

ALASKA LONG ISLAND COAST GUARD ZONE 2007

12088 HOUSE C&RA

HB

212

ALASKA STATE LEGISLATURE

Vice Chair:
House Finance Committee

Chair:
House Finance Subcommittees for;
Department of Public Safety
Department of Law



Session:
Alaska State Capitol, Rm 501
Juneau, AK 99801-1182
Phone (907) 465-4958
Fax (907) 465-4928

District:
600 E. Railroad Ave.
Wasilla, AK 99654

BILL STOLTZE
STATE REPRESENTATIVE
Representative_Bill_Stoltze@legis.state.ak.us

Sponsor Statement House Bill 212

Alaska Railroad Land Transfer of Eklutna Quarry to Eklutna, Inc.

House Bill 212 would authorize the Alaska Railroad Corporation (ARRC) to transfer its entire interest in the Eklutna Quarry site north of Eagle River to Eklutna, Inc., the ANCSA village corporation created for the Eagle River area containing the quarry site.

On February 1, 2007, ARRC, Eklutna Inc. and the Native Village of Eklutna signed an agreement memorializing this land transfer. The agreement allows ARRC to obtain appropriate permits and begin removing stockpiled material in the quarry with a replacement value of approximately \$2 million. All parties understood that legislative approval would be required before ARRC could carry out the land transfer.

This 48-acre property and its use as a quarry has been the subject of a long-running dispute between ARRC on the one side and the Native Village of Eklutna and the Municipality of Anchorage on the other. That dispute culminated in three Alaska Supreme Court decisions, which denied ARRC continued use of the quarry without first obtaining a municipal conditional use permit, and prevented ARRC from obtaining federal approval to use the rock on federally funded projects.

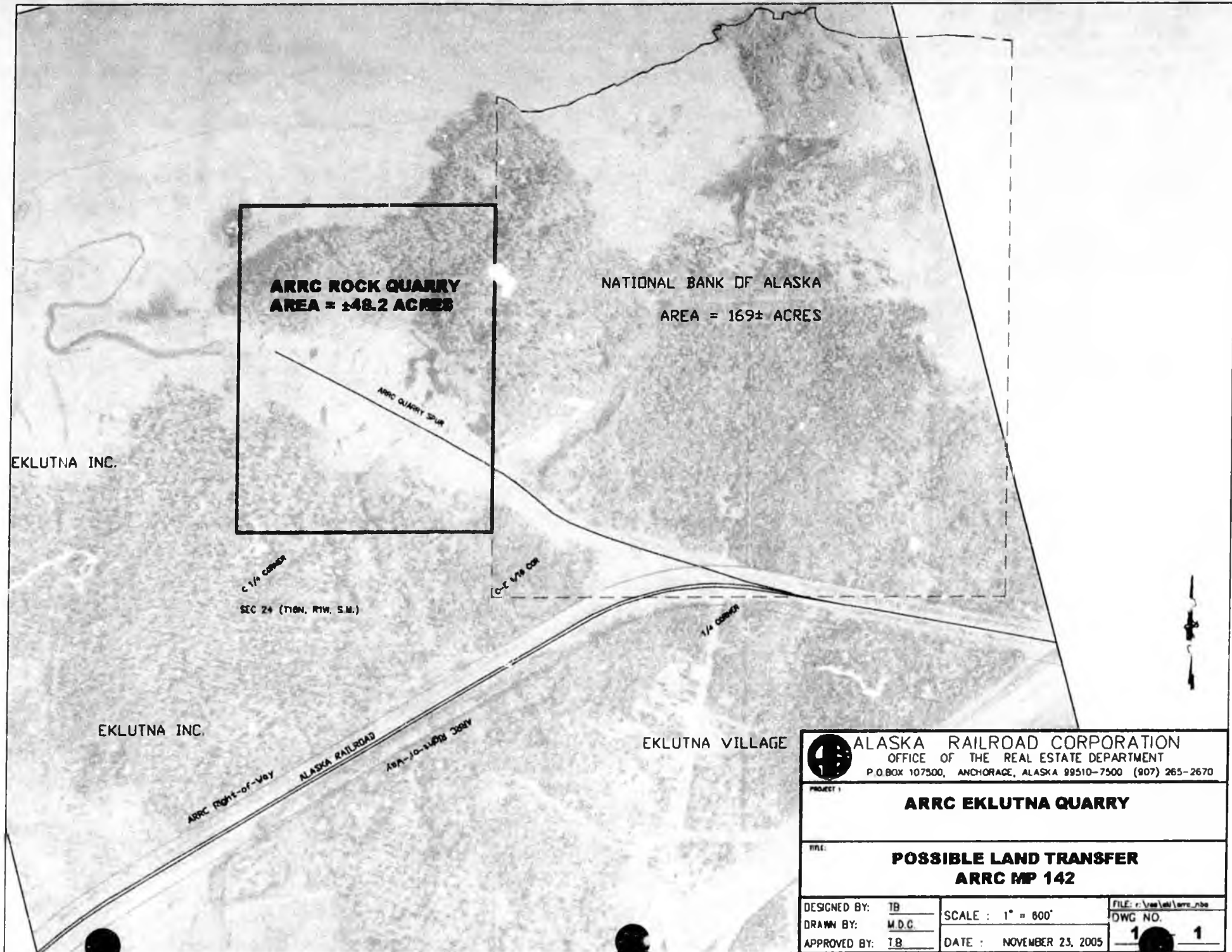
While ARRC has recently obtained local and federal approval to remove the processed material, it is unlikely to ever obtain future permits for new blasting without consent of the Village as tribal representative of the Dena'ina Native people. That consent is highly unlikely because the hills that comprise the quarry have valid historic and cultural significance to the Dena'ina. As a result, ARRC determined that it will not use the Eklutna Quarry again for mining rock and has developed a new quarry site on property it owns near Curry, which is approximately 20 miles north of Talkeetna.

Certain agreements that resolved ANCSA Native land claims long ago identified Eklutna, Inc. as the eventual recipient of title to the quarry. Under the North Anchorage Land Agreement (NALA), and the ARRC-Eklutna 3(e) Claims Settlement Agreement, the Quarry will revert to Eklutna, Inc. when it ceases to be used for certain transportation purposes.

Legislative approval of HB 212 will execute these long-standing agreements and pave the way for ARRC and Eklutna, Inc. to work on future land negotiations that are beneficial to both entities.

DISTRICT 16

BIRCHWOOD • BUTTE • CHUGIAK • EKLUTNA • FAIRVIEW LOOP
KNIK RIVER ROAD • LAZY MOUNTAIN • PALMER • PETERS CREEK



**ARRC ROCK QUARRY
AREA = ±48.2 ACRES**

**NATIONAL BANK OF ALASKA
AREA = 169± ACRES**

EKLUTNA INC.

EKLUTNA INC.

EKLUTNA VILLAGE

c 1/4 CORNER
SEC 24 (T16N, R1W, S.M.)

c 1/4 CORNER

1/4 CORNER

ARRC Right-of-Way ALASKA RAILROAD
ARRC Right-of-Way 10-11000 200Y



ALASKA RAILROAD CORPORATION
OFFICE OF THE REAL ESTATE DEPARTMENT
P.O. BOX 107500, ANCHORAGE, ALASKA 99510-7500 (907) 265-2670

PROJECT : **ARRC EKLUTNA QUARRY**

TITLE : **POSSIBLE LAND TRANSFER
ARRC MP 142**

DESIGNED BY: TB
DRAWN BY: M.D.C.
APPROVED BY: T.B.

SCALE : 1" = 800'
DATE : NOVEMBER 23, 2005

FILE: r:\arrc\arrc_142
DWG NO. **1**

KNIK ARM

**ARRC ROCK QUARRY
AREA = ±48.2 ACRES**

NATIONAL BANK OF ALASKA
AREA = 169± ACRES

EKLUTNA INC.

EKLUTNA INC.

EKLUTNA VILLAGE


6 1/4 COMDEX

SEC 24 (116N, R1W, S14)

6-2 1/2 COM

1 1/2 COMDEX

ARRC Right-of-Way
ALASKA RAILROAD
10A-10-1460 088V

 ALASKA RAILROAD CORPORATION OFFICE OF THE REAL ESTATE DEPARTMENT P.O. BOX 11100, ANCHORAGE, ALASKA 99510-7800 (907) 265-7670		
PROJECT: ARRC EKLUTNA QUARRY		
TITLE: POSSIBLE LAND TRANSFER ARRC MP 142		
DESIGNED BY: TE	SCALE: 1" = 400'	FILE NUMBER: 1
DRAWN BY: M.D.S.	DATE: NOVEMBER 23, 2005	DWG NO: 1 OF 1
APPROVED BY: J.B.		

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB212-COM-ARRC-03-22-07
 Bill Version: HB 212
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title Land Transfer Alaska RR and Eklutna RDU _____
 Component Alaska Railroad Corporation
 Sponsor Stoltze, Fairclough
 Requester House Community & Regional Affairs Component No. _____

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	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
 Mark 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)

This legislation transfers the 48-acre rock quarry site in Eagle River, currently owned by the Alaska Railroad Corporation (ARRC), to Eklutna Inc. ARRC is a public corporation supported by revenues generated through its freight, passenger and real estate services. Because ARRC does not receive state funding for operations or capital improvements and is operated as an independent state-owned enterprise, this legislation would not create a fiscal impact for the State.

Prepared by: Wendy Lindskoog, Assistant Vice President, Corporate Affairs Phone 907.265.2498
 Division: Alaska Railroad Corporation Date/Time 3/22/07 7:10 PM
 Approved by: Emil Notti, Commissioner Date 3/22/2007
 Agency: Commerce, Community, and Economic Development



NATIVE VILLAGE OF EKLUTNA

February 21, 2007

Rep. Bill Stoltze:
Alaska State Legislature
600 E. Railroad Avenue
Wasilla, AK 99654

RE: NVE, ARRC and EI MOU

Dear Representative Stoltze:

As Tribal Administrator of the Native Village of Eklutna, I am writing to assure you that the that the Native Village of Eklutna supports the "Memorandum of Agreement Regarding the Eklutna Quarry" that was recently signed by the Native Village Eklutna, the Alaska Railroad Corporation, and Eklutna, Inc. As we agreed when we signed the Memorandum of Agreement, ARRC will transfer the land of the Quarry to Eklutna, Inc., subject to legislative approval, and ARRC already has the consent to remove stockpiled rock from the Eklutna Quarry. We support both those goals and hope that legislation can be passed that will allow ARRC to make the transfer. If any changes are to be made, we want to be in that loop. When a bill is introduced, we want a copy for our review. Thank you for your consideration of our wishes.

