The Honorable Hollis French
Alaska State Senate
State Capitol, Room 420
Juneau, Alaska 99801-1182

Re: Support for the Promotion of Health Insurance Coverage for All Alaskans

March 11, 2008

Dear Senator French,

The Alaska Health Assurance Advocacy Team (AHAAT) represents 14 statewide organizations concerned with health care related issues. With significant experience in and knowledge of health care delivery and health insurance, AHAAT is the foremost coalition in Alaska with expertise and interest in analyzing and advocating for expanding health insurance to increase access to health care.

AHAAT would like to begin by thanking you for opening up the discussion in the Legislature on this important topic with your legislation, SB 160.

Our coalition knows that expanding insurance to cover those who are uninsured will increase the access to health care services for the 114,000 Alaskans who lack health insurance[1] As 52% of the uninsured in Alaska are employed[2] and 84% of the uninsured in Alaska are from working families,[3] AHAAT understands that this issue impacts individuals and entities statewide and that there is a clear need to provide affordable insurance to working families.

AHAAT also recognizes that lack of health insurance coverage results in higher health risks because the uninsured receive less preventive care; illnesses are diagnosed at later stages; and the uninsured have a greater likelihood of developing chronic conditions that are difficult and expensive to treat.[4] Often, the uninsured are hospitalized for avoidable conditions which can become acute and very costly when left untreated.

AHAAT supports the concept of expanding health coverage insurance to all Alaskans, appreciates that the discussion has begun, and looks forward to working with the Legislature and Governor to find a workable and affordable solution to increase access to health care through more Alaskans having coverage.

Before closing, AHAAT would like to provide you with an alphabetical listing of the organizations participating in our coalition.

AARP - Alaska	Alaska Native Health Board
Alaska Association of Health Underwriters	Alaska Native Tribal Health Consortium
All Alaska Pediatric Partnership	Alaska Primary Care Association
Alaska Behavioral Health Association	Alaska State Chamber of Commerce
Alaska Center for Public Policy	Alaska State Hospital and Nursing Home Association
Alaska Health Care Roundtable	American Cancer Society - Alaska
Alaska Mental Health Trust Authority	American Heart Association - Alaska

Respectfully,

Shelley S. Hughes
AHAAT Co-Chair
Alaska Primary Care Association
Government Affairs Director

Kip Knudson
AHAAT Co-Chair
Alaska State Chamber of Commerce
Legislative Committee Chair

[1] State of Alaska, DHSS, Health Planning & Systems Development. State Planning Grant Power Point Presentation Alaskans' Health Insurance Coverage, July 17, 2007: Local and Regional Perspectives.
[2] State of Alaska, DHSS, Health Planning & Systems Development, State Planning Grant Power Point Presentation Alaskans' Health Insurance Coverage, July 17, 2007: Local and Regional Perspectives.
[3] Email Communication by Alice Rarig, Ph.D., State of Alaska, DHSS, Health Planning & Systems Development to Shelley Hughes, Alaska Primary Care Association, Oct. 16, 2007.
[4] Legislative Health Care Initiatives Presentation to the Anchorage Chamber of Commerce, August 27, 2007.

SB

168

SENATE FINANCE COMMITTEE REPORT
First Committee of Referral

REPORTED OUT
MAY 0 7 2007
SENATE FINANCE COMMITTEE

DATE: 5/2/07

FURTHER:

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 7 May 2007

Finance Committee considered SENATE BILL NO. 168

SB 168 PASSENGER VESSEL TAX CREDIT

"An Act providing a credit for the payment of certain municipal passenger taxes or fees against the excise tax on travel aboard commercial passenger vessels; and providing for an effective date."

and recommends:

[ ] be **replaced** with [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] adopt **previous** [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

SENATE BILL:
[ ] Same Title
[ ] New Title

HOUSE BILL:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
Revenue	5/4/07		*		

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Elton	✓			
	Thomas			✓	
	Dyson			✓	
	Huggins			✓	
	Olson			✓	
CO-CHAIR:	Hoffman			✓	
CO-CHAIR:	Stedman	✓			

REPORTED OUT
MAY 0 7 2007
SENATE FINANCE COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: SB168-DOR-TAX-5-4-07
Bill Version: SB 168
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue 04
Title: Passenger Vessel Tax Credit
RDU: Taxation and Treasury
Sponsor: Senate Finance
Component: Tax Division
Requester: Senate Finance
Component No.: 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	*	*	*	*	*	*

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2007) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

*See attached.

Prepared by: Johanna Bales and Nels Tomlinson
Phone: (907) 269-6628
Division: Tax
Date/Time: 3 May 2007/5:00 pm
Approved by: Jerry Burnett
Date: 5/4/2007
Agency: Dept. of Revenue

(Revised 9/18/2000 OMB)

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

BILL NO. SB 168

ANALYSIS CONTINUATION

Bill Language: This bill would grant commercial vessel passengers who are liable for the $46 tax under AS 43.52.220 a tax credit equal to the lesser of $10 or the actual amount of a passenger tax they may pay to each municipality that is one of their first five ports of call. The total credit would be limited to the total tax levied under AS 43.52.220 ($46).

Revenues: Since Juneau and Ketchikan currently have a $5 and a $7 tax on commercial vessel passengers, respectively, this bill will cost the state at least $12 per passenger. Since the cruise industry projects approximately one million passengers for the 2007 cruise season, we anticipate that this will cost the state approximately $12 million in fiscal year 2008.

One effect of this bill will be to remove the current dis-incentive for communities to tax cruise passengers. Each community will have the option to tax passengers, and that tax will effectively be paid by the state rather than by the passenger, up to a total of $46 for all communities. Therefore, we anticipate that by the next cruise season, more communities will have imposed passenger taxes which take advantage of the credit. These hypothetical local taxes will be higher than the $5 which the ports of call could get from the state. Therefore, it is possible that this measure could eventually erode essentially all of the state's revenues from the commercial passenger vessel tax.

The current law calls for the state to share $5 per passenger with each of the first five ports of call which do not charge their own tax. The state is also called to share 25% of the money collected with regions which are impacted by the cruise industry. Funds for impacted regions could potentially be reduced to nothing by this bill.

Expenditures: It is not anticipated that this bill will result in any additional expenditures for the Department of Revenue.

ALASKA STATE LEGISLATURE

SENATE FINANCE COMMITTEE

Senator Bert Stedman, Co-Chair
State Capitol, Room 516
Juneau, AK 99801-1182
(907) 465- 3873 - Phone
(907) 465-3922 - Fax
Senator_Bert_Stedman@legis.state.ak.us

Senator Lyman Hoffman, Co-Chair
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Official Business

Sponsor Statement SB 168

"An Act providing a credit for the payment of certain municipal passenger taxes or fees against the excise tax on travel aboard commercial passenger vessels; and providing for an effective date."

Senate Bill 168 addresses how the $46.00 passenger excise tax, imposed via voter initiative in 2007 should be distributed to those municipalities that are commercial passenger vessel ports of call.

The 2007 initiative does not assist port communities as intended. SB 168 would ensure that a municipality that is one of the first five ports of call for the vessel would be entitled to a credit against the $46.00 passenger excise tax equal to the lesser of $10 or the actual amount of a similar tax paid by passengers to those municipalities.

The U.S. Constitution and federal statutes restrict the use of marine passenger taxes or fees or "head taxes." Essentially, marine passenger taxes or fees may not be used as general revenue sources, but may be used "solely to pay the cost of a service to the vessel." As a result, there are few, if any, legal uses for cruise ship head tax revenues outside of the port communities that the cruise ships visit.

The 2007 initiative imposed a tax of $46 on each passenger traveling to Alaska on a large cruise ship. Ketchikan and Juneau already impose passenger fees of $7 and $8 per passenger, respectively. With municipal passenger fees "stacked" on top of the state head tax, it will be difficult for port communities to increase existing municipal passenger fees or to impose new ones. Current total passenger fees and taxes (Ketchikan's, Juneau's and the state's) will be $61 per person. If other port communities impose their own municipal fees, the total amount of tax per passenger will obviously grow. Although it is difficult to quantify, at some point the combination of local and state passenger taxes and fees is likely to reduce the amount of money spent in Alaska by cruise passengers – to the detriment of both the port communities as well as other Alaska destinations.

It goes on to provide that each of the first five ports of call on a vessel's voyage in Alaska is entitled to receive $5 per passenger per port visit. A port community must

affirmatively elect to receive these funds and apply to the Department of Revenue to receive them. While in theory, $25 of the $46 tax would be available to port communities, in fact, vessels visit an average of only 3.4 ports per trip to Alaska. The maximum amount that would theoretically go to municipal ports of call, then, is more likely to be $18. The remaining $28 of the $46 total is more than the State is likely to be able to use without violating the federal restrictions.

Ketchikan and Juneau are the first two ports of call for most large cruise ships, and the two communities receive the most cruise ship visits in the state. However, the initiative provides that a port community is not entitled to receive $5 per passenger from the state unless the community gives up its own local passenger tax or fee. Neither of these communities can elect to receive a $5 share of the state tax for two reasons.

1. First, it is less than what these two communities have determined is needed to provide infrastructure and services in connection with cruise ship visits.
2. Second, to the extent that these communities wish to finance port improvements through bonds, they need to have control over the revenue stream rather than have to seek an annual appropriation from the legislature.

With Ketchikan and Juneau certain to opt out of the $5 per passenger share of the state tax, there would often be only 1.4 ports receiving the $5 share, or a total of $7 out of the state head tax. Thus, $39 of the $46 per passenger fee would not be distributed to the ports of call that actually render services to cruise vessels. $39 per passenger is far more than the legislature is likely to be able to use without violating the federal restrictions.

The remaining 1.4 cruise ship ports of call that do not currently impose their own passenger fees will not benefit from the $5 per passenger share of the state tax if, as is likely to be the case, they find it will be more beneficial to impose their own municipal tax or fee. Like Ketchikan and Juneau, these additional port communities may find that $5 per passenger is not enough to cover the costs of providing docks and other services to the vessels. Even if it is sufficient, they may well prefer keeping local control over the amount, imposition and collection of the fee. In addition, vessels calling at some Alaska ports exclusively use privately owned docks, which minimizes the need for a full $5 per passenger in those communities.

With municipal passenger fees "stacked" on top of the state head tax, it will be difficult for port communities to increase existing municipal passenger fees or to impose new ones. Current total passenger fees and taxes (Ketchikan's, Juneau's and the state's) will be $61 per person. If other port communities impose their own municipal fees, the total amount of tax per passenger will obviously grow. Although it is difficult to quantify, at some point the combination of local and state passenger taxes and fees is likely to reduce the amount of money spent in Alaska by cruise passengers – to the detriment of both the port communities as well as other Alaska destinations.

ALASKA STATE LEGISLATURE

SENATE FINANCE COMMITTEE

Senator Bert Stedman, Co-Chair
State Capitol, Room 516
Juneau, AK 99801-1182
(907) 465- 3873 - Phone
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Fax - (907) 465- 4523
Senator_Lyman_Hoffman@legis.state.ak.us

Official Business

Bullet Points for SB 168

- Numerous legal opinions, which have been provided in your packet, show that under the U.S. Constitution and federal law revenues collected from the Cruise Ship Initiative head taxes can only be used to pay the cost of a service to the vessel or watercraft.

- This is much like fees charged to aircraft passengers, which can only be used to service the aircraft" at airport facilities.

- It therefore follows that the $46.00 passenger head tax collected on cruise ship passengers can only be spent at the ports of call at which the vessel stops.

- In fact, Congressman Don Young stated, "non-Federal interests [] may impose taxes or fees only…*under extremely limited circumstances* in which reasonable fees can be charged on a fair and equitable basis *for the cost of service actually rendered to the vessel.*" Cong. Record (Nov. 22, 2002), at E2143-44.

- Federal law does not support the notion that a portion the funds collected under the "Regional Impact Fund" can be used to better tourist facilities throughout the State of Alaska. They can only be used at the ports of call.

- SB 168 would ensure that a municipality that is one of the first five ports of call for the vessel would be entitled to a credit against the tax equal to the lesser of $10 or the actual amount of a passenger tax paid to each municipality.

- The provisions of SB 168 structures a predictable and stable revenue flow making financing of significant port improvement projects a reality.

- SB 168 will guarantee a healthy cruise industry and benefit the State of Alaska, in a legal manner, thereby reducing the chance litigation.

- SB 168 allows a municipality that is a port of call to have a guaranteed income source, which bond buyers, in turn, would see as stable and trustful.

Marine Passenger Fee

$50 Collected per passenger
- 4 To Ocean Ranger program
$46

-25% To "Regional Cruise Ship Impact Fund"
$35

In theory: $5 goes to the first 5 ports of call

$35
- 25 $5 X 5
$10 Per passenger is left over

In reality: Average vessel visits 3.4 ports

$35
-17 $5 X 3.4
$18 Per passenger is left over

Also local ports with their own passenger fees are not eligible to receive the $5 that in theory goes to each of the first 5 ports of call. Ketchikan and Juneau, which are visited by most cruise vessels, have local passenger fees in excess of $5.

$35
-7 $5 X 1.4 (3.4 port visit average minus KTN and JUN)
$28 Per passenger is left over

Prepared by Sen. Stedman's Office
May 4th, 2007

City of Seward
P.O. Box 167
Seward, Alaska 99664-0167

Main Office (907) 224-4050
Facsimile (907) 224-4038

City of Seward, Alaska
1963 1965 2005
All-America City

May 4, 2007

The Honorable Lyman Hoffman, Finance Committee Co-Chair
The Honorable Bert Stedman, Finance Committee Co-Chair
Senate Finance Committee
Alaska State Capitol, Room 520
Juneau, AK 99801

Dear Senator Hoffman and Senator Stedman,

The City of Seward supports SB 168. In our view the initiative has a serious flaw, particularly in the way it is structured to deliver funds to the communities who actually service vessels. The initiative sets aside $35 of the total $50 for this purpose.

Without changing the $50 tax supported by voters, SB 168 provides an attractive alternative for ports like Seward to maximize the use of cruise ship passenger fees through bonding for significant projects aimed at improving our port facilities.

Without SB 168, we are left with small annual grants, while large sums of funds accrue unused in Department of Revenue accounts. This does not make sense!

We ask your support in passing SB 168 this session. This legislation improves upon on what the voters passed to make it workable and effective without changing the tax itself.

Thank you for your consideration.

Sincerely,

Vanta Shafer

Vanta Shafer
Mayor

cc: Senator Gary Stevens
Representative Paul Seaton

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City of Seward, Alaska
1963 1965 2005
All-America City

Hon Anna Fairclough
Co-Chairperson
House Community and Regional Affairs

Hon Gabrielle Ledoux
Co-Chairperson
House Community and Regional Affairs

Honorable Chairpersons

The City of Seward would like to go record in support of the intent of HB 222 and what we understand to be a forthcoming proposed amendment from the sponsor Rep Ramras.

It is our understanding that under federal law revenue from head taxes and fees can only be used to "service the vessel" much like fees charged to aircraft passengers can only be used to "service the aircraft" at airport facilities.

It follows then that these funds can only legally be spent at ports of call where cruise ships actually visit.

The concepts proposed by HB222 go a long way to make the Cruise initiative passed by the voters much more effective in getting the revenues to the port cities where the "vessel servicing" costs actually are.

In addition the bill structures things so that a predictable and stable revenue flow makes financing of significant qualitative improvement to port facilities a possibility.

Thank you for the opportunity to comment.

Sincerely,
Vanta Shafer
Vanta Shafer
Mayor

SOUTHEAST CONFERENCE

Working for strong economies, healthy communities, and a quality environment in Southeast Alaska

April 6, 2007

Representative Jay Ramras
State of Alaska
State Capitol, Room 118
Juneau, AK 99801-1182

RE: Southeast Conference Comments on HB 222

Representative Ramras,

Southeast Conference is a regional, nonprofit corporation that advances the collective interests of the people, communities and businesses in Southeast Alaska. Members include municipalities, Native corporations and village councils, regional and local businesses, civic organizations and individuals from throughout the region. The mission of Southeast Conference is to undertake and support activities that promote strong economies, healthy communities, and a quality environment in Southeast Alaska. After deliberation and recommendations by the Southeast Conference Tourism Committee, Southeast Conference offers the following comments.

The initiative passed last year provides for a marine passenger fee of $50 per passenger to be imposed upon all passengers of large cruise ships calling at ports in the State. The current arbitrary $5 limit per port, for up to five ports, as written in the initiative will, based on the real ship schedules; direct an average of only $18 of the $50 to the communities that are directly impacted by the cruise ships. This is because the average cruise ship stops at 3.5 ports. In our opinion, this is not enough money to meet needs in directly affected communities.

In the present formula, **none** of the state fee goes to the municipalities that have port fees equal to or greater than $5. This further reduces the amount above and it puts ports with local port fees at a big competitive disadvantage against ports without such fees because the port fee is now on top of the $50 tax per person.

