
Overview of Hawai'i Legal Issues Related to a Non-commercial Marine Fishing License

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“Is a non-commercial marine fishing license legally possible for Hawai'i?”

When this question has been raised at various points in the past, it has created confusion and triggered very strong emotions. Many people believe, often for different reasons, that it is not legally possible to create a non-commercial marine fishing license in Hawai'i. The purpose of this overview is to explore in detail some of the legal issues that are often raised about this topic, determine whether any of these issues prevent the creation of a non-commercial marine fishing license in Hawai'i, and provide recommendations about what should be considered, if such a license is pursued.

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Issues Raised During Prior Attempts at Legislation

Just in the last 15 years, there have been multiple attempts to pass legislation related to a non-commercial marine fishing license. These legislative efforts have included attempts to:

- create a non-commercial marine fishing license;
- protect funds related to non-commercial fishing from improper transfers for other purposes;
- clarify that federal funds for non-commercial fishing activities could be used for enforcement activities; and
- provide the State of Hawai'i's Department of Land and Natural Resources (DLNR) with the authority to inspect bags and containers that contain aquatic life to strengthen fisheries regulation enforcement efforts.

¹ Conservation International (CI) is a non-profit organization that works to empower societies to responsibly and sustainably care for nature for the well-being of humanity by building on a strong foundation of science, partnership, and field demonstration. The Hawai'i program focuses on ho'i i ke kai momona (return to an abundant ocean) by merging traditional knowledge with Western science, conservation tools, and strategies for changing how people and business value local, sustainable seafood.

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Some of these legislative efforts were successful. Others were not.² Those that were unsuccessful, often became very divisive.

Written testimony submitted in response to two unsuccessful 2014 bills related to the creation of a non-commercial marine fishing license highlight the concerns that often lead to division around this topic.³ These concerns outline some of the issues that need to be explored and understood by the public and by decision makers before any non-commercial fishing license could progress to policy change in Hawai'i.

In summary, these concerns include:

1. ***Do we know enough to create a new license requirement?*** (Do we have adequate science-based data on fish stock assessments to make an informed decision about a non-commercial fishing license? Why will fishers have to pay for something that other ocean users will benefit from and get for free? Why are fishers the target for the fee?)
2. ***Who would have to get a license?*** (Tourists on vacation? Children fishing with bamboo poles? Native Hawaiians? Fishers on charter boats? How will this affect the right of Native Hawaiians to sustain themselves from the land? Won't this just turn Native Hawaiians into criminals?)
3. ***How will the fee schedule be structured?*** (Will nonresidents pay more than residents? Will Native Hawaiians be exempt? How will subsistence and low-income fishers be accommodated? How will "recreation," and "subsistence" be defined? Would you provide a rate for a family or long-term residents? Would there be different rates based on age?)
4. ***What will the fees be spent on?*** (Will they be used to improve enforcement? How can fishers be confident that license fees won't be swept into the General Fund for other purposes? How do we know that the legislature won't cut DOCARE's budget by the same amount that the new license fees bring in to DLNR? How do we avoid a zero-sum game? The problem is not a lack of funding but a lack of will by the Legislature to properly fund DLNR. Can we require the Legislature and the Governor to match funds generated by a license fee?)
5. ***Where will the fees be held?*** (Will a new fund need to be created? How likely is that to be successful? Could that new fund be raided for other purposes?)

² For example, in 2013, a House resolution was introduced that would have directed DLNR to create what was to be called a Marine Game Fishing Task Force. H. Con. Res. 91, H.D. 1, 27th Leg. Reg. Sess. (2013). Ultimately, this resolution was not enacted into law. If it had become law, however, DLNR would have been required to convene a task force that would have specifically considered:

1. Establishing a regulatory framework for marine game fishing similar to that used by the State to regulate hunting;
2. Requiring annual renewal of marine game fishing licenses;
3. The licensing fee amounts, including establishing different fees for residents and nonresidents;
4. The disposition of the licensing fees collected;
5. The feasibility of establishing joint licensure for hunting and marine game fishing; and
6. Potential issues or concerns that marine game fishing licensure might present, such as specifying which activities constitute marine game fishing and addressing concerns regarding native Hawaiian traditional and customary rights.

³ See H.B. 1911, H.D. 1, S.D. 1, 27th Leg., Reg. Sess. (2014); H.B. 1912, 27th Leg., Reg. Sess. (2014).

6. *How would the new license fit in with existing federal requirements?* (Would fishermen that are already federally registered be required to hold a license as well?)
7. *How would this benefit fishers?* (DLNR is not effectively managing or enforcing the existing rules; how will this change? Exactly what would DLNR use these fees for that would benefit fishers?)
8. *How can we trust DLNR?* (How do we know that the license isn't just the first step needed to impose stricter rules and limit more areas to fishing later? How will this stop overharvesting? How do we know that DLNR will enforce the rules to protect the resource after they get the money from the fees?)

The extent to which these questions raise legal issues under Hawai'i law will be analyzed in the following overview.

Exploring the Issues

A. Do we know enough to create a new license requirement?

This is primarily a policy question. From discussions with federal and state fisheries managers who are familiar with the data used for stock assessments, many managers believe that the currently available data about the number of non-commercial fishers fishing in Hawai'i is inconsistent and not comprehensive. Reportedly, this weakness in the available data affects fisheries managers' ability to make reliable, science-based decisions about Hawai'i's nearshore fisheries. Many of these managers have said that they view a state non-commercial marine fishing license as a way to better identify the number of active non-commercial fishers in Hawai'i waters and improve the reliability of the data used to make management decisions.

Hawai'i's nearshore fisheries are under a myriad of pressures that are likely to increase as the human population adjacent to them continues to grow. Fishing is unique from other recreational ocean activities, in part, because when it is successful, it will remove fish from the water. As the resident and visitor populations continue to grow, lacking an ability to know how many people are removing fish from Hawai'i's waters will become increasingly problematic for fisheries managers. They will continue to be unable to fully assess this particular pressure on Hawai'i's fisheries and marine resources. These managers acknowledge, however, that there are other, equally significant, pressures on nearshore fisheries that would not be reduced or even affected by the creation of a non-commercial marine fishing license. These pressures include pollution (land-based and off-shore), habitat loss and destruction, and climate change. These pressures must also be addressed through appropriate and effective tools before comprehensive improvement in the health of Hawai'i's nearshore fisheries can be realized.

Although the question above is primarily one of policy, there are legal issues that may be relevant to it, too, including:

1. Does Hawai'i law prohibit the creation of a non-commercial marine fishing license because it protects the public's right to fish?
2. If it is not prohibited, can the State of Hawai'i require a non-commercial marine fishing license right now?

These issues are explored in more detail below.

1. The Public's Right to Fish

Hawai'i law grants to the people of Hawai'i access to and use of the public fisheries in state waters, but that grant of access and use is subject to the State's right and responsibility to regulate and manage the taking of fish and other aquatic life in order to protect the long-term use of the fisheries.

Article XI, section 6 of Hawai'i's Constitution provides, in part:

The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State.... All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same[.]

Similarly, section 187A-21 of the Hawai'i Revised Statutes (HRS) states:

Except as otherwise provided by law, all fishing grounds appertaining to any government land or otherwise belonging to the government, except ponds, shall be and are forever granted to the people, for the free and equal use by all persons; provided that for the protection of these fishing grounds, the department may manage and regulate the taking of aquatic life.

