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*Third Judicial District*

*Lavell Wilson*  
*Member*  
*Fourth Judicial District*



# Local Boundary Commission Statement of Decision on Reconsideration

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In the matter of the January 3, 2017, request by respondents Native Village of Ekuk, et al., for the LBC to reconsider the decision approving the City of Dillingham Annexation Petition, with amendments, for the annexation of 279 ± square miles of land and water

## Section I Introduction

On June 12, 2015, the Local Boundary Commission staff accepted the City of Dillingham Legislative Review Annexation Petition of approximately 399 square miles of land and water. The territory is wholly located in the Bristol Bay recording district and the Dillingham Census Area.

At a decisional meeting on December 1, 2016, the commission approved the petition with amendments to the proposed boundaries to include the Nushagak Commercial Salmon District and Wood River Sockeye Salmon Special Harvest area, and excluding the Igushik Section and Snake River Sections as defined by Alaska Department of Fish and Game districts. The commission also excluded territory generally described as the legal offshore fishing distance for set nets and the corresponding Fish and Game statistical areas along the shore on the east side of Nushagak Bay north and south of Clark's Point totaling approximately 9.34± and 2.44± square miles respectively. The commission adopted a written statement of decision, which was finalized and mailed on December 27, 2016.

On January 3, 2017, Respondents Native Village of Ekuk, et al., requested reconsideration of the Dillingham annexation, which the commission granted.

At its January 24, 2017, decisional meeting on reconsideration, the commission rejected Dillingham's annexation petition, finding that it does not meet the annexation standards regarding need, character, boundaries, and the best interests of the state.

## **Section II Proceedings**

September 27, 2014: The City of Dillingham held the required pre-submission hearing for legislative review petitions.

January 22, 2015: The City of Dillingham submitted a legislative review petition.

June 12, 2015: The department accepted the City of Dillingham's petition for filing and opened the first public comment period.

September 1, 2015: The City of Manokotak submitted a legislative review petition for annexation to the Local Boundary Commission.

September 25, 2015: Manokotak asked the LBC to postpone the City of Dillingham annexation proceedings to consolidate the petitions so they would proceed on the same schedule.

December 3, 2015: The LBC granted Manokotak's request for consolidation.

December 4, 2015: The City of Manokotak's petition was accepted for filing and a public comment period for the consolidated petitions opened.

February 26, 2016: The public comment period on the consolidated petitions from cities of Dillingham and Manokotak ended.

June 3, 2016: A preliminary report to the LBC regarding the consolidated annexation petitions was released and a second public comment period began.

July 15, 2016: The second public comment period ended.

August 19, 2016: A motion from Ekuk, et al., was submitted to the LBC, and, consequently, an additional public comment period on the preliminary report opened and was extended through September 19, 2016.

October 28, 2016: A final report to the LBC regarding the consolidated annexation petitions was released.

November 28-30, 2016: A hearing was held in both Manokotak and Dillingham regarding the annexation petitions.

December 1, 2016: A decisional meeting was held in Anchorage. The commission determined that the annexation boundaries proposed by Dillingham must be altered. All five commissioners voted to approve the amended boundaries for the City of Dillingham annexation petition.

December 20, 2017: The LBC met and approved a written statement of decision, conditioned upon the completion and addition of the legal description of the amended boundaries by department staff.

December 27, 2016: The legal description was completed and added to the written statement of decision, and the decision was mailed to the parties and published.

January 4, 2017: The LBC received a request for reconsideration dated January 3, 2017, from Respondents Native Village of Ekuk, et al.

January 10, 2017: At a LBC meeting, three commissioners voted in favor of granting the request for reconsideration of the December 20, 2016, decision, finding that: (1) a substantial procedural error had occurred in the original proceedings (3 AAC 110.580(e)(1)) in that the commission was not aware that it could not reconsider or take a re-vote of its December 1, 2016, decision when the commission met to adopt a written statement of decision on December 20, 2016; and (2) the commission failed to adequately address the annexation standards, including, but not limited to, the standards for boundaries and best interests of the state, and that this failure to adequately address the annexation standards amounts to a failure to address controlling principles of law under 3 AAC 110.580(e)(3).