We believe that without amendment the formula contemplated by the initiative may not comply with federal law. In 2002 Congress passed Section 445 of the Maritime Transportation Security Act, which essentially requires a connection between the fee, and a service to the vessel, passengers, and/or crew. The present formula does not appear to comply with that requirement.

We believe that HB 222 will encourage the cruise lines to work with each port community to develop a plan to provide improvements to port and related facilities, and set a fee at an appropriate level to do so. This should result in a much more productive relationship between cruise lines and their host communities.

P.O. Box 21989 Juneau, Alaska 99802-1989 Tel. (907) 463-3445 FAX (907) 463-5670
An Alaska Regional Development Organization
USDA - NRCS Resource Conservation & Development Council

Furthermore, we believe that HB 222 helps assure that marine passenger fees flow to local communities so that those being impacted the most by the cruise ships can improve their port infrastructure and compete on the world market with ports around the world that are making significant investments.

Finally, we believe that HB 222 is consistent with the initiative, as $50 would still be assessed against each passenger on cruise vessels entering Alaska waters, and with federal law, as the fees collected would be spent on services reasonably related to the vessels, their passengers, and their crews.

Southeast Conference urges you and your colleagues to pass HB 222 this session.

Sincerely,

Carol Rushmore

Carol Rushmore
President

Cc: House of Representative Members

Opinion Piece
Mayor Bruce Botelho, City and Borough of Juneau
Mayor Bob Weinstein, City of Ketchikan

As mayors of coastal communities that host hundreds of thousands of cruise visitors each year, we support legislation which, by correcting flaws in the 2006 cruise ship ballot measure, will assure that each passenger is assessed $50 as intended by the voters, and that the funds are expended in a manner consistent with federal law.

First, let's walk through how the passenger tax works under the initiative.

Each passenger traveling in Alaska on a large commercial passenger vessel will pay $50, of which $4 is a fee for the Ocean Ranger program. That leaves $46 per passenger to be used for port facilities and other services to the vessels. Each of the first five ports of call for each vessel is entitled to receive $5 per passenger, if appropriated by the Legislature, to improve port facilities and provide other services to cruise vessels.

In theory, then, $25 of the $46 tax would be paid to local ports at which the vessels dock. In reality, however, few vessels visit five ports. The average is only 3.4 ports of call. Based on that average, the maximum amount that would actually go to municipal ports of call is $17.

But wait! There's more! The ballot measure denies funds to any community which assesses its own port fees. In practice, this means that Ketchikan and Juneau, which are the two most visited and impacted ports of call, would receive nothing from the $46 tax because they have, respectively, local fees of $7 and $8. Because these two ports are visited by nearly every cruise ship coming to Alaska, on average only $7 of the $46 available to supp[illegible] local ports of call could be used for that purpose, leaving the remaining $39 "stranded," unavailable for distribution to ports which actually render services to cruise vessels.

Some proponents of the current law will argue that the money is not "stranded". In their view, the legislature could simply appropriate the remaining monies to port and other communities around the state with little regard to the actual services provided to cruise vessels. But the federal restrictions don't work that way. The U.S. Constitution and federal statutes have placed restrictions on the use of marine passenger fees. In numerous opinions, the Department of Law and the Legislature's own attorneys have consistently confirmed that marine passenger fees cannot be used as general revenue sources because federal provisions essentially require such fees to be used "solely to pay the cost of a service to the vessel." In short, communities that don't directly service vessels can't generally qualify for funding.

In the meantime, port communities that are visited and impacted by cruise vessels need to make investments to improve their port facilities. Ketchikan currently has a $40 million port upgrade project which was financed through bonds sold via the Alaska Bond Bank.

The $7 passenger fee is being used to pay the debt service. Juneau and other ports are contemplating similar improvements, and need a recurring revenue stream to pay for the improvements.

We do not believe that approval for financing of such projects would be forthcoming if, instead of a reasonably guaranteed revenue stream, municipalities had to rely on annual appropriations from the Legislature. The Bond Bank's financial advisor recently stated that, under any imaginable circumstances, the pledge of a borrower to the Bond Bank secured from on-going revenues- like a marine passenger fee assessed by a local port- is superior to a pledge subject to annual appropriation.

We respectfully urge the Legislature to pass HB 222. The bill would allow existing and new municipal passenger taxes or fees to be taken as a credit against the state's tax up to a maximum credit of $10 per passenger paid to each port.

We believe that the best way of complying with federal requirements, meeting the requirements of any lender willing to finance port projects, and making realistic use of marine passenger fees is to assure that funds flow to local communities to improve our port infrastructure. HB 222 will help accomplish those goals.

CARNIVAL
CORPORATION&PLC

PETER RATCLIFFE
Executive Director, Carnival Corp & plc
24200 Magic Mountain Parkway
Santa Clarita, CA 91355
Tel: (661) 753-1500
Fax: (661) 753-1510

April 11, 2007

The Honorable Sarah Palin
Governor State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Palin,

May I again thank you for taking the time to meet with me last week during my visit to Juneau. As I indicated during our meeting, we are committed to working with Alaskans, taking into account both the benefits our business brings to communities and the impacts that result.

As we discussed, I plan to meet soon with Gershon Cohen to hear first hand his views and explore his concerns.

We have considered carefully the message of the August vote. The initiative showed us that we were not viewed in many Alaskan communities as favorably as we would have liked. We are sincere in our commitment to be responsive to the communities and citizens of Alaska and we are redoubling our efforts in these regards.

When we met, I mentioned to you that we had a legal opinion on the constitutional issues related to the passenger head tax and I offered to provide you a copy. The enclosed paper has been prepared by Ted Olson, a well-respected constitutional lawyer and former Solicitor General of the United States. Mr. Olson prepared this to be submitted to the Alaska Legislature in the form of written testimony if a hearing were to be scheduled on the head tax.

I am committed to moving forward with you to find a constructive resolution to these conflicts and legal uncertainties that will be acceptable to Alaskans.

I look forward to further discussions with you as we go forward.

Sincerely,

Peter Ratcliffe

Alaska State Legislature
_____ Committee

Written Testimony of the Honorable Theodore B. Olson

April __, 2007

Chairman, Vice-Chairman, and distinguished members of this committee:

My name is Theodore B. Olson, and it is an honor and a privilege to present this written testimony to the committee. Today's hearing has been convened to examine the serious legal and constitutional questions that surround the passenger tax provisions of Measure No. 2 of the 2006 Alaska Primary Election, which the voters of this state approved on August 22, 2006.

Assessing the constitutionality of federal and state laws is a task with which I have some familiarity. In my legal career, I have been privileged to hold three positions – Solicitor General of the United States, Assistant United States Attorney General in charge of the Office of Legal Counsel, and an attorney in private practice with the law firm of Gibson, Dunn & Crutcher, where I serve as co-chairman of the firm's Appellate and Constitutional Law practice group. In all three capacities, I have often been called upon by senior government officials, distinguished members of Congress and state legislatures, and major corporations and trade associations to assess the legality and the constitutionality of particular state and federal laws.

At the request of the North West Cruiseship Association, I have studied the provisions of Measure No. 2 that assess a $46 per person tax on passengers of certain kinds of cruiseships. I understand that members of this committee, and of the Legislature as a whole, are interested in determining the constitutionality of this tax and identifying any legal limits that may exist on how proceeds of the tax may be spent.

I have reached two conclusions which I wish to summarize here. First, before we even get to the question of how such tax revenues may be *spent*, I believe that the *collection* of the tax is subject to substantial constitutional objections. Second, I conclude that any proceeds from such taxes may be spent – if at all – only for certain narrow purposes. I will address each point in turn.

First, I begin by noting that there are serious questions whether it is even constitutional to *collect* this tax.

Under the Commerce Clause of Article I of the United States Constitution, "*Congress* shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." Courts have consistently construed this provision to forbid States from discriminating against interstate or out-of-state commerce.

This prohibition on discrimination against out-of-state commerce is no ordinary rule of law. It was one of the fundamental motivations for replacing the Articles of Confederation and adopting the United States Constitution in the first place. As the U.S. Supreme Court observed

less than two years ago, the rule against interstate discrimination "is essential to the foundations of the Union. . . . This mandate 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 tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quotations and alteration omitted). "The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself . . . . For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("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 nonresidents . . . . [T]his was the immediate cause that led to the forming of a constitutional convention.") (quotations and alteration omitted).

So the Constitution expressly forbids states from discriminating against commerce from other states. Such discrimination may be demonstrated either by proof of an intention to discriminate against interstate commerce, or by proof of a discriminatory burden and effect on interstate commerce. There is good reason to believe that the passenger tax suffers from *both* an intent to discriminate against, *and* a discriminatory effect on, interstate commerce.

Public statements of those who sponsored and supported the initiative indicate that they did so precisely because they believed that the initiative disproportionately burdens out-of-state tourists and business interests. According to numerous press clips in the *Anchorage Daily News*, supporters have made a number of statements indicating that the cruiseship tax is "a tax on people from outside the state." One sponsor proclaimed that that he wanted to "win one against a multibillion-dollar industry located in British Columbia and Outside." That same sponsor boasted that Alaska voters would easily approve the initiative because "[f]or the average person sitting in a bar, it takes five minutes to figure out this is a tax on the guy from Ohio." The media also reported that Alaska voters supported the initiative precisely because "it taxes Outsiders."

There is also evidence that the passenger tax will have a discriminatory impact on out-of-state tourists and business interests. The precise details of the tax are important to my legal analysis, so I will go through them briefly here. First, the tax applies only to commercial passenger vessels containing 250 or more berths. Second, the tax applies only to vessels that provide overnight accommodations in Alaska waters. And third, the tax applies only to voyages lasting more than 72 hours. A commercial passenger vessel that does not satisfy all three of these conditions is exempt from the tax.

These three conditions are important to the legal question before the committee. It seems likely – and further investigation and analysis would presumably confirm – that the tax disproportionately burdens those passenger vessels that are most likely to be enjoyed by out-of-state tourists engaged in interstate tourism and commerce.

In sum, the passenger tax is both motivated by a desire to tax out-of-state tourists and business interests – and carefully designed to achieve precisely that goal.

Second, under another provision of the U.S. Constitution, proceeds from the passenger tax may be spent -- if at all – only for certain narrow purposes.

The Tonnage Clause of Article I of the Constitution provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." This provision applies to all state taxes on vessels – even those that do not strictly involve the weighing of cargo. As the U.S. Supreme Court has explained, "[i]n the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent." *Southern S.S. Co. of New Orleans v. Portwardens*, 73 U.S. 31, 35 (1867). The Court has thus concluded that the Tonnage Clause broadly applies to "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935).

Accordingly, state and local government officials across the country – including here in Alaska – have understood that the Tonnage Clause forbids them from imposing taxes on passengers, just as they are prohibited from imposing duties based on "tonnage." Either form of tax would satisfy the Supreme Court's definition of "a charge for the privilege of entering, trading in, or lying in a port."

There is one important exception to the Tonnage Clause, which deserves elaboration here. As the U.S. Supreme Court has instructed, the Tonnage Clause does *not* apply to certain fees that are assessed in return for "services rendered to and enjoyed by the vessel." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935). Under this exception, courts have struck down taxes assessed on vessels that have received nothing in return. Courts have likewise struck down taxes assessed regardless of whether the vessel ever docks at a particular port in the first place. On the other hand, courts have allowed the imposition of fees for piloting services, wharfage services, and general harbor services such as police and fire protection for all who enter and use the harbor.

This is precisely the problem with the passenger tax established under Measure No. 2. Proceeds from the passenger tax are not limited to services rendered to the vessel at a particular port. In fact, the passenger tax applies even to vessels that *never* dock at any Alaskan port.

Moreover, Measure No. 2 allows the Alaska Legislature to use the proceeds from such taxes for "such other lawful purposes as determined by the legislature." Such blanket spending authority is precisely what the Tonnage Clause forbids.

The Tonnage Clause does allow states to impose duties on vessels – so long as it does so with the "Consent of Congress." But Congress has not given any such consent. Indeed, Congress has done quite the opposite.

In 2002, Congress enacted the Maritime Transportation Security Act. That Act added a significant new provision to section 5 of title 33 of the United States Code that, as the legislative history confirms, allows states to tax vessels only "under extremely limited circumstances." Specifically, the Act expressly forbids any taxes on vessels operating in navigable waters,

including Alaskan waters, "except for . . . reasonable fees charged on a fair and equitable basis" and "used solely to pay the cost of a service to the vessel or water craft."

The Alaska passenger tax appears to violate *both* of these conditions. First, the passenger tax does not apply on a "fair and equitable basis." As I have previously explained, the tax applies to only certain large passenger vessels meeting certain conditions. It does not fairly and equitably apply to all vessels that actually make use of the ports and harbors of Alaska. Second, as I have noted, proceeds from the tax are not limited to paying for services rendered to taxed vessels, but instead may be used for "such other lawful purposes as determined by the legislature."

In short, Measure No. 2 poses an unconstitutional and unlawful tax on vessels traveling through Alaska waters. The passenger tax can be applied – if at all – only in order to fund services rendered to the taxed vessels.

I wish to thank this committee again for the honor of allowing me to present this written testimony on the important questions that the committee is examining today.

Thank you.

* * *

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

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May 16, 2003

The Honorable Cheryll Heinze
Alaska House of Representatives
State Capitol, Room 416
Juneau, AK 99801-1182

Dear Representative Heinze:

This is to respond to your request regarding HB 207 and the applicable federal law concerning taxes, fees, and other levies on vessels or their passengers or crew. Specifically, the Maritime Security Act of 2002, among other things, amended 33 U.S.C. sec. 5 to provide:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for --
>
> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or
>
> (2) reasonable fees charged on a fair an equitable basis that --
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce.

John Corso, City & Borough of Juneau Attorney, recently examined the change in federal law. As you know, the CBJ has a port fee in place and is therefore very interested in this subject. I have reviewed Mr. Corso's opinion and I concur with his conclusions. I have attached a copy of his memorandum for your review.

The new statutory language basically restates the federal constitutional rule that a fee can be imposed on vessels or the passengers only to the extent the authority imposing such fee provides a service to the vessel. Article I, section 10, cl. 3 of the United States Constitution provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage...." *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935) (the prohibition against tonnage duties does not extend to charges made by state authority for services rendered to and enjoyed by the vessel). Additionally, there are several other constitutional provisions that are implicated by a fee or tax on cruiseships.

As Mr. Corso states in his memorandum, "the statute adds some new emphasis to the constitutional rule." The fees must be used "solely" to pay the cost of a service to the vessel, must "enhance the safety and efficiency of interstate and foreign commerce," and must not impose more than a "small" burden on that commerce.

I hope this information is of assistance and please let me know if you have further questions.

Sincerely,

Gregg D. Renkes
Attorney General

Enclosure

TO: Senate Finance Committee
FR: Chip Thoma, Juneau, Cruise Initiative Supporter
RE: SB 168, Cruise Tax Credit
DATE: May 4, 2007

SB 168 would have a negative impact on the finances of the State of Alaska. Importantly, this bill would not help municipalities cope with hosting the 1 million cruise passengers coming to Alaska each year in a compressed, 5 month season.

The 'credit' that a cruise passenger should receive under SB 168 will never reach that Alaska ship passenger, as there are no requirements in SB 168 to return these fees to passengers. In reality, this is a tax rebate program that returns new state revenues directly to cruise companies in Miami. For these reasons, I oppose the bill.

Also, SB 198 is not good public policy. It encourages competition between Alaska port towns to solicit industry favor on ship taxes, rather than making sound, community-based decisions on expensive improvements to waterfronts. Local waterfront activities are the heart and soul of each coastal town, and decisions should be made without constant pressure over summer passenger fees. The new cruise law ends the industry practice of comparing and selecting communities based on their local tax climate. It no longer makes any difference.

Instead, the cruise law is an opt-in, revenue-sharing program of **choice** for local municipalities. In years ahead, there will be many new cruise ports in the state that will benefit, such as Cordova, Valdez and Kodiak, because cruise demand and the market are certainly there. Other cruise ports that can benefit now from the initiative are those that have private cruise docks, such as Skagway, Whittier & Hoonah.

In these latter port towns, dock owners charge ships a **private** passenger fee for using their properties. New state revenues would allow municipalities with cruise ports, but without local passenger fees, to make extensive capital improvements to adjacent city docks, harbors and lands used by passengers when they visit. This is a great benefit to the industry, all cruise passengers, and local ports.

As the initiative was written, each community has the choice when to opt-in or to opt-out. They can choose to have the state collect and distribute the cruise taxes, or to charge and bond for municipal cruise docks and improvements with local passenger fees, such as now occurs in Ketchikan and Juneau.

