

HB

397



Alaska State Legislature

House of Representatives
Special Committee on Fisheries

SPONSOR STATEMENT SSHB 397 FISHERY RESOURCE LANDING TAX & SEAFOOD MARKETING ASSESSMENT

Summary

This legislation is designed to more precisely align the current fisheries resource landing tax (AS 43.77) with the fisheries business tax (AS 43.75) and the ASMI seafood marketing assessment provisions (AS 16.51). This is needed to avoid future legal questions and add a measure of fairness to the tax. Specifically, SSHB 397 clarifies that the landing tax is an occupational tax and equalizes tax rates and credits with the fisheries business tax.

In SSHB 397, the 3.3 percent landing tax which includes .3 percent for ASMI is reestablished to a 3 percent landing tax with a separate .3 percent seafood marketing assessment application. This separates the marketing assessment in the landing tax statutes and equalizes the landing tax with the shore-based fisheries business tax.

Throughout SSHB 397, the term "purchased" is replaced with "produced" in order to eliminate the loophole of those who do not specifically purchase seafood and thereby avoid the ASMI assessment. Then, in Section 14, the word "produced" is then defined to include "purchase, production, landing, or export of a fisheries resource." The point of valuation at which the product is taxed the ASMI assessment does not change with this legislation.

Also, this legislation specifies that a person subject to the landing tax is liable for the .3 percent seafood marketing assessment and that all persons who produce less than \$50,000 in seafood products per calendar year would be exempt from the assessment. This encourages small operator value added processing.

The provisions in SSHB 397 retroactively apply effective January 1, 1994.

Background

Two years ago the Legislature passed the Fishery Resource Landing Tax which established a tax on offshore fisheries which landed product in Alaska. Prior to January 1, 1994, these fishery resources were not subject to any Alaska state fishery tax.

The landing tax provisions apply to fishery resources that are caught and processed outside Alaska's three mile jurisdiction and thereafter brought into the state and first landed in this state. As currently in statute, the Landing Tax levies a 3.3% tax on the value of the unprocessed resource which is landed in Alaska for shipment to market elsewhere.

The 3.3 percent is the same percentage applied to shore-based fisheries businesses under the Fisheries Business Tax and the ASMI provisions combined. Of the 3.3 percent landing tax, ASMI receives .3 percent of the tax collected. 50 percent of the tax revenues collected (excluding the ASMI portion) are shared with local governments. This mirrors the fisheries business tax municipal sharing.

The fisheries business tax has been around since 1949 and applies to those fishery resources that are either caught or processed in Alaska's waters. The landing tax does not apply to fishery resources subject to the fisheries business tax.

Update

The American Factory Trawler Association filed suit on February 17, 1994 in the State Superior Court claiming the Landing Tax discriminated against interstate commerce. The Superior Court dismissed the case for failure to exhaust administrative remedies. The case is now being tried administratively in the Department of Revenue.

H753: DOR 1/17/96

**DEPARTMENT OF REVENUE
INCOME & EXCISE AUDIT DIVISION
SECTIONAL ANALYSIS OF SPONSOR SUBSTITUTE FOR HB NO. 397
A BILL FOR AN ACT ENTITLED**

"An Act relating to the fishery resource landing tax and to the seafood marketing assessment; and providing for an effective date."

Section 1 provides a statement of the legislative findings, intent, and purpose for the imposition of the landing tax. The proviso confirms those findings made by the Department of Revenue in regulations adopted contemporaneous in time with the enactment of the landing tax legislation. This section will make it clear that the landing tax is a compensatory fisheries occupation tax on in-state activities that is intended to complement the fisheries business tax under AS 43.75. Section 1 will strengthen the state position in litigation since it encompasses findings that are currently being disputed by the trawler industry.

Sections 2 through 6 amend AS 16.51.120 to substitute the word "produce" for "purchase". Currently, the seafood marketing assessment is levied on the value of products purchased in Alaska. A processor pays the assessment on a percentage of the value the processor paid for the seafood products. The levy of the assessment on seafood products purchased based on value paid by the processor arguably might not encompass the custom processor and exporter situations where the purchase is not made by the processor. It also would not fit the landing of fishery resources. The value of seafood products produced is addressed in Section 11 to include all these situations.

Section 7 amends AS 16.51.120 by adding a subsection to exempt from the assessment processors, as defined in Section 13, who produce less than \$50,000 in value of seafood products. The tax liability under AS 43 would be unaffected by this exemption. This exemption is consistent with current law.

Sections 8, 9 and 10 are conforming amendments to AS 16.51.130 and AS 16.51.150 to substitute the word "produce" for "purchase".

Section 11 amends AS 16.51.150 by adding new subsections to generally provide that the value of seafood products produced is the sum of the values under AS 43.75.015 (fisheries business tax), AS 43.75.100 (export and custom processor situations under fisheries business tax), and AS 43.77 (landing tax). Thus, the value used for purposes of the ASMI ("ASMI") assessment will be the identical value used for purposes of AS 43.

Section 12 amends AS 16.51.160 to correspond with the change from purchase

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to produce. In addition, a technical correction is made to move the return due date from April 1 to March 31 to correspond to the due dates for fisheries business and landing tax returns.

Section 13 repeals and reenacts AS 16.51.180(3) to define a processor as a person who processes, custom processes, or exports fishery resources and is liable for the fisheries business tax under AS 43.75, or who is liable for the landing tax under AS 43.77.

Section 14 amends AS 16.51.180 by adding a new paragraph to define "produce" as an activity upon which a fisheries business or landing tax liability is imposed. In conjunction with taxpayers other than those subject to the tax under AS 43.75.015 being made subject to AS 16.51, an eligible processor is defined as a person liable for the assessment levied under AS 16.51.120. This gives equal voting and other rights under AS 16.51 to all persons liable for the ASMI assessment.

