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Attorney for Hoonah Indian Association

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU**

HOONAH INDIAN ASSOCIATION, )

Plaintiff, )

v. )

CITY OF HOONAH, )

Defendant. )

Case No. IJU-17- \_\_\_\_\_ CI

**COMPLAINT FOR DAMAGES AND RESTITUTION**

Plaintiff Hoonah Indian Association, by and through its attorney Paul H. Grant, brings this action against the City of Hoonah for damages and restitution based on the following:

**PARTIES**

1. Plaintiff Hoonah Indian Association (HIA) is a federally recognized Indian tribe and thus is the governing body for Huna tribal members. As a tribal government, it has authority to enter into contracts for the well being of the tribe.

2. Defendant City of Hoonah (City) is a municipal corporation organized as a first-class city under the laws of Alaska.

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### **JURISDICTION**

3. The superior court has jurisdiction over this matter pursuant to AS 22.10.020(a) and AS 22.15.030(a)(1) because it is a civil action involving claims for damages greater than \$100,000.

### **INTRODUCTION**

4. This is an action about non-payment for services performed under a construction contract, brought by Hoonah Indian Association, the federally recognized tribal government in Hoonah, Alaska against the state incorporated local government in Hoonah. The City and HIA entered into a "Cooperative Project Agreement" (more fully described beginning at paragraph 15, below) under which HIA was to perform services on a project to remedy a hazardous condition along a City-owned road for the benefit of the entire community. As frequently happens in road construction, unforeseen conditions almost immediately arose necessitating a change in the original design and additional work that pushed costs beyond the original estimate.

5. The City was actively engaged in the project. The City Council received frequent briefings on project status and the Mayor engaged in the project on a daily basis, at times acting as effective project manager. The Mayor and City Council were aware of problems that arose early in the project and participated in developing a revised project plan and approved that work.

6. The City paid HIA upon receipt of invoices during Phase I of the project. However, as the project progressed, the City failed to pay some invoices and HIA was forced to advance its own funds to complete it. To do so HIA drew from funds it

received from the federal government as part of the *Ramah* settlement, the last of multiple lawsuits against the Bureau of Indian Affairs relating to the federal government shortchanging tribes by not paying the full costs of contracts with tribal organizations. The City never indicated to HIA that it would not pay it for the additional work necessary to complete the revised project plan, and in fact affirmatively represented to HIA that it would do so. In reliance on these representations, HIA advanced funds believing the City would act in good faith and pay the additional costs necessitated by the project revision.

7. In addition to HIA's loss caused by the City's failure to pay the additional costs to complete the project, the City owes HIA storage fees for rock that was removed from the project site and has been stored on HIA land for more than 20 months. HIA has sent numerous invoices to the City but it has failed to either pay the storage fees and costs or remove the rock from HIA property.

8. HIA seeks to be made whole for its diligent work on an important safety project that benefited the City.

### **FACTS**

9. In August 2014 the City of Hoonah's Mayor Kenneth Skaflestad initiated discussions with HIA Tribal Administrator Robert Starbard regarding how to remediate a growing hazardous condition along Cannery Road, which connects the City of Hoonah to Icy Strait Point. The road passes through a cut between the bedrock headland and a near vertical rock slope. The road originally passed through a tunnel but that tunnel was modified to the current cut in 1974. That change left a tall unstable cut in the rock face

that regularly sheds rocks. An increase in the rockfall in recent years raised concerns about the safety of vehicles and pedestrians using the road.

10. The City Mayor, Kenneth Skafflestad, approached HIA because it could smoothly manage access to the headland, which holds important cultural resources for the tribe. The headland area is considered among the most sacred sites of the Xuna Káawu, the indigenous people of the area. Huna Totem Corporation (HTC), the village corporation formed under the Alaska Native Claims Settlement Act, owns property within the Project's construction zone and its permission was required to access the upper zone of the headland site along Cannery Road. HIA is responsible for protecting cultural sites for Huna tribal members, including the headland site, and HTC likewise works to protect cultural sites. The City concluded that HIA was in the best position to work with HTC to secure necessary access.