January 24, 2017: Pursuant to 3 AAC 110.580(g) and 3 AAC 110.570, the LBC held a decisional meeting to issue a decision on reconsideration regarding the Dillingham decision. Four commissioners were present: Robert Harcharek, Vice Chair, who served as chair for the meeting in Anchorage; Commissioner Darroll Hargraves, present in person; and Commissioners John Harrington and Lavell Wilson, present via teleconference. Chair Lynn Chrystal was absent.

On reconsideration, the commission rejected the Dillingham annexation petition, finding that the annexation standards regarding need, character, boundaries, and the best interests of the state are not met.

January 30, 2017: The LBC met to approve this written statement of decision on reconsideration. Robert Harcharek, Vice Chair served as chair for this meeting and attended by teleconference; Commissioner Darroll Hargraves was present in person. Commissioners John Harrington and Lavell Wilson were present via teleconference. Chair Chrystal was absent.

## **Section III**

### **Findings and Conclusions**

#### **Need – 3 AAC 110.090**

Upon reconsideration, the commission determined that it had not adequately addressed the annexation standard regarding “need” in 3 AAC 110.090.

Upon reconsideration, Commissioners Harrington and Harcharek expressed their view that there is no need for city government in the territory proposed for annexation. Commissioner Harcharek noted and Commissioner Harrington agreed that while the City of Dillingham demonstrated a need for the water to raise revenue, a body of water that is 279 square miles in size and is utilized by multiple communities does not exhibit a reasonable need for city government by a single city. The commission found that the water is not reasonably expected to receive the benefit of services and facilities provided by the city (3 AAC 110.090(a)(6)).

Upon reconsideration, the commission reiterated the findings it made at its December 1, 2016, decisional meeting, including that the City of Dillingham was not planning on providing new services; rather, the city intends to enhance the services the city currently provides and which may have been cut, reduced, or were in jeopardy of being cut due to lack of funds to support those services.

Regarding 3 AAC 110.090(b), the commission again found that no other existing city or organized borough could provide essential municipal services to the territory, as amended by the commission, more efficiently or effectively than the City of Dillingham because there is no other city or an organized borough in place to do this. The commission also found that no borough is likely to form and no existing city is near enough to provide these services.

Upon reconsideration, the commission found the territory proposed for annexation does not exhibit a reasonable need for city government and, therefore, the standard in 3 AAC 110.090 regarding need is not met.

#### **Character – 3 AAC 110.100**

Upon reconsideration, the commission determined that it had not adequately addressed the annexation standard regarding “character” in 3 AAC 110.100.

At its December 1, 2016, meeting, the commission noted that Dillingham is home to a large fishing fleet that uses the city as its base for fishing in the Nushagak District as well as other districts in Bristol Bay. These fishermen and crewmembers come in and out of the Dillingham port during the season. The commission also noted that the City of Dillingham demonstrated in public hearing testimony its reliance on and ties to the fishing industry.

Upon reconsideration, the commission further discussed whether the territory proposed for annexation is compatible in character with Dillingham. Commissioner Harcharek reiterated his belief

that the unpopulated water in the territory proposed for annexation in the petition or in the amended boundaries does not need assistance from Dillingham. There is no permanent population in the territory proposed for annexation. Commissioner Harrington listed some of the factors the commission may consider regarding the standard of character: population density, salability of land, cause of recent population changes, and suitability of the territory for reasonably anticipated community purposes. He stated that he did not believe any of these factors were applicable to the territory, and that the territory, amended or otherwise, fails to meet the standard regarding character because it is a large body of water to which none of the factors in 3 AAC 110.100 apply. Therefore, the commission concluded that the proposed annexation territory, as amended or as originally proposed, is not compatible in character with Dillingham under 3 AAC 110.100.