Juneau is the best example of a port community that has legally defined the uses of cruise passenger fees, as contained in the 2002 Maritime Security Act. This federal law says that reasonable passenger fees can be spent on cruise docks and adjacent access areas for the safe and efficient movement of passengers and cargo. I have included the opinions issued by Juneau Borough attorney Corso in 2003 and by Juneau Borough attorney Hartle in 2005 (attached).

81,000 Alaskans voted correctly on the cruise initiative, and they knew what they were voting for:

- Clean cruise ships, verified as such by Ocean Rangers;
- Consumer disclosure for cruise passengers; and
- Fair state taxes, to be spent on cruise infrastructure.

The cruise lines in Alaska are a multi-billion dollar industry that overwhelms coastal towns throughout Alaska each summer. It is time that the state had a fair tax regime that provides new funds for the huge cruise infrastructure costs needed in the years ahead.

Over three decades ago, Governor Jay Hammond defined the ground rules for industries doing business in Alaska:

- Industry pays its own way, without subsidy;
- Industry does not pollute; and,
- All industries pay a fair share in state taxes.

The ink was not even dry on the initiative results before an all-out repeal effort ensued on every section of the 2006 initiative. Passage of SB 168 would be a repeal of the cruise initiative. According to the AG's opinion of February 6, such a repeal would be found unconstitutional in 2007 and 2008. I urge you to hold SB 168 in committee this interim, and review the collection and application of state cruise taxes during the summer cruise season. Thank you.

CBJ Law Department MEMORANDUM

To: Assembly Finance Committee

From: John R. Corso, City & Borough Attorney

Subject: Port Fees; federal law

Date: April 21, 2003

I. Discussion

Last week, KTOO broadcast a story about the Murkowski administration reaction to recent changes in federal maritime law. The law in question is the Maritime Security Act of 2002, which, among other changes, amended 33 USC §5 to provide:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--
>
> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or
>
> (2) reasonable fees charged on a fair and equitable basis that--
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce.

The reference in (b)(1) is to a long-established program for harbor project fee review by the Federal Maritime Commission. The Port Director administers this program for CBJ. I have attached copies of the new language and the referenced FMC statute.

The new statutory language essentially restates the constitutional rule described in my July 22, 1999 memorandum to the Assembly on the passenger fee initiative. Briefly, the rule is that we can impose a fee on visitors only to the extent we provide a service to visitors. We cannot charge them a fee for services we provide to someone else, such as ourselves.

Some services, such as dock construction and maintenance, are clearly justifiable as a service to ships and passengers. Others are less defensible. The statute will prevent the most flagrant abuses, such as a fee imposed on ships that merely pass through local waters without stopping. So said Congressman Young in the November 22, 2001 *Congressional Record*, attached. However, it can be used in less egregious circumstances as well. Mr. Young speculated that "generally taxes will not be allowed under this section". *Id.*

Even though the statute does not break any new legal ground, it does provide a reasonably clear and concise statement of the law. In this respect, it is more usable, (both for us and for plaintiffs) than a fuzzy principle extracted from constitutional text and a few judicial cases; which is all we had to work with before the statute.

Also, the statute adds some new emphasis to the constitutional rule. The new language says that fees must be use "solely" to provide a service to the vessel, must "enhance the safety and efficiency" of interstate and foreign commerce, and must impose only a "small" burden on that commerce. We must await judicial interpretation to learn exactly what these qualifiers mean, but they certainly do not make things easier for local port fees.

According to the KTOO story, the Murkowski administration has concluded that the new law prohibits passenger fees. I'm not sure that the Attorney General shares this view: informal contact with his staff suggests that they see it pretty much as I do.

II. Conclusion:

For the most part, the new statute just restates existing constitutional law. It makes no fundamental changes and does not invalidate our port or passenger fees.

However, it will serve to focus attention on how we use the fee revenue. Also, the statutory language is slightly more stringent than the constitutional rule it supplements. As a result, we should take extra care to spend passenger fee revenues on programs (or parts of programs) that benefit only the people who pay the fee. We may not balance our budget by taxing people who cannot vote.

CBJ Law Department

MEMORANDUM

To: Mayor and Assembly

From: John W. Hartle, City Attorney JWH

Subject: Fees on Cruise Lines; Resolution 2294b.

Date: March 12, 2005

You have asked for an analysis of the objections raised by Jim Reeves of Dorsey and Whitney regarding the proposed increases in cruise line fees in Resolution 2294b. I have analyzed all the cases cited by Mr. Reeves, and the other major case law as well. The short answer is that, while there is always some risk regarding particular expenditures, and federal law does provide special protection to interstate and foreign shipping, it appears that the present proposal would pass muster under the U.S. Constitution because the proposal is a fee for services and facilities that benefit the cruise industry, rather than a tax to raise general revenues.

The Tonnage Clause.

The Tonnage Clause of the U.S. Constitution gives the shipping industry a measure of special protection from state and local taxation. The clause provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, cl. 3. It was added to the Constitution on September 15, 1787, according to the notes of James Madison, essentially as a supplement to the Commerce Clause, which also serves to limit state and local regulation or taxation of interstate or foreign commerce.

Under the Tonnage Clause, a municipality cannot levy a general tax on ships for the privilege of entering port; fees for services and facilities, however, can be imposed. There are many cases that make this point. Closest to home is the July, 2004, Superior Court decision in *Polar Tankers, Inc. v. City of Valdez*. Case No. 3AN-00-9665Cl. In that case, the court struck down the City of Valdez's Ordinance 99-17 which imposed the "Tanker Tax," a business personal property tax levied mainly on oil tankers. Because the tax was imposed for the admitted purpose of raising general revenues, not based on a particular service or facility for the tankers, the court struck it down.

The fee increase proposed in Resolution 2294b, by contrast, is not intended as a general revenue measure. The resolution would impose fees for the purpose of constructing facilities outlined in the Long-Range Waterfront Plan that benefit the cruise industry. *See* Resolution 2294b, Sec. 2(e), pg. 3, line 22. Courts have consistently found that state or local fees for services or facilities do not violate the Tonnage Clause. In 1877, the U.S. Supreme Court summarized the law as follows:

> To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. *But a charge for services rendered or for conveniences provided is in no sense a tax or a duty.* It is not a hindrance or impediment to free navigation. *The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce.*

Keokuk Northern Line Packet Co. v. City of Keokuk, 95 U.S. 80, 84 -85 (1877) (emphasis added).

125 years later, courts are still saying the same thing:

> "[A] charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation."); see also *Barber v. Hawai'i*, 42 F.3d 1185, 1196 (9th Cir.1994) ("[A] state is not prohibited from charging reasonable fees in return for services rendered.")...For example, a harbor fee charged for the use of restroom facilities, parking, trash disposal, and security is not a "duty of tonnage" because services are provided in exchange for the fee. See *Barber*, 42 F.3d at 1196. Similarly, if fees are for pilotage, wharfage, use of locks on a navigable river, or for medical inspection, those fees are not unconstitutional duties of tonnage. *See Clyde Mallory*, 296 U.S. at 266, 56 S.Ct. 194.

Captain Andy's Sailing, Inc. v. Johns, 195 F.Supp.2d 1157, 1172 (D.Hawai'i 2001).

> A fee charged to ensure that emergency services are available is also not a duty of tonnage, even if not every ship paying the fee needs the service.

New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist., 874 F.2d 1018, 1023 (5th Cir.1989), cert. denied, 495 U.S. 932 (1990).

The Commerce Clause.

The Commerce Clause of the U.S. Constitution provides: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . .." Allocating this authority over foreign and interstate commerce to Congress means that such authority is *not* allocated to states or municipalities; the negative sweep of the Commerce Clause precludes state or local regulation. There are many cases interpreting the Commerce Clause from the earliest days of the federal courts. In the context of shipping, however, the Commerce Clause is not as restrictive as the Tonnage Clause. If a fee or practice is allowed under the Tonnage Clause, the Commerce Clause is not likely to prohibit it.

The Maritime Transportation Security Act of 2002.

As a fairly recent enactment of Congress, this act has no body of developed case law interpreting it. However, from its pla n language, it can be seen as the most restrictive of the three main areas of federal law restricting municipal fees on shipping interests. Although not mentioned in Mr. Reeves' memo regarding Resolution 2294b, the Maritime Security Act of 2002 provides his best argument. It provides:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
>
> (1) fees charged under section 2236 of this title;
> (2) reasonable fees charged on a fair and equitable basis that--
> (A) are used solely to pay the cost of a service to the vessel or water craft;
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
> (C) do not impose more than a small burden on interstate or foreign commerce; or
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

This federal statute, among others, in my view comprises "the Consent of Congress" contemplated by the Tonnage Clause. Accordingly, if a project fits its requirements, it will pass muster under the Tonnage Clause and the Commerce Clause as well. This is the statute CBJ has been acting under since its enactment. Sponsored by Rep. Don Young, it was intended to clarify the requirements of the Commerce Clause, according to his address to Congress upon its passage:

> Section 445 [the Act] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation. . .
>
> ..

Conference Report on S. 1214, Maritime Transportation Security Act of 2002; Speech of Hon. Don Young, of Alaska, in the House of Representatives, Thursday, November 14, 2002.
The requirements of this federal statute appear to be straight out of the case law, particularly, the Fifth Circuit's summary of the U.S. Supreme Court *Clyde Mallory* decision. *See Plaquimines*, 874 F.2d 1018, 1021(5th Cir. 1989). One additional issue raised is that of the requirement that any fee "not impose more than a small burden on interstate or foreign commerce . . .." All indications are that the cruise industry is financially healthy at this time, and that the proposed additional one dollar per passenger could be contractually passed on to the cruise consumer, and, therefore, would not impose more than a small burden on interstate or foreign commerce.

Conclusion.

Resolution 2294b would increase the Port Development Fee by one dollar per passenger. Because the resolution requires that all funds collected by the Port Development Fund be spent on projects outlined in the Long-Range Waterfront Plan that benefit the cruise industry, the fee increase would very likely survive a challenge based on the case law from the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit. In my view, so long as CBJ continues its vigilance in following the requirements of federal law and close cooperation with the industry in making expenditures (as required by Resolution 2294b), a legal challenge would be unlikely to succeed.

STATE OF ALASKA

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February 6, 2007

The Honorable Bob Lynn
House of Representatives
Alaska State Capitol, Rm. 104
Juneau, Alaska 99801-1182

Re: The effect of Ballot Measure 2
on Indian Gaming Opportunities
in the State

Dear Representative Lynn:

During the 2006 Primary Election, the voters approved Ballot Measure Number 2, which imposes a 33 percent tax on the adjusted gross income from cruise ship gambling conducted in state waters. You have asked whether the tax imposed by Ballot Measure 2 opens the door for Alaska Natives to conduct casino-type gambling on Indian lands. It does not.

You also ask if the ballot measure did open the door, whether it can be closed if the Alaska Legislature repeals the gambling tax statutes that were added to Alaska law by the passage of the ballot measure. Since art. XI, sec. 6 of the Alaska Constitution specifically prohibits the legislature from repealing an initiated law within two years of its effective date, a bill repealing the cruise ship gambling tax provisions during this session would be unconstitutional.

Cruise Ship Gaming

State law prohibits all gambling except for charitable gaming authorized by the Alaska Gaming Reform Act, AS 05.15. *See* AS 11.66.200, AS 11.66.280(2). In 1996 Congress passed a provision that prohibits Alaska from making use of gambling devices aboard a marine vessel illegal in Alaska waters, unless the ship is within three nautical miles of a port-of-call. *See* 15 U.S.C. § 1175(c). Accordingly, since 1996, gambling has been conducted in Alaska waters by the cruise ship industry under the protection of federal law, but not state law.

Indian Gaming

The Indian Gaming Regulatory Act (IGRA) permits the conduct of Class III gaming activities when certain requirements are met. Class III games include those conducted with slot machines and casino games. Bingo, pull-tabs, lotto and certain non-banked card games, and social games are not considered Class III games. *See* 25 U.S.C. § 2703.

The first requirement for Class III Indian gaming is that it must be conducted on Indian lands. 25 U.S.C. § 2710(d)(1). There are very few places in Alaska that might qualify as "Indian lands." Metlakatla and certain parts of Klawock are the notable exceptions.

Second, the gaming must be authorized by an ordinance or resolution of the local governing authority. 25 U.S.C. § 2710(d)(1)(A). Presumably, this requirement would not be difficult to satisfy.

Third, the gaming must be "located in a State that permits such gaming for any purpose by any person, organization, or entity. . . ." 25 U.S.C. § 2710(d)(1)(B). The question here is whether by taxing cruise ship gambling the state can be seen as permitting the gaming activity that takes place aboard cruise ships, such that the same gaming activity must also be permitted on Indian lands.

In *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-1258 (9th Cir. 1994), the Ninth Circuit Court of Appeals found that since the California Criminal Code banned the use of casino-type banked card games and slot machines, the state did not permit the use of those games for purposes of Subsection 2710(d)(1). Finding the subsection unambiguous, the court eschewed legislative history and relied instead on the definition of "permit" provided by *BLACK'S LAW DICTIONARY*. The definition generally provides that an actor must take some positive step in order to permit something.

The State of Alaska has not taken a positive step to permit cruise ship gambling. The state's criminal statutes prohibit such activities anywhere in the state. The provisions of 15 U.S.C. § 1175(c) prevent the state from criminalizing cruise ship gambling conducted more than three miles from an Alaska port. Therefore Congress, and not the state, permits cruise ship gambling in Alaska waters.

Passage of Ballot Measure 2 did not amend or repeal the state's criminal code to allow cruise ship gambling. Rather than permitting or legalizing the activities, the ballot measure merely imposes a state tax on activity legalized by an act of Congress. Therefore the ballot measure does not "permit" gambling activities for purposes of Subsection 2710(d)(1).

An argument could be made that imposing a tax upon an activity is tantamount to permitting the activity. But on balance we think this argument would fail in court. If such an argument is successfully presented to a court, by the time a court rules on it, most likely two years will have passed and the legislature will be able to repeal these tax provisions, thus eliminating the so-called permission for the gaming activity. We do not believe under IGRA that once permitted, Indian gaming must always be permitted. In *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1276 (D. Idaho 1994) affirmed 51 F.3d 876, a U.S. District Court found that the State of Idaho could eliminate the chance of a Tribe to conduct Class III gaming by restricting or modifying its laws on gambling even after the Indian Tribe requested to negotiate with the state for a Class III gaming compact. Accordingly, the legislature will have the power to end Class III Indian Gaming in Alaska by simply eliminating a provision seen as authorizing Class III gaming in Alaska law.

Article XI, Section 6 of the Alaska Constitution

If the Alaska Legislature acts now to repeal the gambling tax statutes enacted by Ballot Measure 2 it would violate the prohibition on repeal of a law enacted by initiative set out in the Alaska Constitution, art. XI, sec. 6. This part of the Constitution says that an initiated law may not be repealed by the legislature within two years of its effective date. Two years following certification of Ballot Measure 2 runs from December 17, 2006, until December 17, 2008.[1] Any bill attempting to repeal the gambling tax enacted by the ballot measure during the current legislative session would be unconstitutional.

The three statutes that establish the state's right to tax gambling on cruise ships are a significant part of the cruise ship initiative law. The electorate was advised of the

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[1] This effective date of a law enacted by initiative is set by the Alaska Constitution, art. XI, sec. 6: "An initiated law becomes effective ninety days after certification." The lieutenant governor certified the cruise ship initiative on September 18, 2006, and the effective date of the initiative measure is 90 days from this date, December 17, 2006.

gambling tax statutes proposed by Ballot Measure 2 through the language summarizing the measure on the ballot for the 2006 primary election, and through the Voter's Pamphlet for the 2006 Primary Election. This part of the ballot measure was highlighted in the third sentence of the ballot summary for the initiative: "It would levy a tax on cruise ship gambling activities in state waters."[2] This part of the initiative measure was also highlighted in the sixth and seventh sentences of the legislative affairs agency summary for the initiative: "The bill also taxes gambling on cruise ships. The tax is 33 percent of the cruise ship's adjusted gross income from the gambling."[3] The gambling tax is also listed as part of the third of four major points highlighted by the initiative sponsors in the "Statement in Support" of the initiative set out in the 2006 Primary Election Voter's Pamphlet: "3. **End tax evasion** - All legal gambling operations in Alaska, except those on cruise ships, pay 1/3 of their profits to charity or in tax. Lucrative cruise line casino operations in Alaska pay nothing....under the initiative, the cruise lines will pay the same taxes that local businesses and U.S. registered vessels pay on their income and gambling profits." (Emphasis in original). *See* p. 19 of enclosed copy of Primary Election Voter Pamphlet.