Based on the plain language of these provisions, the public's right to access and use public fisheries and fishing grounds is subject to the state government's higher right to regulate and manage that access and use for the protection of the fishing grounds. In conversations about this issue, some people have focused on the phrases "free to the public" and "free and equal use by all persons" to interpret these provisions as prohibiting the State of Hawai'i from creating a fishing license or registration system that charges a fee. Other people have focused on the qualifying phrases that follow (i.e. "subject to vested rights and the right of the State to regulate the same" and "provided that for the protection of these fishing grounds, the department may manage and regulate the taking of aquatic life") as allowing DLNR to create a fee-based, non-commercial marine fishing license in order to protect the sustainability of the fishing grounds.

Unfortunately, Hawai'i courts have not yet addressed this exact issue, so these conflicting interpretations cannot be definitely resolved right now. It is instructive, however, that many other states with mandatory, fee-based marine fishing licenses have similar constitutional and statutory provisions that protect the public's right to fish subject to the state's right to regulate fishing.⁴

⁴ See Ala. Const. §39.02, Amendment 5; Alaska Const. VIII, §15; Cal. Const. Art. 1, §25; Fla. Stat. §379.104; Ga. Code Ann. § 27-1-3(a); La. Const. Art. I, §27; R.I. Const. Art. I, §17; S.C. Art. 1, §25; Va. Const. Art. XI, §4.

2. DLNR's Existing Authority

Under the Hawai'i Constitution, the State of Hawai'i has "the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources."⁵ As stated above, the State also has the power to "manage and control the marine, seabed and other resources located within the boundaries of the State[.]"⁶ the State of Hawai'i's authority over aquatic life has been transferred to DLNR, which is directed to manage and administer the coastal areas of the State (except the commercial harbor areas) including aquatic life and all activities on or in those coastal areas.⁷ Specifically, DLNR's powers and responsibilities include:

- managing and administering the aquatic life and aquatic resources of the State;
- gathering and compiling information and statistics concerning the habitat and increase and decrease in aquatic resources in the State; and
- enforcing all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State waters.⁸

Subject to the rulemaking process defined by HRS chapter 91, DLNR is required to adopt rules for and concerning the conservation and allocation of the natural supply of aquatic life in any area, including rules on:

- Size limits;
- Bag limits;
- Open and closed fishing seasons;
- Specifications and numbers of fishing or taking gear which may be used or possessed; and
- Prescribing and limiting the kind and amount of bait that may be used and conditions for entry into areas for taking aquatic life.⁹

Under separate statutes, DLNR has also been given the authority to issue licenses for certain activities related to aquatic life. These include the:

- Aquaculturist license: Allows a qualified aquaculturist to fish, possess, rear, and sell any aquatic life whose fishing, possession or sale is prohibited by closed season, minimum size, or bag limit;¹⁰
- Special activity permit: Good for a year or less and allows the permit holder to engage in an otherwise prohibited activity related to aquatic resources for scientific, education, management, or propagation purposes;¹¹
- Aquarium fish permit: Good for a year or less and allows the permit holder to use fine meshed traps or nets (other than throw nets) to take marine or freshwater nongame fish and other aquatic life for aquarium purposes or to sell them live for aquarium purposes;¹²

⁵ Haw. Const. Art. IX, §8.

⁶ Haw. Const. Art. XI, §6.

⁷ HRS §26-15(b)-(c).

⁸ HRS §187A-2.

⁹ HRS §187A-5.

¹⁰ HRS §187A-3.5.

¹¹ HRS §187A-6.

¹² HRS §188-31.

- Mullet license: Allows the owner or operator of a fishpond to lawfully catch young mullet (pua) during the closed season for the purpose of stocking the owner’s or operator’s pond and to lawfully sell pond-raised mullet during the closed season;¹³
- Baitfish license: Allows holders of a commercial marine license to take nehu, iao, or any other species for use as bait only;¹⁴
- Freshwater game fish license: Required for any person nine years old or older to fish, take, or catch any introduced freshwater game fish;¹⁵
- Out-of-season crab or lobster license: Allows a commercial marine dealer, hotel, restaurant, or other public eating house to sell or serve, during closed season, Kona crabs or lobsters lawfully caught during the open season;¹⁶
- Live coral collection permit: Allows the collection of live stony corals or marine life visibly attached to rocks placed in the water for a commercial purpose;¹⁷
- Commercial marine license: Required for any person taking marine life for commercial purposes whether the marine life is caught or taken within or outside of the State and for any person providing vessel charter services in the State for the taking of marine life in or outside of the State;¹⁸
- Commercial marine dealer license: Allows any commercial marine dealer to sell or offer for sale, to purchase or attempt to purchase, to exchange, or to act as an agent in the transfer of, any marine life taken within the State for commercial purposes;¹⁹
- Commercial marine export license: Allows the license holder to export any marine life taken within the jurisdiction of the State for commercial purpose;²⁰ and
- Conservation district permits: Allows the taking of marine life or engaging in activities otherwise prohibited in the conservation district for scientific, education, or other public purposes;²¹

Importantly, these statutes give DLNR the authority to require a license for anyone taking or catching introduced freshwater game fish (i.e. through the freshwater game fish license) and for anyone taking marine life for commercial purposes (i.e. through the commercial marine license). But none of them provide DLNR with authority to require a license for anyone taking or catching marine life for non-commercial purposes. To allow DLNR to issue and require such a license, the Hawai’i Legislature must amend one of the existing license statutes or create a new statute that provides DLNR with the necessary authority. Such a statute would also need to provide DLNR with the authority to set license fees by administrative rule, if the statute does not identify the fees itself.

Creating or amending a statute can happen only during the legislative session, which in Hawai’i starts every year in the third week of January and generally concludes in May.²² If a new or amended statute were successful in becoming law and giving DLNR the necessary authority, DLNR

¹³ HRS §188-44.

¹⁴ HRS §188-45.

¹⁵ HRS §188-50.

¹⁶ HRS §188-57.

¹⁷ HRS §188-68.

¹⁸ HRS §189-2.

¹⁹ HRS §189-10(a).

²⁰ HRS §189-10(b).

²¹ HRS §190-4.

²² Haw. Const. Art. III, sec. 10.

would still need to adopt administrative rules that define the specifics of a non-commercial marine fishing license, such as how much it would cost and whether any groups of fishers might be eligible for a free license.

This rulemaking process is subject to the requirements of HRS Chapter 91, which requires, among other things, that a proposed rulemaking action by DLNR and the full text of the proposed rules or changes to existing rules be posted on the lieutenant governor's website.²³ Prior to the adoption of any new or amended rules, DLNR must give at least 30 day's notice of a public hearing that will be held on the proposed rules, including the date, time, and place and where interested persons may be heard on the proposed rules.²⁴ DLNR must afford all interested persons the opportunity to submit data, views, or arguments, orally or in writing, on the proposed rules, and DLNR must fully consider these submissions prior to adopting the proposed rules.²⁵ After doing so, DLNR would have the discretion to make a decision on the proposed rules at the public hearing or to announce a date when it intends to make a decision.²⁶

DLNR's decision to adopt or amend any rules would then be subject to approval by the governor.²⁷ After approval by the governor, the new or amended rules must be filed with the lieutenant governor.²⁸ Once filed, the new or amended rules become effective 10 days after filing, unless a later effective date is specified in the rule.²⁹ This rulemaking process can be initiated by DLNR at any time during the calendar year and does not have a specific deadline or timeframe for completion. Informal discussions with DLNR staff indicate, however, that this process generally takes approximately eight months to a year to complete.

