

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

Anchorage, Alaska
September 22, 2009
2:16 p.m.

MEMBERS PRESENT

Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Carl Gatto
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Jay Ramras, Chair

OTHER LEGISLATORS PRESENT

Representative John Harris
Representative Les Gara
Representative Scott Kawasaki (via teleconference)
Senator Dennis Egan

COMMITTEE CALENDAR

OVERVIEW(S): CONSTITUTIONAL ISSUES ARISING FROM THE ALASKA
CRUISE SHIP PASSENGER HEAD TAX

- HEARD

PREVIOUS COMMITTEE ACTION

No Previous Action to Report

WITNESS REGISTER

JOE GELDHOF, Attorney
Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the
Alaska Cruise Ship passenger head tax.

REPRESENTATIVE JOHN HARRIS
Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

SENATOR DENNIS EGAN

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

REPRESENTATIVE LES GARA

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

BOB STONE, Chairman

Alaska Cruise Association (ACA)

Anchorage, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

STEVE RUMMAGE, Attorney

Alaska Cruise Association (ACA)

Anchorage, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

DONALD BULLOCK, Attorney

Legislative Legal and Research Services

Legislative Affairs Agency (LAA)

Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

DAN SULLIVAN, Acting Attorney General

Office of the Attorney General

Department of Law (DOL)

Juneau, Alaska

POSITION STATEMENT: Testified during discussion about the Alaska Cruise Ship passenger head tax.

ACTION NARRATIVE

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VICE CHAIR NANCY DAHLSTROM called the House Judiciary Standing Committee meeting to order at 2:16 p.m. Representatives Dahlstrom, Lynn, Gruenberg, Holmes, Coghill, and Gatto were present at the call to order. Also in attendance were Representatives Harris, Gara, and Kawasaki (via teleconference), and Senator Egan.

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Overview(s): Constitutional Issues Arising From The Alaska Cruise Ship Passenger Head Tax

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VICE CHAIR DAHLSTROM announced that the only order of business would be a discussion of constitutional issues arising from the Alaska cruise ship passenger head tax.

VICE CHAIR DAHLSTROM noted that Representative Ramras would not be participating in today's meeting due to a [possible] conflict of interest.

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JOE GELDHOF, Attorney, confirmed that he was one of the prime authors of the Cruise Ship Taxation, Regulation and Disclosure initiative, which was approved by the voters in 2006. He declared that the initiative's goal was to "make Alaska and our coastal ports the best possible cruise ship destination." He explained that the initiative dealt with environmental matters, consumer disclosure, and revenue. He pointed out that this was the culmination of local citizen activities and legislative action, and built upon a 2000 Senate enactment that adopted a \$50 head tax. He offered his belief that the excise tax was constitutional and the Department of Revenue (DOR) had administered it in a neutral manner.

MR. GELDHOF explained that the excise tax was per passenger, and was not a fee levied on the vessel itself. He said he did not believe that the excise tax would be "all balled up into the tonnage tax analysis." He opined that the analysis would recognize the Commerce Clause, the constitutional framework, and federal law. He expressed his belief that the tax needed to be spent on primary infrastructure, designed and related to servicing the vessels and the passengers. He suggested that the real issue was to ensure the expenditures were consistent with state and federal law.

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MR. GELDHOF suggested that the legislators and the administration reevaluate the proposed excise tax projects to ensure the constitutionality of each projects' funding.

MR. GELDHOF restated that the reason for the excise tax revenue was to make Alaska the best possible tourist destination.

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REPRESENTATIVE GRUENBERG asked if Mr. Geldhof was a party to the litigation and whether he planned to intervene.

MR. GELDHOF replied that he was not.

REPRESENTATIVE GRUENBERG asked which would take primacy, federal statute or constitutionality.

MR. GELDHOF offered his belief that the federal statute would first be analyzed.