In *Warren v. Thomas,* 568 P.2d 400, 402-03 (Alaska 1977), the Alaska Supreme Court considered the prohibition on repeal of an initiative measure set out in art. XI, sec. 6. In *Warren,* the Court recognized that the legislature has broad powers to amend an initiative, subject to the limitation that the amendments do not "so emasculate the law that it is effectively repealed." The holding in *Warren* was reaffirmed recently in *State v. Trust the People,* 113 P.3d 613, 623 (Alaska 2005): "[E]ven amendments to popularly-initiated legislation must still 'effectuate [ ] the intent of the electorate,' and an amendment that 'so vitiates an act passed by initiative as to constitute its repeal' is not acceptable." The *Warren* Court found that the legislature's amendments of the initiated law in that case served to clarify and render the law more precise, and thus did not repeal it. *Id.* at 403. In contrast, any bill that would enact an outright repeal of three sections of the cruise ship initiative in question would be seen as unconstitutional because such a bill would not clarify and render the initiative measure more precise but rather it would vitiate a significant part of the enacted measure.

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[2] The ballot summary language is set out on p. 12, of the Primary Election Voter Pamphlet for the 2006 Primary Election, copy enclosed.

[3] The legislative affairs agency summary is set out on p. 12, of the Primary Election Voter Pamphlet for the 2006 Primary Election, copy enclosed.

There is some amount of tension in striking the balance between the legislature's power to amend, and the constitutional prohibition on repeal, a law enacted by initiative. We are aware that the Court in the earlier case of *Warren v. Boucher*, 543 P.2d. 731, 737 (Alaska 1975) outlined the legislature's broad power to amend an initiated measure. The *Boucher* case recognized the legislative power to "assure that initiatives which were ill-advised, which might seriously cripple or frustrate the sound working of government, or which might be impracticable, could be altered or corrected rapidly by the legislature." (Emphasis added.) However, the later decision in *Warren v. Thomas* while citing *Boucher*, still recognized that the legislature's power to amend did not allow the legislature to repeal an initiated law. Under these authorities, the legislature could enact an amendment that would alter or correct the gambling provisions of the cruise ship initiative, but, it may not under art. XI, sec. 6, repeal those provisions.

Conclusion

The state has not permitted the gaming activity that takes place on cruise ships. Therefore, that same kind of activity cannot take place on Indian lands in the state under the Indian Gaming Regulatory Act. The tax on cruise ship gambling imposed by Ballot Measure 2 does not alter this analysis. The tax is on an activity that is not permitted by state law, but is nevertheless permitted by federal law. This does not provide a basis for tribes to conduct the type of gambling that takes place on cruise ships on Indian lands.

Even if the Ballot Measure 2 gambling tax provisions did open the door to Indian gaming in the state, the legislature could not repeal them during the current session without violating the Alaska Constitutional ban on repealing legislation enacted by initiative within two years of its effective date.

Sincerely,

Talis J. Colberg
Attorney General

TJC:DNB:ade

Enclosures

TO: Senate Finance Committee May 4, 2007

Attached is the Primary Election Voter Pamphlet that was sent to all registered voters in early August, 2006.

The Voter Pamphlet was very clear about the uses of the new passenger fee fund, stating that "towns that receive that money cannot impose local cruise ship head taxes." Page 12, Leg. Affairs Summary.

Page 13 of the Pamphlet has a long section on the use of revenues, the establishment of "Impact Funds", and the estimated level of revenues generated for the state of Alaska.

Page 14 contains the initiative language on the disposition of receipts from the passenger tax, including allowed uses, determining the ports-of-call and the status of impact funds.

On Page 19, the statement in support describes the uses of passenger fees and states,"Communities preferring their own tax program can opt-out of the new state program."

Finally, Page 20, the opposition statement, does not discuss the taxing regime at all, though there was full opportunity to do so. I note that Mayor Weinstein of Ketchikan is listed on the opposition page as endorsing that letter, again, without any discussion of cruise taxation.

I hope this Alaska Voter Pamphlet is instructive to the Committee that full and adequate notice was given, and that local and state taxation was thoroughly discussed, except by the initiative opponents.

Thank you for considering this information. Chip Thoma, Juneau

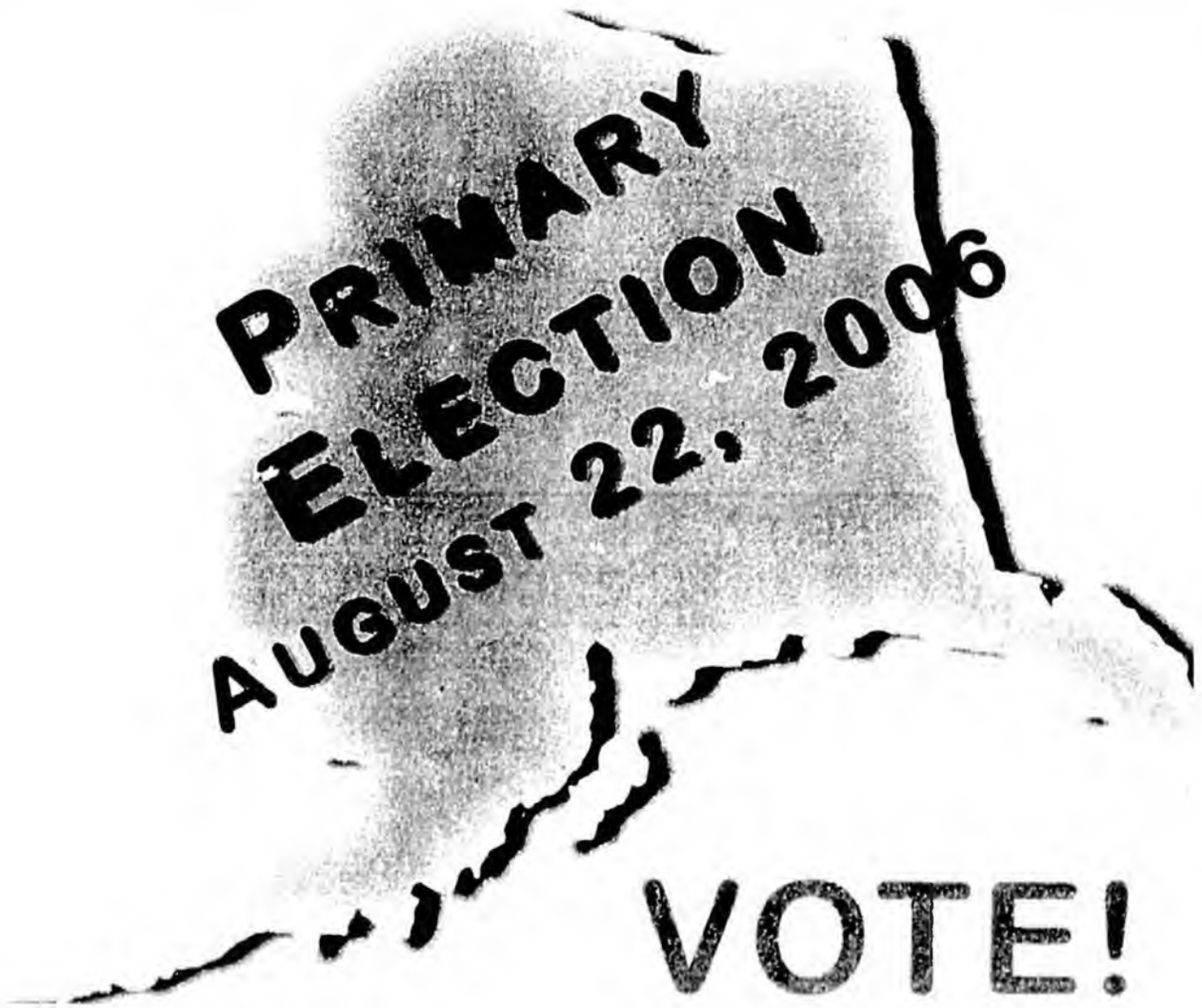
THE FOLLOWING DOCUMENT

HAS NOT BEEN FILMED BUT IS

AVAILABLE IN THE ORIGINAL FILE

STATE OF ALASKA

PRIMARY ELECTION VOTER PAMPHLET



It's your right.
It's your responsibility!

DIVISION OF ELECTIONS

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

BALLOT LANGUAGE

This initiative would impose a $46 per person per voyage tax on large cruise ships to pay for vessel services. It would provide for the proceeds from the tax to be deposited in the state general fund and, subject to appropriation by the legislature, distributed to municipalities. It would levy a tax on cruise ship gambling activities in state waters. It would change the way cruise ship corporate income tax is calculated. It would require cruise ship operators to gather and report more information, and get a new type of permit for sewage, graywater or other wastewater before discharging in state marine waters. It would assess a $4 per passenger berth fee and require large cruise ships to have state-employed marine engineers (Ocean Rangers) licensed by the Coast Guard to observe health, safety and wastewater treatment and discharge operations. It would authorize citizen lawsuits against an owner or operator of a large cruise ship, or against the Department of Environmental Conservation, for an alleged violation of any permit condition, provision of environmental statutes or performance of duties. It would also enable a person who provides information leading to enforcement of the law to receive 25 to 50 percent of fines imposed. It would impose additional requirements on disclosures about on-ship promotions of shore-side businesses.

SHOULD THIS INITIATIVE BECOME LAW?

⬭ Yes

⬭ No

LEGISLATIVE AFFAIRS AGENCY SUMMARY

Part of this bill is about cruise ship taxes. It imposes a $46 a person tax on cruise ship passengers. That money goes into a special account in the state's general fund. The legislature may appropriate part of that money to the vessel's ports of call. But, towns that receive that money cannot impose local cruise ship head taxes. The bill also taxes gambling on cruise ships. The tax is 33 percent of the cruise ship's adjusted gross income from the gambling. The bill changes the state's corporate income tax law so it could be applied to cruise ships.

The bill also changes environmental laws that apply to cruise ships. It requires wastewater discharge permits for cruise ships. It sets minimum standards and conditions for use of those permits. It prohibits wastewater discharges without a permit. It changes the monitoring and record keeping requirements for wastewater discharges. It establishes a new ocean ranger program. A ranger is a marine engineer. It requires each cruise ship to have a ranger on board. The ranger is an independent observer. The ranger monitors compliance with pollution laws. The bill imposes a four-dollar fee per berth for operating the ranger program. It gives private citizens the right to sue for discharge violations. It also establishes financial penalties for violations of environmental laws.

Finally, the bill regulates sales on cruise ships. Persons paid to mention or promote a business in a state port must say they are paid. Written materials must also say that the person is paid. Persons selling tours and other shore-side activities on board a cruise ship must disclose how much they are paid for each sale. A seller must give the address and phone number of the shore-side business if asked. It makes violation of these laws an unfair trade practice.

STATEMENT OF COSTS AND REVENUES FOR BALLOT MEASURE 2 - INITIATIVE 03CTAX - Prepared by the Alaska Department of Revenue

As required by AS 15.58.020(b), the Alaska Department of Revenue has prepared the following statement of costs to the Department of implementing the law proposed in Ballot Measure 2 - Initiative 03CTAX.

COSTS

In order to administer the tax collection process required by this initiative, the Department of Revenue would require six new positions, at an estimated cost of $626,000 per year for staff and associated costs.

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

REVENUES

This initiative would impose an excise tax of $46 per passenger per voyage on travel on commercial passenger vessels with 250 or more berths, and a "Ranger fee" of $4 per passenger berth.

We assume that 2007 cruise ship activity will be similar to the scheduled 2006 cruise ship activity. We cannot predict whether the excise tax might impact the number of passengers.

Assuming the ships sail at 100 percent capacity, we estimate the $46 per passenger excise tax would be applied to approximately 900,000 passengers in the 2007 season, resulting in revenue of approximately $41 million. About $14 million of that revenue would be shared with municipalities at which the cruise ships stopped. Twenty-five percent of the total, or approximately $10 million, would be placed in a "Regional Cruise Ship Impact Fund," to be distributed to other affected municipalities. The $4 per berth Ranger fee would bring in approximately $3.6 million.

Net revenues to the state, after deducting costs for the Departments of Revenue and Environmental Conservation, and deducting the $24 million in shared revenues cited above, would be approximately $14.4 million.

This initiative would impose a tax of 33 percent of the adjusted gross income from operation of gaming or gambling activities on ships operating in Alaskan waters.

The Department has no data on the extent or profitability of cruise ship gaming in Alaskan waters, and therefore cannot calculate revenues from the proposed gaming tax.

This initiative would also change the way the corporate income tax is calculated for the cruise ship industry. The Department does not have adequate data to estimate the effects of this change on corporate income tax revenue.

STATEMENT OF COSTS FOR BALLOT MEASURE 2 - INITIATIVE 03CTAX- Prepared by the Alaska Department of Environmental Conservation

As required by AS 15.58.020(b), the Alaska Department of Environmental Conservation ("DEC") has prepared the following statement of costs to the Department of implementing the law proposed in Ballot Measure 2 Initiative - 03CTAX.

The initiative would require DEC to develop and maintain a new permit program for Large Commercial Passenger Vessels ("cruise ships") to replace the current program for regulating these vessels. It would also require DEC to place marine engineers ("Ocean Rangers") licensed by the Coast Guard on the cruise ships to monitor compliance with State and Federal environmental laws. Two marine engineers working alternating twelve-hour shifts would be placed on each cruise ship operating in Alaska waters.

The cost to the state during the first full year of the implementation of this initiative is estimated to be approximately $5.6 million.

FULL TEXT OF THE PROPOSED LAW

FOR AN ACT PROVIDING FOR TAXATION OF CERTAIN COMMERCIAL SHIP VESSELS, PERTAINING TO CERTAIN VESSEL ACTIVITIES and RELATED TO SHIP VESSEL OPERATIONS TAKING PLACE IN THE MARINE WATERS OF THE STATE OF ALASKA

Be it enacted by the People of the State of Alaska:

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

Chapter 52. Excise Tax on Travel Aboard Commercial Passenger Vessels.

Sec. 43.52.010. Levy of excise tax on overnight accommodations on commercial passenger vessels. There is imposed an excise tax on travel on commercial passenger vessels providing overnight

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

accommodations in the state's marine water.

Sec. 43.52.020. Rate of tax. The tax imposed by AS 43.52.010 – 43.52.095 is levied at a rate of $46 a passenger per voyage.

Sec. 43.52.030. Liability for payment of tax. A passenger traveling on a commercial passenger vessel providing overnight accommodations in state marine water is liable for the tax imposed by AS 43.52.010 -- 43.52.095. The tax shall be collected and is due and payable to the department

(1) by the person who provides travel aboard a commercial vessel for which the tax is payable; and

(2) in the manner and at the times required by the department by regulation.

Sec. 43.52.040. Disposition of receipts.
(a) The proceeds from the tax on travel on commercial passenger vessels providing overnight accommodations in the state's marine water shall be deposited in a special "Commercial Vessel Passenger Tax Account" in the general fund. The legislature may appropriate money from this account for the purposes described in (b) and (c) of this section, for state-owned port and harbor facilities, other services to properly provide for vessel or watercraft visits, to enhance the safety and efficiency of interstate and foreign commerce and such other lawful purposes as determined by the legislature.

(b) For each voyage of a commercial passenger vessel providing overnight accommodations, the commissioner shall identify the first five ports of call in the state and the number of passengers on board the vessel at each port of call. Subject to appropriation by the legislature, the commissioner shall distribute to each port of call $5 per passenger of the tax revenue collected from the tax levied under this chapter. If the port of call is a city located within a borough not otherwise unified with the borough, the commissioner shall, subject to appropriation by the legislature, distribute $2.50 per passenger to the city and $2.50 to the borough. Each port of call receiving funds under this section shall use the funds in a manner calculated to improve port and harbor facilities and other services to properly provide for vessel or water craft visits and to enhance the safety and efficiency of interstate and foreign commerce.

(c) A "Regional Cruise Ship Impact Fund" consisting of 25% of the proceeds from the tax on travel aboard commercial passenger vessels providing overnight accommodations in the state's marine water shall be established as sub-account of the funds established in (a), above, and deposited in the general fund. Subject to appropriation by the legislature and regulations adopted by the Department of Revenue, the commissioner shall distribute funds to municipalities or other governmental entities within the Prince William Sound Region, Southeast Alaska or any other distinctive region impacted by cruise ship related tourism activities but not entitled to receive funds based on port of call visitation as allowed by (b), above, provided that any funds used from this account shall be used to provide services and infrastructure directly related to passenger vessel or water craft visits or to enhance the safety and efficiency of interstate and foreign commerce related to vessel or water craft activities.

Sec. 43.52.050. Administration.
(a) The department shall

(1) administer this chapter; and

(2) collect, supervise, and enforce the collection of taxes due under this chapter and penalties as provided in AS 43.05.

(b) The department may adopt regulations necessary for the administration of this chapter.

Sec. 43.52.060. Local levies. Any municipality, whether home rule or general law, that receives passenger ship fee funds under this chapter may not impose an additional form of tax on travel on commercial passenger vessels engaged in activities involving overnight accommodations for passengers in state marine waters. Any form of tax on travel on commercial passenger vessels engaged in activities involving overnight accommodations for passengers in state marine waters enacted by a municipality, whether home rule or general law, prior to the effective date of this legislation shall expire one year after enactment of this law if that municipality elects to receive funds under this chapter.

