

[PROPOSED]

Robert P. Blasco, Esq.
Megan J. Costello, Esq.
Hoffman & Blasco, LLC
9360 Glacier Hwy., Ste. 202
Juneau, AK 99801
(907) 586-3340
(907) 586-6818 (fax)
Attorneys for the Defendants
rpblasco@hoffmanblasco.com
mjcostello@hoffmanblasco.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, and CRUISE
LINES INTERNATIONAL
ASSOCIATION,

Plaintiffs,

v.

THE CITY AND BOROUGH OF JUNEAU,
ALASKA, a municipal corporation, RORIE
WATT, in his official capacity as City
Manager,

Defendants.

Case No.: 1:16-cv-00008-HRH

**THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

[PROPOSED]

TABLE OF CONTENTS

<u>PART 1: CBJ'S CROSS MOTION FOR SUMMARY JUDGMENT</u>	1
I. INTRODUCTION TO CROSS MOTION FOR SUMMARY JUDGMENT	1
II. STATEMENT OF FACTS AND OBJECTIONS TO THE PLAINTIFFS' STATEMENT OF FACTS	3
III. HISTORY OF THE PORT DEVELOPMENT FEE AND THE PLAINTIFFS' AGREEMENT WITH THE REASONABLENESS OFF THE FEE AND THE EXPENDITURES	4
IV. HISTORY OF THE MARINE PASSENGER FEE AND THE PLAINTIFFS' ABSENSE OF PROTEST, REQUESTS FOR EXPENDITURES AND LACK OF OBJECTIONS TO EXPENDITURES	5
V. CBJ IS ENTITLED TO SUMMARY JUDGMENT OF THE CLAIMS FOR RELIEF DIRECTED AT THE PORT DEVELOPMENT FEE	7
A. <u>Waiver</u>	7
B. <u>Laches</u>	8
C. <u>Equitable Estoppel</u>	8
D. <u>Quasi-Estoppel</u>	9
E. <u>Statute of Limitations</u>	10
1. Claims Under the Rivers and Harbors Act	10
F. <u>Conclusion of PDF</u>	11
VI. CBJ IS ENTITLED DISMISSAL OF CLIA'S CLAIMS DIRECTED AT THE MARINE PASSENGER FEES FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES	11
A. <u>Failure to Exhaust Administrative Remedies</u>	11
1. <i>Background</i>	11
2. <i>Legal Argument</i>	13
a) The procedure is not inadequate	14
b) The procedure is not futile	14

[PROPOSED]

c)	The procedure is not unreasonable	15
VII.	CBJ IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS FOR RELIEF DIRECTED AT THE MARINE PASSENGER FEES.....	15
A.	<i>Background</i>	15
B.	<i>Legal Argument</i>	15
1.	Statute of Limitations.....	15
2.	Waiver.....	18
3.	Laches	21
4.	Equitable Estoppel	22
5.	Quasi-Estoppel.....	23
VII.	THE COMMERCE CLAUSE, TONNAGE CLAUSE, AND RIVERS & HARBORS ACT ALLOW THE CITY AND BOROUGH OF JUNEAU TO ALLOCATE SOME MARINE PASSENGER FEES TO DEPARTMENTAL OPERATING EXPENSES TO REIMBUSE THOSE DEPARTMENTS FOR THE COST OF SERVICES PROVIDED TO PASSENGERS AND/OR VESSELS	24
A.	<u>The United States Supreme Court Has Not Precluded Municipalities from Allocating Some Portion of Fees Collected for Services to Passengers to Cover the Costs of the General Municipal Operating Expense in Providing Services Used by These Passengers</u>	26
B.	<u>Decisions by Other Federal Courts Support Allowing Some Allocation of Fees Collected to the Municipality's General Fund</u>	29
C.	<u>The Rivers & Harbors Act Does Allow the Allocation of Collected Fees to the City's General Operating Expenses to Reimburse Certain Departments for Cost of Services to Passengers and/or Vessels</u>	34
D.	<u>Conclusion</u>	36
IX.	THE COMMERCE CLAUSE, TONNAGE CLAUSE AND RIVERS & HARBORS ACT ALLOW THE CBJ TO USE MARINE PASSENGER FEES TO DEFEND THIS ACTION.....	37
A.	<u>The Assembly's Decision to Use Marine Passenger Fees to Defend this Law is Within the Discretion of the Assembly and Not Prohibited by any Constitutional Provision, Statute or Case Law</u>	38

[PROPOSED]

