

IN THE SUPREME COURT FOR THE STATE OF ALASKA

CITY OF VALDEZ)
)
 Appellant/Cross-Appellee,)
)
 v.)
)
 POLAR TANKERS, INC.)
)
 Appellee/Cross-Appellant.)
)
 Supreme Court No. S -12218/12223

Trial Court Case No. 3AN-00-9665 CI

APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
THE HONORABLE PETER A. MICHALSKI, PRESIDING

BRIEF OF APPELLANT/CROSS-APPELLEE
CITY OF VALDEZ

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the State of Alaska, this 11th day
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CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES PRINCIPALLY RELIED UPON

U.S. Const. art. I, §8

§ 8. Powers of Congress. The Congress shall have the power . . . [T]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

U.S. Const. Amend. XIV

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alaska Const., art IV §§1, 2, 3

Section 1. Judicial Power and Jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Section 2. Supreme Court. (a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. . . .

Section 3. Superior Court. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

Alaska Const., art X §§2, 8, 11

Section 2. Local Government Powers. All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Section 8. Council. The governing body of a city shall be the council.

Section 11. Home Rule Powers. A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

AS 22.05.010

Jurisdiction. (a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

AS 29.45.050(b)(2)

(b) A municipality may by ordinance
(2) classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes.

AS 43.20.130(g) repealed ch. 70, § 13 SLA 1975

(g) The value of vessels operating on the high seas and compensation of employees engaged in operating the vessels shall be apportioned to the state in the ratio which the number of days spent in ports inside the state bears to the total number of days spent in ports inside and outside the state. The term "days spent in ports" does not include periods when ships are tied up because of strikes or withheld from the Alaska service for repairs, or because of seasonal reduction of service. Days in port are computed by dividing the aggregate number of hours in all ports by 24. The value of aircraft and automotive vehicles operating as freight and passenger carriers from, to, and inside the state and compensation of employees so engaged are apportioned to the state in the ratio which the number of days during which the services are rendered inside the state bears to the total number of days during which the services are rendered inside and outside the state.

Valdez Ordinance No. 96-35

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VESSELS AND TO AMEND GENERAL TAX PROVISIONS TO CONFORM WITH STATE LAW.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property.

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing, the transportation of refined petroleum products while within the city's jurisdiction or docks exclusively at city owned facilities while within the city's jurisdiction.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

(a) Has been or is usually, kept or used within the city, whether regularly or irregularly, or

(b) Travels to or within the City along fixed and regular routes; or

(c) Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

(d) Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

(e) Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars (\$1,000,000) during the tax year.

....

Section 16. This ordinance takes effect January 1, 1998.

Valdez Ordinance No. 99-17

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VESSELS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the portion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

a. Has been or is usually, kept or used within the city, whether regularly or irregularly; or

b. Travels to or within the City along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars (\$1,000,000) during the tax year.

.....
Section 3: Section 3.12.030 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.030 Property Exempt from Taxation.

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1);

3. The real property owned and occupied as the primary residence and permanent place of abode by a resident sixty-five (65) years of age or older is wholly exempt from taxation. Only one exemption may be granted for the same property and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. This determination of the assessor may be appealed under A.S. 44.62.560-44.62.570.

a. An exemption may not be granted under subsection (A)(3) of this section except upon written application for the exemption on a form approved by the state assessor for use by local assessors. The claimant must file the application no later than January 15 of the assessment year for which the exemption is sought. The city council for good cause shown may waive during a year the claimant's failure to make timely application for exemption for that year and authorize the assessor to accept the application as if timely filed. The claimant must file a separate application for each assessment year in which the exemption is sought. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of this section. If a failure to file by January 15 of the assessment year has been waived as provided in this subsection and the application for exemption is approved, the amount of tax that the claimant has already paid for the assessment year for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right and amount of an exemption claimed under subsection (A)(3) of this section. The assessor may require proof under this section at any time.

....

Section 7: This ordinance takes effect January 1, 2000.

Valdez Resolution No. 00-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ,
ALASKA ESTABLISHING A METHODOLOGY FOR APPORTIONING THE
PERSONAL PROPERTY TAX ON VESSELS OVER 95 FEET IN LENGTH

....

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF
THE CITY OF VALDEZ, ALASKA, that

Section 1: Personal property tax on a vessel over 95 feet that has
established a tax situs in places outside of Valdez shall be apportioned as follows:

A. A vessel owner will pay the personal property tax based on 100
percent of the assessed value, times a ratio determined by the number of days
spent in Valdez divided by the total number of days spent in all ports, including
Valdez, where the vessel has acquired a situs for taxation;

B. The number of days in Valdez and other ports shall be determined
by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because
of strikes or withheld from the Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the
city limits of the taxing jurisdiction until the vessel is outside that taxing
jurisdiction's boundaries. Any portion of a day a vessel is within the taxing
jurisdiction's boundaries, that vessel will be considered to be in the city limits for
that entire day.

Section 2. If a taxpayer claims that in a particular case the apportionment
formula approved in this Resolution does not reasonably represent the portion of
the total value of the vessel that should be apportioned to the taxing situs of
Valdez, the taxpayer may petition, or the assessor may require, the use of another
apportionment formula that will more fairly represent how the value should be
apportioned among Valdez and other taxing jurisdictions.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY
OF VALDEZ, ALASKA, THIS 1st DAY OF May, 2000.

Alaska R. App. P. 202. Judgments From Which Appeal May Be Taken

(a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010.

JURISDICTIONAL STATEMENT

This is an appeal from the trial court's January 10, 2006 final judgment. [Exc. 744]. The City of Valdez filed a Notice of Appeal on February 9, 2006. This Court has jurisdiction to consider this appeal pursuant to Article IV, section 2(a) of the Alaska Constitution, AS 22.05.010(a), and Alaska R. App. P. 202(a).

LIST OF PARTIES

Appellant/cross-appellee is the City of Valdez ("Valdez" or "the City").

Appellee/cross-appellant is Polar Tankers, Inc. ("Polar" or "Polar Tankers").

SeaRiver Maritime, Inc. ("SeaRiver") and Alaska Tanker Company ("ATC") were plaintiffs in the trial court along with Polar Tankers, but have now settled with the City. Crowley Marine Services, Inc. ("Crowley") and Tesoro Alaska Company ("Tesoro") were also plaintiffs until they voluntarily dismissed their claims against the City.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in holding that Valdez's fairly apportioned vessel tax violated the Due Process and Commerce Clauses of the U.S. Constitution?
2. Should the trial court have held to be constitutional Valdez's vessel tax, which is fairly apportioned, does not discriminate against interstate commerce and is fairly related to Polar Tankers' activities in Valdez?
3. Should the final judgment, which violates the constitutional separation of powers, and fails to sustain the tax, be reversed?

STATEMENT OF THE CASE

I. Statement of Facts

On August 18, 2000, taxpayers, who are owners and lessees of certain large vessels, sued the City of Valdez in Alaska superior court challenging the constitutionality of Valdez's vessel property tax. [Exc. 1-12]. This is the City's appeal from the superior court's ruling that the tax apportionment formula is unconstitutional as applied to some of the taxpayers.

A. The Valdez Vessel Property Tax: VMC § 3.12.020 and Resolution No. 00-15

On November 15, 1999, the City of Valdez adopted a property tax on the value of large vessels that used and/or had access to City services. [Exc. 107-113]. Under Ordinance No. 99-17, codified as VMC § 3:12.020, U.S.-documented boats and vessels of at least ninety-five feet in length are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges. [Exc. 692-693]. The Ordinance further provides:

Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the city the portion of the total market value of the property that *fairly reflects its use in the city*. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the city. The assessment formula shall be approved by the city council.

[Exc. 692] [emphasis added].

In accordance with the City Council's directive in Ordinance No. 99-17, the City Assessor proposed the second part of the Valdez vessel property tax, Resolution No. 00-15. [Exc. 114-116]. On May 1, 2000, the City Council adopted Resolution No. 00-15, which provides in part that the ratio, for purposes of apportioning vessel value that fairly reflects its use in the city, is days in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation. [Exc. 107-116, 271]. This is the port-day apportionment formula. [Exc. 115-116]. The formula excludes periods when a vessel is tied up because of strikes or withheld from Alaska service for repairs. [Exc. 115]. Section 2 of the Resolution also allows the taxpayer to petition or the assessor to require the use of another apportionment formula if, in a particular case, the port-day apportionment formula does not reasonably represent the portion of total value of the vessel that should be apportioned to Valdez. [Exc. 116].

To summarize, the City's vessel property tax consists of two parts: Ordinance No. 99-17 and Resolution No. 00-15. [Exc. 115-116, 692-693]. The Ordinance defines the class of vessels taxed. [Exc. 692-693]. The Resolution adopts the port-day apportionment formula, with discretion to apply a different apportionment formula under certain circumstances. [Exc. 115-116].

B. The Parties

1. The City Of Valdez

Valdez is a home-rule city located at the north end of Prince William Sound. [Exc. 318-319, 327]. The municipal boundaries encompass all the land around the waters of the Valdez Narrows and Port Valdez and extend southerly into the northern end of the

Valdez Arm and the mouth of Jack Bay. [Exc. 318-319, 327]. Port Valdez is a deep-water fjord about 12.5 miles long and 2.5 miles wide. [Exc. 318-319, 327]. It is the northernmost year-round ice-free port in North America. [Exc. 318-320, 327]. Most of the City's population of approximately 4,500 people and the town center are on the north shore of Port Valdez. [Exc. 117-119, 318-319, 327].

The City is a busy seaport and has eight docking facilities located within its bounds. [Exc. 319-320]. Three of these -- the Valdez Small Boat Harbor, the Valdez Container Terminal ("the Container Terminal") and the Old City Dock -- are City-owned, and are located near the town center, on the north side of Port Valdez. [Exc. 319-320]. The United States Coast Guard, the Alaska State Ferry System and Petro Star, a local refinery, also maintain their docks on the north shore. [Exc. 319-320]. A Ship Escort Response Vessel System ("SERVS") facility, including offices and a dock, that was constructed after the 1989 *Exxon Valdez* oil spill, berths the tugs and escort vessels that are fully dedicated to the tanker escort and oil spill response program. [Exc. 320].

The Alyeska Marine Terminal ("the Terminal") is located across from the town center on the south shore of Port Valdez. [Exc. 117-119, 319-320]. The Terminal is the southern terminus of the Trans Alaska Pipeline System ("TAPS"). [See Exc. 267]. The Terminal, including tanks, tanker berths and related facilities, is owned by a consortium of oil pipeline companies ("TAPS Owners"). [Exc. 267]. The City of Valdez issued \$ 1.3 billion in tax-exempt revenue bonds that provided much of the funding for the TAPS Owners' acquisition of the Alyeska Marine Terminal site and the construction of the terminal facilities. [Exc. 274]. The terminal is operated by Alyeska Pipeline Service

Company (“Alyeska”), an entity established by the predecessors of the TAPS Owners to manage TAPS. [See Exc. 267].