In summary, Hawai'i law does not prohibit the State of Hawai'i from establishing a non-commercial marine fishing license. However, DLNR does not currently have the statutory authority required to issue non-commercial marine fishing licenses right now. Since obtaining authority and specifying the required details of a license will require, at minimum, a statutory amendment (which can only happen between January and May of any given year) and a subsequent rulemaking process (which can take an additional eight months to one year), it is likely that even if these processes were initiated tomorrow, a non-commercial marine fishing license would not become a legal requirement for at least another 18 months to two years. If the legislative process must be attempted more than once, the entire process would take much longer to complete.

B. Who would have to get a license?

Through the legislative and rulemaking processes described in the previous section, the State of Hawai'i can create a fee-based license system that applies to all non-commercial marine fishers or one that creates exemptions or fee-waivers for certain categories of fishers. In other states, young fishers (commonly under 16 years) are often exempt from the non-commercial or recreational fishing license requirement. Some states also exempt seniors, disabled individuals, veterans, or active duty military individuals on leave. Other jurisdictions have also chosen to

²³ HRS §91-2.6.

²⁴ HRS §91-3(a)(1).

²⁵ HRS §91-3(a)(2).

²⁶ HRS §91-3(a)(2).

²⁷ HRS §91-3(c).

²⁸ HRS §91-4(a).

²⁹ HRS §91-4(b).

exempt fishers on charter boats (e.g. Massachusetts, Maryland, Puerto Rico, Florida, and South Carolina) and individuals who receive government assistance or are under the care of a government institution (e.g. Florida, North Carolina).³⁰

License exemptions will create categories of fishers that are not required to apply for or obtain a license to fish legally. Providing exemptions, however, can present two main challenges. The first challenge is that license exemptions can create gaps in the data that fisheries managers would rely on to make management decisions. Exemptions can also affect the level of funding that a license may generate in fees for fisheries conservation and management. The greater the number of people qualifying for an exemption category, the more an exemption will reduce the data and funds generated by a license.

The second challenge presented by license exemptions is a practical one. If a state requires fishers to carry a license to prove that they are fishing legally, the state must also identify what kind of documentation a fisher must carry to prove that he or she doesn't need a fishing license. Rhode Island has reported struggling with this issue when trying to properly document an individual's eligibility for a blind or disabled fisher exemption. Rhode Island's state agency found it difficult to determine what proof these fishers needed to carry with them in lieu of a license.

To minimize the data gaps and practical difficulties presented by license exemptions, some states have opted to provide free or reduced-fee special licenses rather than exempting certain categories of fishers from the license requirement altogether. Fee waivers or fee reductions have been provided to resident seniors (often 60 or 65 years and older), disabled individuals, veterans, anglers fishing from public fishing piers or charter boats, low income individuals, or members of federally recognized tribes within the state.

Hawai'i will face a unique practical challenge if it wants to provide free or reduced-fee special licenses to holders of Native Hawaiian traditional and customary rights. In states that offer Native American or indigenous special fishing licenses, the state government usually issues these free special licenses to a tribal authority.³¹ The tribal authority then determines how to appropriately distribute the special licenses to members of the tribe. California, for example, provides a free sport fishing license to low income Native Americans. Fishers must present evidence of income eligibility and a certification by the Bureau of Indian Affairs or proof of being on a tribal registry when applying for the California free sport fishing license. In Hawai'i, there is currently no equivalent tribal registry or tribal authority, so determining how a similar free special license would be issued, and how eligibility for it would be determined, would be more complicated. Because of Hawai'i's unique political history, the models used in other states will not be directly translatable to Hawai'i.

³⁰ Massachusetts (<http://www.mass.gov/eea/agencies/dfg/licensing/who-needs-a-license.html>); Maryland (http://dnr.maryland.gov/service/fishing_license.asp); Puerto Rico (Puerto Rico Fishing Regulations, Ch. III, Art. 16.2 (2004)); Florida (<http://myfwc.com/license/recreational/do-i-need-a-license/>); South Carolina (<http://www.dnr.sc.gov/licenses/genlicense.html>); North Carolina (<http://www.ncwildlife.org/Licensing/HuntingFishingTrappingLicenses/ExceptionsforObtainingaLicense.aspx>).

³¹ Maine (http://www.maine.gov/ifw/licenses_permits/complimentary.htm); Oklahoma (http://www.wildlifedepartment.com/laws_regs/fish1516.pdf).

Ultimately, DLNR has the discretion to determine who would have to get a license, how much it would cost, and who would qualify for exemptions, fee waivers, or free special licenses, as long as DLNR's decisions do not conflict with state and federal law. For example, Hawai'i's existing freshwater game fish license, provides an exemption for fishers under 9 years old, provides free licenses to seniors (65 years or older), and provides a reduced-fee license to members of the U.S. armed forces on active duty in Hawai'i and their families.³² If a non-commercial marine fishing license is created, the main challenge in defining any fee-waivers or special license categories will be protecting the rights of Native Hawaiian traditional and customary practitioners (as required by state law)³³ without defining the fee-waiver or special license by race or ethnicity (which would violate federal law).³⁴

The Native Hawaiian traditional and customary rights that are relevant to this issue are explored in detail in a separate analysis with accompanying recommendations.³⁵ As described in that analysis, the State of Hawai'i has an affirmative duty to protect certain traditional and customary rights related to fishing. Although a non-commercial marine fishing license would not automatically violate these rights, the license cannot regulate these rights out of existence. This means that a fee-based license, at minimum, would need to provide an opportunity for traditional and customary rights holders who cannot afford a license fee to obtain a license for free. If not, the State would likely be vulnerable to a legal challenge based on the rights protected under Hawai'i's Constitution.

C. How will the license fee schedule be structured?

Noting the state law requirements that may require a free or reduced-fee license option based on traditional and customary rights, the State of Hawai'i has discretion in determining how much to charge for a non-commercial marine fishing license. Currently the annual freshwater sport fish license for most residents is \$5, while the license for most nonresidents is \$25. Similarly, a Hawai'i hunting license is \$20 for most residents and \$105 for most nonresidents. Reviewing the fee schedules of fishing licenses in other states, a non-commercial marine fishing license that charges different fees to residents and nonresidents is consistent with the trend seen in a majority of other coastal states.

Non-commercial marine fishing licenses with different fees for residents and nonresidents do not appear to have been challenged in court. There have been legal challenges to commercial fishing licenses that require nonresidents to pay higher fees than residents. This has been the subject of at least one successful federal lawsuit challenging California's non-resident commercial fishing license fees.³⁶ In that case (Marilley v. Bonham), the higher fees charged to non-resident

³² HRS § 187A-9.5; HAR §13-74-10.

³³ See Haw. Const. Art. XII, § 7; Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai), 94 Haw. 31, P.3d 1068 (2000); Public Access Shoreline Hawaii. v. Hawaii County Planning Commission (PASH), 79 Hawai'i 425, 903 P.2d 1246 (1995).

³⁴ See U.S. Const. Amend. XIV ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."); Rice v. Cayetano, 528 U.S. 495 (2000); Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); Corboy v. Louie, 128 Hawai'i 89, 283 P.3d 695 (2011).

³⁵ See "Evaluation of Proposed Hawai'i Noncommercial Marine Fishing Registry, Permit, and License Design Scenarios & Policy Recommendations for Resolving Potential Conflicts with Native Hawaiian Rights," prepared for Conservation International Hawai'i by Malia Akutagawa, Esq.

