



Local Boundary Commission Staff

October 2007

# Final Report to the LBC Regarding the Petition for Annexation of Approximately 4,701 Square Miles to the Ketchikan Gateway Borough



This is the *Final Report to the LBC Regarding the Petition for Annexation of Approximately 4,701 Square Miles to the Ketchikan Gateway Borough.* The report was prepared by the Alaska Department of Commerce, Community, and Economic Development (DCCED), which serves as staff to the Local Boundary Commission. The report can also be found on the Internet at the following address:

http://www.commerce.state.ak.us/dca/lbc/ketchikan4.htm

This report is issued in accordance with 3 AAC 110.530(b) which requires DCCED to issue a Final Report after considering written comments regarding the Preliminary Report.

DCCED complies with Title II of the Americans with Disabilities Act of 1990. Upon request, this report will be made available in large print or other accessible formats. Such requests should be directly to the Local Boundary Commission staff at 907-269-4560.

The maps included in this publication are intended to be used as general reference guides only. Source documents remain the official record and should be reviewed to determine the accuracy of the illustrations.

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# Part I. Introduction

As staff to the Alaska Local Boundary Commission (LBC or Commission), the Alaska Department of Commerce, Community, and Economic Development (DCCED) is required by State law to investigate and analyze a legislative-review annexation proposal (3 AAC 110.530). DCCED is further required to prepare a preliminary report with findings and recommendations to the LBC regarding such proposal. After considering timely written comments addressing its preliminary report, DCCED must prepare a final report on the proposal (3 AAC 10.530).

State law (AS 29.06.040(a)) provides that the LBC may amend and impose conditions on the proposal. That same law provides further that the Commission may approve a legislative-review proposal only if the LBC determines that the proposal meets applicable standards under the State Constitution and the Commission's regulations and is in the best interests of the State. Otherwise, the LBC must reject the proposal.

Further, State law (AS 44.33.812(a)(2)) requires the LBC to adopt regulations providing for standards governing annexation. The LBC has complied with that requirement by adopting standards for borough annexation in 3 AAC 110.160 - 3 AAC 110.210 and 3 AAC 110.900 - 3 AAC 110.990.

DCCED's Preliminary Report to the Local Boundary Commission Regarding the Petition for Annexation of Approximately 4,701 Square Miles to the Ketchikan Gateway Borough (KGB), dated June 30, 2006 (Preliminary Report), was published July 13, 2007. The Preliminary Report comprised 161 pages and is incorporated into this Final Report by reference. To give readers a sense of the scope of the Preliminary Report, the Table of Contents of that report is included here as Appendix A.

Approximately 100 copies of the *Preliminary Report* were distributed by U.S. first-class mail, electronic mail, or intra-departmental routing to LBC members and other State officials, KGB officials, respondents and commentors, news



media in the Ketchikan area, and others. Multiple copies of the *Preliminary Report* were also made available for public review through the KGB Clerk. Additionally, the *Preliminary Report* was made available on the LBC's Website.<sup>1</sup>

Interested persons were given until September 4, 2007, to submit written comments on the *Preliminary Report*. Written comments were received from the City of Wrangell (Wrangell), Metlakatla Indian Community (MIC), Meyers Chuck Community Association (Meyers Chuck), and the City of Craig (Craig). Those comments are included in this report as Appendix B. Further, the U. S. Forest Service<sup>2</sup> filed comments in the Wrangell borough incorporation proceedings regarding the Meyers Chuck/Union Bay area, at issue in both proceedings. Given the relevance of those comments to this annexation proceeding, the comments are also included in Appendix B.

This constitutes DCCED's final report to the LBC regarding the KGB's annexation proposal (*Final Report*).



Figure 1 - Map of Forest Ranger Districts in Tongass National Forest

<sup>&</sup>lt;sup>1</sup> http://www.DCCED.state.ak.us/dca/lbc/ketchikan4.htm.

<sup>&</sup>lt;sup>2</sup> A division of the U.S. Department of Agriculture.

# Part II. Comments

DCCED has carefully considered all comments filed in response to its *Preliminary Report.* For the most part, the comments reiterate those made in response to the public notice of the KGB annexation proposal and, thus, were addressed by DCCED when analyzing the merits of the annexation proposal and making findings and recommendations regarding it. There are a few concerns, however, that require a response in this report.

### A. Concerns of the Department of Education and Early Development (DEED)

DCCED also responded to questions from the DEED regarding the proposed exclusion of Hyder from the KGB annexation at this time. DCCED furnished information to DEED on August 2, 2007, regarding its concern that the Hyder enclave might remain indefinitely. On August 27, 2007, DCCED received a letter from DEED,<sup>3</sup> which stated that following DEED's review of the KGB Petition "Exhibit K, the justification for excluding the Hyder enclave," DEED's concerns had been addressed. Thus, DEED did not oppose KGB's proposed annexation. Copies of DEED's August 2 and August 27 letters are included in this *Final Report* as Appendix C.

The issue of the proposed enclave is addressed on pp. 86-90 and in Appendix E of DCCED's *Preliminary Report*. Staff reaffirms its findings and conclusions regarding that issue. Although creation of a Hyder enclave, even in the short term, may not be ideal, it is certainly not inconsistent with the State's 48-year policy of incremental extension of borough government. KGB's proposal adequately rationalizes the exclusion at this time, and DCCED believes that overall, the annexation proposal satisfies borough annexation standards and is in the balanced best interests of the State. At whatever point Hyder becomes part of an organized borough, DCCED, DEED, the KGB, and the LBC<sup>4</sup> are on record that it should be part of the KGB.

## B. Criticisms

With regard to comments that DCCED failed to summarize and respond to each comment or brief filed in response to notice of the Petition, DCCED replies as follows.

<sup>&</sup>lt;sup>3</sup> DEED's letter is dated August 22, 2007.

<sup>&</sup>lt;sup>4</sup> The LBC's definition of the Model Borough Boundaries for the KGB includes Hyder in the boundaries; and, in 1999, the Commission rejected a KGB annexation proposal because it did not include Hyder in the proposed boundaries.

There is no per se "requirement" that DCCED summarize or rejoin every comment or brief filed in response to a petition. In fact, 3 AAC 110.530(a) requires only the following regarding a preliminary report by DCCED: "The department shall investigate and analyze a petition filed with the department under this chapter, and shall submit to the commission a written report of its findings with recommendations regarding the petition." Subsection (d) of 3 AAC 110.530 requires that: "In its <u>final written report</u> with recommendations, the department <u>shall consider</u> timely submitted written comments addressing the preliminary report . . . (emphasis added)." Again, there is no "requirement" that each comment be summarized and individually analyzed.<sup>5</sup>

Nonetheless, in order to give significance to the requirements of public notice and providing for a period of public comment, DCCED always analyzes and considers every comment and brief filed in response to notice of a petition. DCCED's *Preliminary* Report broadly addressed all concerns when making its findings, conclusions, and recommendation. Moreover, DCCED believes the Petitioner's *Reply Brief to Written Comments and Responsive Briefs* cogently responded to the comments and briefs.

If workload constraints permit, DCCED does summarize and respond to comments. However, in this case, such constraints did not permit the performance of that particular task. In Appendix D to this *Final Report*, DCCED has outlined the major activities of the LBC and its staff from February 2006 - the date of submission of the KGB annexation petition - to the present. DCCED believes that outline adequately demonstrates that the workload of the LBC and its staff during this period was extremely heavy given the very limited size of staff, the volunteer nature of the Commission, and the recent appointment of three new members to the LBC. Nonetheless, that workload did not prevent DCCED from fulfilling its duty to evaluate the proposal and make appropriate recommendations to the LBC.

DCCED has seriously considered the criticisms and assures all interested persons that in every boundary-change proceeding, the merits of the petition, all comments and briefs, and the law are considered and scrutinized. The fact that a commentor, respondent, or even a petitioner does not like a finding, conclusion, or recommendation that is counter to the desire of that person does not mean that DCCED did not seriously consider the merits of the arguments.

<sup>&</sup>lt;sup>5</sup> With regard to LBC decisions, the Alaska Supreme Court has found that there is no requirement that the Commission set out "findings of fact" when making a boundary-change determination. The Court asserted that as long as it can determine the basis of the Commission's decision and that its proceedings are consistent with sound principles of administrative law, the Court will uphold the LBC decision. That logic is obviously applicable to reports prepared by staff to the LBC; i.e., DCCED.

## C. KGB Annexation Boundaries

### 1. Map

In its comments responding to the *Preliminary* Report, the City of Wrangell questioned the accuracy of the map of Election District 2 on p. 13 with regard to the Cleveland Peninsula. DCCED has reviewed the map as well as the minutes of the Alaska Constitutional Convention which established the boundaries of Election District 2 for Ketchikan. Those relevant minutes are from the sixty-fifth day of the Convention (January 26, 1956), which reflect in pertinent part:

HELLENTHAL: . . . Then the next and last change is in Election District No. 2. That would be on the first page of the description, the Ketchikan Election District on the first page of the description, which is page 2 of the paper. Now here we strike the following words: "Clarence Strait and Ernest Sound". They appear in the second and third lines of the description. Strike the words Clarence Strait and Ernest Sound" and substitute these words for them? "Burroughs Bay and the east side of Clarence Strait": I will repeat: B-u-r-r-o-u-g-h-s, "Burroughs Bay and the east side of Clarence Strait"; and then a little further on in the same section, strike the words "that area drained by Bradfield Canal and its tributaries" and substitute "Lemesurier Point"; and I will spell Lemesurier. It is L-e-m-e-s-u-r-i-e-r.<sup>6</sup> And this change--

UNIDENTIFIED DELEGATE: Is that Lemesurier Island?

HELLENTHAL: Lemesurier Point. Now these changes in Election District No. 2 merely make the line that was on the map conform to the actual reality. They were prompted by an observation made by Senator Nolan, checked by the Bureau of Mines people. They are no deviations from the lines that were shown on the map that was before you when the matter WaS discussed....

Proceedings of the Constitutional Convention at 3170 -3171 (1956).<sup>7</sup>

Ketchikan: That area of the mainland drained by streams flowing into Revillagigedo Channel, Behm Canal, **Burroughs Bay, and east side of Clarence Strait** [CLARENCE

Footnote continued on next page.

<sup>&</sup>lt;sup>6</sup> Meyers Chuck is on the Clarence Strait side of Lemesurier Point.

<sup>&</sup>lt;sup>7</sup> Reflecting those changes in the provisions of Election District No. 2 and using legislative drafting style (insertions are underlined and in bold; deletions are capitalized and bracketed), the revised provisions read:

With those changes, Election District No. 2 read:

2. Ketchikan: That area of the mainland drained by streams flowing into Revillagigedo Channel, Behm Canal, Burroughs Bay, and east side of Clarence Strait from the southernmost point of the Alaska-British Columbia boundary line to and including Lemesurier Point; and those islands south of Ernest Sound and east of Clarence Strait, including Revillagigedo, Gravina, Annette, and Duke Islands, and other adjacent smaller islands.

In establishing the initial election districts, the Framers of the Alaska Constitution were most particularly interested in watersheds and the topography of an area as well as its population. On the fiftieth day of the Convention (January 11, 1956), the following statement was made by Delegate John Hellenthal, Chairman of the Committee on Suffrage, Elections, and Apportionment:

Now in this map -- the reason for that map, the prime reason, is to show the delegates the watersheds of Alaska and their connection with these... election districts. The map that you have... shows it beautifully and adequately. And I think that any determination of the boundaries of these districts hinges upon seeing them in relation to the topography of the future State.

### Proceedings of the Constitutional Convention at 1837 (1956) (emphasis added).

DCCED reviewed the Election District No. 2 map in its *Preliminary Report* and concluded that it did not accurately reflect the boundaries of Election District as contemplated by the Framers and the provisions set out for Ketchikan in article XIV, section 3 of the Constitution of the State of Alaska. Giving particular attention to the watershed and topography on the Cleveland Peninsula, DCCED believes the following map accurately depicts the boundaries of Election District No. 2. A map of the original Election Districts adopted by the Constitutional Convention is included as Appendix E to this *Final Report*.

Footnote continued from previous page.

STRAIT AND ERNEST SOUND] from the southernmost point of the Alaska-British Columbia boundary line to and including <u>Lemesurier Point</u> [THAT AREA DRAINED BY BRADFIELD CANAL AND ITS TRIBUTARIES]; and those islands south of Ernest Sound and east of Clarence Strait, including Revillagigedo, Gravina, Annette, and Duke Islands, and other adjacent smaller islands.



Figure 2 - Election District 2, 1956

There has also been assertions made the Lemesurier Point is only simply a specific point at the extreme extension of land around which water flows. That interpretation of is nonsensical given the Framers' specific inclusion of Lemesurier Point. It would be absurd to include only the tip of the point when the plain language of the provision states, "to and including Lemesurier Point." It is the whole peninsula, not just the tip. A map of Lemesurier Point is included below as a frame of reference.



Figure 3 - USGS Map of Lemesurier Point

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### 2. Meyers Chuck and Union Bay

A significant number of comments related to the proposed inclusion of Meyers Chuck and Union bay in the KGB boundaries. While residents of the Meyers Chuck/Union Bay area initially argued for their inclusion in the proposed Wrangell borough rather than the KGB, the latest comments assert the preference for the Meyers Chuck/Union Bay area be allowed to be an enclave similar to what is proposed for Hyder. To DCCED, the rationale for Hyder's being an enclave in the short-term simply is not applicable to the Meyers Chuck/Union Bay area. The KGB Petition and reply brief;<sup>8</sup> DCCED's Preliminary Report: the LBC's Model Borough Boundary study; and its 1999 decision mandating the KGB's inclusion of Meyers Chuck, Union Bay, and Hyder in its boundaries manifestly demonstrate the close ties between those areas and the KGB. While an acceptable argument for a short-term exclusion of Hyder from those boundaries has been made, such a case is not supportable for Meyers Chuck and Union Bay,



Figure 4 - KGB Model Borough Boundaries

which have amply demonstrated historic ties to the Ketchikan area, from pre-statehood to today. DCCED strongly disagrees with the assertion that Meyers Chuck /Union Bay presents a stronger case for "enclave status" than does Hyder. It is clearly unsupported by the facts.



With regard to the statements that the Meyers Chuck/Union Bay area has only one use: "single family residential"<sup>9</sup> and that there are no "public facilities" in the Meyers Chuck/Union bay" area, DCCED points out that there is a U.S. Post Office which receives weekly mail pick-up and deliveries from Ketchikan and that there is a well-used State-owned and maintained seaplane base and dock at Meyers Chuck.<sup>10</sup>

Footnote continued on next page.

<sup>&</sup>lt;sup>8</sup> DCCED also believes that the KGB comments filed in response to the notice of the Wrangell borough incorporation more accurately reflect the community of interest between Meyers Chuck and Union Bay than do comments made by supporters of Meyers Chuck being in the Wrangell borough. A copy of those KGB comments is included in this report as Appendix F.

<sup>&</sup>lt;sup>9</sup> August 31, 2007, comments from Meyers Chuck Community Association.

<sup>&</sup>lt;sup>10</sup> According to the Alaska Department of Transportation and Public Facilities (DOTPF), when an area with State-owned docks or harbors (such as Meyers Chuck) is included in a municipality, it is a

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Figure 5 - Meyers Chuck Seaplane Float Facility Map

Footnote continued from previous page.

priority of the State to transfer those facilities to the municipality. (DCCED telephone conversation with Michael Lukshin, Engineer/Architect IV, DOTPF, September 25, 2007.)



Figure 6 - Alaska Tideland Survey No. 804



Figure 7 - Land Status Plat – Meyers Chuck

A search of the Internet returns hundreds of hits relating to travelogues of persons visiting Meyers Chuck.

In *Coast Pilot 8,<sup>11</sup>* Meyers Chuck is described as follows;

**Meyers Chuck**, a small harbor with good anchorage for small craft, is about 1.6 miles SE of Lemesurier Point (55°45.9'N., 132°16.9'W.) and immediately E of Meyers Island. A light is on the N side of the island. The harbor is entered between the light and a buoy that marks the end of the reef that extends SE of the small island NNW of Meyers Island. Meyers Chuck is a small settlement along the E shore of the harbor. The lighted microwave tower at the settlement is visible from Clearance Strait.

A State-operated float with about 384 feet (117 m) of berthing space and a reported depth of 12 feet (3.6 m) alongside the NE end, and 25 feet (7.6 m) alongside the rest is at the NE side of the harbor; a seaplane float extends NW from the float near the approach pier. Care should be taken to avoid the reef that bares about 25 feet (7.6 m) NW of the head of the approach pier. A private float, S of the State float, has gasoline and diesel fuel; water is available in an emergency. A 56foot (17 m) boat grid is available just inside the State-operated float. Limited amounts of provisions can be obtained at the store at the head of the private float.

A State-operated radiotelephone is at the residence next to the store. A telephone is outside the store.<sup>12</sup> Seaplane transportation to Ketchikan is available upon request. A supply and mail boat from Ketchikan calls weekly at Meyers Chuck.

Anchorage for small craft can also be had in the narrow arm between Meyers Chuck and the mainland. This arm, however, freezes over in the winter and the outer harbor does not.

Coast Pilot 8, p. 178.

The facts amply demonstrate that the Meyers Chuck/Union Bay area is definitely not just a "single family residential" area.

<sup>&</sup>lt;sup>11</sup> 2007 (29<sup>th</sup>) Edition, National Oceanic and atmospheric Administration (NOAA).

<sup>&</sup>lt;sup>12</sup> According to information received from Alaska Telephone Company through the Regulatory Commission of Alaska, the utility has 17 customers and 24 telephone lines in Meyers Chuck. (E-mail from RCA, October 4, 2007.)

### 3. Effect of KGB Annexation on Education Funding in Unorganized Borough

The City of Craig and the Prince of Wales Community Advisory Council advocate rejection of the KGB annexation proposal on numerous grounds, which have been addressed either by the Petitioner in its reply brief, or in the *Preliminary Report*. There is one issue, however, that warrants further addressing here. That is the effect that KGB's annexation; which will result in the KGB receiving more in National Forest Receipts (NFRs) and the surrounding areas receiving less, will have on education funding in southeast Alaska and the other educational facilities in the area - schools operated by first-class and home-rule cities and Regional Educational Attendance Areas (REAAs).

It is a given that the growth of borough government in Alaska will have an effect on each first-class and home-rule city and REAA in the area of such borough growth, most

The Commission rejects the notion that State policy positions concerning borough incorporation and annexation should be driven by the financial considerations such . . . [as] National Forest Receipt and Payments in Lieu of Taxes programs [which] are ephemeral – in a few years those programs may operate in a significantly different manner or may no longer exist. In contrast, the formation of a borough or the extension of a borough over a large area is a much more permanent action.

LBC 1999 Statement of Decision.

particularly in southeast Alaska because of the loss of NFRs. That fact, however, is not a bar to the development of borough incorporation or annexation. It is one factor that must be considered in consultation with the DEED and when considering of the best interests of the State. Moreover, the LBC has expressly rejected this argument as a reason to deny annexation.<sup>13</sup> For more detail regarding this issue, *see* pp. 93-98 of the *Preliminary Report.* 

A goal of the Framers of Alaska's Constitution was the creation and growth of regional governments. The State is required to provide education in the state and must see to financing of such. Where there is a diminution, such as here, from a portion of NFRs being redistributed to the KGB from the other school districts in the area, the State is still required to finance education in those school districts in accordance with the formula for education funding. The State, in turn, will require the KGB to provide additional support for its schools in the form of the four-mill-equivalent levy on the value of taxable property in the newly expanded boundaries of the borough.

These arguments, of course, will apply to the proposed incorporation of a 3,465-squaremile Wrangell borough and prospective incorporation of a 4,450-square-mile Petersburg borough. The position of DCCED with regard to the effect on NFRs on education funding in those areas will be the same.

<sup>&</sup>lt;sup>13</sup> KGB annexation proceeding, LBC 1999 Statement of Decision, p. 12.



Figure 8 - Proposed Wrangell Borough



Figure 9 - Proposed Petersburg Borough

Further, DCCED notes the discussion above that DEED is not opposed to the KGB annexation proposal.

### 4. The MIC and Duke Island

The MIC opposes the KGB annexation only to the extent it seeks to include Duke Island and surrounding waters in the boundaries of the KGB.

Under federal law, the Annette Island Reserve has the right to pursue expansion of its reservation boundaries through the U.S. Congress. Inevitably, such federal action may require some type of corresponding state action although it is not clear what that might be. Pursuit of an expanded reservation could happen regardless of whether or not the territory is in the unorganized borough or the organized borough of Ketchikan.

It is not exactly clear how the Borough's annexation proposal would exacerbate the "economic crisis" on Annette Island other than reducing somewhat a share of timber receipts for schools. Rather, the Borough would suggest the economic health of Annette will only continue to strengthen as planned ferry improvements to the island and Ketchikan are built in the near future.