Sincerely,

Daniel Alex, Tribal Administrator, The Native Village of Eklutna

3 (e)

• **AGREEMENT**

BETWEEN

ARRC-EI

JAN 1987

AGREEMENT OF ALASKA RAILROAD CORPORATION
AND EKLUTNA, INC.
SETTLING CLAIMS OF VALID EXISTING RIGHTS
TO RAIL PROPERTIES OF THE ALASKA RAILROAD AND PROVIDING
FOR CONVEYANCES PURSUANT TO THE ALASKA NATIVE CLAIMS
SETTLEMENT ACT AND THE ALASKA RAILROAD TRANSFER
ACT OF 1982

3e agreement

January 8, 1987

16.1 Conveyance of Rock Quarry Lands Upon Cessation of Use. The Parties acknowledge that, pursuant to paragraph I.B(3)(e) of the North Anchorage Land Agreement of March 15, 1982, Among Eklutna, Inc., the Municipality of Anchorage, and the State of Alaska, the State of Alaska or its assignee is required to convey to Eklutna, Inc. certain lands including Parcel B of the Eklutna Rock Quarry, as described in subparagraph 1.5.2, above, and Exhibit No. 3B hereto, if the State of Alaska or its assignee ceases to use such lands "in connection with furnishing mass or bulk transportation." To further implement the requirements of paragraph I.B(3)(e) of the North Anchorage Land Agreement, the Parties agree as follows:

(a) The Alaska Railroad Corporation or its successor will notify Eklutna, Inc., the Governor of Alaska, the Legislature of Alaska, and the Municipality of Anchorage of the cessation of use of Parcel B of the Eklutna Rock Quarry in connection with furnishing mass or bulk transportation when such cessation occurs.

(b) Within 90 days after receipt of notice of cessation of use pursuant to the foregoing clause (a), Eklutna, Inc. will notify the Alaska Railroad Corporation or its successor whether Eklutna, Inc. desires to receive a conveyance of Parcel B of the Eklutna Rock Quarry.

(c) As soon as feasible after receipt of a request for conveyance of Parcel B of the Eklutna Rock Quarry from Eklutna,

Inc., pursuant to the foregoing clause (b), but in no event sooner than January 5, 1995, and subject to legislative approval if necessary at the time of conveyance, the Alaska Railroad Corporation or its successor will convey the lands within Parcel B in accordance with the requirements of paragraph I.B(3)(e) of the North Anchorage Land Agreement.

(d) The Parties agree that cessation of use of Parcel B of the Eklutna Rock Quarry in connection with furnishing mass or bulk transportation will occur only when (i) the rock structure occupying the parcel has been exhausted and no quarry rock that can be removed remains above the subgrade of the track bed presently situated on the parcel; or (ii) the parcel is devoted principally to a use other than the mining of rock. During the period the Alaska Railroad Corporation is using Parcel B of the Eklutna Rock Quarry for mining purposes, it may also use Parcel B for other incidental railroad support functions, including storage of railroad equipment. The Alaska Railroad Corporation shall not quarry rock situated lower than the existing subgrade of the track bed, and rock below such grade shall not be considered in determining whether the rock structure has been exhausted.

16.2 Conveyance of Easements by Eklutna, Inc. Within three days after its receipt of the conveyance of Parcel A of the Eklutna Rock Quarry, described in subparagraph 1.5.1, above, Eklutna, Inc. shall deliver to the Alaska Railroad Corporation

**Agreement Regarding Eklutna Quarry
Between
Alaska Railroad Corporation,
Eklutna, Incorporated and
the Native Village of Eklutna**

Dated as of 1/22/2007

Recitals:

The Eklutna Hills have a documented historic cultural use by the Eklutna Natives of major significance.

The Alaska Railroad developed a rock quarry in the Eklutna Hills sometime between 1920 and 1940. The Railroad has used rock from the quarry for railroad and other projects since that time.

The Eklutna Quarry (Quarry) transferred from the Federal Government to the Alaska Railroad Corporation (ARRC) with the purchase of the Railroad by the State of Alaska in 1985.

The Quarry was also identified for eventual transfer to Eklutna, Incorporated (EI) in the North Anchorage Land Agreement (NALA), and was further addressed in the Agreement dated January 8, 1987 between the ARRC and EI resolving native land claims (the "3(e) Agreement").

Because of the cultural significance of the Quarry, the ARRC is not able to use the rock resources on Federal projects. The continued use of the Quarry has also been a matter of considerable dispute between the Native Village of Eklutna and the ARRC.

Pursuant to a Memorandum of Understanding dated December 21, 2005, as amended, (MOU) between ARRC, EI, and the Native Village of Eklutna (NVE), the parties have been working together to develop an agreement to allow the ARRC to transfer control, either by ownership or lease, of the ARRC Eklutna rock quarry site; and to provide for other concerns of the parties.

While the above referenced MOU references other properties and negotiations towards agreements regarding other properties and issues are in progress, this Agreement is specific to the Quarry and the stockpiled materials at the Quarry.

Agreement:

1. The mechanism for transfer of control and title to the Quarry is agreed to as follows: ARRC agrees to transfer title and control of the Quarry to EI as soon as practicable on such further terms and conditions as shall be mutually agreed to by the parties as provided for in the December 21, 2005 MOU. EI and NVE understand that a title transfer may require legislative action. All parties are also desirous of accomplishing the transfer under the terms of NALA.

2. The ARRC wishes to utilize the previously mined rock materials (materials) on the ground at the Quarry for ARRC purposes, including federally funded projects. EI and NVE agree that removal of these materials by the ARRC is a necessary part of the transfer process and support ARRC's effort to obtain a conditional use permit for this purpose.

3. All parties agree that removal of the materials, as soon as practicable, is a desired element of this Agreement. All parties agree to cooperate with each other to this end.

4. Traditional access through or near the Quarry site is permitted for NVE villagers or EI shareholders, for subsistence purposes and to gain access to a traditional fishing site on the western side of the Quarry. Such permissible access is subject to safety concerns if the ARRC is operating at the site. EI and NVE agree to observe ARRC safety measures and precautions while using the traditional access.

5. While industrial noise is unavoidable during ARRC operations pursuant to this Agreement, the ARRC will take measures to minimize noise and the timing of noise to the greatest extent possible.

6. Explosives can be used in conjunction with removal of unsafe loose hanging rock or shaping the face of the Quarry rock wall for safety purposes, on twenty-four (24) hours' prior notice to EI and NVE, unless otherwise provided in the conditional use permit.

7. NVE and EI agree that they support any ARRC effort to obtain a National Historic Preservation Act, Section 106 resolution that allows the use of such materials on federally funded railroad projects.

8. Upon final removal of materials, the ARRC will remove the tracks and crossties and any loose or unstable materials in and around the Quarry that could present a safety hazard.

9. EI and NVE are not requesting or demanding any remedial re-vegetation or importation of remedial materials to the Quarry site as part of this Agreement.

Eklutna, Inc.

By W. Price

Its CEO

Dated 1/30/07

Native Village of Eklutna

By Donald Alax

Its Tribal Administrator

Dated Feb 1, 2007

Alaska Railroad Corporation

By PK Gould

Its Pres./CEO

Dated 1/23/07



Adopted: 01/22/07

Resolution No. 2007-07

Relating to the Approval Transfer
of the Eklutna Rock Quarry to
Eklutna, Inc.

WHEREAS, the Alaska Railroad developed a rock quarry in the Eklutna Hills sometime between 1920 and 1940 and used rock from the quarry for railroad and other projects; and

WHEREAS, the Eklutna Rock Quarry (Quarry) was transferred by license from the Federal Government to the Alaska Railroad Corporation (ARRC) with the purchase of the Alaska Railroad by the State of Alaska in 1985; and

WHEREAS, the Quarry was among the rail properties claimed by Eklutna, Inc. under the Alaska Native Claims Settlement Act (ANCSA) and was the subject of a settlement agreement regarding ANCSA claims between ARRC and Eklutna, Inc. dated January 8, 1987; and

WHEREAS, under said settlement agreement, ARRC would be entitled to continue mining the Quarry until the rock was removed to track subgrade level or when the property was devoted principally to a use other than mining of rock, at which point it would then revert to Eklutna, Inc.; and

WHEREAS, ARRC continued work in the Quarry from time to time following transfer from the Federal Government, but use of the Quarry has also been a matter of considerable dispute with the Native Village of Eklutna (Village) due to the documented significant historic cultural use of the Eklutna Hills by the Eklutna Natives; and

WHEREAS, the Native Village of Eklutna has taken several legal actions against ARRC and others to protect the historical and physical integrity of the Eklutna Hills, culminating in a 2003 Alaska Supreme Court ruling that ARRC must attempt to comply with local planning and zoning ordinances and seek a conditional use permit before conducting any further activity in the Quarry; and

WHEREAS, there is over one million dollars' worth of inventory stockpiled in the Quarry, consisting of rip rap, ballast and fines, which cannot be removed for use without a municipal conditional use permit; and

WHEREAS, because of the historic cultural significance of the Quarry, a conditional use permit for further rock extraction is difficult to obtain and, in addition, without completing a successful consultation with the Village under the

National Historical Preservation Act, ARRC is not able to use any of the rock resources on Federal projects; and

WHEREAS, ARRC management has located and is developing an alternative rock quarry at Curry and, as a result, further use of the Eklutna Quarry as a source is not urgent and compelling; and

WHEREAS, ARRC management believes that final resolution of the Quarry controversy will allow more efficient use of corporate resources, foster better relations with the Village, and encourage good faith negotiations to proceed with Eklutna, Inc. regarding exchange of other properties in a manner that will serve the parties' respective development and operational needs; and

WHEREAS, pursuant to a Memorandum of Understanding dated December 21, 2005, as amended, among ARRC, Eklutna, Inc. and the Village, the parties have been working together to develop an agreement to allow the ARRC to transfer control, either by ownership or lease, of the Quarry site; and to provide for other concerns of the parties; and

WHEREAS, reaching agreement with Eklutna, Inc. and the Village for transfer of the Quarry will enable ARRC to obtain a conditional use permit for removal of the existing rock inventory stockpiled in the Quarry and also to receive Federal Transit Administration approval for use of said rock inventory on federally funded projects; and

WHEREAS, a proposed Agreement Regarding Eklutna Quarry, as attached to the Resolution, has been negotiated and is recommended by ARRC management for Board approval.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors has reviewed the history of railroad use of the Eklutna Rock Quarry and the surrounding controversy and finds that it is in the best interests of the corporation to cease effort to conduct further quarry operations and to transfer complete ownership of the Eklutna Quarry to Eklutna, Inc. as set forth in the attached Agreement and consistent with the provisions of the January 8, 1987 settlement agreement and any other applicable agreements, laws or regulations; and

FURTHER RESOLVED, the President and CEO or his designee is authorized to negotiate such other conditions of transfer and take such other steps as he deems are appropriate and in the best interests of the corporation, including but not limited to seeking legislative approval of the transfer if required by law.