2. The Shippers

The Shippers are either wholly-owned subsidiaries or affiliates of ConocoPhillips, Exxon Mobil¹ and British Petroleum.² [Exc. 184-185, 188, *see* Exc. 85-86, 483-486]. These three companies together produce more than ninety percent of the Alaska North Slope (“ANS”) crude oil that is carried by TAPS to the Alyeska Marine Terminal. [Exc. 425-426]. The Shippers are corporations or limited liability companies organized under the laws of Delaware whose principal places of business are states within the United States.³ [Exc. 52]. Polar Tankers is a wholly-owned subsidiary of ConocoPhillips⁴ created in 2000 to ship ConocoPhillips’ oil. [Exc. 383, 468, 474, 477]. Essentially, Polar Tankers and ConocoPhillips are “the same.” [Exc. 477]. Polar Tankers is the successor in interest of ARCO Marine, Inc. [Exc. 188].

¹ SeaRiver Maritime, Inc. (“SeaRiver”) is a wholly-owned subsidiary of Exxon Mobil. [Exc. 429].

On April 4, 2006 Exxon Mobil Corp. and SeaRiver settled their interests in this case with Valdez. As a part of the settlement agreement, SeaRiver voluntarily dismissed its claims against the City. [*See City of Valdez v. Polar Tankers, Inc.*, Supreme Court Case No. S-12218 (February 9, 2006) Joint Motion for Dismissal of Party on Appeal.]

² Alaska Tanker Company, LLC (“ATC”) was formed April 1, 1999 in order to consolidate all shipping of British-Petroleum-owned oil into a single company. [Exc. 482]. ATC manages the operation of the vessels used to ship BP-owned oil from Valdez to points south. [Exc. 483]. British Petroleum pays all operating costs associated with the running of the vessels, including taxes. [Exc. 485-486, 491].

³ Polar Tankers’ principal place of business is California. [Exc. 52-53].

⁴ Polar Tankers receives all of its income from ConocoPhillips. [Exc. 479].

The Shippers' oil tankers are loaded with Alaska North Slope crude oil at the Alyeska Marine Terminal on a regular basis throughout the year. [Exc. 120-183]. In 1999, Shippers' vessels loaded approximately 345 million barrels of ANS crude oil at Valdez. [See Exc. 381, 401, 421-422]. This was about 90% of the annual TAPS throughput during this period. [Exc. 425-426]. The oil was transported mostly to ports on the West Coast and Hawaii but also to some foreign destinations as well. [Exc. 5]. The vessels each averaged about forty-two days in Valdez during the year. [R. 848].

C. The Vessels Taxed

The City taxed 35 vessels for tax year 2000. [Exc. 273 and 565-572]. The following chart summarizes the vessels taxed:

- 22** Oil tankers owned by Shippers (including ATC and SeaRiver), used *interstate*.
- 2** Oil tankers not owned by Shippers, used only *within Alaska waters*.
- 11** Tugs, barges and other vessels, used only *within Alaska waters* (*most are used only in and around the Port of Valdez*).⁵

TOTAL: 35 Vessels taxed

[Exc. 273 and 565-572].

Twenty-two of the vessels were tankers owned by the Shippers (including ATC and SeaRiver). [Exc. 273]. Polar Tankers owned six of the twenty-two tankers. [Exc. 565; R. 776-779]. Two of the taxed vessels were tankers not owned by the Shippers, operating only in Alaska waters. [Exc. 273]. Eleven taxed vessels were tugs, barges and other

⁵ In 2003, the City's right to tax the tugs and barges was established through administrative proceedings before the Alaska Department of Revenue. At that time, the City levied a tax on the tugs and barges, retroactive to 2000. [Exc. 561, 565-572].

vessels, used only within Alaska waters.⁶ [See Exc. 273-274, 565-572]. One vessel was a locally-owned tour vessel that was taxed on 100 percent of its assessed value, since all of its port days were spent in Valdez. [Exc. 317].

In tax year 2000, the City received roughly \$16.9 million from taxes on all real and personal property, excluding the vessels taxed under VMC § 3.12.020(A)(1). [Exc. 273, 565-572]. The same year, the Shippers together paid the City approximately \$1.9 million in ad valorem tax on their vessels. [Exc. 273]. Vessel taxes under VMC § 3.12.020(A)(1) paid by parties other than the Shippers in 2000 were about \$1 million. [Exc. 565-572]. Revenue from the Shippers in 2000 constituted about 9.6 percent of total municipal revenue from taxation of all real and personal property. [Exc. 273, 565-572].

II. Procedural Background

A. 1999-2000: Adoption Of Ordinance No. 99-17 and Resolution No. 00-15

On November 15, 1999, the City of Valdez adopted Ordinance No. 99-17, which imposed an ad valorem personal property tax on certain defined large vessels. [Exc. 107-113]. This enactment climaxed a long-term effort by the City to come to grips with the serious fiscal dilemma: the City's tax base was declining and would continue to decline further in the years to come. [Exc. 267]. Much of Valdez's tax base is oil and gas property, including a section of the Trans Alaska Pipeline System and the Alyeska Marine Terminal itself. [Exc. 273]. The State of Alaska assesses oil and gas property

⁶ The fleet of oil spill prevention and response tugs and barges stationed in and around the Port of Valdez ("SERVS vessels") is part of the oil spill contingency plan required by the Oil Pollution Act of 1990, 33 U.S.C.S § 2732 and Alaska Statute 46.04.030.

under AS 43.56 and then shares a portion of the taxes with the City. [Exc. 273].

Depreciation of the value of state oil and gas property was eroding Valdez's tax base.

[Exc. 273]. During the five years before the enactment of the vessel property tax, municipal budgets had decreased by approximately twenty-five percent. [Exc. 267]. In fact, in 1997 Valdez had enacted a version of the vessel tax to address the revenue decline, but withdrew it in an effort to work out a compromise with the Shippers.⁷ [See Exc. 276-278, 290].

The Valdez City Council determined that the vessel property tax needed to be reinstated. [Exc. 107-113, 267-268]. On November 15, 1999, the City enacted the revived Valdez Municipal Code § 3.12.020. [Exc. 107-113, 267-268]. On May 1, 2000, the City adopted Resolution No. 00-15, which specified the use of the port-day formula to apportion the value of vessels that had acquired situs in places other than Valdez. [Exc. 114-116].

The City promptly requested the additional information needed to apply the port-day formula to the various vessels. [Exc. 271]. On May 30, 2000, the Shippers responded and asked the City to apportion the value of their vessels using a non-port-day formula under Section 2 of the Resolution. [Exc. 271]. In early June 2000, final revised assessments were prepared using the port-day formula. [Exc. 271]. The City Manager

⁷ The 1997 vessel tax was repealed about two months after its enactment. The vessel tax payers, Governor Tony Knowles and others encouraged the City of Valdez to resume discussions with the Shippers and their corporate parents, i.e., BP, Exxon, and ConocoPhillips, in the hopes that an agreement for annual payments in lieu of taxes could be reached. [Exc. 267-268]. The parties ceased negotiations after two years of unproductive discussions. [Exc. 268, 276-278, 290, 299-301].

denied the Shippers' petitions for relief under Section 2, Resolution No. 00-15. [Exc. 271]. The Shippers appealed to the City Council. [R. 828-841].

On July 11, 2000, the Valdez City Council heard the Shippers' tax appeal. [R. 850-855, 876-894]. The Shippers argued that the City's "days in port" method was unfair and unconstitutional. [R. 878]. Notably, however, none of the vessels actually was taxed by any jurisdiction other than Valdez. [R. 880]. The Board denied the Shippers' appeal. [R. 855].

B. August 2000 - April 2006: Superior Court Proceedings

On August 18, 2000, the Shippers and other vessel property taxpayers sued Valdez in Alaska superior court challenging the constitutionality of VMC § 3.12.020 and Resolution No. 00-15, and raising other, non-constitutional claims. [Exc. 1-12]. Some of the plaintiffs voluntarily dismissed their claims without prejudice and others settled with the City during the litigation.⁸ [Exc. 23-25, 46-51]. The Shippers amended their complaint on August 21, 2003 and again on January 6, 2004. [Exc. 26-35, 52-60].

Each party moved for summary judgment in its favor on all claims. [Exc. 79-80, 192-194]. On July 26, 2004, the trial court granted summary judgment in favor of Polar Tankers and SeaRiver on the ground that the Valdez vessel property tax was an

⁸ On February 5, 2001, Crowley Marine Services, Inc., which owns most of the Ship Escort Response Vessels, dismissed its claims against the City without prejudice. [Exc. 23-25]. Likewise, Tesoro dismissed its claims without prejudice on February 5, 2001. [Exc. 23-25].

On November 19, 2003, British Petroleum Pipelines (Alaska), Inc., and ATC settled with Valdez. [Exc. 46-48]. These parties renegotiated their settlement agreement on December 6, 2005. As a part of the settlement agreement, ATC voluntarily dismissed its claims against the City. [Exc. 49-51].

unconstitutional duty of tonnage. [Exc. 550-559]. The City moved for reconsideration. [Exc. 560-578]. On September 23, 2004, the court granted the City's reconsideration motion and vacated the July 2004 summary judgment order. [Exc. 609-611]. In addition, the court asked the parties to submit supplemental briefing in response to seven specific questions posed by the court. [Exc. 609-611].

The parties submitted supplemental briefing and orally argued the issues. [Exc. 612-669]. On January 31, 2005, the court issued a second summary judgment order granting partial summary judgment in favor of Polar Tankers and SeaRiver. [Exc. 670-672]. The court held that the Valdez port-day apportionment formula (Resolution No. 00-15) created a "risk of multiple taxation" and therefore, violated the Due Process and Commerce Clauses of the U.S. constitution with respect to the Polar Tankers and SeaRiver vessels. [Exc. 671-672].

Plaintiffs submitted a proposed final judgment form. [Exc. 673-675]. Valdez objected to the proposed final judgment because it exceeded the scope of the trial court's summary judgment order. [Exc. 676-693]. The City contended that the apportionment formula, which the court had held to be unconstitutional as to plaintiffs, should be severed from the Ordinance, which remained in full force and effect. [Exc. 676-677, 680, 682-683]. On April 19, 2005, the court issued its third summary judgment order, essentially granting the City's request to sever the apportionment formula from the Ordinance. [Exc. 694-695].

