ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

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SSHB 397
FISHERY RESOURCE LANDING TAX &
SEAFOOD MARKETING ASSESSMENT

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

SSHB 397 clarifies that the landing tax is an occupational tax and equalizes the landing tax rates and tax credits with those of the fisheries business tax. This is needed to avoid future legal challenges and add fairness to the tax.

The landing tax provisions apply to fishery resources that are caught and processed outside Alaska's three mile jurisdiction and are thereafter brought into the state and are first landed in this state.

Within SSHB 397, the current 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 bill separates the marketing assessment from the landing tax statutes and equalizes the landing tax with the shore-based fisheries business tax rate of 3 percent.

Of the 3.3 percent landing tax, ASMI receives .3 percent of the tax collected while 50 percent of the remaining tax revenues collected 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.

(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.)

DEPARTMENT OF REVENUE
INCOME & EXCISE AUDIT DIVISION
SECTIONAL ANALYSIS OF A BILL
FOR AN ACT ENTITLED
"An Act relating to the fishery resource landing tax; and providing for an effective date."

Section 1 is a statement of the legislative findings, intent, and purpose for the imposition of the landing tax. The provisions confirm 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 offshore fisheries industry.

Section 2 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 authenticates 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 offshore fisheries 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 ("ASMI") levy. The offshore fisheries 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. This is the same rate provided in AS 43.75 for developing species. The offshore fisheries 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.

Section 3 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 offshore fisheries 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 4 and 6 amend the revenue sharing provision in AS 43.77.050 to repeal the

ASMI revenue sharing under AS 43.77 consistent with the amendment in Section 2. 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 5 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 7 provides that the act is retroactive to January 1, 1994 and, with the tax rate reductions and education credit provisions, will result in overpayments of previously paid taxes. The act does not extend the tax to any person not previously subject to the tax nor does it create an additional tax liability on any person.

Section 8 provides that the act takes effect immediately.

THE SUPREME COURT OF THE STATE OF ALASKA

AMERICAN FACTORY TRAWLER ASSOCIATION, Appellant, v. STATE OF ALASKA, WALTER J. HICKEL, Governor of the State of Alaska, DARREL J. REXWINKEL, Commissioner of Revenue of the State of Alaska, Appellees.	Supreme Court No. S-6687 Superior Court No. 1JU-94-177 Civil MEMORANDUM OPINION AND JUDGMENT [No. 0777 - May 10, 1995]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Larry R. Weeks, Judge.

Appearances: Avrum M. Gross, Susan A. Burke, Gross & Burke, Juneau, for Appellant. Stephen C. Slotnick, Assistant Attorney General, Bruce M. Botelho, Attorney General, Juneau, for Appellees.

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton and Eastaugh, Justices.

Where a case is dismissed for failing to exhaust administrative remedies and the dismissal does not preclude the ultimate adjudication of the claims presented, the dismissal will be reviewed under an abuse of discretion standard. See Standard Alaska Production Co. v. State, Dep't of Revenue, 773 P.2d 201, 206, 208 (Alaska 1989). "We 'will reverse a ruling for abuse of

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* Entered pursuant to Appellate Rule 214.

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discretion only when left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling.'" Eufemio v. Kodiak Island Hospital, 837 P.2d 95, 98 (Alaska 1992) (quoting Morgan v. State, Dep't of Revenue, 813 P.2d 295, 297 n.4 (Alaska 1991)). The trial court found that administrative review in this case (1) would allow the Department of Revenue "to correct errors in the perceived application of AS 43.77"; (2) would supply a factual context which would aid in understanding the appellant's claims of unconstitutionality; and (3) would resolve factual issues "regarding nexus, discriminatory effect, apportionment and relationship of the tax to the services provided by the state." These reasons are consistent with well-recognized reasons for requiring that administrative remedies be exhausted. Cf. Standard, 773 P.2d at 206-208. In view of the abstract setting of this case, the general difficulty of Commerce Clause adjudication, and the fact-bound nature of at least some of the issues presented, this court is not left with a definite and firm conviction that the trial court has erred in requiring that available administrative remedies first be utilized before judicially determining this case. The judgment of the superior court which dismissed appellant's complaint and required appellant to exhaust its administrative remedies with the Department of Revenue before presenting its claims to the court is therefore AFFIRMED.

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FIRST DISTRICT
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DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

AMERICAN FACTORY TRAWLER ASSOCIATION,

Plaintiff,

v.

STATE OF ALASKA, WALTER J. HICKEL Governor of the State of Alaska, DARREL J. REXWINKEL, Commissioner of Revenue of the State of Alaska,

Defendants.

Case No. 1-JU-94-177 Civil

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff American Factory Trawler Association (hereinafter "AFTA") is a non-profit corporation organized under the laws of the State of Washington for the purpose of promoting the growth of markets and the superior quality of seafoods that are processed aboard vessels at sea and of promoting the common business interests of those engaged in the North Pacific at-sea processing industry. AFTA's members are owners or operators of vessels that are engaged in the catching and processing of fisheries resources on the high seas. All of AFTA's members have principal offices in the State of Washington. The members of AFTA are Alaska Ocean Seafood, Inc.; American Seafoods Company; Arctic King Fisheries; Arctic Storm, Inc.; Arica Fishing Co.; Cape Horn Fisheries L.P.;

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

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

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

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

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

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

6. In 1993, the Alaska legislature adopted Ch. 67, SLA 1993, "An Act levying and providing for the collection of and disposition of the proceeds of a fishery resource landing tax." The Act is set out in AS 43.77.010 -- AS 43.77.200. AS 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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pay the landing tax at all, and from the fact that an in-state fisheries business pays a lower total tax for unloading, transferring and processing fish in Alaska than an out-of-state processor pays for merely unloading or transferring previously processed fisheries resources within Alaska.

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

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

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

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

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

(c) the tax is not fairly apportioned;

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

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

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

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

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

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

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

WHEREFORE, AFTA requests that this court issue a judgment:

(a) declaring AS 43.77 invalid and unconstitutional;

(b) permanently enjoining each and every defendant and their agents from taking any action to enforce collection of the tax;

(c) awarding AFTA its costs and attorneys fees;

(d) for such other relief as the court deems appropriate in the circumstances.

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

GROSS & BURKE

Avrum M. Gross

Susan A. Burke

COUNSEL FOR AMERICAN FACTORY TRAWLER ASSOCIATION

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

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

FILED IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
9/26/94
BY: MA

AMERICAN FACTORY TRAWLER ASSOCIATION, Plaintiff, vs STATE OF ALASKA, WALTER J. HICKEL, Governor, DARREL J. REXWINKEL, Commissioner of the Alaska Department of Revenue, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Case No. 1JU-94-177 CI

MEMORANDUM AND ORDER

Introduction

This case comes before the court on plaintiff's (AFTA) and defendant's (state) cross motions for summary judgment pursuant to Civil Rule 56. This dispute centers on a State of Alaska taxation statute, AS 43.77, which is called the "Fisheries Landing Tax." The statute imposes a tax on a person who first lands a fishery resource in the State of Alaska. The tax on the resource is calculated as 3.3% of the unprocessed value of the resource at the place of landing.

The American Factory Trawlers Association (AFTA) argues AS 43.77 is violative of the U.S. Constitution. AFTA argues AS 43.77

amounts to state taxation of interstate commerce, and thus violates the U.S. Commerce Clause, Article I, Section 8, of the U.S. Constitution. Further, AFTA argues AS 43.77 taxes seafood products destined solely for the export markets of Asia. Accordingly, AFTA argues AS 43.77 violates the Import Export Clause of the United States Constitution, Article I, Section 10, cl. 2. AFTA maintains it has standing to sue because its members who fish in Alaska are subject to taxation under the statute. Further, AFTA maintains administrative exhaustion is inapplicable to this case, because this case involves a pure question of constitutional law which the agency has no expertise in applying.

The state responds, arguing procedurally, that AFTA must exhaust administrative appeals with the Alaska Department of Revenue before bringing suit in this court. Further, the state argues AFTA lacks standing as a "taxpayer organization" to challenge AS 43.77. The state argues AFTA is an organization with offices in Seattle, and as an organization pays no taxes to the State of Alaska. The state argues allowing standing to a taxpayer organization, combined with dismissing administrative exhaustion requirements will "open the door" for taxpayer organizations to challenge any taxation statute in court without establishing a factual basis, and before exhausting administrative remedies.

The state argues, without conceding standing and exhaustion issues, that AS 43.77 does not violate the Commerce Clause and the Import Export Clause of the United States Constitution. The state

maintains AS 43.77 complies with the requisite nexus, fair apportionment, non-discriminatory application, and fair relationship to state activity requirements which allow states to place taxes on interstate commerce. Further, the state argues AS 43.77 is not violative of the Import Export Clause of the United States Constitution.

Background

AFTA is a plaintiff's organization of off-shore catcher/processor vessels which catch and process pollock, cod, flatfish, rockfish, Atka mackerel, and Pacific ocean perch. The vessels fish in the offshore Alaska fishing area administered by the North Pacific Fishery Management Council called the Exclusive Economic Zone. The Exclusive Economic Zone is a federally managed area beyond a state's jurisdiction. After AFTA member vessels are fully laden with fish products processed into frozen blocks and surimi, the vessels seek the shelter of the Alaska coast to transfer their product to "tramp" steamers for shipment both to southern American ports, or to on shore container shippers for transport directly to Asia. Most of the "catch" is transported through the State of Alaska territorial waters, or to on shore shipping agents for foreign and domestic processing in the continental United States.

In 1993, the State of Alaska enacted Section 4, Chapter 67, SLA 1993 codified as AS 43.77 entitled the "Fishery Resource Landing Tax." AS 43.77.010 provides:

> A person owning a fishery resource that is not subject to AS 43.75 but that is brought into the jurisdiction of, and first landed in, this state is liable for and shall pay a landing tax on the value of the fishery resource. The amount of the landing tax is 3.3 percent of the value of the fishery resource at the place of the landing.

The activity taxed by AS 43.77 is the process or act of landing fish in Alaska defined as the "act of unloading or transferring a fishery resource." AS 43.77.200(3). AS 43.77.030 provides tax credits for taxpayers who are required to pay taxes on the fishery resources in another jurisdiction where the fish are either caught, processed, or sold.