Sections 15 through 20 make technical amendments to the education credit provisions throughout AS 43 to include the landing tax education credit in the combined \$150,000 limitation.

Section 21 amends AS 43.77.010 by using language similar to that found in AS 43.75 to articulate that the tax applies to a person who engages or attempts to engage in a fisheries business in the state. This provision corroborates the Department of Revenue position that the tax is a business occupation tax, as opposed to a property tax on the resource as argued by the trawler industry.

This section also reduces the tax rate from 3.3% to 3% to coincide with the fisheries business shore based tax rate under AS 43.75. As originally enacted, the 3.3% tax rate was composed of a 3% tax and a .3% Alaska Seafood Marketing Institute levy. The trawler industry attacked the 3.3% as imposing a higher rate under AS 43.77 than is imposed under AS 43.75. This amendment extinguishes that argument by removing the ASMI levy from AS 43.77 to achieve equal tax rates under both AS 43.77 and AS 43.75.

The tax rate for a developing commercial fish species is established at 1% of the value of the fishery resource. Developing fish species are those species designated by Fish and Game under AS 16.05.050. These developing species are eligible for a 1% tax rate under the fisheries business tax provisions. The trawler industry argued that AS 43.77 imposed an unconstitutionally higher tax burden than was imposed under AS 43.75 for these species. The amendment addresses that argument and corrects an unintended consequence of the original legislation.

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Section 22 amends AS 43.77 by adding a new provision to provide an education credit identical to that contained in AS 43.75 and other state tax provisions. The trawler industry argued that the failure to provide equal credits in AS 43.77 was unconstitutional. The amendment addresses that argument and corrects an unintended consequence of the original legislation.

Sections 23 and 26 amend the revenue sharing provision in AS 43.77.050 to repeal the ASMI allocation under AS 43.77 consistent with the amendments in Section 21. All tax revenue will continue to be deposited into the general fund with Community Development Quota tax credits paid from revenue otherwise shared with municipalities.

Section 26 would also repeal, in conformity with value under Section 11, the present definition of value in AS 16.51.180(6).

Section 24 amends AS 43.77.200 to define "engages or attempts to engage in a floating fisheries business in the state" as any part of the comprehensive occupation of harvesting or taking, processing, transportation, or delivery of a fishery resource.

Section 25 provides that the ASMI portion of the current landing tax is to be applied by the Department as a credit against the ASMI assessment that is retroactively imposed under Sec. 27. In practice, the retroactive imposition of the ASMI assessment under AS 16 will only amount to a reallocation of monies paid under AS 43.77 to AS 16.51.

Section 27 provides that the act is retroactive to January 1, 1994. This retroactive application does not create an additional tax liability on any person and effectively averts some of the constitutional arguments advanced by the trawler industry.

Section 28 provides that the act takes effect immediately.

Table 9 - Fishery Resource Landing Tax

	FY 95	FY 94 *	FY 93 *	FY 92 *	FY 91 *	Total All Years
Borough						
Aleutians East	\$ 3,641	-	-	-	-	\$ 3,641
Kenai Peninsula	10,315	-	-	-	-	10,315
Kodiak Island	18,533	-	-	-	-	18,533
Yakutat	3,266	-	-	-	-	3,266
Total Boroughs	35,756	-	-	-	-	35,756
City						
Alka	8,511	-	-	-	-	8,511
Kodiak	60,164	-	-	-	-	60,164
Saint Paul	229,839	-	-	-	-	229,839
Sand Point	1,042	-	-	-	-	1,042
Seward	45,036	-	-	-	-	45,036
Unalaska	2,512,253	-	-	-	-	2,512,253
Total Cities	2,858,845	-	-	-	-	2,858,845
GRAND TOTAL	\$2,892,601	-	-	-	-	\$2,892,601
Number of Communities Subject to Sharing	10	0	0	0	0	10
Additional Sharing with DCRA **	\$89,195	N/A	N/A	N/A	N/A	\$89,195

* Fishery resource landing tax took effect January 1, 1994. Calendar year 1994 landing tax returns were due June 30, 1995.

** As part of the fisheries resource landing tax statute enacted by the 1993 legislature, section 43.77.060(d) authorizes sharing 50% of fisheries resource landing tax revenue for landings in the unorganized borough (Ch 67 SLA 1993). DCRA is responsible for disbursing the 50% share of revenue to eligible communities.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SS for HB 397

Revision Date: January 29, 1996 Department: Commerce and Economic Development
 Title: An Act relating to the fisheries resource landing and the seafood marketing assessment; BRU: Alaska Seafood Marketing Institute
 Component: Alaska Seafood Marketing Institute
 Sponsor: Austerman
 Requestor: House Special Committee on Fisheries COMPONENT SERIAL NO. 393

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	1,300.0	700.0	700.0	700.0	700.0	700.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1,300.0	700.0	700.0	700.0	700.0	700.0

CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts	1,300.0	700.0	700.0	700.0	700.0	700.0
1006 GF/MHTIA						
Other						
TOTAL	1,300.0	700.0	700.0	700.0	700.0	700.0

Estimate of any current year (FY 96) cost: \$ _____

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS (Attach a separate page if necessary)

SS HB 397 amends AS 16.51.120(a) to include floating processors in the seafood marketing assessment. This assessment will generate up to \$700,000 of additional program receipts per year for the Alaska Seafood Marketing Institute to utilize in marketing Alaska seafood products.

Prepared by: Dwayne Peoples Phone: 465-5571
 Division: Alaska Seafood Marketing Institute Date: January 29, 1996
 Approved by Commissi: William L. Hensley Date: 1-29-96
 Agency: Commerce and Economic Development

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SS HB 397

ANALYSIS: (continued)

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT Fiscal Note Calculations for SS HB 397

The seafood marketing assessment is a tax levied on the value of seafood products produced in Alaska to be utilized for promoting seafood consumption. The assessment is a voluntary tax which can be terminated by the Commissioner of the Department of Revenue with approval of the eligible processors who together purchase 51 percent of the value of the products, or by a vote of two thirds of the Alaska Seafood Marketing Institute (ASMI) Board of Directors as specified in AS 16.51.130.