On May 26, 2005, at a status conference, the parties agreed that summary judgment was appropriate on the outstanding issue in the case: whether the City's

Ordinance was a duty of tonnage and therefore, unconstitutional. [See R. 2237-2239]. On July 28, 2005, the court issued its fourth and final summary judgment order. The court granted the City's summary judgment motion and denied the Shippers' summary judgment motion, upholding the Ordinance as constitutional. [Exc. 696-701].

Further motion work ensued. The parties each submitted proposed final judgment forms. [Exc. 721-722; *see* Exc. 744-746]. On January 10, 2006, the court signed the form proposed by plaintiffs, with some minor revisions. [Exc. 744-746].

In addition, each party contended that it was the prevailing party, and asked the court to award it attorneys' fees. [R. 1862-1900, 1957-1967, 2251-2262]. After extensive briefing, the court held that neither party had prevailed and therefore required each party to bear its own costs and fees. [Exc. 811].

The City also moved to stay enforcement of the final judgment because Valdez would be irreparably harmed by the inevitable decrease in City educational funding resulting from the court's ruling on the port-day apportionment formula. [R. 1847-1861, 1955-1956, 2571-2585]. On March 10, 2006, the court stayed enforcement of the final judgment. [Exc. 809-810].

Finally, Valdez moved to clarify the final judgment to track the court's April 19, 2005 summary judgment ruling that the port-day apportionment formula was unconstitutional only as applied to Polar Tankers and SeaRiver. [Exc. 747-791]. The court denied the City's motion to clarify the final judgment. [Exc. 808].

This appeal followed.

STANDARD OF REVIEW

This is an appeal from the superior court's erroneous partial summary judgment ruling that Valdez's vessel tax apportionment formula was unconstitutional as applied to Polar Tankers and SeaRiver. The City contends that the superior court should have granted its motion for summary judgment and held the Valdez vessel tax, including the apportionment formula, to be constitutional.

The appellate court reviews a grant of summary judgment *de novo*.⁹ In reviewing an order of summary judgment, the appellate court must reverse if the pleadings and evidence presented reveal either the existence of any genuine issue of material fact or that the moving party is not entitled to summary judgment as a matter of law.¹⁰ The court reviews questions of law generally, including questions of constitutional law, *de novo*.¹¹ The court adopts the rule of law that is most persuasive in light of precedent, reason and policy.¹²

ARGUMENT

I. Introduction

The Valdez vessel property tax is constitutional. The superior court erred in holding that the apportionment formula in Resolution No. 00-15 was unconstitutional because it created the "risk of multiple taxation." [Exc. 671-672]. The test for

⁹ *Jackovich Revocable Trust v. State of Alaska*, 54 P.3d 294, 297 (Alaska 2002).

¹⁰ *Taranto v. North Slope Borough*, 909 P.2d 354, 355-56 (Alaska 1996) (citation omitted).

¹¹ *Jackovich*, 54 P.3d at 297 (citation omitted); *Newton v. Magill*, 872 P.2d 1213, 1215 (Alaska 1994).

¹² *Jackovich*, 54 P.3d at 297. (citation omitted).

determining whether the tax is fairly apportioned is whether it captures value reasonably attributable to the vessels' presence and activities in Valdez. The City's apportionment formula clearly meets this constitutional test.

In the superior court, the Shippers conceded that a substantial nexus exists between Valdez and the vessels such that Valdez has the authority under the Due Process and Commerce Clauses to tax the vessels. [Exc. 95]. In other words, the Shippers conceded that Valdez is a tax situs. Nevertheless, Valdez briefs and argues the substantial nexus/tax situs issue for two reasons. First, the "substantial nexus" Commerce Clause criterion is construed by most courts to be virtually identical to the "fair relation" criterion (*see* § VI below). Second, the Shippers argued in the superior court, and Polar Tankers continues to assert on appeal, that the Valdez vessel property tax is a duty of tonnage prohibited by the Constitution.¹³ The "tonnage" argument is that the Valdez tax is unconstitutional because it is a charge against the vessels solely for laying in Port Valdez. [Exc. 89-92]. The factual record on the extensive and substantial connections between the City, and the taxpayers and their oil-shipping vessels shows that the Valdez vessel tax is fairly related to them and that the tax is not imposed on them solely for laying in Port Valdez. [Exc. 212-217; Appendix A].

II. The Constitutional Standards: The Due Process And Commerce Clauses.

The Due Process and Commerce Clauses of the U.S. Constitution impose similar, though not identical requirements on taxes on property that moves among the states. Due

¹³ *City of Valdez v. Polar Tankers, Inc.*, Alaska Supreme Court Case Nos. S-12218/S-12223, (February 9, 2006), Polar Tankers' Statement of Points on Appeal.

process requires: 1) a “minimal connection” between the entity/property taxed and the taxing sovereign that justifies the assertion of jurisdiction; and 2) fair apportionment (i.e., a rational relationship between the tax and the intrastate values of the enterprise).¹⁴

Stated another way, due process requires that a tax be related “to opportunities, benefits, or protection conferred or afforded” by the taxing authority, and such a relationship exists “if the tax is fairly apportioned to the commerce [there] carried on.”¹⁵

The Commerce Clause requires a tax on mobile property used interstate to meet the four criteria set forth in *Complete Auto*: 1) The property taxed must have a “substantial nexus” with the taxing jurisdiction; 2) the tax must be fairly apportioned; 3) the tax must not discriminate against interstate commerce; and 4) the tax must be fairly related to the services provided by the taxing jurisdiction.¹⁶

Though the Due Process and Commerce Clause nexus and fair apportionment criteria overlap, the standards speak to different concerns and policies.¹⁷

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him.¹⁸

In contrast, the Commerce Clause and its nexus requirement focus on structural concerns

¹⁴ See *Atlantic Richfield Co. v. State of Alaska*, 705 P.2d 418, 430 (Alaska 1985).

¹⁵ *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *North Slope Borough v. Puget Sound Tug & Barge*, 598 P.2d 924, 928 (Alaska 1979).

¹⁶ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

¹⁷ See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 313 n. 7 (1992).

¹⁸ *Id.* at 312.

about the effect of state regulation on the national economy.¹⁹ The Commerce Clause nexus (and the fair relation) requirements limit the reach of state taxing authority to ensure that state taxation does not unduly burden interstate commerce.²⁰

The Valdez vessel property tax satisfies the nexus and fair apportionment criteria under both the Due Process and Commerce clauses. Given the overlapping constitutional standards, the City will address nexus and fair apportionment under the Due Process and Commerce clauses together in the following two sections of this brief. The City then will address the two additional criteria of nondiscrimination and “fair relation to services” under the Commerce Clause.

III. Valdez Is A Tax Situs: There Is A Substantial Nexus Between Valdez And The Benefits, Opportunities And Protection Afforded The Shippers.

Due process requires that a tax be related “to opportunities, benefits, or protection conferred or afforded” by the taxing authority.²¹ The Alaska Supreme Court, in *North Slope Borough*, found the “nexus” requirement of due process readily met. In that case, nonresident owners of tugs and barges challenged a Borough property tax on the vessels. The tax was apportioned based upon the fraction of the year each vessel was in the Borough.²² The owners maintained a land-based office in the Borough during the

¹⁹ *Id.*

²⁰ *Id.* at 313.

²¹ *North Slope Borough*, 598 P.2d at 928.

²² The taxed properties in *North Slope Borough* were seagoing vessels owned by U.S. corporations which did business in Alaska and had their principal places of business elsewhere. Each of the vessels had a “home port” in the U.S. outside Alaska. The vessels were on round trip voyages from the West Coast of the U.S. to Alaska when they became trapped in pack ice. The vessels were within the boundaries of the North Slope

shipping season and a camp in the Borough with both people and equipment. They had vessels within Borough waters both temporarily and continuously. They were “present in the Borough to participate in the commerce and traffic generated by the Prudhoe Bay oil fields located there, and their presence [was] presumably of benefit to them.”²³ The Borough offered police protection and certain health care services, which were available to the vessel owners and crews.²⁴ The availability of police and fire protection, the benefit of a trained work force and “the advantages of a civilized society” are some of the factors that indicate a nexus between the taxing jurisdiction and the taxpayer.²⁵ Significantly, the Alaska Court stated that, “[s]o long as such services were available whether they were utilized in fact is irrelevant.”²⁶

Similarly, in *Sjong v. State, Dep’t of Revenue*,²⁷ the Alaska Supreme Court upheld an Alaska State income tax, which was challenged on due process and commerce clause grounds. The taxpayer was a non-resident crab fisherman who fished off the coast of Alaska in international waters and sold his catch to Alaska processors.²⁸ The taxpayer bought supplies in Alaska, and had access in Alaska to emergency medical services, repair facilities and crew replacement, all of which clearly benefited his business

Borough for five months during one calendar year, and accordingly, were taxed on 5/12ths of their market value. *North Slope Borough*, 598 P.2d at 926.

²³ *North Slope Borough*, 598 P.2d at 928.

²⁴ *Id.*

²⁵ *Exxon Corp. v. Wisconsin Dep’t of Revenue*, 447 U.S. 207, 228 (1980); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979).

²⁶ *North Slope Borough*, 598 P.2d at 928 (citations omitted); *See also, Alaska Airlines, Inc. v. Oregon Dep’t of Revenue*, 769 P.2d 193, 200 (Or. 1989).

²⁷ *Sjong v. State, Dep’t of Revenue*, 622 P.2d 967 (Alaska 1981).

²⁸ *Id.* at 968-69.

operations.²⁹ Most importantly, the taxpayer's income was derived from sources in the State.³⁰ Under the circumstances, the Court concluded that there was a sufficient connection between the taxpayer and the State such that the imposition of a state income tax did not violate the taxpayer's due process rights.

The Shippers' presence and activities in Valdez are sufficient to allow the City to tax their vessels. All of the factors cited by the Court in *North Slope Borough* and *Sjong*--and many more--are present here. First, there is a direct and significant economic connection between the City and the Shippers. The Shippers' vessels come to Valdez to load ANS crude oil for delivery to other ports, mostly on the West Coast of the United States. [Exc. 456, 475-476]. Valdez is the only port in the United States at which the oil tankers load crude oil. [Exc. 475-476]. Essentially all of the Shippers' marine transportation business and income comes from loading oil at the Alyeska Marine Terminal.³¹ [Exc. 428, 452-453]. Shippers' vessels are Jones Act tankers built exclusively for the ANS trade and have very few practical alternative uses.³² [Exc. 203; see Exc. 439]. The Shippers' fleet of vessels constitutes, in essence, the marine extension of the TAPS system, and the vessels are continuously going in and out of the City. [See

²⁹ *Id.* at 970.