REPRESENTATIVE GRUENBERG referred to the most recent decision in JOHN MOSCHEO v. POLK COUNTY, TENNESSEE in the Court of Appeals in Tennessee.

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REPRESENTATIVE GRUENBERG asked whether the wording of the ballot initiative, which imposed a tax, was deliberate, as opposed to calling this a fee.

MR. GELDHOF, in response, said there was a lot of discussion about the nomenclature, but that tax was the most honest.

REPRESENTATIVE GATTO asked if a fee could be refused, whereas a tax could not.

MR. GELDHOF said that he would have to research whether there was a meaningful distinction. He noted that, as a practical matter, if a person balks at paying a fee, they are not issued a ticket.

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REPRESENTATIVE JOHN HARRIS, Alaska State Legislature, reported that the intention of the initiative sponsors was to have the money spent for the benefit of the cruise ship passengers.

MR. GELDHOF, in response to Representative Harris, shared that Alaska was one of a minority of jurisdictions that has a prohibition on dedicated funds. He explained that the initiative tried to offer "some points to steer by" without requiring where the expenditures be spent. He pointed out that the cruise ship industry was not offering project ideas for the passenger tax, even though they had the best perspective of how the funds should be spent.

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REPRESENTATIVE HARRIS asked whether any other state had a similar law or imposed a similar fee on cruise ship passengers.

MR. GELDHOF said that there were a number of charges levied by international, state, federal, and local jurisdictions. He offered an analogy to the early aviation industry, and noted that, ultimately, the US Congress would harmonize the collection of these charges.

REPRESENTATIVE HARRIS asked Mr. Geldhof whether he believed the Alaska cruise ship taxes were illegal.

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MR. GELDHOF offered his belief that a federal judge would give some suggestions for legal projects.

REPRESENTATIVE GRUENBERG asked if there was a federal agency with the oversight for the expenditure of charges, or if not, should the legislature introduce a joint resolution for the US Congress to create one.

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MR. GELDHOF suggested that they speak with Sean T. Connaughton, lawyer and former head of the U. S. Maritime Administration.

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SENATOR DENNIS EGAN, Alaska State Legislature, noted that Juneau and Ketchikan had charged fees prior to the Cruise Ship

Taxation, Regulation and Disclosure initiative, and he asked why those fees were not in issue.

MR. GELDHOF explained that the issue was the \$46 excise tax; however that did not mean the other fee issues were waived. He opined that the litigation was as political as it was legal.

REPRESENTATIVE LES GARA, Alaska State Legislature, clarified that he did request a legal memo outlining rules for the expenditure of cruise ship fees, but not because he believed that any of the expenditures were illegal. He opined that the federal government should not determine how a state spends its tax money, and he asked Mr. Geldhof how it was determined that the cruise ship taxes had to be spent on "directly relevant cruise ship related expenditures."

MR. GELDHOF, in response to Representative Gara, mused on the scant Alaskan legislative history for the relevant provisions in the Maritime Transportation Security Act of 2002.

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BOB STONE, Chairman, Alaska Cruise Association (ACA), said that he was available to answer questions.

STEVE RUMMAGE, Attorney, Alaska Cruise Association (ACA), asked to speak for 15 minutes, and then to answer any questions.

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MR. RUMMAGE explained that the Alaska Cruise Association (ACA) had filed suit to rescind the passenger excise tax. He said that the ACA doesn't want to be in an adversarial relationship with the state, but that the cruise industry firmly believed that the tax was unconstitutional, improper, and unwise. He stated that it violated fundamental constitutional principles and it discourages tourism.

MR. RUMMAGE referred to the Commerce Clause, Art. 1, § 8, cl. 3, of the Constitution, which stated that "The Congress shall have power to regulate commerce with foreign nations, and among the several states..." He reflected that this had been construed to prevent the states from discriminating against interstate or out of state commerce, and he opined that this was a fundamental motivation for replacing the Articles of Confederation. He quoted from a U.S. Supreme Court decision forbidding interstate discrimination:

... reflects a central concern of the framers that was an immediate reason for calling the Constitutional Convention, the conviction that in order to succeed, the new union would have to avoid the economic balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation.