The funds generated from this assessment are collected by the Department of Revenue and transferred to ASMI to be use in generic promotion of Alaskan seafood products. In order to comply with the statutory intent for these funds, ASMI is requesting program receipt authority of \$1,300,000 in FY 97 to expend those fund collected in 1994 and 1995 as prescribed by Section 28 of SS HB 397. In addition, ASMI is requesting \$700,000 authority in the subsequent years for the same purposes.

CONTRACTUAL: Purchase of advertising, and printing services to promote the consumption of Alaskan seafood products.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SS for HB 397

Revision Date: January 17, 1996
 Title: An Act relating to the fisheries resource landing tax
and the seafood marketing assessment;
 Sponsor: Austerman
 Requestor: House Special Committee on Fisheries

Department: Commerce and Economic Development
 BRU: Alaska Seafood Marketing Institute
 Component: Alaska Seafood Marketing Institute
 COMPONENT SERIAL NO. 393

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	1,300.0	700.0	700.0	700.0	700.0	700.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1,300.0	700.0	700.0	700.0	700.0	700.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts	1,300.0	700.0	700.0	700.0	700.0	700.0
1006 GF/MHTIA						
Other						
TOTAL	1,300.0	700.0	700.0	700.0	700.0	700.0

Estimate of any current year (FY 96) cost: \$ _____

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Sec. 5 AS 16.51.120(d) as amended by SS HB 397 will generate up to \$700,000 of program receipts per year for the Alaska Seafood Marketing Institute to utilize in marketing Alaska seafood products. These funds will be utilized to purchase advertising and promotional services to increase the consumption of seafood products.

Section 27 of this bill would allow ASMI to utilize an estimated \$1,300,000 collected from 1994 and 1995 which is held in escrow by the Department of Revenue. These fund will be received and expended in FY97.

Prepared by: Dwayne Peoples
 Division: Alaska Seafood Marketing Institute
 Approved by Commissioner: William L. Hensley
 Agency: Commerce and Economic Development

Phone: 485-5571
 Date: January 18, 1996
 Date: 1-16-96

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LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Revenue
 Title: Fisheries Resource Landing Tax & ASMI BRU: Audit Operations
 Component: Income and Excise Audit
 Sponsor: Rep. Austerman
 Requestor: (H) FSH Committee COMPONENT SERIAL NO. 113

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost \$ 0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The statutory amendments requested in SSHB 397 have no financial impact on the operating budget of the Department of Revenue. There may be a very small impact on revenues. Section 21 of the bill amends the Fishery Resource Landing Tax to change the tax rate on developing species from 3% to 1%. This change impacts a very small portion of seafood products taxed and could reduce revenues by less than 2 tenths of 1% (approximately \$8,000).

Prepared by: Robert Bartholomew
 Division: Income and Excise Audit
 Approved by Commissioner: _____
 Agency: Department of Revenue

Phone: 465-2320
 Date: 1/16/96
 Date: 1/16/96

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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 AMERICAN FACTORY TRAWLER)
4 ASSOCIATION,)
5)
6 Plaintiff,)
7)
8 v.)
9)
10 STATE OF ALASKA, WALTER J. HICKEL)
Governor of the State of Alaska,)
DARREL J. REXWINKEL, Commissioner)
of Revenue of the State of Alaska,)
11 Defendants.)

12 Case No. 1-JU-94-177 Civil

13 REPLY MEMORANDUM AND OPPOSITION TO DEFENDANTS'
14 CROSS-MOTION FOR SUMMARY JUDGMENT

15 Most of the arguments raised in the State's Memorandum
16 have already been extensively discussed in our opening
17 memorandum. There is no need to repeat that discussion here.
18 This reply will first address the procedural arguments raised
19 by the State -- standing and exhaustion of administrative
20 remedies. We will then review the substantive constitutional
21 issues, focusing on only a few aspects of the State's arguments
22 -- those that we believe demonstrate in and by themselves the
23 complete lack of merit to the State's position.

24 I. AFTA HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY
25 OF AS 43.77 AND NEED NOT FIRST PURSUE ADMINISTRATIVE
26 REMEDIES.

The State initially claims, as a procedural matter, that
AFTA has no standing to raise the constitutional issues and

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2 Emerald Resource Management, Inc.; Glacier Fish Company, Ltd.;
3 Golden Age Fisheries; Golden Alaska Seafoods; Morning Star
4 Fisheries; M/V Savage, Inc.; Oceantrawl Inc.; and Premier
5 Pacific Seafoods, Inc.

6 2. Defendant State of Alaska is a sovereign State of the
7 United States; defendant Hickel is Governor of the State of
8 Alaska and is responsible, under Article III, sec. 16, of the
9 Alaska Constitution, for the faithful execution of the laws of
10 the State; defendant Rexwinkel is the Commissioner of Revenue
11 of the State of Alaska and under AS 44.25.020 has the specific
12 duty of enforcing the tax laws of the State.

13 3. Fish are caught and processed by AFTA's members in the
14 Gulf of Alaska and Bering Sea off the coast of Alaska but
15 outside of the territorial waters of the State of Alaska in
16 what is designated as the Exclusive Economic Zone of the United
17 States. After the fish are caught, they receive primary
18 processing on board the vessels owned or operated by AFTA's
19 members. The fish are cleaned, headed and gutted, and then
20 processed into a variety of product forms such as surimi,
21 fillets, blocks and related by-products before being frozen on
22 board the vessels. The frozen product is then stored on the
23 vessels in refrigerated holds.