MUNICIPALITY OF ANCHORAGE
PLANNING AND ZONING COMMISSION RESOLUTION NO. 2006-066

A RESOLUTION APPROVING A FINAL CONDITIONAL USE TO ALLOW NATURAL RESOURCE EXTRACTION IN THE T (TRANSITION) ZONE DISTRICT FOR T16N, R1W, SEC. 24, PARCEL B, EKLUTNA ROCK QUARRY SUBDIVISION.

(Case 2006-151; Tax I.D. No. 052-061-04)

WHEREAS, a request has been received from Alaska Railroad Corporation (ARRC) to allow natural resource extraction for Parcel B, generally located northwest of the Village of Eklutna, and

Whereas, the actual rock and gravel quarrying operations have been completed and the applicant proposes to clean up and stabilize the quarry before deeding the property to Eklutna, and requires a conditional use for this purpose, and

WHEREAS, notices were published, posted and mailed and a public hearing was held December 4, 2006.

NOW, THEREFORE, BE IT RESOLVED, by the Municipal Planning and Zoning Commission that:

- A. The Commission makes the following findings of fact:
1. Quarrying operations have been completed. The ARRC conditional use for natural resource extraction is actually for the purpose of removing stockpiled rock and gravel material, general clean-up of the site, and rock face stabilization to return the area to a safe condition before turning the property over to Eklutna.
 2. Eklutna Inc. and the Village of Eklutna support the conditional use.
- B. The Commission APPROVES a final conditional use permit to allow natural resource extraction in the T (Transition) Zone District for T16N, R1W, SEC. 24, Parcel B, Eklutna Rock Quarry Subdivision, subject to the following conditions.
1. A Notice of Zoning Action, including a copy of the approved Commission Resolution for this case, shall be filed with the State Recorder's Office and proof of such shall be submitted to the Planning Department.
 2. The conditional use is intended to allow removal of approximately 145,000 tons of stockpiled rip-rap, ballast, and fines from Parcel B.
 3. All construction shall substantially conform to the petitioner's narrative and submitted plans on file at the Planning Department, except as modified by other conditions herein.

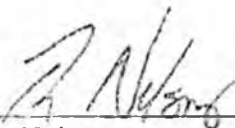
4. Prior to the issuance of any land use or excavation permit, the following shall be accomplished:
 - a. Review and approval of a final Air Quality Plan by the Department of Health and Social Services, Air Quality Office; the plan shall include any dust mitigation measures on public roadways and on the roadways within the site; a copy of the approved plan shall be submitted to the Planning Department.
 - b. Resolve the need for a drainage plan, sedimentation and erosion control plan, and a plan for the treatment of stormwater runoff. Plans shall be submitted to Municipal Project Management and Engineering Section for review and approval. Include copies of any required AK-DNR or AK-DEC applications, permits or plans.
 - c. Resolve the need for a restoration plan with Eklutna Inc. and the Planning Department. If the development of the site does not begin within a year, the site will be sodded or hydro-seeded to maintain runoff and air quality, or shall be restored via an alternative method approved by DHHS, DNR, DEC and PM&E.
 - d. A noise control permit application shall be submitted for review, to be approved by DHHS, with a copy to be provided to the Planning Department. Blasting is to be limited to restoring the rock faces to a safe and stable condition and shall be limited to the hours of 8:00 am to 4:00 pm, Monday through Friday. If the Applicant proposes to store explosives on site, a copy of the approved magazine application shall be submitted to the Planning Department. All equipment used in these operations shall comply with Chapter 15.70 Noise Control of the Anchorage Municipal Code.
5. Operational hours for removal of previously quarried materials shall be limited to loading and train operations from 6:00 a.m. to 7:00 p.m., Monday through Saturday. Only emergency operations are permitted on Sundays and holidays, or outside of the above hours. Removal of quarried material by truck will be allowed only by amendment to this conditional use.
6. The operation of the site shall include the following:
 - a. On-site personnel shall be formally trained on all aspects of the excavation operation.
 - b. The telephone number of the contractor selected to perform the work, as well as a contact telephone number for the owners, shall be placed on site. The sign shall be of sufficient size to be visible from the adjacent roadways and the view of the sign shall be unobstructed by equipment, machinery, vegetation and the like.
 - c. On-site personnel shall have total authority to direct road clean-up and maintenance operations as needed. On-site personnel shall have the

authority to call a sweeper, water truck and motor grader, as necessary, to respond to specific site conditions or complaints.

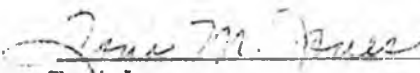
- d. Circulation roads within the excavation area shall be maintained to minimize materials carried onto the adjacent properties.
 - e. The owners shall identify contact people to respond to public inquiries. The numbers of the contact people shall be provided to the Chair of the Chugiak Community Council, representatives of the Village of Eklutna and Eklutna Inc., and to the Manager, Land Use Enforcement. The Community Council chairman and Land Use Enforcement shall be notified of any change in the contact personnel or business telephone number(s).
7. This approval is valid until October 31, 2011. Prior to that date the petitioner may apply for a time extension on the same record supplemented as deemed appropriate by the Department. The time extension would be granted after a non-public hearing if the Commission finds the operation has not violated the conditions of approval nor has it created environmental problems either on-site or off-site.
 8. Beginning December 1, 2007, and every December 1 thereafter until the property is transferred to Eklutna, Inc., the Applicant shall submit to the Planning Department, an annual monitoring report containing the following information:
 - a. A log of any complaints reported in the previous year and how the complaint was resolved.
 - b. An update on the amount of material removed during the previous year, and an update, if necessary, of any change to the proposed completion date.
 - c. A close out inspection of the property with representatives of the Planning Department and Eklutna, Inc. at the completion of operations.
 9. The Alaska Railroad Corporation shall seek a jurisdictional determination from the Corps of Engineers, and seek any necessary Clean Water Act authorizations from the COE and EPA. In addition ARRC shall limit adverse impact to water quality and habitat functions, and plan the work to avoid and minimize activities in the intertidal waters, wetlands, and streams, and to provide a non-disturbance buffer for such areas to the maximum extent practical. Copies of permits and plans shall be provided to the Planning Department.

PASSED AND APPROVED by the Municipal Planning and Zoning Commission
on the 4th day of December, 2006.

ADOPTED by the Anchorage Municipal Planning and Zoning Commission this 29th day of January 2007. If the secretary received a written request and intent to appeal, this written decision/resolution of the Planning and Zoning Commission is final and any party may appeal it within twenty (20) days to the Board of Adjustment pursuant to Anchorage Municipal Code 21.30.030 and Anchorage Municipal Code of Regulations 21.10.304. If the secretary did not receive a written request and intent to appeal within seven (7) calendar days of the date the decision was made on the record, December 4, 2006, then this written decision is final and not appealable to any other administrative body. Final administrative decisions with no further administrative remedy may be appealed to the Superior Court within thirty (30) days.



Tom Nelson
Secretary



Toni Jones
Chair

(Case Number 06-151)
(Parcel ID 052-061-04)

**NORTH ANCHORAGE
LAND AGREEMENT
&
AMENDMENTS**

Work Session

File Copy

MARCH 1982

NORTH ANCHORAGE LAND AGREEMENT

TABLE OF CONTENTS

	<u>Page No.</u>
Purpose.....	1
Amendments.....	2
Military Lands.....	2
Township 17 North, Range 3 East, Lands Litigation.....	2
Mental Health Lands Litigation.....	2
Miscellaneous Provisions.....	2
Disposition of Lands Withdrawn by Section 1425(b)(1) of ANILCA [I].....	3
Submerged Lands [I B(1)].....	4
Lands Withdrawn or Reserved for National Defense Purposes [I B(2)].....	4
Lands to State [I B(2)(a)].....	4
Railroad Right-of-Way [I B(2)(b)].....	4
Floatplane Bases [I B(2)(c)].....	5
Mass and Bulk Transportation Facility [I B(2)(d)].....	6
Location of 1,000 Acre Parcel [I B(2)(d)].....	6
3,000 Acres of Floating Public Interest [I B(2)(e)].....	7
Military Lands to Eklutna and To State [I B(2)(f)].....	7
"Development" Lands to Eklutna and State in Trust for Municipi- pality [I B(2)(g)].....	7
Lands Determined by the Secretary Pursuant to Section 3(e)(1) of ANCSA not to be Public Lands for the Purposes of ANCSA [I B(3)].....	8
Lands to Eklutna [I B(3)(a)].....	8
Lands to State [I B(3)(b)].....	8

ject of litigation in the case of Eklutna, Inc. v. Andrus, A78-192 Civ., U.S.D.C. Alaska. This portion of the Agreement is authorized by Section 1425(f) of ANILCA.

Section IV of this Agreement contains miscellaneous provisions concerning the relationships between and among the parties which do not affect the conveyance of lands by the Department of the Interior.

I.