³⁰ *Id.* at 971.

³¹ For example, SeaRiver makes between 75 and 90 percent of its income from transporting ANS crude oil from Valdez to other ports. [See Exc. 428, 452-453].

³² See *In Re Exxon Valdez*, 236 F. Supp. 2d 1043 (D. Alaska 2002). Shippers are in the process of replacing this original fleet with double-hulled Jones Act tankers. This was mandated by the Oil Pollution Act of 1990, which was passed by a Congress energized by the public outrage over the *Exxon Valdez* oil spill in 1989, the largest oil spill in the history of the United States. 46 U.S.C. § 3703a(c).

Exc. 120-183]. In 1999, there were 22 of Shippers' vessels in the tanker fleet. [Exc. 273]. In 1999, the fleet spent 919 port days in Valdez. [See Exc. 120-150]. Averaged over the fleet, each vessel spent about 42 port days in Valdez. [See Exc. 120-150]. In fact, the Shippers and their respective production affiliates cooperate with other ANS crude oil producers in order to maximize the efficient use of the tankers to transport ANS crude to refineries.³³ [Exc. 434-435, 445, 454-455].

From the time the oil tankers pass between Hinchinbrook Island and Seal Rocks in the Prince William Sound until they dock at the Alyeska Marine Terminal, the tankers are required to travel in dedicated "lanes." [Exc. 321, 327-328]. Within the tanker lanes, the tankers have priority over all other marine traffic. [Exc. 321]. Although the Coast Guard regulates this traffic, the City of Valdez helps to keep the lanes clear of other marine traffic by advertising and posting notices and information concerning them. [Exc. 321]. The significant presence of the U.S. Coast Guard in Valdez is due to the existence of the Alyeska Marine Terminal and the operations of the Shippers.³⁴ [Exc. 321-322, 327-330].

³³ For efficiency purposes, the Shippers sometimes "exchange barrels" of oil at the Alyeska Marine Terminal in Valdez. [Exc. 434-435]. In a barrel exchange, one producer buys another's cargo of oil at the Terminal, and in turn, sells that cargo at the port where the oil is unloaded in order to facilitate the timing of crude deliveries at the refineries. [Exc. 434-435].

³⁴ After September 11, 2001, four anti-terror strategies involving the City were adopted to protect the oil tankers and the Alyeska Marine Terminal: 1) the Coast Guard doubled the number of its employees in Valdez, to about 70; 2) the City installed a Coast Guard "infrared" camera in its Police Dispatch area for surveillance of the harbor area; 3) the security zone in Port Valdez was expanded to include the area around the Terminal and the tankers themselves; and 4) the City provides educational notices relating to the increased security in Port Valdez. [Exc. 321-322].

The Coast Guard facility itself is tax exempt. [Exc. 321]. After the 1989 *Exxon Valdez* oil spill, the tanker escort program was instituted, and a separate docking and office facility was constructed in the City for the tugs and support vessels dedicated to this service. [Exc. 319-320].

When the Shippers tie up at the Alyeska Marine Terminal they are using a facility financed by \$1.3 billion in tax-exempt revenue bonds issued by the City. [Exc. 274]. Shippers discharge their “segregated ballast” directly into local waters.³⁵ The Shippers sometimes dock their vessels at the City’s Container Terminal for repairs, including the repair of hull fractures.³⁶ [Exc. 437-438, 469]. Their vessels also dock at the Container Terminal when they cannot leave Port Valdez but need to vacate a berth at the Alyeska Marine Terminal so that another vessel can load oil. [Exc. 438a, 446, 462-463].

Each of the Shippers has at least one employee who lives and works in Valdez. [Exc. 185, 189, 334]. SeaRiver maintains an office in Valdez. [Exc. 462]. The Shippers’ Valdez employees enjoy all the benefits and opportunities offered by the City: they use

The City’s support of security for the oil storage and transportation facilities and vessels located in Valdez was evident when a national “Code Orange” security alert was declared in December 2003. [Exc. 322]. The Port of Valdez was the only port in the United States closed temporarily because of the alert. [Exc. 322]. The Valdez City Police worked 12-hour shifts required by increased security demands, and the City was required to hold a briefing to quell residents’ fears. [Exc. 322].

³⁵ The tankers discharge “significant volumes” of “segregated ballast” at the Alyeska Marine Terminal into Port Valdez. [Exc. 440-441; *see* Exc. 470]. The segregated ballast is water from other ports, carried by the tankers to stabilize them on their voyage north to Valdez. [Exc. 440-441]. The discharge of ballast into the waters of Port Valdez and other ports has caused concern over the introduction of nonindigenous species. [*See* Exc. 447].

³⁶ The Shippers hire divers from either Valdez or Anchorage to locate and repair such leaks. [Exc. 437-438]. They use the Valdez Municipal Airport when obtaining divers and spare parts to repair their vessels. [Exc. 438a, 441].

the Municipal Airport, the local roads, and medical providers. [Exc. 448]. They shop at local stores, enjoy the protection of a local police force, use local recreational facilities and meeting facilities, and use the local post office. [Exc. 441, 448]. Further, the Shippers regularly hold meetings in Valdez at the Civic Center.³⁷ [Exc. 323]. The Shippers use the Valdez Airport when they change crew members in Valdez.³⁸ [Exc. 438-438a, 461, 477]. Crew members with medical emergencies have access to services in Valdez, such as the hospital.³⁹ [Exc. 441, 461-462].

City employees are involved in the oil spill contingency plans. [Exc. 322-323]. The police and City Manager participate in oil spill drills. [Exc. 322]. City services are made available in the event of an oil spill including police, fire response, emergency, and other medical resources. [Exc. 322].

The concern with preparedness is not just theoretical. Both the City of Valdez and the Shippers themselves live in fear of an oil spill, such as the 1989 catastrophe, in which the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound and hemorrhaged 11 million gallons of oil.⁴⁰ [Exc. 323-325, 490-491]. Though the spill occurred 20 miles outside the City limits, it had a profound impact on Valdez. [Exc. 323-325]. Hundreds of

³⁷ The City has an “Exceptional Use” agreement with Alyeska to allow it special use of Civic Center in the case of an emergency, such as an oil spill, and for use during spill drills. [Exc. 323]. There have been nine oil spill drills held at the Civic Center since January 1990. [Exc. 323].

³⁸ Each tanker carries between 20 and 26 crew members. [See Exc. 438].

³⁹ Valdez subsidizes the local hospital facility so that immediate, local medical care is available at all times not only to Valdez residents, but also, to those, such as tanker personnel, who transit through or near the City. [Exc. 322].

⁴⁰ See also, *In Re Exxon Valdez*, 236 F. Supp. 2d at 1047.

clean-up workers flooded into Valdez, and threatened to overwhelm City resources.⁴¹ [Exc. 323-325]. Though the City felt the brunt of the oil-spill clean-up effort for the first six months after the spill, clean-up efforts continued to consume City resources for more than three years afterward. [Exc. 323-325].

In sum, the Shippers' activities in Valdez dwarf those contacts found to be sufficient for taxation in *North Slope Borough* and in *Sjong*. The Shippers are physically present in Valdez not only when they call at the port, but also, because they maintain land-based offices and employees in the City. [Exc. 185, 189, 334, 462]. The Shippers' vessels are continuously in the City. [Exc. 120-183]. The Shippers enjoy the full benefit of a "civilized society," including access to all the amenities within the City, as well as protection from City police and the services of the medical personnel.⁴² [Exc. 322, 441, 448]. The Shippers make most of their income from the transportation of ANS crude. [Exc. 428, 475-476]. They are present in Valdez to "participate in the commerce and traffic" generated by the oil which flows to the Alyeska Marine Terminal. [Exc. 428, 475-476]. Their presence in Valdez is to their benefit. [Exc. 428, 475-476]. There is a "substantial nexus" between the Shippers' presence, their activities, and opportunities in the City, and the vessel property tax. Polar Tankers has conceded that Valdez has the

⁴¹ Over 100 people were housed in a vessel tied to the City Dock. [Exc. 323-325]. The City landfill was filling sooner than had been planned; the sewage treatment ponds were used beyond their capacity. [Exc. 323-325]. The City administration had to hold staff meetings twice a day in order to help coordinate clean-up efforts and delegate work to city employees. [Exc. 323-325]. City employees were diverted from their regular work, and enlisted in clean-up-related duties. [Exc. 323-325].

⁴² *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. at 228 (1980).

authority to tax its vessels under the Due Process and Commerce clauses. Valdez is a tax situs. [Exc. 95].

IV. The Vessel Property Tax Is Fairly Apportioned.

The question in this case is the extent to which Valdez constitutionally may tax Polar Tankers' vessels that are domiciled elsewhere and are operated among the states. The port-day apportionment formula is days in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation. [Exc. 115-116]. The formula excludes periods when a vessel is tied up because of strikes or withheld from Alaska service for repairs. [Exc. 115]. In other words, the City's apportionment formula, contained in Resolution No. 00-15, is:

Days in Valdez
Days in [Tax Situs] Ports Everywhere – Drydock days – Strike days

[Exc. 115-116].

The U.S. Supreme Court and state supreme courts consistently have accorded state and local governments great latitude in fashioning apportionment formulae. The taxpayer challenging an apportionment formula has the heavy burden of proving "the method of apportionment . . . [is] inherently arbitrary, or that its application to this [taxpayer] produced an unreasonable result."⁴³

Polar Tankers has failed to meet its heavy burden, both as a matter of law and as a matter of fact. Polar Tankers' presence and activities in Valdez are substantial. The vast majority of the Polar Tankers' income derives from the transportation of ANS crude oil

⁴³ *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) (citation omitted).

loaded only at Valdez. [Exc. 428, 475-476]. Yet, in 1999, the port-day formula captured an average of just 26% of the Shippers' vessels' value. [See Exc. 273, 338-391]. No other jurisdiction taxes Polar Tankers' vessels. [Exc. 102]. The port-day formula captures value reasonably attributable to Polar Tankers' presence and activities in Valdez.⁴⁴ Polar Tankers has failed to meet its heavy burden to prove otherwise. The apportionment formula is constitutional.