A person who lands fish in Alaska, and then proceeds to process the fish on shore in Alaska is not subject to AS 43.77. Instead, persons who land and then process (i.e. salmon canneries) fish in Alaska are subject to taxation pursuant to AS 43.75.015, known as the "Fisheries Business tax." Shore based fishery processors who process bottom fish similar to those caught by AFTA member vessels are taxed at a rate of 3 percent, and floating processors are taxed at a five percent rate pursuant to AS 43.75.015(a)(2). Tax credits are available under AS 43.75.018 and 43.75.032 for educational grants made by processors, and for processors who process fish designated as" developing species." Shore based processors and floating processors must also pay an additional .3 percent tax designated as funding for the Alaska Seafood Marketing institute pursuant to AS 16.51.120.

Questions Presented

This court heard oral argument on AFTA and the state's cross motions for summary judgment on September 22, 1994. At the conclusion of oral argument, the court **DENIED** the State's Motion for Summary Judgment on grounds of standing, but **GRANTED** the state's motion based on the doctrine of exhaustion of administrative remedies. The procedural questions presented, which are the basis of the court's decision are as follows:

I. Procedural Issues

a. Whether AFTA must exhaust administrative remedies with the Alaska Department of Revenue before bringing suit in Superior Court.

i. Exhaustion unnecessary where constitutionality is the only issue raised.

ii. Exhaustion unnecessary where hearing will be "futile."

b. Whether AFTA, a membership group comprised of fishing members individually subject to the taxation in AS 43.77 has standing to challenge the fishery resource landing tax.

Discussion

I. Procedural Issues

a. Exhaustion of Administrative Remedies

i. Pure Question of Constitutional Law

The state argues before a plaintiff may bring suit on an issue within agency discretion and expertise, it must exhaust agency appeal procedures. See Fedpac Int'l, Inc. v. State Dept. of

Revenue, 646 P.2d 240, 241-42 (Alaska 1982). The state argues the purpose of the exhaustion of remedies rule is to promote judicial economy, and to afford the agency an opportunity to develop a factual record, and exercise its discretion. See Ben Lomond, Inc. v. Municipality of Anchorage, 761 P.2d 119, 121-122 (Alaska 1988); Van Hyning v. University of Alaska, 621 P.2d 1354 (Alaska 1981), cert. den., 454 U.S. 958 (1981). The state argues AS 43.05.240 provides a dispute resolution process for "aggrieved taxpayers," and that exhaustion of AS 43.05 is a prerequisite to action in this court. Fedpac, 646 P.2d at 241-42. The state argues the Department of Revenue has expertise in the implementation of tax laws, and the agency must be allowed to exercise its expertise before a court may determine whether the agency made errors of law or factual findings not supported by substantial evidence. State Dept. of Revenue v. Parsons Corp., 843 P.2d 1238, 1241 (Alaska 1992), cert. den., ___ U.S. ___, 113 S. Ct. 2416 (1993). Further, the state argues where the constitutionality of a state statute is in question, the Alaska Supreme Court relies on facts developed in the agency record to reach a decision. Gulf Oil Corp. v. State Dept. of Revenue, 755 P.2d 372, 383-88 (Alaska 1988). The state distinguishes Moore v. State Dept. of Revenue, ___ P.2d ___, No. 4093 (Alaska, June 17, 1994), where the supreme court held that a plaintiff seeking a declaratory judgment was not required to exhaust administrative remedies. The state argues in Moore, there were no facts in dispute, and the plaintiff's case did not turn on

the "contents of a factual record."[1] The state argues determination of the issues in this case depends on analyses of mixed questions of fact and law. The state argues the following material questions of fact are in dispute, requiring the application of agency expertise:

1. the tax falls on goods in "transit;"
2. AFTA members have insufficient "nexus;"
3. risks of multiple taxation;
4. substantial similarity with AS 43.75;
5. discriminatory effect on interstate commerce;
6. tax not related to state services.

The state concludes, arguing even if no material questions of fact are in dispute, exhaustion of administrative remedies is still required, because summary judgment is available in administrative proceedings.

AFTA disputes the state's exhaustion of administrative remedies analyses. AFTA argues the Alaska Supreme Court has never required exhaustion of administrative remedies in cases where the litigation raises a "purely constitutional issue as is the case here."[2] See Standard Alaska Production Company v. State Dept. of Revenue, 778 P.2d 201, 207 (Alaska 1989); Ben Lomond, 761 P.2d at 122. AFTA argues this case requires application of constitutional

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[1] Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at p. 5, ¶ 3.

[2] AFTA's Reply and Opposition to Cross Motion for Summary Judgment, p. 4.

law principles to the "undisputed facts" of this case.[3] AFTA argues this suit is a challenge to AS 43.77 on its face, and the Department of Revenue has no special expertise in determining questions of constitutional law.

In Standard, the Alaska Supreme Court cautioned superior courts to avoid dispensing with the exhaustion of administrative remedies requirement based on artful pleading where constitutional issues are severed from factual issues:

> Ben Lomond and Eidelson both instruct the superior court not to entertain "legal" or "constitutional" claims which have been severed from the remainder of a controversy otherwise subject to the doctrine of administrative exhaustion. As we have indicated in the past, where a controversy involves *only* constitutional, and no factual issues, the exhaustion doctrine may be held not to apply. Ben Lomond, 761 P.2d at 122 (citing 4 K. Davis, Administrative Law Treatise § 26:6 (2d ed. 1983)). But cases of mixed questions of law and fact are "particularly" appropriate for administrative resolution prior to judicial review since 1) a ruling on the legal issues will not necessarily be dispositive of the whole controversy, and 2) an administrative ruling on the factual issues may moot the legal issue.

Standard Prod. v. Dept. of Revenue, 773 P.2d at 207-08. Thus, Standard instructs this court that the need for exhaustion is obviated by a finding that purely constitutional issues are before the court, and no fact finding and agency determinations are

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[3] AFTA's Reply and Opposition to Cross Motion for Summary Judgment at 4.

required.

This court finds the reasoning of Ben Lomond instructive.

> Davis concludes that exhaustion may be required when non-constitutional issues are present, or when a factual context is needed for deciding the constitutional issue.
>
> ***
>
> We further believe that it is axiomatic to our system of justice that we have a factual context within which to review a case. (citations omitted)

Ben Lomond, 761 P.2d at 122. This court finds there is little factual record upon which this court may base a decision. The plaintiff is correct that the promulgation of agency regulations does not constitute a determination of facts. Neither, however, do the factual assertions in plaintiff's brief. The affidavits filed in this case reflect very different views of reality. Commerce Clause determinations require specific factual findings regarding nexus, discriminatory effect, apportionment and relationship of the tax to the services provided by the state. There is no factual record on many of these issues sufficient enough on which to base a decision.

On motions for summary judgment, this court must base a decision on admissable evidence. It is not enough to take factual assertions in either party's briefing as a basis for deciding a complex issue of taxation. The agency is the appropriate forum to make factual findings. This is especially true where the agency determinations are highly technical, and the discriminatory effects

of the landing tax and associated credits, if any, requires analysis of the agency's factual determinations. Among the issues the agency might develop in a factual record which are not presently before the court are:

1. The amount and significance of AFTA's contacts with the state; whether sales or other transaction of fish products are actually made in Alaska waters;

2. Whether the tax is a property tax or a occupation tax;

3. Do processors buy fuel when in state waters, and do AFTA members take advantage of environmental, fire, police, health, repair and other state support and infrastructure provisions;

4. Do state resources such as fisheries management and AMSI benefit AFTA members;

5. Are tax credits allowed pursuant to AS 43.77 comparable to credits allowed by AS 43.75;

6. How does the "first landing" AS 43.77 differ from Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 98, L.Ed. 583 (1954);

7. What is the relationship between the taxes collected, and the services provided by the state.

As was the case in Ben Lomond, AFTA has the opportunity to argue AS 43.77 is unconstitutional on its face, or as applied

before the Department of Revenue. The agency should have the opportunity to correct errors in the perceived application of AS 43.77. The record before this court is insufficient.

ii. Futility Exception to Exhaustion Requirement

AFTA argues the state's exhaustion of administrative remedies argument is inapposite, because it would require the Department of Revenue to find its own statute unconstitutional; a step AFTA asserts the Department would not take given the posture of this litigation. Eidelson v. Archer, 645 P.2d 171, 181-183 (Alaska 1982). The Alaska Supreme Court has held, that "[w]here exhaustion of administrative remedies will be futile because of the certainty of an adverse decision, a party need not obtain a final agency ruling before seeking judicial review. Standard, 773 P.2d at 209 (citing Eidelson, 645 P.2d at 181-83). Thus the question before this court, is whether there is "certainty" regarding evidence in the record, that the Department of Revenue will not "seriously consider" the contentions of AFTA. Id. Based on the record before the court, there has been no showing with "certainty," that the Department of Revenue will not fairly consider the above facts or whether it will implement AS 43.77 as either party argues.

b. Standing

The state argues AFTA lacks the requisite standing to challenge AS 43.77. The state argues a party lacks injury and

thus standing as a "taxpayer," until demand for payment of taxes is levied. The state argues no demand for payment has been made on AFTA members, and thus AFTA has suffered no injury and has no standing. Further, the state argues in Trustees, the plaintiff's organization granted standing did not claim "interest-injury" as a basis for standing, but asserted standing based on citizen-taxpayer grounds. Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987). Thus argues the state, Trustees does not stand for the proposition that AFTA has standing based on the group's "interest-injury" grounds.

AFTA responds, arguing a party has standing to challenge a statute which causes some injury to the challenging party. AFTA argues the standing standard under the "interest-injury" standard is flexible and liberal in application. AFTA argues "interest-injury" standing is predicated on a low threshold showing of "an identifiable trifle." Trustees, 736 P.2d at 327 (citing Coghill v. Boucher, 511 P.2d 1297, 1303 (Alaska 1973), where the court announced "[w]e have departed from a restrictive interpretation of the standing requirement.") AFTA argues its members will be adversely affected by the implementation of AS 43.77. Id. AFTA reads Trustees as allowing "interest-injury" standing to any group -- not just taxpayer groups -- that can demonstrate adverse impact of the statute in question.

Alaska courts have adopted an interpretation of the "interest-injury" standing doctrine which favors "increased

accessibility to judicial forums." Moore v. State, 553 P.2d 8, 24 n.25 (Alaska 1976) (quoting Flast v. Cohen, 392 U.S. 83, 100-01, 20 L.Ed.2d 947, 961 (1968)). This court finds AFTA has the requisite "interest-injury" standing to bring this suit based on AFTA's economic interests implicated by AS 43.77.

Order

This court **GRANTS** the state's motion for summary judgment, finding AFTA must exhaust its administrative remedies with the Department of Revenue, before this court may properly hear this case.