DISPOSITION OF LAND WITHDRAWN BY SECTION 1425(b)(1) OF ANILCA

A. For the purposes of this Section I, the parties agree that Section 1425(b)(1) of ANILCA withdrew the following lands located within Townships 18 North, Ranges 1 and 2 East, and Ranges 1 and 2 West; Townships 17 North, Ranges 1 and 2 East, and Ranges 1 and 2 West; Townships 16 North, Ranges 1, 2 and 3 East, and Ranges 1, 2 and 3 West; Townships 15 North, Ranges 1, 2 and 3 East, and Ranges 1, 2 and 3 West; and Townships 14 North, Ranges 1, 2 and 3 East and Ranges 1, 2 and 3 West, Seward Meridian, and provided for their disposition pursuant to this Agreement:

- (1) Lands withdrawn or reserved for national defense purposes; and
- (2) Lands determined by the Secretary under Section 3(e)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq. ("ANCSA") not to be public lands for the purposes of ANCSA.

B. The parties agree that upon termination or revocation of any withdrawal or upon a declaration of excess status in whole or in part of lands withdrawn by Section 1425(b)(1), or disposition other than in accordance with Section 1425 and this Agreement, the Secretary shall convey such lands

Eklutna's or the State's entitlement, a conveyance of an undivided one-half interest (or a surface estate in an undivided one-half interest) in an acre shall be charged as if each party had received one-half acre. The parties agree that the cross reference in Section 1425 of ANILCA to Section 906(c) is a typographical error and should in fact be to Section 906(b).

(3) Lands Determined by the Secretary Pursuant to Section 3(e)(1) of ANCSA not to be Public Lands for the Purposes of ANCSA.

- (a) Any lands within the following described areas which are finally determined under Section 3(e)(1) of ANCSA not to be public lands shall be conveyed to Eklutna:

Sections 13, 23, 24, 25 and 26, Township 16 North, Range 1 West, and Sections 18, 19 and 30, Township 16 North, Range 1 East, Seward Meridian.

- (b) Any other lands which are finally determined under Section 3(e)(1) of ANCSA not to be public lands shall be conveyed to the State.
- (c) The parties agree that the revocation of P.L.O. 5187 and power project withdrawals effected by the filing of this Agreement shall not affect the Secretary's authority to make 3(e) determinations under ANCSA concerning such land. The parties understand that the lands within Power Site Classification 107 within Township 14 North, Range 1 East, Seward Meridian, should be conveyed to the State.

- (d) This paragraph A shall not affect the rights of Eklutna in lands finally determined by the Secretary under section 3(e)(1) of ANCSA to be public lands.
- (e) Notwithstanding subparagraph B(3)(a) of the introduction language to this paragraph B, the parties agree that the Alaska Railroad may become the property of the State of Alaska as an operating entity whether or not first exceded without there being any violation of Section 1425 or this Agreement, to the extent of the lands lawfully determined by the Secretary under Section 3(e)(1) of ANCSA not to have been public lands (including any of the same that may be included in the descriptions in subparagraph B(3)(a)); if lands or interests in lands in Paragraph (a) above are transferred to the State by the United States as part of the railroad transfer, the State will reconvey the land to Eklutna if it ceases to use them in connection with furnishing mass or bulk transportation. For so long as the railroad is in operation, the Secretary shall no convey to Eklutna the lands lawfully determined not to have been public lands.
- B. Section 1425(c) provides that the State and Eklutna are authorized pursuant to the agreement contemplated by Section 1425(b), to relinquish one or more land selections whether or not such selections have been previously approved or tentatively approved. Pursuant to this authority, Eklutna hereby relinquishes its selections of the

desires to mine, the parties acting by registered professional engineers with experience in fluvial geomorphology shall prepare a plan of operations based upon sustained yield. The plans shall address the volume of materials which can be removed without damage to the bridge or to other riparian lands. Eklutna and the State shall likewise agree upon a system of accounting for materials removed and other necessary aspects of the operation.

STATE OF ALASKA

WILSON CONDON, ESQ.
Attorney General

By: Chip Dennerlein
Chip Dennerlein, Director
Subject to the approval of
the Commissioner of the Department
of Natural Resources and the
Legislature of the State of Alaska

By: Barbara J. Miracle
Barbara J. Miracle, Esq.
Assistant Attorney General

ATTEST:

ANCHORAGE, a municipal corporation

Rush & Smith
Municipal Clerk

By: Tony Knowles
Tony Knowles, Mayor

EKLUTNA, INC.

BURR, PEASE & KURTZ

By: Daniel Alex
Daniel Alex, President

By: Edward Gould Burton
Edward Gould Burton

RECOMMENDED AND APPROVED:

By: Dorothy Cook
Dorothy Cook, Vice President

By: Jerry Westzbaugher
Jerry Westzbaugher
Acting Municipal Attorney

EKLUTNA QUARRY Q&A

Proposal Title:

Railroad Transfers Eklutna Quarry to Eklutna, Inc.

Proposal Summary:

ARRC proposes to transfer its entire interest in the Eklutna Quarry site north of Eagle River to Eklutna, Inc., and seeks legislative approval of the conveyance. This property and its use as a quarry has been the subject of a long-running dispute between ARRC on one side and the Native Village of Eklutna and the Municipality of Anchorage on the other. That dispute culminated in three Alaska Supreme Court decisions, which denied ARRC continued use of the quarry without first obtaining a municipal conditional use permit. While ARRC has recently obtained a permit to remove processed materials stockpiled in the quarry, it is unlikely to ever obtain a permit for new blasting without consent of the Village as tribal representative of the Dena'ina Native people. That consent is highly unlikely because the hills that comprise the quarry have valid historic and cultural significance to the Dena'ina.

Eklutna, Inc. is the ANCSA village corporation created for this area and is entitled to the Quarry property in the future under certain agreements that resolved ANCSA Native land claims. Under the North Anchorage Land Agreement (NALA), and the ARRC-Eklutna 3(e) Claims Settlement Agreement (the 3(e) Agreement), the Quarry will revert to Eklutna, Inc. when it ceases to be used for certain transportation purposes.

ARRC has determined that it will not use the Quarry again for mining rock, which potentially triggers transfer to Eklutna, Inc. An Agreement has been reached between the ARRC, Eklutna, Inc. and the Village that commits ARRC to transferring the Quarry to Eklutna, Inc., subject to legislative approval. The agreement also commits the Village and Eklutna, Inc. to support ARRC's application for a conditional use permit to allow the ARRC to remove previously stockpiled materials at the ARRC Quarry and to support its efforts to obtain federal approval for using the rock on federally funded projects.

Because of the application of NALA to this location, the transfer to Eklutna, Inc. will operate as an ANCSA conveyance under Section 1425 of the Alaska National Interest Lands Conservation Act (ANILCA). Under ANCSA and NALA, CIRI will receive the subsurface rights with Eklutna receiving the surface rights. Any transfer by ARRC of its entire interest in land is subject to legislative approval under the Alaska Railroad Corporation Act. To this end, ARRC is seeking and Eklutna, Inc. and the Village will support appropriate legislation this session.

Attachments:

- Agreement between ARRC, Eklutna, Inc., and Native Village of Eklutna

- Railroad Board of Director Resolution No. 2007-07
- Map/aerial photo of area
- ANILCA Section 1425
- NALA excerpt
- AS 42.40.285
- 3(e) Agreement excerpt
- Conditional Use Permit

Questions & Answers:

What is the history behind the Eklutna Quarry?

The Eklutna Hills, just outside the Native Village of Eklutna, are a culturally significant part of the heritage of the Dena'ina Native people. In addition, the larger area was administered by the Bureau of Indian Affairs as a Native school reserve from 1935 until 1946. During World War II, the BIA authorized the Alaska Railroad to develop a rock quarry on one of the knobs of granite that comprise the Eklutna Hills. That location still exists as the Eklutna Quarry. BIA abandoned the school complex in 1946 and decided to surplus the Native school reserve lands beginning in 1952. BIA transferred the quarry and other nearby lands to the federal Alaska Railroad in 1955. In keeping with the attitudes of the times, the government does not appear to have involved the Eklutna villagers in any of the transactions or decisions about how to handle this land. Usage as a quarry was fairly steady albeit light until the early 1980s, the heaviest use being for earthquake recovery efforts in 1964.

After the passage of ANCSA in 1971, Eklutna, Inc. (as the village corporation established for this area) asserted selection rights for a number of Alaska Railroad lands. Those selections were still in dispute when the State bought the Alaska Railroad in 1985. In 1987 ARRC negotiated a settlement of ANCSA land claims with Eklutna, Inc. known as the "3(e) Agreement" under which ARRC received a limited title to the Quarry and the right to mine the rock down, essentially, to ground level.

The Railroad's somewhat sporadic use of the Quarry intensified in the early 1990s and was opposed by the Native Village of Eklutna, which is a tribal council and a separate legal entity from Eklutna, Inc. This led to three separate lawsuits and three separate Alaska Supreme Court decisions. The cases established that ARRC had to obtain a conditional use permit in order to use the Quarry. The Village's opposition, based on the cultural significance of the Eklutna Hills, made it highly unlikely that ARRC would be able to get a permit. In addition, this opposition prevented ARRC from using rock from the Quarry on federally funded projects because federal law requires certain accommodations for culturally significant properties.

In 2001, the last season of blasting at the Quarry, ARRC produced over \$1 million's worth of railroad ballast and rip rap. Due to the ongoing lawsuits and the federal funding restrictions, most of this inventory remains stockpiled at the Quarry. A conditional use permit is required even to remove this already processed rock, and satisfaction of the Village's concerns is necessary before this rock can be used on federally funded projects.

After years of litigation, the ARRC, Eklutna, Inc. and the Native Village of Eklutna have settled their differences about the Quarry. An agreement was signed effective January 22, 2007 under which ARRC will transfer the Quarry to Eklutna, Inc., subject to legislative approval and other due diligence being agreed and performed (such as an environmental site assessment). A conditional use permit to remove the stockpiled rock is in hand. Based on this most recent agreement, the federal funding agency has removed its prohibition on use. Legislative approval of the transfer of the Quarry to Eklutna, Inc will bring this contentious chapter to a close and create a foundation for a future land exchange at other locations.

What is the North Anchorage Land Agreement and how does it affect the current situation?

The North Anchorage Land Agreement (NALA) was executed by the State of Alaska, the Municipality of Anchorage and Eklutna, Inc. in March 1982 to resolve numerous long-standing land ownership and management issues in the area north of downtown Anchorage and south of the City of Palmer. Native land selections under ANCSA in this area overlapped with state selections and municipal entitlements. Section 1425 of ANILCA authorized local parties to enter an agreement like NALA to resolve their issues directly instead of through BLM adjudications and individual litigation. Section 1425 requires that conveyances made under agreements like NALA be treated as conveyances under ANCSA.