A. Property Taxes On Vessels Are Subject To The Rule Of Fair Apportionment.

The constitutional rules governing taxation of instrumentalities of interstate commerce, such as vessels, have evolved over the last several decades. For many years and into the 1940's, seagoing vessels could be taxed only at the domicile of the owner, or their "home port," in accordance with the maxim, *mobilia sequuntur personam* or "movables follow [the law of] the person."⁴⁵ This was known as the "home port" doctrine. However, in 1949, in *Ott v. Mississippi Barge Line*,⁴⁶ the U.S. Supreme Court held that vessels involved in interstate commerce on inland waterways could be taxed on an apportioned basis by a non-domicile jurisdiction where the vessel had otherwise acquired tax situs. Later, in *Standard Oil Co. v. Peck*,⁴⁷ the Court announced the corollary of *Ott*, and denied the domiciliary port the right to tax the entire value of vessels which were taxed elsewhere:

⁴⁴ See *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

⁴⁵ *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1911).

⁴⁶ *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949).

⁴⁷ *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952).

“[t]he rule which permits taxation on an apportionment basis precludes taxation of all the property by the state of domicile.”⁴⁸

Finally, in *Japan Line*, the U.S. Supreme Court reiterated its rejection of the “home port” doctrine with respect to instrumentalities of interstate commerce. The Court stated:

This theory of taxation [personal property taxed in full by the owner’s domicile], . . . has fallen into desuetude, and the “home port doctrine,” as a rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States. This Court, accordingly, has held that various instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel.⁴⁹

In *North Slope Borough*, the Alaska Supreme Court examined the history of the “home port” doctrine, and, following *Japan Line*, concluded that the “home port” doctrine no longer is good law.⁵⁰ Thus, non-domicile jurisdictions where tax situs is established may tax instrumentalities of interstate commerce if the tax is fairly apportioned.

B. The Port-Day Method Satisfies The Constitutional Standard For Fair Apportionment.

“[T]he central purpose [of the “fair apportionment”] prong of the *Complete Auto* test is to ensure that each State taxes only its fair share of an interstate transaction.”⁵¹ The test for determining whether a tax is fairly apportioned under the Commerce Clause

⁴⁸ *Id.* at 384 (citation omitted).

⁴⁹ *Japan Line, Ltd.*, 441 U.S. at 442 (citations omitted).

⁵⁰ *North Slope Borough*, 598 P.2d at 927.

⁵¹ *Goldberg*, 488 U.S. at 260-261 (citation omitted).

is whether it is “internally” and “externally” consistent.⁵² The risk of multiple taxation is analyzed through this framework. The Plaintiff’s vessels are not taxed in any jurisdictions other than Valdez. [Exc. 102]. There is no actual multiple taxation of the vessels here.

C. The Port-Day Method Is Internally Consistent.

At the trial court level, the Polar Tankers conceded that the port-day formula is internally consistent.⁵³ That is, if every other tax situs used a port-day apportionment formula identical to that of Valdez, the taxpayer, Polar Tankers, would not be subject to multiple taxation.⁵⁴

D. The Port-Day Method Is Externally Consistent.

The constitutional test of external consistency test asks whether the taxing jurisdiction has taxed only the portion of the interstate activity that reasonably reflects the in-state component of the activity being taxed.⁵⁵ The external consistency test is a practical inquiry.⁵⁶ “[I]n substance [it] is nothing more than another label for the fair apportionment requirement.”⁵⁷ The external consistency test looks at whether other states

⁵² *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

⁵³ See *Goldberg*, 488 U.S. at 261.

⁵⁴ See *id.* Internal consistency is measured by comparing the challenged tax against *identical* taxes hypothetically imposed by other states. *Id.*

⁵⁵ *Goldberg*, 488 U.S. at 262, *citing Container Corp.*, 463 U.S. at 169-170.

⁵⁶ *Goldberg*, 488 U.S. at 264.

⁵⁷ J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 4.15[2], 4-142 (3rd ed. 2005).

have passed statutes that, in conjunction with the challenged approach, create a risk of multiple taxation.⁵⁸

In *Sjong*,⁵⁹ the Alaska Supreme Court determined the constitutionality of the apportionment method by answering two questions: 1) Is the apportionment method as a whole constitutional; and 2) Is the apportionment method fair as applied to the individual taxpayer?⁶⁰ Under the *Sjong* analytical framework, the Valdez vessel property tax clearly is constitutional.

1. The apportionment formula as a whole is constitutional.

a. Taxing jurisdictions have wide latitude in devising apportionment formulas.

The U.S. Supreme Court has never invalidated an apportionment formula as unconstitutional on its face.⁶¹ That is because taxing jurisdictions have wide latitude in fashioning apportionment formulas.⁶²

The U.S. Supreme Court has upheld a variety of apportionment methods in the property tax context. In *Ott*, the Court approved Louisiana's statutory formula for vessels plying the Mississippi River using miles in the state divided by miles in the route or

⁵⁸ *Id* at 261.

⁵⁹ *Sjong*, 622 P.2d at 975.

⁶⁰ *Id.* at 976-78.

⁶¹ J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 8.12[1] at 8-221 (3rd ed. 2005); see also *Flying Tiger Line, Inc. v. County of Los Angeles*, 333 P.2d 323, 333 (Cal. 1958) (Traynor J., dissenting).

⁶² For instance, the U.S. Supreme Court repeatedly has held that a single-factor formula is presumptively valid. *Moorman Mfg.*, 437 U.S. at 273.

system.⁶³ In *Braniff Airways*, the Court upheld a three-factor formula for interstate aircraft based on ratios of arrivals/departures, revenue tons and originating revenues.⁶⁴ In *Japan Line*, the Court upheld, as a matter of interstate commerce analysis, California's apportionment scheme based on the "average presence" of taxpayer's units in California on the lien date.⁶⁵

The Alaska Supreme Court, too, has approved various allocation methods. As noted above, in *North Slope Borough*, the Court approved an ad valorem tax on ocean-going vessels based on the number of months they were icebound in the jurisdiction divided by twelve.⁶⁶ In *Atlantic Richfield*, the Court upheld a separate accounting approach in the alternative to traditional apportionment of nationwide net income for the taxation of oil and gas production and pipeline income.⁶⁷ And in *Sjong*, the Court upheld the port-day formula used to apportion the property factor in the three factor income tax allocation method.⁶⁸

As discussed below, Valdez's port-day apportionment formula is well within the bounds of the wide latitude accorded taxing jurisdictions.

⁶³ *Ott*, 336 U.S. at 171 n. 2.

⁶⁴ *Braniff Airways v. Nebraska Board of Equalization and Assessment*, 347 U.S. 590, 593 n. 4 (1954).

⁶⁵ *Japan Line*, 441 U.S. at 437.

⁶⁶ *North Slope Borough*, 598 P.2d 924.

⁶⁷ *Atlantic Richfield Co.*, 705 P.2d 418.

⁶⁸ *Sjong*, 622 P.2d 967.

b. The port-day method constitutionally may be employed to apportion the property factor for income taxes.

The port-day formula has been held constitutional in Alaska, California and Maryland for taxing business income.⁶⁹ In *Sjong*, the Alaska Supreme Court upheld the State's income tax that apportioned a taxpayer's business income to Alaska by averaging the results of a three-factor apportionment formula based on sales, payroll and property. The property factor in *Sjong* was calculated using the "port-day" method:⁷⁰ the number of days spent in ports inside the state divided by the total number of days in ports inside and outside the state (excluding idle time between fishing seasons or between charters).⁷¹ The taxpayer argued since more than 95% of his business activity was conducted outside of Alaska, a formula which allocates approximately 85-92% of his income to the State was manifestly unfair.⁷² The Alaska Supreme Court upheld the port-day formula as "constitutional on its face,"⁷³ noting:

[o]ur task is not to determine whether this formula is the best method of apportioning income, but merely whether it is fairly calculated to assign to the state that portion of net income reasonably attributable to the business done in the state.⁷⁴

⁶⁹ *Sjong*, 622 P.2d 967; *Luckenbach Steamship Co. v. Franchise Tax Board*, 33 Cal. Rptr. 544, 551 (Cal. App. 1963); *Sea-Land Service, Inc. v. Comptroller of the Treasury*, 1984 WL 2910 (Md. Tax 1984).

⁷⁰ The port-day method upheld in *Sjong* was taken from AS 43.20.130(g) (repealed ch. 70, § 13, SLA 1975). The port-day formula in the statute applied to water transportation carriers operating in interstate commerce.

⁷¹ *Sjong*, 622 P.2d at 977.

⁷² *Id.*

⁷³ *Id.* at 977-78.

⁷⁴ *Id.* at 977.

Significantly, the *Sjong* Court refused to require the Alaska Department of Revenue to use a “voyage-day” ratio rather than one based on “port-days” to apportion property value.⁷⁵

Likewise, in *Luckenbach*, the California Supreme Court approved the port-day formula to apportion a shipping company’s property in the state. The tax at issue in *Luckenbach* was an income tax, apportioned in relation to the sum of three factors.⁷⁶ The port-day ratio was applied to the property factor. The Court noted that there are a variety of ways in which taxpayer activity in a jurisdiction may be measured constitutionally, but that apportionment formulae often focus on one or more of three dimensions: time, space or production.⁷⁷ The ratio of days in the jurisdiction divided by 365 (the voyage-day formula) measures only time. The ratio of voyage miles in the jurisdiction divided by total voyage miles (the voyage miles formula) measures only geographical space. The ratio of days in one port divided by days in all ports (the port-day formula) measures “productive-time.” The port-day formula apportions the value of the ship based upon the productive time it spends at port, but the voyage-day formula does not. Under the voyage-day formula, all time is treated alike, whether or not it is associated with

⁷⁵ *Id.* at 977-78.

⁷⁶ “California, like a number of other states, employs a three-factor income tax formula consisting of property, payroll and revenue. The formula basically is the average of the percentages of property, payroll and revenue located in California multiplied by the taxpayer’s unitary net income. *Luckenbach*, 33 Cal. Rptr. at 547.

⁷⁷ *Id.* at 549.

“productive activity.”⁷⁸ The Court noted that the Constitution does not require any particular apportionment formula:

Allocation formulae devised for specialized use in the taxation of interstate transportation commonly take account of one or more of these dimensions. But insistence on measurement of one or two of these dimensions to the exclusion of the remainder rests on a distortion. We must not adopt the attitude of the blind man who seized the elephant's tail and compared the animal to a rope. It is enough that the formula rest on one or a combination of logically relevant factors.⁷⁹

Thus, courts have found the port-day method is a constitutionally permissible basis for apportioning property for income tax purposes.

c. Productivity measures such as the port-day method are regularly employed to apportion property taxes.

The wide latitude granted states in adopting apportionment formulae, subject only to the rule against gross distortion, applies in the property tax context as well.⁸⁰ This includes ad valorem apportionment formulae that focus solely or partly on the productivity dimension, such as the port-day formula.