Done this 26TH day of September, 1994.

Larry R. Weeks
Superior Court Judge

U.S. mail

I certify that I served the above pleading to Susan Burke, Avrum Gross, Vincent Usera, and Stephen Slotnik by court box this 26th day of September, 1994.

Margie Anderson
Secretary to Judge Weeks

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

AMERICAN FACTORY TRAWLER ASSOCIATION,	)
Plaintiff,	)
v.	)
STATE OF ALASKA, WALTER J. HICKEL Governor of the State of Alaska, DARREL J. REXWINKEL, Commissioner of Revenue of the State of Alaska,	)
Defendants.	)

Case No. 1-JU-94-177 Civil

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

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

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

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

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

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

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8/ (State's Memorandum at p.1.) Actually, as noted in our opening memorandum and supporting affidavit, the fisheries products are either loaded on tramp steamers or delivered to a common carrier. In either case, the transportation to 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).

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Instead, the State argues that the Landing Tax is not a tax on goods or property at all; it is a tax on an "occupation." (State's Memorandum at 16.) The State goes on to claim that, "A trawler that only moves property through the jurisdiction is not subject to the landing tax." (Id.)

At the outset, one might ask just what "occupation" is being taxed here. The Landing Tax is imposed upon the owner of fisheries products that are being "landed" in the state; there is no provision of AS 43.77 that even refers to an "occupation," much less imposes a tax on one. The owner of the fish "landed" need not have caught them or processed them himself; so long as the fish are owned by him when they come into the State, he must pay a tax on them if he transfers them for further transportation, whether his "occupation" is fisherman, processor, fish broker, or what have you. The reason the statute does not seek to tax an "occupation" and specifically, the occupation of plaintiff's members is, of course, obvious; all of the crucial elements of that occupation -- the catching of fish, the processing of fish and the sale of fish take place outside of Alaska. The state cannot tax an occupation that occurs outside of its borders and AS 43.77, on its face at least, makes no effort to do so.

A comparison with Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited as support for the State's argument, is instructive. The tax in Arctic Maid was specifically placed by statute on those "prosecuting or attempting to prosecute . . . lines of business in connection with Alaska's commercial

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

B. Nexus.

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

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10/ This is exactly the kind of tax that the Supreme Court distinguished in Arctic Maid from the local occupation tax imposed there. As opposed to a tax on a local business, the court noted, "[a] tax on an integral part of an interstate movement might be imposed by other states, with the net effect of unduly burdening commerce". . . . The "integral part of interstate movement" referred to in Arctic Maid was stevedoring. And while subsequent decisions have recognized stevedoring as a local business that may be taxed as such, no court has ever held that a state may tax goods that are merely 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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equal right that is the source of concern over multiple taxation. Whatever tax the state imposes (which, incidentally, must be imposed on intra-state commerce as well) must be apportioned to reflect the portion of business activity attributable to the State. No effort was made to do that here.

D. The Landing Tax Discriminates Against Interstate Commerce.

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

The State initially attempts to justify the clear 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

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

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

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

This leads, of course, to the State's argument concerning compensating taxes. While it may be a legitimate goal for a State to insure that its local businesses are not disadvantaged by lower taxes paid by interstate competitors, there are three tests that must be met before such a compensating tax will be held valid. There must be an identifiable local burden for which the State has an interest in compensating; the local tax and the alleged compensating tax must be on "substantially equivalent" activities; and the tax rates on interstate commerce may not exceed those imposed on local business. Oregon Waste Systems, Inc. v. Oregon, Department of Environmental Quality, 62 U.S.L.W. 4209 (April 4, 1994). The Landing Tax meets none of these tests.

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

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

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

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

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

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

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

22/ The legislative findings adopted as part of the 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.

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

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

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

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

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23/ The restriction of the Landing Tax educational and infrastructure credits to fisheries products produced under a Community Development Quota results in precisely the kind of economic protectionism that the Court in Maryland v. Louisiana found so discriminatory. Landing Tax taxpayers can obtain a credit only if they participate with a local Alaska community and only if they invest in training and infrastructure that will benefit Alaska based processors. This credit system clearly discriminates against the majority of the offshore catcher/processor fleet who do not participate in the Community Development Quota program by subsidizing the operations of 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.

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

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

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).

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

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

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27/ The State also argues that even if the failure to provide a reduced rate for developing species under the Landing Tax is held discriminatory, the court need not declare the entire act unconstitutional because the State can "cure" the defect. The only case cited for this remarkable proposition is McKesson Corporation v. Division of Alcoholic Beverages, Department of Business Regulation of Florida, 496 U.S. 18, 110 L.Ed.. 2d. 17 (1990), and the case in no way supports the State's argument. The only issue before the United States Supreme Court was whether the taxpayer was entitled to relief 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.

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

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

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

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

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

29/ The weakness in the State's attempt to characterize transferring fisheries products as "utilizing Alaska's infrastructure to conduct a fisheries business" is best demonstrated by the State's admission on pages 15 and 16 of its 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.

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

As written in your sponsor statement, this legislation is designed to more precisely align the current landing tax with the fisheries business tax and the ASMI assessment.

After talking with the department of revenue, we learned of the legal challenges affecting the landing tax and its revenues and of the need to make clear the intent of this tax by aligning the landing tax with the fisheries business tax.

Specifically SSHB 397 clarifies that the landing tax is an occupational tax and equalizes tax rates and credits with the fisheries business tax.

Prior to 1994 resources that were caught outside the 3 mile limit, and then brought inside that limit were not subject to any landing tax despite the fact that they used state and local resources. One of the concerns of the industry is that the DOR is taxing resources caught outside the state boundary at a higher rate because of this inclusion of the ASMI assessment rate. SSHB 397 reduces the fishery landing tax in the statute from 3.3% to 3%. The ASMI statute would institute a .3 % ASMI assessment.

Throughout SSHB 397 the term "purchased" is replaced with "produced" to eliminate the loophole of those who do not specifically purchase seafood and thereby avoid the ASMI assessment. In section 14, produced is defined to include purchase, production, landing or export of a fisheries resource.

The landing tax for a developing commercial fish species would be 1% instead of 3% of the value of the fishery resource at the place of landing. Developing commercial species are determined by Fish and Game. This section 21.1 encourages economic development of otherwise under-or non-utilized fish species.

Section 22 includes a resource landing tax education credit for direct instruction, research, and educational support, not to exceed $150,000.

DIVISION OF LEGAL SERVICES

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MEMORANDUM February 22, 1993

SUBJECT: State taxation of interstate commerce: Proposal to levy and collect a tax on fisheries resources caught outside the state but brought into the state for introduction into the stream of interstate commerce (Work Order No. 8-LS0684)

TO: Representative Carl Moses
ATTN: Molly McCammon

FROM: Jack Chenoweth
Legislative Counsel

Your recent contact with Legislative Counsel George Utermohle advised of a potential measure proposing to impose a tax on the landing of fisheries resources caught outside the state--presumably from waters above the outer continental shelf beyond the three-mile state boundary--but brought into the state's jurisdiction--across a dock or harbor facility, or through an airport--for purposes of eventual transport outside the state, i.e. introduction into interstate commerce. You have asked the office to summarize potential legal issues that may arise out of that legislation.

I

Since the proposed measure apparently would address state taxation and state regulation of interstate commerce, it necessarily invites scrutiny under the United States Constitution's commerce clause--clause 3, section 8 of article I. [1] Historically, that clause has served as a significant check on state efforts to expose business activities to multiple tax liability and to unique forms of regulatory action.

At the outset, I should note that a state tax is not per se invalid because it imposes a burden on interstate commerce. States may require goods and services in interstate commerce that enter the taxing jurisdiction to contribute to the jurisdiction's treasury.

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[1] The provision declares that "[t]he Congress shall have power . . . to regulate commerce with foreign nations, and among the several states . . . ."

The approach generally invoked in commerce clause analysis has involved consideration of the links that exist between the taxpayer and the taxing jurisdiction, on the one hand, versus the burden that the tax would impose on interstate commerce. The approach generally adopted in recent cases derives from the United States Supreme Court's disposition of Complete Auto Transit v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), in which the court identified the factors or elements that needed to be considered in evaluating the effects of a state- or locally-imposed tax on goods or services in interstate commerce: (1) does the activity that is subject to tax have a substantial nexus with the taxing state; (2) does it discriminate against interstate commerce; (3) does it fairly relate to services claimed to be provided within or by the taxing state; and (4) is the tax fairly apportioned. As a general rule, a tax on interstate commerce will be sustained if the court can find that the state has a sufficient connection to the business activity that is to be taxed; that, as between instate and interstate commerce, the tax is imposed equitably; and that the tax imposed fairly relates to the state's nexus--its contact or connection--to the business activity that is the subject of the tax. [2/] If all of these factors are properly addressed, the tax should survive a commerce clause challenge. [3/]

In a decision that would seem to be important for this state's efforts to tax resources brought in from outside the limits of the state's jurisdiction, under the Complete Auto Transit test, the court has struck down a first-use tax on federal outer continental

---

[2/] Establishing nexus is probably the critical element of three. It can be tricky. There are precedents that may be cited to support the conclusion that **delivery of product within a state**--International Harvester Co. v. Department of the Treasury, 322 U.S. 340, 88 L.Ed. 1313, 64 S.Ct. 1019 (1944) (sales of Indiana goods to an out-of-state buyer, who took possession of the goods for transport out of the state sufficient to justify payment of the Indiana gross receipts tax), State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co., 372 U.S. 605, 10 L.Ed.2d 8, 83 S.Ct. 925 (1963) (sales of Utah-made goods manufactured to meet specifications of out-of-state jobs and required to be shipped out of state, when title passes and delivery is made at seller's place of business in state with transfer by purchaser, who receives a credit for freight charges incurred, subject to Utah state sales tax)--and that **transfer of possession to a purchaser of a product within a state**--McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 84 L.Ed. 565, 60 S.Ct. 388 (1940) (negotiation of contract for sale of coal and delivery of coal within New York City meant that transfer of possession occurred within the city and made the transaction subject to the city's sales tax) are each sufficient to establish the required nexus.

[3/] Any debate in this area may prompt discussion or analysis as to whether a state levy violates the so-called "dormant" Commerce Clause--that is, whether the state action, while not actually contrary to an expressed or exercised Act of the Congress, nevertheless threatens the values the Commerce Clause was intended to serve. The analytical mechanism is, of course, the test first laid down in Complete Auto Transit cited earlier.

shelf natural gas [4] imposed by Louisiana. Maryland v. Louisiana, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). Conceding that Louisiana has an interest in protecting natural resources within its jurisdiction, the court nonetheless rejected the state's contention that the levy was a proper compensatory tax. [5] It found that there was no evidence of justification for the levy and collection of the tax in order to equalize tax treatment of natural gas in interstate and local commerce, and declared that the state does not have an interest in being compensated for the severance or removal of resources from adjacent federally owned lands of the outer continental shelf.