There are a number of locations in the existing borough that have strong indigenous cultural and historic values. The borough believes that the inclusion of the Duke Island area would be consistent with other similar areas in the existing borough. In addition, Duke Island is a minerally rich area that has the potential for development in the future depending upon the outcome of current exploration efforts. If developed, the mining would likely be serviced out of Ketchikan just like the current exploration efforts. Due to the cultural sensitivity of the island, it is also likely that personnel would be stationed in Ketchikan and transported to the island in the event of mining operations there.

With respect to fishing rights, the comments appear somewhat contradictory. On one hand, the comments recognize that Ketchikan harvests resources in the area and that this harvest needs to be protected if annexed to Annette Island. On the other hand, the comments also suggest that the need for the expansion of the Annette Island Reserve is to stabilize its economy... by increasing "...the area of its sovereign reserved rights, particularly in regard to the fishing rights that would accompany the expanded Reserve boundary." In summary, there is a long history of shared use of this area by Reserve residents and commercial and sport fisheries based in Ketchikan that only further underscores the share[d] community of interests in this area

KGB Reply Brief to Written Comments and Responsive Briefs, pp. 30 - 31.

As noted above in the *Criticisms* section, DCCED carefully considered all comments and briefs. DCCED fully agreed with the Petitioner's statements in its *Reply Brief* with regard to the MIC and Duke Island.



Figure 10 - Technical Paper No. 256 by Brian L. Davis, Geographic Patterns of Seal Hunting in Southeast Alaska, 1992-94, Alaska Department of Fish and Game, Division of Subsistence, September 1999, p. A-11.

Duke Island and its surrounding waters have historically been part of the greater Ketchikan area and its inhabitants since long before statehood. The island and its waters were not included in the area of the Annette Islands Reserve when it was created in 1891 or in the 1937 affirmation of the Secretary of the Interior regarding the waters surrounding the Reserve. Moreover, Duke Island was noted as among those specifically excluded from the reservation during a 1993 Interior Board of Land Appeals dealing with the territory and waters of the Annette Islands Reserve. A copy of that opinion (127 IBLA 1 (July 12, 1993.)) is included with this report as Appendix G.

DCCED has confirmed that the MIC filed a request with the Secretary of the Interior on September 11, 2007, to expand the Reserve boundaries.<sup>14</sup> The process to expand reservation boundaries is set out in 25 CFR Part 151. Among other things, once a request has been filed, the Secretary of Interior must notify the state and local governments having regulatory jurisdiction over the land to be acquired. According to the Alaska Attorney General's Office, it has not seen any communication from the Secretary of Interior regarding the MIC's request.

The fact that the MIC has requested to expand its boundaries does not mean that it is a foregone conclusion. The process for such expansion could take several years. Moreover, the fact that Duke Island might be part of the KGB does not foreclose the Island's being part of the Reserve if the MIC's request is granted. In addition, there is a two-year transition period for the KGB to extend borough services into the area annexed, thus minimizing any perceived difficulties of removing Duke Island properties from KGB tax and service rolls if the reservations boundaries are expanded to include Duke Island. Reservation boundaries inside county boundaries are common throughout the United States.

DCCED opposes the MIC's request that Duke Island and its surrounding waters be excluded from the KGB annexation. If the MIC's expansion request is not granted by the Secretary of Interior, the area would be an enclave.<sup>15</sup> If the MIC's request is granted and its reservation is thereby expanded, primary jurisdiction over Duke Island would most likely shift to MIC and the federal government, although the State and KGB may be able to exercise some authority over on-reservation activities in some circumstances. Rather than prejudge any determination by the Secretary of the Interior, DCCED believes it is more appropriate to include Duke Island and its surrounding waters in the KGB at this time and to let the MIC's off-reservation acquisition request pursue its way through the appropriate federal process.

<sup>&</sup>lt;sup>14</sup> DCCED telephone conversation with Greg Argel, Northwest Regional Realty Officer, Bureau of Indian Affairs, Department of Interior, Portland, Oregon. September 27, 2007.

<sup>&</sup>lt;sup>15</sup> Assuming, of course, that the KGB's annexation proposal is approved by the LBC.

# Part III. Final Findings, Conclusions, and Recommendation

In its *Preliminary Report,* DCCED concluded that the Petition satisfies all legal standards applicable to the pending annexation proposal. Those include article X, sections 1 and 3 of the Alaska Constitution, AS 29.06.040; 3 AAC110.160 – 3 AAC 110.210, and 3 AAC 110.900 – 3 AAC110.990; and provisions of the federal Voting Rights Act. Thus, DCCED recommended that the Petition be approved without amendment or condition. A synopsis of DCCED's findings, conclusions, and recommendation set out in its *Preliminary Report* is provided below.

## A. Findings

The following summarizes the findings reached by DCCED in its analysis and investigation of the KGB proposal for annexation:

- the KGB annexation proposal provides for maximum local selfgovernment in accordance with article X, section 1 of the Alaska Constitution;
- the KGB annexation proposal comports with the minimum-number-oflocal-government-units constraint in article X, section 1of the Alaska Constitution;
- the KGB annexation proposal satisfies the standards set out in article X, section 3 of the Alaska Constitution and 3 AAC 110.160(a);
- the KGB annexation proposal satisfies the standards set out in 3 AAC 110.160(b);
- the population within the proposed expanded KGB boundaries is sufficiently large and stable to support the resulting borough;
- the economy within the proposed borough boundaries includes the human and financial resources necessary to provide borough services on an efficient, cost-effective level;
- the proposed new boundaries of the borough conform generally to natural geography; include all land and water necessary to provide the full development of essential borough services on an efficient, cost-effective level; and are otherwise proper;

- the proposed annexation is in the best interests of the State;
- several of the circumstances set out in 3 AAC 110.200 exist with regard to the ending KGB legislative-review annexation;
- a proper plan for the orderly transition to borough government has been provided; and
- annexation will not deny any person enjoyment of any civil or political right because of race, color, creed, sex, or national origin, and will not violate the federal Voting Rights Act.

Included as Appendix H to this report, is a segment from a publication by the Southeast Conference relating to regional facilities in southeast Alaska. The data contained in that publication reflects the status of Ketchikan as a regional center for retail, medical, business, transportation, and other services. For example, the document sets out the following with regard to regional health care facilities:

### **Regional Health Care Facilities**<sup>16</sup>

The health care facilities in the region are as follows.

### Hospitals:

- Ketchikan General Hospital 46 beds
- Sitka Community Hospital 13 beds
- SEARHC Hospital (Sitka) 64 beds
- Bartlett Memorial Hospital (Juneau) 56 beds.

### Medical Centers (resident doctors):

- Petersburg Medical Center (14 beds)
- Wrangell Medical Center (8 beds)
- Craig Clinic (outpatient)
- ③ Haines Clinic (outpatient)

<sup>&</sup>lt;sup>16</sup> SE Alaska Regional Facilities and Services, p.6.

The document also reflects the following with regard to regional ship-repair facilities vis-à-vis Ketchikan and Wrangell:

### **Regional Ship Repair Facilities**<sup>17</sup>

Southeast Alaska has several boat haul-out and repair facilities....

### Ketchikan:

- 50-ton lift
- 200-ton marine railway
- Dry dock for ships up to 10,000 tons
- Full shipbuilding and repair services

### Wrangell:

- 130-ton marine railway
- 150-ton lift and uplands work yard

DCCED reaffirms the findings set out in its Preliminary Report.

### B. Conclusions<sup>18</sup>

The following are the conclusions reached by DCCED that the Petition meets all requisite standards governing annexation by the legislative-review method:

 The Delegates who authored the Local Government Article of the Alaska Constitution strived to create an effective structure for "democratic selfgovernment below the state level." They constructed broad constitutional provisions for local government in a manner that, in the words of the Local Government Committee, "the interests and welfare of all concerned" would be guarded "in a framework which will foster orderly development and prevent the abuses of duplication and overlapping of taxing entities." Article X, section 1 of Alaska's Constitution promotes those ideals and encourages the extension of borough government through incorporation and annexation. It is DCCED's view that Article X, section 1 should be read to uphold LBC decisions approving any borough incorporation and annexation that meets the reasonable-basis test. Boroughs are meant to provide local government for regions as well as localities and encompass lands with no present municipal

<sup>&</sup>lt;sup>17</sup> *Id.*, p. 7.

<sup>&</sup>lt;sup>18</sup> The references to "Part" in this subsection are to those in the *Preliminary Report*.

use. In light of these facts, DCCED takes the view that the KGB annexation proposal provides for maximum local self-government in accordance with article X, section 1 of the Alaska Constitution.

- Article X, section 1 of Alaska's Constitution also promotes boroughs that embrace large and natural regions, in part, to avoid too many boroughs. Currently, the boundaries of the KGB encompass the second-smallest area of any organized borough. The KGB annexation proposal would significantly increase the size of the area within the KGB. The 1963 Legislature determined that the appropriate boundaries of the KGB were more on the order of those currently proposed. Given those and other facts outlined in Part II, DCCED reaches the conclusion that the annexation proposal comports with the minimum-number-of-local-government-units constraint in article X, section 1of the Alaska Constitution.
- Article X, section 3 of Alaska's Constitution mandates that each borough embrace an area and population with common interests to the maximum degree possible. Moreover, 3 AAC 110.160(a) allows annexation of an area if, on a scale suitable for borough government, the post-annexation boundaries of the borough would embrace a population that is interrelated and integrated with respect to social, cultural, and economic characteristics and activities. In the context of boroughs embracing large and natural regions, the large area and small population proposed for annexation have many interests in common with the area and population within the existing boundaries of the KGB. Based on the evidence in this proceeding, DCCED concludes that the KGB annexation proposal satisfies the standards set out in article X, section 3 of the Alaska Constitution and 3 AAC 110.160(a).
- Again, in the context of large and natural regions, the communications media and transportation facilities in the proposed expanded boundaries of the KGB allow for the level of communications and exchange necessary to develop an integrated borough government. DCCED concludes from those circumstances that the KGB annexation proposal satisfies the standards set out in 3 AAC 110.160(b).
- Based on the most current available data, the population of the KGB is 63 percent greater than the median population of all organized boroughs in Alaska. The population density of the KGB is the fourth highest of among the sixteen organized boroughs in Alaska. Although the proposed annexation would quadruple the amount of land within the KGB and increase its population by only one-tenth of 1 percent, the proposed expanded KGB would still have a population density greater than nine of Alaska's sixteen organized

boroughs.<sup>19</sup> While the KGB experienced a moderate population downturn from 1996 - 2004, its population has increased in the past two years. Based on the facts outlined in Part II of this report, DCCED concludes that the size and stability of the population within the proposed new boundaries of the KGB are sufficient to support the proposed expanded borough and that the standard set out in 3 AAC 110.170 is satisfied.

- In DCCED's view, the KGB annexation proposal is fiscally sound considering the reasonably anticipated functions, expenses, and income of the KGB in the area proposed for annexation; the ability of the KGB to generate and collect local revenue; and the feasibility and plausibility of the KGB's anticipated operating and capital budgets. Moreover, the economic base, property valuations, land use, existing and reasonably anticipated development, and personal income in the KGB proposed expanded boundaries demonstrate that the economy in the greater Ketchikan region is capable of supporting the proposed expanded borough government. Furthermore, there are sufficient employable persons to serve the needs of the proposed expanded borough. DCCED concludes, therefore, that the standard set out in 3 AAC 110.180 regarding the human and financial resources is fully satisfied by the Petition.
- In the context of the boundary standard in 3 AAC 110.190, DCCED examined • land use and ownership patterns, population density patterns, existing and reasonably anticipated transportation patterns and facilities, natural geographical features and environmental factors, model borough boundaries. and other factors. It is evident to DCCED that the proposed new boundaries of the KGB conform generally to natural geography, include all land and water necessary to provide the full development of essential borough services on an efficient and cost-effective level, and are otherwise proper. DCCED recognizes, of course, that the KGB annexation proposal would create a 205square mile enclave in and around Hyder. Based on the discussion in Part II, DCCED finds that such an enclave would not result in inefficient, costineffective service delivery in the near-term. However, if a Prince of Wales Island Borough were formed, the enclave would become a small remnant of the Southeast Island REAA. At that point, the enclave should be annexed to the KGB. Lastly, it is noted that the proposed expanded boundaries of the KGB do not overlap the boundaries of an existing organized borough. In DCCED's view, the KGB proposal satisfies the boundary standard set out in 3 AAC 110.190.
- An annexation proposal may only be approved if the LBC finds that it serves the best interests of the State. Examination of that standard by DCCED

<sup>&</sup>lt;sup>19</sup> With the incorporation of Skagway as a borough, there are now 17 organized boroughs in Alaska.

included consideration of the constitutional principles of maximum local selfgovernment and minimum numbers of local government units. DCCED's review also addressed the manner in which annexation will relieve the State of Alaska of the responsibility of providing local services and how annexation will result in broad policy benefit to the public statewide. While the KGB annexation would have some adverse fiscal impacts on communities in the unorganized borough, the LBC has repeatedly indicated that such circumstances are not relevant in terms of the applicable standards and are no basis to deny the proposal. Based on these facts, DCCED takes the view that the standard set out in AS 29.06.040 and 3 AAC 110.195 regarding the best interests of the State is satisfied.

- The provisions of 3 AAC 110.200 allow a legislative review annexation if • certain circumstances exist. Among those are several that DCCED finds to be evident. For example, the area proposed for annexation manifests a reasonable need for borough government that can be met most efficiently and effectively by the KGB. Additionally, in a general sense, residents and property owners within the area proposed for annexation receive, or may be reasonably expected to receive, directly or indirectly, the benefit of borough government without commensurate tax contributions. Annexation of the area will also enable the KGB to plan and control reasonably anticipated growth or development in the area that otherwise may adversely affect the area and population within the KGB. Moreover, annexation of the area will promote maximum local self-government with a minimum number of government units. Annexation of the area will also enhance the extent to which the KGB meets the legal standards for borough incorporation. Lastly, specific policies set out in the Constitution of the State of Alaska are best served through annexation of the area by the legislative review process. Given its findings, DCCED concludes that the standard set out in 3 AAC 110.200 is satisfied.
- The Petition presents a seven-page transition plan that demonstrates KGB's capacity to extend borough services into the area proposed for annexation in the shortest practicable time after annexation. The document includes a practical plan for the assumption of all relevant and appropriate powers, duties, rights, and functions presently exercised by Southeast Island REAA and the State of Alaska. Given those circumstances, DCCED concludes that a proper plan for the orderly transition to borough government has been provided in accordance with 3 AAC 110.900.
- DCCED finds no evidence in this proceeding to indicate that the KGB annexation proposal proposed will have the purpose or effect of discriminating based on race, color, creed, sex, or national origin. Nothing suggests that the proposed annexation will have a retrogressive purpose or effect with regard to any civil or political right, including voting rights, because of race, color, creed, sex, or national origin. No minority-language groups covered by the federal Voting Rights Act exist in the area proposed for annexation. Even if such groups existed in the area, there is no evidence to

indicate that annexation will have the purpose or effect of discriminating against a language minority group. Those facts led DCCED to conclude that the standard set out in 3 AAC 110.910 is satisfied and that the proposed annexation does not violate any provision of the federal Voting Rights Act.<sup>20</sup>

DCCED reaffirms those conclusions.

## C. Recommendations

Based on its analyses, findings, and conclusions, DCCED recommended that the LBC approve KGB's annexation proposal without condition or amendment. DCCED reaffirms those analyses, findings, and conclusions and recommends that KGB's annexation proposal be approved by the LBC without condition or amendment.

<sup>&</sup>lt;sup>20</sup> *Preliminary Report*, pp. 114 -117 (footnotes omitted).

# Part IV. Scheduling and Notice of November 6, 2007, LBC Hearing and Decisional Meeting

The LBC will conduct a public hearing in Ketchikan regarding the KGB's annexation proposal. The hearing is scheduled to be held in the City of Ketchikan's Council Chambers on Tuesday, November 6, 2007, beginning at 9 a.m. The LBC has scheduled a decisional meeting under 3 AAC 110.570 to act on the Petition.<sup>21</sup>

Formal notice of the hearing and decisional meeting has been given by DCCED under 3 AAC 110.550. Arrangements have been made for publication of the notice as a display advertisement in the *Ketchikan Daily News* on October 5, 19, and 26, 2007; in the *Island News* on October 15, 22, and 29; and in the *Wrangell Sentinel* on October 11, 18, and 25, 2007.



<sup>&</sup>lt;sup>21</sup> At that meeting, the Commission will also act on the Petition to incorporate a Wrangell borough, a proposal on which a hearing is scheduled for November 3, 2007, in Wrangell, Alaska.

If the LBC concurs with DCCED's conclusions that the Petition meets all applicable legal standards, the LBC may approve the Petition with or without condition and/or further amendments.

## Appendix A

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# Appendix B

Public Comment Received on DCCED's Preliminary Report

## LOCAL BOUNDARY COMMISSION STATE OF ALASKA

#### IN THE MATTER OF THE PETITION OF ) THE KETCHIKAN GATEWAY BOROUGH ) FOR ANNEXATION OF 4,701 SQUARE MILES )

Local Boundary Commission

ECEIVE

SEP 04 2007

# COMMENT OF THE CITY OF WRANGELL TO THE PRELIMINARY REPORT TO THE LOCAL BOUNDARY COMMISSION REGARDING THE PETITION FOR ANNEXATION OF THE KETCHIKAN GATEWAY BOROUGH

The June 30, 2007 DCCED Preliminary Report (the "Report") regarding the KGB annexation petition is inadequate in its analysis and discussion of the overlapping territory sought by both the Petition for Incorporation of the City and Borough of Wrangell and by the KGB annexation Petition. The disputed territory is the western part of the Cleveland Peninsula, specifically that part of the Peninsula which drains west into Clarence Strait or Ernest Sound, down to and including Meyers Chuck.

The overlapping territory of these competing petitions is of course not the only matter which needed to be addressed in the DCCED Preliminary Report on the annexation, which must address all issues presented by the annexation petition. However, the conflicting contentions between Wrangell and Ketchikan as to which community has the greater connections with the disputed Cleveland Peninsula area was easily the greatest focus of public comment, and of a responsive brief filed by Wrangell<sup>1</sup>. Yet, the Report (1) examines the disputed territory issues only in the most superficial terms; (2) largely accepts Ketchikan's limited contentions at face value, without critical examination; (3) ignores substantial evidence supplied by the City of

<sup>&</sup>lt;sup>1</sup> Wrangell's interest in including Meyers Chuck/Union Bay and the western Cleveland Peninsula in the proposed Wrangell borough is not primarily related to the "two- community" issue created by LBC regulations. The two-community regulation was at most a regulatory presumption at 3 AAC 110.045(b), now repealed (pending Department of Law Review) by the LBC in its April 30, 2007 final decision to adopt regulation amendments. While DCCED's Preliminary Report notes (p.3) that these modified regulations are not retroactive, it acknowledges that the newly adopted regulations express the LBC's current policy views with respect to borough boundary issues. Although the Commission has now determined that borough approval should not be based upon inclusion of multiple communities, such that Wrangell's inclusion of Meyers Chuck/Union Bay is not essential for this purpose, Wrangell nevertheless seeks to include the western Cleveland Peninsula because of its greater connections with this area and the desire of local residents in Meyers Chuck/Union Bay to be included in a Wrangell, not Ketchikan, borough.

Wrangell and public comment from Meyers Chuck/Union Bay residents, which specifically rebutted Ketchikan's contentions; (4) presents misleading information concerning Ketchikan's connections with the eastern half of the Cleveland Peninsula in a manner which erroneously implies strong Ketchikan connections with the entire Peninsula, including the disputed western portion sought by the Wrangell petition; and (5) places substantial reliance upon an erroneous description, and accompanying map, of the boundaries of Election District 2, as described in the Alaska Constitution and as utilized in the 1963 Mandatory Borough Act, when in fact the relevant western boundary of that district actually conforms nearly identically to the proposed Wrangell Borough boundary, rather than to the KGB's. The Report attaches maps of current election districts and NOAA weather service zones, both of which the Department acknowledges to be poor sources for Borough boundaries, yet fails to note the boundaries identified by ADF&G for game management units, commercial fishing districts and the Ketchikan Non-Subsistence Area, which support Wrangell's, rather than Ketchikan's asserted The Report also incorrectly describes the boundaries of the Outer boundaries. Ketchikan Census Subarea as including Union Bay, which it does not. These omissions and misstatements are discussed at greater length below.

The Report's failure to discuss and address the extensive public comment and the responsive briefing filed is somewhat puzzling. While a regulation (3 AAC 110.530) charges the department with the duty to "investigate and analyze" a proposed annexation and to prepare a preliminary report of its findings and recommendations, this step comes only after annexation procedures call for the taking of public comments and for the filing of any briefs responsive to the annexation petition. The obvious intention here is that public comments and responsive briefs will be addressed, analyzed, and taken into account (even if rejected) in the Department's later preliminary report. That has not been done in this case.