³⁶ See Marilley v. Bonham, 802 F.3d 958 (9th Cir., 2015) (a class of non-resident fishers who purchased commercial fishing licenses and gear and species specific permits in California and paid higher fees than

fishers for commercial fishing licenses and permits were successfully challenged and found to be unconstitutional based on the Privileges and Immunities Clause of the United States Constitution.

The Privileges and Immunities Clause provides that the citizens of each state are entitled to the same privileges and immunities of other states.³⁷ This was designed to put the citizens of each state on the same “footing” with citizens of other states when it comes to the advantages of state citizenship. The clause creates a national economic union among all the states.

There are circumstances, however, where different treatment between residents and non-residents is allowed. The courts use a two-part test to determine whether different treatment of non-residents violates the Privileges and Immunities Clause:

- (1) Does the challenged restriction deprive nonresidents of a privilege that falls within the protection of the Privileges and Immunities Clause? If yes, then:
- (2) Is the restriction closely related to the advancement of a substantial state interest? If no, then the court will invalidate the restriction.

In Marilley, it was undisputed that the right to pursue commercial fishing was a “common calling” that fell within the scope of the Privileges and Immunities Clause. So the answer to the first question was “yes.” To answer the second question, the State of California had to demonstrate that “substantial reasons” exist for the discrimination against non-residents and that the degree of discrimination bears a close relationship to those “substantial reasons.”

Courts have allowed a state to charge non-residents a different fee to compensate the state for conservation expenses that only residents pay. The Marilley court acknowledged that a state can be compensated for conservation and enforcement expenses, but it concluded that the State of California failed to demonstrate that the additional fees charged to non-residents had a close relationship to taxes that only residents paid. California could have justified the higher fee for non-residents by showing that the higher fee was closely related to the costs of addressing a burden created uniquely by non-residents, or that it was close to the amount in taxes that only residents pay toward relevant state expenses that non-residents also benefit from. California did not make that showing in the Marilley case and lost. Because the Marilley case was decided by a federal appellate court with jurisdiction that includes Hawai‘i, a similar challenge brought against the State of Hawai‘i would likely be decided the same way.

In 2014, a federal lawsuit was filed against the State of Hawai‘i by a commercial fisherman from Oregon.³⁸ The lawsuit challenged the State’s ability to charge higher commercial fishing licenses fees to nonresidents than it charges to residents. A commercial fisherman from California also joined the lawsuit. The argument in this case appears to have mirrored the one made in the Marilley case. To defeat this challenge, the State of Hawai‘i would have needed to demonstrate

California residents successfully sued the State of California for violation of the Privileges and Immunities Clause of the United States Constitution). In the Marilley case, the plaintiffs specifically challenged: (1) a commercial fishing license (\$130.03 for residents, \$385.75 for non-residents); (2) commercial fishing vessel registration (\$338.75 for residents, \$1,002.25 for non-residents); (3) Herring Gill net permit (\$359 for residents, \$1,334.25 for non-residents); and (4) Dungeness Crab vessel permit (\$273 for residents, \$538 for non-residents).

³⁷ U.S. Const. art. IV, § 2, cl. 1.

³⁸ Daranciang, Nelson, “Settlement erases higher fee for fishers from outside state,” Honolulu Star-Advertiser, Jan. 9, 2016.

that the higher nonresident commercial fishing license fees were (1) closely related to costs of addressing a burden created uniquely by non-residents, or (2) close to the amount in taxes that only residents pay toward the State of Hawai'i's expenses relevant to commercial fishing. Ultimately, the lawsuit was settled and the State of Hawai'i agreed not to charge nonresidents higher fees than residents for commercial fishing licenses. At the time of the settlement, resident annual commercial license fees were \$50 and nonresident fees were \$200.

There are fundamental differences between the legal arguments that apply to commercial license fees and those that apply to non-commercial license fees. The commercial license court cases were based on a legal principle that specifically protects business interests. For non-commercial licenses, there is no business interest at issue. For this reason, the commercial license cases do not appear to apply to non-commercial licenses that may charge a higher fee to nonresidents.

D. What will the fees be spent on? Where will the fees be held?

1. State and Federal Protections

There are state and federal law restrictions on how sport fishing license fees could be spent and where they must be held. First, Hawai'i law imposes restrictions on how any license fees collected by the state government can be spent. License fees collected by the state government must be used for purposes that specifically benefit the people who pay the fees (i.e. the license holders). If not, license holders can challenge the license fees as an improper tax and seek to have them invalidated in court.³⁹ Essentially, the argument is that all tax payers must be taxed equally for public benefits that all tax payers receive.⁴⁰ If license holders pay more to the state government than other tax payers, they must receive an extra benefit from the government that other tax payers do not receive.

Second, under state law, all sport fishing license fees must be deposited into an existing special fund, called the Sport Fish Special Fund.⁴¹ This fund was created in 1993 "to establish a sport fish special fund to be administered by the department of land and natural resources and into which sport fishing license and permit fees, and other associated moneys are to be deposited[.]"⁴²

Specifically, the State of Hawai'i must deposit the following into the Sport Fish Special Fund:

1. Money collected as fees for sport fishing licenses and permits, attendance of aquatic resources education programs, use of public fishing areas or other fishing grounds for sport fishing purposes, and use of sport fisheries-related facilities;
2. Money collected in relation to the importation, taking, catching, or killing of any sport fish;

³⁹ Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008).

⁴⁰ Generally, a fee is exchanged for a service rendered or a benefit conferred, and the amount of the fee normally bears a relationship to the value of the service or benefit. Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008). Fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of a society. Id. (quoting National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974)).

⁴¹ HRS §187A-9.5.

⁴² S. Stand. Comm. Rep. No. 1647, in 1993 Senate Journal, at 1348.

3. Most of the money collected as fines or bail forfeitures for sport fishing violations (with the exception of informers' fees);
4. Money collected from DLNR's sale of any items related to sport fish or sport fishing;
5. Monetary contributions or money collected from the sale of gifts made to DLNR to benefit sport fish or sport fishing; and
6. The interest, dividend, or other income generated from the above sources.⁴³

Once deposited, any funds in the Sport Fish Special Fund can only be used for the following:

1. Programs and activities to implement the laws related to aquatic resources and wildlife, including providing state funds to match federal grants under the Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act) for sport fish projects;
2. For acquiring the use, development, or maintenance of trails or accessways into public fishing areas, fishery management areas, marine life conservation districts, or private lands where public sport fishing is authorized;
3. For research programs and activities concerning sport fish conservation and management; and
4. For the importation into, and the management, preservation, propagation, enforcement, and protection of sport fishes in the State.⁴⁴

Limiting Sport Fish Special Fund money to only these uses is required not only by Hawai'i law, but also by federal law. The State of Hawai'i receives funding from the Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act).⁴⁵ Under this Act, the U.S. Fish and Wildlife Service (USFWS) must cooperate with eligible state, commonwealth, and territory fish and wildlife departments to fund fish restoration and management projects.⁴⁶ For eligible states, the USFWS provides funding (often referred to as "DJ funds") to the state fish and wildlife departments for projects that have the purpose of restoring, conserving, managing, and enhancing sport fish.⁴⁷ These federal funds are provided as reimbursement for up to 75 percent of eligible project costs.⁴⁸ This means that a state has to cover the other 25 percent of a project's costs from its own funds or in-kind contributions. To the extent practicable, coastal states (which include Hawai'i) are also required to split DJ funds equally between marine and freshwater projects.⁴⁹

DJ funds are apportioned among the different eligible states and territories based on two ratios: 1) the area of a state's land and coastal waters compared to the total area of all the states combined; and 2) the number of sport or recreational license holders in a state compared to the number of such license holders in all of the states combined. The first ratio determines how 40% of the available DJ funds will be distributed to eligible states, and the second ratio determines how

⁴³ 64 Stat. 430, 16 U.S.C. §§ 777-777n; HRS §187A-9.5(b).