The text of this bill is presented as submitted by petition sponsors.

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

Sec. 43.52.095. Definitions. In this chapter, (1) "commercial passenger vessel" means a boat or vessel that is used in the common carriage of passengers in commerce; "commercial passenger vessel" does not include
(A) vessels with fewer than 250 berths or other overnight accommodations for passengers;

(B) noncommercial vessels, warships, and vessels operated by the state, the United States, or a foreign government;

(2) "marine water of the state" and "state marine water" have the meaning given to "waters" in AS 46.03.900, except that they include only marine waters.

(3) "passenger" means a person whom a common carrier has contracted to carry from one place to another.

(4) "voyage" means any trip or itinerary lasting more than 72 hours.

* **Sec. 2.** AS 05, is amended by adding a new chapter to read:

Chapter 16. Games of Chance and Contests of Skill on Ships Operating on Waters Within the Jurisdiction of Alaska.

Sec. AS 05.16.010. Gambling activities aboard commercial vessels purportedly authorized by federal law. This chapter applies to the use of playing cards, dice, roulette wheels, coin-operated instruments or machines, or other objects or instruments used, designed, or intended for gaming or gambling used in the waters under the jurisdiction of the State of Alaska on a voyage described in 15 U.S.C. Section 1175(c)(2), and to any other gambling activities taking place aboard large passenger vessels in the state.

Sec. AS 05.16.020. Tax on gambling activities authorized by AS 05.16.010. There is imposed on the operator of a gaming or gambling activities aboard large passenger vessels in the state a tax of 33% of the adjusted gross income from those activities. "Adjusted gross income" means gross income less prizes awarded and federal and municipal taxes paid or owed on the income. The tax shall be collected and is due and payable to the department of revenue in the manner and at the times required by the department of revenue.

Sec. 05.16.030. Disposition of receipts. (a) The proceeds from the tax on gambling operations aboard commercial passenger vessels in the state's marine water shall be deposited in a special "Commercial Vessel Passenger Tax Account" in the general fund.

* **Sec. 3.** AS 43.20.021 is repealed and reenacted as follows:

Sec. 43.20.021(a). Internal Revenue Code adopted by reference. (a) Sections 26 U.S.C. - 1399 and 6001 - 7872 (Internal Revenue Code), as amended, are adopted by reference as a part of this chapter. These portions of the Internal Revenue Code have full force and effect under this chapter unless excepted to or modified by other provisions of this chapter.

(b) Nothing in this chapter or in AS 43.19 (Multistate Tax Compact) may be construed as an exception to or modification of 26 U.S.C. 883.

(c) The provision in (b), above, does not apply to commercial passenger vessels as defined in AS 43.52.095.

* **Sec 4.** AS 46.03.462 is repealed and re-enacted as follows:

Sec. 46.03.462. Terms and conditions of discharge permits. (a) An owner or operator may not discharge any treated sewage, graywater, or other wastewater from a large commercial passenger vessel into the marine waters of the state unless the owner or operator obtains a permit under AS 46.03.100, which shall comply with the terms and conditions of vessel discharge requirements specified in (b) of this section.

(b) The minimum standard terms and conditions for all discharge permits authorized under this provision require that the owner or operator:

(1) may not discharge untreated sewage, treated sewage, graywater, or other waste-

waters in a manner that violates any applicable effluent limits or standards under state or federal law, including Alaska Water Quality Standards governing pollution at the point of discharge;

(2) shall maintain records and provide the reports required under AS 46.03.465(a);

(3) shall collect and test samples as required under AS 46.03.465(b) and (d) and provide the reports with respect those samples required by AS 46.03.475(c);

(4) shall report discharges in accordance with AS 46.03.475(a);

(5) shall allow the department access to the vessel at the time samples are taken under AS 46.03.465 for purposes of taking the samples or for purposes of verifying the integrity of the sampling process; and

(6) shall submit records, notices, and reports to the department in accordance with AS 46.03.475(b), (d), and (e).

* Sec. 5. AS 46.03.463 is amended to read as follows:

Sec. 46.03.463(d) is repealed.

Sec. 46.03.463(e) is repealed and reenacted to read: An owner or operator may not discharge any treated sewage, graywater, or other wastewater from a large commercial passenger vessel into the marine waters of the state unless the owner or operator obtains a permit under AS 46.03.100 and AS 46.03.462, and provided that the vessel is not in an area where the discharge of treated sewage, graywater or other wastewaters is otherwise prohibited.

Sec. 46.03.463(g) is repealed.

* Sec 6. AS 46.03.465 repealed and reenacted to read as follows:

Sec. 46.03.465 Information-gathering requirements. (a) The owner or operator of a commercial passenger vessel shall maintain daily records related to the period of operation while in the State, detailing the dates, times, and locations, and the volumes and flow rates of any discharges of sewage, graywater, or other waster into the marine waters of the State, provide electronic copies of such records on a monthly basis to the department no later than 5 days after each calendar month of operation in State waters.

(b) while a commercial passenger vessel is present in the marine waters of the State, the owner or operator of the vessel shall provide an hourly report of the vessel's location based on Global Positioning System technology and collect routine samples of the vessel's treated sewage, graywater, and other wastewaters being discharged into marine waters of the State with a sampling technique approved by the department.

(c) while a commercial passenger vessel is present in the marine waters of the State, the Department, or an independent contractor retained by the Department, may collect additional samples of the vessel's treated sewage, graywater, and other wastewaters being discharged into the marine waters of the State.

(d) the owner or operator of a vessel required to collect samples under (b) of this section shall ensure that all sampling techniques and frequency of sampling events are approved by the department in a manner sufficient to ensure demonstration of compliance with all discharge requirements under AS 46.03.462.

(e) the owner or operator of a commercial passenger vessel shall pay for all reporting, sampling and testing of samples under this section.

(f) if the owner or operator of a commercial passenger vessel has, when complying with another state of federal law that requires substantially equivalent information required under (a), (b), or (d) of this section, the owner or operator shall be considered to be in compliance with that subsection so long as the information is also provided to the department.

The text of this bill is presented as submitted by petition sponsors.

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

* Sec. 7. AS 46.03 is amended to include new provisions as follows:

Sec. 46.03.476. Ocean Rangers. (a) An owner or operator of a large commercial passenger vessel entering the marine waters of the state is required to have a marine engineer licensed by the United States Coast Guard hired or retained by the department on board the vessel to act as an independent observer for the purpose of monitoring state and federal requirements pertaining to marine discharge and pollution requirements and to insure that passengers, crew and residents at ports are protected from improper sanitation, health and safety practices.

(b) The licensed marine engineer shall monitor, observe and record data and information related to the engineering, sanitation and health related operations of the vessel, including but not limited to registration, reporting, record keeping and discharge functions required by state and federal law.

(c) Any information recorded or gathered by the licensed marine engineer shall be promptly conveyed to the Alaska Department of Environmental Conservation and the United State Coast Guard on a form or in a manner approved by the Commissioner of Environmental Conservation. The Commissioner may share information gathered with other state and federal agencies.

46.03.481. Citizens suits. (a) Any citizen of the State of Alaska may commence a civil action

(1) against an owner or operator of a large passenger vessel alleged to have violated any provision of this chapter, or

(2) against the department where there is an alleged failure to perform any act or duty under this chapter which is not discretionary. No civil action may be commenced under this section, however, prior to 45 days after the plaintiff has provided written notice of the intent to sue to the Attorney General of Alaska.

(b) Subject to appropriation, as necessary, up to 50% and not less than 25% of any fines, penalties or other funds recovered as a result of enforcement of this chapter shall be paid to the person or entity, other than the defendant, providing information sufficient to commence an investigation and enforcement of this chapter under this provision.

* Sec. 8. AS 46.03.480 is amended as follows:

Sec. 46.03.480 is amended by adding a new section to read:
(d) An additional fee in the amount of $4.00 per berth, is imposed on all large commercial passenger vessels, other than vessels operated by the state, for the purpose of operating the Ocean Ranger program established in AS 46.03.476; said program shall be subject to legislative appropriation.

Sec. 46.03.480(d) shall be repealed and reenacted as 46.03.480(e).

* Sec. 9. AS 46.03.760 is amended as follows:

Sec. AS 46.03.760 is amended by adding a new section to read:

(f) An owner, agent, employee or operator of a commercial passenger vessels as defined in AS 43.52.095 who falsifies a registration or report required by AS 46.03.460 or 46.03.475 or who violates or causes or permits to be violated a provision of AS 46.03.250 – 46.03.314, 46.03.460 – 46.03.490, AS 46.14, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 – 46.03.314, 46.03.460 – 46.03.490, or AS 46.14 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than $5000 nor more than $100,000 for the initial violation, nor more than $10,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(4) the need for an enhanced civil penalty to deter future noncompliance.

Sec. 46.03.760(f) shall be repealed and reenacted as 46.03.760(g).

* **Sec. 10.** AS 45.50.474 is repealed and reenacted to read as follows:

Sec. 45.50.474. Required disclosures in promotions and shore side sales on board cruise ships. (a) A person may not conduct a promotion on board a cruise ship that mentions or features a business in a state port that has paid something of value for the purpose of having the business mentioned, featured or otherwise promoted, unless the person conducting the promotion clearly and fully discloses orally and in all written materials used in the promotion that the featured businesses have paid to be included in the promotion. All such written notice of disclosure shall be in a type not less than 14-point typeface and in a contrasting color calculated to draw attention to the disclosure.

(b) A person or other entity aboard a cruise ship conducting or making a sale of tours, flightseeing operations or other shore-side activities to be delivered by a vendor or other entity at a future port of call shall disclose, both orally and in writing, the amount of commission or percentage of the total sale retained or returned to the person making the sale. The person or entity aboard a cruise ship making or attempting to make a sale of services or goods provided by a shore-side vendor shall disclose the address and telephone number of the shore side vendor if asked by a consumer. All such written notice of disclosure shall be in a type not less than 14-point typeface and in a contrasting color calculated to draw attention to the disclosure.

(c) Each violation of this section constitutes an unfair trade practice under AS 45.50.471, and shall result in a penalty of not more than $100 for each violation. In this section, "cruise ship" means a ship that operates at least 48 hours in length for ticketed passengers, provides overnight accommodations and meals for at least 250 passengers, is operated by an authorized cruise ship operator, and is certified under the International Convention for the Safety of Life at Sea or otherwise certified by the United States Coast Guard.

* **Sec. 11. Severability.** It is the intention of the people of Alaska that any portion of this legislation that is declared unlawful shall be stricken in a manner that preserves the remaining portion of the remaining legislation to the maximum extent possible.

* **Sec. 12. Effective Date.** This Act takes effect 90 days after enactment.

The text of this bill is presented as submitted by petition sponsors.

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

STATEMENT IN SUPPORT

The cruise lines should follow Alaska's taxation and pollution rules like everyone else. This initiative protects our fisheries and helps pay for cruise ship impacts on Alaskan communities by establishing/requiring:

1. **$50 passenger tax** - Alaskans pay tourism taxes when traveling Outside and independent tourists pay taxes on rental cars and lodging in Alaska. Cruise passengers willingly pay similar fees throughout the world. A typical cruise, including tickets, airfare, shopping, tours, gambling, and alcohol, costs over $3000. A $50 fee won't make people choose a cruise to New Jersey - therefore there will be no negative impact on Alaska's tourism economy. Federal law requires the funds be spent "servicing the industry," for example, maintaining ports and harbor infrastructure. This tax will help SUPPORT the Alaska tourism economy. Communities preferring their own tax program can opt out of the statewide program.

2. **Meet Alaska Water Quality Standards** - Alaskans need clean water and healthy fish. Cruise ships are the only major polluters not required to have a discharge permit and meet ALL Alaska water quality standards. Everyone else has a permit; no new permitting program is necessary. Nearly every major cruise line has felony convictions for dumping, tampering with pollution control equipment, or falsifying documents to the Coast Guard. This initiative places an independent marine engineer observer on every ship (paid through the passenger tax) to monitor discharges, inspect equipment, and verify logbook entries. The cruise lines have proven they cannot be trusted to help keep Alaska's waters clean and productive.

3. **End tax evasion** - All legal gambling operations in Alaska, except those on cruise ships, pay 1/3 of their profits to charity or in tax. Lucrative cruise line casino operations in Alaska pay nothing. Alaska corporations pay Corporate Income Tax. The cruise industry lobbied for and was granted a specialized income tax exemption for revenue from foreign registered ships. Under the initiative, the cruise lines will pay the same taxes that local businesses and U.S. registered vessels pay on their income and gambling profits.

4. **Support local businesses** - Since 1994, Alaska law has required oral and written disclosure to passengers by cruise lines when they receive commissions for promoting shore-based tours/businesses. Cruise line promotions are presented as "advice" when they are really "advertisements." This is unfair to local businesses that can't afford the steep, advertising commission. This initiative will require cruise lines to disclose the size of their commissions which will help local businesses compete for tourism dollars. No local businesses will have to report anything.

The cruise lines are "selling" Alaska - while impacting our docks, roads, public facilities, wildlife, and the quality of our lives. This initiative will do nothing to turn visitors away; it will help keep our tourism industry sustainable while protecting the needs of all Alaskans. The Miami/Vancouver-based cruise lines make billions in profits by registering their ships in third world countries to avoid paying U.S. income taxes and wages. The cruise lines can easily afford to play by Alaska's rules like everyone else.

Please vote YES on Ballot Measure 2!

RESPONSIBLE CRUISING IN ALASKA

Gershon Cohen, Haines, Alaska

Joe Geldhof, Juneau, Alaska

The statement printed on this page is the opinion of the author(s) and is presented as submitted to the Division of Elections.

Ballot Measure 2

Cruise Ship Taxation, Regulation and Disclosure

STATEMENT IN OPPOSITION

Vote "No" on Ballot Measure 2
It just doesn't make sense!

Dear fellow Alaskans,

Ballot Measure 2 is a direct attack on Alaska's economy. It will hurt our tourism industry -- a growing industry and the 4th largest employer of Alaskans. Additional taxes, lost jobs and more lawsuits in Alaska are not the answer. **Ballot Measure 2 deserves a "No" vote on August 22nd.**

The Alaska State Chamber of Commerce, Anchorage Chamber of Commerce, City of Fairbanks, Associated General Contractors of Alaska, Southeast Conference, Alaska Travel Industry Association, Resource Development Council, Juneau Chamber of Commerce, City of Skagway and the Ketchikan Chamber of Commerce and several hundred others all **oppose Ballot Measure 2 because it's bad for Alaska.**

Measure 2 will:

Mandate four additional new taxes including a state wide head tax of $50 per person, $100 per couple, and $200 for an average family of four. Rising oil prices are driving up the cost of living, which has reduced all travelers' budgets. Imposing more taxes and fees on top of the other additional travel costs will keep tourists away and hurt our economy instead of helping it.

Force the disclosure of confidential business information about Alaska's local small businesses to competitors including those in the lower 48. No other business in Alaska is required to disclose this type of information. Forced disclosure would reduce the pre-purchase of tours and excursions, hurting Alaska businesses.

Raise costs and discourage tourism to Alaska. Tourists already pay millions of dollars in taxes and fees on their plane tickets, hotels, restaurants, tours and shopping. Additionally, there are more than 26,000 local jobs provided by the tourism industry contributing tens of millions of dollars to our strong economy. Measure 2 would increase costs, discourage tourism and reduce spending at our local businesses.

Open the door and create new motives for lawyers to file predatory lawsuits. Lawyers will be allowed to file suit and collect up to 50% of any fines collected. Out-of-state attorneys will line up and flood Alaska's court systems with frivolous lawsuits. The Measure would even allow individuals to sue the state of Alaska.

Increase the amount of bureaucratic red tape, bureaucracy and size of state government in Alaska. Measure 2 creates a new layer of state bureaucracy, red tape, paperwork and unnecessary government regulations that don't provide any additional benefits to Alaskans or the environment. Increasing the number of state bureaucrats, cost of state government and the amount of red tape doesn't solve anything.

Tourism is over a $2 billion dollar industry in Alaska. Attacking the tourism industry through Measure 2 and attempting to pass more taxes, unnecessary and redundant government regulations, and tourism disincentives is the wrong move.

Threatening Alaska's economy, over 26,000 local jobs and thousands of small businesses across the state isn't the answer.

Also endorsing this letter: Mayor Bob Weinstein, City of Ketchikan; Chris Anderson, ORSO and Glacier BrewHouse – Anchorage

Vote "No" on Ballot Measure 2.