24 4. From time to time during the course of a fishing
25 season, some of the vessels owned or operated by AFTA's members
26 and carrying processed fish enter Alaskan territorial waters

1
2 for the purpose of transferring the processed fish to other
3 vessels for continued transportation of the products to foreign
4 or domestic destinations. In some instances, the fish is
5 simply transferred from one vessel to another while the vessels
6 are at sea but inside territorial waters; in other instances,
7 the ships may dock at Alaska ports for the purpose of transfer.
8 After being transferred, all of the previously processed fish
9 is promptly transported out of Alaska.

10 5. Approximately 75 percent of the total fisheries
11 resources taken and processed by AFTA's members on the high
12 seas is sold to foreign purchasers and transported by ship to
13 foreign countries, primarily Japan and Korea. The remaining 25
14 percent is transported by ship and motor transportation to
15 various final destinations within the United States for sale or
16 further processing. In the course of transportation, the
17 fisheries products enter the jurisdictions of various states
18 and foreign countries outside of Alaska, where the products are
19 either transferred from one form of transportation to another
20 and then moved to new jurisdictions or unloaded for additional
21 processing or sale.

22 6. In 1993, the Alaska legislature adopted Ch. 67, SLA
23 1993, "An Act levying and providing for the collection of and
24 disposition of the proceeds of a fishery resource landing tax."
25 The Act is set out in AS 43.77.010 -- AS 43.77.200. AS
26 43.77.010 imposes a tax of 3.3 percent on the entire

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unprocessed value of any fishery resource "that is brought into the jurisdiction of, and first landed in," the State of Alaska. "Landing" a fishery resource in the State is defined in AS 43.77.200 to mean "the act of unloading or transferring a fishery resource" in the State.

7. Ch. 67, SLA 1993 became effective on January 1, 1994, and AFTA's members are required, under the terms of the Act, to file returns and taxes on April 1 of each year, beginning in 1995, on the unprocessed value of any fish "landed" in Alaska during the previous calendar year. The tax applies to fish that were caught and processed outside of Alaska by AFTA's members.

8. AS 43.77.010 provides that persons who pay tax under AS 43.75 are exempt from payment of the landing tax. AS 43.75 imposes a tax on persons engaged in "a fisheries business," inside of the State of Alaska. A "fisheries business" is defined in AS 43.75.200 as "processing fisheries resources for sale by freezing, cooking, salting, or other method and includes but is not limited to canneries, cold storages, freezer ships, and processing plants."

9. The landing tax under AS 43.77 and the processing tax under AS 43.75 do not impose equal tax burdens. For example, the tax rate imposed under the processing tax (AS 43.75.015) on persons who land raw fish in the state and process them on shore in Alaska is 3 percent of the unprocessed value of the

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fisheries resources; the tax rate imposed under the landing tax (43.77) on persons who merely unload or transfer processed fisheries products in Alaska and do not catch or process them at all in Alaska is 3.3 percent of the unprocessed value of the harvested fish. The processing tax (43.75) provides for tax credits for certain contributions that may be applied against 100 percent of the taxes owing under the processing tax on the value of 100 percent of the fisheries resources processed by in-state processors; tax credits under the landing tax for similar contributions may be applied against only 45.45 percent of the taxes owing on the value of only those fish taken under a community development quota. The processing tax (AS 43.75.015) provides for a tax rate of 1 percent on shore based processors for fisheries resources that have been designated by the Commissioner of Fish and Game as "developing species"; "developing species" that are taken and processed outside of Alaska but unloaded or transferred in Alaska are taxed under the landing tax at the rate of 3.3 percent of the unprocessed value of the fish.

10. The landing tax under AS 43.77, imposed on fish caught and processed outside of Alaska's jurisdiction, but not imposed on a fisheries business conducted within the State, provides an economic advantage to those persons who conduct fisheries businesses within the State. The advantage stems both from the fact that an in-state fisheries business need not

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1
2 pay the landing tax at all, and from the fact that an in-state
3 fisheries business pays a lower total tax for unloading,
4 transferring and processing fish in Alaska than an out-of-state
5 processor pays for merely unloading or transferring previously
6 processed fisheries resources within Alaska.

7 11. An unapportioned tax imposed on the full value of
8 fisheries resources, landed in Alaska solely for the purpose of
9 subsequent shipment through and landing in a variety of other
10 states and foreign jurisdictions, unfairly subjects the
11 fisheries resources to the risk of multiple taxation in all
12 jurisdictions in or through which the fish is landed or
13 transported, and constitutes a deterrence to the free movement
14 of goods in interstate and foreign commerce.

15 12. Article I, Sec. 8, of the Constitution of the United
16 States provides that Congress has the authority to "regulate
17 commerce with foreign nations, and among the several states . .
18 ." Pursuant to this allocation of governmental responsibility,
19 individual states are prohibited from imposing taxes that place
20 a heavier burden on businesses involved in interstate or
21 foreign commerce than imposed upon businesses carrying on
22 similar business activities purely within the boundaries of the
23 State. Taxes imposed on interstate and foreign business
24 activities must be non-discriminatory and must be fairly
25 allocated dependent upon the proportion of the total interstate
26 business activity that takes place within the State.

1
2 13. AS 43.77 unlawfully discriminates against interstate
3 commerce in violation of Article I, Sec. 8, of the United
4 States Constitution in that:

5 (a) the activity taxed has an insufficient nexus
6 with the State of Alaska to justify imposition of any tax;

7 (b) the tax discriminates against interstate and
8 foreign commerce in favor of purely local activities;

9 (c) the tax is not fairly apportioned;

10 (d) the tax is not fairly related to services
11 provided by the State of Alaska.