X.	CONCLUSION ON CROSS MOTION	43
<u>PART 2: CBJ'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT</u>		44
I.	INTRODUCTION TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	44
II.	STANDARD OF REVIEW	47
III.	THE TONNAGE CLAUSE ALLOWS THE USE OF PASSENGER FEES FOR SERVICES AND PROJECTS FOR PASSENGERS AND/OR VESSELS AND FOR SERVICES AND PROJECTS AT PRIVATE DOCKS AND WITHOUT REGARD WHETHER ANY SERVICES MAY BE AVAILABLE TO THE PUBLIC: THIS IS AN ISSUE OF FIRST IMPRESSION	47
A.	<u>The Port Development Fees and the Marine Passenger Fees are Constitutional under the Tonnage Clause</u>	47
IV.	RESPONSE AND OBJECTIONS TO PLAINTIFFS INTRODUCTION AND SUMMARY OF FACTS.....	66
V.	THERE IS NO PRIVATE CLAUSE OF ACTION UNDER THE RIVERS AND HARBORS ACT, 33 USC 5B DOES NOT ESTABLISH A CONGRESSIONAL INTENT OF PRE-EMPTION AS TO ALL PASSENGER FEES, AND CBJ'S PORT DEVELOPMENT FEE AND MARINE PASSENGER FEE DO NOT VIOLATE THE RIVERS AND HARBORS ACT OR THE SUPREMACY CLAUSE	68
A.	<u>There is no Private Cause of Action under the Rivers and Harbors Act</u>	68
B.	<u>The Plaintiffs have not established that USC 5b preempts all state and local laws related to passenger fees</u>	71
C.	<u>The Use of Marine Passenger Fees for Services to the Cruise Ship Passengers are Permissible under the Rivers and Harbors Act and there is no Supremacy Clause violation</u>	71
D.	<u>The Plaintiffs are not entitled to a permanent injunction based on the RHAA</u>	73
E.	<u>The use of Marine Passenger Fees for services to passengers does not violate the Supremacy Clause</u>	75

[PROPOSED]

VI.	THE PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER 42 USC 1983 AND THIS IS AN ISSUE OF FIRST IMPRESSION	77
VII.	THE PLAINTIFFS HAVE ABANDONED OR WAIVED THEIR CLAIM UNDER THE COMMERCE CLAUSE	80
VII.	CBJ HAS NOT VIOLATED THE TONNAGE CLAUSE, RIVERS AND HARBORS ACT OR THE SUPREMACY CLAUSE AND THE PLAINTIFFS ARE NOT ENTITLED TO A DECLARATORY JUDGMENT IN THEIR FAVOR AND NOT ENTITLED TO A PERMANENT INJUNCTION	81
	A. <u>The Plaintiffs have not Suffered an Irreparable Injury</u>	81
	B. <u>The Balance of Equities does not Tip to the Plaintiffs</u>	84
	C. <u>An Injunction is not in the Public Interest</u>	88
IX.	CONCLUSION ON OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.....	88

[PROPOSED]

TABLE OF AUTHORITIES

Cases

Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority,
906 F.2d 516 (11th Cir. 1990)

Alaska Department of Natural Resources v. Alaska Riverways
232 P.3d 1203 (Alaska 2010)

Alaska Wildlife Alliance v. Jensen,
108 F.3d 1065 (9th Cir. 1996)

Alaska State Employees Ass'n v. Alaska Public Employees Ass'n,
813 P.2d 669 (Alaska 1991)

American Airlines, Inc. v. Massachusetts Port Auth.
560 F.2d 1036 (1st Cir.1977)

Associated General Contractors, Inc. v Coalition for Economic Equity,
950 F. 2d 1401(9th Cir. 1991)

Barber v. Hawaii,
42 F.3d 1185 (9th Cir. 1994)

Bittner v. State,
627 P.2d 648 (Alaska 1981)

Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,
566 F.2d 81 (D. Conn. 2008)

Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,
567 F.3d 79 (2nd. Cir. 2009)

Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority,
2004 U.S. Dist. Lexis 6643, 2004 WL 840140 (D. Conn. April 15, 2004).

Captain Andy's Sailing, Inc. v. Johns,
195 F. Supp. 2d 1157 (Dist. Hawaii 2001)

California v. Sierra Club,
451 U.S. 287 (1987)

Central Point Software, Inc. v. Global Software & Associates, Inc.,
859 F. Supp. 640 (E.D.N.Y. 1994).

CLIAA, et al. v. CBJ, et al.

Case No. 1:16-cv-00008-HRH

TABLE OF CONTENTS TO THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Page v of ix

[PROPOSED]

Chapman v Houston Welfare Rights Organization,
441 US 600 (1979).

Cholla Ready Mix, Inv. v Civish,
382 F. 3d 969 (Ninth Cir. 2004).

Cincinnati, P. B.S. P. Packet Co. v. Catlettsburg,
105 US 559 (1881).