The DCCED Report fails to disclose the existence and content of extensive public comments opposing KGB annexation of the Meyers Chuck/Union Bay area. It does not note the fact that the residents of Meyers Chuck and Union Bay unanimously oppose annexation of this area into the KGB, but instead favor their inclusion into a Wrangell Borough.<sup>2</sup> The unanimous preference of Meyers Chuck/Union Bay residents to be in a Wrangell Borough rather than in the KGB <u>at a minimum</u> merited a discussion in the Report as to why this preference should be discounted. Although it is true that Alaska's borough incorporation and legislative annexation laws do not elevate local consent to an absolute requirement, neither do such laws simply ignore local residents' preferences. The public comment and responsive brief procedures embodied in LBC regulations should not be regarded as merely nuisancing formalities, but as a source of potentially meaningful input into the Department's subsequent analysis.<sup>3</sup> The Local Boundary Commission has always taken very seriously the position of local residents as to whether they support their inclusion in one municipal government or another. The Wrangell petitioners hope that the Commission will itself regard the specific input provided in Wrangell's written responses and in public comment by affected residents as important information regarding Ketchikan's annexation proposal.

Here, the choice is not between annexation of a remote region and community into a borough versus continuing to exclude them from *any* organized borough; the choice is between including them in the Ketchikan Borough or in the proposed Wrangell Borough, a circumstance in which the local preferences of Meyers Chuck/Union Bay should be accorded substantial weight, rather than being ignored as irrelevant. As the LBC itself recently quoted from the Sponsor Statement regarding the proposed "administrative borough" legislation (SB 128),

> The role of the Local Boundary Commission is to review proposed changes, not to create boroughs. If we are to have a government by the people, those proposed changes

<sup>&</sup>lt;sup>2</sup> There is only an oblique reference to these local residents' preference, at p.106 of the Report, where the KGB's annexation petition itself is quoted as stating that KGB representatives traveled to Hyder and Meyers Chuck and met with community members, who expressed "overwhelming opposition to the annexation proposal".

<sup>&</sup>lt;sup>3</sup> As is shown in greater length in the follow sections, the errors, omissions and misleading statements in the Report concerning the western Cleveland Peninsula all operate to favor Ketchikan's annexation of the disputed area as opposed to its inclusion in the Wrangell Borough. From the standpoint of the Wrangell petitioners and the residents of Meyers Chuck/Union Bay, the Report appears at times to be more of an advocacy document than an evenhanded assessment of the evidence supporting the contrary positions of Wrangell and Ketchikan.

should emanate from the local level up, not from the top of the government pyramid down.

See, LBC Statement of Decision (January 18, 2007) regarding Skagway Borough proposal, p.18. The petitioners for incorporation of a City and Borough of Wrangell include residents of Meyers Chuck/Union Bay, whose proposal to include their community in a Wrangell Borough warrants serious consideration. The DCCED report on the KGB annexation should seek to include the affected Meyers Chuck/Union Bay residents in the process, rather than appear to treat them as outsiders.<sup>4</sup>

# I. Mandatory Borough Act

To support its conclusion that the disputed territory belongs in the KGB, rather than a Wrangell Borough, the Report claims that the area would have been included in a Ketchikan Borough under the 1963 Mandatory Borough Act. See, Report at pp.11-14. This claim is wrong, as is the map drawn at Figure 2-1, p.13 of the Report to support this claim.

Under that Act, eight different regions of the State would have automatically become boroughs on January 1, 1964 unless different boundaries were proposed by local option petition. The boundaries of those mandated boroughs corresponded to election districts, and one of those districts was Ketchikan Election District #2, described as follows:

The area of the mainland drained by streams flowing into Revillagigedo Channel, Behm Canal, Burroughs Bay, and

<sup>&</sup>lt;sup>4</sup> A substantial portion of the department's Report contains a dissertation regarding the history and interpretation of the Alaska Constitution's Article X, concerning local government. The point of this lengthy discussion is to argue in favor of generally larger rather than smaller boroughs – a point which does not appear to be in issue regarding the KGB proposal, as either the existing Ketchikan Gateway Borough or a larger borough including areas proposed for annexation would unquestionably comply with the Constitution's conception of borough size. The discussion appears to be more of a argument by Department staff voicing disagreement with the LBC's recent (January 18, 2007) decision approving the relatively small Skagway Borough, a decision with which staff evidently disagreed but which is not really in issue in the proposed KGB annexation. What is noteworthy is that the KGB annexation Report spends in excess of 30 pages constructing a constitutional argument against too-small boroughs, while it dedicates no discussion whatever to the factually specific suggestions of the City of Wrangell and Meyers Chuck/Union Bay residents who filed public comment in opposition to Ketchikan's annexation of the western Cleveland Peninsula.

east side of Clarence Strait from the southernmost point of the Alaska-British Columbia boundary line to and including Lemesurier Point; and those islands south of Ernest Sound and east of Clarence Strait, including Revillagigedo, Gravina, Annette, and Duke Islands, and other adjacent smaller islands. (Italics added)

The Report includes a map (Figure 2-1) purporting to illustrate these boundaries, which shows the entirety of the Cleveland Peninsula within the district, and thus concludes that the disputed territory lies "within the boundaries that would have been instituted on January 1, 1964, had the KGB not incorporated under the local option provisions." Report, at p.14. This claim was repeated by a DCCED staff person in a radio interview concerning the Report, in support of the Report's conclusion that the disputed territory has more in common with Ketchikan than with Wrangell:

[L]et me emphasize that historically that same conclusion was reached by the Alaska Legislature in 1963 when it adopted the Mandatory Borough Act, [and] it was reached by Governor Egan implicitly when he signed the Mandatory Borough Act into law....

July 30, 2007 interview comments by Dan Bockhorst, on KRBD, 105.3 FM.

In fact, however, this claim is simply incorrect – the vast majority of the disputed territory was then located within the Wrangell Election District, and would not have been included in a Ketchikan Borough created under the Act.<sup>5</sup> As described above, Ketchikan Election District #2, initially described in the Alaska Constitution and later incorporated into the 1963 Mandatory Borough Act, only included the mainland drainages on the "east side of Clarence Strait" from Lemesurier Point <u>south</u>, to the Canadian border. It did not contain the portion of the mainland (which includes the Cleveland Peninsula) <u>north</u> of Lemesurier Point, which drains into Ernest Sound, i.e. the western drainage of the Peninsula. Thus, Figure 2-1 of the Report, which purports to show District #2 as including the entirety of the Peninsula, is wrong, as are the conclusions drawn by the staff from that erroneous map, including statements regarding

<sup>&</sup>lt;sup>5</sup> The Wrangell-Petersburg Election District #3 included all land on the mainland north of Election District #2. See, Sec. 3, Art. XIV, Constitution of Alaska.

the supposed intent of the Legislature and Governor in regard to the disputed territory. When correctly drawn, the Election District #2 boundary line in the disputed territory follows the natural watershed geography of the Cleveland Peninsula, and in fact corresponds *nearly identically* to the proposed southern boundary line of the Wrangell Borough. Attached as Exhibit 1 is a map showing the proposed Wrangell Borough boundary in the disputed territory, along with the correctly drawn Election District #2 boundary line. Attached as Exhibit 2 is a similar map, contrasting the substantial difference between the KGB proposed boundary in the disputed territory with that of Election District #2.<sup>6</sup>

The true conclusions to be drawn from the boundaries of this election district are thus the direct opposite of the conclusions drawn by DCCED staff and contained in the Report. The Alaska Legislature (and Governor Egan), by utilizing that election district line as a proposed borough boundary, concluded that the western drainage area of the Cleveland Peninsula had more in common with Wrangell to the north, than with Ketchikan.<sup>7</sup>

# II. Fish and Game Harvest Patterns Support Including the Western Portion of the Cleveland Peninsula in a Wrangell Borough

The Report's discussion of fish and game harvest patterns on the Cleveland Peninsula is limited to sport/subsistence use, and does not address commercial harvest, which supports Wrangell's proposed boundary encompassing the western drainage of the Cleveland Peninsula down to and including Meyers Chuck. Even the discussion of sport/subsistence usage, at pp.46-47, fails to note that the referenced information supports Wrangell's, rather than Ketchikan's, position regarding the disputed overlap area.

<sup>&</sup>lt;sup>6</sup> A map showing the boundaries of Election district #2 has been prepared and is attached hereto as Exhibit 3.

<sup>&</sup>lt;sup>7</sup> A previous staff report on the KGB's 1998 annexation attempt contained a map showing (in darkened shading) the correct boundaries of Ketchikan Election District #2. See, p. 33, figure 7, of the October 1998 DCRA Preliminary Report regarding the Ketchikan Gateway Borough's Petition to Annex Approximately 5,524 Square Miles (a copy of which is also attached hereto as Exhibit 4.)

The Report's discussion starts by directly quoting from a section of the KGB petition which asserts that the Alaska Department of Fish & Game (ADF&G) Game Management Unit boundaries "roughly coincide" with the area proposed for annexation. With respect to the overlap area, this statement is starkly untrue, and the Report should have stated this. Instead, the report vaguely notes that the GMU boundaries "run down the middle of the cape at Lemesurier Point on the Cleveland Peninsula." Because a primary focus of the Report is the overlap area disputed between Wrangell and Ketchikan, it should more specifically have noted that the boundary between the ADF&G's GMU 1B and GMU 1A divides the western and eastern drainages of the Cleveland Peninsula – not like the KGB annexation proposes, but rather in a manner nearly identical with the proposed Wrangell Borough's southern boundary. See, Exhibit 5. In its responsive brief to the KGB annexation, the City of Wrangell attached a map of the GMU boundaries. That map, attached again hereto as Exhibit 6, should have been included in Appendix D to DCCED's Report; it has far more significance than the NOAA weather service zone boundary map (Appendix D-5) and election district maps (Appendix D-2 through Appendix D-4) which were included.<sup>8</sup>

The Report also discusses deer hunting on the Cleveland Peninsula, but again fails to note that this information supports the boundaries proposed by Wrangell, not Ketchikan. The Report refers to a 2003 Deer Hunter Survey conducted by ADF&G, which notes that Ketchikan hunters hunted in both Units 1A & 1B, Wrangell hunters hunted in GMU 1B, and that Meyers Chuck residents hunted in both areas. The actual statistics for the 2003 survey show that Ketchikan hunters harvested 0 deer in GMU 1B (which includes the western drainage of the Cleveland Peninsula), while Wrangell hunters harvested 10 deer from this area. The DCCED report then quotes from a Wildlife Biologist with ADF&G regarding fish and game harvest use patterns in the disputed area, who noted that:

"Wrangell folks use the Peninsula on the west side down to Union Bay, and Ketchikan folks use it on the east side."

<sup>&</sup>lt;sup>8</sup> The Report included these, and not other maps, even though the Report itself notes that neither weather zones nor current election districts supply a good basis for borough boundaries. See, p. 85, n. 57, and pp. 41-42 (citing LBC Statement of Decision in initial Skagway Borough proceedings, September 27, 2002 at pp. 15-16).

This is precisely the point urged by Wrangell in support of its proposed borough boundary. Because of the ease of access by Ketchikan residents to the *eastern* drainages of Cleveland Peninsula, via the protected water ways of Behm Canal, the fish and game harvest patterns tie that area to Ketchikan. The *western* drainages, however, down to the vicinity of Meyers Chuck, are used predominantly by Wrangell residents, and by the residents of Meyers Chuck/Union Bay.

The statement attributed to the wildlife biologist as to greater deer harvest on the Cleveland Peninsula by Ketchikan, rather than Wrangell residents, relates to harvest on the *east* side of the Peninsula. There is a major difference between Ketchikan residents' access to the eastern side of the Cleveland Peninsula via Behm Canal, and the lengthy trip up the exposed outside of Clarence Strait necessary for a Ketchikan resident to reach Meyers Chuck/Union Bay and the remainder of the western drainage of the Cleveland Peninsula. This explains why Ketchikan residents rarely hunt and fish in this area. The quoted ADF&G biologist, Boyd Porter, confirmed that it is rare for a Ketchikan hunter to hunt on the western side of the Cleveland Peninsula. (Personal communication, August 2, 2007).

Natural watershed geography profoundly affects fish and game harvests and transportation patterns, and results in a natural division between the Wrangell side and the Ketchikan side which was recognized by ADF&G in drawing Game Management Unit boundaries and which should be respected in drawing borough boundary lines. By vaguely suggesting that fish and game harvest favors the proposed Ketchikan annexation boundaries, the Report does a disservice to analysis of this important issue.

The Report similarly ignores other important information on this issue which was submitted in the City of Wrangell's response to the KGB annexation petition. This included reference to ADF&G's Wrangell Harvest Study (Technical Paper No. 165), which contained information showing that the heavy subsistence usage of Wrangell residents included usage of the western drainage area of the Cleveland Peninsula. Wrangell's response to the KGB petition attached several ADF&G maps from the Wrangell Harvest Study, showing that Wrangell residents use the western watershed of the Cleveland Peninsula, adjacent to the Meyers Chuck/Union Bay community, for deer

hunting, non-commercial salmon harvest, and non-commercial harvest of finfish other than salmon. These maps are again attached hereto as Exhibit 7.

Wrangell's response also discussed the historic ties of the Wrangell Stikine Tlingit to the disputed area for use in trapping, fishing and hunting. Portions of a 1998 Sealaska Heritage Foundation publication, entitled "Haa Aani, Our Land, Tlingit and Haida Land Rights and Use", discussing the Wrangell Tlingit's traditional use of the western drainage of the Cleveland Peninsula, including a map, were attached to Wrangell's filing, but ignored in the Report. The map is hereto attached again, as Exhibit 8. The historic territory of the Wrangell Stikine Tlingits is significant to the "social, cultural and economic" ties Wrangell has with this area, all of which are referenced in the statutory standards for borough incorporation under AS 29.05.031(a)(1). Particularly in Southeast Alaska, traditional Native clan territory has ongoing significance – recognized by the Native residents of both Wrangell and Ketchikan. The DCCED Report should, at least, acknowledge and address this important factor.

The DCCED Report also fails to consider information submitted by Wrangell showing that ADF&G has designated a Ketchikan Non-subsistence Area which again supports Wrangell's, not Ketchikan's, position regarding the disputed overlap area. Under ADF&G regulation 5 AAC 99.016(a), the Department designates as a "Nonsubsistence Area" an "area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community." ADF&G designated the "Ketchikan Non-subsistence Area" as including the eastern drainages of the Cleveland Peninsula, between Niblack Point and Bluff Point, but not including the western drainages and the Meyers Chuck/Union Bay area. A copy of the regulatory designation of the Ketchikan Non-subsistence Area, 5 AAC 99.015(a) is again attached hereto, as Exhibit 9, along with a map of the Ketchikan Nonsubsistence Area, which shows a boundary excluding the western drainages of the Cleveland Peninsula and Meyers Chuck/Union Bay. Additionally attached, as Exhibit 10, is a map of the disputed territory, showing the non-subsistence area boundary, as well as the proposed boundaries for the KGB and the Wrangell Borough. As is the case with other important boundary lines discussed in this comment, the proposed southern

boundary of the Wrangell Borough closely follows the Non-Subsistence area line, a factor ignored in the Report.

The boundary of the Ketchikan Non-subsistence Area was based upon ADF&G studies of the lifestyles of local residents. ADF&G concluded that the drainages of the east side of the Cleveland Peninsula, which are adjacent to Behm Canal and are thus directly accessible from Ketchikan, do not feature human populations which are dependent upon subsistence, while the opposite side of the Cleveland Peninsula, adjacent to Clarence Strait and Ernest Sound, is subsistence-dependant. In substantial contrast with the KGB, the entire proposed Wrangell Borough, including the western drainages of the Cleveland Peninsula, is not included in a "non-subsistence area," and is therefore viewed by the ADF&G as being rural rather than urban in character. Meyers Chuck/Union Bay residents for the most part are engaged in self-reliant lifestyles typical of more remote settlements, featuring substantial subsistence harvest of fish and game and participation in commercial fisheries. Their lifestyles are more compatible with those of Wrangell residents than with the residents of the more urban Ketchikan area. This information should be included in DCCED's Report, rather than ignored in favor of less significant information.

The Report also fails to note the greater *commercial* fishing and hunting connections of Wrangell with the disputed overlap area. A comment signed by five residents of the area<sup>9</sup> states that:

The Meyer Chuck/Union Bay residents who have commercially fished have delivered in Wrangell, used the Wrangell boat shop for repairs and maintenance ... [Wrangell] commercial and subsistence fishermen have ties to the Union Bay area for salmon, halibut, dungeness crab and spot prawns.

In responding to the KGB petition, Wrangell also submitted information that commercial fishermen from Wrangell engage in pot fishing for shrimp and dungeness crab in the

<sup>&</sup>lt;sup>9</sup> Debbie Johnson, Brad Johnson, Kurt Brodersen, Rory Bifoss and Marion Bifoss.

Union Bay area, while few boats from Ketchikan do the same<sup>10</sup>, that Wrangell residents engage in trapping of wolves, otter and marten in this area while Ketchikan residents do not; and that there is only one permitholder, who is from Wrangell, authorized to conduct commercially guided bear hunts in the western watershed area of the Cleveland Peninsula.<sup>11</sup> In a separate letter, Union Bay residents Debbie Johnson and Marion Bifoss state that "We share the same geographic areas for subsistence fishing and hunting and also for commercial fishing in Union Bay and Ernest Sound as Wrangell." Although both local residents' public comments to the KGB petition and ADF&G reports and biologist's comments all demonstrate a far greater connection of Wrangell than Ketchikan with the western Cleveland Peninsula, the DCCED report fails to discuss this information.

## III. Wrangell has Superior Transportation Links with Meyers Chuck/Union Bay

The Report also ignores Wrangell's transportation links with Meyers Chuck/Union Bay. Despite the fact that the rural marine community of Meyers Chuck places greater reliance on maritime transportation than on air service, the Report focuses only upon the latter. It also emphasizes, by quoting twice, a 1998 statement by a Ketchikan group (the "Cleveland Users Coalition") that the Cleveland Peninsula is only "20 minutes by skiff" from the north end of Ketchikan, failing to note that this describes only connections

<sup>&</sup>lt;sup>10</sup> The commercial gillnet salmon fishery in northern Clarence Strait (which extends south as far as Pt. Stanhope but does not include Ernest Sound, where no gillnetting occurs), features a predominantly Wrangell-based gillnet fleet, which procures fuel and supplies in Wrangell and sells the majority of its product to Wrangell processors. (Personal communication, ADF&G biologist Scott Forbes, August 7, 2007.) A substantial number of Wrangell-based dungeness crab boats and shrimp boats fish in fishing districts 6 and 7, including the Ernest Sound area adjacent to Union Bay and Vixen Harbor, in the disputed territory. Wrangell boats predominate these fisheries. The crab are processed in Wrangell; the shrimp are processed and frozen onboard the vessels. (Personal communication, Wrangell fisherman, Tom Sims, August 15, 2007). Fishing districts 6 and 7 are of vital importance to the Wrangell economy.

<sup>&</sup>lt;sup>11</sup> Guide Mark Galla has been conducting guided bear hunting out of Wrangell in the western drainages of the Cleveland Peninsula, in GMU 1B, since 1990. Mr. Galla conducts three guided hunts each spring, each featuring approximately 12 client hunters or observers, in which he utilizes three or four accompanying employees from Wrangell. These trips originate and end in Wrangell. (Personal communication, August 10, 2007).

with *eastern* drainages (into Behm Canal) of the Cleveland Peninsula, not the *western* drainage area, including Meyers Chuck/Union Bay.

The paramount importance of maritime transportation links to Meyers Chuck/Union Bay residents cannot be overstated. Nearly all of these residents own their own boats of varying sizes, some of which are engaged in commercial fishing. Freight of any bulk, including items which cannot be placed into a float plane<sup>12</sup>, must be delivered to Meyers Chuck/Union Bay by boat or barge. The primary transportation link to Meyers Chuck/Union Bay is by boat, not airplane. The LBC's April, 2007 regulatory changes revise the regulation relating to transportation links (3 AAC 110.045(d)) to provide that, in determining whether such links are sufficient, the Commission may consider "... other customary means of travel including boats ...."

However. the agency's Report ignores written comment from Meyers Chuck/Union Bay residents and from the City of Wrangell describing Wrangell's far superior maritime route. One letter states as follows:

> The protected waters going between Wrangell and Meyers Chuck/Union Bay are more logical from a safety viewpoint. It is much safer to go by boat to Wrangell from Meyers Chuck/Union Bay, the entire route in enclosed protected waters for provisions, than the open unprotected waters of Clarence Strait to get to Ketchikan by boat.

> The possibility of getting "stuck" in Ketchikan because of weather for a week is not unusual for a large part of the year, - then there is the added cost of having to stay in a hotel room for \$69.00 and up depending on the season.

The letter further notes that Meyers Chuck/Union Bay residents

... use the barge system for large and bulk items sent from the lower 48. We get fuel, propane and groceries frequently from Wrangell or Thorne Bay on Prince of Wales Island.

Similarly, Meyers Chuck residents Tim and Donna Collins noted in their comment that

<sup>&</sup>lt;sup>12</sup> Promech Air, out of Ketchikan, offers scheduled flights to Prince of Wales Island communities which will drop off/pick up Meyers Chuck/Union Bay passengers on a space-available basis. These are normally DeHavilland Beaver seaplanes which feature a 1000 lb. total weight limit, including up to 5 passengers and their freight. This sometimes allows little or no freight to accompany a passenger.