⁴⁴ HRS §187A-9.5(c)-(e).

⁴⁵ 64 Stat. 430, 16 U.S.C. §§ 777-777n.

⁴⁶ Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop-Breaux Act) (64 Stat. 430, 16. U.S.C. §§ 777-777n); see 16 U.S.C. 777 (2015); 50 C.F.R. 80.1.

⁴⁷ The term "sport fish" here means "aquatic, gill-breathing, vertebrate animals, bearing paired fins, and having material value for sport or recreation." 50 C.F.R. 80.5(b).

⁴⁸ See 50 C.F.R. 80.12.

⁴⁹ See 50 C.F.R. 80.23.

the remaining 60% will be distributed.⁵⁰ Regardless of these ratios, however, each eligible state is guaranteed to receive at least 1% of available DJ funds, and no state will receive more than 5%.⁵¹

Hawai'i is a state that receives only 1% of the available DJ funds, which has been approximately \$3.5M per year.⁵² These DJ funds provide approximately 40% of the annual budget for DLNR's Division of Aquatic Resources (DAR).⁵³ To remain eligible for DJ funds, a state cannot divert revenues from sport fishing license fees for purposes other than the administration of the state's fish and wildlife agency.⁵⁴ With DJ funds making up nearly half of DAR's annual budget, it is in the best interest of the State of Hawai'i to remain eligible to receive DJ funds.

One of the requirements of eligibility for DJ funds is that a state must pass legislation that specifically assents to the restrictions and requirements of the Dingell-Johnson/Wallop-Breaux Act.⁵⁵ In particular, this state legislation must prohibit the diversion of any license fees (and revenue from license fees) paid by hunters and sport fishermen to purposes other than the administration of the fish and wildlife agency.⁵⁶ In Hawai'i, the Sport Fish Special Fund was created to satisfy this requirement.⁵⁷ In 2002, the legislature passed amendments to the Sport Fish Special Fund statute to further clarify that the Sport Fish Special Fund is exempt from transfers to the

⁵⁰ See 16 U.S.C. 777c (2015).

⁵¹ Range of DJ funds received by states/territories in FY 2013:

- Territories (1/3 of 1%): ~\$1.2M (American Samoa, D.C., Guam, Virgin Islands)
- Min. State (1%): ~\$3.5M (Hawai'i, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Puerto Rico, Rhode Island, Vermont, West Virginia)
- Middle (≥1% to 4%): ~\$4M-14M (Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, Wyoming)
- Max State (5%): ~17M (Alaska, California, Texas)

⁵² Specifically, Hawai'i's final apportionment of DJ funds for the last three available fiscal years were: \$3.6M (FY2016); \$3.4M (FY2015); \$3.2M (FY2014). See https://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR_Funding.htm.

⁵³ DJ funds are provided in the form of reimbursement for up to 75% of eligible project costs. This means that a state must cover the other 25% of a project's costs from its own funds or in-kind contributions. 50 C.F.R. 80.12.

⁵⁴ 50 C.F.R. 80.4.

⁵⁵ 50 C.F.R. § 80.3.

⁵⁶ 50 C.F.R. §§ 80.3-80.4. Revenues from license fees include income from: 1) general or special licenses, permits, stamps, tags, access and recreation fees or other charges imposed by the State to hunt or fish for sport or recreation; 2) real or personal property acquired or produced with license revenues; 3) interest earned on license revenues; and 4) project reimbursements to the State that were originally funded by license revenues (50 C.F.R. § 80.4(a)).

⁵⁷ S. Stand. Comm. Rep. No. 1647, in 1993 Senate Journal, at 1348 ("The purpose of this bill is to establish a sport fish special fund to be administered by the department of land and natural resources and into which sport fishing license and permit fees, and other associated moneys are to be deposited. ... In 1992, the United States Fish and Wildlife Service requested the department to provide documentation regarding its compliance with the program requirements pertaining to the nondiversion of sport fishing license fees for purposes other than administration of the state fish and game agency. The department explained that although the State was already in compliance, a special fund would resolve any doubt that the State is in compliance.").

General Fund to cover central service and departmental administrative expenses, which were not allowed under federal law.⁵⁸

Although it is possible for the Hawai'i Legislature to transfer funds from the Sport Fish Special Fund into the General Fund by mistake, such a transfer would likely be recognized as a mistake and the funds returned to preserve Hawai'i's eligibility to continue receiving DJ funds.⁵⁹

2. "Sport fishing" vs. "Non-commercial fishing"

The Sport Fish Special Fund statute does not define the term "sport fishing" or "sport fish." Neither do any other Hawai'i statutes. The USFWS regulations, however, define the term "sport fish" as "aquatic, gill-breathing, vertebrate animals with paired fins, having material value for recreation in the marine and fresh waters of the United States."⁶⁰ Additionally, the term "angler" is defined as "a person who fishes for sport fish for recreational purposes as permitted by State law."⁶¹ Assuming these definitions apply to the interpretation of the Sport Fish Special Fund statute, a person who is fishing for paired-fin fish in marine or fresh water for recreational purposes would likely be considered someone who is "sport fishing." Therefore, fees from licenses issued for that activity would clearly be required to be deposited in the Sport Fish Special Fund.

Many managers and fishers view the term "sport fishing" and even the term "recreational fishing" as being too narrow to capture all the kinds of non-commercial fishing activities that take place in Hawai'i waters, such as subsistence fishing, fishing as a regular supplement to a family's diet, bartering, or traditional fishing to perpetuate culture and customs. For this reason, there is often a strong preference to use the term "non-commercial" rather than "sport" or "recreational" to describe a potential fishing license for these activities in Hawai'i.

As currently written, the Sport Fish Special Fund statute would clearly require all fees from a "sport fishing" or "recreational fishing" license to be deposited into the Sport Fish Special Fund, and once deposited, receive state and federal protection from transfers to non-fish conservation or management purposes. Additionally, nothing in the current statutory language would prevent license fees from a "non-commercial fishing license" to be deposited into the Sport Fish Special Fund. However, the current statutory language may not guarantee that all "non-commercial fishing" license fees would be deposited into the Sport Fish Special Fund. Therefore, if a "non-commercial fishing" marine license were created in Hawai'i, to ensure that all license fees must be deposited into the Sport Fish Special Fund, the language of HRS §187A-9.5 should be amended to add "non-commercial" to the description of fishing license fees that must be deposited into the Sport Fish Special Fund.

⁵⁸ S. Stand. Comm. Rep. No. 3550, in 2002 Senate Journal, at 1676; S. Stand. Comm. Rep. No. 2859, in 2002 Senate Journal, at 1381; H. Stand. Comm. Rep. No. 117, in 2002 House Journal, at 1279; H. Stand. Comm. Rep. No. 2538, in 2002 House Journal, at 1449.

⁵⁹ Courts that have addressed the issue of funds transferred from special funds so that they could be used for more general purposes have held that the transferred funds should be returned to the special funds. Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008).

⁶⁰ 50 CFR 80.2.

⁶¹ 50 CFR 80.2.