For the Quarry location, NALA has two direct effects. One is the general principle of designating the lands around Eklutna Village as available for selection by Eklutna to the extent it was not actually used by a federal agency in 1971. NALA expressly recognized that the State was negotiating for purchase of the Alaska Railroad and the parties agreed such a transfer would not come within NALA's control. However, they went on to agree that if the State or its assignee (for owning the railroad, i.e. ARRC) ceased to use the lands "in connection with furnishing mass or bulk transportation", the Quarry land would be conveyed to Eklutna.

What is the ARRC-Eklutna "3(e) Agreement" and how does it affect the current situation?

ARRC inherited a number of ANSCA Native land selection disputes when the federal railroad was transferred in January 1985. One of the first negotiations was between ARRC and Eklutna, Inc. and it culminated in an agreement dated January 8, 1987. As to the Eklutna Quarry site, the agreement provided that it

was further implementing the previously agreed requirements of NALA. Specifically, the 3(e) Agreement stated that "cessation of use of the Quarry in connection with furnishing mass or bulk transportation will occur only when (i) the rock structure occupying the parcel has been exhausted and no quarry rock that can be removed remains above the of the track bed presently situated on the parcel, or (ii) the parcel is devoted principally to a use other than the mining of rock."

What is the proposal?

The proposal is to obtain legislative approval and transfer ARRC's entire interest in the 48-acre Eklutna Quarry parcel to Eklutna, Inc. under NALA and Section 1425 of ANILCA.

Why is it needed?

ARRC has determined that the corporation will no longer use the Quarry for mining rock. This is because the likelihood of getting a permit to conduct future blasting is slim and the likelihood of being allowed to use the rock on federal projects, which are the vast majority of ARRC's capital improvements, is even slimmer given the cultural significance of the knob. The cost of seeking these approvals is considerable, both in terms of direct expense and public and community bad will. Given that decision, the ultimate disposition of the land to Eklutna, Inc. under the applicable settlement agreements need not and should not be delayed. Under ARRC's governing statute, AS 42.40.285(1), legislative approval is required before the corporation can convey its entire interest in land. However limited or conditioned ARRC's interest in the Quarry might be, it is still an interest in land and therefore legislative approval is necessary.

Why is it needed now?

There is an estimated 145,000 tons of stockpiled material on the Quarry floor that ARRC needs for the upcoming spring break up season and summer construction projects. These materials cost ARRC over \$1 million to produce six years ago. Without assured access to the stockpile, ARRC would have had to spend at least \$2 million to purchase the same quantity of materials for use this year. The good faith cooperation of Eklutna, Inc. and the Village, which was based on the ARRC's commitment to seek authority for this transfer, has enabled ARRC to obtain the necessary permit and federal approvals. It's now ARRC's turn to follow through on its commitment and pursue this legislation, satisfying any legislative concerns that may be expressed.

Who owns the land value of the quarry?

ARRC currently holds title to the quarry under an interim conveyance issued by the U.S. on November 23, 2004, but the conveyance is expressly subject to the provisions of ARRC and Eklutna's 3(e) Agreement. Under NALA and the 3(e) Agreement, the residual land value of the quarry belongs to Eklutna, Inc. The ARRC can only extract the rock resource down to ground level under those agreements, with the "reversionary interest" belonging to Eklutna.

What is the resource value of the quarry?

The ARRC is unable to extract the resource because of its inability to obtain a conditional use permit from the Municipality of Anchorage for further production. Any third party owning the quarry would face the same requirement. In addition, if more material could be produced, the National Historic Preservation Act (NHPA) would prohibit its use on federal projects, greatly limiting use, without a successful NHPA consultation over the historic cultural aspect with the Village and Alaska SHPO. While a private owner would not face the NHPA issue, it would still have similar difficulties getting a municipal permit. As a result of all this, to the ARRC, there is little value in the raw resource (the remaining undisturbed knob). ARRC estimates that about 5 million tons of rock remain in place at the Eklutna Quarry.

Describe the future land exchange needed between the Alaska Railroad and Eklutna Inc.? Is DOT involved? What about the Birchwood Airport Expansion?

The ARRC and Eklutna, Inc. are considering a future land exchange that would benefit both parties' commercial and operational interests. The ARRC would give up its rights to "Parcel C", an area of about 400 acres adjacent to the North Eagle River interchange. Eklutna would incorporate this into its Powder Ridge development. Any conveyance of this land would, of course, also require legislative approval and we would expect to present a bill on this subject in the 2008 session.

ARRC would receive an equivalent value of land at Birchwood. ARRC intends this land for industrial development. It is zoned industrial and is easily accessible to the railroad.

Alaska DOTPF may be involved in the land exchange. DOTPF wants certain ARRC and Eklutna lands for expansion of the Birchwood Airport. DOTPF has been attending the discussions about a land exchange, but it is not clear that their timing and funding is consistent with the other parties' desired timeline. They will, however, continue to be invited to the discussions in an effort to incorporate their needs.

Isn't the quarry ARRC's leverage for the future land exchange? If yes...why does the transfer need to occur now rather than at the time the larger deal is finalized?

First and foremost, the Eklutna Quarry exchange stands out as an important symbol of good faith. It demonstrates the potential of a new business relationship, one whose strength issues from cooperation and trust as opposed to the exercise of leverage and maneuver.

Second, ARRC has inventory in the Quarry that can be particularly useful in early 2007. The ARRC would like to liquidate this inventory while preparing for

production of similar materials from a new source at Curry, 20 miles north of Talkeetna. Curry production is not expected to come on line until late 2007.

Does the Railroad need the Quarry any longer? Why not?

No. The Railroad has no "long-term" right to the land under NALA and the 3(e) Agreement; it only has the right to extract rock down to ground level. However, any realistic possibilities for further resource extraction are severely limited by the Village's opposition to further destruction of a culturally significant site. The only remaining value to ARRC is in the produced inventory, and as a demonstration of good faith to overcome the harsh legacy of years of litigation and in order to create favorable conditions for a reasonable negotiation on the exchange of lands at Birchwood and Eagle River.

What does the Railroad get out of this agreement?

Immediate use of the stockpiled materials with the associated cost avoidance, and the building of good will with its neighbors, particularly the Village and Eklutna, Inc.

What does Eklutna get out of this agreement?

Expressly, it gets land and the remaining resource intact and well in advance of when it would otherwise. This is important to the many Village residents who are also Eklutna shareholders. CIRI similarly gets the subsurface rights in advance of when it would have gotten them otherwise.

Are there limitations on what Eklutna can do with the land once it is transferred?

No, nor would there be any if it were transferred in the future after ARRC exhausted the above ground level resource. The granite resource probably extends far below ground level, and the regional corporation, CIRI, will own the subsurface rights in keeping with the usual ANCSA ownership scenario.

Are community leaders on board with this proposal?

ARRC has begun concerted public outreach with local government and community leaders, briefings of area legislators, and media briefings, and will continue this effort. We have not had any negative feedback to date.

Is there opposition to this proposal that we are aware of?

No.

Are there adjacent land owners or other land interests that should be considered? (Wells Fargo, CIRI etc.)

Eklutna, Inc. and Wells Fargo own most of the adjacent property. There are also individual land owners who are Village residents. CIRI owns the subsurface rights to the other Eklutna land in the area.

Wells Fargo's situation is somewhat unique. By historical quirk, it owns about half of the larger knob of the two Eklutna Hills, which is the same knob in which the ARRC's Quarry is located. Its predecessor NBA acquired this land through foreclosure on another early homesteader in the area. NBA tried to obtain a conditional use permit to mine its half of the knob in the 1990s, and while it was initially successful at the municipal level, it too was sued by the Native Village of Eklutna and lost at the Alaska Supreme Court level. It has not made any further efforts to mine the knob to our knowledge. It is reported that Wells Fargo is trying to sell the entire parcel of approximately 157.77 acres.

EXCERPT

§ 1425, Alaska National Interest Lands
Conservation Act (ANILCA)

Public Law 96-487, Dec. 2, 1980, 94 Stat.
2371

EKLUTNA VILLAGE CORPORATION LANDS

Sec. 1425. Eklutna-State Agreements and Negotiations.-(a) The purpose of this section is to provide for the settlement of certain claims and litigation, and in so doing to consolidate ownership among the United States, the State of Alaska, the Municipality of Anchorage, Eklutna, Incorporated, and Cook Inlet Region, Incorporated, thereby facilitating land management, a fair implementation of the Alaska Native Claims Settlement Act, // 43 USC 1601 // the protection of State public park lands and resources, and appropriate development patterns in and about Anchorage, Alaska.

(b) The Secretary shall accept relinquishments and make conveyances of selections in accordance with the specific terms, conditions, covenants, reservations, and other restrictions set forth in any agreement respecting the lands described in subparagraph (1) below, executed by the State of Alaska, by the Municipality of Anchorage, and by Eklutna, Incorporated, and hereafter submitted to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs and filed with the Secretary, the execution and implementation of which agreement are hereby authorized as to those duties and obligations of the United States, the State of Alaska, the Municipality of Anchorage, and Eklutna, Incorporated, which arise under Federal law: Provided, however, That any conveyance under such agreement of lands to Eklutna, Incorporated, shall be only of the surface estate, with a subsequent conveyance to Cook Inlet Region, Incorporated, of the subsurface estate except as otherwise provided in subsection (h). In aid thereof:

(1) The following lands located within the townships described in sections 11(a) (1) and (2) of the Alaska Native Claims Settlement Act // 43 USC 1610, // with respect to the Native Village of Eklutna are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and including Public Law 94--204, // 43 USC 1604, 1611 // except section 12 thereof, and from selection under the Alaska Statehood Act, // 48 USC prec. 21, // or any statutes authorizing selections by the State of Alaska: (A) lands withdrawn or reserved for national defense purposes; and (B) lands determined by the Secretary under section 3(e)(1) of the Alaska Native Claims Settlement Act // 43 USC 1602, // not to be public lands for purposes of the Alaska Native Claims Settlement Act. This withdrawal and the agreement shall not affect the administrative jurisdiction of the Department of Defense or any other holding agency over the lands withdrawn, but all forms of disposition other than in accordance with this section and the agreement are prohibited: Provided, That the foregoing to the contrary notwithstanding, lands placed prior to July 15, 1979, in the pool contemplated by part I.C.(2) of the document entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area as clarified 8--13--76", but only to the extent authorized by that document under section 12 of Public Law 94--204 // 43 USC 1611 // as amended heretofore and in accordance with the procedures and with the consents and approvals required by laws, regulations and Executive orders in effect on such date of placement, may be selected by Cook Inlet

Region, Incorporated, free of the effects of the agreement pursuant to this section; if the lands placed in that pool are not thereafter selected in accordance with part I.C.(2) of that document any agreement pursuant to this section shall govern: Provided further, That neither the revocation of certain withdrawals of lands made by subsection (b) effective upon the filing of the agreement, nor the expiration of the withdrawal made by subsection (b) in the event no agreement is reached, shall be deemed an action causing those lands affected thereby to be subject to disposition under such section 12. The withdrawal made by this subsection (b) will expire March 15, 1982, if an executed agreement described in this section is not filed by the parties thereto on or before that date with the Secretary in the Alaska State Office of the Bureau of Land Management; but if an agreement is so executed, rights under the agreement shall vest as of the effective date of this Act, and this withdrawal shall become permanent, except as otherwise provided in the agreement. The agreement shall not impose upon the United States obligations or outlays of funds, except as reasonable in the ordinary course of business, or impose any procedural requirements or require the reassignment of personnel; and any of its provisions to the extent to the contrary shall be void as against the Secretary.