### **Resources – 3 AAC 110.110**

The commission did not reconsider the standard regarding resources at its meeting on January 24, 2017. At its decisional meeting on December 1, 2016, the commission noted that the City of Dillingham demonstrated that the city has the human and financial resources and ability to provide essential municipal services to the city and the territory proposed for annexation, as amended, because the city had done so for two years before the previous annexation decision was vacated by the superior court.<sup>1</sup> The commission also noted that the testimony provided evidence of the need for additional revenues and the value of the taxable property (in this case, raw fish) found in the territory proposed for annexation.

The commission found that the proposed expanded city has the human and financial resources necessary to provide essential municipal services on an efficient, cost-effective level in the expanded boundaries, as amended, and meets the standard of resources found in 3 AAC 110.110.

### **Population – 3 AAC 110.120**

At the December 1, 2016, meeting, the commission noted the City of Dillingham does have a stable and large enough population to support the proposed annexation. The commission also noted that the successful implementation of the prior annexation approved in 2011 (but vacated by the superior court in 2014) demonstrated that in the past, the city did indeed have the population to support the extension of city government into the expanded boundaries.

At the meeting on reconsideration, the commission discussed the population of the proposed expanded boundaries of the city, as originally proposed and as amended. Commissioner Harrington said there is no population in the area proposed for annexation and the annexation will not result in a change in the population of the city. Commissioner Wilson agreed that the territory is a large unpopulated area.

Commissioner Hargraves noted again that only fish live in the territory and there is no permanent population as defined by 3 AAC 110.990(10) in the territory proposed for annexation. The other

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<sup>1</sup> On December 14, 2011, the commission approved a petition by the City of Dillingham to annex the entire Nushagak Bay. That annexation was in effect for approximately two years before the superior court in Dillingham vacated the annexation on March 27, 2014 (Case No. 3DI-12-22CI).

commissioners agreed that there is no permanent population in the proposed expanded boundaries of the city.

On reconsideration, however, the commission did not change its original findings that the population within the proposed expanded boundaries of the city is sufficiently large and stable enough to support the extension of city government and that the standard regarding population in 3 AAC 110.120 is met.

### **Boundaries – 3 AAC 110.130**

Upon reconsideration, the commission determined that it had not adequately addressed the annexation standard regarding “boundaries” in 3 AAC 110.130.

The commission found the proposed boundaries are contiguous and do not create enclaves.

Upon reconsideration, Commissioner Hargraves said that the territory proposed for annexation is a huge area with no permanent residents. Commissioner Harcharek agreed and stated that the annexation is not on a scale suitable for city government. The commissioners reiterated their belief that the size of the proposed annexation, even as amended by the commission on December 1, 2016, is not on a scale suitable for city government.

Commissioner Wilson noted that the LBC’s role is to make decisions in the best interests of the state, not based on the best interests of a single community, and that it is not equitable to allow one city to acquire revenue from a regional resource. Commissioner Wilson also stated that approving such a large annexation would set a poor precedent for city annexations by encouraging cities to annex large unpopulated areas or entire regions in contravention of city annexation standards.

Commissioner Hargraves agreed there was no need for government over a large area with no population and that the area is too large for a small first- or second-class city.

Upon reconsideration, Commissioner Harrington said that the size and large area standards were not dealt with accurately in the prior decisional meeting, and the commission cannot find, given the discussion, that the territory meets the boundary criteria for annexation in 3 AAC 110.130.

Overall, as in their December 1, 2016, meeting, the commission agreed that the original boundaries proposed by Dillingham include an entire geographical region and a large unpopulated area. However, upon reconsideration, they found that the original boundaries proposed in the Dillingham petition and the amended boundaries approved at the previous meeting are not suitable for city government and are not justified by application of the rest of the annexation standards in 3 AAC 110.090 – 3 AAC 110.135, as required under 3 AAC 110.130(c)(2).

The commission further found that the originally proposed and amended boundaries of the city are not on a scale suitable for city government because the boundaries do not comprise an existing community plus reasonably expected growth over the next 10 years (3 AAC 110.130(c)(1)).

Commissioner Harrington noted that there will be no anticipated growth into the area proposed for annexation in the next 10 years because it consists almost entirely of water.