... it is much safer to navigate from here to Wrangell to a meeting of our governing body than to Ketchikan!

The Report failed to discuss this input, as well as the following information provided in the City of Wrangell's response:

The greater connections of Meyers Chuck/Union Bay with Wrangell than with Ketchikan are due in large part to the character of the marine waterways which serve as de facto highways in the roadless areas of southeast Alaska. The exposed harborless route along Clarence Strait from Meyers Chuck to Ketchikan frequently features rough water from which a transiting boat cannot escape, making far more preferable the protected route to Wrangell via Ernest Sound and Zimovia Strait. Residents of Union Bay, some of whose fishing vessels exceed 50 feet in length, therefore travel to Wrangell rather than Ketchikan to obtain fuel necessary for boats, generators and heating, and have all of their bulk products, including construction materials and bulk foods, shipped to Wrangell to be picked up by boat and transported to Union Bay. Where the size of freight requires towing a barge, the protected waterway route from Wrangell is far preferable than the Ketchikan route. A landing craft service in Wrangell is available to transport bulk shipments to Meyers Chuck, e.g., this service recently transported a Lindahl cedar home from Wrangell to Meyers Chuck.

The leading cruising guide for southeast Alaska notes the dangerous qualities of Clarence Strait, through which one must travel to reach Ketchikan:

Clarence Strait, open to the southeast-northwest, has strong currents of several knots in certain areas . . . The strait is susceptible to southeast gales which can quickly pick up to dangerous proportions with the passage of a weather front. A nasty chop develops any time a wind over 15 knots is blowing, especially against the strong outflowing ebbs at Behm Canal and Ernest Sound.

Exploring Southeast Alaska, by Don Douglass and Réanne Hemingway-Douglass (2000) pp.157-59.

In the one context in which the Report does focus on maritime connections, it does so in a misleading fashion, by twice repeating the Cleveland Users Coalition statement that the Cleveland Peninsula is only 20 minutes by skiff from Ketchikan. The Report fails to note that this connection is only with the *east* side of the Cleveland Peninsula. This is obvious from the Coalition statement where it refers to "four major estuary type bays which are popular destinations for hunting, fishing, beach combing and crabbing." These are the estuaries of Smugglers Cove, Helm Bay, Port Stewart and Spacious Bay, all on the east side of the Cleveland Peninsula, on Behm Canal. The Report further cites the organization "Tidepool", which describes "the Peninsula" as "being just a short boat ride through relatively sheltered waters, making it accessible to people with inexpensive skiffs." Again, this is a description of the *east* side of the Cleveland Peninsula; no one would describe the exposed Clarence Strait as a "relatively sheltered water", and any transit from Ketchikan to Meyers Chuck via Clarence Strait would be foolhardy and dangerous in any unsettled weather. The 20 minute skiff ride which is described by the Coalition is the 10 mile crossing of Behm Canal from the northwest end of the Ketchikan road system to the closest part of the *east* side of the Cleveland Peninsula, assuming a 30 mph speed.

Area residents made this point in a comment to the KGB annexation petition:

The Ketchikan Gateway Borough keeps trying to justify using Loring and Moser Bay [on the east side of Behm Canal] as a parallel to the communities of Meyers Chuck/Union Bay. They are entirely different in several aspects.

Geographically, Loring and Moser Bay are in a skiff of moderate speed, a 20 or 30 minute ride in protected waters to the Clover Pass area, where they have access to the Ketchikan road system by vehicle to pick up goods, use services or have a job.

Here [in Meyers Chuck/Union Bay], we live several hours by boat to Ketchikan and we have to travel the open unprotected waters of Clarence Strait to use the same facilities.

There is no feasible way to have a job in Ketchikan from our area of Meyers Chuck/Union Bay as someone from Loring or Moser Bay could do.

By lumping all of the Cleveland Peninsula together on the basis of Ketchikan's connections with only its eastern side, the Report's analysis is akin to claiming Cuba is

closely tied to Seattle because it is only 90 miles from Florida. Geography is important, and the Local Boundary Commission and the petitioners deserve an accurate appraisal in a departmental analysis.

The Report uncritically accepts the Ketchikan petition's assertion, from which the Report quotes, that Meyers Chuck/Union Bay residents utilize the Ketchikan International Airport to travel to destinations outside of the region, as evidence supporting the area's inclusion in the KGB. The fact that these residents travel *through* the Ketchikan Airport to go Outside does not warrant such inclusion. Residents of Prince of Wales, Wrangell, Petersburg -- and southern Southeast Alaska generally -- travel through the Ketchikan Airport to go to other destinations. The only real significance of this is that most of the air transits between Meyers Chuck and Ketchikan do not reflect Meyers Chuck residents' use of Ketchikan itself as a source of supplies or other support, but merely indicate that these residents spend an hour or two at the Ketchikan Airport on Gravina Island (not in Ketchikan itself) while awaiting flight connections elsewhere. This point was raised in a letter from area residents, which also notes that Union Bay residents use Wrangell and Prince of Wales communities for most of their goods and services.<sup>13</sup>

Regarding communication connections, Meyers Chuck residents have stated that they do not rely upon Ketchikan outlets for either radio, television or newspapers. There are cell phone services through Anchorage; television is received by satellite and they receive satellite radio, none of which originates in Ketchikan.

A recent development regarding radio transmission is significant, however. Public Radio station KSTK, based in Wrangell, has now, after years of effort, obtained funding to install a 100 Watt "translator" at a 300 foot elevation above Coffman Cove,

<sup>&</sup>lt;sup>13</sup> An exception relates to Ketchikan's hospital, which is the largest in the southern southeast region, and often used by those who live in that area, including residents of the City and Borough of Sitka and the City of Wrangell. The service area for the hospital is very broad, including a population of approximately 35,000 people, and is obviously not intended to constitute legitimate boundaries for borough formation. See, information provided by the Hospital at <a href="http://www.pharmacyweek.com/job\_seeker/profiles">http://www.pharmacyweek.com/job\_seeker/profiles</a>. The use of Ketchikan's hospital by residents of the entire southern half of Southeast Alaska is much like the use of the large hospitals located in Anchorage by other Alaska residents living far outside of the Municipality of Anchorage.

directly across Clarence Strait from Meyers Chuck/Union Bay. This comparatively powerful translator will supply radio reception to the Meyers Chuck region superior to that now afforded by Ketchikan stations. The translator is scheduled to be installed this month, and its programming will include regional news from the Meyers Chuck/Union Bay area. (Personal communication, KSTK General Manager, Peter Helgeson, August 22, 2007).

#### IV. <u>Census Subarea Boundaries</u>

In support of its conclusion that the disputed territory belongs in the KGB, the Report (p.43) also relies upon census subarea boundaries, characterizing the Outer Ketchikan Census Subarea (OKCS) as including both "Meyers Chuck and Union Bay", and stating that,

[t]he OKCS generally corresponds to the area proposed for annexation, with the notable exception that Hyder is part of the OKCS but is excluded from the annexation proposal.

In this regard, the Report is both incorrect and misleading.

Union Bay is in fact located within the Wrangell/Petersburg Census Subarea, not the OKCS.<sup>14</sup> See, Exhibit 11 hereto, a map showing the boundary of the Outer Ketchikan Census Subarea in the disputed territory. That map, which also shows the proposed boundaries of both the proposed KGB annexation and the proposed Wrangell Borough, demonstrates that the Report's statement that the OKCS 'generally corresponds' to the proposed KGB annexation boundaries is flatly misleading in regard to the disputed territory -- in fact, the census subarea boundary in this area generally conforms to the proposed Wrangell Borough boundary, not the KGB's, and the Report should have stated that. The census subarea boundary line, like other boundary lines discussed in this comment, conforms to the natural geography of the Cleveland Peninsula, separating the eastern and western drainages, and is nearly identical to the southern boundary proposed for the Wrangell Borough.

<sup>&</sup>lt;sup>14</sup> The Wrangell/Petersburg Census Subarea is located generally to the north and west of the Outer Ketchikan Census Subarea. Copies of the census maps, obtained from the State of Alaska Department of Labor and Workforce Development website, were included as exhibits to the City of Wrangell's response to the KGB petition.

### V. Land Use in the Disputed Territory

The DCCED Report for the most part addresses land use in the area proposed for annexation only in general terms, not specific to the territory disputed between Wrangell and Ketchikan. The exceptions to this are the lengthy quotations, at p.75 and p.101 of the Report, from the KGB petition in which Ketchikan asserts that there will likely be large-scale commercial mining in the Union Bay area and that Ketchikan would be the primary service provider to the mine, such that nearby Meyers Chuck/Union Bay should be included in the KGB. The petition contains no supporting authority for its assertions, and the Report appears to accept them at face value. In doing so, DCCED ignores specific contrary evidence presented in the City of Wrangell's response to the KGB petition, and in comment by current Union Bay residents.

Wrangell's Responsive Brief stated:

Exploratory drilling by the joint venture pursuing [prospective platinum mines in the Union Bay area] was concluded in August, 2005, without sufficient findings to warrant development. According to an August 24, 2005 news release on the website of Freegold Ventures, Ltd. (www.freegoldventures.com),

The 2005 Union Bay exploration program focused on several areas identified from last year's airborne magnetic survey and the ground followup completed earlier this year. A 10,000 foot drill program tested a number of these targets within these prospective areas, but did not identify significant followup targets for the joint venture.

The news release stated that Freegold's London-based financer, joint venture partner Lonmin Plc, has notified the joint venturers that it will not fund further exploration in the remaining undrilled areas. One of the joint venturers, Pacific North West Capitol Corp., has retained one-third of the claims; the rest have been abandoned. According to the joint venturer's Fairbanks-based geological subcontractor, Avalon Development Corporation, it is highly unlikely that any mine development will occur in the Union Bay area. All of the drilling equipment on site has now been removed. Similarly, a comment letter signed by area residents states that:

I have kept in close communication with Kurt Freeman with several phone calls concerning the drilling for platinum at the Union Bay site.

He claims that joint venture partner Lonmin PLC has notified Freegold Ventures Limited and Pacific Northwest Capital Corp. that it will not fund further exploration of the Union Bay area.

All of the drilling equipment has been removed from the Union Bay site, the crew camp has been removed and no contingency plans were filed with the Forest Service for further exploration.

The Report, in short, accepts an unsubstantiated claim by the annexation petitioner and ignores specific, substantiated information to the contrary.

Even if mining or logging<sup>15</sup> activity in the disputed area of the western Cleveland Peninsula were to occur, there is no basis to assume it will be supported from Ketchikan rather than Wrangell. Wrangell has a long history of supporting both logging and mining<sup>16</sup> activities in its surrounding area including the area of the proposed Wrangell Borough. As described earlier, Wrangell has a superior, more protected maritime freighting route to the western Cleveland Peninsula than does Ketchikan, and would be at least as likely to provide support for any mining or logging venture which might occur on the western Cleveland Peninsula.

#### VI. The Model Borough Boundary Should be Given Little Weight

The Report notes that the proposed annexation would not result in a borough which extends beyond model borough boundaries developed for the Ketchikan

<sup>&</sup>lt;sup>15</sup> Wrangell's responsive brief also rebutted the KGB's assertion that a commercial timber harvest would occur in the Emerald Bay area. The Forest Service is not currently proceeding with this sale, which in any case would not be commercially viable due to access difficulties and expensive harvesting techniques required.

<sup>&</sup>lt;sup>16</sup> Wrangell currently is the infrastructure and supply source for exploratory gold mining activities occurring on Zarembo Island. The mining company is locally owned, and all of its employees and supplies come from Wrangell.

Borough. (p.90) Under existing regulation 3 AAC 110.190(c)<sup>17</sup>, this means that there is no "rebuttable presumption" against approval of the proposed expanded KGB boundaries.

The model borough boundary, however, should be regarded as a minimal factor only. The Commission is aware of the substantial disgruntlement of Alaskans, including legislators, with model borough boundaries and the perception that the model boundaries have discouraged, rather than encouraged, voluntary formation of boroughs in Alaska. The LBC's Decisional Statement in the Skagway Borough proposal noted that the *ad hoc* advisory Commission on Local Government created by the 2006 Legislature stated that only "minor consideration" should be given to model borough boundaries and other administrative boundaries. (Statement of Decision, pp.16-17.)

The LBC has more recently determined that model borough boundaries have been afforded too much significance in analyzing borough incorporations and annexations. On April 30, 2007, the Commission adopted final regulation changes, including amendments to 3 AAC 110.060(b) and adoption of new section, 3 AAC 110.422, which remove the rebuttable presumption that borough boundary lines should conform to model borough boundaries and replace it with a provision that the Commission "may consider" model borough boundaries which are "adopted for reference purposes only", as a "frame of reference in the evaluation of boundary change While DCCED's Preliminary Report points out that these regulatory petitions." modifications are not retroactive, it correctly notes that "... the newly adopted regulations offer relevant insights regarding the LBC's policy views with respect to borough boundary issues." (Report, p.3.) The 1991 model borough boundaries should be noted for reference purposes only, and not accorded greater weight than evidence of current Meyers Chuck/Union Bay connections with Wrangell, and of other relevant boundary lines which divide the Cleveland Peninsula between its western and eastern drainages. Current and specific evidence should be offered far more weight than an outdated identification of model borough boundaries which generally addressed all of southern Southeastern Alaska, and which gave only cursory attention to the specific

<sup>&</sup>lt;sup>17</sup> As discussed below, the LBC recently amended this regulation, pending Department of Law review.

boundary issue illuminated by the Ketchikan and Wrangell petitions and the resulting public comments by affected residents.

In a radio report broadcast in Southeast Alaska, DCCED's spokesman stated that the model borough boundary identified by the LBC in 1991 was the same as those described in the 1963 Mandatory Borough Act. As described *supra* at pp.6-7, this is erroneous; the Mandatory Borough Act, unlike either the model borough boundary or the proposed KGB annexation boundary, divides the Cleveland Peninsula between its western and eastern drainages, and conforms more closely to the proposed Wrangell borough boundary.

In any case, when the LBC identified model borough boundaries in 1991 and modified the boundary utilized in the 1963 Mandatory Borough Act to include the entire Cleveland Peninsula in a model KGB, it does not appear that this area was given extensive study. Very little was stated as to why Meyers Chuck/Union Bay would be better included in a Ketchikan Borough over a Wrangell Borough. The August 1991 Model Borough Boundaries Review, Southern Panhandle, asserted generally at p.8 that Meyers Chuck should be in a model Ketchikan Borough because it was more accessible and had better transportation links with Ketchikan than with other major communities. Closer scrutiny of the transportation question, including current input from Meyers Chuck/Union Bay residents, however, shows that Wrangell has stronger transportation links because of the better marine route and the residents' greater dependence upon maritime rather than air transportation.

#### VII. Conclusion

The evidence submitted by both the City of Wrangell and the residents of the Meyers Chuck/Union Bay area demonstrates the substantial social, cultural and commercial ties between the western drainage area of the Cleveland Peninsula and the City of Wrangell, which exceed the area's connections with Ketchikan. In reaching its conclusion that the area should be included in the KGB, not a Wrangell Borough, the department's Preliminary Report consistently ignores evidence and local preference, fails to consider and attach relevant maps (including those showing ADF&G Game Management Units and Nonsubsistence areas), relies upon erroneous conclusions regarding the boundaries set forth in the 1963 Mandatory Borough Act, and repeatedly,

uncritically, accepts unsubstantiated claims by the KGB. When viewed impartially, the overwhelming weight of the evidence supports including the western watershed of the Cleveland Peninsula in a Wrangell Borough, and not in the KGB.

Very significantly, the area residents unquestionably prefer inclusion in a Wrangell-based borough over the KGB. Particularly where the briefs filed by the KGB and Wrangell make it apparent that Ketchikan does not really care if Meyers Chuck/Union Bay is included, so long as its annexation is otherwise approved; where the Wrangell petitioners strongly desire to include this area in their proposed Borough; and where the Meyers Chuck/Union Bay residents overwhelmingly seek to be included in a Wrangell rather than Ketchikan Borough, it is difficult to comprehend the department's approach to this issue. Would it not be preferable to give local Alaskans the local government they seek, rather than forcing them into an uninterested borough against their wishes? Even if the Report's assertions were correct that the KGB has greater connections with the western Cleveland Peninsula watershed than does Wrangell – which Wrangell strongly disputes – there can be no question that Wrangell Borough, consistent with the <u>Mobil Oil</u> decision and with strongly-expressed preferences of the affected Alaskan residents.

DATED this  $4^{-4}$  day of September, 2007. By James T. Brennan

Sara E. Heideman









had proposed a borough with boundaries encompassing just 75 square miles. The LBC expanded the area to 1,752 square miles – more than 23 times the area proposed by the petitioners. The record clearly reflects that the 1,752 square mile area approved for incorporation was considered by the LBC to be smaller than the region's ideal jurisdictional territory. As is detailed in Appendix E to this report, the LBC concluded that "the Ketchikan trading area is much larger than the area proposed by the sponsor for borough incorporation. The trading area includes and roughly approximates Election District # 1." The Commission indicated that it did not wish at that time to alter the proposed borough boundaries to include the entire election district, but did expand them well beyond those proposed by the petitioners.

The record does not indicate why the LBC was unwilling in 1963 to include an even larger area. Perhaps it was concerned that the voters would have reacted negatively to an even larger expansion of the original proposal. As it was, the LBC was criticized for its expansion of the boundaries from the mere 75

square miles proposed by the petitioners to 1,752 square miles. Appendix E of this report provides evidence of such criticism.

#### 5.7 – Census Area Boundaries.

The area proposed for annexation conforms substantially to the "Outer Ketchikan Census Subarea" of the "Prince of Wales-Outer Ketchikan Census Area." Hyder and Meyers Chuck are also included in that subarea. This suggests relative integration of the area with the KGB as compared to the rest of the Census Area.





Exhibit 6






This map depicts areas used for resource harvesting during the lifetimes of a sample of Wrangell residents while they lived in Wrangell. Interviews were conducted with 75 Wrangell households from December 1987 through January 1988. Because not all residents were interviewed, it is likely that some use areas have been omitted. Therefore this map must be considered to be an incomplete representation of all Wrangell use areas.

See: Wrangell Harvest Study by Kathryn A. Cohen, Division of Subsistence, Technical Paper No. 165 for more information. More detailed 1:250,000 scale maps of these use areas are available at the Division of Subsistence.



STATE OF ALASKA DEPARTMENT OF FISH AND GAME Subsistence Division Chart 11: WRANGELL ERRITORY SHOWING ABORIGINAL USE AND OWNERSHIP AND PRESENT (1946) USES



#### 5 AAC 99.015. JOINT BOARD NONSUBSISTENCE AREAS.

(a) The following areas are found by the Joint Board of Fisheries and Game to be nonsubsistence use areas:

(1) The Ketchikan Nonsubsistence Area is comprised of the following: within Unit 1(A), as defined in 5 AAC 92.450(1) (A), all drainages of the Cleveland Peninsula between Niblack Point and Bluff Point, Revillagigedo, Gravina, Pennock, Smeaton, Bold, Betton, and Hassler Islands; all marine waters of Sections 1-C, as defined by 5 AAC 33.200(a) (3), 1-D, as defined by 5 AAC 33.200(a) (4), 1-E, as defined by 5 AAC 33.200(a) (5), that portion of Section 1-F, as defined by 5 AAC 33.200(a) (6), north of the latitude of the southernmost tip of Mary Island and within one mile of the mainland and the Gravina and Revillagigedo Island shorelines; and that portion of District 2, as defined by 5 AAC 33.200(b), within one mile of the Cleveland Peninsula shoreline and east of the longitude of Niblack Point.

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TOPO! map printed on 08/14/07 from "KNA with WB and KGB.tpo"

WGS84 131°41.000' W



TOPO! map printed on 08/13/07 from "OKCS with WB and KGB.tpo" 131°49.000' W WGS84 131°39.000' W 131°55.000' W 132°19,000' W 132°13,000' W 132°07.000' W 132°01.000' W

55°58.000'



September 4, 2007

Local Boundary Commission Department of Commerce, Community, and Economic Development 550 West Seventh Avenue, Suite 1770 Anchorage, Alaska 99501-3510

Dear Local Boundary Commission Members:

Attached you will find comments regarding the LBC preliminary report in the matter of the petition of the Ketchikan Gateway Borough for legislative review annexation of approximately 4,701 square miles to the Ketchikan Gateway Borough.

The comments detail the city's concerns regarding the proposed annexation. There are a number of problematic areas in the preliminary report that the LBC must address prior to the issuance of a final report and the holding of a public meeting where comments and testimony can be offered. These problematic areas will require careful consideration by the LBC before the annexation petition is again the subject to Commission action.

Among the many issues that the LBC must address regarding this proposed annexation is the equity of requiring many small communities to collectively forfeit some \$1.3 million in education and other funding every year to the Ketchikan Gateway Borough, which in turn will face no proportional requirement to deliver public services to the area subject to annexation.