II

The levy that you describe in this forthcoming measure may prompt a due process objection under the 14th Amendment. Still, to the extent the commerce clause test is met, satisfaction of that test should also answer the usual concerns that attend due process objections. [6]

III

State taxation of goods and services in interstate commerce also offers grounds for a potential "supremacy clause" [7] challenge. Generally, under that clause, a state

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[4] The tax was imposed on the "first use" of any natural gas imported into the state of Louisiana which had not been previously subjected to taxation by another state or by the United States. Most OCS-produced gas was piped ashore for processing, chiefly the removal of liquid hydrocarbons.

[5] A "compensatory tax," as I understand, is a state imposed levy on a substantially equivalent good or service that is itself already taxed in order to assure uniform treatment of goods and materials within the jurisdiction. A use tax imposed as a complement to a locally-imposed sales tax is an obvious example.

[6] What you have described is a tax measure. Courts traditionally are deferential to state revenue raising efforts if a due process objection is interposed. Generally, in the consideration of the tax under a due process analysis, the courts will look for evidence of (1) a minimal connection between the interstate activity that is the subject of the tax and the taxing state, and (2) a rational relationship between the income attributed to the jurisdiction levying the tax and the "intrastate" elements of the enterprise that are the subject of the jurisdiction's levy. Trinova Corp. v. Michigan Dept. of the Treasury, 498 U.S. --, 112 L.Ed.2d 884, 111 S.Ct. 818 (1991). These factors appear as included elements within federal commerce clause analysis.

[7] Under the "supremacy clause," article VI, clause 2 of the United States Constitution,

(continued...)

statute is void to the extent it conflicts with a federal statute. The courts are prepared to find evidence of conflict if compliance with the state law stands as an obstacle to the accomplishment of the objectives of Congress. While there has been much Congressional interest in fisheries at least since initial passage of the Magnuson Act, I don't know of any particular federal statutory or regulatory provision that would bar or otherwise present an asserted obstacle to a proposed state levy of the kind you have briefly described. Still, in any legislative review of the proposed measure, the point deserves consideration.

IV

Finally, to round out this memo, though I am not familiar with the specifics of the tax that the administration may have under consideration, to the extent that the fisheries products leave a state dock or airport bound for another nation, the proposed levy may be construed to violate the implied limitation or prohibition on Congressional authority to regulate foreign commerce. [8/] My hunch, however, is that federal authority as to goods and services in foreign commerce would not provide a basis for challenge of a tax statute independent of that provided by the interstate commerce clause.

JBC:pl
93-116.plm

[7/](...continued)

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

[8/] Under article I, sec. 8, the Congress is authorized to exercise power with respect to the regulation of foreign commerce, while article I, sec. 10, constrains the states from imposing any "duty of tonnage" without Congressional consent.

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Juneau, Alaska 99801-2105

MEMORANDUM March 26, 1993

SUBJECT: Draft bill establishing fishery resource landing tax (Work Order No. 8-LS0941\A)

TO: Representative Carl Moses
ATTN: Molly McCammon

FROM: George Utermohle GU
Legislative Counsel

This memorandum addresses the draft bill, establishing a fishery resource landing tax, that you requested.

The draft bill is largely identical to the proposed bill that was supplied with your drafting request. The significant difference between this draft bill and the material provided involves those provisions of the bill relating to the use of the proceeds of the tax for support of the Alaska Seafood Marketing Institute and for municipal revenue sharing. These provisions have been rewritten to avoid any suggestion of a dedicated fund and to directly incorporate the relevant provisions of AS 43.75.130 and 43.75.137 into the bill.

In addition to being cognizant of the constitutional issues associated with a tax such as that proposed by this bill, the legislature should pay attention to precisely defining the taxable event to which the tax is applied. The bill currently proposes to impose the landing tax on the first act of unloading or transferring a processed finfish or shellfish for which the raw fish tax has not been paid, provided that the first act of unloading or transferring occurs in the state. The legislature should consider whether this provision encompasses the situations where the legislature intends that the tax should apply.

If I may be of further assistance, please advise.

GU:gc
93-279.glc

Enclosure

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 26, 1993

RECEIVED
ALASKA DEPARTMENT OF REVENUE
MAR 26 1993
COMMISSIONER'S OFFICE

Hon. Darrel Rexwinkel
Commissioner
Department of Revenue
P.O. Box 110400
Juneau, Alaska 99811-0400

Dear Commissioner Rexwinkel:

You have asked that we comment on the constitutionality of the proposed legislation which would institute a landing tax on processed fisheries resources taken outside Alaskan waters but subsequently brought into the State. "Landing" would be defined as the act of unloading or transferring a fishery resource inside Alaska waters.

We believe the tax to be constitutionally defensible because the tax would be triggered only by activities within State waters and because there is a sufficient nexus between the availability of State services and resources and a vessel to justify the tax. *See, e.g., **Sjong v. State, Dep't of Revenue***, 622 P.2d 967 (Alaska 1981).

This letter will serve to confirm the Department of Law's position that the proposed legislation is constitutionally defensible. We will be available for further analysis should you require.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Vincent L. Usera
Vincent L. Usera
Assistant Attorney General

VLU/ps
cc: K. Lethin, Leg. Liaison
Office of the Governor

D. Behr, AAG

03-CSLH

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MEMORANDUM March 31, 1993

SUBJECT: Potential constitutional questions in House Bill 264 (Work Order No. 8-LS0941\E)

TO: Representative Ramona Barnes
Speaker of the House
ATTN: Mel Krogseng

FROM: Jack Chenoweth
Legislative Counsel

House Bill 264 imposes a fishery resource landing tax.

A fishery resource land tax involving fish harvested outside the state but brought into or landed in the jurisdiction may raise questions under the United States Constitution's commerce clause, clause 3, section 8 of article I; a question under the federal due process provision of the Fourteenth Amendment; a potential "supremacy clause" question under clause 2 of article VI of the United States Constitution; and a possible claim under applicable provisions of the federal constitution involving federal regulation of foreign commerce.

I

The most serious constitutional question is probably the one relating to scrutiny under the United States Constitution's commerce clause--clause 3, section 8 of article I. Historically, that clause has served as a significant check on state efforts to expose business activities to multiple tax liability and to unique forms of regulatory action.

A state tax is not per se invalid because it imposes a burden on interstate commerce. States may require goods and services in interstate commerce that enter the taxing jurisdiction to contribute to the jurisdiction's treasury.

The approach generally invoked in commerce clause analysis has involved consideration of the links that exist between the taxpayer and the taxing jurisdiction, on the

one hand, versus the burden that the tax would impose on interstate commerce. The approach generally adopted in recent cases derives from the United States Supreme Court's disposition of Complete Auto Transit v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), in which the court identified the factors or elements that needed to be considered in evaluating the effects of a state- or locally-imposed tax on goods or services in interstate commerce: (1) does the activity that is subject to tax have a substantial nexus with the taxing state; (2) does it discriminate against interstate commerce; (3) does it fairly relate to services claimed to be provided within or by the taxing state; and (4) is the tax fairly apportioned. As a general rule, a tax on interstate commerce will be sustained if the court can find that the state has a sufficient connection to the business activity that is to be taxed; that, as between instate and interstate commerce, the tax is imposed equitably; and that the tax imposed fairly relates to the state's nexus--its contact or connection--to the business activity that is the subject of the tax. If all of these factors are properly addressed, the tax should survive a commerce clause challenge.

However, in a decision that would seem to be important for this state's efforts to tax resources brought in from outside the limits of the state's jurisdiction, under the Complete Auto Transit test, the court has struck down a first-use tax on federal outer continental shelf natural gas imposed by Louisiana. Maryland v. Louisiana, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). The tax had been imposed on the "first use" of any natural gas imported into the state of Louisiana which had not been previously subjected to taxation by another state or by the United States. Most OCS-produced gas was piped ashore for processing, chiefly the removal of liquid hydrocarbons. Conceding that Louisiana has an interest in protecting natural resources within its jurisdiction, the court nonetheless rejected the state's contention that the levy was a proper compensatory tax. It found that there was no evidence of justification for the levy and collection of the tax in order to equalize tax treatment of natural gas in interstate and local commerce, and declared that the state does not have an interest in being compensated for the severance or removal of resources from adjacent federally owned lands of the outer continental shelf.

II

The levy imposed by HB 264 may prompt a due process objection under the 14th Amendment. However, to the extent the commerce clause test is met, satisfaction of that test should also answer the usual concerns that attend due process objections.

III

The state's taxation of goods and services in interstate commerce also offers grounds for a potential "supremacy clause" challenge. Generally, under that clause, a state statute is void to the extent it conflicts with a federal statute. The courts are prepared to find evidence of conflict if compliance with the state law stands as an

obstacle to the accomplishment of the objectives of Congress. While there has been much Congressional interest in fisheries at least since initial passage of the Magnuson Act, I don't know of any particular federal statutory or regulatory provision that would bar or otherwise present an asserted obstacle to a proposed state levy of the kind you have briefly described. Still, in any legislative review of the proposed measure, the point deserves consideration.

IV

Finally, to the extent that the fisheries products leave a state dock or airport bound for another nation, the proposed levy may be construed to violate the implied limitation or prohibition on Congressional authority to regulate foreign commerce. My hunch, however, is that federal authority as to goods and services in foreign commerce would not provide a basis for challenge of a tax statute independent of that provided by the interstate commerce clause.

JBC:pl
93-261.plm

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

ALASKA COMMISSION ON POSTSECONDARY EDUCATION

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JUNEAU, ALASKA 99811-0505
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APR 1 1993

M E M O R A N D U M

TO: Molly McCammon, Legislative Aide
Office of Representative Carl Moses

FROM: Diane Barrans, Programs Coordinator
Alaska Commission on Postsecondary Education

SUBJECT: A.W. "Winn" Brindle Memorial Scholarship Tax Credit

DATE: April 2, 1993

In follow-up to our telephone conversation of earlier today, Commission staff is requesting that the following language be added as an amendment to HB 264 (Providing for a fishery resource landing tax):

AS 43.75.032 be amended to read:

(e) A fisheries business is entitled to a credit of not more than five percent of the business tax liability under AS 43.75.015 for contributions made during the tax year or during the period in which the taxpayer may file the return and pay the tax for the tax year to the A.W. "Winn" Brindle memorial scholarship account (AS 14.43.250). A fisheries business may claim a credit under this subsection for the 1993 (1987) tax year and subsequent tax years. A tax credit under this subsection may not be approved for more than 100 percent of a scholarship contribution.