The commission further found that the proposed expanded or amended boundaries did not include all land and water necessary to provide the development of essential municipal services on an efficient, cost-effective level. Rather, the proposed territory for annexation included more than is necessary. After reconsideration of the standard regarding boundaries, the commission concluded that 3 AAC 110.130 is not met.

### **Best Interests of the State – 3 AAC 110.135**

#### **Maximum Local Self-Government**

At the December 1, 2016, meeting, the commission found that the proposed annexation would expand government to an area in the unorganized borough and outside any city and would bring more territory under an incorporated city, maximizing the self-government of that area. The commission therefore found this annexation promotes maximum local self-government and meets the standard found in 3 AAC 110.981 and 3 AAC 110.135(1).

#### **Minimum Number of Local Government Units**

At the December 1, 2016, meeting, the commission found that the annexation proposed by the City of Dillingham would simply enlarge boundaries of an existing city rather than create a new governmental unit. For this reason, the commission determined that the proposed annexation meets the standard promoting a minimum number of local government units as determined under 3 AAC 110.982 and in accordance with art. X, sec.1, Constitution of the State of Alaska.

#### **Relief from State Provision of Local Services**

Upon reconsideration, Commissioner Wilson noted that this annexation would not relieve the state of any burden of providing services in the territory. He stated that a single community taxing the resources of an entire region is not fair to other communities in the area that also rely on those resources, and is not in the best interest of the state. Commissioner Hargraves acknowledged that the staff recommended denial of the petition in its October 28, 2016, final report, because the petition does not meet the annexation standards and is not in the best interests of the state.

Commissioner Hargraves expressed concern over the possible effect such an annexation could have on the state, and agreed that the petition does not propose to relieve the state of the provision of any local services in the area.

Because the commission found on reconsideration that the annexation, as originally proposed or as amended, is not the best interests of the state, the commission concluded that the petition for annexation by the City of Dillingham must be rejected.

### **Legislative Review – 3 AAC 110.140**

The commission did not reconsider the legislative review criteria at its meeting on January 24, 2017.

At their December 1, 2016, meeting, the commissioners considered the standards for annexation via legislative review under 3 AAC 110.140 and found that four of the eight listed circumstances were present.

The commission found that the extension of city services or facilities into the territory is necessary to enable the city to provide adequate services to city residents. The commission noted that the testimony demonstrated a need for increased city revenue in order to compensate for the services the city provides that are related to the fishing industry. Subsection (3) of 3 AAC 110.140 is met.

The commission also found that subsection (7) is met because the commission had already determined that the annexation would promote maximum local self-government and a minimum number of local government units.

The commission also noted that the City of Dillingham has already demonstrated its ability to implement this annexation and administer the fish tax during the two years in which the prior annexation was in effect. The commissioners found that this demonstrated that the annexation would enhance the extent to which the City of Dillingham met the incorporation standards for cities.

In addition, the commission found that subsection (9) was met and that the specific policies set out in the Constitution of the State of Alaska and AS 29.06 are best served through annexation of the territory by the legislative review process. Moreover, the commission had already found that the annexation was in the best interests of the state.

Needing only to find one circumstance met under legislative review, the commission finds that the proposed territory, as amended, may be annexed to the City of Dillingham by the legislative review process under 3 AAC 110.140.

### **Transition – 3 AAC 110.900**

The commission did not reconsider the criteria regarding transition at its meeting on January 24, 2017.

At the December 1, 2016, meeting, the commission found that Dillingham's annexation petition includes a practical plan that demonstrates the capacity of the city to extend essential municipal services into the boundaries proposed for change in the shortest practicable time.

The commission noted that the City of Dillingham had operated within and administered a fish tax over the entire bay for two years before the prior annexation was vacated. In this way, Dillingham has demonstrated its ability to extend services into the expanded boundaries of the city.