Please note that the attached comments are also those of the Prince of Wales Community Advisory Council.

Thank you for considering our comments.

Sincerely, on Bolling City Administrator

Governor Sarah Palin Senator Albert Kookesh Representative Bill Thomas Ketchikan Gateway Borough City of Wrangell Annette Island Indian Community Meyers Chuck Community Association Prince of Wales Community Advisory Council

Cc:

IN THE MATTER OF THE PETITION OF THE KETCHIKAN GATEWAY BOROUGH FOR LEGISLATIVE REVIEW ANNEXATION OF APPROXIMATELY 4,701 SQUARE MILES TO THE KETCHIKAN GATEWAY BOROUGH

<u>COMMENTS ON BEHALF OF THE CITY OF CRAIG AND THE PRINCE</u> <u>OF WALES COMMUNITY ADVISORY COUNCIL IN RESPONSE TO</u> <u>THE PRELIMINARY REPORT OF THE STAFF OF THE DEPARTMENT</u> <u>OF COMMUNITY, COMMERCE AND ECONOMIC DEVELOPMENT</u>

9/4/07

Date

Jon Bolling, Craig City Administrator, and Prince of Wales Community Advisory Council Chairman

#### I. INTRODUCTION

On April 16, 1999, the Local Boundary Commission (hereafter LBC) denied the Annexation Proposal of the Ketchikan Gateway Borough because "the proposal fails to serve all the relevant principles established in the Constitution of the State of Alaska." (Statement of Decision, 1999, p. 14) The 1998 Annexation Proposal petitioned to annex essentially the same uninhabited area as the present proposal and it excluded the communities of Hyder and Myers Chuck. The current petition excludes the community of Hyder.

To accept KGB's petition, the LBC must find that it meets "the relevant principles established in the Constitution." The 1998 Proposal did not do so because Hyder was excluded.<sup>1</sup> Thus, the LBC's proper course in order to be consistent with the principles established in the Alaska Constitution is to deny this petition because, again, Hyder is excluded.

The City of Craig does not advocate that the LBC should require KGB to amend the Petition to include Hyder. KGB has been emphatic in its refusal to include Hyder. Equally as emphatic have been the residents of Hyder against being annexed by the KGB. The proper constitutional decision is to deny the Petition for the same constitutional reasons the LBC denied the 1998 Proposal. The Alaska Constitution has not changed. The Alaska Supreme Court has not entered any decision since 1999 upon which the LBC could rely to reverse its 1999 decision. Therefore, the City of Craig respectfully requests that the LBC reject the recommendation of the Preliminary Report, and deny the Petition.

<sup>&</sup>lt;sup>1</sup> Myers Chuck was also excluded. However, the LBC left no doubt in its Statement of Decision that the reason that the 1998 Proposal did not meet constitutional standards was the exclusion of Hyder. There is no suggestion that the Proposal would have been accepted, and thus found constitutional, by the LBC, if the Proposal had included Myers Chuck, but not Hyder.

### II. LBC STAFF'S RECOMMENDATION TO "APPROVE THE KGB PETITION WITHOUT CONDITION OR AMENDMENT IS CONTRARY TO THE LBC'S DECISION IN 1999 AND CANNOT BE RECONCILED WITH THAT DECISION OR STAFF'S RECOMMENDATION IN 1998

The 1998 Petition by the KGB is functionally identical to this Petition except as follows:

- 1. Myers Chuck would be annexed under this Petition;
- 2. The boundaries creating the Hyder "enclave" would not divide a natural drainage.

Of significance, none of the factual basis for the LBC's denial of the 1998 Petition has

changed. The LBC noted in denying the 1998 Petition:

- KGB refused the invitation of the LBC to amend its Petition to include Hyder and Myers Chuck (Statement of Decision, 1999, p. 3);
- "Residents of Meyers Chuck and Hyder have expressed strong opposition to being included in a borough and the Borough has expressed little interest in annexing those communities. Such an arrangement would poorly serve the State's long-term interests." (Statement of Decision, 1999, p. 8, emphasis added);
- "If the Borough's annexation proposal were approved, the Borough would have little or no incentive to further extend its boundaries to include Hyder and Myers Chuck." (Statement of Decision, 1999, p. 8);
- "...the constitution calls for boundaries to embrace an area of common interests to the maximum degree possible. Without Myers Chuck and Hyder, this standard cannot be met." (Statement of Decision, 1999, p. 11);

- 5. "...the Borough's annexation proposal significantly undercuts its own ability to effectively address planning needs by excluding Myers Chuck and Hyder."
  (Statement of Decision, 1999, p. 12);
- "The State would be left with the responsibility for the education of students in those communities. The State currently contracts directly with the school district in Stewart, British Columbia for the education of Hyder students." (Statement of Decision, 1999, p. 12);
- "Because the annexation petition excludes Hyder and Meyers Chuck, the Commission considers the proposal to fail in terms of promoting maximum local self-government." (Statement of Decision, 1999, p. 13);
- 8. "Further, the proposal fails to serve all relevant principles established in the Constitution of the State of Alaska." (Statement of Decision, 1999, p. 14).

None of these circumstances have changed since 1999. KGB again deliberately excludes Hyder. Without addressing a single significant changed fact or circumstance, the Preliminary Report now recommends that the Petition be approved.

1. KGB has again refused to include Hyder in the area proposed to be annexed.

It is apparent that the LBC found it significant that the 1998 annexation proposal did not include Hyder. The LBC gave the KGB the opportunity to amend the petition to include Hyder. It refused. Seven years later it files another petition deliberately excluding Hyder. The reality is that the KGB will never voluntarily annex Hyder. Given the expense that would be involved, meaning it would have to provide schools and other mandatory borough services, why would it if it can annex the uninhabited lands, receive approximately an additional \$1,200,000 in National forest receipts revenue, and not have to provide services?

LBC staff's conclusion that the LBC's interpretation of Article X, Section 1 of the Alaska Constitution is "unduly restrictive" is wrong, biased, and indefensible. (Preliminary Report, p. 17) In the absence of changed facts, which there are none, and none were identified in the 117 page Preliminary Report, the LBC should not change its interpretation of the Constitution solely because of an unsupported new legal opinion offered by LBC staff.<sup>2</sup>

# 2. <u>The residents of Myers Chuck and Hyder remain unanimously</u> <u>opposed to annexation.</u>

The Preliminary Report acknowledges that the residents of Myers Chuck and Hyder remain adamantly and unanimously opposed to annexation by KGB. In conjunction with KGB's adamant opposition to annexing Hyder, the long-term state's best interests again would be "poorly served" by allowing the annexation without Hyder. These facts are the same as used by the LBC to deny the Petition in 1998, and no basis is shown in the Preliminary Report that changes the importance of these facts to the LBC. They were important in the denial of the petition in 1999; they should be equally important in denying this petition.

### 3. <u>If the petition is approved, KGB will have no incentive to annex Hyder</u> in the future.

<sup>&</sup>lt;sup>2</sup> The LBC has access to the Department of Law for legal opinions regarding the interpretation of the Alaska Constitution. If there has been an opinion from the Department of Law that the LBC has been interpreting the Constitution in an "unduly restrictive" manner, the LBC should make that opinion part of the record.

The LBC was correct in 1999. Why would KGB annex Hyder and have to provide schools and all mandated borough services if it could obtain all of the additional National Forest receipts revenues through this annexation and avoid the expense of providing services? The Preliminary Report has no answer. Indeed, the Report essentially acknowledges that KGB will never annex Hyder. In order to justify the fact that KGB is never going to annex Hyder, LBC staff came up with the new concept of creating official enclaves within boroughs, completely contrary to the historical position of the LBC. What is particularly disconcerting about LBC staff's new position is that the \$1,200,000 that would go to KGB upon annexation, with no corresponding obligation to provide services, will result in a direct loss of school funding dollars to the other Southeast Communities who do have the obligation to provide schools, such as the City of Craig. The LBC was honest in its assessment in 1999—KGB has no incentive to annex Hyder. The LBC should be honest again in 2007—KGB still has no incentive to annex Hyder if this petition is approved.

4. <u>The Constitution has not changed</u>—the KGB petition cannot meet the constitutional standard to embrace an area of common interests to the maximum degree possible without the annexation of Hyder.

Despite 25 pages of discussion, primarily related to snippets of the Constitutional Convention, and LBC staff's disagreement with the decision of the Superior Court in *Petitioners for the Dissolution of the City of Skagway and the Incorporation of the Skagway Borough v. Local Boundary Commission*,<sup>3</sup> the Report fails to cite to a single fact or changed circumstance such that this constitutional standard can now be met without the annexation of Hyder.

<sup>&</sup>lt;sup>3</sup> 1JU-02-0124 CI, September 20, 2005)

The Preliminary Report goes so far as to recommend that the LBC change the words of the Constitution. The Preliminary Report states that this constitutional standard is satisfied if "the post annexation boundaries of the borough would embrace a population that is interrelated and integrated with respect to social, cultural, an economic characteristics and activities." (Preliminary Report, p. 115) That is not what the Constitution says or mandates. As applied to this petition, the statement is meaningless. This Petition would "embrace" a population of no more than 25 people, probably only 14. Article X, Section 2 cannot be so lightly disregarded. The LBC stated clearly in 1999 that, without Hyder, the Constitution was correct. The LBC did not say that without "Hyder or Myers Chuck, one or the other" the Constitutional standard could not be met. The LBC should not reinterpret such an important Constitutional mandate without any new facts or new circumstances that would justify such a significant shift in the historical interpretation of this provision of the Constitution by the LBC.

## 5. <u>The exclusion of Hyder continues to undercut the ability of the KGB</u> to meet its own planning needs.

In "considering the best interests of the State of Alaska," in its 1999 decision, the LBC stated clearly that the planning needs of the proposed borough, as annexed, must include Hyder. As the only community in the area of the KGB model boundaries with roads, schools, land use issues (commercial, industrial, and residential development), and tourism growth, the planning needs in the nine years since that decision have increased, not decreased. Thus, the planning needs have increased. These are the facts. In considering these facts in 1999, the LBC rejected the proposed annexation without Hyder. In order to reverse its 1999 decision, without being totally arbitrary and

capricious, the LBC must cite to new facts that warrant approval of the petition, in the "best interests of the state," without the inclusion of Hyder.

The Preliminary Report does not provide any new facts upon which the LBC could rely to reverse its 1999 decision. The preliminary report makes the remarkable statement that "creating the 205-square mile Hyder enclave would not initially impede 'the full development of essential borough services on an efficient, cost-effective level." (Preliminary Report, p. 88) The annexation proposal does not include any land or community that needs "services." By excluding Hyder, it goes without saying that the services presently provided by the State in Hyder "would not be impeded." The Preliminary Report is saying that since the annexed area has no need for services, the exclusion of Hyder would not "impede" the "full development" of <u>no services!</u> As a constitutionally created body, with a mandate to act in the best interests of the State, how can the LBC act in a constitutional manner and reverse its 1999 decision on such a basis? A reversal of its 1999 decision would be arbitrary and capricious if the LBC adopts the double-speak of the preliminary report.

## 6. <u>The state will continue to be left with the responsibility for providing</u> education services to Hyder students.

It is a simple fact that this proposal does not relieve the State of any of its current responsibilities and obligations in the area proposed to be annexed. The important obligation is the provision of school services. It cost money to provide school services in Hyder. KGB wants the additional \$1,200,000 in yearly revenues, and does not want to have to spend any of it on providing any services in the area to be annexed, in particular it wants no part of providing school services in Hyder. This was a significant factor in the LBC's recommendation against the proposal in 1998. It was a significant factor in

the LBC's denial of the petition in 1999. Nothing has changed. Hyder needs a school system. The state provides the school system.<sup>4</sup> KGB does not want to have the obligation of providing the school system. The proposal excludes Hyder so that KGB does not have to provide educational services in Hyder. What facts are the LBC going to rely on to reverse the 1999 decision and now say it is in the best interests of the State to continue to require the State to provide the educational services in Hyder and yet allow KGB to annex all the uninhabited land and collect the additional \$1,200,000 annually? None are advanced in the Preliminary Report.

The people of the State have to rely on the Commissioners to maintain constitutional and policy consistency, that is, to again deny this Petition based on the same best interests of the state and constitutional principles as resulted in the 1999 Decision.

# 7. <u>The exclusion of Hyder continues to mean that the petition does not</u> <u>promote maximum local self-government.</u>

Promoting maximum local self-government is a constitutional mandate for consideration of a borough proposal. (Article X, Section1) As the LBC stated in its 1999 Decision, "the annexation proposal seeks to add 99.6 percent of the area within the Borough's model boundaries not already within its corporate boundaries, but excludes 87.7 percent of the residents of that area." The current petition, which includes Myers Chuck, but still not Hyder, continues to essentially grab all the land, but take no responsibility for the people. As the Preliminary Report states, the population of Myers

<sup>&</sup>lt;sup>4</sup> The school system in Hyder is provided by the Southeast Island School District at state expense.

Chuck is reported at 14, but is probably less. Therefore, the same factual scenario is presented to the LBC as the one rejected by the LBC in 1999.<sup>5</sup>

The LBC upheld the Article X, Section 1 mandate in 1999 by properly denying the annexation proposal because it excluded Hyder. The LBC has no basis to conclude that the mandate of Article X, Section 1 can now be satisfied by granting a petition for nearly the same area that still excludes Hyder.

## 8. With the exclusion of Hyder, the petition again fails to serve all relevant principles established by the Alaska Constitution.

We continue to stress that nothing has changed since the LBC concluded that KGB's annexation of this area, without including Hyder, fails to serve all the relevant principles established by the Alaska Constitution. (Statement of Decision, 1999, p. 14) The Constitutional principles have not changed. The best interests of the state standard has not changed. The LBC's constitutional obligations to all the people and the communities in the state—including the people and communities in the unorganized borough—has not changed. Hyder remains the only community in the area that needs essential services. Hyder remains the only community in the area where the State is presently providing all the essential services that would be provided by a borough. And, KGB continues to exclude Hyder from the proposed annexed area. Based on the facts and the Constitution, the LBC's decision must remain the same, and deny the Petition. There is no conceivable Constitutional basis, and no benefit to the State, for the LBC to reverse its 1999 Decision.

<sup>&</sup>lt;sup>5</sup> The Preliminary Report remarks that the inclusion of Myers Chuck in this petition is a "notable" difference from the 1998 proposal. We assume the LBC staff used the word "notable" only to signify a technical difference, not that the inclusion of Myers Chuck while excluding Hyder is meaningful in any sense.

#### III. LBC STAFF'S STATEMENT THAT THE ALASKA CONSTITUTION MANDATES ANNEXATION HAS NO BASIS IN THE CONSTITUTION OR ALASKA CASE LAW

Article X, Section 3 of the Alaska Constitution states: "The entire State shall be divided into boroughs, organized and unorganized." (emphasis added) The Constitution does not say that the State must be divided into only "boroughs." The Constitution is silent as to annexation of lands in the unorganized borough. The Constitutional article further states: "Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law." Again, the Constitution does not mention annexation. By its plain language, Article X, Section 3 does not equate the formation of a borough with annexation of land from the existing unorganized borough by an already formed borough. The Constitution does encourage the formation of boroughs, as stated by the Alaska Supreme Court in Mobil Oil Corp. v. Local Boundary Commission.<sup>6</sup> The Alaska Supreme Court did not say that the Constitution encourages the formation of boroughs or the annexation of land in the unorganized borough by an already formed borough. The new Constitutional interpretation offered in the Preliminary Report would rewrite the Constitution, and deny important Constitutional protection to the people in the unorganized borough.

The Preliminary Report does not cite to any Alaska Supreme Court case that interprets the Constitution as mandating or encouraging the annexation of lands in the unorganized borough by an existing borough. We are not aware of any. Both under the Constitution and the "balanced bests interests of the state" standard (19 AAC 10.200), annexation is not the same as the formation or incorporation of a borough.

<sup>&</sup>lt;sup>6</sup> 518 P. 2d 92 (Alaska 1974)

In *Port of Valdez Co., Inc. v. City of Valdez*, the Alaska Supreme Court noted that the LBC had a statutory duty to develop standards for "borough annexation."<sup>7</sup> If the formation of boroughs and the annexation of land in the unorganized borough were the functionally the same acts under Article X, Section 3 of the Alaska Constitution, there would be no need for mandated annexation standards. The Alaska Supreme Court would not specifically point out that there are "three purposes underlying the statutory requirement of annexation standards."<sup>8</sup> Principles related to constitutional interpretation and statutory interpretation require that provisions and statutes not be read as superfluous. By imposing a separate legislative requirement related to annexation standards, and with the Alaska Supreme Court specifically noting the distinction of annexation, the formation of boroughs and the annexation of land in the unorganized borough by an existing borough, are not constitutionally the same.

Despite lengthy quotes from the Alaska Constitutional Convention, the preliminary report fails to quote anything that equates borough formation under the Constitution with the annexation of land in the unorganized borough by an existing borough. Importantly, the Preliminary Report quotes a draft version of Article X, Section 3 of the Constitution, which was not adopted. (Preliminary Report, p. 25) The draft version of Article X, Section 3 would have divided the state into boroughs—there is no mention of unorganized boroughs. By rejecting that draft version, the delegates made a clear choice to provide constitutional status to the unorganized borough (s).

The Preliminary Report fails to address the constitutional issues of Article X, Section 3 as to the annexation of land in the unorganized borough by an existing borough.

<sup>&</sup>lt;sup>7</sup> Preliminary Report of DCRA, October 1998, p. 25, quoting 522 P. 2d 1147, 1155 (Alaska 1974)

<sup>&</sup>lt;sup>8</sup> 522 P. 2d at 1155

In the Preliminary Report prepared by the same LBC staff person in 1998, the Report concluded that the KGB proposal, without Hyder, "would seriously diminish the significance of this principle" [referencing Article X, Section 3]. (Preliminary Report, 1998, p. 80-81) The "principle" embodied in Article X, Section 3 has not changed. The only thing that has changed is that the same LBC staff person recommends ignoring the Constitutional principle of Article X, Section 3 for reasons not explained anywhere in the report. The LBC staff went on record in 1998 stating unequivocally that annexation of this area <u>without</u> Hyder violated the principles of Article X, Section 3. The LBC agreed in its 1999 decision. The LBC has the obligation to the State to maintain its consistency in the interpretation and application of constitutional principles, and as such, must again deny this Petition because it excludes Hyder.

Rather than be consistent in the interpretation of Article X, Section 3 advanced and followed by the LBC staff in 1998, the Preliminary Report ignores Article X, Section 3, and argues that <u>Article X, Section 1</u> makes "no distinction" between borough formation and the annexation of land from the unorganized borough by an existing borough. (Preliminary Report, p. 16) The Report cites to two Alaska Supreme Court cases involving the interpretation of Article X, Section 1. (Preliminary Report, p. 14). Neither of those cases involved the issue of whether the standards for annexation of land from the unorganized borough by an existing borough is encouraged or mandated by the Constitution in the same manner as the formation of boroughs. Indeed, the Report highlights that section of the *Mobil Oil* case that specifically says "<u>Our constitution</u> <u>encourages their creation.</u>" (Preliminary Report, p. 15, underlining in Report, bold emphasis added) Without citation to any other case, or even to anything from the

constitutional convention, the Preliminary Report states: "borough incorporation and borough annexation are equally encouraged by article X, section 1, whenever the applicable standards are satisfied." This interpretation of the Constitution offered in the Preliminary Report is not supported by the language of the Constitution, existing Alaska case law, and the applicable statutes and regulations.

Because the people and communities of the unorganized borough are afforded specific constitutional status and protection, the LBC cannot constitutionally equate borough formation with the annexation of land from the unorganized borough by an existing borough. In particular, the LBC cannot accept a tortured interpretation of Article X, Section 1, such that annexation can be used as a vehicle to increase its National Forest Receipts revenues <u>without</u> in fact minimizing local government units.

The KGB petition neither maximizes "local self-government" nor minimizes "local government units." It is undisputed that none of the area to be annexed has any need for "local self-government." It is also undisputed that the area to be annexed does not "minimize" the local government units because Hyder, which does need borough services, is excluded and may incorporate as a city—thus increasing the local government units. Nothing from the Constitutional convention would be supportive of the interpretation of the Constitution offered by the LBC staff, that is, the Constitution encourages borough formation and the annexation of land in the unorganized borough equally, regardless of the detrimental impact on the people and communities in the unorganized borough, and particularly the devastating loss of school funding in those communities.

The Constitutional significance of creating boroughs is specifically to provide necessary services that are currently being provided by the State. Thus, when an area seeks to form a borough, it must provide necessary services, such as schools. That is why the formation of boroughs is encouraged by Article X, Section 1 and Section 3. The Constitution cannot be similarly interpreted to encourage the annexation of land from the unorganized borough by an existing borough which does not provide any necessary service, particularly schools, in the proposed annexed area, and will in fact seriously impair the provision of school services by the communities in the unorganized borough <u>directly as a result of the annexation.</u> The KGB petition will not provide any necessary services in the area to be annexed, and thus, cannot satisfy the purpose and intent of Article X, Section 1 and 3 of the Alaska Constitution.