12 14. AS 43.77 unlawfully discriminates against foreign
13 commerce in violation of Article I, Sec. 8, of the United
14 States Constitution for the reasons outlined in Paragraph 13 of
15 this complaint and for the additional reasons that:

16 (a) the tax, even if were fairly apportioned (which
17 it is not) creates a substantial risk of international multiple
18 taxation; and

19 (b) the tax prevents the federal government from
20 speaking with one voice when conducting commercial relations
21 with foreign governments.

22 15. AS 43.77, to the extent that it taxes the value of
23 fisheries resources that are brought into Alaska for the sole
24 purpose of transferring them to vessels for export to foreign
25 nations, imposes a tax on exports in violation of Article I,
26 Section 10, Clause 2, of the United States Constitution.

1
2 16. AS 43.77 is in direct conflict with economic and
3 resource management policies and purposes of the United States
4 government as set forth in 16 U.S.C. sections 1801 et seq. (the
5 Magnuson Act), and therefore void as in violation of Article VI
6 of the United States Constitution (the Supremacy Clause).

7 17. AS 43.77 violates the equal protection clauses of
8 Article I, sec. 1, of the Alaska Constitution and Amendment
9 XIV, sec. 1, of the United States Constitution.

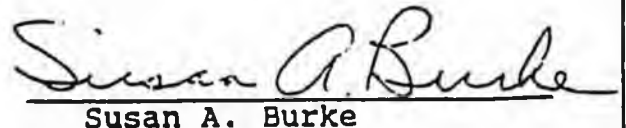
10 WHEREFORE, AFTA requests that this court issue a judgment:

- 11 (a) declaring AS 43.77 invalid and unconstitutional;
12 (b) permanently enjoining each and every defendant
13 and their agents from taking any action to enforce collection
14 of the tax;
15 (c) awarding AFTA its costs and attorneys fees;
16 (d) for such other relief as the court deems
17 appropriate in the circumstances.

18 DATED this 17th day of February, 1994 at Juneau, Alaska.
19
20

21 GROSS & BURKE

22 
23 Avrum M. Gross

24 
25 Susan A. Burke

26 COUNSEL FOR AMERICAN
FACTORY TRAWLER ASSOCIATION

THIS MATTER IS FORMALLY
ASSIGNED TO
LARRY R. WEEKS
SUPERIOR COURT JUDGE

1 eastern markets." 8/ Yet the State, nonetheless, claims that
2 the Landing Tax "does not tax property moving through the
3 State." It is hard even to understand this position. If, for
4 instance, a catcher/processor vessel comes in from the high
5 seas, anchors in the "protected waters of Southeast Alaska" for
6 a few days and continues with its cargo to Seattle, the State
7 would apparently recognize that the taxpayer is "only moving
8 property through the jurisdiction" and is "not subject to tax."
9 If the same vessel, however, anchors in the same protected
10 waters and unloads its cargo to a tramp steamer through
11 stevedoring (which is uniformly recognized as an integral part
12 of the shipment of goods in interstate commerce) 9/ that
13 activity apparently makes some kind of difference and confers
14 power on the State to tax an entire "occupation" which, of
15 course, is not defined in the act and which the State makes no
16 real effort to define even in its memorandum.

17 The Landing Tax is clearly not an occupation tax. It is
18 not defined as one and it could not reach the occupation of
19 offshore harvesting and processing even if it purported to do
20 so. It is, plainly and simply, a tax on property being
21

22 8/ (State's Memorandum at p.1.) Actually, as noted in
23 our opening memorandum and supporting affidavit, the fisheries
24 products are either loaded on tramp steamers or delivered to a
25 common carrier. In either case, the transportation to
26 interstate and foreign destinations continues and the fisheries
products are immediately removed from the State.

9/ Puget Sound Stevedoring Co. v. State Tax Commission,
302 U.S. 90, 82 L.Ed. 68 (1937); Joseph v. Carter & Weeks
Stevedoring Co., 330 U.S. 442, 91 L.Ed. 992 (1947); Washington
Revenue Department v. Association of Washington Stevedoring
Cos., 435 U.S. 734, 55 L.Ed.2d 682 (1978).

1 transported by a series of vessels through the state to other
2 states and foreign countries. 10/ The State itself recognizes
3 that goods purely in transit were never meant to be subject to
4 the Landing Tax. We emphasize here that the immunity of such
5 goods from taxation is not simply a matter of legislative
6 choice; it is a matter of constitutional necessity.

7 B. Nexus.

8 The State spends much of its argument on nexus seeking to
9 demonstrate that the AFTA members' vessels that enter Alaskan
10 waters for a few days a year cause sufficient impact to create
11 adequate nexus for the State to impose the Landing Tax on them.
12 As we noted in our opening memorandum, if the State believes
13 that through occasional contacts, various vessels have
14 established some sort of nexus with Alaska, it can seek to

15 _____
16 10/ This is exactly the kind of tax that the Supreme
17 Court distinguished in Arctic Maid from the local occupation
18 tax imposed there. As opposed to a tax on a local business,
19 the court noted, "[a] tax on an integral part of an interstate
20 movement might be imposed by other states, with the net effect
21 of unduly burdening commerce". . . . The "integral part of
22 interstate movement" referred to in Arctic Maid was
23 stevedoring. And while subsequent decisions have recognized
24 stevedoring as a local business that may be taxed as such, no
25 court has ever held that a state may tax goods that are merely
26 transferred during the course of their interstate shipment.
This is because the mere act of transferring goods from one
mode of transportation to another in the course of interstate
shipment is not a purely local event. It can be repeated again
and again during the course of interstate shipment. It is
important to keep in mind here that unlike the business tax
imposed on stevedoring companies in Association of Washington
Stevedores (whose local business was unloading for hire), the
Landing Tax is not imposed on the person doing the unloading or
transferring -- it is imposed on the owner of the fisheries
products, who may never even touch the products while they are
being transferred within Alaska and may continue to own them as
they are shipped through and "landed" in many states.