E. How would a new state license fit in with existing federal requirements?

In 2010, the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) established the National Saltwater Angler Registry (NSAR) program as part of its Marine Recreational Information Program (MRIP).⁶² MRIP is the way NMFS counts and reports marine recreational catch and effort, which provides the basis for fisheries management decisions in federal waters. Prior to NSAR, MRIP relied on a data collection method that involved randomly dialing coastal households to determine the number of people fishing and the number of fishing trips they take in a given year.⁶³ The participants in the random household surveys may or may not have been fishers. With NSAR in place, recreational fishers that fish in federal waters (and some state waters) are now required to register each year with NOAA or through an approved alternative method.⁶⁴ In this way, NSAR provides a "phone book" or registry of people who are actually recreationally fishing.

The registry was created to account for recreational anglers and for-hire fishing vessels that engage in angling and spearfishing for marine and anadromous fish (i.e. species that migrate from marine waters to fresh water to spawn).⁶⁵ NSAR registration requires a fisher to provide his or her name, address, date of birth, current home or cell phone number, and region of the country that he or she plans to fish in. Currently, a \$29 annual fee is required for NSAR registration, which covers the cost of administering the program.⁶⁶ These registration fees go to the Federal treasury and are not designated to support non-commercial fishing activities or any other specific purpose.⁶⁷

There are exemptions from the NSAR registration requirement, however. For example, fishers that obtain a state-issued recreational fishing license are automatically registered with NSAR when they buy the state license. Unlike NSAR registration fees, however, the money paid for a recreational fishing license stays with the state.⁶⁸ As described in a previous section, if the state is a recipient of DJ funds, the recreational fishing license fees it receives must be restricted to fish conservation or management purposes, in order to maintain DJ fund eligibility.⁶⁹ Fishers who are exempt from a state's recreational license or registration requirements and who fish for non-anadromous marine fish in state waters would not be required to register under NSAR.⁷⁰

⁶² NSAR was created through a National Marine Fisheries Service regulation that implements Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 et seq.).

⁶³ NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions:" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

⁶⁴ NOAA Fisheries website, "Frequently Asked Questions:" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

⁶⁵ According to NMFS, generally speaking "angling" and "spear fishing" mean using a hook and line, or a spear, to try to catch fish. Technically, angling and spear fishing include fishing for, attempting to fish for, catching or attempting to catch fish using a hook that is attached to a line that is hand held or by rod and reel (angling) or by a spear or powerhead (spear fishing).

⁶⁶ NOAA Fisheries website, "National Saltwater Angler Registry" <https://www.countmyfish.noaa.gov/register/>

⁶⁷ NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

⁶⁸ NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

⁶⁹ 50 C.F.R. 80.4.

⁷⁰ NOAA Fisheries website, "National Saltwater Angler Registry – Do I Need to Register?" https://www.countmyfish.noaa.gov/register/q_2011_intro.jsp

Therefore, if a non-commercial marine fishing license were established in Hawai'i, fishers who obtain that license would no longer need to register with NSAR. Similarly, marine fishers that are exempt from the Hawai'i license and who only fish for non-anadromous marine fish in state waters would not be required to register with NSAR. However, marine fishers that are 16-years or older that are exempt from the state license requirement, but who fish in federal waters (i.e. beyond 3 nautical miles from shore) or who fish in state waters for anadromous fish would still be required to register with NSAR. It is very unlikely, however, that many fishers would fall into the last category.

F. How would this benefit fishers?

1. Funding for Beneficial Programs, Management Activities, and Research

As briefly described in a previous section, Hawai'i law imposes restrictions on how license fees must be spent. Hawai'i law requires that license fees must be used for purposes that benefit the individuals who pay the the fees (i.e. the license holders). This requirement was stated by the Hawai'i Supreme Court in a 2008 case called, Hawai'i Insurers Council v. Lingle.⁷¹

Based on this case, Hawai'i courts use a three-step test to determine whether a charge imposed by the government will be considered a permissible regulatory fee or an improper tax.⁷² Under that test, the charge in question will be considered a permissible regulatory fee if: (1) a regulatory agency assessed the fee; (2) the agency placed the money in a special fund; and (3) the money is not used for a general public purpose, but rather for the regulation or benefit of the parties upon whom the assessment is imposed.⁷³ This is likely the test that would be used to evaluate the fees charged by any new non-commercial marine fishing license.

In the case of a non-commercial marine fishing license, DLNR (a regulatory agency) would assess the fee. As discussed in a previous section, any fees from such a license would be required by state law to be deposited into the Sport Fish Special Fund.⁷⁴ Therefore, the first two steps of the Hawai'i Insurers Council test would be satisfied. The third step of the test would be satisfied if DLNR actually uses the license fees for the regulation or benefit of the non-commercial fishers who paid the fees.

⁷¹ 201 P.3d 564, 120 Haw. 51 (2008).

⁷² Hawai'i courts have recognized two common types of fees: (1) user fees; and (2) regulatory fees. User fees are "based on the rights of the entity as a proprietor of the instrumentalities used. Id. Examples of user fees include bridge tolls, sewer hookups, and charges for managing wastewater. Regulatory fees (including licensing and inspection fees) are "founded on the police power to regulate particular businesses or activities" and to promote public safety, health, and welfare. Examples of regulatory fees include state fund assessments imposed on insurance companies to protect insurance policy holder, transaction fees for each pawn shop transaction report filed with the police department, and permit, registration, application, license, and franchise fees assessed against telecommunication service providers. Regulatory fees may deliberately discourage particular conduct by making it more expensive or raise money placed in a special fund to help defray an agency's regulation-related expenses.

⁷³ This test is based on the test stated by the U.S. First Circuit Court in San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, 967 F.2d 683 (1st Cir. 1992).

⁷⁴ The Sport Fish Special Fund's explicit prohibition against transfers to the General Fund further strengthens an argument that the license fees are not a tax.

As reported to the Hawai'i Legislature in 2015, the money in Hawai'i's Sport Fish Special Fund and administratively related special funds were used:

- To monitor recreational fishing success and harvest levels with creel censuses, maintain the statewide system of open-water fish aggregating devices, and maintain and improve existing artificial reefs; and
- For salary and operating costs for various projects previously approved by the Legislature, including:
 - to perform education and outreach: conducting fishing education classes, teacher's workshops, educational presentations, public service announcements, displays at appropriate events, presentations to fishing clubs, civic groups, distributing printed materials related to marine and freshwater resources and watershed-based approaches to fisheries management;
 - for the coordination of the Statewide Sport Fish Restoration Program;
 - to review environmental impact statements, permit applications, legislation, investigate fish kills, provide environmental guidance to State, County and private agencies to mitigate freshwater environmental disturbances;
 - for the development and maintenance of man-made shelters and structures (artificial reefs) for attracting and sustaining marine life to new fishing areas, thus improving recreational fishing opportunities;
 - for the management and improvement of the statewide fish aggregation device system;
 - to manage and evaluate the effectiveness of the freshwater public fishing areas and fishery management areas; stock, monitor and assess trout fishing at Koke'e, Kauai, Public Fishing Area;
 - to monitor recreational fishing success and harvest levels with creel censuses, conduct ulua movement patterns study and life histories of marine fishes, and evaluate the effectiveness of bottomfish restricted fishing areas; and
 - to conduct marine research and surveys to improve recreational fishing, e.g. investigations of estuarine habitats, bottomfish movements, and development and improvement of an aquatic resources database.

The use of fishing license fees for the activities above would likely satisfy the third step of the Hawai'i Insurers Council test. If a non-commercial marine fishing license were created, fishers would likely have to benefit from additional investment of funds in activities such as these in order for the license fees to be considered legally valid under state law.