(2) Upon termination or revocation of any national defense withdrawal or reservation or of any other withdrawal in effect December 18, 1971, respecting lands described in subsection (b)(1), or upon declaration of their excess status in whole or in part, whichever first occurs, but not before, and from time to time, the lands excessed or as to which the withdrawal is terminated or revoked shall be conveyed to Eklutna, Incorporated, as to the surface estate and Cook Inlet Region, Incorporated as to the subsurface estate, or to the State of Alaska (for reconveyance by the State of Alaska in whole or in part to the Municipality of Anchorage), as may be provided in the agreement described in this subsection: Provided, however, That such conveyance shall not be made of lands in the pool established under part I.C.(2) of the document entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area as clarified 8--31--76" under section 12 of Public Law 94--204 // 43 USC 1611 // as amended heretofore, unless and until removed from that pool in accordance with such part I.C.(2). This section and the agreement shall preempt the procedures of the Federal Property Act (40 U.S.C. 471, et seq., and of 41 CFR 101--47.000 et seq.), (other than as to fixtures and personalty) and the preference right for State selection of section 6(g) of the Alaska Statehood Act. The conveyances to Eklutna, Incorporated, of lands withdrawn by this subsection called for by the agreement shall not be subject to section 1613(e) of title 43, United States Code. This section shall revoke PLO 5187 as it pertains to any lands withdrawn by this subsection and any power project withdrawals other than Power Project 350 as to such lands, effective upon the date of filing of the agreement. Lands conveyed to the State of Alaska, the surface estate of lands conveyed to Eklutna, Incorporated, and the subsurface estate conveyed to Cook Inlet Region, Incorporated, pursuant to this section and the agreement, shall be charged against their respective entitlements under sections 12 and 14 of the Settlement Act // 43 USC 1611, 1613. // and be considered conveyed and received pursuant to the Settlement Act, and section 6 of the Alaska Statehood Act // 43 USC 1601 // or section 906(e) of this Act.

(c) If an agreement to the following effect executed by the State of Alaska and Eklutna, Incorporated, is hereafter filed with the Secretary in the Alaska State Office of the Bureau of Land Management on or before April 2, 1982, the public lands as defined in the Settlement Act, // 43 USC 1601 // located within township 17 north, range 3 east, Seward Meridian, Alaska, shall be deemed to have been withdrawn pursuant to section 11(a) of the Settlement Act // 43 USC 1610. // as of December 18, 1971, and, selections heretofore made by Eklutna, Incorporated, with respect to lands therein shall be processed by the Secretary as though said selections had been made within a township heretofore validly withdrawn pursuant to section 11(a). If no such agreement is filed, this subsection shall not be held to affect the validity or invalidity of such selections. Whether or not any agreement is filed, this subsection shall not be held to affect the validity or invalidity of any third party interest heretofore created by the State of Alaska.

(d) Notwithstanding other provisions of this Act, the State and Eklutna, Incorporated, are each authorized to relinquish, in whole or in part, pursuant to either or both of the agreements contemplated by subsections (b) and (c), any one or more land selections affecting lands to be conveyed under the agreement to the other whether or not such selections have been previously approved or tentatively approved. The lands affected by the State selections so relinquished shall be deemed public lands as of December 18, 1971, as that term is defined in the Settlement Act.

(e) Eklutna, Incorporated, and the Secretary shall stipulate to dismiss cause number A-78--24 Civil in the United States District Court for the District of Alaska, when the Secretary tenders to Eklutna, Incorporated, a conveyance of all lands in township 17 north, range 3 east, Seward Meridian, which are to be conveyed to Eklutna, Incorporated, under the agreement referred to in subsection (c).

(f) Eklutna, Incorporated, and the Secretary shall stipulate to dismiss cause number A-78--192 Civil in the United States District Court for the District of Alaska except as to the lands affected thereby which under the agreement referred to in subsection (b) are to remain in litigation in that cause, if any, when the Secretary tenders to Eklutna, Incorporated, a conveyance of all those lands which under the agreement the State agrees are to be conveyed to Eklutna, Incorporated, from among those selected at one time by the State under the authority of the Mental Health Enabling Act of 1956 (70 Stat. 709).

(g) The Secretary shall convey to Eklutna, Incorporated, its entitlement without regard to the acreage or interests which may ultimately be conveyed to Eklutna, Incorporated, under the agreement from within lands withdrawn by subsection (b). The agreement shall, however, require Eklutna, Incorporated, to subject to section 907 of this Act one or more compact tracts of lands of at least equal acreage to that ultimately to be conveyed to Eklutna, Incorporated, under the agreement from those withdrawn by subsection (b). The agreement shall require Eklutna, Incorporated, to reconvey to the State lands from those subject to section 907 in an amount provided by the agreement, upon the occasion of each receipt of lands by Eklutna, Incorporated, from among those withdrawn by subsection (b). Lands received by the State in such a reconveyance from

Eklutna, Incorporated, shall be charged, to the extent of the acreage received by Eklutna, Incorporated, in the relevant conveyance to it, against the State's entitlement under section 6 of the Alaska Statehood Act, // 48 USC prec. 21. // or section 900(c) of this Act, as the State may elect. If thereby the State receives more than its entitlements under the Act elected, it shall reconvey to the United States a compact tract of unencumbered State lands of equal acreage contiguous to lands belonging to the United States. Eklutna, Incorporated, shall also subject to section 907 of this Act, once an agreement under subsection (c) exists and thereafter from time to time, one or more compact tracts which equals the acreage amount by which Eklutna, Incorporated's entitlement would be over satisfied considering the acreage already conveyed to Eklutna, Incorporated; to the extent such a risk of over entitlement abates the lands may be withdrawn from the Land Bank.

(h) In the event that Eklutna, Incorporated, receives a conveyance from the United States of the surface estate in lands withdrawn by subsection (b) pursuant to the agreement authorized in that subsection, and if a reconveyance from Eklutna, Incorporated, of the surface estate in land to the State from those subject to section 907 of this Act is thereby occasioned, a conveyance of the subsurface estate in the lands conveyed to Eklutna, Incorporated, shall be withheld until the Secretary ascertains to whom the subsurface estate is to be conveyed under this subsection. The entity owning the subsurface estate in those reconveyed lands shall retain that interest, unless it in the agreement or separately consents to convey the same to the State. In the event such entity so consents to convey the subsurface to the State, the Secretary shall convey the subsurface estate in the lands conveyed to Eklutna, Incorporated, to that entity; if such entity does not so consent, the subsurface estate in the lands conveyed to Eklutna, Incorporated, shall be conveyed to the State.

HB

214

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB 214-DOA-GS-5-10-07
 Bill Version: HB214
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title Naming Pacillo Parking Garage RDU State Owned Facilities
 Component Facilities Administration
 Sponsor Representative Fairclough
 Requester _____ Component No. 2430

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type—Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
 Mark 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)
 This bill would name the Atwood Building Anchorage parking garage that is currently under construction in honor of Carolyn Pacillo.

 The Division of General Services does not expect any financial impact as a result of this bill.

Prepared by: Vern Jones, Director Phone 465-2200
 Division: Division of General Services Date/Time 5/10/07 11:45 AM
 Approved by: Kevin Brooks, Deputy Commissioner Date 5/10/07
 Agency: Department of Administration

ALASKA STATE LEGISLATURE

Sponsor



Statement

SB 131: "Naming Pacillo Parking Garage"

Senate Bill 131 would name the new state parking garage in Anchorage in honor of Carolyn 'Linny' Pacillo. Linny was a constant positive force for change in Anchorage, and it is only fitting that the new parking garage bear her name.

Linny moved to Homer, Alaska with her family in September of 1974. She worked in numerous restaurants, fished on salmon tenders in Bristol Bay and crab boats in the Bering Sea and built and operated the first mobile espresso stand in Alaska "Not the Same Old Grind". In 1988, Linny moved to Anchorage to run the family gas station, Courtney's on Tudor Road. Linny was a champion of "the Little Guy" and a voice for ordinary citizens. Throughout her life she raised money and awareness for many causes and charities including the Muscular Dystrophy Association, Food Bank of Alaska, Alaska Women's Aid in Crisis, Standing Together Against Rape, Challenge-Alaska, American Lung Association of Alaska, and the March of Dimes, among others. She also bought and delivered a water supply pump to a small village in Nicaragua, and quietly aided thousands of individuals with a tank of gas, a clean coat, a safe place to sleep, and a hot meal.

Linny, along with her sister Susan, challenged the Anchorage Parking Authority by donning tutus and fairy-wings and depositing coins into expired parking meters. Linny was an agent of change leaving compassion, humor, and a profound change in her wake. The Twentieth Alaska State Legislature formally honored the Parking Fairies and stated, "The Pacillo sisters have reminded all of us that government must serve the people. They have also confirmed the strength of our democracy by showing that wrongs can be corrected, and that the will of the people can triumph."