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1 equal right what is the source of concern over multiple
2 taxation. Whatever tax the state imposes (which, incidentally,
3 must be imposed on intra-state commerce as well) must be
4 apportioned to reflect the portion of business activity
5 attributable to the State. No effort was made to do that here.
6

7 D. The Landing Tax Discriminates Against Interstate
8 Commerce.

9 The State's claim that the Landing Tax does not
10 discriminate against interstate commerce is based on a series
11 of arguments. First, the State argues that its "unified tax
12 scheme" (comprised in the State's view of the Landing Tax and
13 the fisheries business tax imposed under AS 43.75) provides no
14 economic advantage to local processors; second, the State
15 argues that the Landing Tax validly compensates for the
16 fisheries business tax imposed under AS 43.75; third, the State
17 claims that the tax rates under both taxes are actually
18 identical; finally, the State argues that the State's failure
19 to have provided Landing Tax taxpayers with tax rate reductions
20 for developing species (available to AS 43.75 taxpayers) and
21 the State's failure to have provided Landing Tax taxpayers with
22 tax credits of comparable magnitude to those available under AS
23 43.75 is of no constitutional significance. None of these
24 arguments has merit.

25 The State initially attempts to justify the clear
26 discrimination here by arguing that the Landing Tax and the
fisheries business tax under AS 43.75 are nothing more than
parts of a single "unified tax scheme" -- one that imposes

1 essentially the same tax on any entity that "conducts a
2 substantial fishery business in Alaska, subsequent to the
3 actual catching of the fish." In the State's view, the
4 legislature could just as well have expanded the definition of
5 "fisheries business" under AS 43.75 to include the mere
6 activity of offloading or transferring fish caught and
7 processed outside the state. In that case, under the State's
8 view, there would be no discrimination at all since all
9 "fisheries businesses" would be taxed at exactly the same rate.
10 The flaw in this argument is that the activities that are
11 conducted within Alaska by AFTA's members are of a vastly
12 different nature and vastly different magnitude from those
13 conducted by local processors subject to taxation under AS
14 43.75 and cannot rationally be stretched to cover an entire
15 "fisheries business" conducted within the state. The State
16 cites Alaska v. Arctic Maid, 366 U.S. 199, 6 L.Ed.2d 227
17 (1961), as being dispositive of this issue. But as noted
18 earlier in this memorandum, the critical fact in that case was
19 that the fish caught by the processors who were challenging the
20 tax were all caught in Alaska waters, and the Court made it
21 crystal clear that Alaska could not impose a "fisheries
22 business" tax on persons who neither catch nor process fish
23 within the state. Id., 366 U.S. at 203.

24 It is unquestionably for this reason, rather than an
25 arbitrary choice on the legislature's part (or as the State
26 suggests at p. 28 of its memorandum some "historical anomaly"),
that the Landing Tax was enacted as a separate and distinct tax

1 and not included within the fisheries business tax. What we
2 are left with, then, is a clearly discriminatory landing tax
3 imposed on persons who catch and process fish outside Alaska
4 and from which local processors are exempt. Moreover, there is
5 a distinct and very real element of protectionism at play here,
6 for as the State itself argues, the Landing Tax is intended to
7 compensate for the 3 percent fisheries business tax and the 0.3
8 percent ASMI assessment that local processors pay -- a way of
9 attempting to ensure that local businesses are not placed at a
10 competitive disadvantage to interstate commerce.

11 This leads, of course, to the State's argument concerning
12 compensating taxes. While it may be a legitimate goal for a
13 State to insure that its local businesses are not disadvantaged
14 by lower taxes paid by interstate competitors, there are three
15 tests that must be met before such a compensating tax will be
16 held valid. There must be an identifiable local burden for
17 which the State has an interest in compensating; the local tax
18 and the alleged compensating tax must be on "substantially
19 equivalent" activities; and the tax rates on interstate
20 commerce may not exceed those imposed on local business.

21 Oregon Waste Systems, Inc. v. Oregon, Department of
22 Environmental Quality, 62 U.S.L.W. 4209 (April 4, 1994). The
23 Landing Tax meets none of these tests.

24 The State identifies as the "local burden" the fisheries
25 business tax imposed on local processors under AS 43.75. While
26 the State attempts to characterize AS 43.75 as simply a tax on
one who "utilizes Alaska resources and infrastructure," there

1 is in fact no real question that the fisheries business tax is
2 an occupation tax imposed on those who actually conduct a
3 fisheries business within Alaska -- catching and processing
4 fish within Alaska. 20/ Since AFTA's members neither catch nor
5 process any fish within Alaska, it is difficult to understand
6 why they should be required to compensate for the burden placed
7 on local processors who do engage in that activity within
8 Alaska and whose operations are heavily dependent on
9 significant state and local resources and infrastructure. Just
10 as Oregon could not, in Oregon Waste Systems, justify
11 differential rates on out of state businesses that used
12 Oregon's waste disposal sites on the basis that local waste
13 disposal businesses paid income taxes to Oregon, Alaska cannot
14 justify a landing tax imposed only on out of state processors
15 simply because its local processors pay a state processing tax.
16 And just as Louisiana "had no interest" in offshore gas such
17 that a discriminatory tax on in-state uses of that gas could be
18 justified as compensating for state severance taxes on locally
19 produced gas, Alaska has no interest in either the resources
20 that are taken from the high seas or in the processing
21 activities that take place there. Maryland v. Louisiana, 451
22 U.S. 725, 68 L.Ed.2d 576 (1981).

23 As we noted in our opening memorandum, the Landing Tax
24 rates are higher both nominally and effectively than those
25 imposed under the fisheries business tax. The Landing Tax, of
26

20/ See, Alaska v. Arctic Maid, 366 U.S. at 202.