In *Braniff Airways*, for example, the Court held that non-domicile Nebraska could impose an apportioned property tax on Braniff Airways' planes operating in interstate air routes and habitually employed in the state.⁸¹ In *Braniff Airways*, Nebraska apportioned the ad valorem value of airplanes under the uniform statute by averaging the following three ratios: (1) arrivals and departures in state divided by arrival and departures within

⁷⁸ *Luckenbach*, 33 Cal. Rptr. At 549.

⁷⁹ *Id.* at 549-550 (internal citations omitted).

⁸⁰ *Norfolk & W.R.R. Co. v. Tax Commission*, 390 U.S. 317, 323-25 (1967).

⁸¹ *Braniff Airways*, 347 U.S. 590.

and without the state; (2) revenue tons handled in state divided by revenue tons handled within and without the state; and (3) originating revenue in the state divided by originating revenue within and without the state.⁸² All three allocation ratios measure “production” attributable to activity that occurs in the state; none is based on the taxed property’s actual physical presence (in the sense of actual time or miles) in the taxing jurisdiction. Although resolution of *Braniff Airways* turned on the issue of whether the state was a tax situs, the U.S. Supreme Court let the model formula stand.⁸³

In *Alaska Airlines*,⁸⁴ Oregon, a non-domicile, used a different formula to apportion the value of aircraft for property tax purposes. Oregon apportioned aircraft value by taking the total time in Oregon airspace plus a half hour for each time an aircraft landed in Oregon and dividing that sum by the sum of the same measure for all states.⁸⁵ Thus, aircraft value was apportioned as a function of productive time, which was measured by time during which the aircraft were being used. The airlines challenged the Oregon property tax on Due Process and Commerce Clause grounds. The Oregon Supreme Court held the formula to be constitutional.

The Plaintiff has failed to meet its heavy burden to prove that Valdez’s vessel property tax is unconstitutional as a whole. Vessel value constitutionally may be

⁸² *Id.* at 591 n. 4. The Nebraska apportionment formula in *Braniff* was the existing model formula adopted by the Council of State Governments.

⁸³ *Id.* at 600-01.

⁸⁴ *Alaska Airlines, Inc. v. Department of Revenue*, 769 P.2d 193 (Or. 1989).

⁸⁵ *Id.* at 195-96.

apportioned using the port-day method. The apportionment formula is constitutional as a whole.

2. The port-day method is fair as applied to Polar Tankers.

The port-day apportionment formula is constitutional as applied to the particular taxpayer, Polar Tankers.⁸⁶ An apportionment formula is overturned as unconstitutional as applied only if the formula, when compared with the taxpayer's business transacted in the jurisdiction, has "led to a grossly distorted result."⁸⁷ The taxpayer challenging the apportionment formula has the heavy burden of proving by "clear and cogent evidence" that application of the formula has led to a grossly distorted result.⁸⁸ Polar Tankers has failed to meet its heavy burden to prove that Valdez's vessel property tax leads to grossly distorted results in this case. The apportionment formula is constitutional.

In this case, the port-day apportionment method reasonably reflects the in-state component of the activity being taxed. Valdez has taxed only the portion of the vessels' value that reasonably reflects their activities in the City. The vessels' value largely derives from the valuable cargo they transport. [See Exc. 428, 475-476]. Polar Tankers' vessels are part of a fleet dedicated to transporting millions of barrels of oil worth billions of dollars from Alaska annually to points south. Yet, in 2000, Polar Tankers paid the City about \$440,000 in property tax on its tankers. [Exc. 273]. Valdez is the only port at

⁸⁶ *Sjong*, 622 P.2d at 975.

⁸⁷ *Moorman Mfg.*, 437 U.S. at 274; *see Container Corp. v. Franchise Tax Bd.*, 463 U.S. at 164, 171.

⁸⁸ The U.S. Supreme Court repeatedly has held that a single-factor formula is presumptively valid. *Moorman Mfg.*, 437 U.S. at 273.

which the tankers load oil. [Exc. 475]. The vast majority of the Polar Tankers' income comes from the transportation of ANS crude oil. [Exc. 428]. Clearly, the port-day formula, which captures an average of only 26% of the vessels' value, is fair. [See Exc. 273, 338-391].

E. The Port-Day Formula Does Not Tax "Extraterritorial Value" Of The Vessels.

In the trial court, Polar Tankers contended that the City's apportionment formula is unconstitutional because it taxes "extraterritorial values." [Exc. 56]. Polar Tankers argued that, since the time its vessels spend transiting international waters and in dry-dock is not included in the denominator of the port-day fraction, the formula necessarily includes values outside the constitutional reach of the City. [Exc. 56].

Polar Tankers' contention is irrelevant and erroneous. Implicit in Polar's argument about extra-territorial taxation is the assumption that the vessels do not use Valdez resources when they are outside the City limits. [See Exc. 99-101]. This is incorrect as a matter of fact. The impact of the *Exxon Valdez* oil spill on the City of Valdez abundantly reveals the error of Polar's assumption. [Exc. 323-325]. Although the 1989 spill occurred 20 miles outside the City limits and about 35 to 40 miles from downtown Valdez, it had a profound impact on Valdez for up to three years afterward. [Exc. 323-325]. In short, the Shippers, including Polar Tankers, do rely on City resources, sometimes even when they are outside the City limits.

In addition, the requirement of fair apportionment under the constitution is couched in terms of *activity*, and not in terms of physical presence. The City need not

show a direct relationship between services it provides and the revenues generated by the tax, nor demonstrate the use of any extra-jurisdictional services.⁸⁹ In *Sjong*, the Alaska Supreme Court rejected the taxpayer's constitutional challenge of the law based merely on a comparison of the percentage of business activity in the jurisdiction with that outside the jurisdiction.⁹⁰ Even though 95% of the fisherman's activities took place *outside* the jurisdiction, Alaska taxed 85 to 92% of his income.⁹¹ The Court did not see the disparity as an unconstitutional "gross distortion," and observed:

[T]here [is] nothing unconstitutional about a tax which is contingent upon events brought to pass without a state, so long as there is a nexus between such tax and transactions within a state for which the tax is an exaction. Due process does not prohibit a formula which considers out-of-state activity in evaluating the local activity.⁹²

In this case, Valdez's port-day formula arrives at values reasonably attributable to the presence and use of the vessels in the City in comparison to their presence and use in other jurisdictions. The average allocation of 26% of vessel value to the City is reasonable in light of the allocation upheld in *Sjong*, and in light of the fact that virtually all of Polar Tankers' oil shipping business and income are derived from its activities in Valdez. [Exc. 428, 475-476].

⁸⁹ See *North Slope Borough*, 598 P.2d at 928.

⁹⁰ *Sjong*, 622 P.2d at 977.

⁹¹ *Id.* at 977-978.

⁹² *Id.* at 977 (citations omitted).

F. The Port-Day Formula Does Not Create The Risk Of Multiple Taxation.

In the trial court, Polar Tankers contended that Valdez's apportionment formula was unconstitutional because it "creates the risk of multiple taxation." The superior court agreed. [Exc. 670-672]. However, this is not the standard by which the constitutionality of an apportioned tax is measured. The constitutional test is whether Valdez taxes value reasonably attributable to the Polar Tankers' activities in the jurisdiction. The constitutional standard is flexible. Not all multiple taxation is prohibited by the constitution.

In *Moorman Manufacturing*, the U.S. Supreme Court refused to hold the challenged apportionment formula unconstitutional though its application theoretically could have caused the taxpayer to be subjected to multiple taxation.⁹³ The Court admitted that a uniform method of taxation would be preferable to the varied and sundry state taxation schemes. However, the Court viewed this as essentially a legislative task. The Court refused to engage in the substantial "judicial lawmaking" that would be required to enforce uniformity. Therefore, the Court upheld the challenged apportionment formula, although it differed from the uniform formula adopted by 44 other states.⁹⁴ According to the Court, any overlapping taxation was merely the result of applying two different apportionment formulas, a result to be expected in a system with

⁹³ *Moorman Mfg. Co.*, 437 U.S. at 276-81.

⁹⁴ *Id.* at 278-81, 283-84 and 283-84 n. 1.

non-uniform tax laws.⁹⁵ The Court concluded that overlapping taxation was not to be attributed solely to the one apportionment formula, and did not render the formula unconstitutional.⁹⁶

No jurisdiction other than Valdez imposes a property tax on Polar's vessels. [Exc. 102]. Nevertheless, Polar, in briefing below, posed a hypothetical to make its case of *possible* multiple taxation *if* one of the vessel's dry dock jurisdictions were to impose a tax. [Exc. 97-99, 101-103].

There is no risk in this case that Polar's vessels would be subject to multiple taxation because Polar Tankers' dry dock jurisdictions cannot tax the vessels. Polar Tankers dry docks its vessels outside the United States, in Asia. [Exc. 190]. Polar's vessels are registered in the United States. [See Exc. 85]. Since only the nation of a vessel's registry may tax it as property, the foreign jurisdictions where Polar dry docks its vessels cannot tax them.⁹⁷ Thus, with respect to Polar's vessels, overlapping taxation between Valdez and a dry dock jurisdiction is not possible.

Polar Tankers also contended that the port-day formula creates the risk of multiple taxation since it excludes from the denominator time the vessels spend in international waters. [Exc. 97-99, 101-103]. Polar based its argument on the following flawed assumptions:

1. The property owner's domicile can tax, regardless of whether the property was ever or is present there.

⁹⁵ *Id.* at 277 and 277 n. 12; *Atlantic Richfield*, 705 P.2d at 435-36.

⁹⁶ *Moorman Mfg.*, 437 U.S. at 280-81.

⁹⁷ *See Japan Line*, 441 U.S. at 447 n.11.

2. The non-domicile jurisdiction can tax only in direct proportion to the property's physical presence in the jurisdiction (either days in the jurisdiction/365 or miles in the jurisdiction/miles everywhere).
3. The only limitation on the taxing power of the domicile jurisdiction is the property's actual physical presence of the property in another jurisdiction.

Polar reaches the following mistaken conclusion based on its false assumptions:

Since Valdez does not apportion its tax based on the vessels' time or miles in the jurisdiction, its apportionment formula necessarily captures part of the vessels' value not reasonably attributable to their activities in the City.

[Exc. 95-103]. If any one of the three assumptions is false, Polar's entire argument collapses like a house of cards.