### IV. LBC STAFF'S STATEMENT THAT THE LBC HAS A POLICY ALLOWING THE CREATION OF ENCLAVES IS CONTRARY TO THE LBC'S 1999 STATEMENT OF DECISION

In its Statement of Decision denying the KGB annexation proposal in 1999, the LBC stated: "The annexation proposed by the Borough create [sic] enclaves. The Commission has a formal policy to avoid enclaves within boroughs as reflected in 19 AAC 10.200(2)." (Statement of Decision, 1999, p. 13) The present Petition creates a Hyder enclave. (Preliminary Report, p. 86) LBC staff admit that the Haines Borough is the only borough in the state with an enclave—Klukwan. (Preliminary Report, p. 87) LBC staff admit that the creation of the Klukwan enclave was a "public policy" issue that "would not exist with respect to the proposed Hyder enclave." (Preliminary Report, p. 88) Thus, there is no "public policy" impediment to the inclusion of Hyder in the KGB. Therefore, the approval of this Petition with a Hyder enclave would be the first enclave

ever created by the LBC where it is admitted that no reason exists at all for the enclave except that KGB does not want the obligation of providing services to Hyder. Rather than evidencing a historical "policy" of creating enclaves, approval of this Petition would contravene the Constitution, applicable statutes, the regulations, and every prior decision of the LBC with respect to the analysis of enclaves proposed as part of a borough formation or annexation. The preliminary report offers no reasonable or persuasive reason for such a dramatic reversal of LBC policy and precedent.<sup>9</sup>

LBC staff's "conclusion" that the Hyder enclave "should be annexed to the KGB" if "a Prince of Wales Island Borough were formed," fundamentally ignores the regulation precluding enclaves and makes the condition of annexation of Hyder unrelated to any Constitutional, statute or regulation related to borough formation or annexation. Hyder is in the KGB borough boundaries, constitutionally, statutorily, and in accordance with LBC regulations. It is under those standards that this Petition must be reviewed. There is no constitutional provision, statute or regulation that allows an existing borough to annex land in the unorganized borough, specifically excluding the only populated area, under the novel hypothetical concept that if some other area is later formed as a borough, then the enclave "should" be annexed. By what mechanism? The LBC staff does not explain how the LBC can force or order or direct that Hyder be annexed by the KGB if a Prince of Wales Borough is formed. Equally as important, there is no standard in the

<sup>&</sup>lt;sup>9</sup> As addressed below, the Preliminary Report was written by LBC staff person, Dan Bockhorst. Mr. Bockhorst has applied for the position of Ketchikan Gateway Borough Manager. Without question, he has a substantial conflict of interest. It cannot escape the scrutiny of the LBC, nor will it escape the scrutiny of the Alaska courts, that the Preliminary Report authored by Mr. Bockhorst recommends that the LBC reverse its historical policy on enclaves, which will benefit the KGB directly by allowing it to receive an additional \$1,200,000 annually without the provision of any services at all in the annexed area because of the creation of the Hyder enclave. As a minimum, the LBC should, in fairness to the people of the State as whole, and the people in the Southeast communities in the unorganized borough, hire an independent staff person, who has never worked for DCCED or Mr. Bockhorst, to prepare a new Preliminary Report.

Constitution, statutes, or regulations which allows the KGB the benefit of excluding Hyder from its borough until other communities form a different borough—which would not include Hyder. The impact of the LBC's staff recommendation is clear—if the LBC approves this Petition, Hyder will never be annexed into the KGB. The Preliminary Report misrepresents the historical policy of the LBC against creating enclaves, and then creates a fictional "possibility" of later annexation of Hyder that the LBC staff, and the LBC, knows will never happen. Therefore, the LBC should continue to maintain its historical policy against enclaves, clearly stated in the 1999 decision, and deny this Petition.

### V. THE LBC MUST TAKE INTO ACCOUNT THE CONFLICT OF INTEREST OF THE LBC STAFF PERSON WHO PREPARED THE PRELIMINARY REPORT IN ASSESSING WHY LBC STAFF HAS CHANGED ITS POSITION AS TO THE KGB PETITION

The LBC is a "quasi-judicial" body, according to the Preliminary Report. (Preliminary Report, p. B-4) The LBC must provide a fair hearing and review of petitions, according to the Preliminary Report. (Preliminary Report, p. B-4) The Preliminary Report acknowledges that Alaska courts will review decisions of the LBC "to determine whether a fact finder has shown bias such as prejudgment of the facts or issues or a personal bias for or against an issue or a participant in the proceeding." (Preliminary Report, p. B-4)

A judge is required not only to avoid bias and avoid any impropriety, a judge must avoid the appearance of bias and the appearance of impropriety. For example, it would be an unquestionable appearance of impropriety if a judge's law clerk prepared a memorandum for the judge with a recommended decision in favor of one party in a case where the law clerk was seeking employment with that party. The LBC is in no different situation.

The author of the Preliminary Report wants to be employed by the KGB as its Borough Manager. The Preliminary Report was completed as of June 30, 2007. The Borough position became open in June of 2007, when the KGB Borough manager resigned.

It cannot be disputed that this Preliminary Report represents a complete reversal of the recommendation of the same LBC staff in its Preliminary Report in 1998. It also cannot be disputed that nothing has changed except this petition includes Myers Chuck a totally inconsequential change under the Alaska Constitution, applicable statutes, applicable regulations, and the best interests of the state standard. The Preliminary Report fails to offer any distinguishing Constitutional or factual reason for the reversal of the LBC staff position. If the LBC considers this Preliminary Report and approves the Petition, the appearance of bias and impropriety will undoubtedly result in judicial review of the decision.

The LBC has two choices. It can reject the recommendation of the LBC staff, and deny the Petition because that would be the factually and legally correct decision. The denial of the Petition would be consistent with the Constitutional principles the LBC is obligated to uphold and apply. The denial of the Petition will be consistent with the 1999 Decision.

The second choice is for the LBC to remove the Preliminary Report from the record and to retain an independent consultant to prepare a report not tainted with the appearance of bias and conflict of interest enveloping this Preliminary Report.

We urge the LBC to carefully scrutinize this problem. The people of this State are entitled to not only a fair decision that is in the best interests of the state, the people of the State are entitled to a decision that all can feel is free from any potential bias or conflict. Under the circumstances presented by the author of the Preliminary Report having applied to be the KGB borough manager, and having recommended the approval of this Petition—a complete reversal from the same author's position in 1998 on annexation of this area without Hyder—the people of this State cannot have any confidence in a decision being free of bias if the LBC relies on the Preliminary Report and approves the Petition.

### VI. THE PETITION CANNOT MEET THE BEST INTERESTS STANDARDS WHEN THE PRELIMINARY REPORT ADMITS THAT THE STATE WILL BE REQUIRED TO CONTINUE TO PROVIDE ALL NECESSARY SERVICES TO HYDER AND THE ANNEXATION WILL NOT RELIEVE THE STATE OF ANY RESPONSIBILITIES

The Preliminary Report acknowledges that the best interests of the standard applies to the proposed annexation of land from the unorganized borough to the existing KGB, including by legislative review, pursuant to 3 AAC 110.195. (Preliminary Report, p. 100) In order to be in the best interests of the State, the petition must demonstrate that the proposed annexation "will relieve the state government of the responsibility of providing local services. (3 AAC 110.195(3)) LBC staff identifies two "areas" "in which the KGB would relieve the State of responsibility of providing local services...Those are education and platting." (Preliminary Report, p. 92)

After admitting that the proposed annexation will not in fact result in the provision of education services in the area proposed to be annexed, the LBC staff notes that in 2011 the KGB required local contribution to its existing school system, may increase by

\$15,197. (Preliminary Report, p. 93) LBC staff then acknowledges this potential increase is "not particularly significant." (Preliminary Report, p. 94) Unexplainably, the next sentence reads: "Thus, KGB provides a significant financial relief to the State in terms of responsibility for delivery of education services. (Preliminary Report, p. 94) The alleged "financial relief" to the state of \$15,197 cannot be both "not particularly significant" and "a significant financial relief."

The Preliminary Report fails to discuss the burden that remains on the State by KGB not annexing Hyder. That burden on the State is currently approximately \$174,000 to provide education services in Hyder, and can only be projected to go up. In essence, without any discussion, rationale, or reasoning, LBC calls the \$15,000 increase in KGB's school contribution "significant relief" to the State, and makes no characterization of the \$174,000 State must expend because KGB does not want the responsibility of providing the school system in Hyder. Similarly, LBC makes no comparison of the \$15,000 increase in 2011 in KGB's school contribution with the more than \$1,000,000 additional revenues KGB will get annually. The \$15,000 contribution is less than 10% of what the State will continue to pay to serve Hyder. The \$15,000 contribution is approximately 1% of the additional National Forest receipts KGB will receive, and KGB would receive nearly four additional years of the dramatically higher receipts before even paying the additional \$15,000 school funding contribution. The Preliminary Report fails to offer any actual analysis of the best interests of the state standard under A.S. 29.06.040(a) and 3 AAC 110.195(3).

The Preliminary Report devotes all of three sentences to how the petition will supposedly relieve the state of "platting" responsibility and this aspect of the application

of 3 AAC 110.195(3). Without identifying any potential planning, platting, or land use regulation necessary within the proposed annexed area, LBC staff concludes that "the power and duties for platting within the area proposes for annexation would shift from the State to the KGB." (Preliminary Report, p. 94) That the "powers and duties" would shift is a given—what is important under the best interests standard is how this proposed annexation in fact relieves the state of "the responsibility of providing local services." (3 AAC 110.195(3). The state does not provide any local services in the proposed annexed area, including platting. No local services would be provided by the state in the foreseeable future. KGB does not propose to provide any local services in the area to be annexed, nor does it anticipate providing any local services in the foreseeable future. 3 AAC 110.195(3) cannot be met by KGB agreeing to provide nothing in the area where nothing is currently provided and nothing is needed. 3 AAC 110.195(3) is stated in the affirmative and with mandatory language-"will." "Will" this petition "relieve the state government of the responsibility of providing local services?" The answer is factually and legally easy—the record is undisputed—the answer is a resounding no.<sup>10</sup>

VII. THE PETITION CANNOT BE CONSTITUTIONALLY IN THE BEST INTEREST OF THE STATE WHEN THE ONLY REASON FOR THE ANNEXATION IS TO GARNER OVER \$1,000,000 ANNUALLY IN FEDERAL FUNDS THAT PRESENTLY IS DISTRIBUTED THROUGHOUT THE COMMUNITIES OF SOUTHEAST ALASKA AND NO SERVICES WILL BE PROVIDED BY KGB IN THE ANNEXED AREA WITH THOSE FUNDS

<sup>&</sup>lt;sup>10</sup> The proportion of private land in the area proposed to be annexed is so small that if a private land owner sought some platting service in the future, it would be such minimal relief to the State that it could not properly be characterized as the State being relieved of the burden of providing local services. If the cost savings would be a benefit to the State, the Preliminary Report would have quantified the benefit.

The City of Craig is very concerned about the impacts on the school children of Craig and all the Southeast communities in the unorganized borough if the LBC approves the petition request submitted by the Ketchikan Gateway Borough.

#### 1. National Forest Receipts Revenues

We believe the LBC is well aware of the financial impacts to the communities and school districts of the unorganized borough that will result from the proposed annexation. The proposed annexation will remove up to \$1.2 million annually from the budgets of regional school districts and transfer that funding to the KGB, whose proposed annexation would add exactly zero students to the KGB School District.<sup>11</sup> This impact was not anticipated when the model borough boundaries were adopted because communities like Craig, which have precisely the same legal obligation to support local schools as do boroughs, did not receive NFR payments until 1993. The entire model borough boundary issue should be revisited and revised to account not just for the NFR impacts, but for other relevant issues that may have changed since 1992.

#### 2. Best Interest Finding

The Best Interest Findings section of the preliminary report fails to properly apply the provisions of 3 AAC 110.980. The report does not reasonably weigh the impacts of the proposed annexation on affected local governments nor does it relieve the state of significant financial obligations that could otherwise be assumed by the KGB. In addition, the report fails to note that proposed annexation also reduces state revenues.

<sup>&</sup>lt;sup>11</sup> LBC staff's discussion of the amount of national forest receipts that will be transferred to the KGB as a result of this petition is identical to the its discussion of the amounts in 1998. LBC staff ignores what has actually been received by the communities during the intervening nine years. The loss to the communities, and corresponding windfall to the KGB is in fact closer to the \$1,200,000 than LBC staff's "projection" of "roughly \$286,000 annually." To use that substantially lower figure is not justified, misleading, inaccurate, unreasonable, and unfair.

#### A) Provision of Local Services – 3 AAC 110.195(3)

The preliminary report fails to recognize the financial detriment to the State of Alaska should the annexation be approved. The proposed annexation does not relieve the State of Alaska of the cost to deliver state services in proportion to the area subject to annexation. The petition seeks the financial benefits that the annexation will bring but rejects including in the annexation the four percent of the model borough boundary that would bring with it the responsibility typically required of local government: education funding. The petition proposes to annex 4,701 square miles of the area within the KGB model borough boundaries, but exclude the 205 square miles of the model borough boundaries that would require the actual delivery of local government services. The result of this is that the State of Alaska, through the Southeast Island School District REAA, will continue to be responsible for the full \$174,000 cost of educating the 16 students in Hyder. Were this area included in the annexation petition, the state's obligation would be reduced by the borough's four mill equivalent requirement.

While the petition proposes to avoid the cost of providing education to Hyder, the petition would also reduce revenue to the State of Alaska to provide those same education services. Currently the state receives national forest receipts funding that provide education funding to the three REAAs in Southeast Alaska. The Preliminary Report fails to account for this loss of state funding, which would have totaled more than \$280,000 in the current fiscal year. Ironically, this funding loss occurs because the approval of the petition increases the KGB's national forest receipts funding at the expense of the State of Alaska.

## B) Affected Local Governments – 3 AAC 110.980(2)(B) and (C)

The preliminary report fails to account for the losses suffered by affected local governments as called for in 3 AAC 110.980(2)(B) and (C). The reduction in education and other funding that will result from the proposed annexation is substantial, as shown below.

	FY 2007		Income Loss		Income Loss		Income Loss	
Home Rule	Ed. Receipts		Ed. Funding		Road Funding		Project Funding	
Petersburg	\$	914,381	\$	201,164	\$	15,236	\$	41,806
Wrangell	\$	571,788	\$	125,793	\$	7,963	\$	25,840
First Class								
Craig	\$	594,437	\$	130,776	\$	6,380	\$	26,497
Hoonah	\$	257,409	\$	56,630	\$	6,209	\$	12,140
Hydaburg	\$	112,085	\$	24,659	\$	4,230	\$	5,581
Kake	\$	179,336	\$	39,454	\$	9,566	\$	9,470
Klawock	\$	209,638	\$	46,120	\$	7,028	\$	10,268
Pelican	\$	25,087	\$	5,519	\$	896	\$	-
Skagway	\$	168,900	\$	37,158	\$	8,222	\$	8,767
Second Class								
Angoon		-		-	\$	5,294		-
Coffman Cove		-		-	\$	10,698		-
Gustavus		-		-	\$	20,659	\$	3,956
Kasaan		-		-	\$	5,831		-
Port Alexander		-		-	\$	861		-
Tenakee Springs		-		-	\$	1,721		-
Thorne Bay		-		-	\$	23,847	\$	4,566
REAA'S								
Annette Island	\$	537,333	\$	118,213	\$	23,677	\$	19,140
Chatham	\$	368,934	\$	81,165		-	\$	13,141
Southeast Island	\$	373,545	\$	82,180		-	\$	13,306
Total Annual Loss				948,832	\$	158,317	\$	194,477
Aggregate loss of funding								1,301,626

Every affected local government that has commented to date on this proposed annexation has gone on record in opposition, due to severe impacts to education funding. These comments demonstrate that there is broad agreement among the affected local governments that public interests are not served by the proposed annexation. For its part, the preliminary report fails to address how the losses detailed above, losses that negatively impact twelve school districts, sixteen cities, and 2,700 K-12 public school students, are in the best interests of the State. When weighing the claims of the preliminary report against the multiple community statements against the proposed annexation, it is not reasonable or fair for the LBC to ignore the specific academic harm identified by the communities of the region.

LBC staff offers no justification at all for recommending the transfer of nearly \$1,200,000 per year in academic funding presently shared by sixteen cities and twelve school districts in Southeast Alaska to the Ketchikan Gateway Borough with absolutely no increase in either the number of students to serve or education services in the Ketchikan Gateway Borough. LBC staff offers no justification at all for not only recommending that the KGB be the recipient of this additional \$1,200,000, at the expense of all the other Southeast Communities in the unorganized borough, but in addition, recommending the exclusion of Hyder from the annexation even thought Hyder is within the model borough boundaries and Hyder does have education services presently provided and paid for by the State. The LBC must carefully scrutinize why LBC staff has so dramatically changed its recommendation from 1998, even though the annexation petition is essentially identical, and neither the facts supporting the denial nor the reasons supporting the denial by the LBC in 1999 have changed.

#### VIII. CONCLUSION

The people of the State of Alaska should expect, and receive, fairness and consistency from the LBC. The Constitution is the Constitution—it cannot be manipulated to achieve a desired result. The best interests of the State standard for annexation of land from the unorganized borough is also a constant—it should not be manipulated to achieve a desired result.

What possible constitutional, statutory, regulatory, or best interest of the State reason can the LBC rely on to approve this Petition, with Hyder excluded, after having rejected the nearly identical petition as <u>not</u> justifiable under the Alaska Constitution <u>because</u> Hyder was excluded in the 1998 annexation proposal? The LBC will not find an answer to that question in the Preliminary Report.

Despite a 117 page report, with attachments, the LBC staff is not able to cite to a single comment from any person or community in this State in support of this Petition. All comments we are aware of to date in response to the Petition oppose the Petition. The LBC has a Constitutional obligation to consider the voice of a unanimous people against this Petition.

We request that the LBC reject the recommendation of the LBC staff and deny the annexation petition of the KGB.



Meyer's Chuck Community Histociation

August 28, 2007

Local Boundary Commission Staff Attention: Dan Bockhorst Department of Commerce, Community and Economic Development 550 West Seventh Avenue, Suite 1770 Anchorage, AK 99501

Re: Response to the Preliminary Report to the LBC

Dear Members of the Local Boundary Commission, Staff and Ketchikan Gateway Borough,

On behalf of the Meyers Chuck Community Association, we submit the attached response to the Local Boundary Commission Staff "Preliminary Report to the LBC Regarding the Proposed Annexation to the Ketchikan Gateway Borough".

Sincerely,

Pr lo Vm

Glen G. Rice Chairman Meyers Chuck Community Association

Attachment

Cc: Robert P. Blasco - Attorney for the Meyers Chuck Community Association Carol Brown -Meyers Chuck Community Association Representative/Consultant John Hill - Consultant to the Ketchikan Gateway Borough

### IN THE MATTER OF THE PETITION OF THE KETCHIKAN GATEWAY BOROUGH FOR LEGISLATIVE REVIEW ANNEXATION OF APPROXIMATELY 4,701 SQUARE MILES TO THE KETCHIKAN GATEWAY BOROUGH

## <u>COMMENTS ON REHALF OF THE MYERS CHUCK COMMUNITY</u> <u>ASSOCIATION IN RESPONSE TO THE PRELIMINARY REPORT OF THE</u> <u>STAFF OF THE DEPARTMENT OF COMMUNITY, COMMERCE AND</u> <u>ECONOMIC DEVELOPMENT</u>

DATED: 8/28/07

R

Glen Rice President of the Myers Chuck Community Association

cc: John Hill, Ketchikan Gateway Borough Carol Brown, Consultant and Representative of the Myers Chuck Community Association Robert P. Blasco, Attorney for the Myers Chuck Community Association

#### I. INTRODUCTION

We have read with interest the petition submitted to the State of Alaska Local Boundary Commission (LBC) by Ketchikan Gateway Borough (KGB) and the Preliminary Report prepared by the staff for the Local Boundary Commission (DCCED). In making this response, the Meyers Chuck Community Association (MCCA), comprised of the residents of Meyers Chuck, Union Bay, and Three Islands, has met several times. Additionally, we have sought out and received technical assistance from the DCCED staff, and independent legal advice. We continue to remain united and resolute in requesting to remain within the Unorganized Borough until such time as conditions change and annexation of Meyers Chuck, Union Bay and Three Islands by an organized borough is appropriate. If this is not an option, we believe that identifying a Meyers Chuck/Union Bay enclave (including Union Bay and Three Islands) with specific triggers for when future annexation would be considered, satisfies the concerns of the MCCA and meets the objectives of the KGB and the LBC.