He quoted another court decision:

During the first years of our history as an independent confederation each state was free to adopt measures fostering its own local interests without regard to possible prejudice to non-residents.

He offered his belief that this was the immediate cause which lead to the formation of the Constitutional Convention. He noted that "the Commerce Clause was the framers' response to the central problem giving rise to the Constitution itself."

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MR. RUMMAGE pointed out that this "goes to the core of the very instrument that binds us together as a nation in economic terms." He reported that, historically, courts had dealt with Commerce Clause challenges by requiring proof that a law was discriminatory in its intent or in its effect on interstate commerce. He pointed out that, in this case, the public record of intent existed as this was a contested political campaign. He quoted a [initiative] sponsor from the Anchorage Daily News (ADN): "It's a good day when the citizens get to win one against the multi-billion dollar industry in British Columbia and outside" and "Alaskans are not stupid. For the average person sitting in a bar, it takes five minutes to figure out this is a tax on the guy from Ohio." He observed that the media reported that Alaska voters supported the fee precisely because it taxed outsiders. He surmised that the record indicated that the purpose of the initiative was to impose a tax on non-residents of Alaska because they were visiting and were available to tax. He continued, detailing that this had a discriminatory effect on interstate commerce because the tax only applied to cruise ships which were 250 feet or longer, cruises of longer than 72 hours in duration, and vessels that supplied overnight accommodations in Alaskan waters. He summarized that these tax requirements only applied to out of state Alaska cruise companies. He

proposed that the tax was overwhelmingly imposed "on the guy from Ohio." He noted that there were other court imposed tests for the Commerce Clause, including an internal consistency test and the "complete auto transit test," and that any of these tests would reveal that the \$46 entry fee violated the Commerce Clause. He referred to other judicial cases, similar to those in Alaska, including Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 567 F.3d 79 (2nd Cir.2009). He read that "the fee was not based on a fair approximation of the ferry passengers' use of the port facilities, and that the fee was excessive in comparison with the government benefit conferred in a relation to the cost incurred by the taxing authority." He offered his belief that a court would reach the same conclusion about the Alaska Cruise Ship passenger head tax.

MR. RUMMAGE directed attention to the Tonnage Clause, Art. 1, § 10, cl. 3, which read: "no state shall, without the consent of Congress, lay any duty of tonnage." He pointed out that the Supreme Court, in its decision to strike down the Valdez tanker tax, (Polar Tankers, Inc. v. City of Valdez, 2009) ruled that a tonnage tax could not be avoided simply by calling it a tax on something other than tonnage: "all taxes and duties regardless of their name or form that impose a charge for the privilege of entering in, trading in, or lying in a port." He reported that the tonnage tax could not be avoided by levying a tax on "the number of masts, or of mariners, the size and power of the steam engine, or the number of passengers which she carries." Referring to Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, the court ruled that the Tonnage Clause applied to a passenger head tax. He surmised that the Alaska Cruise Ship passenger head tax violated the Tonnage Clause, as the fee was assessed based upon entering into the port, and based on the capacity of the ship. He catalogued the permissible charges and fees under the Tonnage Clause to include: for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like. He explained that "if a tax or fee is levied to raise money, as distinct from defraying services actually provided to the vessel, it violates the Tonnage Clause."

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MR. RUMMAGE, referring to the Maritime Transportation Security Act of 2002, 33 U.S.C. 5(b)(2), which imposed the limitations on taxes and fees, noted that this gave additional detail to the Tonnage Clause, and he read: "a state cannot impose any taxes,

tolls, operating charges, fees, or any other impositions from any vessel or from its passengers or crew." He offered his belief that this clarified that it was not permissible to circumvent the law by taxing the passengers instead of the vessel, that a tax included tolls and assorted fees, and that the only exceptions allowed were "reasonable fees charged on a fair and equitable basis used solely to pay the cost of the service to the vessel or watercraft, enhance the safety and efficiency of interstate and foreign commerce and do not impose more than a small burden on interstate or foreign commerce."