The first assumption is simply incorrect as a matter of law. Under *Union Refrigerator Transit*, not even the domicile can tax property if it never has been there.⁹⁸ More recently, in *Bi-Go Markets*, the Missouri Supreme Court held that the New Hampshire domicile of an airplane that spent most of its time in Missouri lacked the authority to levy a property tax on the airplane.⁹⁹ The Missouri Court therefore allowed Missouri, a non-domicile state, to levy a tax on the full value of the airplane (i.e., an unapportioned tax).¹⁰⁰ The Missouri Court reasoned:

[T]he domiciliary retains the right to tax personal property not located in the state only when it has *not* been shown that the property acquired a tax situs elsewhere.¹⁰¹

⁹⁸ *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 201, 206, 210-11 (1905) (holding that the domicile cannot tax tangible property permanently outside the domicile and having no situs within the domicile).

⁹⁹ *Bi-Go Markets, Inc. v. Morton*, 843 S.W.2d 916, 918-20 (Mo. 1992).

¹⁰⁰ *Id.* at 920.

¹⁰¹ *Id.* at 919, citing *Braniff Airways*, 347 U.S. at 601.

According to the Missouri Court,

When personal property has acquired a tax situs elsewhere, the domicile loses its jurisdiction to tax unless the domicile can establish the property is deriving substantial “opportunities, benefits, and protections” from the state by habitual or continuous use within the state.¹⁰²

The fallacy of Polar’s assumption is borne out by the facts in this case. For example, the undisputed evidence is that no SeaRiver vessel ever has been in Texas, the SeaRiver vessels’ state of domicile. [See Exc. 133-142]. Therefore, the domicile of the SeaRiver vessels cannot tax them. Polar’s first and third propositions are false as a matter of law and fact.

Polar’s second assumption likewise is false. The constitutional test for fair apportionment is: the non-domicile tax situs can tax *value* reasonably attributable to the taxpayer’s activities in the jurisdiction. Polar has cited no case that holds that a non-domicile tax situs, such as Valdez, constitutionally can apportion the value of movable personal property *only* based on time or mileage in the jurisdiction.

Property *value* can be apportioned in a variety of different ways, including by port days in jurisdiction divided by port days everywhere.¹⁰³ The City’s apportionment formula must be evaluated according to the constitutional standard of fair apportionment. The Valdez formula is constitutional because the City has taxed only that portion of value reasonably attributable to Polar’s presence and activities in the jurisdiction. The Valdez

¹⁰² *Id.* at 919-920 (citation omitted).

¹⁰³ *Luckenbach*, 33 Cal. Rptr. at 549-50.

formula fairly taxes Polar for the “benefits, opportunities and protections” afforded it by the City. Valdez’s apportionment formula is constitutional.

V. The Vessel Property Tax Does Not Discriminate Against Interstate Commerce.

The City’s choice to tax large vessels and then exempt some does not make the Tax unconstitutional. The constitution does not require the City to tax in a manner that would be the most inclusive, though also the most burdensome administratively.¹⁰⁴ Further, AS 29.45.050(b)(2) grants to municipalities, such as Valdez, the broadest possible latitude in classifying and exempting personal property for taxation purposes.¹⁰⁵ Alaska Statute 29.45.050(b)(2) states:

A municipality may by ordinance . . . classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes.

Generally, it is presumed that the legislature has not acted unreasonably or arbitrarily, and the party challenging a statute has the burden to establish its unconstitutionality.¹⁰⁶ Legislative bodies “have especially broad latitude in creating . . . distinctions in tax statutes.”¹⁰⁷ The taxing authority must have a rational basis for a

¹⁰⁴ See *Braniff Airways*, 347 U.S. at 591-93 (the U.S. Supreme Court let stand a Nebraska tax on airline equipment that was part of a statutory property tax system that was rife with exemptions).

¹⁰⁵ See also, *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 359 (Alaska 1971) (the constitution does not impose an “iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of . . . taxation.”).

¹⁰⁶ *Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d at 401-02.

¹⁰⁷ *Atlantic Richfield*, 705 P.2d at 437 (citation omitted).

distinction, and must not resort to one that is palpably arbitrary.¹⁰⁸ However, courts apply a practical approach when considering the question of the constitutionality of distinctions in tax statutes.¹⁰⁹

Polar Tankers' entire Commerce Clause discrimination argument can be summed up as follows:

The majority of vessels within the taxed class are Shippers'. The Shippers' vessels are used in interstate commerce. Therefore, the Tax discriminates against interstate commerce.

[See Exc. 104].

The focus of the anti-discrimination part of the Commerce Clause is on "free trade" among the states.¹¹⁰ Court decisions that discuss discrimination compare the tax burden on out-of-state residents with the tax burden on in-state residents *in the same business*. The cases compare the tax burden imposed on an *interstate* enterprise with the burden imposed on a *competing intrastate enterprise of like character*.¹¹¹ For example, in considering the Commerce Clause discrimination claim in *Dunbar-Stanley Studios*, the U. S. Supreme Court compared the tax burden on non-resident photographers with resident photographers.¹¹² In short, the Commerce Clause prohibits legislation that favors local business over competing interstate business.

¹⁰⁸ See *K & L Distributors*, 486 P.2d at 359.

¹⁰⁹ *Id.*

¹¹⁰ *Moorman Mfg.*, 437 U.S. at 287-88; see *Goldberg v. Sweet*, 488 U.S. at 259.

¹¹¹ *Complete Auto Transit*, 430 U.S. at 282 (citation omitted).

¹¹² *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 542 (1969).

In practice, the anti-discrimination principle does not require much more than that a tax is fairly apportioned.¹¹³ For example, in *Atlantic Richfield*,¹¹⁴ the Alaska Supreme Court concluded that a state apportionment formula that did not inevitably result in overlapping or duplicative taxation did not discriminate against interstate commerce. Thus, an apportionment formula may not differ so substantially from methods of allocation used by other jurisdictions in which the taxpayer is subject to taxation as to produce double taxation, and a resultant tax burden higher than the taxpayer would incur if its business were limited to a single jurisdiction.¹¹⁵

In this case, for Commerce Clause discrimination purposes, the proper focus is not whether the Valdez tax rationally distinguishes between oil tankers and commercial fishing vessels, or between large and small vessels. The question is whether the tax treats non-resident oil transporters, such as the Shippers, the same way it treats in-state oil transporters.

There is no actual multiple taxation of the vessels in this case since Valdez is the only jurisdiction that levies an ad valorem tax on the vessels. In addition, the tax is facially neutral; it applies equally to all large vessels within the defined class, oil tankers and others alike, regardless of whether they engage in purely interstate or intrastate business or whether they engage in commerce. Eleven of the 35 vessels taxed in tax year 2000 were tugs, barges and other vessels, used only within Alaska waters. [Exc. 273-274

¹¹³ *Container Corp.*, 463 U.S. at 169-71.

¹¹⁴ *Atlantic Richfield*, 705 P.2d at 436.

¹¹⁵ *Id.*

and 565-572]. One vessel was a locally-owned tour vessel that was taxed on 100 percent of its assessed value. [See Exc. 273 and R. 779].

Further, the Valdez tax has been applied equally to vessels within its ambit, regardless of the nature of the business in which the vessels were engaged. The tax treats non-resident oil transporters exactly the same way it treats in-state oil transporters. [Exc. 293-295, 310; *see also* Exc. 239-240]. For example, in 1999, an oil tanker operated by Tesoro mostly transported crude oil strictly within Alaska. [See Exc. 310]. With respect to the 1997 (predecessor) version of the vessel property tax (Ordinance No. 96-35), Tesoro expressly asked to be exempted from the tax for the intrastate transportation of crude oil to its Nikiski Refinery. [See Exc. 293-295]. The Valdez City Council rejected Tesoro's request then, and the exemption was not included in the existing Ordinance. [Exc. 107-109]. Thus, the City refused to exempt intrastate oil transporters from the tax. Clearly, the City's tax does not give competitive advantage to intrastate versus interstate oil transporters.

The Valdez tax falls equally on qualifying large vessels whether or not they are engaged in interstate commerce, and whether or not they are engaged in crude oil transportation. The Valdez vessel property tax is constitutional.

VI. The Vessel Property Tax Is Fairly Related To The Services Provided To The Shippers.

The vessel property tax is a general revenue tax. As a rule, taxing sovereigns have

“considerable latitude” in imposing such taxes.¹¹⁶ A tax is not an assessment of benefits. It is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.¹¹⁷

In order to satisfy the fourth criterion of the *Complete Auto* test, the entity taxed must enjoy some benefits provided by the taxing jurisdiction.¹¹⁸ However, the tax need not be limited to the cost of the services provided.

On the contrary, “interstate commerce may be required to contribute to the cost of providing all government services, including those services from which it arguably receives no direct ‘benefit.’” . . . The fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. . . . [A] taxpayer’s receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satis[fi]y the requirement that the tax be fairly related to benefits provided by the State to the taxpayer.¹¹⁹

The “just share of state tax burden” includes sharing in the cost of providing “police and fire protection, the benefit of a trained work force, and ‘the advantages of a civilized

¹¹⁶ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981).

¹¹⁷ *Id.* at 622-23.

¹¹⁸ *Goldberg v. Sweet*, 488 U.S. at 267.

¹¹⁹ *Id.*

society.”¹²⁰ “The simple but controlling question is whether the [taxing jurisdiction] has given anything for which it can ask return.”¹²¹

The “fair relation” criterion of *Complete Auto* in practice has not required much beyond the existence of a “substantial nexus” between the taxing jurisdiction and the taxpayer.¹²² The measure of the tax must be reasonably related to the extent of the contact with the taxpayer, since it is the activities or presence of the taxpayer in the jurisdiction that may properly be made to bear a “just share of the . . . tax burden.”¹²³ However, the “fair relation” prong does not require “a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity . . .”¹²⁴ The legislature, not the judiciary, determines the appropriate level or rate of taxation.¹²⁵

The vessel property tax, apportioned using the port-day formula, fairly relates to Polar Tankers’ activities in the City. For more than 20 years since the start up of the Trans Alaska Pipeline System (“TAPS”) line in 1977, Shippers have sent their vessels to the City on a regular and continuous basis to load their cargoes. [Exc. 120-191]. Over the years, they have transported billions of dollars worth of crude oil to refineries in the Lower 48 and, more recently, to some in foreign ports as well. [Exc. 185, 189, 381, 401, 421-422]. Until the year 2000, the Shippers were not required to pay any taxes to the

¹²⁰ *Exxon Corp. v. Wisconsin Dep’t of Revenue*, 447 U.S. 207, 228 (1980).

¹²¹ *Commonwealth Edison*, 453 U.S. at 625 (citation omitted).

¹²² L. Tribe, *American Constitutional Law*, §6-15 at 443 (2nd Ed. 1988).