1 course, is imposed at a rate of 3.3 percent, while the
2 fisheries business tax is imposed at the rate of 3 percent.
3 The State contends that the nominal tax rates imposed on AFTA
4 members and local processors are actually identical, since AFTA
5 failed to take into account the fact that local Alaska
6 processors pay a 0.3 percent assessment levied to finance the
7 Alaska Seafood Marketing Institute ("ASMI"). (State's
8 memorandum at 24.) AFTA is perfectly aware of the 0.3 percent
9 ASMI assessment imposed under AS 16.51.120 on Alaska processors
10 who purchase and process fish within Alaska. AFTA is also
11 aware of the fact that this is a self-imposed assessment -- one
12 that is imposed at all only if a majority of Alaska processors
13 vote to impose it on themselves. See, AS 16.51.120 (a). AFTA
14 members do not serve on the ASMI Board and have no say over how
15 ASMI funds are spent. Similarly, AFTA members are not eligible
16 to vote in elections to determine whether the assessment will
17 be terminated or the rate of the assessment increased or
18 decreased. See, AS 16.51.120. Although the State claims on
19 page 10 of its memorandum that the fisheries products produced
20 by AFTA members are "extensively marketed as "Alaska
21 Seafood," the State has not offered one whit of evidence to
22 support that claim. AFTA members do not catch "Alaska fish"
23 and reap little, if any, benefits from ASMI's promotions, the
24
25
26

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1 vast majority of which feature salmon. 21/ Equally important,
2 the ASMI assessment is not part of the State's fisheries
3 business occupation tax, but a special assessment for a
4 specific and limited purpose -- providing reimbursement from
5 Alaska processors to the State for state expenditures on ASMI
6 to promote the marketing of their products. 22/ Forcing AFTA
7 members to contribute to ASMI is tantamount to requiring Juneau
8 property owners to pay additional property taxes to help
9 Anchorage retire its municipal bonded indebtedness. Even under
10 the State's expansive and totally unjustified characterization
11 of the "substantial fisheries activities" that AFTA members
12 conduct in Alaska, the proper comparison of tax rates is
13 between the Landing Tax at 3.3 percent and the fisheries
14 business tax under AS 43.75 at 3 percent. There is no
15 justification for imposing a Landing Tax that is 0.3 percent
16 higher than the tax imposed under the fisheries business tax in

17
18 21/ See, 1993 ASMI annual report, attached to the State's
19 memorandum. AFTA members may, of course, derive some indirect
20 benefit from ASMI's promotions to the extent that they promote
21 the general consumption of fish products; but that benefit is
22 no different from that received by any processor of fish
23 anywhere in the world that ASMI conducts Alaska seafood
24 promotions.

25 22/ The legislative findings adopted as part of the
26 enactment establishing ASMI expressly articulate this purpose.
See, secs. 1 and 2, Ch. 106, SLA 1981.

Moreover, the ASMI assessment is as close to creating a
dedicated fund as Article IX, sec. 7, would permit. While the
money collected from the assessments is subject to annual
appropriation and technically could be used for any state
purpose, there is no question that if the legislature
appropriated the money received from those assessments for
purposes other than to fund ASMI, there would be a quick and
decisive vote by the processors to terminate the assessments.

1 AS 43.75, and the State's argument concerning the ASMI
2 assessment provides none.

3 The State's memorandum does not really even address the
4 argument in our opening memorandum that the tax rates under the
5 Landing Tax are effectively even more than 0.3 percent higher
6 than the AS 43.75 tax rate because of the vastly reduced
7 credits allowable under the Landing Tax. The State merely
8 argues that it does not matter in "economic terms" whether a
9 taxpayer contributes \$10,000, for instance, to an educational
10 institution or pays the same amount to the Department of
11 Revenue in taxes. However, the State confuses "monetary terms"
12 with "economic terms." A taxpayer is likely to view a
13 contribution to an educational institution as a form of
14 business investment for training future employees or for
15 advancing technical or scientific knowledge that will benefit
16 the industry. A taxpayer is not likely to view payment of tax
17 to the state as any kind of investment. But more important,
18 the State totally ignores the major thrust of our argument --
19 that even the educational credits under the Landing Tax are
20 allowed only for those taxpayers who enter into joint ventures
21 with local Alaska communities in the federal Community
22 Development Quota program. This limitation not only involves a
23 clear and flagrant discrimination against interstate commerce
24 (as we pointed out at p. 57 of our opening memorandum); it
25 results in a vast reduction in the total amount of available
26 contribution tax credits under the Landing Tax as compared to
similar credits under AS 43.75. Such a vast reduction in

1 allowable credits of necessity increases the effective tax rate
2 under the Landing Tax. 23/

3 Similarly, the State's memorandum never really comes to
4 terms with the obvious discrimination against the offshore
5 catcher/processor fleet found in the legislature's failure to
6 provide in the Landing Tax for the same reduction in tax rates
7 for developing species as is provided under AS 43.75. 24/ The
8 State's only argument is that the legislature legitimately did
9 not afford offshore catcher/processors a rate reduction for
10 developing species because they catch and process too much of
11 those species to be considered "developing." The basis for
12 this argument is to compare the 84,000 metric tons of
13 developing species caught last year by AFTA members with

14
15 23/ The restriction of the Landing Tax educational and
16 infrastructure credits to fisheries products produced under a
17 Community Development Quota results in precisely the kind of
18 economic protectionism that the Court in Maryland v. Louisiana
19 found so discriminatory. Landing Tax taxpayers can obtain a
20 credit only if they participate with a local Alaska community
21 and only if they invest in training and infrastructure that
22 will benefit Alaska based processors. This credit system
23 clearly discriminates against the majority of the offshore
24 catcher/processor fleet who do not participate in the Community
25 Development Quota program by subsidizing the operations of
26 those who do through tax credits for employee training and
capital improvements in shore based facilities.