Cooley v. Board of Wardens
53 U.S. 299 (1851)

Clyde Mallory Lines v. Alabama,
296 U.S. 261 (1935)

Commercial Barge Line Co. et al. v. Director of Revenue,
431 S.W.3d 479 (Mo. 2014)

Dietzman v City of Homer,
District Court of Alaska, 2010 WL 4684043, 3:09-cv 00019 RJB

Evansville–Vanderburgh Airport Authority District. v. Delta Airlines, Inc.
405 US 707 (1972)

*Herrell v Locals 302 and 612 of the International Association of Electrical
Engineers, et.al.* ,
120313 AKDC, 3:13 cv-0055 HRH, at 4

High Country Adventures, Inc. v. Polk County,
2008 Tenn. App. LEXIS 651 *28 (Tenn. Ct. App. November 10, 2008)

Huse v. Glover
119 U.S. 543(1886)

Indiana Port Comm. v. Bethlehem Steel Corp,
653 F. Supp. 604 (Dist. N. Indiana, 1987)

Indiana Port Comm. v. Bethlehem Steel Corp
835 F. 2d 1207 (7th Cir. 1987)

International Marine Terminals Partnership v. Port Ship Service, Inc.,
865 So. 2d 199 (La. App. 2003)

Jones v. R.R. Donnelly & Sons, Co.,
541 US 369 (2004)

[PROPOSED]

Jorling v. United States Dept. of Energy,
218 F.3d 96 (2d Cir. 2000)

Keokuk Northern Line Packet v. Keokuk
95 U.S. 80 (1877)

Kittatinny Canoes, Inc. v. Westfall Township,
2013 Pa. Dist. & Cnty. Dec. LEXIS 323, 30 PA. D & C. 5th 46, 2013, WL
8563483 (Pa. County Ct. May 6, 2013)

Lil' Man in the Boat, Inc. v City of San Francisco,
No. 3:17 CV-00904-JST, 2017 WL 3129913 (N.D. Cal. July 24, 2017)

Maher Terminals, LLC v. The Port Authority of New York and New Jersey
805 F. 3d. 98 (3rd Cir. 2015)

Miller Construction Equipment Sales, Inc. v. Clark Equipment Company,
050616 AKDC, 1:15-cv-0007-HRH, District Court of Alaska (2017)

Moscheo v. Polk County,
2009 Tenn. App. LEXIS 602 *28, 2009 WL 2868754 (Tenn. Ct. App. Sept 2,
2009)

Morgan's Louisiana & T.R. & S.S. Co. v Board of Health,
118 U.S. 455 (1886)

Northwest Airlines, Inc. et al. v. County of Kent, Michigan et al,
510 US 355 (1994)

*New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal
District, (Plaquemines II)*
874 F.2d 1018, (5th Cir. 1989) cert denied, 495 U.S. 923 (1990)

Offshores Systems-Kenai v. State,
282 P. 3d 348 (Alaska 2012)

Oslund v Bobb,
825 F. 2d 1371 (9th Cir 1987)

Ouachita River Packet Co. v. Aiken,
121 U.S. 444, 448 (1887)

Packet Co. v. St. Louise
100 U.S. 423 (1879)

[PROPOSED]

Parson v. Marathon Oil Co.,
960 P.2d 615 (Alaska 1998)

Polar Tankers, Inc., v. City of Valdez
557 US 1 (2009)

Prison Legal News v. Columbia County,
942 F. Supp. 2d 1068, 1091 (D.C. Ore. 2013)

Reel Hooker Sportfishing, Inc. v. Dept. of Taxation,
236 P.3d 1230 (Hawaii App. 2010), *state cert.denied*,
28958(Hawai'i Oct. 19, 2010) *cert. denied*, 131 S.Ct. 1616 (2011)

South Peninsula Hospital v. Xerox,
223 F. Supp. 3d 929, 936 (Dist. Ct. Ak. 2016).

Southern Steamship Co. (S.S.Co) v. Portwardens
73 U.S 31 (1867)

SCA Hygiene v First Quality,
137 S CT 954(2017).

Shenzhenshi Haitiecheng Science and Technology Co. v. Rearden LLC,
No. CV 15-cv-00797-SC United States District Court, N.D. California,
October 15, 2015.

TKC Aerospace v Muhs,
102215 AKDC 3-11-cv 0189 HRH, October 22, 2015

Transportation Co. v. Parkersburg
107 U.S. 691 (1882)

Transport Limousine of Long Island, Inc. v. Port Authority of NY & NJ,
571 F. Supp. 576 (E.D.N.Y. 1983)

US v Sperry Corporation,
493 US 52 (1989)

Wheeler v USAA, 082713,
AKDC 3:11, cv-00019 SLG, August 27, 2013

[PROPOSED]

U.S. Constitution

Tonnage Clause, USCS Const. Art. I, § 10, Cl 3.

Commerce Clause, USCS Cons. Art I §8, Cl 3

Supremecy Clause, USCS Cons. Art. VI, P.2.

U.S. Code

28 USC 1658

Rivers and Harbors Act, 33 USC §5(b)

33 USC 5(a)

33 USC 5(b)

42 USC 1983

Alaska Statutes

AS 09.10.070

Other Authorities

Alaska Rule of Appellate Procedure 609

Local District Court Rule 56.1.

CBJ Code 69.20 et. seq

CBJ Code 69.20.100

CBJ Code 69.20.120

Conference Report on S. 1214, Maritime Transportation Security Act of 2002
148 Cong Rec E 2143, 2143-2144. *(Emphasis added)*

Maritime Transportation Security Act of 2002
148 Cong Rec H 8561, 8590

CLIAA, et al. v. CBJ, et al.

Case No. 1:16-cv-00008-HRH
TABLE OF CONTENTS TO THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Page ix of ix