The purpose of this amendment would be to allow fisheries businesses additional time to calculate their tax liabilities and to allot donations accordingly.

Thank you for your attention to this matter. Please let me know if I can be of further assistance in this process.

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 1
To Molly McCammon	From Diane Barrans
Co. Rep Moses	Co.
Dept. Rules Comm	Phone # 465-6743
Fax # 465-[redacted]3445	Fax # 465-3293

963N

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

APR 7 1993

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April 6, 1993

The Honorable Carl Moses, Chairman
House Special Committee on Fisheries
Alaska House of Representatives
Room 204
State Capitol
Juneau, Alaska 99811-1182

RE: HB 264 - relating to
a fisheries landing tax

Dear Representative Moses:

We have reviewed the memorandum from Legislative Affairs attorney Jack Chenoweth to House Speaker Ramona Barnes as requested at the hearing on HB 264 on April 5. This memo explores the possible constitutional bases for challenge of the legislation.

We agree with the memo's identification of constitutional issues and the discussion of the two important commerce clause cases cited. Applying the holdings of *Complete Auto Body v. Brady*, 430 U.S. 274 (1977) to the taxing scheme envisioned by HB 264, we believe the tax can be defended. First, the activity has a substantial nexus with Alaska and fairly relates to services provided or available. The vessels used to transport the fisheries resources either use or have the availability of use of Alaska port facilities, refueling capabilities, navigational aids, safety and rescue availability, as well as others. Second, the tax would be fairly apportioned; there would be no discrimination in favor of residents.

We believe *Maryland v. Louisiana*, 451 U.S. 725 (1981) can be distinguished. In that case, Louisiana *only* taxed natural gas that would go into interstate commerce after merely passing through Louisiana; residents were given substantial protection from the impact of the tax. These are the chief failures of the Louisiana scheme. In addition, Louisiana asserted that the tax was linked to severance taxes, however, the Court rejected this argument as the gas subject to the tax came exclusively from outside Louisiana's

jurisdiction. House Bill 264 would establish a tax on landings within the State of Alaska. It is clearly not a severance tax.

Once again, we are not making a definitive determination of constitutionality and agree that the legislation may be subject to challenge. We do continue to believe that the landing tax is defensible.

If you wish to discuss this, please do not hesitate to contact me; my number is 465-2398.

CHARLES E. COLE
ATTORNEY GENERAL

By: Vincent L. Usera
Vincent L. Usera
Assistant Attorney General

cc: Jack Chenoweth
D. Behr

DIVISION OF LEGAL SERVICES

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MEMORANDUM April 8, 1993

SUBJECT: Suggested tax credit amendment to HB 264 (Work Order No. 8-LS0941\E)

TO: Representative Carl Moses
ATTN: Molly McCammon

FROM: Jack Chenoweth
Legislative Counsel

My view is that the amendment is decidedly **not** OK as drafted. For openers --

Is it clear to you that "For one or more of the following purposes," set out in the last line of the lead-in of subsection (a), refers to the taxpayer's contributions or the activities of the nonprofit foundation? My first guess is that the bill is speaking to taxpayer contributions to foundations that do these things. Then I read (b) and I'm persuaded that, well, no, a taxpayer's direct contributions for one of these four purposes is what is intended. Or maybe both . . .

Why only a "nonprofit foundation"? Must the recipient of the contribution have the status of a foundation? Why?

The purposes for which the credit contribution claim may be filed--(a)(1) - (4) of the draft--seem rather "loose." Who decides, in the end, whether the foundation is doing at least one of these things in so responsible a manner as to warrant allowance of a tax credit?

How is (c) intended to operate? If a taxpayer in the city in which I am mayor opts to make a gargantuan contribution to a qualifying charitable foundation and claim the credit, is my city's revenue sharing payment reduced proportionally? Should it be?

Why does the taxpayer need to go through the dance of applying for credit? We don't require that of credit claimers for other taxes. Most other credits that I'm familiar with provide that the taxpayer should just take it and wait for an audit

challenge. However, as loose as this proposal is, perhaps an advance application approach makes better sense.

How does this proposed credit square with others already on the books for other state taxes? Believe me, there are a slug of 'em. Should we not worry about double dipping credit claims? Were we wrong to do so in the past?

Finally, why do you propose to limit this credit claim to those submitted by "CDQ groups"? Do you have a fair and reasonable basis by which to make that distinction? If you don't, then down the line there lurks a possible equal protection challenge.

JBC:mi
93-065.mai

• Need should have a basis.
+ why others.

limit credit to this chapter.

8-LS0941\E.2
Chenoweth
4/12/93

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 264

Page 2, following line 11:

Insert a new section to read:

"Sec. 43.77.035. CREDIT FOR APPROVED CONTRIBUTIONS. (a) A taxpayer who harvests a fishery resource under the provisions of a community development quota may claim as a credit against not more than 50 percent of the tax due under this chapter the taxpayer's contributions made during the tax year to a nonprofit corporation incorporated under the laws of the state that are used by the recipient for one or more of the following purposes:

(1) scholarships for study in the disciplines of fisheries management, fisheries business administration, or another related course or discipline;

(2) training for employment in the seafood industry;

(3) making contributions of capital, in the form of loans or grants, to construct or improve

(A) transportation facilities such as airports and docks that are used for the unloading, transferring, or shipment of fisheries products; or

(B) facilities at which fisheries products are canned, frozen, or otherwise processed for inventory, including floating facilities that are documented under the laws of the United States as defined in 46 U.S.C. App. 801;

(4) awarding grants for research projects relating to fisheries.

(b) A taxpayer who makes a contribution that qualifies for the credit authorized by (a) of this section and who claims a credit for the contribution must apply to obtain the credit. The taxpayer shall apply in the manner provided by the department by regulation, and shall provide to the commissioner all information relating to the contribution that may be required by the department. Upon receipt of

a complete application, the department shall approve or disapprove the application for the credit within 60 days.

(c) The department may not approve a tax credit under this section if (1) the department determines that the contribution does not qualify under (a) of this section; or (2) the taxpayer claiming the credit is in arrears in the payment of the tax levied by this chapter. For purposes of this subsection, a taxpayer is not in arrears if the payment is under administrative or judicial appeal.

(d) A contribution allowed as a credit under this section may not be claimed as a credit under another provision of this title."

Page 4, following line 9:

Insert a new subsection to read:

"(e) In this section, "tax revenue collected" does not include amounts credited against taxes under AS 43.77.035."

Page 4, line 13, after "(1)":

Insert ""community development quota" has the meaning given that term in a regulation adopted by the Office of the Governor, under authority granted by art. III, secs. 1 and 24, Constitution of the State of Alaska, to implement a program of the North Pacific Fishery Management Council to set aside fisheries resources for community development purposes in western Alaska;

(2)"

Renumber the following paragraphs accordingly.

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Juneau, Alaska 99801-2105

MEMORANDUM April 21, 1993

SUBJECT: Revised amendment relating to tax credit to CSHB 264 (FSH) (Work Order No. 8LS-0941\J.13)

TO: Representative Carl Moses
ATTN: Molly McCammon

FROM: Jack Chenoweth
Legislative Counsel

I've have tried to make the revisions substantially as you have directed.

I have inserted "in this state" in the lead-in to AS 43.77.035 and it should accomplish what I think you are trying to accomplish with this caution. In proposed AS 43.77.-035(a)(4), the addition makes reference to research projects related to "Alaska fisheries." Do you mean only research undertaken from in-state activities or would research on Alaska fisheries undertaken by, say, the University of Washington in Seattle also qualify? I assumed you meant the former, but thought I'd better check.

Your indicated revision of subsections (b) and (c) results in a "tentative" approval or disapproval, but you make no provision for "final" approval and I have not a clue as to what is intended to turn on the distinction between "tentative" and "final" approval. Is there to be no provision for "final" approval? If not, why not? If there is to be, what process do you contemplate? Under what circumstances does a "tentative" approval become "final"?

As to the remaining changes: I did not contact the Department of Revenue. With my drafting caseload at this time of the session, I depend upon staff like yourself to make those contacts and provide the information. To save time, I tried my hand at the matter a second time. If this is not satisfactory, have Revenue prepare a response that we may consider.

JBC:pl
93-318.plm

DRAFT

TO ACHIEVE INTENT OF WORKING DRAFT

Section 43.77.035. CREDIT FOR APPROVED CONTRIBUTIONS. (A) A taxpayer who harvests a fishery resource under the provisions of a community development quota may claim as a credit against not more than 45.45% [50%] of the tax due under this chapter . . . .

Section 43.77.040. SEPARATE ACCOUNTING. (a) An amount of tax paid equal to [THE TAX COLLECTED ON THE LEVY OF] 3/10 of one percent of the value of the fishery resource [UNDER AS 43.77.010, CALCULATED WITHOUT REFERENCE TO A REDUCTION FOR THE REVENUE THAT IS NOT COLLECTED DUE TO TAX CREDITS APPROVED BY THE COMMISSIONER UNDER AS 43.77.035,] shall be paid into a separate account in the general fund. The annual ~~estimated~~ balance in the account may be appropriated by the legislature to the Alaska Seafood Marketing Institute.

(b) After payment of the amount determined under (a) of this section, the balance of the tax collected under this chapter shall be paid into a separate account in the general fund. The annual [ESTIMATED] balance in the account, less all tax credits approved by the commissioner under AS 43.77.035, may be appropriated by the legislature for revenue sharing under AS 43.77.050 ~~and for other public purposes~~.

Hypothetical	Ex. One	Ex. Two
Value of fishery resources	$10,000	$10,000
Tax Rate	3.3%	3.3%
Tax before credits	330	330
Credit Claimed (45.45% maximum and 10%)	150	30
Tax due shown on return and paid by taxpayer	$180	300
Amount to ASMI under AS 43.77.040(a)	$ 30	$ 30
Amount remaining in general fund	$150	$270
Reduction for tax credits per AS 43.77.040(b)	$150	$ 30
Amount available for revenue sharing	$ 0	$240
50% to municipalities under AS 43.77.040	$ 0	$120
Amount retained by General Fund	$150	$150

Note: If a taxpayer pays only a part of the tax, ASMI always gets all of its share before the state general fund and the municipalities.