The KGB objective is to annex the Federal lands within its model boundaries from which it will benefit financially. The KGB has never had an interest in annexing the populated areas of Hyder and Meyers Chuck/Union Bay that are also within the model boundary. In fact, the KGB has gone on record that they would not oppose Meyers Chuck/Union Bay joining a Wrangell borough if it was formed. (KGB Assembly minutes 2/6/06). The 1999 LBC rejection of the
previous KGB petition has forced the KGB to address the populated areas if it wishes to annex the Federal lands. The remedy proposed in this petition is to annex Meyers Chuck/Union Bay and create an enclave to include Hyder. Approval of this petition by the LBC hinges upon its reversal of previous decisions regarding the Hyder enclave and acceptance of the need for services as a trigger for future annexation considerations. The DCCED staff endorses this concept. If the LBC approves the enclave, Meyers Chuck/Union Bay must be given equal treatment.

If the petition is approved, the KGB will avoid the expense of delivering mandated and needed services to Hyder and perpetuate the State's stewardship, including the operation and funding of its schools. According to the petition, annexation of Hyder could be considered at some future date associated with demand and taxation for community services, Hyder's needs for infrastructure, and the establishment of regular and frequent ferry service. These conditions have not been applied to Meyers Chuck/Union Bay as a measure of the appropriateness of annexation, thus creating a double standard. Interestingly, the KGB has not proposed any "trigger" related to Hyder schools or the formation of a Prince of Wales borough, which means the State could be left supporting and operating the schools indefinitely.

The LBC has been given discretionary authority to decide if and when borough government is appropriate. The Commission must follow established policies, law, and criteria, and apply them equally and fairly. They rely on

precedence as a basis for decisions. The DCCED summarizes that there is clear precedence that the LBC has taken a policy position that creation of enclaves is an appropriate mechanism for achieving incremental extension of borough boundaries or boundaries that reflect compromise. (DCCED Preliminary Report page 86) They restate the KGB opinion that the model boundaries are a long-term target. (DCCED Preliminary Report page 87). If the criteria used to determine when annexation is appropriate are applied equally and without bias, there is no question that the current KGB petition cannot be approved without either an amendment creating a Meyers Chuck/Union Bay enclave or entirely excluding Meyers Chuck/Union Bay from annexation at this time.

We have discussed our concerns and creation of a Meyers Chuck/Union Bay enclave with DCCED staff and KGB's planning consultant. They voiced no objections and therefore we believe this response presents a fair and widely endorsable solution to the annexation proposal before us. We will show this is a better recommendation in that it satisfies the established LBC criteria for annexation, and addresses the concerns of a wide group of affected parties. State Law (AS 29.06.040(a)) provides that the LBC may amend and impose conditions on proposals. The DCCED staff has pointed out to us that typically situations arise warranting a modification to preliminary conclusions and recommendations. This is such a situation. This proposal is offered in the spirit of fairness, cooperation and compromise. We only request to be treated equally and fairly under our Constitution and applicable State laws.

#### **II. BACKGROUND**

In 1998 the KGB advanced an annexation petition through the legislative process that would have annexed all territory within its model boundary with the exception of the unincorporated, populated areas of Hyder and Meyers Chuck/Union Bay. The LBC determined 7 criteria were satisfied, 2 partially satisfied, and 4 not satisfied. The LBC indicated the latter would have been satisfied had Meyers Chuck/Union Bay and Hyder been included in the petition. The petition was rejected in 1999.

According to DCCED, the Commission shall reject a proposal unless it meets applicable standards and is in the best interest of the State. The LBC decision to approve or reject will be affirmed if there is a reasonable basis of support for its evaluation and application of standards. Furthermore, the LBC has determined that they may make decisions even if the standards are only minimally met. Their 1999 decision with regards to the standards is summarized in Table 1 and discussed in detail below.

In December 2005, the KGB submitted an annexation petition that attempts to address the previously identified deficiencies. It is identical in substance to the 1998 petition but now proposes annexation of Meyers Chuck/Union Bay and creates an enclave in and around Hyder. The petition describes some conditions and events that are indicators of when the KGB might consider future annexation of Hyder. It follows that the absence of these conditions and events also describe

why they believe Hyder does not qualify for annexation at this time. These same (or equivalent) conditions and events have not been used to determine if Meyers Chuck/Union qualifies for annexation.

# III. JUSTIFICATION FOR AN ENCLAVE INSTEAD OF ANNEXATION

By recommending the approval of the KGB petition, DCCED concurs with the KGB that there is clear precedence that the LBC has taken a policy position that creation of enclaves is an appropriate mechanism for achieving incremental extension of borough boundaries or boundaries that reflect compromise. (Preliminary Report, DCCED page 86). It appears that if there are triggers for when an enclave should be considered for annexation, concerns pertaining to ultimately achieving the model boundary are eliminated. (Preliminary Report, DCCED page 116).

The DCCED has recommended approval of the proposed Hyder enclave even though the LBC "has a formal policy to avoid enclaves within boroughs." (LBC Decisional Statement, page 13) Under the current petition, Canada and the KGB would entirely surround Hyder, leaving it with no physical connection to the unincorporated borough. If a Meyers Chuck/Union Bay enclave was created following the boundary proposed below, it would remain within, and adjacent to, the unincorporated borough. The resulting KGB would be consistent with many other boroughs throughout Alaska that have not fully expanded to achieve their model boundaries. The approval of the Hyder enclave by the DCCED conflicts

with LBC policies and its conclusions reached in its 1999 statement of decision. The approval of the Meyers Chuck/Union Bay enclave would be consistent with LBC formal policy.

There appears to be no single criterion established for determining when it is appropriate to annex territory.

The KGB justifies forming a Hyder enclave in lieu of annexation at this time because it views the community's ties to the KGB are attenuated and there is no need for its services. This is inaccurate. Hyder does need services such as its schools. It is a requirement that the KGB provide this service if they annex Hyder. KGB's apparent real concern is the expense to the KGB of delivering services, not its cultural and social ties. In fact, the KGB has not proposed a re-consideration of the Hyder annexation even if a Prince of Wales borough is formed, leaving the enclave without the support of the Southeast Island School District. This would result in an even more costly and difficult situation for the Sate of Alaska.

The LBC has determined that Hyder indeed has needs for government services and they foresee these needs increasing. (LBC Decisional Statement page 13) This was, to a large extent, their principal concern in 1999 when they denied KGB's petition. There is universal agreement that Meyers Chuck/Union Bay has no identified needs for borough services either now or in the foreseeable future. As will be discussed in detail below, if the need for borough services is a key factor in determining when annexation is appropriate as proposed by the KGB and endorsed by the DCCED, Meyers Chuck/Union Bay should not be annexed at this time.

### IV. DESCRIPTION OF THE PROPOSED MEYERS CHUCK/UNION BAY ENCLAVE

The Meyers Chuck Community Association (MCCA) was formed in 1981 to address issues of mutual interest. Its members include all residents of Meyers Chuck, Union Bay, and Three Islands. As described in the Wrangell Petition for Incorporation, "..the inhabitants reside permanently in a close geographical proximity that allows frequent personal contacts and comprise a population density that is characteristic of neighborhood living, and constitute a discreet and identifiable social unit, based upon permanency of dwelling units." (Wrangell Petition, Exhibit H page 11)

The proposed enclave boundary consists of all land and water within the Meyers Chuck Community Association drainage area. This is an area of approximately 14 square miles of land and conforms to natural drainage basins. The salt-water boundaries in Clarence Strait and Ernest Sound that are designated as the KGB model boundary will form the boundary between the enclave and the unincorporated borough. The proposed enclave includes all private properties owned by MCCA members as well as the land and water necessary for existing services and transportation linkages. The area includes Meyers Chuck, Union Bay and Three Islands.

#### **V. TRIGGERS FOR ANNEXATION**

Similar to the KGB proposal for Hyder, we offer examples of when phasing-in of Meyers Chuck/Union Bay to the KGB might be reconsidered and possibly warranted. These are:

- If Meyers Chuck/Union Bay residents desire to form a political subdivision of the State
- If Meyers Chuck/Union Bay experiences significant economic development (e.g. tourism and /or mineral development), there may be an increased need for municipal services (e.g. roads, harbors, and utilities)
- If residents of Meyers Chuck/Union Bay desire municipal services to address development concerns and health issues, or to provide other services that benefit the community (e.g. regulation of growth and development relating to commercial tourism)
- If Prince of Wales Borough is formed and Meyers Chuck/Union Bay no longer shares a common boundary with the Unincorporated Borough
- If the Meyers Chuck/Union Bay population and demographics change sufficiently to warrant a school

We accept the qualifications placed upon these 'triggers' by KGB and accepted by the DCCED with regard to Hyder. As stated, "the KGB emphasizes, that the examples are not meant to be specific "triggers' for annexation but to describe the circumstances and context within which annexation would be reexamined." (KGB Petition for Annexation, page 87)

### VI. PETITION ANALYSIS BASED UPON THE 1999 LOCAL BOUNDARY COMMISSION DECISION AND CONTEMPORARY RECOMMENDATIONS BY THE LOCAL BOUNDARY COMMISSION STAFF

The strong similarity between this annexation petition and the 1998 petition affords the opportunity to evaluate this petition on the basis of the previous conclusion reached by the Commission. The LBC "Statement of Decision" in 1999 found that all but 7 of their established criteria were satisfied when Meyers Chuck and Hyder were excluded from annexation. The DCCED finds that no conditions have substantially changed to warrant reversal of the conclusions reached in 1999. Following is an analysis of the remaining criteria.

# a. Provides for maximum local self government (Article X, section 1 of the Alaska Constitution)

The DCCED opines that the LBC 1999 decision was unduly restrictive. If the DCCED is correct, it is not necessary to annex Meyers Chuck/Union Bay and Hyder to satisfy this criterion. Indeed, the DCCED conclusion that this requirement has been satisfied in the current petition with respect to the proposed enclaves, confirms that the potential for annexing Meyers Chuck/Union Bay at some future date satisfies this criteria.

Conclusion: A Meyers Chuck/Union Bay enclave satisfies this condition.

# b. Provides for minimum number of government units (Article X, section 1 of the Alaska Constitution)

On this issue, the 1999 LBC conclusion found deficiency only with respect to the exclusion of Hyder. They concluded "Hyder, which is within the Borough's model boundaries, clearly has governmental needs" and "the proposed exclusion of Hyder from the Borough virtually guarantees that the only way those service needs are going to be met in the future, other than by the State of Alaska, is through a city government. On the other hand, those Commissioners note that if Hyder were annexed into the Borough, it could obviate the need to form a city because its governmental needs can be met by the Borough." (LBC Decisional Statement page 13-14) The majority of the Commissioners concluded the borough needed to "be maximally expansive to encompass any unincorporated community that might incorporate as a city." (DCCED Preliminary Report, p.21) The conclusion reached by the LBC in 1999 states" the Commission determines that the Borough's annexation proposal failed to meet this standard because the exclusion of Hyder from the Borough would likely encourage that community to form a city government, which might not be necessary if it were included with the Borough." (DCCED Preliminary Report, p. 22)

The KGB also recognizes that Hyder needs a host of services and that these would become borough responsibilities and costs if Hyder were annexed. The KGB Petition states: "In the normal and expected course of community development in Hyder, Ketchikan will be poised and able to assume its natural and

logical role as the provider of local and government services there including education, planning and assessment and other needs that residents there might determine to be in their best interest. The exclusion of Hyder in the short-term will neither encourage nor discourage Hyder from forming an independent local government." (KGB Petition page 69). This is a clear admission that this standard will not be met unless there is a formalization of Hyder's status within the borough. The DCCED now finds that enclave status satisfies this concern given the KGB has identified the need for formation of government to be a trigger for future annexation consideration.

Neither the KGB, LBC or its staff identified a need for government services or a potential to form a government unit in Meyers Chuck in 1999 nor have there been subsequent changes that indicate a current or future need. The DCCED states that "Obviously, with only 16 residents and little development, the area does not presently manifest a significant need for services". (DCCED Preliminary Report p.101). By forcing Meyers Chuck to annex now, the KGB fails to give Meyers Chuck/Union Bay the same consideration as Hyder. For the LBC to adopt DCCED's position, it would be a denial of due process and equal protection to the residents of Meyers Chuck/Union Bay and the members of the MCCA. It can therefore be logically concluded, with respect to Meyers Chuck/Union Bay, since this condition was satisfied in 1999 when annexation of Meyers Chuck/Union Bay was not proposed, it is also satisfied if Meyers Chuck/Union Bay becomes an enclave. Meyers Chuck/Union Bay also offers the need for

formation of government as a trigger for future annexation consideration.

Conclusion: A Meyers Chuck/Union Bay enclave satisfies this criterion and Meyers Chuck/Union Bay has not been given equal treatment.

# c. Promotes boundaries with common interests to the maximum degree possible

In 1999 the LBC concluded that all of the area proposed for annexation at that time met the "common interests" criteria. The LBC concluded the condition of "to the maximum degree possible" was not satisfied without the annexation of Hyder and Meyers Chuck. "Maximum" is a relative term. The Commission acknowledges in its findings that "There have been instances in the past where the Commission has approved petitions that do not fully extend a borough's corporate boundaries to it model boundaries." (Statement of Decision page 7)

The DCCED has re-examined this issue and concluded in its Preliminary Report that this standard is met if enclaves are established within the model boundary with annexation to occur at some future date when more appropriate. They considered the model boundary to reflect boundaries with common interests. Therefore, it is not necessary for Hyder and Meyers Chuck/Union Bay to be annexed at this time in order to satisfy this condition, provided they become enclaves.

In its 1998 petition, the KGB identified 4 factors it considered to be of "particular importance" in demonstrating close ties to the borough 1) election district 2) recording districts 3) borough government boundaries and 4) model

boundaries. The LBC concluded Hyder and Meyers Chuck/Union Bay shared these factors. They further concluded that Hyder has stronger ties to Ketchikan than any other city in Alaska, and in fact is isolated from other Alaskan communities. In contrast, Meyers Chuck/Union Bay has ties to several communities in the unincorporated borough.

In its current submission, the KGB has elected to use a subjective measure of "current social, economic, and other ties" to justify annexing Meyers Chuck/Union Bay. The public has persistently, vigorously, and overwhelmingly challenged the accuracy of their conclusions. They have attempted to correct the record with respect to many issues including; the local newspaper is from Thorne Bay, not Ketchikan; there is no scheduled seaplane service, rather an occasional added stop to the Thorne Bay route; passenger enplanements largely reflect traffic transiting through the Ketchikan airport – not a final destination of Ketchikan; residents of Meyers Chuck/Union Bay maintain vehicles in Thorne Bay and rely heavily upon the barge service, fuel, grocery, and hardware retailers, boat storage, and other services located in Wrangell, Thorne Bay and other Prince of Wales communities.

The KBG has called the social, and economic ties to Hyder weak and therefore determined that it is not appropriate to annex them at this time. This subjective measure, however, is not offered as the indicator of when annexation <u>is</u> appropriate for Hyder. Rather, the KGB has determined that specific events and conditions primarily relating to a need for services indicate when annexation might be appropriate. Specifically, these are 1) if a political subdivision is formed to collect taxes 2) if there is significant commercial tourism 3) if municipal services are desired 4) when there is regular and frequent ferry service. If these criteria are also used to determine when and if Meyers Chuck/Union Bay, should be annexed, clearly there is no justification at this time. This double standard is not acceptable.

If the LBC approves the petition in its current form, a Constitutional issue will be raised. The LBC would be denying members of the Meyers Chuck Community Association due process if it applies one set of criteria to decide Meyers Chuck/Union Bay should be annexed and an entirely different set to justify the exclusion of Hyder, when, if the latter set of criteria were used, Meyers Chuck/Union Bay would also be excluded from annexation. Their decision would be arbitrary and an abuse of discretion.

Conclusion: There is insufficient justification for annexing Meyers Chuck/Union Bay at this time and an enclave will satisfy this criteria. Meyers Chuck/Union Bay has not been afforded equal treatment.

## d. Conform to natural geography and include all area necessary for full development of municipal services on an efficient, costeffective level

The concern voiced by the LBC in 1999 was two-fold. First, the proposed Hyder boundary divided the natural drainage. This boundary has been modified under the current petition and now satisfies the DCCED. The proposed enclave

boundary for Meyers Chuck/Union Bay, as described and illustrated above, similarly follows natural drainage contours. Therefore, this criterion is satisfied. Second, they felt that the municipal services standard had not been met. LBC and its staff have concluded, "Hyder clearly has need for government services". The DCCED concludes that "creating a Hyder enclave would have no initial effect on the structure for delivery of local services to the community of Hyder" (Staff report p.88). They also conclude that the "creation of the enclave would not initially bring about inefficient, cost-ineffective delivery of essential services, such would result upon formation of a Prince of Wales Island Borough. It would be appropriate at that point to initiate proceedings for the annexation the 205-square mile Hyder enclave to the KGB". (Staff report p. 90) The KGB has not offered this as a trigger for annexation.

Meyers Chuck presents an even stronger case. The KGB and DCCED have stated Meyers Chuck, "does not presently manifest a significant need for services". (DCCED Preliminary Report p.101) The only change of any significance related to government services was the 2006 sale of its only public facility, the Meyers Chuck School, which is now a private residence. Additionally, the MCCA has also specified that formation of a Prince of Wales Borough would trigger annexation considerations to alleviate any future concerns.

Conclusion: The proposed Meyers Chuck/Union Bay enclave conforms to natural geography and there is no need for government services so the issue of efficient, cost-effective delivery of services is moot.

#### e. Conforms to model boundaries

The LBC's concern in 1999 was that there would be no incentive in the future for the eventual annexation of the areas initially excluded. The DCCED finds that phased annexation using the concept of enclaves is clearly an established practice leading to the future realization of model borough boundaries. Specifying events and conditions that would lead to future annexation consideration further satisfies this concern. The proposed Meyers Chuck/Union Bay enclave specifies such events and conditions. It is also important to note, that amending this petition to establish two enclaves, results in a significantly different petition than the 1999 one. The populated areas would be recognized and included within the model boundaries and events triggering consideration of eventual annexation address when the model boundaries might ultimately be achieved.

Conclusion: Creating a Meyers Chuck/Union Bay enclave in consistent with the model boundaries.

#### f. Best interest of the state

In its 1999 denial of the KGB petition, the LBC voiced concerns relating to two issues: 1) creation of enclaves, and 2) providing borough services principally in terms of education and planning. As stated previously, the DCCED has concurred with KGB that there is clear precedence that the LBC has taken a policy position that creation of enclaves is an appropriate mechanism for achieving incremental extension of borough boundaries or boundaries that reflect compromise. Therefore, creating a Meyers Chuck/Union Bay enclave presents no conflict. The issue of whether the LBC should approve enclaves that are entirely surrounded by an incorporated borough and therefore isolated from the unincorporated borough (as would be the case for Hyder), is unclear. This would not be an issue for the Meyers Chuck/Union Bay enclave, as it would adjoin the unincorporated borough.

In terms of LBC's second concern, the KGB acknowledges that the residents of both Meyers Chuck/Union Bay and Hyder "expressed overwhelming opposition to the annexation proposal, expressed no desire or need for Borough administered services, and did not express a need for capital improvements that could be financed by or through the Borough. The Borough proposes to initially provide only mandatory services as required by the State." (KGB Petition, page 40) The mandatory services referenced by KGB are education, planning, platting, land use regulation and assessment and collection of taxes. Following is a comparison between Hyder and Meyers Chuck of the need for each of these services.

#### 1. Education

There are no school age children in Meyers Chuck and there are no educational facilities or properties held for the purpose of constructing educational facilities in the future. KGB acknowledges this and states, "Although Meyers Chuck does not currently have any school-age children, it is reasonable to believe that this could change in the future. Annexation of the proposed territory would offset the cost of providing this state provided service though local property taxes." (DCCED Preliminary report, page 102). Given the demographics of Meyers Chuck/Union Bay, there is no foreseeable need for a school and therefore no need to offset the State's cost of providing this non-existent service.

Conversely, the Hyder enclave has educational facilities funded by the State and operated by the Southeast Island School District and a contractual arrangement with the government of Canada. The KGB is making no effort to offset the state's cost for delivering this service through taxation of Hyder. If the KGB annexed Hyder, the borough would be responsible for the delivery of educational facilities to the community and would remove this financial and operational burden from the State of Alaska. Although the DCCED concludes that Hyder should be annexed if a Prince of Wales Borough is formed, the KGB Petition has not offered this as a condition for reconsidering the annexation of Hyder. (DCCED preliminary report page 116). It is in the State's best interest to have the borough assume these responsibilities and without assurances of when the burden of Hyder schools will be removed from the State, it is not possible to conclude the KGB petition is in the State's best interest. It is a denial of due process to the members of the MCCA to mandate that Meyers Chuck/Union Bay be annexed, while at the same time, exclude Hyder when in fact, Hyder currently receives extensive State services that would become the responsibility of the KGB if Hyder was annexed.

#### 2. Planning

The DCCED concludes that the area manifests a reasonable need for borough government and receives, or may be reasonably expected to receive " the benefit of borough government." More specifically the KGB states, "There are a number of current and likely future commercial and economic development activities that would require Borough services and consequent management. These include the possible expansion of commercial tourism in the area and the likelihood of mine development in either Union Bay or Duke Island during the next 20-30 years. Specifically, tens of thousands of visitors depart Ketchikan annually for destinations with the territory (mostly Misty Fjords National Monument)." (KGB Petition page 101).When these statements are examined more closely, future planning needs are clearly centered on Hyder, not Meyers Chuck/Union Bay.