2. Improved Enforcement Efforts

a) Additional Funding for Aquatics Enforcement

In addition to providing additional funding for programs, management activities, and research that benefit fishers, a non-commercial marine fishing license could provide additional funds for aquatics enforcement activities. In conversations with fishers, increased funds for enforcement of fisheries regulations is often cited as a condition of their support for a non-commercial marine fishing license. There has been some confusion in the past about whether it is possible to fund enforcement activities with fishing license fees.

Federal DJ funds generally will not be granted to state fish and wildlife agencies to support projects that involve law enforcement activities to enforce fish regulations.⁷⁵ This does not prevent, however, a state from using the fees it collects from a recreational or non-commercial fishing license (i.e. state funds) to support such law enforcement activities. The USFWS has confirmed to Hawai'i fisheries managers that law enforcement activities specific to fish conservation are very much a part of the administration of state fish and game agencies. As such, a state can fund those activities with state recreational or non-commercial fishing license fees without negatively affecting the state's ability to continue receiving federal DJ funds.

If a non-commercial marine fishing license were created in Hawai'i, the fees collected from that license could be used to support enforcement activities specific to fish conservation. In Hawai'i, such enforcement activities are carried out by DLNR's Division of Conservation and Resources Enforcement (DOCARE).⁷⁶ Unlike states with enforcement officers that exclusively enforce natural resource violations (such as fish and game wardens), DOCARE officers have broad police powers, in addition to their duties to enforce natural resource laws. Their duties apply to the land as well to the marine waters within the State's jurisdiction.⁷⁷ These broader duties mean that if a DOCARE officer observes a non-natural resource violation while on patrol (such as a parking or firearm violation), the DOCARE officer would be required to respond to such violations under Hawai'i law. Any time that DOCARE officer spends responding to a non-resource violation cannot be funded with recreational or non-commercial fishing license fees. If such time was funded by fishing license fees, Hawai'i's eligibility to continue receiving DJ funds would be jeopardized.⁷⁸

What this means is that, to use non-commercial marine fishing license fees to fund permissible enforcement efforts, DOCARE must be able to separately track the time that officers spend on enforcement activities related to fish conservation. DOCARE appears to have this ability in place, as it already receives various sources of restricted funding that require similar documentation and tracking practices. If these practices are followed for any hours funded by non-commercial fishing license fees, Hawai'i could support enforcement activities related to fish conservation with license fees without jeopardizing its eligibility to continue receiving DJ funds.

b) Consent to Inspections

In addition to providing a new source of funding for aquatics enforcement activities, a non-commercial marine fishing license could improve the effectiveness of aquatics enforcement activities that already take place. Currently, by statute, enforcement officers must have probable cause before they can conduct examinations and searches of: (1) the contents of any bag or container of any kind used to carry aquatic life; or (2) any vehicle or conveyance used to transport aquatic life.⁷⁹

Determining whether "probable cause, as provided by law to believe that such bag, container, vehicle, or conveyance contains evidence of a violation of DLNR law or rule" exists in any given

⁷⁵ 50 C.F.R. §80.6. Exceptions to this general rule can be made when these activities are necessary for the accomplishment of project purposes that have been approved by the USFWS regional director.

⁷⁶ HRS § 199-3.

⁷⁷ HRS §§ 199-3; 199-4.

⁷⁸ 50 C.F.R. § 80.5.

⁷⁹ HRS §187A-15.

situation, however, can be difficult and is very dependent on the facts of the situation.⁸⁰ Enforcement officers must establish sufficient probable cause prior to inspecting any bags and containers for every suspected fishing violation or they risk having the enforcement action thrown out of court. This means that even if fishers are caught violating fishing regulations they may not be held accountable for those violations because enforcement officers cannot provide a court with the evidence necessary to prove the fishing violations. This can result in DOCARE officers spending many days in court, rather than on patrol, and the fishing violation cases taken to court may still be thrown out for lack of evidence. This creates a cycle of demoralizing inefficiency for aquatics enforcement efforts.

Since 2007, there have been legislative attempts almost every year to give DOCARE the authority to inspect bags or containers containing aquatic life without the need for probable cause.⁸¹ This legal issue has been identified as a hurdle to effectively enforcing fishing violations.⁸² For comparison, this particular enforcement challenge does not exist for hunting violations, because game mammal and bird hunting licenses require a hunter to consent to these kind of searches as a condition of receiving the hunting license.⁸³ Since no similar license exists for non-commercial marine fishing, legislative efforts have attempted to address the consent to

⁸⁰ State v. Delmondo, 54 Haw. 552 (Haw. 1973) (“Probable cause has been established when it can be said that a reasonable person viewing the evidence would have a strong suspicion that a crime had been committed.”); HRS § 803-5(b) (A law enforcement officer has probable cause to make an arrest when the facts and circumstances within the officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a crime has been or is being committed.)

⁸¹ See S.B. 663, S.D. 1, 24th Leg., Reg. Sess. (2007);

⁸² See S. Stand. Comm. Rep. No. 265 (2007) (“Hawaiian commercial and recreational marine life stocks are depleted, over-utilized, and in danger of irretrievable exhaustion. Although management tools have been enacted, fishery assessment depends on the voluntary cooperation of those who harvest these resources. While most fishers are willingly cooperative, increasing stock scarcity has led to conspicuous instances of obstruction of the efforts by Division of Conservation and Resources Enforcement officers to inspect catch. Your Committee finds that the current probable cause provision under section 187A-15, Hawai‘i Revised Statutes, does provide a degree of constitutional protection while at the same instance, may unduly hinder enforcement officers by preventing them from inspecting containers that may be used to transport fish and other aquatic life. Thus, this greatly weakens the effect of fisheries management measures, such as bag and size limits. While your Committee recognizes the seriousness of repealing the probable cause requirement from section 187A-15, Hawai‘i Revised Statutes, establishing an administrative inspection scheme will enable Division of Conservation and Resources Enforcement officers to better inspect and enforce the State’s fishing laws.”).

⁸³ For example, consent to inspections is a condition of applying for game mammal hunting in public hunting areas. See HAR § 13-123-22(1)(D) (“By signing a hunting license, stamp, tag, or permit, the person agrees to comply with all the terms and conditions of the applicable license, stamp, tag, or permit, as well as applicable laws and regulations; and consents to be subject to inspection for appropriate license, permit, stamp, and/or tag, hunting equipment, and type and amount of game, by a duly authorized representative of the department[.]”); see also HAR § 13-122-12(a)(4) (providing a similar condition for game bird hunting); S.B. 663, S.D. 1, 24th Leg., Reg. Sess. (2007) (“No probable cause is required because the consent to a search occurs when a hunting license is issued.”).

search issue for all aquatics violations by statute.⁸⁴ Those legislative attempts have been unsuccessful.

Many fishers have stated that they are unsatisfied with the current level of fisheries enforcement. Many of them have also stated that they would support a non-commercial marine fishing license, if the license fees would be used for better enforcement. Although it is not likely to be universally supported, many fishers may support increasing DOCARE's enforcement effectiveness (by allowing officers to spend less time in court and more time in the field), even if funding to DOCARE is not increased. If some portion of the money from non-commercial marine license fees was also used to support DOCARE's aquatics enforcement activities, these fishers may consider a non-commercial marine fishing license to be capable of providing noticeable and meaningful benefits to them.