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Molly McCammon	From Carl Mayer
Co.	Co.
Dept.	Phone # 2343
Fax # 3445	Fax #

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Molly McCammon	From Carl Meyer
Co.	Co.
Dept.	Phone # 2343
Fax # 3445	Fax #

4/21/94 Changes to Working Draft on CSHB 264 by Legislative Counsel

Section 43.77.040. SEPARATE ACCOUNTING. (a) An amount equal to the tax collected on the levy of 3/10 of one percent of the value of the fishery resource under AS 43.77.010, calculated without reference to a reduction for the revenue that is not collected due to tax credits approved by the Commissioner under AS 43.77.035, shall be paid into a separate account in the general fund. The annual estimated balance in the account may be appropriated by the legislature to the Alaska Seafood Marketing Institute.

(b) After payment of the amount determined under (a) of this section, the balance of the tax collected under this chapter shall be paid into a separate account in the general fund. The annual estimated balance in the account, less all tax credits approved by the commissioner under AS 43.77.035, may be appropriated by the legislature for revenue sharing under AS 43.77.050 ~~and for other public purposes.~~

Hypothetical

$10,000	landing tax value for fishery resources
3.3%	tax rate
$330	tax before credit ($300 is 3% / $30 is ASMI .3%)
<$165>	maximum credit allowed by 43.77.035
$165	tax due shown on return & paid by TP
<$30>	to ASMI under 43.77.040(a)
$135	remaining for General Fund acct. of the tax actually collected.
<165>	acct. reduced by all tax credits as provided in 43.77.040(b)
<$30>	deficit for revenue sharing

General Fund reduced by $15 because state pays for 50% of the ASMI contribution

lcb.29.cshb264

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM April 24, 1993

SUBJECT: Draft CSHB 264 ( ), "U" version
(Work Order No. 8-LS0941\U)

TO: Representative Carl Moses
ATTN: Molly McCammon

FROM: Jack Chenoweth
Legislative Counsel

I have followed much, but not all, of the language you provided. I've also had to add provisions to cover the sharing of revenues to municipalities.

In AS 43.77.040, you'll see that I've split the credit into two paragraphs, (a)(1) and (a)(2), then separately stated the substantive requirements bearing on each of the two elements of the credit in the next following subsections (b) and (c).

In AS 43.77.040(c) of the earlier draft--AS 43.77.040(e) of this one--I did not substitute "shall not allow." The phrase "shall not" is not properly used in bill drafting, and I retained reference to "approve" for that is in fact what the commissioner of revenue must do on credit applications submitted--either "approve" or "disapprove" them. "May not approve an application for a credit" is a correct statement of the prohibition imposed on the commissioner under the circumstances indicated.

The new subsection (f) becomes AS 43.77.060(e) in this draft, leaving the applicable definition in the last subsection. In (e), you'll note that I went beyond your instructions to try to provide authority to a municipality to revoke its waiver decision and to give guidance to the handling of revenue sharing in the event a city, but not the borough of which it is a part, or a borough, but not its constituent cities, waives payment.

Your change in the definition of "value" negates the necessity of providing a definition of "market value." "Market value" is omitted, and the definition of "value" revised in line with your instructions.

JBC:lmb
93-136.lmb

Enclosure

SECTIONAL ANALYSIS
HOUSE BILL NO. 264

An Act Providing For A Fishery Resource Landing Tax and providing for an effective date.

Section 1 adds a new chapter in AS 43 to implement a landing tax. The landing tax imposed under AS 43.77.010 will apply to processed fishery resources that are not subject to AS 43.75 (the Fisheries Business Tax provisions). A fisheries resource that is subject to tax under AS 43.75 is not subject to the landing tax in AS 43.77.

The Fisheries Business Tax in AS 43.75 applies to fishery resources that are either caught or processed in Alaska. Therefore, the landing tax provisions will apply to fishery resources that were both caught and processed outside the jurisdiction of Alaska and thereafter brought into the state and first landed in this state.

The landing tax will apply to processed resources that are first landed in the state of Alaska rather than in another state or foreign country. The landing tax does not apply if the processed resources are first landed in another state or foreign country. A first landing outside the jurisdiction of a state or foreign country, such as in United States jurisdictional waters, is not a landing in a state or foreign country and does not prevent the Alaska tax from applying. The tax rate is 3.3% of the value of the processed fishery resources at the place of the landing.

AS 43.77.020 provides that a person subject to the tax must file a return reporting the value of the resources landed and the point of landing, as well as such other information as may be required by the department in regulations. The return is to be made on a calendar year basis and is due before April 1 of the following year, as is the case with the Fisheries Business tax return. An extension of time to file may be granted by the department but the tax remains due and payable before April 1.

AS 43.77.030 allows a credit against the landing tax on a fishery resource for processing and salmon enhancement taxes paid to a state in which the fishery resource was caught or processed prior to landing in Alaska. In this provision, we interpret "state" to include foreign countries. The Department understands this credit provision is intended to avoid certain constitutional challenge to the tax, and recognizes that in reality few, if any, resources that are first landed in Alaska will have been subject to tax by another state or foreign country.

AS 43.77.040 provides that the tax collected on .3% of the value of the fishery resource is to be deposited into the general fund in an account for the use of the Alaska Seafood Marketing Institute upon appropriation by the legislature Similarly, the tax collected on 3% of the value of the fishery resource shall be deposited into the general fund and may be appropriated by the legislature for revenue sharing purposes under AS 43.77.050 and other public purposes.

AS 43.77.050 contains the revenue sharing provisions. AS 43.77.050 must be read in conjunction with AS 43.77.040(b) and the amount available for sharing with municipalities and cities is 50% of the tax collected on 3% of the value of the fisheries resources. These revenue sharing provisions mirror the revenue sharing provisions in AS 43.75.130 and AS 43.75.137 that apply to the Fisheries Business Tax.

AS 43.77.060 gives the department the authority to adopt regulations to interpret and implement the landing tax provisions.

AS 43.77.200 contains definitions. A fishery resource for purposes of this chapter is a processed resource. An unprocessed fishery resource in the state, if otherwise taxable, would be subject to AS 43.75.

Landing is defined as the act of unloading or transferring a fishery resource. A taxable landing can take place over water or on land. For instance, a factory ship might catch and process fishery resources on the high seas outside the Alaska 3 mile limit, transfer the processed resources to a second vessel on the high seas, and the second vessel might enter the 3 mile jurisdiction of Alaska and transfer the product to a third vessel. The Fisheries Business Tax under AS 43.75 would not apply because the fishery resources were both caught and processed outside the state. However, the landing tax would apply at the point the second vessel transferred the product to the third vessel. There has been no previous landing in any other state or foreign country so the first landing of the processed resources is in Alaska. The owner of the fishery resources aboard the second vessel at the moment of unloading or transfer is liable for the landing tax.

The valuation of the resources for purposes of computing the tax differs from that under the Fisheries Business Tax provisions. The value is the lesser of the actual market value of the resource at the point of the landing in the state or the statewide average price paid for the resource in that tax year as reported by the Department of Fish and Game.

The use of the statewide average price paid is intended to accomplish two results. First, it will simplify the determination of the tax value since the market value for the processed product may otherwise be difficult to ascertain. Second, it will roughly approximate the value that would otherwise have been applicable under the Fisheries Business Tax provisions.

While the value for purposes of the landing tax, as a result of the use of a statewide average price as a base, may be lower than the actual value as determined by a similar taxpayer under AS 43.75, the landing tax will not generally result in a higher tax burden than that incurred under AS 43.75. That is because the statewide average price paid is based on unprocessed product and therefore does not include the value added from the act of processing. The value added to fishery resources from processing is not included in taxable value under AS 43.75, and HB 264 thereby achieves an equality in the tax burden.

Section 2 provides that the Act takes effect on January 1, 1994 and applies to fishery resources that are first landed in the state on that date.

The Department of Revenue strongly supports House Bill No. 264.

12:h

"An Act providing for a fishery resource landing tax, and providing for an effective date."

* **Section 1.** AS 43 is amended by adding a new chapter to read:

CHAPTER 77. LANDING TAX ACT.

Sec. 43.77.010. LANDING TAX. A person owning a fishery resource that is not subject to AS 43.75 but that is brought into the jurisdiction of, and first landed in, this state is liable for and shall pay a landing tax on the value of the fishery resource. The amount of the tax is 3.3 percent of the value of the fishery resource at the place of the landing.

Sec. 43.77.020. FILING RETURN AND PAYMENT OF TAX. (a) A perso subject to the tax under this chapter shall file a return stating the value of fishery resources landed in the state, the point of landing of the resources, and any other information the department prescribes by regulation.

(b) The return shall be made on the basis of the calendar year to the department at Juneau before April 1 after the close of the calendar year, and the tax shall be paid with the return.

(c) The department may, under regulations adopted by the department, grant a reasonable extension of time for the filing. A grant of an extension of time for filing does not extend the time for payment of the tax.

Sec. 43.77.030. CREDIT FOR TAXES PAID OTHER STATES. A credit, not to exceed the taxpayer's liability for the tax under this chapter on a fishery resource, shall be granted the taxpayer for taxes equivalent to those imposed under AS 43.75

and AS 43.76 that are paid to another state in which the fishery resource was either caught or processed.

Sec. 43.77.040. REVENUE SHARING. The tax collection on three tenths of one percent of the value of the fishery resource under AS 43.77.010 shall be paid into an account in the general fund for the use of the Alaska Seafood Marketing Institute.

Sec. 43.77.050. REFUNDS TO LOCAL GOVERNMENTS. Fifty percent of the tax revenue collected from the tax levied under this chapter that is not earmarked for use by the Alaska Seafood Marketing Institute shall be refunded to boroughs and cities in the manner provided for in AS 43.75.130. Additional refunds shall be made in the manner provided for in AS 43.75.137.

Sec. 43.77.800. REGULATIONS. The department shall adopt regulations to implement and interpret this chapter.

Sec. 43.77.900. DEFINITIONS. In this chapter

(1) "fishery resource" means processed finfish, shellfish, and fish by-products, including salmon, halibut, herring, flounder, crab, clam, cod, shrimp, and pollock;

(2) "landing" means the act of unloading or transferring a fishery resource;

(3) "market value" means the highest price a willing buyer would pay and a willing seller would accept for a fishery resource if both are fully informed and neither is under any compulsion to buy or sell, as determined by the department under regulations adopted to make value

determinations.