Carol Fraser
Aspen Hotels of Alaska

Steve Frank
Rivers Edge Resort in Fairbanks

Marc Langland
President Fiscal Policy Council of Alaska

TESTIMONY ON SENATE BILL 168

For the record, my name is Jeff Bush, and I appear today at the request of Mayor Bruce Botelho on behalf of the City and Borough of Juneau. Mayor Botelho could not be here today because he is hosting Chief Justice Roberts at the Alaska Bar Convention in Fairbanks.

I testify in support of Senate Bill 168,

TESTIMONY ON ~~HOUSE~~ SENATE BILL ~~222~~ 168

Bruce M. Botelho, Mayor
City and Borough of Juneau

~~I testify today on behalf of the assembly of the City and Borough of Juneau in support of Committee Substitute for House Bill 222~~, legislation that would provide a credit for certain municipal passenger fees against the statewide excise passenger tax established by 2006 Primary Election Ballot Measure No. 2.

I support the purpose that the sponsors sought to achieve in promoting the passenger tax: having users contribute to the infrastructure necessary to serve them in communities they visit by cruise ship. However, I believe that there is a fundamental flaw in the initiative that frustrates this purpose, and that ~~the~~ Senate Bill 168 ~~Committee Substitute for House Bill 222~~ would help correct ~~that flaw~~. ~~That~~ The flaw is the creation of a vast pool of money that can not be expended constitutionally. ~~Let me explain.~~

Let me begin by addressing how Measure No. 2 is designed to work.

First, it imposes a $46 tax on each passenger traveling in Alaska on a large commercial passenger vessel. The proceeds from the tax are placed in a special account within the general fund of the state. Each of the first five ports of call for each vessel's voyage within Alaska is entitled to receive $5 per passenger per port visit.

Second, the initiative also establishes a "regional cruise ship impact fund" consisting of 25 percent of the total proceeds from the passenger tax. Regional cruise ship impact funds may be appropriated for distribution to local governments within regions of the state "impacted by cruise ship related tourism activities but not entitled to receive funds based on port of call visitation."

Finally, the remainder of the funds may be appropriated for "state-owned port and harbor facilities" or certain other services.

Under the initiative,
There are specific restrictions on these taxes.

- If a municipal port elects to receive its $5 per passenger share of the state's passenger tax, it may not impose its own local passenger tax.
- Conversely, a municipality that imposes its own local passenger tax may not access either the $5 per passenger share for regional impact funds.
- Expenditure of the monies is limited to "provide services and infrastructure directly related to passenger vessel or watercraft visits or to enhance the safety and efficiency of interstate and foreign commerce related to vessel or watercraft activities."

This is the statutory scheme in place. ~~How does this relate to the "fundamental flaw" in it? What's wrong with the scheme?~~ The problems with it are of two kinds: constitutional and practical.

~~What are the constitutional problems?~~ Federal law limits the kinds of taxes or fees that may be imposed on vessels in interstate commerce. ~~Let me mention the laws I believe most directly apply:~~

- The Tonnage Clause, Art 1, sec. 10 of the United States Constitution, ~~(Art. 1, sec. 10)~~ prohibits any taxes or fees on vessels except those directly related to services provided to those vessels.

- 33 USC Section 5 [redacted] authorizes the levy of "reasonable fees charged on a fair and equitable basis" that (A) are used *solely* to pay the cost of a service to the vessel; (B) enhance the safety and efficiency of interstate and foreign commerce; *and* (C) do not impose more than a small burden on interstate or foreign commerce.

The sponsors of the initiative were aware of these restrictions and have tried to meet the high burden set by federal law. That's why the funds generated by this tax must be used "in a manner calculated to improve port and harbor facilities and other services to properly provide for vessel or watercraft visits and to enhance the safety and efficiency of interstate and foreign commerce."

Yet this language is of little import when applied to the regional impact fund. That's because that fund is available only to those ports that are not today "ports of call", that is ports that are not visited by cruise ships at all. So, applying the federal statute, what conceivable service to a vessel should be recovered by these ports and on what basis? Similarly, what state-owned port, harbor facilities or other service is being directly rendered that would permit these funds to be expended? I suggest that few expenditures could meet the federal test.

Regarding
~~What~~ the practical problems?

First, there is little incentive for major ports of call to take part in the state program, rather than maintain or establish their own passenger fees. ~~Why is this? DOR fiscal note~~ ~~that passage of SB 115 will result in this~~

(1) Municipalities are able to set higher or lower fees to meet local infrastructure needs without reliance on the state program. Thus, Juneau currently imposes two separate fees computed on the number of a vessel's passengers per port visit. The two fees now total $8.00. Ketchikan currently imposes a $7.00 per passenger fee.

(2) Municipal ports electing to receive the $5 per passenger tax instead of imposing their own would be required to come to the legislature each year and seek an appropriation for that purpose. It leaves municipalities dependent upon the legislative process and having port monies traded for other capital projects. In addition, reliance on annual appropriations to bond for projects is ~~difficult because~~ probably impossible.

As recognized by the Dept. of Revenue in its fiscal note, passage of this legislation is necessary to remove the dis-incentive for communities to pass local passenger tax ordinances, allowing them (port communities) to deal with local issues created by cruise impacts – precisely what the initiative was purportedly meant to do.

Let me apply all of this to the initiative. For purposes of this exercise, I am assuming a year in which 1 million passengers arrive by cruise ship (slightly more than are actually projected for this season):

$46,000,000 total amount to be remitted to the State

The cruise ship industry estimates that the average cruise ship vessel calls on 3.5 ports in Alaska. ~~I've~~ Let's round~~ed~~ up to four ports. The two largest ports of call, Juneau and Ketchikan, do not participate. ~~I have also~~ Let's also assume~~d~~ that a million passengers visited each of the next two ports of call. That allows me to subtract - **$10,000,000** as the total amount remitted to municipalities.

That leaves a total of **$36,000,000**. Another 25% is to be allocated to the regional impact fund. Again, it is doubtful whether much, if any, of that amount can be expended, but that amount totals **$11,500,000**. That leaves a total of **$24,500,000** to be expended on **state** harbors, ports and services to be used **solely** in direct service to cruise ship vessels. I submit that you cannot spend it. In the meantime, of the **$46,000,000** theoretically set aside for support of local governments servicing cruise ship vessels, at most **$10,000,000** reaches them.

Thus we are left with a municipal port revenue sharing program that will not work as intended: as a way to assist port communities to cope with cruise ship visits.

Fortunately, this problem can be fixed. Proposed ~~Committee Substitute for House~~ SENATE Bill 168 is one such way. The CS bill would allow municipal passenger taxes or fees to be taken as a credit against the State's $46 tax, up to a maximum credit of $10 per passenger, per community.

as noted by the Dept. of Rev

Let there be no question. Under this bill, the allowance of a tax credit will reduce the amount of proceeds going into the State general fund. And the cruise industry will end up remitting fewer total dollars to government entities, local and state, as a result.

But creating a credit is likely to achieve a couple of other results that I believe are highly desirable:

- Port cities that do not currently have a local fee structure will be encouraged to enact one and to develop port projects that serve cruise ship passengers in the manner most compatible with their respective communities, without fear of adverse political consequences; and
- In so doing, because general fund revenues are taken off of the table—instead, the revenues go directly to communities—competition within the legislature for allocations is reduced.

To summarize: allowing the tax credit clearly benefits the port communities for the reasons I've outlined. At the same time, it will reduce the total amount of passenger tax proceeds received by the State. This reduction, however, should not raise major policy objections because of the severe legal restrictions on the ways that these tax proceeds may be spent.

Thank you for allowing me the opportunity to testify today.

SB 168 Draft Testimony

I would like to speak in support of SB 168. I view it as a legislation which, by correcting flaws in the 2006 cruise ship ballot measure, will assure that each passenger is assessed $50 as intended by the voters, and that the funds are expended in a manner consistent with federal law by actually- rather than theoretically- providing infrastructure and services directly related to visits of cruise vessels in port communities. and to

1. Review background; mayor since 1997, council member for 6 years prior. Elected service has coincided with growth of cruise industry in Ketchikan.

2. Lost largest employer in 1997 with the LP closure. Fortunately the tourism sector has been improving, so that Ketchikan's economy has partially recovered in the past 10 years. still has a way to go.

3. Port communities that are visited and impacted by cruise vessels need to make investments to improve their port facilities. Ketchikan owns and operates substantial port facilities which provide services to cruise ships and their passengers. 6 years ago the city initiated a long term port facility development plan. The plan envisions, among other things, making improvements to existing facilities so that we can accommodate the largest known ships likely to be in the Alaska touring trade while also addressing impacts, such as vehicle and pedestrian congestion, that result from visits by cruise ships.

As part of that effort, the city received legal advice regarding federal statutory restrictions on the use of marine passenger fees. We believe those restrictions essentially require a connection between the fee, and a service to the vessel, passengers, and/or crew.

4. Ketchikan currently has a $40 million port upgrade project to improve some of our facilities to better provide for the safety of tourists and alleviate the dangerous pedestrian and vehicular crowding that occurs when vessels are in port. Our $7 passenger fee is

appropriated by the Legislature, to improve port facilities and provide other services to cruise vessels. will also say there is not passengers will not receive credit; the bill clearly says that the passenger and the company is entitled to the credit

In theory, then, $25 of the ~~$46~~ 35 tax would be paid to local ports at which the vessels dock. In reality, however, few vessels visit five ports. The average is only 3.4 ports of call. Based on real ship schedules, the maximum amount that would actually go to municipal ports of call- in theory- is $17.

There's more, however! The ballot measure denies funds to any community which assesses its own port fees. In practice, this means that Ketchikan and Juneau, which are the two most visited and impacted ports of call, would receive nothing from the $46 ta.: because they have, respectively, local fees of $7 and $8. Because these two ports are visited by nearly every cruise ship coming to Alaska, on average only $7 of the ~~$46~~ 35 available to support local ports of call could be used for that purpose, leaving the remaining ~~$39~~ 28 "stranded," unavailable for distribution to ports which actually render services to cruise vessels.

Briefly review $~~4~~ and $35 sheet.

I want to note that the proposed bill does not just benefit large port communities; it applies to all ports. Small communities such as Petersburg ~~and~~ Hoonah, Kodiak, Valdez could proportionally benefit depending upon the visits of cruise vessels to those communities and local decisions about whether or not to impose passenger fees. The data clearly shows that, based upon the real schedules of cruise vessels, the $50 collected should be adequate for all port communities.

In my opinion the initiative does not assist port communities as intended, as it does not provide come close to meet needs in directly affected communities.

Some proponents of the current law will argue that the money is not "stranded". In their view, the legislature could simply appropriate the remaining monies to port and other

being used to pay the debt service. Juneau and other ports are contemplating similar improvements, and need recurring revenues to pay for the improvements.

The financing for the City's port project was arranged through the Alaska Bond Bank. We do not believe their approval would have been forthcoming if, instead of a reasonably guaranteed revenue stream, we had to rely on annual appropriations from the Legislature. The Bond Bank's financial advisor recently told us that, under any circumstance he could imagine, the pledge of a borrower to the Bond Bank secured from on-going revenues- like a marine passenger fee assessed by a port- is superior to a pledge that is subject to annual appropriation. He noted that, in fact, there have been some fairly high-profile defaults in recent years by issuers in which one governing body opted to not meet obligations that had been entered into by a prior governing body. Consequently, his conclusion was that he would always be more inclined to support a pledge not subject to annual appropriation than he would be to support a pledge subject to appropriation. The executive director of the Bond Bank agreed with that opinion.

Allowing the collection of taxes at the local level provides a surety of revenue stream that, by our constitution, the state cannot. This facilitates bonding to permit capital investment in support of the infrastructure necessary in port communities.

5. I would like to walk through how the passenger tax works under the initiative.

Each passenger traveling in Alaska on a large commercial passenger vessel will pay $50, of which $4 is a fee for the Ocean Ranger program. That leaves $46 per passenger to be used for port facilities and other services to the vessels, of which 25% is designated for a so-called regional impact fund which, upon close examination, is in essence designed to provide funds to communities which are not ports of call, and which are providing little, if any, services to ships, while at the same time stating that the funds must be used to provide services and infrastructure directly related to visits of cruise vessels. Each of the first five ports of call for each vessel is entitled to receive $5 per passenger, if

communities around the state with little regard to the actual services provided to cruise vessels. But the federal restrictions don't work that way. The U.S. Constitution and federal statutes have placed restrictions on the use of marine passenger fees. In numerous opinions, the Department of Law and the Legislature's own attorneys have consistently confirmed that marine passenger fees cannot be used as general revenue sources because federal provisions essentially require such fees to be used "solely to pay the cost of a service to the vessel." In short, communities that don't directly service vessels can't generally qualify for funding.

In closing, legal advice received at the state and local levels states that federal law requires marine passenger fees to be spent on services related to the vessels, passengers, and crew. This is acknowledged indirectly throughout the initiative. We believe that the best way of complying with federal requirements, meeting the requirements of any lender willing to finance port projects, and making realistic use of the monies that will accrue in the passenger tax account,- while still assuring that each passenger is assessed $50 as intended by the voters- is to assure that marine passenger fees flow to local communities so that we can improve our port infrastructure and compete on the world market with ports around the world that are making significant investments. SB 168 will help accomplish those goals.

A compilation of legal opinions relating to components of the Head Taxes authorized in the cruiseship ballot initiative approved by Alaska voters in August, 2006.

MEMORANDUM

TO: North West Cruiseship Association

DATE: January 18, 2007

RE: *Analysis of Constitutional Issues Arising from Passenger Head Tax*

I. OVERVIEW

The Initiative's $46.00 passenger head tax violates federal law in at least three ways:

First, it violates 33 U.S.C. § 5, which prohibits taxes or fees on vessels operating in navigable waters, or their passengers, except for narrowly tailored, fairly allocated user fees that enhance the "safety and efficiency" of interstate commerce. The passenger tax imposed by the Initiative does not come close to satisfying the test for a proper fee under 33 U.S.C. § 5.

Second, it violates the Tonnage Clause of the United States Constitution, which the Supreme Court has read to prohibit any taxes or fees on vessels in interstate commerce except those directly related to services provided to those vessels. Here, the tax operates not as a user fee but as a revenue generating device, which the Tonnage Clause squarely prohibits.

Third, it violates the Commerce Clause of the United States Constitution. The sponsors of the Initiative designed the passenger tax to discriminate against interstate commerce, which the Commerce Clause prohibits. Further, the tax fails the "internal consistency" test, which asks whether interstate commerce would be unduly burdened if every state imposed a similar tax, as well as the requirement that the tax be fairly related to the services provided by the state.

II. 33 U.S.C. § 5

In 2002, Congress amended the Rivers and Harbors Act of 1884 to prohibit state and local governments from levying or collecting *any* "taxes, tolls, operating charges, fees, or any other impositions whatever …from any vessel or other water craft [operating in navigable waters], or from its passengers or crew." 33 U.S.C. §5(b). This law preempts any state taxes enacted in violation of its terms. *See also Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12 n.5 (1983) (addressing similar federal statute governing airline taxes and fees).

Congress excepted narrowly-tailored user fees from this broad prohibition. Thus, a state may levy "*reasonable* fees *charged on a fair and equitable basis* that (A) are used *solely* to pay the cost of a service to the vessel or water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; *and* (C) do not impose more than a small burden on interstate or foreign commerce." 33 U.S.C. § 5(b)(2) (emphasis added). (Congress also excepted some types of "property taxes" from the prohibition. *See* 33 U.S.C. §5(B)(3).) Congress meant this exception to be narrow. As Representative Young stated, "non-Federal interests[] may impose taxes or fees only . . . *under extremely limited circumstances* in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel." Cong. Record (Nov. 22, 2002), at E2143-44 (emphasis added). Any such "fees must *also* enhance the safety and efficiency of interstate and foreign commerce *and* represent at most a 'small burden' on interstate and foreign commerce." *Id.* at E2144 (emphasis added). "Generally, taxes will *not* be allowed under this section." *Id.* (emphasis added).

Notably, as Representative Young pointed out, Subsection 5(b)(2) sets forth *conjunctive* requirements for a permissible fee, not a disjunctive test, so a fee must satisfy all three statutory criteria. Thus, a charge imposed to cover something other than the cost of servicing a vessel would be improper *even if* it enhanced the safety and efficiency of commerce. Similarly, a charge that is not imposed on "a fair and equitable basis" – for example, a fee imposed on some vessels that receive services but not others – would violate the statute *even if* it defrayed the cost of services and enhanced the safety and efficiency of commerce. At bottom, the statute makes clear that a state's fees must be tethered to the impact of having *that* vessel in its waters, and it must apply fairly across the board.

Bearing these conjunctive requirements in mind, the passenger tax violates Section 5(b) for at least four reasons:

First, it is a "tax," not a "fee," and the federal statute allows only "fees." Congress distinguished between taxes and fees, as illustrated by the exceptions to the prohibition, which are separately addressed to "fees" (in Sections 5(b)(1) and (2)) and "taxes" (in Section 5(b)(3)), and by the comments of Representative Young in the legislative history quoted above. Aside from the fact that the Initiative calls it a "tax," the passenger levy *functions* as a "tax," in part because the Initiative allocates some revenues to municipalities and then leaves the balance as unearmarked revenue. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006); *Hexom v. Oregon Dept. of Transportation*, 177 F.2d 1134, 1135-36 (9th Cir. 1999).

