting Commerce Clause challenge); *Carlson III*, 65 P.3d at 867-68 (directing superior court to include in fisheries expenditures capital costs directly supporting commercial fishing industry and hatchery loan fund subsidy); 65 P.3d at 868-69 (affirming use of State's methodology for calculating percentage of state budget derived from oil revenue). *See also*, *Carlson IV*, 191 P.3d at 146-48 (holding that incidental inequality is permissible within rational scheme, which dramatically reduced number of plaintiffs who are owed refunds).

abused its discretion by declining to make adjustments to the award to reflect the mixed results achieved by class counsel.[93]

3. Although protracted, the character of this litigation does not justify an attorneys' fee award far in excess of full reasonable attorneys' fees.

The litigation of this case, although lengthy, has not been especially complicated nor required inordinate amounts of plaintiff counsel's time. It was not complex litigation, as in the nature of a large shareholder or construction suit, oil spill or oil and gas tax rate case, serious medical malpractice or environmental damage lawsuit, or similar case involving multitudinous details, documents, and witnesses requiring complex tracking systems and weeks or months of intense trial and usually several different parties and legal counsel. Virtually all of this case has been resolved by motion practice.

This fact is reflected in class counsel's attorney fee records submitted to the superior court. They show that over 25 years he worked a total of 2,702.3 hours on this case, some 1,054.5 of which were devoted to appeals to this Court and petitions for certiorari to the United States Supreme Court. [Exc. 88] Even at counsel's present hourly rate of $200, this would produce a full attorney fee award of $540,460 for all work

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[93] *Shepherd v. State, Dep't. of Fish and Game*, 897 P.2d 33, 44 (Alaska 1995) ("Where each party prevails on a main issue, the court retains the discretion to not award any attorney's fees."); *Tobeluk v. Lind*, 589 P.2d 873, 877 (Alaska 1979) ("there is no immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party"); *Continental Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 552 P.2d 1122, 1125 (Alaska 1976) (same); *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313-314 (Alaska 1972) (same; affirmed trial court determination that party which received affirmative recovery not the prevailing party).

performed on the case, including at the appellate level.[94] And as this Court has noted "attorney's fees for appeals are not awardable by the trial court or governed by Civil Rule 82," but are instead awardable "by an appellate court acting in accordance with Appellate Rule 508."[95] Moreover, this Court has already awarded the class attorneys' fees for the two of the four appeals in which they were considered the prevailing party. [Exc. 84]

Based on the 1,647.8 hours of work performed on this case before the superior court, full attorneys' fees for the class would be $329,560 at class counsel's current hourly rate. In comparison, the trial court's award of $7,482,569.73 in Rule 82 attorneys' fees is shocking. It constitutes a fee award of $4,540.95 per hour, or nearly 23 times counsel's current hourly rate.[96] Even an award based on Rule 82(b)(1)'s formula for a case contested without trial would be excessive in this case, given the windfall interest that is part of the judgment. Applying the percentages provided in Rule 82(b)(1)

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[94] 2,702.3 hours multiplied by class counsel's current hourly rate of $200 produces a full attorney fee of $540,460.

[95] *Marsingill v. O'Malley*, 128 P.3d 151, 163 (Alaska 2006). *See also* Alaska R. Civ. P. 1 & 2 (providing that the Alaska Civil Rules, including Rule 82, apply to civil proceedings in the Alaska "superior court and, so far as applicable, in the district court").

[96] The State notes, in addition, that the superior court awarded class counsel 25% of the common fund or about $18,700,174, an award which is offset by the Rule 82 award against the state. Thus class counsel has actually been awarded fees at an hourly rate of approximately $6,920 ($18,700,174 divided by the 2702.3 hours claimed by class counsel). Although the State has no *parens patriae* relationship with the plaintiff non-resident class members in this case, *cf. State v. Okuley*, 214 P.3d 247 (Alaska 2009), and, therefore, lacks standing to challenge the common fund award, the State also believes that the common fund award is excessive. It represents a multiplier of 34.6, compared with cases cited approvingly by this Court in *Okuley*, suggesting that a maximum reasonable multiplier in common fund cases might be 5. *Id*. at 254, n.42.

for cases contested without trial to the judgment of $74,800,697.28, produces an attorney fee award of $1,520,513.95 or $922.75 per hour. Because the purpose of a Rule 82 award is to "compensate a prevailing party *partially, not fully*, for attorney's fees *incurred* in litigation,"[97] the superior court abused its discretion in making this Rule 82 award.

C. THE STATE'S 3:1 DIFFERENTIAL IN LICENSE AND PERMIT FEES FOR NONRESIDENTS AND RESIDENTS WAS PERMISSIBLE UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

The State hereby incorporates by reference the arguments it made regarding the application of the Privileges and Immunities Clause to the fishing license and entry permit fee differentials in each earlier appeal in this case. The State recognizes that this Court has already decided those issues in earlier iterations of this appeal and therefore does not intend to reargue the issue because the law of the case applies. The application of the Privileges and Immunities Clause to entry permit license fees does not meet the standard of "exceptional circumstances presenting a clear error constituting manifest injustice" as the misapplication of the tax interest rate does in this case. The State is reasserting those arguments here only to preserve them should future appellate proceedings occur.

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97 *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987) (emphasis added).

V. CONCLUSION

Because the *Carlson III* court's holding that prejudgment interest at the rate provided in AS 43.05.225(1) was due on refunds in this case was based on the assumption that license fees would be refunded, but in fact only entry permit fees were overpaid, or in the alternative because that holding was clear error creating a manifest injustice, the Commission respectfully asks this Court to hold that such interest is not due or, at most, that standard rates of prejudgment interest under AS 09.30.070 should apply. And because the superior court abused its discretion by inflexibly applying the "contested with trial" fee schedule from Civil Rule 82(b)(1) to the judgment in this case to arrive at a highly excessive attorney fee award, the Commission also respectfully requests that this Court reverse the attorney fee award and remand to the superior court with instructions to employ the "contested without trial" schedule and then adjust downward as is appropriate in the unusual circumstances of this case.

DATED this 23rd day of March, 2010.

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