11. On September 18, 2014 the Mayor made a presentation to the City Council about the need to mitigate the rockfall hazard to ensure the safety of all vehicles and pedestrians using Cannery Road. At the meeting HIA indicated it was willing to take on the project due to the cultural importance of the site.

12. Over the next four months the City and HIA developed a plan for completing the rockfall hazard mitigation (Project). With the City's full knowledge and input, HIA retained R&M Engineers and R&M Consultants to develop alternatives. The City received reports on plan progress and made the Project a top priority for use of head tax funds.

13. The construction plan that was agreed on by the City and HIA to stabilize the dangerous rock slope required cutting a series of benches into the rock slope and then constructing a ditch at the bottom to catch any falling rock.

14. On January 8, 2015 the City voted to begin the Project with HIA.

15. On January 30, 2015 the City and HIA entered into a contract titled “Cooperative Project Agreement, A Hoonah Cannery Road Rockfall Mitigation and Walking Trail Accessibility Upgrade Project. A Collaboration Between: The Hoonah Indian Association and the City of Hoonah, Alaska” (the Contract).

16. The Contract sets forth the need for the Project, including the need for collaboration between to the City and HIA due to the cultural sensitivity of the location. It also defines the scope of the project as all engineering, material, administration and other actions necessary to complete the Project.

17. The Contract was a “cost plus” contract as acknowledge by Mayor Skaflestad at a City Council meeting on April 9, 2015.

18. Construction on the Project began February 2, 2015.

19. The first rock blast in February of 2015 revealed unanticipated conditions that required a change in the project design and scope. Specifically, the blast resulted in a large number of small rock particle fractures that required the size of the original benches to be increased in both height and width.

20. This rock condition was unusual and thus was unforeseen by HIA, its contractors, and the City.

21. Resolving the problems created for the Project by the unforeseen rock condition required additional work and time beyond what the City and HIA originally

contemplated and was set forth in the original Project plan drawings from HIA contractor R&M Engineers. Larger and deeper benches had to be constructed requiring additional blasting, more scaling time and more trucking of rock material produced by the additional blasting to secondary storage locations in Hoonah.

22. On March 2, 2015 the City Council held a special meeting to discuss the impact of the Project on the City's finances. Mayor Skaflestad reported on his daily oversight of the Project and communication with HIA personnel. He told the Council the unforeseen rock conditions would require that the bench design be changed to make them higher and wider than originally planned.

23. On March 20, 2015 R&M Engineering revised drawings for the Project and presented them to HIA and the City, both of which approved them.

24. On April 30, 2015 HIA and the City began discussing alternatives in light of the fact that project would not be completed before the cruise ship season. They agreed to leave excavated material in place and create a covered temporary gravel access road through the Project area.

25. On May 20, 2015 HIA suspended work on the Project for the summer in order to avoid negative impacts to summer cruise ship and tourist season.

26. HIA was ready to restart work on the Project by September 28, 2015. The City requested delay of start-up for several reasons and work on the Project did not resume until November 23, 2015.

27. On November 25, 2015 the Contract's General Provisions section was amended to change the project time frames for completion and reentry.

28. On January 22, 2106 HIA completed the project.

29. On June 1, 2016 HIA formally requested the City to pay storage fees for the rock products that were removed from the Project site and are being stored on two lots that it owns. The first lot is "Lot 1-B HIA Hoonah Cultural Subdivision; USS 736". This is the larger of the lots and is located in the central core of town. The second lot is referred to as the "Hoonah Quarry Subdivision" which consists of five (5) parcels: Lot 5, 6, 7, 8, & 9. HIA requested the City pay the prevailing industry storage rate of 1% of value, and remove the rock as soon as possible.

30. The City did not respond to HIA's request.

31. On August 31, 2016 HIA followed up with a letter notifying the City that it continues to owe HIA rock storage fees and will potentially incur annual finance charges of 18% until the fees are paid.