Second, even if a court evaluates the tax as a "fee" under Section 5(b)(2), it is not charged "on a fair and equitable basis." Passengers taking similar voyages on vessels with 249 or fewer sleeping berths can avoid the tax entirely, even if the state provides similar services to those vessels. Further, the tax bears no relationship to the time spent by passengers in Alaska waters or their impact on Alaska ports. Under the Initiative, passengers on large vessels would pay for services that smaller vessels use as well, such as the construction, maintenance and operation of docks. There is nothing "fair and equitable" about one segment of an industry subsidizing services used by another. *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 955 F.2d 1054, 1062-63 (6th Cir. 1992) (airport could not impose cost of maintaining fire rescue solely on airlines where concessionaires also benefited from those services).

Third, the revenue generated from the passenger tax is not used "*solely* to pay the cost of a service to the vessel." To the contrary, the Legislature "may" use money generated by the taxes for general improvement of port and harbor facilities, services to provide for vessel visits, enhancing the safety and efficiency of interstate commerce, and "*such other lawful purposes as determined by the legislature*." AS 43.52.040(a) (emphasis added). Even if the Legislature were to accommodate the Initiative's suggested uses of the funds collected, passengers on vessels calling in one port would wind up paying to improve facilities in other ports, where the vessel may not call and the passenger may never visit. This violates the law. *See City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 840 (D. Colo. 1989) (airport could not charge passengers a fee to build new facility they might never use).

Fourth, the Initiative virtually ensures that this tax will generate millions of dollars to be spent for something other than vessel services. The revenue anticipated from the passenger excise tax in 2007 is $41 million, of which $14 million will be shared with municipalities where the cruise ships call. *See* Primary Election Voter Pamphlet 2006, at 13. Another $10 million will go into a "Regional Cruise Ship Impact Fund" for other municipalities at which cruise ships *do not stop*. *Id.* These funds cannot *possibly* be described as covering the cost of servicing these vessels; indeed, they will be given to the very jurisdictions whose potential actions so concerned Representative Young. *See* Cong. Record (Nov. 22, 2002), at E2143 (referring to "local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters . . . adjacent to the taxing community . . . even where the vessel is not calling on, or landing, in the local community"). Further, the Initiative allows tax revenues to be used to "enhance the safety and efficiency of interstate and foreign commerce" or for "other lawful purposes," provisions so amorphous that they transform the Alaskan passenger tax into a general revenue measure in clear violation of federal law.

III. THE TONNAGE CLAUSE

Article I, Section 10 of the United States Constitution provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. CONST. art. I, § 10, cl. 3. Courts have construed the Tonnage Clause expansively to forbid a variety of taxes based on measures other than tonnage. Thus, in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935), the Court construed the Tonnage Clause to apply to "all taxes and duties regardless of their name or form . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port," without regard to any reference to "[t]onnage."

The Tonnage Clause does *not* forbid the collection of "fees or charges by authority of a state for *services* facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like." *Clyde Mallory*, 296 U.S. at 265; *see also id.* at 265-66 (Tonnage Clause does not prohibit charges "for services rendered to and enjoyed by the vessel"). Thus, a charge will satisfy the Tonnage Clause if it defrays the cost of services provided directly to the vessel at issue; it will fail, however, if it merely operates as "a revenue device." *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1023 (5th Cir. 1989).

The passenger tax violates the Tonnage Clause for essentially the same reasons that it violates 33 U.S.C. § 5(b). The flat head tax applies to all covered vessels that enter Alaska

marine waters, without regard to the number of ports at which they call or the facilities they use; its proceeds are not dedicated entirely to legitimate port-related services (and, indeed, the tax will generate more money than the state could expect to use for port-related services); and even the possible port-related uses of funds collected from a particular vessel will not necessarily go to facilities (or even ports) used by that vessel or its passengers. Accordingly, the tax has been assessed for the mere "privilege of access by vessels or goods to the ports or to the territorial limits of a state," in violation of the Tonnage Clause. *Clyde Mallory*, 296 U.S. at 265.

IV. THE COMMERCE CLAUSE

Article I, Section 8 of the United States Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Although this provision makes only an affirmative grant of power to Congress, it also prevents states from unduly interfering with interstate commerce – a doctrine known as the "dormant" or "negative" Commerce Clause. Under the dormant Commerce Clause, a State's "power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against [interstate] commerce." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). The point is to combat local favoritism and economic isolationism by individual states, and to foster a single, unified national identity and market. *See, e.g., Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2423 (2005).

The U.S. Supreme Court has developed and applied several tests to determine whether a state tax unconstitutionally discriminates against, or otherwise unduly burdens and interferes with, interstate commerce. The passenger tax fails at least three of these tests:

First, the dormant Commerce Clause bars any form of discrimination against interstate commerce, unless the State offers a compelling justification for that discrimination. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999). This prohibition against discrimination applies not only to facially discriminatory state taxes, but also to state taxes that have either the *purpose* or the *effect* of burdening out-of-state interests to the advantage of in-state interests. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

The passenger tax is unlawful because it has a clear *purpose* of burdening persons from outside Alaska. In determining whether a state has enacted a law with a discriminatory purpose, courts often look to its legislative history or the statements of its sponsors. *See, e.g., S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (looking to "direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses"); *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995) (referring to "legislative history ... brimming with protectionist rhetoric"). Here, public statements show that the sponsors supported the Initiative *specifically* because it would disproportionately burden out-of-state tourists and out-of-state businesses – and they counted on fellow Alaskans to support the initiative for that very reason. *See, e.g.*, Paula Dobbyn, *Court to Rule on Tourist Tax Petition*, Anchorage Daily News, Oct. 11, 2005 at F1 ("'It's a tax on *people from outside* the state and it's specifically designed to build infrastructure so that when they come here, Alaskans don't have to subsidize them,' Geldhof said."); Joseph Ditzler, *Mat-Su CVB*

to Campaign Against Tax on Cruising, Anchorage Daily News, Dec. 17, 2005 at F1 ("Alaskans polled typically support the initiative, recognizing *it taxes Outsiders . . .* , Geldhof said."); Paula Dobbyn, *Judge OKs Cruise-Ship Initiative*, Anchorage Daily News, Feb. 9, 2006 at D1 ("'Even for a cynical political hack like me, it's a good day when the citizens get to win one against a multibillion-dollar industry *located in British Columbia and Outside*,' said Joe Geldhof."); Paula Dobbyn, *Cruise Industry Blitzing Voters*, Anchorage Daily News, May 19, 2006 at A1 ("'Alaskans are not stupid,' said Joe Geldhof, a Juneau lawyer. 'For the average person sitting in a bar, it takes five minutes to figure out *this is a tax on the guy from Ohio.*'").

Second, the U.S. Supreme Court has developed a test of "internal consistency" to detect and prevent multiple taxation of (and therefore discrimination against) interstate commerce. Courts apply the test by imagining what would happen if every state imposed precisely the same tax; the tax fails the internal consistency test if, as a result, interstate commerce would be burdened more heavily than intrastate commerce. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

The passenger tax fails the internal consistency test. The Supreme Court long has expressed suspicion of state schemes that assess a flat tax simply because someone crosses the state's border in the course of commerce. "If each state imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the states would be deterred." *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284 (1987). Here, the passenger tax assesses a flat tax on passengers solely for the privilege of allowing their cruises to enter Alaskan waters. Plainly, if every other state imposed an identical tax, the result would be a heavy burden on interstate commerce that intrastate commerce would not also bear – a burden that would increase depending on how many states' waters a cruise ship entered, without regard to the burdens imposed by the vessel on any given state. *See Jefferson Lines*, 514 U.S. at 185. The tax thus violates the fundamental principle of the internal consistency test, i.e., that "revenue measures [must] maintain state boundaries as a neutral factor in economic decisionmaking." *Scheiner*, 483 U.S. at 283.

Third, a state tax passes muster under the dormant Commerce Clause only if it "is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *See also Atlantic Richfield Co. v. Alaska*, 705 P.2d 418, 432 (Alaska 1985) (same). The Initiative violates this test.

"[W]hen the measure of a tax bears no relationship to the taxpayer's presence or activities in a State, a court may properly conclude under the … *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Commonwealth Edison*, 453 U.S. at 629. Here, the passenger tax does not fairly relate either to the services provided by the State to, or to the costs imposed on the State by, cruise ships. Instead, the Initiative imposes the same tax on cruise ship passengers, whether the vessel stays in Alaska 3 days or 10, whether it calls at one Alaska port or several, and whether it loads cargo and supplies on one occasion or many.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 16, 2003

The Honorable Cheryll Heinze
Alaska House of Representatives
State Capitol, Room 416
Juneau, AK 99801-1182

Dear Representative Heinze:

This is to respond to your request regarding HB 207 and the applicable federal law concerning taxes, fees, and other levies on vessels or their passengers or crew. Specifically, the Maritime Security Act of 2002, among other things, amended 33 U.S.C. sec. 5 to provide:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for --
>
> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or
>
> (2) reasonable fees charged on a fair an equitable basis that --
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce.

CBJ Law Department MEMORANDUM

To: Assembly Finance Committee

From: John R. Corso, City & Borough Attorney

Subject: Port Fees; federal law

Date: April 21, 2003

I. Discussion

Last week, KTOO broadcast a story about the Murkowski administration reaction to recent changes in federal maritime law. The law in question is the Maritime Security Act of 2002, which, among other changes, amended 33 USC §5 to provide:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--
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> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236), or
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> (2) reasonable fees charged on a fair and equitable basis that--
>
> (A) are used solely to pay the cost of a service to the vessel or water craft,
>
> (B) enhance the safety and efficiency of interstate and foreign commerce, and
>
> (C) do not impose more than a small burden on interstate or foreign commerce.

The reference in (b)(1) is to a long-established program for harbor project fee review by the Federal Maritime Commission. The Port Director administers this program for CBJ. I have attached copies of the new language and the referenced FMC statute.

The new statutory language essentially restates the constitutional rule described in my July 22, 1999 memorandum to the Assembly on the passenger fee initiative. Briefly, the rule is that we can impose a fee on visitors only to the extent we provide a service to visitors. We cannot charge them a fee for services we provide to someone else, such as ourselves.

Some services, such as dock construction and maintenance, are clearly justifiable as a service to ships and passengers. Others are less defensible. The statute will prevent the most flagrant abuses, such as a fee imposed on ships that merely pass through local waters without stopping. So said Congressman Young in the November 22, 2001 *Congressional Record*, attached. However, it can be used in less egregious circumstances as well. Mr. Young speculated that "generally taxes will not be allowed under this section". *Id.*

CBJ Law Department
MEMORANDUM

To: Mayor and Assembly

From: John W. Hartle, City Attorney JWH

Subject: Fees on Cruise Lines; Resolution 2294b.

Date: March 12, 2005

You have asked for an analysis of the objections raised by Jim Reeves of Dorsey and Whitney regarding the proposed increases in cruise line fees in Resolution 2294b. I have analyzed all the cases cited by Mr. Reeves, and the other major case law as well. The short answer is that, while there is always some risk regarding particular expenditures, and federal law does provide special protection to interstate and foreign shipping, it appears that the present proposal would pass muster under the U.S. Constitution because the proposal is a fee for services and facilities that benefit the cruise industry, rather than a tax to raise general revenues.

The Tonnage Clause.

The Tonnage Clause of the U.S. Constitution gives the shipping industry a measure of special protection from state and local taxation. The clause provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, cl. 3. It was added to the Constitution on September 15, 1787, according to the notes of James Madison, essentially as a supplement to the Commerce Clause, which also serves to limit state and local regulation or taxation of interstate or foreign commerce.

Under the Tonnage Clause, a municipality cannot levy a general tax on ships for the privilege of entering port; fees for services and facilities, however, can be imposed. There are many cases that make this point. Closest to home is the July, 2004, Superior Court decision in *Polar Tankers, Inc. v. City of Valdez*. Case No. 3AN-00-9665CI. In that case, the court struck down the City of Valdez's Ordinance 99-17 which imposed the "Tanker Tax," a business personal property tax levied mainly on oil tankers. Because the tax was imposed for the admitted purpose of raising general revenues, not based on a particular service or facility for the tankers, the court struck it down.

The fee increase proposed in Resolution 2294b, by contrast, is not intended as a general revenue measure. The resolution would impose fees for the purpose of constructing facilities outlined in the Long-Range Waterfront Plan that benefit the cruise industry. *See* Resolution 2294b, Sec. 2(e), pg. 3, line 22. Courts have consistently found that state or local fees for services or facilities do not violate the Tonnage Clause. In 1877, the U.S. Supreme Court summarized the law as follows:

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The Maritime Transportation Security Act of 2002.

As a fairly recent enactment of Congress, this act has no body of developed case law interpreting it. However, from its plain language, it can be seen as the most restrictive of the three main areas of federal law restricting municipal fees on shipping interests. Although not mentioned in Mr. Reeves' memo regarding Resolution 2294b, the Maritime Security Act of 2002 provides his best argument. It provides:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
>
> (1) fees charged under section 2236 of this title;
> (2) reasonable fees charged on a fair and equitable basis that--
> (A) are used solely to pay the cost of a service to the vessel or water craft;
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
> (C) do not impose more than a small burden on interstate or foreign commerce; or
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

This federal statute, among others, in my view comprises "the Consent of Congress" contemplated by the Tonnage Clause. Accordingly, if a project fits its requirements, it will pass muster under the Tonnage Clause and the Commerce Clause as well. This is the statute CBJ has been acting under since its enactment. Sponsored by Rep. Don Young, it was intended to clarify the requirements of the Commerce Clause, according to his address to Congress upon its passage:

> Section 445 [the Act] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation. . . .

Conference Report on S. 1214, Maritime Transportation Security Act of 2002; Speech of Hon. Don Young, of Alaska, in the House of Representatives, Thursday, November 14, 2002.

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MEMORANDUM

February 16, 2004

SUBJECT: HB 207 Legal Issues (Work Order No. 23-LS0850)

TO: Representative Carl Gatto
Attn: Cody Rice

FROM: Kathryn Kurtz
Legislative Counsel

You have asked several questions related to the legality of HB 207.

Do the numbers your staff provided from the administration relating to state costs incurred supporting the cruise industry make HB 207 more defensible in terms of the tonnage clause and the Maritime Transportation Security Act of 2002 (MTSA)? The list of costs potentially attributable to the cruise industry that you provided attached to the letter of January 27, 2004 may be sufficient to satisfy the requirements of the tonnage clause, if that provision is read broadly enough. However, they may not be sufficient to satisfy the Maritime Transportation Security Act of 2002 (MTSA) service-to-vessel requirement for a fee of $100 per passenger.

The tonnage clause prohibits charges "for the privilege of entering, trading in, or lying in a port," but permits charges "for services rendered to and enjoyed by the vessel, such as pilotage, wharfage, or charges for the use of locks on a navigable river, or fees for medical inspection." Clyde Mallory Lines v. Alabama ex. rel. State Docks Commission, 296 U.S. 261, 265-266 (1935) (citations omitted).

In addition, under the Clyde Mallory decision, the tonnage clause permits charges for general services that benefit all harbor users, such as the "policing of a harbor so as to insure the safety and facility of movement of vessels." *Id.* at 266-267. The court reasoned that such services benefit all who enter a harbor:

> It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it.

Id. Similarly, a fee to ensure that emergency services will be available was upheld against a tonnage clause challenge, even if "not every ship paying the fee needs the service." New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal

District, 874 F.2d 1018, 1023 (5th Cir. 1989).

In Barber v. Hawaii, 42 F.3d 1185 (9th Cir. 1994), the plaintiffs acknowledged the ability of states to charge reasonable fees in return for services rendered under the Clyde Mallory case, and further acknowledged provision of rest room facilities, parking, trash disposal, and security would satisfy the Clyde Mallory test. Based on this, the court found that "Hawaii provides services in exchange for the mooring and anchorage fees. The fees are not a duty on tonnage." *Id.* at 1196.

The list of costs you provided includes several programs that relate to navigation in general, including cruise ships, among them harbor project debt service, the marine pilot licensing program, the Department of Labor's marine training program, and the Corps of Engineers harbor program that might conceivably fall within the broader class of services to vessels for which fees are permissible under the tonnage clause. Other services included on the list, such as state parks and the Alaska Railroad, appear to have a much more attenuated relationship to vessels that may not be sufficient to bring them under the rubric of "services to vessels" for purposes of the tonnage clause.

The next question is to what extent the requirements of the tonnage clause and the MTSA are the same. A strong argument can be made that the requirements of the MTSA are more stringent in this regard.