¹²³ *Commonwealth Edison*, 453 U.S. at 626.

¹²⁴ *Id.* at 627.

¹²⁵ *Id.*

City in which they essentially receive all of their business as shipping companies. [See Exc. 186, 190-191, 428]. Beginning in 2000, Valdez levied a tax whose practical effect is viewed by the Shippers themselves as “not a big thing all by itself...” [Exc. 491]. Unquestionably, as detailed in Section III of this brief, the Shippers, including Polar Tankers, enjoy the many advantages of a civilized society in Valdez: the benefit of a trained work force, police protection and port security, access to medical providers and facilities, access to spill contingency resources and, of course, access to the Alyeska Marine Terminal, financed in large part by the City’s tax-exempt revenue bonds. [Exc. 274]. Clearly, the tax is fairly related to the services provided to the Shippers.

The Valdez vessel property tax meets all Due Process and Commerce Clause requirements. The tax, including the apportionment formula, is constitutional.

VII. The Final Judgment Is Defective And Must Be Reversed.

The Final Judgment must be reversed because it violates the constitutional separation of powers. In addition, the Final Judgment fails to sustain Valdez’s vessel tax in accordance with the law.

On January 10, 2006, the trial court entered Final Judgment in this case. [Exc. 744-746]. The final judgment provided, in part:

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-19 [sic] violates the Due Process and Commerce Clauses and therefore is unconstitutional as applied to Polar Tankers, Inc., and SeaRiver Maritime, Inc.

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code § 3.12.020, does not violate the Tonnage Clause and therefore can remain in full force and effect; *however, until the City adopts a constitutional*

apportionment formula, it can not collect any further tax under Ordinance 99-17 from Polar Tankers, Inc., or SeaRiver Maritime, Inc.

3. The City is permitted to levy the vessel tax under Ordinance 99-17 against Polar Tankers, Inc., and SeaRiver Maritime, Inc., *once a constitutional apportionment formula is adopted.*

4. *The City shall adopt a constitutional apportionment formula and use that constitutional apportionment formula to recalculate all taxes paid by Polar Tankers, Inc., and SeaRiver Maritime, Inc.,...*

[Exc. 741] [emphasis added].

The trial court should have clarified the Final Judgment as proposed by Valdez.

[Exc. 733-737, 742-743; 747-791, 800-802]. The first numbered paragraph should have been modified to read:

The port-day apportionment formula contained in Valdez Resolution 00-15 is unconstitutional as applied only to Polar Tankers.

[Exc. 721-722]. Such a modification would have avoided the current litigation nightmare, in which non-party vessel taxpayers now contend that the apportionment ruling in this case applies equally to them.¹²⁶ [Exc. 747-748, 758-763, 769-770].

The second two numbered paragraphs of the Final Judgment are equally defective. They bar Valdez from collecting any further tax from Polar Tankers and SeaRiver Maritime “until the City adopts a constitutional apportionment formula.”

The trial court’s affirmative injunction against Valdez poses two problems. First, the court has legislated by judicial fiat, in violation of the constitutional separation of powers. Second, the Final Judgment does not sustain the City’s vessel tax in accordance

¹²⁶ See Crowley Marine Services and Prince William Sound Oil Spill Response Corporation v. City of Valdez, 3AN-04-13039 CI.

with statutory construction rules. Each of these defects requires reversal of the Final Judgment.

The separation of powers doctrine is implied in the Alaska Constitution.¹²⁷ The State Constitution vests the legislative power of the City of Valdez in its City Council.¹²⁸ A home rule city, such as Valdez, may exercise all legislative powers that are not prohibited by law or by charter, including the power to tax.¹²⁹ Valdez has exercised its constitutional power to tax by adopting its vessel tax (Ordinance No. 99-17) and apportionment resolution (Resolution No. 00-15).

Under the Alaska Constitution, judicial power is vested in the supreme court, superior court and the courts established by the legislature.¹³⁰ The superior court has the power to hear all controversies which may be brought before it within the legal bounds of rights or remedies, unless specifically denied by the Alaska Constitution or statutes.¹³¹ The extent to which a court can imply terms into statutes (or ordinances) is limited by the separation of powers doctrine, which prohibits the court from “enacting legislation or redrafting defective statutes.”¹³² Thus, under the Alaska Constitution, this Court’s power

¹²⁷ *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

¹²⁸ Alaska Constitution, art. X, §§ 8, 11.

¹²⁹ Alaska Constitution, art. X §§ 2, 11.

¹³⁰ Alaska Constitution, art. IV, § 1.

¹³¹ Alaska Constitution, art. IV, § 3; *see K.C.M. v. State*, 627 P.2d 607, 610 (Alaska 1981).

¹³² *State v. Campbell*, 536 P.2d at 111.

does not include the power to legislate either directly or indirectly, by “compelling” the City to “legislate” in a particular way.¹³³

On January 10, 2006, the trial court signed the Final Judgment, which barred Valdez from collecting taxes from Polar Tankers and SeaRiver “until the City adopts a constitutional apportionment formula.” [Exc. 744]. The Shippers concede that a voyage-day (days in port/365) apportionment formula is constitutional (assuming the City has the constitutional right to tax the Shippers’ vessels). [Exc. 97 n. 45]. However, the Shippers wanted the court to compel Valdez to adopt an entirely new apportionment resolution because it would benefit not only themselves, but also, arguably, other taxpayers who have challenged the constitutionality of the City’s vessel tax and apportionment formula in separate litigation, and who also are represented by Shippers’ counsel, Mr. Leon Vance.¹³⁴

The Court violated the separation of powers doctrine implied in the Alaska Constitution by compelling the City to adopt “a constitutional apportionment formula.” In accordance with the Alaska Constitution, the Court either should have allowed the City to apply a non-port-day apportionment formula under Section 2 of Resolution No. 00-15, or should have remanded the case with instructions for the City Council to adopt a non-port-day apportionment formula. But the Court could not compel Valdez to adopt a

¹³³ *Id.* at 110-111 and n. 19.

¹³⁴ It stands to reason that the City is reluctant to adopt two different apportionment resolutions (formulas) for the vessel taxpayers, all of whom are within the class of taxpayers defined in Ordinance No. 99-17. *See* Alaska Superior Court case, *Crowley Marine Services, Inc., et al., v. City of Valdez*, 3AN-04-13039CI.

particular apportionment formula without “legislating” in violation of the separation of powers doctrine. Further, the Court erroneously compelled the City to adopt a “constitutional” apportionment formula. [Exc. 744]. Except for apportionment formulas the Shippers concede to be constitutional, the constitutionality of any particular apportionment formula only can be determined retrospectively by a court through litigation, upon constitutional challenge and review.

The trial court also failed to sustain the port-day apportionment formula in accord with sound rules of statutory construction. In the Final Judgment, the trial court erroneously required the City to adopt a constitutional apportionment formula before it can tax Polar and SeaRiver. [Exc. 244-245]. The City had proposed, instead, that the court preserve the apportionment resolution intact, and allow judgment to be entered directing the City Assessor to apply a non-port-day apportionment formula to Polar and SeaRiver under Section 2 of Resolution No. 00-15.¹³⁵ [Exc. 730-737, 742-743, 758-763, 800-802, 805-807]. Section 1 of Resolution No. 00-15 provides that vessel value generally be apportioned using the port-day formula. Section 2 of Resolution No. 00-15 allows the City Assessor to require the use of another apportionment formula if, in a particular case, the port-day apportionment formula does not reasonably represent the portion of total vessel value that should be apportioned to Valdez. The City argued that this practical approach would have been consistent with the law and would have properly limited the effect of the Final Judgment to the litigants in the case. [Exc. 730-737, 742-

¹³⁵ See N. J. Singer, *Statutes and Statutory Construction*, §44.1 (6th ed., Rev. Dec. 2001).

743, 758-763, 800-802, 805-807,].

A well established rule of statutory construction holds that statutes, ordinances and resolutions should be construed to sustain their constitutionality when it is possible to do so. Here, the trial court should have sustained Resolution No. 00-15. The court could have required the City to apportion Polar Tankers and SeaRiver vessel taxes using a non-port-day formula under Section 2 of Resolution No. 00-15.

The trial court violated the separation of powers doctrine and ignored a well established statutory construction rule. Therefore, the Final Judgment should be reversed.

CONCLUSION

The superior court erred in failing to grant Valdez's motion for summary judgment which requested that its vessel tax, including its apportionment formula, be declared constitutional. The superior court's ruling that the apportionment formula violated the Due Process and Commerce Clauses of the U.S. Constitution should be reversed. The case should be remanded with instructions for the superior court to enter summary judgment in the City's favor and sustain the Valdez vessel tax.

Even if the superior court's summary judgment ruling regarding the City's apportionment formula is permitted to stand, Valdez respectfully asks that the superior court be instructed to sustain Resolution No. 00-15. The City should be permitted to apportion Polar Tankers' vessel tax under Section 2 of Resolution No. 00-15.

APPENDIX A

Valdez Services Used By Shippers

The City of Valdez provides many important services and benefits that the

Shippers use:

- The Shippers' employees and crewmembers use and have access to all "the advantages of a civilized society" in Valdez:
 - Airport
 - Hospital, Ambulance service
 - Roads
 - City infrastructure
- Valdez provides police and fire support.
- The Shippers' employees live in Valdez.
- The Shippers maintain offices in Valdez.
- Valdez assists in port security.
 - Posting notice and information about tanker lanes and security measures
 - Port security camera is installed in the Valdez police department
- The Shippers use City personnel and buildings for oil spill contingency exercises.
- Valdez provides the Container Terminal as a repair and docking facility.
- Virtually *all* oil transported on the Shippers' dedicated fleet is loaded at Valdez.
- Valdez financed the Alyeska Marine Terminal with tax-exempt revenue bonds.
- The Shippers' activities impact the City:
 - Exxon Valdez* oil spill
 - National security alerts and closures affecting the Port
 - Risk of introducing non-indigenous species into Port waters.

The above facts are all undisputed.¹³⁶ The City and the Shippers agree that the constitutionality of the Valdez tax does not require that the Shippers actually use every service paid for by general fund monies.¹³⁷ However, the record is replete with evidence that the Shippers do actually use many, if not most of the municipal services for which their tax dollars help to pay.¹³⁸

¹³⁶ Full citations to these undisputed facts are found at pages 17 through 22 of the Brief of Appellant/Cross-Appellee, City of Valdez, to which this Appendix is attached.

¹³⁷ Exc. 612-630.

¹³⁸ Brief of Appellant/Cross-Appellee, City of Valdez at pages 17-22.