Dillingham's transition plan includes a plan for the assumption of all relevant powers, duties, rights, and functions by the city, as well. Commissioner Harrington noted that the city is providing environmental protection within city boundaries, as well as enhancing public safety and response coordination by volunteers. The commission found that the petitioners consulted with relevant



entities and documented the dates and subjects of such consultations in the transition plan. The transition plan also indicated that it was designed to effect an orderly, efficient, and economical transfer within the shortest practical time.

The commission found that a section in the plan regarding the transfer and integration of assets and liabilities was not applicable and therefore not necessary to include. The commission also found it was not necessary to require an agreement between any entities because there are no other governmental entities within the proposed annexation area, as amended.

The commission determined that the information contained in testimony, the petition, and the entire record is sufficient to meet the standard in 3 AAC 110.900 regarding transition.

### **Statement of Nondiscrimination – 3 AAC 110.910**

At the December 1, 2016, meeting, the commission found no evidence that the adoption of the annexation proposal from the City of Dillingham would deprive any person of any civil or political rights because of sex, creed, national origin, or race. The commissioners found the standard under 3 AAC 110.910 is met.

The commission did not reconsider this standard at its meeting on January 24, 2017.

### **Determination of Essential Municipal Services – 3 AAC 110.970**

At the December 1, 2016, meeting, because essential municipal services were discussed, the commission did identify those that are reasonably necessary to the community and promote maximum, local self-government, as well as services that cannot be provided more efficiently or more effectively by the creation or modification of some other political subdivision of the state.

The commission noted that the City of Dillingham does offer those services that are necessary for the safety and well-being of residents, including taxation, platting, oil spill response, and the operation of a school system.

Several commissioners noted that a borough could better provide services, but at this time, with no anticipated borough formation petition, the commission found that the City of Dillingham was the most appropriate and most able entity to provide those essential municipal services.

The commission did not reconsider this standard at its meeting on January 24, 2017.

### **Conclusion and Vote**

After a discussion of the standards under reconsideration, Commissioner Harrington moved that on reconsideration the LBC must reject the Dillingham petition for annexation because the petition does not meet the standards regarding need, character, boundaries, and the best interests of the state, either as originally proposed or as amended. Commissioner Wilson seconded the motion.

After discussion, Brent Williams called the roll and Commissioners Harcharek and Hargraves voted in opposition. Commissioners Harrington and Wilson voted in favor. The motion failed with a tie vote.

Commissioner Harcharek called for a motion to reconsider the vote. Three commissioners voted in favor of a revote: Commissioners Harcharek, Harrington, and Wilson. Commissioner Hargraves opposed a revote.

The vice chair called for a roll call vote on the original motion to reject the annexation petition. Commissioners Harcharek, Harrington, and Wilson voted in favor. Commissioner Hargraves voted in opposition. The motion to reject the Dillingham annexation petition passed.

On reconsideration, the commission concluded that upon finding that the petition was not in the best interests of the state and did not meet all of the annexation standards, the petition must be rejected. Based on the findings and conclusions upon reconsideration set out in Section III of this decisional statement, the Local Boundary Commission concludes that not all of the standards and requirements for annexation are satisfied by the Dillingham annexation petition. Therefore, the commission hereby rejects the January 22, 2015, petition of the City of Dillingham for the annexation of 399 square miles of land and water.

## **Section IV**

### **Order of the Commission on Reconsideration**

This written statement of decision is the order of the Local Boundary Commission on reconsideration of the commission's December 27, 2016, written statement of decision approving the Petition for Annexation to the City of Dillingham with amendments.

Approved in writing on this 30<sup>th</sup> day of January, 2017.

Local Boundary Commission

By: \_\_\_\_\_  
Robert Harcharek, Vice Chair

Attest: \_\_\_\_\_  
Eileen Collins, Staff

### **Judicial Appeal**

Pursuant to 3 AAC 110.570(g) and 3 AAC 110.580(g), this is the final decision of the Local Boundary Commission. A decision of the Local Boundary Commission may be appealed to the Superior Court under AS 44.62.560(a) and Rule of Appellate Procedure 602(a)(2). A claimant has 30 days from the date this decision is mailed to appeal to the Superior Court.