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REPRESENTATIVE GRUENBERG, noting the language of the statute, asked if the interpretation of "solely" was limited to mean a benefit only for the cruise ships. He questioned whether, hypothetically, the costs for dredging the channel, which would make it possible for the cruise ships to operate, could be levied on the cruise ships.

MR. RUMMAGE offered his belief that a court would determine that this constituted a service to the cruise ships.

REPRESENTATIVE GRUENBERG replied that this was the determination in New Orleans SS Assn. v. Plaquemines Port, Harbor & Terminal Dist. (5th Cir. 1989).

MR. RUMMAGE concurred that this was fundamentally correct, and was similar to the decision of Clyde Mallory Lines v. Alabama (1935), in which it was stated that even if the security was not used, one would benefit from the harbor security.

REPRESENTATIVE GRUENBERG added, "because it was available."

MR. RUMMAGE agreed. He opined that the current \$46 entry fee was not designed, and did not function, as a "user fee for services provided" even by the hypothetical definition offered by Representative Gruenberg. He listed the cruise ship fees to already include: docking fees, lightering fees, and utility fees. He pointed out the distribution of the \$46 fee: 25 percent (\$11.50) was distributed to communities with no cruise ship visitation via the Regional Cruise Ship Impact Fund; \$25 was divided among the first five ports of call, with no state restriction on the use; and the remainder was appropriated by the legislature. He opined that the Regional Cruise Ship Impact Fund was not used "solely to pay the cost of a service to the vessel or watercraft" and that there were not enough appropriate

projects to absorb this \$46 entry fee. He directed attention to the memo from [Legislative Legal and Research Services] to Representative Gara which referenced funding for the Alaska Zoo, and he opined that the implications of this were clear, "that passenger fees that are collected to fund zoos, convention centers, community centers, light rail stations and so on, do not satisfy federal law." He expressed that these were not legitimate expenditures of cruise line fees.

MR. RUMMAGE directed attention to the memo from Responsible Cruising in Alaska (RCA), which expressed concern that the appropriations would undermine the law. He assessed, from the appropriations identified in the memo, that approximately 20 percent of those appropriations were proper.

MR. RUMMAGE pointed out that most of the collected passenger fee revenue was not spent in accordance with the Tonnage Clause guidelines. He opined that the Tonnage Clause dictated that the fee should be for services rendered and advised that this collection of fees for future project spending was not appropriate.

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REPRESENTATIVE GRUENBERG directed attention to the exceptions for 33 U.S.C. 5(b), which included fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236), and reasonable fees charged on a fair and equitable basis. He opined that 33 U.S.C. 2236 was written differently than 33 U.S.C. 5(b)(2), as 33 U.S.C. 2236 prohibited the expenditure of local funds to build a new structure, but 33 U.S.C. 5(b)(2) did not have a similar prohibition. He stressed that this placed both Alaska and the cruise ship industry in a difficult position, as ports could not be used without facilities, yet the fees could not be used to build those facilities. He noted that the remainder of 33 U.S.C. 5(b)(2) did not contain the prospective prohibition, and he asked if Congress would have put this specific prohibition in if they expected this to be read as Mr. Rummage suggested. In response to Mr. Rummage, he clarified that 33 U.S.C. 2236 "says you cannot use federal funds unless it is to improve existing facilities."

MR. RUMMAGE explained that a more typical funding approach would be to issue bonds for construction, and then pay the debt with user fees. He suggested that collecting fees from a passenger

today to build a service for use by a future passenger was not in compliance.

REPRESENTATIVE GRUENBERG concluded that a financing program would solve the problem.