24/ The State's argument that this claim is not ripe
because no taxpayer has actually been denied such a reduction
is meritless. The discrimination is clear on the face of the
two statutes. Any Landing Tax taxpayer who has harvested
species on the list of "developing species" is clearly harmed
by the obvious discrimination. The State does not dispute the
fact presented in the Affidavit of Joseph R. Blum that AFTA
taxpayers indeed harvest species that are on the list that
applies during 1994 -- the current Landing Tax tax year. And
the State cannot seriously dispute the fact that the Department
of Revenue would have absolutely no statutory authority to
grant the rate reduction even if an AFTA member applied for it.

1 "minimal" amount of revenue the Department received from in-
2 state processors for developing species. However, as the 1993
3 Revenue Report cited by the State indicates at p. 12, the State
4 received last year \$200,628 in tax revenues from shore based
5 processors for developing species. Since those fish are taxed
6 at only 1 percent of value, it means that in-state processors
7 processed developing species having an unprocessed value of
8 \$20,062,800 -- hardly a "minimal amount."

9 The State makes two other claims with respect to the
10 clearly discriminatory tax credits. The first is that there is
11 no discrimination because taxpayers under the Landing Tax will
12 never pay more than the 3 percent reduced tax for developing
13 species paid by floating processors. This argument was
14 addressed in our opening memorandum in a slightly different
15 context, but it applies with equal force to the State's
16 argument here. 25/ The higher tax rate imposed on in-state
17 floating processors is justified only as a means of encouraging
18 floating processors to move their operations on shore. See,
19 State v. Reefer King, 559 P.2d 56, 66 (Alaska 1977). While a
20 state may have differential tax rates to encourage local
21 businesses to conduct their businesses in certain ways that
22 inure to that state's overall economic well being, it may not
23 do so with respect to interstate businesses. 26/ The State
24 here may not, therefore, justify the higher tax rates under the

25
26 25/ See, AFTA's opening memorandum at 54 n. 37.

26/ See, Halliburton Oil Well Co. v. Reily, 373 U.S. 64,
72, 10 L.Ed.2d 202 (1963).

1 Landing Tax for developing species on the basis that the
2 Landing Tax, without the reduced rate for developing species,
3 will never exceed the lowest possible tax rate imposed on
4 floating processors. 27/

5 The most serious flaw in the State's argument that the
6 Landing Tax is a valid compensating tax for the fisheries
7 business tax is its claim that the two taxes are imposed on
8 "substantially equivalent" events. The sole argument that the
9 State makes is that the "substantially equivalent" event taxed
10 under both the Landing Tax and the fisheries business tax is
11 utilizing "Alaska's infrastructure to conduct a fisheries
12 business." The State's argument never comes to grips with the
13 palpably obvious differences between the two taxable events or
14 with the fact that it cannot impose a tax on conducting a

15
16 27/ The State also argues that even if the failure to
17 provide a reduced rate for developing species under the Landing
18 Tax is held discriminatory, the court need not declare the
19 entire act unconstitutional because the State can "cure" the
20 defect. The only case cited for this remarkable proposition is
21 McKesson Corporation v. Division of Alcoholic Beverages,
22 Department of Business Regulation of Florida, 496 U.S. 18, 110
23 L.Ed.. 2d. 17 (1990), and the case in no way supports the
24 State's argument. The only issue before the United States
25 Supreme Court was whether the taxpayer was entitled to relief
26 retroactively for taxes already paid under a tax that the state
court had invalidated. At issue before the state court was a
reduced tax rate under Florida's alcoholic beverage tax for
alcoholic beverages made from products grown in Florida. The
state court allowed the overall beverage tax to stand, and
apparently severed the offending rate reduction section. That
sort of "surgery" is not possible here since the court is faced
with two wholly separate taxes imposed on two entirely
different activities -- one that grants the reduction and one
that does not. In any event, there is no possible way that the
court could simply instruct the Department of Revenue to "cure"
the discrimination. The Department may have the authority to
interpret tax laws, but it does not have the authority to amend
them. Only the legislature has that authority.

1 "fisheries business" that does not take place in Alaska. 28/
2 The fisheries business tax under AS 43.75 is an occupation tax
3 on conducting a fisheries business in the state -- that is,
4 processing fish. The Landing Tax is imposed on the mere act of
5 transferring fisheries products that have been caught and
6 processed elsewhere, not necessarily by the same person who
7 "owns" the fish products brought through Alaska and "landed"
8 there. The activity of processing fish is no more equivalent
9 to the activity of transferring already processed fisheries
10 products than manufacturing is to wholesaling. 29/

11 In summary, the State has offered no justification for the
12 obvious and clear discriminatory treatment that the Landing Tax
13 imposes on interstate commerce.

14 E. The Rate of Taxation Under the Landing Tax is Not
15 Fairly Related to the Services Provided by the
16 State.

17 The State claims that on page 16 of our opening
18 memorandum, AFTA "concedes that they cannot prevail on the

19 28/ As noted earlier, the State cannot, under Arctic
20 Maid, impose a fisheries business tax on persons who neither
21 catch nor process fish in Alaska.

22 29/ The weakness in the State's attempt to characterize
23 transferring fisheries products as "utilizing Alaska's
24 infrastructure to conduct a fisheries business" is best
25 demonstrated by the State's admission on pages 15 and 16 of its
26 memorandum that the Landing Tax is not imposed on an offshore
catcher/processor who merely transports its products through
Alaska without unloading or transferring them here -- even
though that same vessel may, during the course of transporting
its products to some interstate or foreign destination, enter
an Alaska port, take on fuel, make emergency repairs, and
transfer crew members prior to continuing its transportation of
the products. Under the State's analysis, then, so long as the
fisheries products remain in the vessel's hold, the vessel is
not conducting a "fisheries business" in Alaska.