The Linny Pacillo Parking Garage would serve as a reminder that we live in a representative democracy that honors its agents of change. It would serve to honor Linny's tireless efforts to improve the parking experience of Anchorage residents and its visitors. I ask you to support SB 131, and recognize this extraordinary Alaskan's life.

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: SB 131-DOA-DGS-3-23-07
 Bill Version: SB 131
 () Publish Date: _____

Revision Date/Time (Ncte if correction): _____

Title Naming Pacillo Parking Garage

Dept. Affected: Administration

RDU State Owned Facilities

Component Facilities Administration

Sponsor Senators Ellis and Dyson

Requester _____

Component No. 2430

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0

Mark 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)*

This bill would name the Atwood Building Anchorage parking garage that is currently under construction in honor of Carolyn Pacillo.

The Division of General Services does not expect any financial impact as a result of this bill.

Prepared by: Vern Jones, Director
 Division: Division of General Services
 Approved by: Kevin Brooks, Deputy Commissioner
 Agency: Department of Administration

Phone: 465-2200
 Date/Time: 4/23/07 11:00 AM
 Date: 4/23/07

Submitted by: ASSEMBLY MEMBER SULLIVAN;
Mayor Begich

Prepared by: Assembly Counsel
For reading: February 27, 2007

CLERK'S OFFICE
APPROVED

Date: 2-27-07

ANCHORAGE, ALASKA
AR NO. 2007-60

1 A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY FOR SUBMISSION
2 TO THE TWENTY-FIFTH ALASKA STATE LEGISLATURE IN SUPPORT OF NAMING
3 THE STATE'S NEW PARKING GARAGE IN DOWNTOWN ANCHORAGE IN HONOR
4 OF CAROLYN "LINNY" PACILLO.

5
6 WHEREAS, the new State Parking Garage under construction in downtown
7 Anchorage north of the Atwood Building is a state parking facility; and

8
9 WHEREAS, the Twenty-fifth Alaska State Legislature has full legislative authority to
10 name state facilities; and

11
12 WHEREAS, by resolution dated December 19, 2006 entitled "A RESOLUTION OF THE
13 ANCHORAGE MUNICIPAL ASSEMBLY HONORING AND REMEMBERING THE LIFE OF CAROLYN
14 "LINNY" PACILLO AND THE CONTRIBUTIONS SHE MADE TOWARD THE BETTERMENT OF THE
15 MUNICIPALITY OF ANCHORAGE", the Anchorage Municipal Assembly unanimously recognized
16 and honored the passing of a uniquely influential Anchorage resident, Linny Pacillo; and

17
18 WHEREAS, widely known around Anchorage as one of the "Parking Fairies", Linny
19 Pacillo served the community as an agent of change, adorned in a tutu and fairy-wings,
20 leaving compassion, humor, and profound change in her wake; and

21
22 WHEREAS, in co-sponsoring the December 19, 2006 resolution, the Mayor of
23 Anchorage and the Anchorage Municipal Assembly concurred in recognizing that
24 "seemingly small acts of purposeful altruism" like those of Linny Pacillo "can alter
25 government policy and make life better for individuals living in a democratic society"; and

26
27 WHEREAS, during her lifetime, the Twentieth Alaska State Legislature formally
28 honored Linny Pacillo and her sister Susan Pacillo for reminding all of us that "government
29 must serve the people"; and

30
31 WHEREAS, in the words of this prior state legislature, the actions of the Pacillo
32 sisters "confirmed the strength of our democracy by showing that wrongs can be corrected
33 and the will of the people can triumph"; and

34
35 WHEREAS, to honor Linny Pacillo, her family, and the Municipality of Anchorage by
36 designating the new State Parking Garage in her memory would serve to recognize this
37 exceptional citizen and remind us all that we live in a representative democracy that
38 honors its agents of change;

39

1 NOW THEREFORE BE IT RESOVED that the Anchorage Municipal Assembly
2 honors and remembers the positive impacts and profound influence of Carolyn "Linny"
3 Pacillo's life by giving its support and recommendation to the Twenty-fifth Alaska State
4 Legislature to name the new State Parking Garage, under construction in downtown
5 Anchorage, in her memory.

6
7 PASSED AND APPROVED by the Anchorage Assembly this 27th day of
8 February, 2007.
9

10
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12
13
14 Alan Sullivan
Chair

15 ATTEST:

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20 Bridget E. Grewer
21 Municipal Clerk
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Municipality of Anchorage
MUNICIPAL CLERK'S OFFICE
Agenda Document Control Sheet

AR 2007-60

(SEE REVERSE SIDE FOR FURTHER INFORMATION)

1	SUBJECT OF AGENDA DOCUMENT NAMING THE STATE'S NEW PARKING GARAGE	DATE PREPARED 2/27/07
		Indicate Documents Attached <input type="checkbox"/> AO <input checked="" type="checkbox"/> AR <input type="checkbox"/> AM <input type="checkbox"/> AIM
2	DEPARTMENT NAME Assembly	DIRECTOR'S NAME Dan Sullivan, Chairman
3	THE PERSON THE DOCUMENT WAS ACTUALLY PREPARED BY Julia Tucker, Assembly Counsel	HIS/HER PHONE NUMBER 343-4419
4	COORDINATED WITH AND REVIEWED BY	INITIALS
	Mayor	
	Municipal Clerk	
	Municipal Attorney	
	Employee Relations	
	Municipal Manager	
	Cultural & Recreational Services	
	Fire	
	Health & Human Services	
	Merrill Field Airport	
	Municipal Light & Power	
	Office of Management and Budget	
	Police	
	Port of Anchorage	
	Public Works	
	Solid Waste Services	
	Transit	
	Water & Wastewater Utility	
	Executive Manager	
	Community Planning & Development	
	Finance, Chief Fiscal Officer	
	Heritage Land Bank	
	Management Information Services	
	Property & Facility Management	
	Purchasing	
	Other	
5	Special Instructions/Comments	
	ADDENDUM - CONSENT AGENDA-RESOLUTIONS FOR ACTION	
6	ASSEMBLY HEARING DATE REQUESTED 2/27/07	7
		PUBLIC HEARING DATE REQUESTED N/A

2007 FEB 23 AM 10:16
 M.O.A.
 ULDANS OFFICE

Anchorage's own superhero wore a tutu

COMPASS: POINTS OF VIEW FROM THE COMMUNITY

By ANDREE McLEOD AND PATRICK McLEOD

(Published: November 25, 2006)

Heaven had better have its house in order because Linny is a-comin'! One of our beloved Parking Fairies, Linny Pacillo, has traded in her fairy wings for angel wings and Anchorage has lost one of its most endearing public leaders.

Linny's leadership involved a rather unorthodox, meticulously sophisticated, in-your-face kind of style. Linny knew what was right and what was wrong. And she knew it was right to challenge authority when it was wrong.

The large sign at Courtney's on Tudor, her family's gas station where she worked, was a daily testament of her beliefs and a venue for speaking her piece about the injustices and wrongs in the world. The status quo was confronted every day. Commuters got into the habit of reading Linny's sign to see what was up and have a belly laugh.

Linny had courage, which was tested often by people holding positions of power. When she took on the institutions and businesses that attempted to pilfer the pockets of ordinary citizens, she was subjected to threats and intimidations that would have scared most people. But Linny was indomitable and persistently attended public meeting after meeting while continuing to delight by putting nickels and quarters in parking meters.

Linny and her sister Susan took on the Parking Authority and won like Olympic gymnasts: making it look easy and fun. Well, not fun for everyone. There are people who bristle still at the mention of Linny.

It's safe to say that if you wanted to ignore Linny you found out soon enough that discounting her was not an option. Just ask a few former Assembly members and a mayor or two. She had a knack for telling people to ... uh ... "go fly a kite" and getting away with it. She conducted her campaign like she lived her life -- on her own terms, regardless of what politicians or bureaucrats thought.

Children loved her because she was a real-life superhero: an honest-to-goodness fairy dressed with a tutu, tights, a set of sparkling wings and an animated out-of-this-world way of talking. She would lavish praise on them as she mentored the many who came in to buy a candy bar or soda. She would discuss with them whatever was on their minds. They always had questions for her because she had a gift for stimulating children's curiosity. She taught them one of life's important lessons: not to spare a minute of the day being idle.

Albert Schweitzer said, "Example is not the main thing in influencing others. It is the only thing." Linny showed us how to be good citizens. She was generous with her time and energy, engaging in a righteous power struggle with an exploitative and oppressive public institution. Her goal was to win back a fundamental right for the people of Anchorage, and in the end she won.

Recognition of Linny's generosity of spirit was the source of the great public affection felt toward her. A genuine leader, Linny never forgot or disregarded the many friends who helped along the way.

So long, our dear, beautiful, sweet, fiery friend. Though you no longer walk and laugh among us, your blazing spirit will live on in the hearts of many and the minds of untold thousands whose lives (and downtown parking experiences) were enhanced because of you. You are forever Anchorage's symbol representing the strength of common people fighting for their interests and the reality that all we need to do in order to improve our community is to have the courage to begin to struggle and the sense of humor to persevere in that struggle until we win.

Fairy dust

Pacillo Parking Garage? Perfect

At just nine lines of type, it's one of the shortest bills you'll ever see proposed in the Alaska Legislature. And one of the sweetest.

Anchorage Sen. Johnny Ellis has a bill that would name the new state parking garage under construction across the street from the Atwood Building in downtown Anchorage for the late Linny Pacillo. Ms. Pacillo and her sister, Susan, helped temper the zeal of ruthless parking police in the 1990s by dressing as fairies and putting change in expired parking meters to spare drivers those \$10 tickets.

The bill commends Linny Pacillo for being "an agent of change through small acts of purposeful altruism."

How true. The parking fairies' protest was kind, funny, theatrical and devastating to an Anchorage Parking Authority that had become an aggravation to citizens. In 1997, voters said enough and stripped the authority of its power to write parking tickets.

To name a parking garage for Linny Pacillo shows a fine appreciation for the sisters' civic action — and a fine sense of humor too. Passage should be unanimous.

BOTTOM LINE: Linny Pacillo Parking Garage — now there's a memorial.

<<Back

Distributed by Senator Johnny Ellis



Honoring a parking fairy



by Maria Downey
Thursday, April 26, 2007

JUNEAU, Alaska -- The '90s were a tense time in downtown Anchorage -- the parking authority was writing parking tickets plenty and often.