MR. RUMMAGE agreed, and shared an example of the Denver Airport which had initially applied a passenger surcharge to fund the new airport. He pointed out that the courts rejected this fee.

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MR. RUMMAGE, in response to Representative Gatto, said that rental car fees were not applicable under the Tonnage Clause.

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MR. RUMMAGE, in response to another question from Representative Gatto, confirmed that a cruise ship passenger could not be singled out to pay an entry fee that was not charged to other users.

REPRESENTATIVE COGHILL asked whether the cruise industry had monitored the Cruise Ship Taxation, Regulation and Disclosure initiative before it was approved as a statutory provision.

MR. RUMMAGE replied that he was unaware of the initiative until the day after it was passed [by the voters]. He conveyed that there had been "pretty substantial development in the law on exactly this issue since the initiative was passed."

MR. RUMMAGE, in response to Representative Coghill, clarified that the lawsuit seeks an injunction against the further collection of the tax, but it does not seek a refund.

REPRESENTATIVE COGHILL asked whether anyone in the cruise industry had recognized the approaching clash with the Tonnage or Commerce Clauses.

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MR. RUMMAGE reiterated that he had only become aware of the initiative after its passage.

REPRESENTATIVE COGHILL asked Mr. Stone if he was the Chairman of ACA at the time of the initiative.

MR. STONE replied that he was not, and he observed that ACA was formed after passage of the Cruise Ship Taxation, Regulation and Disclosure initiative.

REPRESENTATIVE COGHILL surmised, given the history of the initiative, the use of the language in the statute, and the ensuing court decisions, that the legislature had been reasonable in its approach.

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REPRESENTATIVE GATTO asked if entry fees could be charged for cruise ship visitations to the glaciers in the City and Borough of Yakutat, even if they did not dock.

MR. RUMMAGE said that he did not know the details, but he reflected that Mr. Geldhof had earlier mentioned Yakutat in connection with the Maritime Transportation Security Act of 2002.

REPRESENTATIVE GATTO noted that the glacier visitations were in Icy Bay.

MR. RUMMAGE emphasized that the ACA members wanted to pay their fair share, but the \$46 entry fee was in excess of the services provided to each vessel. He relayed that the ACA did want to reach an agreement for a passenger fee that satisfied federal law and delivered benefits to the Alaska cruiseline industry.

MR. RUMMAGE opined that the approach taken by the legislature would send a signal to the cruise ship industry.

REPRESENTATIVE LYNN, acknowledging the importance of the cruise industry for tourism, questioned why the ACA had taken so long to file the lawsuit.

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MR. STONE, in response to Representative Lynn, explained that it took time for nine separate, competing cruise lines to come to a consensus of the next steps. He emphasized that the filing of the lawsuit had nothing to do with the scheduled agenda for the House Judiciary Standing Committee.

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REPRESENTATIVE GRUENBERG offered his understanding that considerable deference was given to each state in its use of taxes. He questioned whether Mr. Rummage was correct in his premise that a state was not allowed to forward fund projects using the entry tax and he asked for a specific case law. He stressed that waiting for enough tax money in the future could cause a problem for a currently healthy cruise ship industry in Alaska.

MR. RUMMAGE affirmed that he did not "have anything that is absolutely, categorically on point." He offered his belief that this was implied in statute, referencing Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, and he identified that many of the \$46 entry fee projects did not benefit the passengers who were paying the fees.

The committee took an at-ease from 3:24 p.m. to 3:25 p.m.

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REPRESENTATIVE GRUENBERG asked what percentage of the passengers who pay the \$46 entry fee were Alaskan.

MR. STONE supposed that it was less than 1 percent.

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REPRESENTATIVE GARA established that the intent of the initiative and the will of the majority of Alaskans was not to tax out of state visitors, but instead to pay for infrastructure costs imposed by the cruise ship industry.

MR. RUMMAGE replied that ACA was ready to deal with the infrastructure issues.