G. How can we trust DLNR?

As with the first question addressed in this overview, this one is really a policy question. Although there are no legal issues that would likely inform this question, some recommendations about process can be made. If the public, particularly fishers of various interest groups, do not trust DLNR, they are unlikely to provide DLNR with more regulatory authority than it already has. As discussed in a previous section, DLNR needs additional statutory authority to issue non-commercial marine fishing licenses. Such statutory authority requires action by the Legislature and support (or at least lack of opposition) from the public, particularly fishers. As previously discussed, even after DLNR is granted authority, however, a lengthy rulemaking process will be required before any new license could be legally mandated. DLNR may rightfully view that the rulemaking process will allow concerned members of the public to influence what a new license would eventually look like. Members of the public who are already distrustful of DLNR, however, may not be willing to allow the necessary statutory authority to be secured, until they know more about the likely details of a new license. Unfortunately, these details are often not available until the later rulemaking stage.

There are two possible ways to bridge the divide that may currently exist between DLNR and a mistrusting public on this issue:

1. Consultation Prior to Legislation: DLNR could engage in a consultation process or create an advisory committee comprised of key fisher group representatives (including traditional and customary rights holders) to advise DLNR prior to seeking the necessary statutory authority. Connecticut, Massachusetts, and Rhode Island utilized a fisher advisory group prior to seeking legislation, and these states currently have in place a fee-based license or permit for recreational marine fishing.
2. Accountability After Legislation: DLNR could also commit to keeping such an advisory committee engaged after statutory authority has been granted and after a non-commercial marine fishing license is in place. This is an approach that has been used in Maryland, Massachusetts, and Rhode Island. In Massachusetts and Rhode Island, the fisher advisory group is also involved in the fisheries department's budgeting process. The fisher group is invited to make recommendations for uses of the license fees during the department's budgeting process and it receives reports at the close of the

⁸⁴ H.B. 1499, H.D. 2, S.D. 1, 24th Leg. Reg. Sess. (2007) (seeking to use an administrative exception to the probable cause requirement and obtain authority to create a valid administrative search scheme to enforce aquatic regulations).

year on how the license fees were actually spent. This approach could provide a way for DLNR to be directly accountable to the fishers and begin to rebuild trust between them.

If DLNR commits to a specific fisher engagement process both prior to and after seeking statutory authority, fishers may be willing to support an effort to provide DLNR with the authority it currently needs to issue non-commercial marine fishing licenses.

Conclusions

To summarize the main conclusions from the legal issues explored in this overview:

1. A non-commercial marine fishing license is not prohibited under Hawai'i law;
2. DLNR does not currently have the legal authority necessary to make such a license mandatory;
3. DLNR requires additional legal authority from the Legislature to issue non-commercial marine fishing licenses and to adopt rules to specify how such a license would work;
4. Securing the necessary legal authority will require support from the general public, particularly from the fishers who would be most impacted by the new license;
5. Whether or not the necessary support can be found will likely depend on whether fishers believe they will gain something meaningful to them after the license is implemented;
6. If a "recreational" marine fishing license were created, the license fees would be required to be deposited into the existing Sport Fish Special Fund. It is less clear if all the fees from a "non-commercial" marine fishing license would be required to be deposited into the Sport Fish Special Fund;
7. Any fees deposited into the Sport Fish Special Fund would be protected by state and federal law from transfers for any purpose other than fish conservation and management;
8. There are traditional and customary rights related to fishing that the State of Hawai'i has an affirmative duty to protect. A non-commercial marine fishing license will not automatically violate these rights, but a fee-based license, at minimum, needs to provide an opportunity for traditional and customary rights holders who cannot afford a license fee to obtain a license for free;
9. License fees could provide additional funding for programs, management activities, and research that benefit fishers;
10. License fees could provide additional funding for aquatic enforcement activities; and
11. A non-commercial marine fishing license could provide a consent to inspection by DOCARE officers for coolers and other containers that might contain evidence of fishing regulation violations, allowing officers to spend more time in the field on patrol and less time in court.

Identifying which of the potential benefits from a non-commercial marine fishing license will be meaningful to fishers will be very important to securing the authority that DLNR needs to issue licenses. For some fishers, it may be meaningful that a license may improve the effectiveness of aquatics enforcement efforts (through the ability to legally inspect coolers of suspected regulation violators more often) and increase the presence of enforcement officers in the field (through

additional funding for aquatics enforcement activities). For other fishers, it may be meaningful that the data that drives fisheries management decisions could be improved and become more reflective of what is actually happening in the water. For other fishers, it may be meaningful to them that the ability to take fish out of Hawai'i's waters will come with a responsibility to give back to the fisheries and to make a tangible investment in their long-term care and sustainability.

Recommendations

H. Based on This Analysis

The conclusions of the legal analysis provided in this overview, suggest the following recommendations:

1. If a non-commercial marine fishing license is pursued, conduct further research into the benefits and drawbacks created by using the term “non-commercial” rather than “recreational” to describe the license. If the term “non-commercial” is used, seek amendment of the Sport Fish Special Fund statute (HRS § 187A-9.5) to add the language “non-commercial” to the description of fees that must be deposited into the fund (i.e. “Moneys collected as fees for non-commercial and sport fishing licenses...”);
2. If a fee-based non-commercial marine fishing license is pursued, provide, at minimum, an opportunity for traditional and customary rights holders who cannot afford the license fee to obtain a license for free;
3. Conduct public engagement and consultation with key fisher groups (including traditional and customary rights holders) prior to seeking the necessary statutory authority for DLNR. At minimum, create a non-commercial marine fishing advisory group comprised of key fisher group representatives to advise DLNR on proposed legislation; and
4. Provide a mechanism for DLNR to be held accountable to fishers after statutory authority to issue a license has been secured. At minimum, DLNR should be required to provide annual reports to the fisher advisory group (and make available to the public) the amount collected in fees from the new license and how those fees were spent. If a portion of the fees is provided to DOCARE for aquatics enforcement, the report should also describe how those enforcement funds were spent.

I. From Other States

During the course of researching these issues, fish agency representatives from states that have created recreational marine fishing license programs within the last seven years offered recommendations to decision makers in Hawai'i, as they consider creating a new non-commercial marine fishing license. Their recommendations include:

- Make sure there is clear communication with the public from the beginning of the engagement process, including clearly articulating the goals of the proposed system, where collected fees go, and who they support.
- Get the head of the fish and game department and higher level officials to convene stakeholders and fisher focus groups to increase fisher buy-in for a new license;

- Get major angler groups to sign off on any proposed system even before going public to get their input early on.
- Once a supportable path forward has been identified, assure individuals who express opposition that “we’ll do the best we can” rather than “no, we can’t do that.”
- Craft a license fee structure with foresight that anticipates future needs. For example, it is difficult to change the age range of license requirements after regulations have been established.
- Involve top levels of resource management in any bill design to encourage their ownership and investment in its success. Maintain clear communication while the bill progresses during the legislative session.
- Present a unified voice of commercial and non-commercial fishers to demonstrate wide public support of the bill.
- Establish a solid partnership with a member of the legislature who can defend any proposed bill during session.
- Prepare the fisher community for the need to protect license revenues at the legislature, if necessary. Provide them with the information they will need to be effective in doing so.
- If possible, a financial argument for self-sufficiency can be persuasive to the legislature. But any limitations on the use of the license revenue needs to be clear.
- Co-mingling of recreational and commercial license funds can be problematic.
- Changes to a proposed bill during the legislative session (without fisher input) can result in significant backlash and subsequent repeal of any law that is finally passed.