(4) "process"

(A) means any activity that modifies the physical condition of the resource, including butchering, freezing, salting, cooking, canning, dehydrating, or smoking;

(B) does not include decapitating shrimp, or gutting, gilling, sliming, washing, or icing a resource solely for the purpose of maintaining the quality of the fresh resource;

(5) "value" means the lesser of (1) the market value of the fishery resource at the time and place the resource becomes subject to the tax under this chapter, or (2) the statewide average price paid in the year for the fisheries resource as reported to, and the results compiled and released by the Department of Fish and Game.

* **Sec. 2.** This act takes effect on January 1, 1994.

DRAFT DRAFT

April 9, 1993

Representative Carl Moses
Alaska State Legislature
State Capitol
Juneau, AK 99801

Dear Representative Moses:

On behalf of the Coastal Villages Fishing Cooperative, I would like to provide these comments to the House Special Committee on Fisheries concerning HB 264 "An Act Providing for a Fishery Resource Landing Tax; and Providing for an Effective Date."

The Coastal Villages Fishing Cooperative agrees with the need for the State of Alaska to obtain revenues from fishing activities which occur in the EEZ off Alaska. We agree that the State puts a significant effort into managing these resources and that the State is an important staging area for offshore activities. We also recognize that there are legal questions raised by the imposition of this tax as outlined in the memorandum from Legislative Counsel Jack Chenoweth to House Speaker Barnes.

Given the potential infirmities with the legislation, Coastal Villages would be able to strongly support this legislation with the adoption of one amendment, which I have enclosed with this letter. This amendment would allow fishing companies participating in community development quota fisheries to deposit 50% of their tax liability into a foundation that would serve four specific "governmental" purposes, similar to the purposes landing ports will make of their share of the tax revenue. These purposes are (1) training residents to work in the seafood industry, (2) obtaining education in the various aspects of fisheries and fisheries business, (3) building the infrastructure for the communities to become active members of the fishing industry, and (4) conducting basic research into fisheries.

The Coastal Villages Fishing Cooperative understands the justification for providing revenue sharing to communities with ports where landings actually occur. However, the Cooperative also believes that there is significant justification for providing a small portion of the revenue to communities without ports, as would be allowable through the attached amendment.

* The purpose of the Community Development Quota program is to establish fishing economies in economically-depressed Bering Sea coastal communities. By providing a source of funding for what are in essence "governmental" functions [education, training, infrastructure, and

research], the State will help ensure that successful fishing economies are created.

* Fisheries infrastructure development in more Alaskan coastal communities will cause more fishery resources to be landed in Alaska providing more revenue to the State.

* With declining State revenues, funds for scholarships, training, and infrastructure development will be less available in the future to coastal communities which do not receive revenue sharing from the landing tax. Providing this source of funding will in small measure compensate for the upcoming budget reductions.

* The Community Development Quota fisheries will be providing revenues to the general fund equal to the amount provided by any other offshore fishing activity.

* The Community Development Quota fisheries are not now contributing to the State through a fisheries business tax [Coastal Villages Fishing Cooperative is contributing to the State through the Alaska Corporate Income Tax.] All of the funds are now available for regional fisheries investment. Paying our fair share to the State through the landing tax is appropriate; however, the tax credit amendment will be beneficial by funding those "governmental" functions that are as necessary as business investment for long term program success.

For each of these reasons, the Coastal Villages Fishing Cooperative requests that HB 264 be amended and the bill be passed out of committee to its next committee of referral.

Thank you for your consideration of our views.

Very truly yours,

Norman A. Cohen
Executive Director

cc: Commissioner Fuhs
Commissioner Rosier
Commissioner Rexwinkel
Clem Tillion
CDQ groups
Rep. MacLean
Rep. Hoffman

JUSTIFICATION: The western Alaska Community Development Quota program was initiated by the State of Alaska, western Alaska residents, and the North Pacific Fishery Management Council for the purpose of creating a fishing economy in one of the nation's most economically-depressed areas. To create these economies, six community groups have formed along the Bering Sea coastline. While each group has chosen a somewhat different method of obtaining this goal, the basic components are the same: training residents to work in the seafood industry; obtaining education in the various aspects of fisheries and fisheries business; building the infrastructure for the communities to become active members of the fishing industry; basic research into fisheries; and setting up seafood businesses.

The first four categories of the activities listed are in the nature of governmental, as opposed to business, functions. For those communities with ports, income from the landing tax will be available to carry out these governmental functions. However, those community groups without established ports will not be able to receive funds from the landing tax for these purposes and will have to use their limited investment capital on programs and projects which cannot sustain themselves financially. This amendment will provide a source of funding for these governmental programs to these "port-less" communities.

The amendment is written narrowly in order to limit its application and impact on the general fund and the established ports. First, the tax credit can only be used for a limited set of activities that can be considered "governmental functions" rather than to "private, business functions." Second, the tax credit will be counted against the amount of money available for appropriation by the Legislature for revenue sharing with communities, not against the general fund. And third, the tax credit is limited to 50% of the value of fish harvested by the community development quota fisheries, which at the present time is only 7.5% of the Bering Sea pollock quota. [The tax credit would be limited to 50% of the 3% landing tax or 1.5% of the value of 7.5% of Bering Sea pollock quota.] While this is an extremely small portion of the revenue sharing with communities, it will be an important source of funding for small communities seeking to establish a fishing economy, but presently without the skills and infrastructure to succeed.

c: taxamen1

Alaska State Legislature

Representative Carl E. Moses

CHAIRMAN
HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL FISHERIES COMMITTEE

MEMBER
FINANCE SUBCOMMITTEES
FISH AND GAME
PUBLIC SAFETY

SESSION:
CAPITOL BUILDING, ROOM 204
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-4451
FAX: (907) 465-3445

INTERIM:
P.O. BOX 109
UNALASKA, ALASKA 99685
PHONE: (907) 581-1234
FAX: (907) 581-2875

May 20, 1993

Greta Goto
Box 233
Dillingham, AK 99576

Dear Ms. Goto:

Thank you for sending me your public opinion message concerning HB 264, the offshore fishery landing tax. As you probably heard, HB 264 passed the Legislature on the final day, and is now awaiting the Governor's signature.

As approved by the legislature, HB 264 does include a credit for the taxes that would be owed by the Community Development Quota (CDQ) groups. That credit could be used for donations to such groups as the Bering Sea Commercial Fisheries Development Foundation.

A proposal to expand the tax credit was discussed, but it was decided that it should be pursued in separate legislation which Senator Jacko and I will both be working on.

Again, thank you for your interest in this important piece of legislation.

Sincerely,

Carl E. Moses

Representative Carl Moses

Public Opinion Message

Only those single messages delivered by the signing individual to the Legislative Information Office by phone or fax, hand-delivered or written at the Legislative Information Office will be accepted for transmission via electronic mail as a Public Opinion Message. We require the following information to be held confidential: (1) name address and phone number of sender, (2) who the POM should be addressed to, (3) the text of the POM (50 words or less), and (3) when possible, the bill number referenced in the POM. Your message may be directed to any individual or combination of the following members of the Legislature.

Delegations	
	Anchorage Delegation (*)
	Fairbanks Delegation (+)
	Mat-Su Delegation (^)
	Bush Caucus (#)

Committees	
Indicate H for House or S for Senate.	
	Community & Regional Affairs
	Finance
	Health, Education & Social
	Judiciary
	Labor & Commerce
	Resources
	Rules
	State Affairs
	Transportation

Senate			
	Adams#		Lincoln#
	Donley*		Little
	Duncan#		Miller+
	Ellis*		Pearce*
	Frank+		Phillips*
	Halford*^		Rieger*
	Jacko#		Salo*
	Kelly*		Sharp+
	Kertula*^		Taylor
	Leman*		Zharoff#

House				
	Barnes*		Hoffman#	Olberg#
	Brice+		Hudson	Parnell*
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	Bunde*		Kott*	Porter*
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	Davidson#		Mackie#	Stiton+
	Davies+		MacLean#	Therriault+
	Davis, B.*		Martin*	Toohey*
	Davis, G.		Menard^	Ulmer
	Finkelstein*	✓	Moses#	Vezey+
	Foster#		Mulder*	Williams
	Green*		Navarre	Willis*
	Grussendorf#		Nicholia#	
	Hanley*		Nordlund*	

APR 27 1993

Mr., Mrs., Ms., Dr. Etc.

Name	Norman N. Anderson V.P B.B.E.D.C.	Phone	246-4210-4423
Address	Box 112		
City	Naknek AKA 99633	ZIP	99633

Subject H.B. 264.

1 SIR	2 I	3 Wish	4 to
5 Go	6 on	7 Record	8 Supporting
9 this	10 Bill	11 on	12 behalf
13 of	14 B.B.E.D.C	15 I	16 feel
17 It	18 would	19 benefit	20 our
21 Group	22 A.I.A	23 the	24 Area
25	26	27	28
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41	42	43	44
45	46	47	48
49	50		

Amended 5/3/93

Support ✓ Oppose ☐ Amend ☐ None ☐

Signature

01/10/93

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

P.O. BOX 110400
JUNEAU, ALASKA 99811-0400
TELEPHONE: (907) 465-2300
FACSIMILE: (907) 465-2389

May 3, 1993

Honorable George Jacko
Alaska State Legislature
State Capitol, Rm 125
Juneau, AK 99801-1182

Dear Senator Jacko:

Brice Edgmon of your staff requested a letter regarding the Department of Revenue's position on HB 264 relating to a fisheries landing tax.

A fish tax study conducted by the Department of Revenue with Department of Fish & Game assistance recommended legislation establishing a landing tax. The tax rate recommended in that study was 5% of the value of the landed, processed product.

The Department of Revenue working with the Governor's Office drafted legislation that Representative Moses introduced under sponsorship of the House Rules Committee. With the same definitions for the tax base, the legislation proposed a 3.3% tax rate with .3% of that amount available for appropriation to the Alaska Seafood Marketing Institute. That is the legislation that is currently being considered by the Senate Finance Committee.

The current version of the legislation, CSHB 264(FIN), contains several amendments adopted by the House Finance Committee. One of those amendments allows landing tax credits for CDQ's that make donations to allowable non-profit organizations for certain purposes including training, education and capital improvements related to fisheries in the State of Alaska. There are provisions of this tax credit proposal that eliminate the State of Alaska's liability and call for the tax credit amount to be paid out of the shared tax amount. The total liability is estimated to be between $150,000 and $250,000 for the tax credits. The administration agreed to this tax credit. We are opposed to any other tax credit provisions at this time.