32. The City has not responded to HIA's second notice.

33. Mayor Ken Skaflestad was on the construction site almost every day during the entire Project. He was instrumental in "on the ground" supervision of the Project, and actively participated in formulating the plan that was adopted to resolve the problems caused by the atypical rock. Because the Mayor was so actively involved in day-to-day supervision, activities and decisions, Project engineers worked closely with both the Mayor and HIA throughout the Project.

34. Throughout the Project, the Mayor informed the City Council of progress on the Project, including the discussions of necessary changes to address the unforeseen rock condition. The Mayor also assured HIA that it could proceed with the additional work and that the tribe would be compensated by the City for the additional work.

35. Acting on the City's assurances, HIA advanced funds to pay contractors for the additional work required to increase the height and width of the benches to the degree necessary to make the Project safe and effective.

36. The total costs incurred by HIA to perform the necessary work to complete the contract is \$5,278,414.24. This total is \$2,281,414.24 more than the original Project budget of \$2,997,000.00. The increased costs reflect the additional work that was necessary to complete the project after the unforeseen rock condition came to light during initial blasting. That total does not include rock storage fees owed to HIA by the City, or the costs necessary to clean up an intertidal zone discharge of fill material that was the subject of a notice of violation of the Clean Water Act issued by the Environmental Protection Agency against the City and HIA.

37. To date, the City has refused to pay HIA for any of these increased costs despite numerous requests.

38. As a result of the City refusing to pay HIA for the additional costs it incurred, HIA has suffered monetary damages because it had to pay its own employees as well as subcontractors for work on the Project. To do so it drew on funds that were very important to HIA for other purposes, the settlement money it received in the *Rhama* settlement.

39. On June 1, 2016, HIA notified the City by letter that beginning June 1, 2016, it could no longer store on HIA property at no cost, the excess rock removed from the Project site as a result of blasting the rock slope. The City owns the rock and is responsible for its disposition. HIA informed the City that the monthly storage fee beginning June 1 would be the standard industry rate of 1% of valuation.



40. The total volume of rock stored in HIA property is 36,369 cubic yards consisting of: Lot 1-B: 17,612 cubic yards (City Hall site) and Hoonah Quarry Subdivision: 18,757 cubic yards (Hoonah Rock Quarry site).

41. The original storage fee in the June 2016 invoice for the Quarry Subdivision was \$1,533.00 and for Lot 1-B was \$7,350.00. The current total storage fees, as of November 1, 2017 are \$34,457.30 for the Quarry Subdivision and \$159,073.46 for Lot 1-B.

42. Since June 1, 2016 to date, the City has continued to store its rock on lands owned by the HIA but has not paid any of the storage fees and costs owed to HIA, nor has it removed any of the rock.

**COUNT ONE**  
**BREACH OF CONTRACT**

43. Plaintiff Hoonah Indian Association re-alleges and incorporates the allegations in paragraphs 1-42.

44. The City of Hoonah entered into a contract for construction services with HIA on January 30, 2015.

45. Unforeseen circumstances changed the original scope of the project. The City worked closely with HIA to develop the new design that required additional work by HIA. The Mayor repeatedly made assurances that HIA would be made whole for the additional work it was undertaking, including directly to the Tribal Council sitting in session. The City formally approved new drawings for the redesigned project that required additional work due to the unforeseen rock conditions on the slope that was altered to mitigate the rockfall hazard.

46. HIA performed its obligations under the contract and did everything necessary to complete the Project.

47. The City has failed to meets its obligations under the contract because it has failed to pay HIA for the full cost of work performed and thus is in breach of the contract.

**COUNT TWO**  
**UNJUST ENRICHMENT - PROJECT COMPLETION**

48. Plaintiff Hoonah Indian Association re-alleges and incorporates the allegations in paragraphs 1-42.

49. HIA, by performing the additional work required to resolve problems that were caused by the unforeseen rock conditions, conveyed a benefit to the City. The City accepted and appreciated this benefit, and, by refusing to pay HIA for its additional work, retained this benefit under inequitable circumstances.