Some called it unfair and too aggressive as a way to generate more revenue.

The '90s were a tense time in downtown Anchorage -- the parking authority was writing parking tickets plenty and often. (KTUU-TV)

It was also the days of the parking fairies -- two sisters, rebels with a cause. Now there is a bill in the state senate to honor one posthumously with a very ironic dedication.



Linny and Susan Pacillo, better known as the parking fairies, were two sisters who simply had enough of the unforgiving ticket writers downtown.

So in what they thought was a one-day event, they took to the streets with lots of coins and raced the parking officers to expired meters.

Linny and Susan Pacillo, better known as the parking fairies, were two sisters who simply had enough of the unforgiving ticket writers downtown. (KTUU-TV)

"We tried talking to them like normal citizens dressed in business suits and what not and they didn't want to listen, so it was kind of an in your face creative conflict resolution with some random act of kindness thrown in with it," Susan Pacillo said.

She refers to herself as the retired, but not expired parking fairy.

Her sister Linny passed away last November, gone but not forgotten.

Sen. Johnny Ellis, D-Anchorage, introduced a bill to name the state's new parking garage after Linny.

"Linny was constant positive force for change in Anchorage and I think it's only fitting that we rename the downtown parking garage or having it bear her name," Ellis said.



Linny passed away last November, gone but not forgotten. (KTUU-TV)

Bill 131 proposes to name the state's new parking garage after a

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education & Early Development
State of Alaska

[Back](#)

Distributed by Senator Johnny Ellis



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Linny passed away last November, gone but not forgotten. (KTUU-TV)

Bill 131 proposes to name the state's new parking garage after a

Distributed by Senator Johnny Ellis



Susan Pacillo thought the ironic tribute would make her sister laugh. (Jason Kohler/KTUU-TV)

woman who pushed for change and got it, when Anchorage voters abolished the workings of the parking authority.

The bill is also supported by the Anchorage Assembly.

"So regardless what side you were on there, I think you can admire the stick-to-it-ness and the passion of the folks who said government has gone too far in this regard," Ellis said.

Andree McLeod supports the bill.

"Exercising her right of critical democracy showed others to be good citizens. She was a model to all who wanted to improve various governmental processes," McLeod said.

Also involved through a teleconferenced hearing, was Susan Pacillo at the Legislative Information Office in Anchorage.

"My sister Linny would probably find the irony in this kind of fun," Pacillo said. "She stood up against bureaucracy and big government. We were the voice of the people -- period. That's all there is to it. And so I hope this goes forward and you can honor my sister on a parking garage. Ha!"



Linny was known for helping those in need with free gas and other donations. (Courtesy Photo)

"I think it's very ironic Linny will find it pretty funny I'm sure she's probably up there rolling," Pacillo said.

Linny was also recognized today for her many other random acts of kindness associated with her family's gas station, Courtney's.

She was known for helping those in need with free gas and other donations.

The bill did clear it through committee with one minor amendment -- to call it the Linny Pacillo parking garage instead of the Carolyn "Linny" Pacillo parking garage.

The bill still has to go to the full Senate and the House.

Contact Maria Downey at mdowney@ktuu.com



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SARAH PALIN, GOVERNOR

ALASKA COMMISSION ON POSTSECONDARY EDUCATION

PO BOX 110505
JUNEAU, ALASKA 99811 0505
VOICE (800) 441-2962
In Juneau (907) 465-6740
TDD (907) 465-3143
FAX (907) 465-3293

May 8, 2007

The Honorable Johnny Ellis
Alaska Senate
State Capitol, Room 9
Juneau, Alaska 99801

Re: Carolyn Pacillo

Dear Senator Ellis:

Regarding your recent inquiry concerning Carolyn Pacillo's Alaska Student Loan account, I can tell you that the account was paid in full effective October 9, 1997.

If you have any further questions, please do not hesitate to call.

Sincerely,

Diane Barrans
Executive Director

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSSB 131(STA)
 (S) Publish Date: 4/27/07

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title Naming Pacillo Parking Garage RDU State Owned Facilities
 Component Facilities Administration
 Sponsor Senators Ellis and Dyson
 Requester _____ Component No. 2430

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type- Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0

Mark 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)

This bill would name the Atwood Building Anchorage parking garage that is currently under construction in honor of Carolyn Pacillo.

The Division of General Services does not expect any financial impact as a result of this bill.

Prepared by: Vern Jones, Director
 Division: Division of General Services
 Approved by: Kevin Brooks, Deputy Commissioner
 Agency: Department of Administration

Phone: 465-2200
 Date/Time: 4/23/07 11:00 AM
 Date: 4/23/07

HB

222

Representative Jay Ramras
Chair, House Judiciary
House Labor & Commerce
House Oil & Gas
House Military & Veteran
Affairs

1292 Sadler Way, Suite 324
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

Alaska State Legislature



While in Session
State Capitol, Room 118
Juneau, Alaska 99801-1182
(907) 465-3004
Fax: 465-2070
Toll Free: (877) 465-3004

House District 10

House of Representatives

Memo

To: Representative Gabrielle LeDoux
Co-Chair House Community & Regional Affairs
Representative Anna Fairclough
Co-Chair House Community & Regional Affairs

From: Representative Jay Ramras

Date: March 31, 2007

Re: Hearing Request for HB222 – Passenger Vessel Tax Credit

Please accept this memo as a request for the House Community and Regional Affairs Committee to hear HB222.

Please find attached to this memo the following documents:

- Sponsor Statement for HB222
- CSHB222 (25-LS0782\E)
- Explanation of changes version \C to version \E
- Original version of the Bill (25-LS0782\C)
- Legal opinions

Alaska State Legislature

Session:

State Capitol, Room 118
Juneau, Alaska 99801-1182
Ph: (907) 465-3004
Fax: (907) 465-2070
Toll Free: (877) 465-3004



Interim:

1292 Sadler Way, Suite 324
Fairbanks, Alaska 99701
Ph: (907) 452-1088
Fax: (907) 452-1146
Toll Free: (877) 465-3004

Representative Jay Ramras House District 10

Chair, House Judiciary Committee • Member, House Labor & Commerce Committee • Member, House Oil & Gas Committee • Member, House Military & Veteran Affairs Committee

Sponsor Statement HB222

“An Act providing a credit for a municipal tax imposed on certain passengers traveling on commercial passenger vessels that provide overnight accommodations; and providing for an effective date.”

The revenue anticipated from the passenger excise tax in 2007 is \$41 million. The *Primary Election Voter Pamphlet* of 2006 stated that \$14 million would go to municipalities that have ports of call and another \$10 million will go to a “Regional Cruise Ship Impact Fund” for other municipalities at which cruise ships do not stop.

These taxes cannot possibly be described as covering the costs of servicing the vessels, as required under Federal law, 33 U.S.C. § 5(b)(2).

House Bill 222 addresses how the \$46.00 passenger excise tax should be distributed as a tax credit to municipalities with ports of call. HB 222 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.

House Bill 222 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. Through the provisions of HB222 municipalities could bond permanent port facilities, which in turn would ensure a healthy cruise industry and income stream for the State of Alaska.

25-LS0782VE
Bullock
3/28/07

CS FOR HOUSE BILL NO. 222()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - FIRST SESSION**

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE RAMRAS

A BILL

FOR AN ACT ENTITLED

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

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 *** Section 1.** AS 43.52 is amended by adding a new section to read:

6 **Sec. 43.52.225. Tax credit for local levy.** A passenger liable for the tax under
7 AS 43.52.220 is entitled to credit against the tax equal to the lesser of \$10 or the actual
8 amount of a passenger tax paid to each municipality that is one of the first five
9 municipalities that is a port of call for the vessel on which the passenger is traveling
10 and that imposes a passenger tax. The total amount of the credits may not exceed the
11 amount of the tax levy in AS 43.52.210. In this section, "passenger tax" means a
12 municipal tax or fee that is imposed on the passenger, the commercial passenger
13 vessel, or the operator of the vessel, and is calculated by reference to the number of
14 passengers or berths on the vessel.

1 * Sec. 2. The uncodified law of the State of Alaska is amended by adding a new section to
2 read:

3 RETROACTIVITY. Section 1 of this Act is retroactive to December 17, 2006.

4 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

Representative Jay Ramras
Chair, House Judiciary
House Labor & Commerce
House Oil & Gas
House Military & Veteran
Affairs

1292 Sadler Way, Suite 324
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

Alaska State Legislature



While in Session
State Capitol, Room 118
Juneau, Alaska 99801-1182
(907) 465- 3004
Fax: 465-2070
Toll Free: (877) 465-3004

House District 10

House of Representatives

Memo

To: Representative Jay Ramras

From: Jane Pierson

Date: April 1, 2007

Re: HB 222 Explanation of Changes versio \C to version \E

P. 1, L. 7 Caps the amount that can be collected to \$10.00

P. 1, L.12 Adds the word fee after tax in the definition of "passenger tax".

**Legal Opinions Relating to the Cruiseship
Head Tax Initiative**

6111

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.



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON D.C.

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 un earmarked 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, 1062-03 (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'n 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’n 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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

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 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.

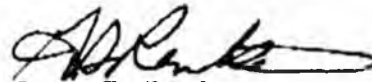
John Corso, City & Borough of Juneau Attorney, recently examined the change in federal law. As you know, the CBJ has a port fee in place and is therefore very interested in this subject. I have reviewed Mr. Corso's opinion and I concur with his conclusions. I have attached a copy of his memorandum for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



MEMORANDUM

CBJ Law Department

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 used "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.



MEMORANDUM
CBJ Law Department

To: Mayor and Assembly
From: John W. Hartle, City Attorney
Subject: Fees on Cruise Lines; Resolution 2294b.
Date: March 12, 2005

JWA

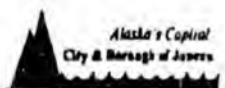
You have asked for an analysis of the objections raised by Jim Reeves of Dorsey and Whitney regarding the proposed increases in cruise line fees in Resolution 2294b. I have analyzed all the cases cited by Mr. Reeves, and the other major case law as well. The short answer is that, while there is always 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-00-9665C1. 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 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.

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.

✓
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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. Madiean, 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

Representative Carl Gatto

February 16, 2004

Page 3

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

Representative Carl Gatto
February 16, 2004
Page 4

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--

(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).

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

^{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.

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
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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).

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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).

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