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DONALD BULLOCK, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), stipulated that it was not the length of the ship that determined whether a cruise ship was taxable, but rather whether it had at least 250 berths. Referring to AS 43.52.230, he pointed out that the proceeds from the tax actually went into the general fund. He clarified that the legislature could appropriate money for specific purposes, but that this was not a dedicated fund. He noted that the ACA litigation was founded on the use of the entry tax money, and

that the Tonnage Clause, the Commerce Clause, and 33 U.S.C. 5(b) put a limit on the state use of that money.

MR. BULLOCK, referencing the tax on commercial passenger vessels providing overnight accommodations, explained that AS 43.52.220 addressed the liability for payment of the tax. He stated that the tax was on the passenger and generally it was the cruise line that collected the tax. He pointed out that Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 567 F.3d 79 (2nd Cir.2009) declared that the ferry company could be a partner to the lawsuit because the passenger tax could have an effect on its business, and that the tax had to be reasonable and not an undue burden on interstate commerce.

MR. BULLOCK, in response to Representative Coghill, noted that both Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 567 F.3d 79 (2nd Cir.2009) and High Country Adventures, Inc. v. Polk County, No. E2007-02678-COA-R3-CV treated the passengers as litigants and the courts determined they were entitled to refunds of the tax.

REPRESENTATIVE COGHILL questioned the reason for the cruise lines to be the aggrieved litigants, when it was the passengers who paid the tax.

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MR. BULLOCK explained that the passenger tax in Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 567 F.3d 79 (2nd Cir.2009), which arose prior to 33 U.S.C. 5(b)(2), was imposed by the Bridgeport Port Authority to be used for the operating budget of the Authority. He relayed that the 2nd Circuit Court of Appeals determined that the activities which benefited the ferry passengers were the "construction and maintenance of a new ferry terminal building, repair of the bulkhead of the dock, construction of the access road, planning of the parking facility for ferry passengers, security for the dock, and daily operations related to the ferry," but he said that he did not know how this would relate to forward funding. He listed activities which the 2nd Circuit Court of Appeals determined did not benefit ferry passengers, which included other development projects, a high speed ferry for another route, a barge-feeder service for shipping containers, a complimentary pump-out service for pleasure boats, and dredging of the Bridgeport harbor.

MR. BULLOCK opined that there was no guidance from the Court decision defining the distance from the ferry buildings for allowable projects. He noted that both the Tonnage Clause and the Commerce Clause required a relationship of the benefit to the entity and interstate commerce. He noted that both of these cases were prior to 33 U.S.C. 5(b)(2), which now offered a narrower "roadmap" of traditional concepts and Commerce Clause analysis.

MR. BULLOCK pointed out that two parts of 33 U.S.C. 5(b)(2) related to the passenger tax: "reasonable fees charged on a fair and equitable basis," and "do not impose more than a small burden on interstate or foreign commerce." He confirmed that there had been a lot of litigation concerning "reasonable tax and reasonable amount." He noted that the Department of Law (DOL) was concerned with the litigation from the cruise ship lines, whereas the legislature was concerned whether the law was being correctly applied. He cautioned that the merits and the ramifications of the case should not be discussed in a public meeting.

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REPRESENTATIVE COGHILL noted that discussion of the case should be continued in executive session. He opined that although this was a very dynamic process, the law had been settled before the appropriations were agreed upon.

MR. BULLOCK affirmed that the Cruise Ship Taxation, Regulation and Disclosure initiative was effective in December, 2006; the law in effect at that time, 33 U.S.C. 5(b)(2), was enacted in November, 2002.

REPRESENTATIVE COGHILL asked whether 33 U.S.C. 5(b)(2) was scrutinized during the budget process.

MR. BULLOCK declined to answer, surmising that it was one of the points that would be addressed in the litigation. He referenced the privilege tax imposed by Polk County on the rafters (High Country Adventures, Inc. v. Polk County, No. E2007-02678-COA-R3-CV); and cited an argument was that the rafts were used on navigable waters, which he analyzed to be trigger for 33 U.S.C. 5(b)(2).