The General Fund revenue estimate is $4,300,00 with a like amount available before tax credits for sharing with municipalities. ASMI stands to receive up to $860,000 for marketing.

The Department is available if you have other questions concerning this legislation and supports its passage.

Sincerely,

Darrel J. Rexwinkel
Commissioner

cc: Kris Lethin, Office of the Governor
Representative Carl Moses

93-085

Alaska Department of Revenue
Income and Excise Audit Division
FISH LANDING TAX ANALYSIS

	Value	Projected Revenue
***Landing Tax** at 3.3%*		
Fish Tax (3%)	$285,700,000	$8,600,000
ASMI (.3%)	$285,700,000	860,000
Total Landing Tax		$9,460,000

Source: 1991 Fish Tax Study (Department of Revenue - May 1992)

landtax
PED:3/11/93

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 9, 1996

SUBJECT: HB 397; Retroactivity of amendments to the seafood marketing assessment program (Work Order No. 9-LS1471\A)

TO: Representative Alan Austerman

FROM: George Utermohle
Legislative Counsel

This memorandum relates to the retroactive application of HB 397.

HB 397 provides that persons who pay the fishery resource landing tax under AS 43.77 are also required to pay the seafood marketing assessment under AS 16.51. Presently, persons subject to the landing tax do not have to pay the seafood marketing assessment; a portion of the landing tax is earmarked for use by the Alaska Seafood Marketing Institute for seafood marketing programs. AS 43.77.050. The changes made by HB 397 are retroactive to January 1, 1996.

States are given considerable latitude in matters of taxation, including retroactive imposition and collection of taxes. However, there is a limit (albeit a not well defined limit) as to how far the state may "reach back" to collect taxes, because retroactive legislation generally raises due process concerns. Sutherland, Statutory Construction, § 41.10 (1993). As the application of the bill is extended farther into the past, the burden on the state to justify the retroactive application of the seafood marketing assessment is correspondingly increased.

Nonetheless, retroactivity back to January 1, 1996 appears clearly permissible. Atlantic Richfield Co. v. State, 438 P.2d 418, 438 (Alaska 1985). The fact that the bill could be construed as curative, in that it resolves an imbalance in the rates of assessment imposed on processors and persons subject to the landing tax, may also weigh in its favor and support retroactivity.

If I may be of further assistance, please advise.

GU:lmb
96-009.lmb

LEGAL SERVICES

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STATE OF ALASKA

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Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM November 29, 1995

SUBJECT: Amendments to the seafood marketing assessment program (Work Order No. 9-LS1379\A)

TO: Representative Alan Austerman

FROM: George Utermohle
Legislative Counsel

Enclosed is a draft bill relating to the seafood marketing assessment (AS 16.51) that was requested by Amy Daugherty of your staff. The portion of the drafting request relating to the fishery resource landing tax (AS 43.77) is being drafted separately.

The enclosed bill incorporates the concepts proposed by the Department of Revenue in its draft on this subject. The enclosed bill contains numerous changes in drafting style from that used by the department, but does not change the substance of the bill. Most significantly, the definition of "processor" has been rewritten to include all classes of persons subject to the seafood marketing assessment. This new definition is clear, concise, and eliminates the cumbersome litany of "processor, custom processor, person subject to the tax in AS 43.77, and person who removes a seafood product from the taxing jurisdiction of the state." In order to more clearly achieve the apparent purpose of the department, new substantive provisions have been added to the bill: sec. 6, relating to the exemption granted to certain small processors; sec. 10, relating to the procedure for calculating the value of seafood products produced in the state and produced by each processor; sec. 13, adding a definition of "eligible processor."

The draft bill is longer than the bill prepared by the department due to numerous technical and conforming amendments that are necessary as a result of the substantive changes that the bill makes to AS 16.51.

There is one significant constitutional issue associated with this bill that you should be aware of. The changes made by this bill are made retroactive to January 1, 1994. Certainly as applied to the persons subject to the landing tax under AS 43.77 (and possibly others who may not have had a clear obligation to pay the seafood marketing assessment), the retroactive assessment raises a significant due process concern. Making persons who are subject to the landing tax, retroactively pay assessments for the last two and one-half years is potentially unfair and violative of due process under the state and federal constitutions. Prior to this bill,

persons subject to the landing tax did not have to pay the seafood marketing assessment. Presently a portion of the fishery resource landing tax is earmarked for use by the Alaska Seafood Marketing Institute for seafood marketing programs. AS 43.77.050.

States are given considerable latitude in matters of taxation, including retroactive imposition and collection of taxes. The fact that the bill could be construed as curative, in that it resolves an imbalance in the rates of taxes (assessments) imposed on processors and persons subject to the landing tax, may weigh in its favor. Retroactivity back to January 1, 1996 appears clearly permissible. However, there is a limit (albeit a not well defined limit) as to how far the state may "reach back" to collect taxes. Two and one-half years may be too much. In order to avoid the constitutional issue, the bill could waive the retroactive portion of the assessment or make the assessment effective from January 1, 1996.

If I may be of further assistance, please advise.

GU:pl:lmb
95-209.plm

Enclosure

SCOMM

95:33

House District 36
Alatna
Alcan
Allakaket
Aniak
Anvik
Arctic Village
Beaver
Bettles
Birch Creek
Canyon Village
Central
Chalkyitsik
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Circle Hot Springs
Coldfoot
Copper Center
Copperville
Crooked Creek
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Yukon
Gakona
Galena
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Koyukuk
Lime Village
Livengood
Lake Minchumina
Lower Kalskag
Manley
Marshall
McCarthy
McGrath
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Russian Mission
Shageluk
Slana
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Telida
Tetlin
Tok
Tuluksak
Tyonek
Upper Kalskag
Venetie
Wiseman

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Resources
Community and Regional Affairs
International Trade and Tourism
Chair, House Bush Caucus

Sponsor Statement

House Bill 504

An Act relating to the types of seafood promotions and promotional contracts that can be made by the board of the Alaska Seafood Marketing Institute.

House Bill 504 amends the current statutes governing the Alaska Seafood Marketing Institute by allowing the institute to promote Alaska seafood on a regional basis.

Currently, seafood promotions must be generic and statewide, such as Alaska salmon, Alaska sockeye salmon, Alaska king salmon, etc. The existing framework for marketing salmon produced in Alaska waters assumes that generic product promotions will increase overall sales thereby providing benefits to fishermen from all regions of the State. While this works to some extent and is a necessary part of an overall marketing program, regional disparities in the cost of production and transportation require that in certain areas niche marketing efforts be undertaken. HB 504 amends AS 16.51.110 to allow ASMI to promote seafood from specific regions, such as Yukon River chum salmon, Bristol Bay sockeye salmon, Copper River reds, etc. Promotion by brand names will still be prohibited.

Testimony of
Karl Ohls – Resources Development Specialist
Division of Trade and Development
Department of Commerce and Economic Development

House Bill 504
"An Act relating to the types of seafood promotions and promotional contracts that can be made by the board of the Alaska Seafood Marketing Institute."

Special Committee on Fisheries
Alaska House of Representatives
April 3, 1996

Our understanding is that HB 504, and its Senate companion bill SB 255, were introduced in response to a serious problem with salmon markets in the Arctic-Yukon-Kuskokwim region of Alaska.

As you know, Alaska's salmon industry statewide is in a difficult situation. The problems associated with increasing international competition from farmed salmon have hit home. The industry will probably have lower prices and fewer buyers in 1996.

Because of higher transportation costs, the problems with salmon markets are multiplied at least several times in the AYK region. As profit margins narrow for Alaska salmon statewide, the AYK region has been the first region to feel the effects through loss of markets. This is especially unfortunate because AYK chum salmon — with their higher oil content and richer flavor — are an excellent product.

The administration is very concerned about the situation in the AYK region, and wants to work with people in the region and the legislature to try to address the problems.

One idea that has been discussed is trying new and creative approaches to marketing, such as creating a separate identity and demand for AYK salmon in the marketplace. The hope is that this demand could overcome the higher transportation costs involved in getting the product to market.

HB 504 is aimed at creating a separate identity and demand for AYK salmon by allowing the Alaska Seafood Marketing Institute to do regional marketing. Currently, ASMI is limited by statute to generic marketing. It promotes only Alaska seafood, not Alaska seafood by region.

This requirement is necessary for the successful operation of the current

ASMI program. It allows ASMI to create interest among potential buyers — retail and institutional — in Alaska seafood products and then for individual companies to come in and sell their specific products. It allows the 25 member ASMI Board of Directors to focus on a common goal — promotion of Alaska seafood sales — and avoid becoming a battleground over regional marketing allocations.

Regional or niche marketing could work in concert with ASMI's current program. Interest could be created in Alaska salmon. Then, in specific markets, the appropriate entity could sell higher-priced AYK salmon by promoting its advantages and attributes.

While the administration supports the goal of HB 504, it does not support the specific approach taken in this bill. Our concerns are that the bill could disrupt ASMI's current program at a very critical time. ASMI's strong generic marketing efforts should be maintained.

The administration shares the sponsor's interest in trying regional and niche marketing efforts as an additional approach to run parallel to and compliment ASMI's generic effort. We are interested in working with the bill's sponsor and people in western Alaska toward the development and funding of a pilot regional marketing project for the region to try this approach and test its potential effectiveness. There is one limited project of approximately $50,000 now underway for a Yukon salmon targeted marketing project, conducted by the Yukon River Drainage Fisheries Association. This could be expanded upon.

We believe ASMI can play a meaningful role by providing assistance on developing strategies for regional marketing and on developing the technical materials necessary for marketing, as it has already demonstrated. ASMI now has broad authority (AS 16.51.100) to "promote all species of seafood and their by-products that are harvested in the state and processed for sale" and to "prepare market research and product development plans for the promotion of all species of seafood...."

Additionally, a marketing project contract funded by an outside source could be administered by ASMI or another appropriate entity. ASMI has expertise in marketing that should be utilized to the fullest extent possible.

The administration is reviewing grant and loan programs in DCED and DCRA as possible funding sources.

We should keep in mind that regional niche marketing is only part of the solution. Marketing programs take time to develop. Product development and business development needs to occur in the region. Transportation costs

We see no easy solutions to the problem. But we know that whatever the cost of addressing the problem now, the cost of not doing anything will, in the long run, be much greater. The development of new seafood markets is an expensive proposition, but the cost of dealing with social and economic dislocation in rural Alaska would exceed that sum many times over.

Again, the administration is committed to working with the committee and the sponsor of HB 504 and other legislators to find the most effective means of solving the problems in the AYK region.