50. The benefit of HIA's unpaid work is unjust enrichment of the City.

51. By enriching itself at the expense of HIA, the City now has an obligation to pay restitution to HIA in the full amount of its damages calculated as the amount of money HIA advanced to contractors, and paid its own staff, to finish the project.

**COUNT THREE**  
**UNJUST ENRICHMENT - ROCK STORAGE**

52. Plaintiff Hoonah Indian Association re-alleges and incorporates the allegations in paragraphs 1-42.

53. The City of Hoonah has been storing rock on HIA land since the end of the project in January 2016. After six months, in June 2016, HIA notified the City that it must pay storage fees for that rock.

54. By storing its rocks on HIA's property since June 1, 2016 to the present, and by refusing to pay any storage fees during this time, the City has received a benefit from HIA and has accepted and appreciated this benefit. The City has retained this benefit under inequitable circumstances.

55. Further, HIA has suffered damages due to its inability to utilize its property for planned construction projects and other purposes.

56. The benefit received by the City refusing to pay rock storage fees, or remove the rock as requested by HIA is unjust enrichment of the City.

57. By enriching itself at the expense of HIA, the City now has an obligation to pay restitution to HIA as measured by the full amount of the storage fees it owes to HIA plus interest.

**COUNT FOUR**  
**TRESPASS**

58. Plaintiff Hoonah Indian Association re-alleges and incorporates the allegations in paragraphs 1-42.

59. Rocks removed from the Project are stored on two lots owned by HIA.

60. In June 2016 HIA notified the City that it was charging storage fees for that rock at the prevailing industry rate. The City has not paid those fees, removed the rock, nor even acknowledged HIA's request for payment.

61. The rocks are an unauthorized entry onto HIA land and are interfering with HIA's use of the lands on which they are currently stored.

62. Because the City has negligently failed to pay storage fees or remove the rocks they constitute a trespass onto HIA property.

**CLAIMS FOR RELIEF**

THEREFORE, Plaintiff Hoonah Indian Association requests the following relief:

A judgment finding that the City of Hoonah is in breach of the Contract, “Cooperative Project Agreement, A Hoonah Cannery Road Rockfall Mitigation and Walking Trail Accessibility Upgrade Project. A Collaboration Between: The Hoonah Indian Association and the City of Hoonah, Alaska” dated January 30, 2015 for failure to pay HIA for services it performed to complete the project;

A judgment requiring the City to pay HIA damages in the amount of \$2,281,414.24, which is the total amount of costs to complete the Project that have not been paid by the City, plus additional damages in an amount to be proved at trial for loss of use of the property on which the City’s rock is in trespass; and lost opportunity costs associated with the City’s breach of contract.

A judgment awarding restitution for services provided by HIA that benefits and thus unjustly enriches the City in the amount of \$2,281,414.24, which is the cost of completing the project, plus \$193,530.76, which is the amount of rock storage fees due to HIA from June 1, 2016 to November 1, 2017, calculated at 1% of the value of the rock plus finance charges on the unpaid balance;

An order declaring that the City is in trespass for the unauthorized storage of rock on HIA land;

An order requiring the City to remove the 36,630 cubic yards of rock that it is storing on two HIA properties;

For an award of costs and attorneys' fees incurred by HIA in this matter;

For such other and further relief as the Court deems just, equitable and proper.

Dated Nov. 20, 2017 at Juneau, Alaska



Paul H. Grant ABA #7710124  
For Hoonah Indian Association

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU**

HOONAH INDIAN ASSOCIATION, )

Plaintiff, )

v. )

CITY OF HOONAH, )

Defendant. )

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**REQUEST FOR JURY TRIAL**

The Hoonah Indian Association requests a trial by jury of all issues.

Dated at Juneau, Alaska on November 20, 2017.



Paul H. Grant ABA #7710124  
Attorney for Hoonah Indian Association

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
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 Defendant. )


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**ACKNOWLEDGMENT OF SERVICE**

The firm of Simpson, Tillinghast, Sorensen and Sheehan acknowledges and accepts service of the Complaint on behalf of the City of Hoonah.

Dated November 20, 2017.



By: Barbara Hagstrom