REPRESENTATIVE GRUENBERG asked if the statute, AS 43.52.200, could be read that any ship with overnight accommodations,

navigating Alaskan waters for more than 72 hours, could be taxed.

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MR. BULLOCK explained that whenever an Alaskan statute was challenged, there was a presumption of constitutionality. He opined that if there was a means of enforcement and application of the statute which was consistent with the words and intent of the statute, in a constitutional manner, then the courts would be unlikely to determine the statute was unconstitutional. He pointed out to Representative Gruenberg that the definitions in Polar Tankers, Inc. v. City of Valdez, 2009 had so many exceptions that the only ships left were the tankers.

In response to Vice Chair Dahlstrom, Mr. Bullock noted that any further discussion would best be discussed in executive session.

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DAN SULLIVAN, Acting Attorney General, Office of the Attorney General, Department of Law (DOL), shared his enthusiasm for working with the legislature and introduced Assistant Attorney General Chris Poag.

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MR. SULLIVAN reminded the committee that this hearing had been originally scheduled as an information gathering session for the Alaska Cruise Ship passenger head tax, and that the "posture of this hearing has changed given the filing of the lawsuit by the Cruise Ship Association [ACA] against the state on Friday." He underscored that the administration and the state retained respect for the Cruise Ship industry and the importance of working with the industry, but that the state would vigorously defend against the lawsuit. He pointed out that it was not in the best interest of the state or Alaskans "to be publicly revealing what we think of the merits of the Cruise Association's lawsuit, or what our litigation strategy is, particularly given that this lawsuit has only been filed a few days ago, and it involves significant finances for the state."

MR. SULLIVAN declared that adjourning to executive session was common practice during these types of litigation issues. He directed attention to two important points: (1) although the economic benefit of the cruise industry was very significant to the state, so was the impact of one million tourists in a very

short period of time, and that the state and local communities had spent significantly to build infrastructure and provide services necessary to accommodate this large influx of passengers and would continue to significantly spend to host these passengers; (2) it was well established jurisprudence under the U.S. Constitution "that when state and local communities have provided significant infrastructure and services to host travelers, whether from in or out of state, that the law allows for users of such services to pay their fair share of the costs."

MR. SULLIVAN offered his belief that while the ACA counsel had indicated that this case was "open and shut," the state did not agree with that, particularly given the well established case law. He opined that the burden of proof that the principle was violated lay with the ACA.

MR. SULLIVAN observed that "facts and economics can be elusive things." He recognized the argument that the passenger tax was significantly hurting passenger demand for Alaska; however, he pointed to a study by the Legislative Legal and Research Services which established that since implementation of the tax, passenger visits through Juneau had increased in 2007 by 65,000 passengers, in 2008 by 15,000 passengers, and in 2009, a notably difficult economic year, that additional cruise lines had announced Alaska as a destination. He assessed that establishing the facts would be an important part of the litigation.

MR. SULLIVAN requested the opportunity to speak more candidly in executive session.

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REPRESENTATIVE LYNN expressed concern with the possibility of voting on legislation using information gathered in executive session, and thereby being unable to fully explain the reasoning.

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REPRESENTATIVE GATTO made a motion to move to executive session for the purpose of discussing confidential litigation strategies.

REPRESENTATIVE COGHILL objected for discussion, and asked if all legislators were invited to the executive session.

VICE CHAIR DAHLSTROM, in response to a question, clarified that all legislators, DOL staff, and Mr. Bullock were invited.

REPRESENTATIVE HOLMES noted that the uniform rules stated that no members of the legislature could be excluded.

[The objection was removed.]

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There being no objection, the committee went into executive session at 4:01 p.m.

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VICE CHAIR DAHLSTROM brought the meeting back to order at 5:35 p.m.

[5:36:08 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:36 p.m.