The starting point to answer this question is the language of the MTSA. According to the Ninth Circuit,

> Statutory interpretation begins with the language of the statute. *See United States v. Ron Enters., Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). When the plain meaning of a statutory provision is unambiguous, that meaning is controlling. *Id.* at 242. To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy. *See Green v. Commissioner*, 707 F.2d 404, 405 (9th Cir. 1983). If ambiguity exists, we may use legislative history as an aid to interpretation. *See Id.*; *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992).

Children's Hospital and Health Center v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999).

To pass muster under the MTSA, a fee must be used "solely to pay the cost of a service to the vessel or water craft." 33 U.S.C. 5(b)(2)(A). These words could be read to require that fee revenue must pay for services to the vessel carrying the passenger who paid the fee. The language refers to "the vessel," which implies a specific vessel, not "a vessel," which could be any vessel. This phrasing is not ambiguous. However, if the court does look to the legislative history of this provision for additional guidance, they will find Representative Young's comment that "reasonable fees can be charged on a fair and

equitable basis for the cost of service actually rendered to the vessel. . . . Generally, taxes will not be allowed under this section." Congressional Record, November 22, 2002, E2143 at E2144, Conference Report on S. 1214, Speech of Hon. Don Young, Nov. 14. 2002 (emphasis added). This indicates legislative intent that "service to the vessel" be construed narrowly for purposes of this statute, more narrowly than the service to vessel concept as it is interpreted in the tonnage clause context.

Looking at the context of the enactment, arguably, such a narrow construction might invalidate some existing passenger fees in place in other states, fees that were in place prior to passage of the MTSA. This may not reflect the intent of the Congress. Also, it is conceivable that the drafters of this provision were writing with the tonnage clause in mind. Most of the courts that have interpreted the tonnage clause have taken fairly liberal views on what constitutes a service to a vessel, permitting fees that provide services to harbor users in general, including emergency services that most individual vessels will not actually use. However, given the clarity of the language of the statute, the courts interpreting the language of the MTSA may not try to interpret it in light of the tonnage clause.

The list of budget components and portions potentially attributable to the cruise industry that you provided does not appear to include any items that would fit the "service actually rendered to the vessel" criteria as I understand it, except possibly the port security grant portion of the Homeland Security Grant Program. Harbor project debt service, the marine pilot licensing program, and the marine training program may benefit the cruise industry, but it would be difficult to argue that they constitute services actually rendered to particular vessels. A harbor is usually not built for a particular vessel, and a marine pilot is probably not trained to work with only a specific vessel. Similarly, the Corps of Engineers harbor program projects in St. Paul and Wrangell would probably not be considered "a service actually rendered" to a particular vessel; it may benefit vessels that actually use those harbors, but it might be difficult to argue that it benefited vessels that do not visit those harbors.

Do the services support a $100 fee?

Independent of the cost of service to vessels requirement discussed above, to qualify for an exception to the MTSA ban on head taxes, a "fee" must be "reasonable." "Reasonable" might be gauged partly by reference to fees charged by other ports. According to the data your staff supplied, cruise ship passenger fees in selected U.S. ports range from $1.30 to $9.35. Internationally, fees range from $1 in the Dominican Republic to $15 in the Bahamas, with Bermuda an outlier at $60. So, Bermuda charges four times as much as the next highest port, and the proposed tax is 40% more than Bermuda charges. The proposed tax to be imposed by HB 207 is more than ten times as much as the other U.S. fees listed.

Reasonable might also be evaluated with reference to the total cost of a cruise. The Royal Caribbean website today is offering "hot deals" on Alaska cruises starting at $999. http://www.royalcaribbean.com/gohome.do, accessed 2/8/04. A fee of $100 would be

about 10% of the whole cruise price for some travelers; that may not be "reasonable" in the sense of inexpensive. On the other hand, travelers may face excise taxes of more than 10% in other contexts, for example on car rentals. I know of no legal authority that says a $100 head tax is inherently unreasonable; however, the size of the tax compared to fees elsewhere and relative to the price of the cruise might be used to argue that the fee is not "reasonable" and therefore violates the MTSA.

In addition, the MTSA requires that a fee "not impose more than a small burden on interstate or foreign commerce." Your staff has provided me with a sheaf of FCC filings to support your position that the burden of a $100 fee on the industry is small, given the financial position of the companies involved. Whether a $100 fee poses more than a small burden in this context is a question of fact requiring the analysis of financial statements rather than legal expertise. I can not predict with any degree of accuracy how a court will answer this question. Again, the MTSA is so new that there is no case law available interpreting "small burden" in this particular context.

Please explain the distinction between the legal requirement to "use the funds solely for the costs of a service to a watercraft . . . " and an unconstitutional dedication of funds.

As discussed above, the MTSA requires that fees levied on passengers be used "solely to pay the cost of a service to the vessel or water craft." 33 U.S.C. 5(b)(2)(A).

Article IX, sec. 7, Constitution of the State of Alaska, generally prohibits the dedication of funds:

> SECTION 7. Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

The MTSA addresses the use of funds. It does not require a dedication of funds per se.

As long as revenue from a fee levied on cruise ship passengers were used solely to pay the cost of a service to the vessel, the MTSA would arguably be satisfied, regardless whether Alaska adopts a statutory provision requiring that the funds be spent on the cost of a service to the vessel. Adopting such a statute would likely violate the prohibition on dedicated funds. Spending the money as required by the MTSA without adopting a statute specifically dedicating the stream of fee revenue should not pose a dedicated fund problem, but would require institutional memory and discipline on the part of the legislature.

How would a packaged tour tax differ from a cruise ship head tax in terms of defensibility?

Under the MTSA, a packaged tour tax would not differ from a cruise ship head tax in terms of defensibility. The MTSA applies to all taxes, tolls, fees, and impositions on passengers, vessels, and so forth. The MTSA provides:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--
>
> (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or
>
> (2) reasonable fees charged on a fair and equitable basis that--
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> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce.

33 U.S.C. 5(b).

The tonnage clause is a slightly different animal. There is one case that could be used to argue that a broader packaged tour tax that was not limited to cruise ships or cruise ship passengers should pass muster under the tonnage clause. *See* Hartley Marine Corporation v. Mierke, 474 S.E.2d 599 (W.Va. 1996) and the discussion of that case in my memo to you of March 19, 2003 at page 3. That decision is from a state court, and not binding precedent in Alaska, although a court might find it to have some persuasive value. However, there have been no additional reported decisions since my prior memo citing that case, and none of the decisions citing that case make the same argument related to the tonnage clause (although some of them discuss tax issues relating to the commerce clause).

You also asked how the Hartley Marine case passed muster under the privileges and immunities clause. The answer is that the privileges and immunities clause was apparently not raised in that case; it is not mentioned in the decision.

Commerce Clause

Your staff requested inclusion in this memo of the material relating to the commerce clause in my memo to you of March 19, 2003. Your staff also requested an analysis of the fourth prong of the commerce clause test, whether the tax discriminates against interstate commerce, in relation to the cruise ship head tax, particularly whether exempting Alaska Marine Highway System vessels from the tax proposed in HB 207 would violate the commerce clause.

When the framers wrote the federal constitution, they were very concerned about removing barriers to free trade between the states. This concern was addressed in the Commerce Clause in Article I, section 8 of the Constitution of the United States. The commerce clause expressly permits Congress to regulate commerce among the several states. It has also been interpreted to include a "negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even where Congress has failed to legislate on the subject." Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

The Supreme Court has developed a four-part test for determining the validity of a tax under the federal commerce clause:

> (1) whether the activity taxed has a sufficient nexus with the taxing state;
> (2) whether the tax is fairly related to benefits provided by the state to the taxpayer;
> (3) whether the tax is fairly apportioned to local activities; and
> (4) whether the tax discriminates against interstate commerce.

Sjong v. State, Department of Revenue, 622 P.2d 967, 973 (Alaska 1981), *citing* Complete Auto Transit, Inc., v. Brady, 430 U.S. 274, 279 (1977).[1]

The first prong of the Complete Auto deals with "nexus," or the quantity and quality of connections between the taxing state and the activity being taxed. The many interactions between cruise ships and coastal communities in Alaska would be found sufficient to satisfy the first prong of the Complete Auto test. Cruise ships and ferries provide overnight accommodations in part to enable passengers to enjoy the goods, services, and attractions available on shore in Alaskan communities. Cruise ships and ferries dock in Alaska ports, purchase goods and services from local vendors, and cruise ships sell on-shore tours and other services to disembarking passengers. Other state taxes involving vessels have easily met this prong of the Complete Auto test by virtue of less extensive contacts with shore. *See* Sjong v. State, Department of Revenue, 622 P.2d 967, 970-971 (Alaska 1981); Hartley Marine Corporation v. Mierke, 474 S.E.2d 599, 608-609 (W. Va. 1996).

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[1] / Although this is an older case, the four-part test it describes is still good law. *See for example* Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995). Sometimes courts first analyze whether a law treats in-state and out-of-state interest differently, and then move to the Complete Auto test. *See* Barber v. Hawaii, 42 F.3d 1185, 1194 (9th Cir. 1994); Hartley Marine Corporation v. Mierke, 474 S.E.2d 599, 607 (W.Va. 1996).

The second prong, requiring a fair relationship to benefits provided by the state to the taxpayer, is also easily met. This relationship need not be especially close. According to the United States Supreme Court,

> If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. ... The bus terminal may not catch fire during the sale, and no robbery may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax.

Oklahoma Tax Commission v. Jefferson Lines, 514 U.S. at 199-200 (upholding an Oklahoma sales tax on the full price of bus tickets, including tickets for travel between states).[2] *See also* Hartley Marine Corporation v. Mierke, 474 S.E.2d at 610 ("There simply is no requirement that the tax imposed result in a direct and attributable benefit to a taxpayer.") Cruise ships and disembarking ferry and cruise ship passengers use many services provided by state and local government. For purposes of the commerce clause, it is not necessary that each vessel or passenger actually need or use each service in order to justify the tax.

The apportionment prong of the Complete Auto test is intended to ensure that "each State taxes only its fair share of an interstate transaction." *Id.* at 184, *quoting* Goldberg v. Sweet, 488 U.S. 252 (1989). Although there may be some question about how to apportion nights spent in transit between Canada and Alaska, assuming there is an equivalent Canadian tax, there should be no apportionment problem if the tax is calculated based on nights spent on Alaska waters.

The final commerce clause test element is whether the tax discriminates against interstate commerce. This prong of the Complete Auto test, according to the Alaska Supreme Court, means that a state cannot impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local businesses relative to interstate business. Sjong v. Department of Revenue, 622 P.2d 967, 973 (Alaska 1981).

Discrimination against interstate commerce and HB 207

You asked whether the provisions of HB 207, particularly the exclusion of vessels operated by the state (including the Alaska Marine Highway System vessels), could be found to discriminate against interstate commerce. The leading U.S. Supreme Court case on the discrimination prong of the commerce clause test is Camps Newfound/Owatonna v. Harrison, 520 U.S. 564 (1996). In that case, the court invalidated a property tax that

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[2] / Similarly, to satisfy the requirements of due process, the relationship does not have to be particularly close--"[a]s long as the services are available, the issue of usage by the taxpayers is irrelevant." Keane v. Local Boundary Commission, 893 P.2d 1239, 1248 (Alaska 1995).

exempted property of charitable organizations generally, but offered only a limited tax benefit to charitable organizations "conducted or operated principally for the benefit of persons who are not residents." *Id.* at 568, 595.

In that case, the court first established that the camp was engaged in commerce, comparing it to hotels that offer guests goods and services that are consumed locally, noting the provision of services to out of state campers. *Id.* at 574. The court explained that the purpose of the clause was to provide a 'barrier against protectionism," and that the "'paradigmatic . . . law discriminating against interstate commerce is the protective [import] tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State.'" *Id.* at 575, *quoting* West Lynn Creamery v. Healy, 512 U.S. 186 (1994).

The definition of "commercial passenger vessel" in the bill excludes certain types of vessels, but does not overtly discriminate against interstate commerce in a way that would be clearly prohibited under the interstate commerce clause. The exclusion for non-commercial and government vessels applies to *all* noncommercial and government vessels, not just those operated by the state of Alaska or businesses incorporated in Alaska or those serving primarily Alaskans.

Conclusion

A $100 tax on cruise ship passengers, as proposed in HB 207, would probably be held to violate the MTSA. A packaged tour tax that extended beyond the cruise ship industry would probably also violate the MTSA. However, as written HB 207 does not create a dedicated fund problem under the state constitution.

In order to withstand scrutiny under the MTSA, the tax would have to meet all of the requirements of the exception in 33 U.S.C. 5(b)(2)(A), including that requirement that the fee be used "solely to pay the cost of a service to the vessel or water craft." A smaller fee with a direct link to the provision of specific services to specific vessels would be easier to defend.

The tax in HB 207 might also be held to violate the federal tonnage clause, although what constitutes a "service to a vessel" has been interpreted broadly enough in the tonnage clause context to permit some types of taxes on vessels. The tax might well withstand scrutiny under the commerce clause.

KLK:lmb
04-039.lmb

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MEMORANDUM March 19, 2003

SUBJECT: Cruise Ship Head Tax (Work Order No. 23-LS0850\A)

TO: Representative Carl Gatto
Attn: Jennifer Yuhas

FROM: Kathryn L. Kurtz KK
Legislative Counsel

An excise tax on passengers traveling on commercial passenger vessels might encounter challenges based on the commerce and tonnage clauses of the Constitution of the United States.

Commerce Clause

When the framers wrote the federal constitution, they were very concerned about removing barriers to free trade between the states. This concern was addressed in the Commerce Clause in Article I, section 8 of the Constitution of the United States. The commerce clause expressly permits Congress to regulate commerce among the several states. It has also been interpreted to include a "negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even where Congress has failed to legislate on the subject." Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

The Supreme Court has developed a four-part test for determining the validity of a tax under the federal commerce clause:

> (1) whether the activity taxed has a sufficient nexus with the taxing state;
> (2) whether the tax is fairly related to benefits provided by the state to the taxpayer;
> (3) whether the tax is fairly apportioned to local activities; and
> (4) whether the tax discriminates against interstate commerce.

Sjong v. State, Department of Revenue, 622 P.2d 967, 973 (Alaska 1981), *citing* Complete Auto Transit, Inc., v. Brady, 430 U.S. 274, 279 (1977).[1]

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[1] Although this is an older case, the four-part test it describes is still good law. *See for example* Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995). Sometimes courts first analyze whether a law treats in-state and out-of-state interest

apportion nights spent in transit between Canada and Alaska, assuming there is an equivalent Canadian tax, there should be no apportionment problem if the tax is calculated based on nights spent on Alaska waters.

The final commerce clause test element is whether the tax discriminates against interstate commerce. This prong of the Complete Auto test, according to the Alaska Supreme Court, means that a state cannot impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local businesses relative to interstate business. Sjong v. Department of Revenue, 622 P.2d 967, 973 (Alaska 1981).

The Tonnage Clause

The tonnage clause is a relative of the commerce clause; it too is concerned with ensuring the free flow of commerce between states. It prohibits a state from laying "any Duty of Tonnage" without the consent of Congress. The term "tonnage" originally referred to the internal capacity of a vessel. Clyde Mallory Lines v. Alabama ex rel State Docks, 296 U.S. 261, 265 (1935). However, the clause has been interpreted more expansively to include "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Id.* The clause prohibits "reliance on tonnage duties to raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port." New Orleans S.S. v. Plaquemines Port, Harbor and Terminal District, 874 F.2d 1018, 1023 (5th Cir. 1989).

The clause permits states to charge for services rendered to a vessel, such as pilotage, wharfage, use of locks on a navigable river, or policing of a harbor, Clyde Mallory Lines, 296 U.S. at 265, or for ensuring the availability of a service, such as fire fighting, even though not every vessel will actually need the service. Plaquemines, 874 F.2d at 1023.

The first question to ask in a tonnage clause analysis is whether the tax in question fits into the tonnage clause framework--whether it might reasonably be construed as a charge for the privilege of entering, trading in, or lying in a port.

West Virginia considered this issue in Hartley Marine Corporation v. Mierke, 474 S.E.2d 599 (W.Va. 1996). The statute challenged in that case taxed the use or consumption by "motor carriers"--including buses, trucks, and aircraft as well as barges and watercraft--of fuel purchased outside the state. Id. at 672. The court held:

> Appellants urge this Court to view the use tax at issue as a charge for navigation of the rivers in violation of the Duty of Tonnage Clause. If this use tax were solely imposed for fuel consumption on the waters of this state, Appellants' arguments would be more convincing. The use tax at issue, however, is not a prohibited toll on the use of this state's navigable waterways, but an excise tax on the use of fuel which is imposed on all motor carriers operating within this state, including, buses, trucks, trains, and aircraft.