• Tourism

The KGB petition contains a supporting map that indicates the proposed Hyder enclave receives approximately 40,000 visits annually to view bears. Furthermore, the KGB petition states, "The most likely development activity in Hyder will be the growth of commercial tourism." "The community may want to establish planning and zoning regulations to insure hotels or tourism lodges are not constructed next to residential properties or to regulate the potential growth of commercial tourism." (KGB Petition page 87) Transportation linkages between Hyder and Ketchikan to accommodate tourists remain a priority from a planning perspective. The DCCED report notes, "The proposed ferry between Ketchikan and Hyder was included among the Borough's legislative priorities. It is also among the Borough's recommendations for funding under the Statewide Transportation Improvement Program." (DCCED Preliminary Report, page 52)

In contrast, Meyers Chuck has no tourism. The only commercial tourist lodge burned to the ground several years ago after being closed for many years. It has not been rebuilt. The photos contained in the DCCED report show the lodge prior to its destruction. We don't know why DCCED chose to include this inaccurate depiction of the current Meyers Chuck and are concerned that misassumptions have been made as a result. We expect that this will be corrected in the final report. Attempts to sell the lodge to another operator failed.

#### • Mining

The LBC 1999 position was that "substantial weight should be given to the need for planning in an area that has potential for significant mining activity. It is best to institute the local governmental mechanism to provide for planning before substantial development occurs." (DCCED Preliminary Report, page 100). In the eight years since this opinion was offered, the mining potential in the vicinity of Meyers Chuck and Union Bay has been tested and the potential operators and investors have concluded (despite an attractive world metal market) the mines are not feasible and there will be no funding for further exploration. Eighty eight percent of the mining claims have been abandoned and all equipment removed. The DCCED has included in its report the KGB's incorrect statement that there is a camp and active, on-going exploration in the area (DCCED Preliminary Report page 75). We expect the DCCED will correct this error in the final report and change the conclusions drawn as a result of this error. The KGB acknowledges that any such activities would be 15-30 years in the future, if at all. The extremely unlikely development of mining in the vicinity of Meyers Chuck/Union Bay makes planning a wasted effort. Nor does the mere fact that mining claims exist within the area justify the need for planning. The conclusion reached by the DCCED and KGB is that despite the existence of mining claims within the proposed Hyder enclave, no need for planning exists.

#### 3. Platting

The need for platting and recording services correlates with community growth. The population of Meyers Chuck/Union Bay has been steadily decreasing while that of Hyder has been increasing. (DCCED Preliminary Report page 49) While both communities use the recording services provided by Ketchikan, they are not alone. Ketchikan provides recording services to much of the surrounding unincorporated borough including Prince of Wales. This is a fee basis service and no increase in platting and recording needs are foreseen for Meyers Chuck/Union Bay.

#### 4. Land Use Regulation

The developed properties in Meyers Chuck/Union Bay have only one use – single family residential. There are no commercial, industrial, or public facilities. Since there are no foreseeable new uses or developments, the need for land use regulation is obscure. Conversely, Hyder has a variety of community land uses including residential, commercial, and public. Given its size and the future for tourism, it is more likely to need land use regulation than Meyers Chuck/Union Bay.

#### 5. Assessment and Collection of Taxes

Of all the issues addressed in this report, there is a substantial body of law (federal, state and local) addressing equitable treatment. If one makes the argument that all citizens in a model boundary should be contributing financially, it is inequitable to include Meyers Chuck/Union Bay and exclude the larger population of Hyder. The above discussion relating to the funding and operation of educational facilities in Hyder and the KGB's justification for proposing taxation of Meyers Chuck/Union Bay to offset the costs of delivering educational services at some future date in Meyers Chuck is indicative of the inequity created by the KGB petition.

DCCED has concurred with the KGB's statement that "Residents of the territory receive, or may be reasonably expected to receive, directly or indirectly, the benefit of Borough government without commensurate tax contributions." (DCCED Preliminary report page 102) In direct opposition to this conclusion, the LBC 1999 decision states, "It is poor public policy to suggest that each annexation or incorporation proposal should be weighed to ensure that revenues and costs are somehow balanced. Many areas within existing organized boroughs do not receive services commensurate with revenues generated by those areas. Conversely, many areas of organized boroughs receive services well beyond the

level of revenues generated by those areas. The Commission is guided by Alaska's constitution and standards established by law. These make little or no provision for consideration of the fiscal effects..." (LBC Decisional Statement P.12) It should be noted that since Meyers Chuck/Union Bay will gain no benefits from annexation, the residents would be paying a disproportionate amount of tax.

Finally, as previously discussed, Meyers Chuck/Union Bay does not receive any services from the KGB. Residents of many communities in the unincorporated borough as well as other boroughs utilize Ketchikan's regional airport, healthcare, library, and retail businesses. Given Ketchikan is a hub, many non-borough residents occasionally access and enjoy the benefits of KGB's public services. As appropriate, they access them on a fee for use basis. They contribute to the KGB's economy through sales taxes and generating revenues for KBG's business community.

Conclusion: The KGB defends its petition as it relates to this all-important criteria by suggesting "the State of Alaska Constitution is the chief expression of the State's best interest." (Petition page 70) In satisfaction of this constitutional standard they believe their petition maximizes local self-government. They state, "Residents of the territory will find the political expression of their local community development needs and services at the local rather than State level. These include those services which are best provided at the local level including education, planning, assessment and other services which address uniquely local needs." (Petition page 70-71) This is clearly not a true statement when, in fact,

Hyder's needed services will continue to be the responsibility of the State and Hyder itself, and Meyers Chuck/Union Bay, which has no need for services, will be saddled with the cumbersome burden of borough government attempting to fill non-existent needs. In conclusion, creation of a Meyers Chuck/Union Bay enclave satisfies the LBC, DCCED, and KGB criteria, and Meyers Chuck/Union Bay presents a stronger case for forming an enclave than does Hyder.

#### g. Meets legislative review standard

As stated by the DCCED "The provisions of 3 AAC 110.200 allow a legislative review annexation if certain circumstances exist. Among those are several that the DCCED finds to be evident in the KGB proposal" (Preliminary Report page 116). These are; need for borough services; receipt of borough government without commensurate tax contributions; ability of the borough to plan and control growth; promote local self-government with a minimum number of units. All of these have been addressed above and it has been shown that the DCCED conclusion on every issue is unsupported with respect to Meyers Chuck. Meyers Chuck/Union Bay presents a stronger case for enclave status in terms of these issues than does Hyder.

Conclusion: Creation of a Meyers Chuck/Union Bay enclave satisfies the LBC, DCEEC, and KGB criteria, and Meyers Chuck/Union Bay presents a stronger case for forming an enclave than does Hyder

#### VII. SUMMARY

In 1998 the KGB had no interest in annexing the remaining populated areas within its model boundaries. They saw no need to render services, and the planning and growth issues on the horizon (mining and tourism) did not appear to warrant any need for control. In the intervening years, the planning issues related to Meyers Chuck/Union Bay (i.e. mining development) have faded to a remote possibility. Conversely, growth and planning issues relating to tourism and transportation in the Hyder vicinity have increased. In its 1999 denial of the KGB petition, the LBC expressed many more concerns regarding the exclusion of Hyder than it did with Meyers Chuck/Union Bay. The LBC didn't identify any single criterion that was satisfied by Hyder and not Meyers Chuck/Union Bay. Most importantly, the LBC's previous denial of KGB petition to expand was due to their concern over Hyder's need for services and the potential formation of a government unit that would jeopardize future realization of the model boundary.

It appears that the only reason Meyers Chuck/Union Bay has been included in this petition is in an attempt appease the concerns voiced by the LBC in 1999 relating to embracing area of common interest "to the maximum degree possible". It has clearly been shown that the KGB applied a different standard to Meyers Chuck/Union Bay than to Hyder in justifying annexation. In doing so, they have raised the Constitutional issue of due process. The DCCED, for reasons it fails to explain in its preliminary report, apparently supports the denial of due process and denial of equal protection to the members of the MCCA as proposed by the KGB Petition. Finally, by petitioning to annex only Meyers Chuck/Union Bay, the KGB has completely ignored the concern raised by the LBC in 1999 that Hyder does have need for government services and Meyers Chuck/Union Bay does not. It has been clearly shown that on every criterion, an equal if not stronger case has been made for excluding Meyers Chuck/Union Bay than for Hyder.

If the petition is amended to include Meyers Chuck/Union Bay as an enclave, the goal of the DCCED and KGB of working towards the model boundary will be achieved. It will appease the immediate concerns raised by the members of the Meyers Chuck Community Association, and afford the LBC an opportunity to approve a petition that addresses concerns previously raised and is substantially different from the one they denied in 1999. This solution appears to be a win-win for the KGB, LBC and communities within the KGB model borough boundary.

In summary it has been shown:

- Enclaves are an established mechanism and appropriate incremental step for borough expansion.
- There is no justification for annexing Meyers Chuck/Union Bay at this time
- The KGB's claim that is will provide local governmental services in a manner and scale which addresses local residents needs has been shown to be untrue

- Meyers Chuck/Union Bay presents a stronger case for enclave status than does Hyder
- All of the LBC's criteria can and will be satisfied if Meyers Chuck/Union Bay is an enclave in the KGB model borough.
- Amending the current petition to exempt Meyers Chuck/Union Bay from annexation at this time does not jeopardize annexation of the remaining territory within the KGB model boundary
- Annexing Meyers Chuck/Union Bay and excluding Hyder is fundamentally unfair to the Meyers Chuck Community Association members and raises the Constitutional issues of denial of due process and denial of equal protection.

	The 1999 Petition extudes the annexation of Meyers Chuck/Union Bay andHyder	
	EVALLATION STANDARD	SATISFIED
Article X Section 1	advances maximum local self-government	ou
Articlw X Sectin 1	promotes a minimum of local govenrment units	no
Article X Section 3	promotes boundaries that embrace an area and population with common interests to maximum degree possible	ou
19 AAC 110.160(a)	interrelated social, cultural and economc characteristics	yes
19AAC 110.160 (b)	establish boundaries that allow communication and exchand necessary for development of integrated burough government	yes
19AAc 110.170	population large and stable enough to support exanded government	yes
19AAC 110.180	sufficent human and financial resources to operate government	yes
19AAC 110.190(a)	boundaries conform generally to natural geography and include all areas necessary for full development of esserntial services on a cost effective basis	ou
19AAC 110.190 (b)	contiguous to the existing burrough boundaries	yes
19 AAC 110.190 ©	conforms to model burrough boundaries	partially
19AAC 110.195	serves the balanced best interest of the State of Alaska	partially
19AAC 110.200	meets legislative review standard	not clear
10AAC 110.900	transition plan for proper extension of services, rights, and powers	yes
194AC 110 910	unbiolist sivil and political rights	yes



**United States** 

Agriculture

Forest Service **3031 Tongass Avenue** Ketchikan, AK 99901-5743 Phone: (907) 225-2148 Fax: (907) 225-8738

File Code: 1560 Date: September 18, 2007

Local Boundary Commission Department of Commerce, Community and Economic Development 550 West Seventh Avenue Suite 1770 Anchorage, AK 99501-3510

> Notice of proposed amendment to Wrangell Borough Incorporation Petition Re:

I am writing in support of the Alaska Department of Commerce, Community, and Economic Development findings and recommendations to include a 191-square-mile area encompassing Meyers Chuck and Union Bay in Ketchikan Gateway Borough (KGB) rather than the proposed Wrangell borough. I understand the proposed amendment to the City and Borough of Wrangell (CBW) petition excludes this 191-square-mile area.

As noted in my comment letter to the initial petition, the inclusion of this area to KGB will better facilitate administrative responsibilities since the boundaries would follow Tongass National Forest ranger district boundaries. Staff offices for both KGB and Ketchikan Misty Fiords Ranger District and CBW and Wrangell Ranger District are located in the same town resulting in more efficient and economical benefits.

I fully support this amendment. If you have any questions or comment, please feel free to contact Jeannie Blackmore, Natural Resource Specialist-Lands, at (907) 228-4120 or jblackmore@fs.fed.us.

Sincerely,

DKolend

D. KOLUND District Ranger





Agriculture

**United States** Forest Department of Service **Alaska Region Tongass National Forest Ketchikan-Misty Fiords Ranger District** 

**3031 Tongass Avenue** Ketchikan, AK 99901-5743 Phone: (907) 225-2148 Fax: (907) 225-8738

**File Code: 1560** Date: July 7, 2006

Local Boundary Commission 550 West Seventh Avenue Anchorage, AK 99501-3510



Re: Notice of Filing of Petition for Incorporation Of the City and Borough of Wrangell

I am writing in response to your Public Notice regarding the filing of a petition for the incorporation of the City and Borough of Wrangell (CBW). I have reviewed the notice and offer the following comments.

The boundary for the proposed CBW includes portions of the Cleveland Peninsula. As shown by the map included with your Public Notice, the proposed CBW boundary would run south down the middle of the peninsula and effectively divide it in half lengthwise. Splitting the Cleveland Peninsula in this fashion will result in a portion of the Ketchikan – Misty Fiords Ranger District (KMRD) being included within the CBW.

The Ketchikan Gateway Borough (KGB) recently filed a petition to expand its boundary. The proposed KGB expansion would create a larger borough whose boundaries mirror the boundaries of the KMRD, with the exception of the temporarily excluded area near Hyder, Alaska. Exhibit C of the KGB's Annexation Petition visually depicts the KMRD boundary. I am enclosing a copy for your reference. If the KGB's proposed boundary on the Cleveland Peninsula is used, the result will be that all of the within the KMRD in that are will be in the expanded KGB and all of the land with in the Wrangell Ranger District will be within the new CBW.

From the Forest Service perspective, I believe it would facilitate administrative responsibilities if proposed borough boundaries on the Cleveland Peninsula matched those of the Tongass National Forest ranger districts. Similar management boundaries will help avoid confusion between the ranger districts of the Tongass National Forest and the proposed boroughs. Furthermore, the offices and staff of both the KMRD and the KGB are located in Ketchikan. The same is true of the Wrangell Ranger District and the proposed CBW. The proximity of these organizations to one another will result in a savings of time and travel on matters that mutually affect them.



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In conclusion, we recommend that the boundary for the proposed CBW be modified to remove the portions of the Cleveland Peninsula that are within the KMRD. If you have any questions about these comments, please feel free to contact Vernon Keller, Realty Specialist, at (907) 228-4129 or vkeller@fs.fed.us.

Sincerely,

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DYNND. KOLUND District Ranger

#### EXHIBIT C MAPS AND PLATS

A map showing the existing boundaries of the Borough and the boundaries of the area proposed for annexation are presented in this Exhibit.



# HAGLUND KELLEY HORNGREN JONES & WILDER LLP

One Main Place 101 SW Main Street Suite 1800 Portland, Oregon 97204-3226

TEI (503) 225-0777 FAX (503) 225-1257 Michael E. Haglund Michael K. Kelley Scott W. Horngren Timothy J. Jones LeRoy W. Wilder, PC Michael G. Neff Shay S. Scott Julie A. Weis William K. Barquin Christopher Lundberg James L. Francesconi Danica Hibpshman Matt Malmsheimer

August 30, 2007

## VIA E-MAIL AND REGULAR MAIL

LBC@alaska.gov

Local Boundary Commission Staff Department of Commerce, Community & Economic Development 550 W. Seventh Avenue, Suite 1770 Anchorage, AK 99501-3501

> Re: Comments on the Preliminary Report to the LBC Regarding the Proposed Annexation to the Ketchikan Gateway Borough - Submitted by the Metlakatla Indian Community

Dear Commission Staff:

On behalf of the Metlakatla Indian Community (the "Community"), we are submitting comments on your Preliminary Report. At the outset, we are disappointed to note that, after reviewing this lengthy and detailed document, a complete absence of any analysis of, or comment on, the concerns presented by the Community in its Response Brief, dated April 26, 2006. In all of the Report's 118 pages and its five appendices, only one minor reference noted that the Community timely filed a responsive brief. The Report's failure to respond in any way to the Community's significant concerns over the breadth of the proposed annexation reflects a troubling lack of respect for Metlakatla's legitimate role in the process.

To be clear, the Community does not oppose the annexation *per se*, except to the extent that it includes waters south of the Annette Islands, including Duke Island and its surrounding waters. In fact, the Community recognizes that the annexation could provide some mutual benefit to the Community and Ketchikan. The Community also acknowledges and respects the long-standing positive relationship it has tried to maintain with Ketchikan.

However, the Community's need and its legal right to enjoy self-governance and some reasonable level of prosperity necessarily transcend any other issue or concern and required it to submit its comments in compliance with your timeframes – concerns you apparently summarily ignored. In short, since the collapse of the timber industry Local Boundary Commission Staff August 30, 2007 Page 2

and changes in salmon markets, the Community has experienced a time of poverty and high unemployment rates and all of the related economic and social issues that naturally arise under such circumstances. Although these conditions are not unique in southeast Alaska, they are matters which must be addressed by the Community government in meeting its responsibilities. That is why it brought to the Commission's attention that it is seeking federal expansion of its Reserve boundary to include lands and waters subject to the annexation request. You should also note that, although the expansion proposal described in the Community's brief remains substantially as stated therein, political and legal realities make a precise description of the area that may be added to the Reserve somewhat problematic. Suffice it to say, and you should note in the official record, that all lands and waters south of the Annette Islands Reserve at the present time are of interest and subject to Metlakatla's request for expansion and its opposition to the annexation.

Also important to note is that the Community's proposed expansion will utilize a lawful exercise of federal power that already exists or, if that is not sufficient, a request to Congress for that power. The request is justified and is a realistic effort to improve economic and social conditions on the Annette Islands Reserve. Its justification is equally as important and lawful as the request submitted by Ketchikan, especially given the Community's long history of self-government and economic self-sufficiency. It certainly merits substantially greater deference than the total distain reflected in the complete absence of consideration in your report. Thus, please consider this letter as a reiteration of the Community's opposition to the proposed annexation. Given the intent and complex tension between the tribal/federal and state interests involved, perhaps the better approach would be to make an effort to reconcile the competing interests prior to any decision on annexation. At the very least, it is incumbent on the Commission to understand the scope of the Community's formal request prior to granting the annexation request.

It is not lost on me that, given the Commission's complete failure to address any of the Community's concerns, the formulaic analysis the proposed annexation must follow does not lend itself well to accommodating the interests of the Community as an independent sovereign and as set forth herein. Nonetheless, I urge you to familiarize yourselves with the law associated with Metlakatla's status and the role that the federal government has to play. The marginal benefit to Ketchikan of including waters that may ultimately be claimed by Metlakatla is far outweighed by the larger benefit to the Community of including them within its boundary. Worth noting is that, in its effort to receive federal authorization for this expansion, the Community has specifically acknowledge a willingness and, indeed its obligation, to preserve the legitimate interests <u>HAGLUNP</u>f others, such as Ketchikan, in the natural resources that may exist within the <u>KELLEY</u> expansion area.

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Local Boundary Commission Staff August 30, 2007 Page 3

In sum, Metlakatla is seeking only an opportunity equal to Ketchikan's for selfgenerated success. That quest will not die, regardless of the action taken by the Commission. By completely ignoring the Community's request, however, the Commission certainly will make a statement, without explicit comment, on its position regarding Metlakatla's right to protect its political autonomy and its right to seek economic self-sufficiency.

From a practical view, if Ketchikan's proposal includes mutually-coveted lands and waters, the possibility of a disannexation process looms. Disannexation of waters in which the federal government has authorized an expansion of federal authority carries with it substantial difficulties, such as having to void actions taken pursuant to police, taxation and eminent domain powers. By excluding lands and waters from Ketchikan's proposed annexation that ultimately may become part of the Annette Islands Reserve, such difficulties can be avoided. <u>See Port Valdez Company, Inc. v.</u> <u>City of Valdez</u>, 522 P.2d 1147, 1153 (Alaska 1974) (holding that the difficulties associated with disannexation <u>should be avoided when possible</u>.) Accordingly, at this time, the Commission is uniquely positioned to shape a win-win situation for all parties concerned by recommending an amendment to the boundary of Ketchikan's proposed

Finally, the Community wishes to present testimony during the upcoming public hearing on the annexation proposal, and with this letter, expressly reserves its right to do so. For your ease of reference and review, I also attach a copy of the Community's previously-filed Response Brief. Your anticipated thoughtful consideration of our comments is appreciated.

Sincerely yours .eRoy W. Wilder

LWW:lsh / Enclosure Cc: The Hon. Victor C. Wellington, Sr. (without enclosure)

HAGLUND KELLEY HORNGREN Jones & Wilder up

# RESPONSE BRIEF OF THE METLAKATLA INDIAN COMMUNITY TO THE PETITION FOR ANNEXATION TO THE KETCHIKAN GATEWAY BOROUGH

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HAGLUND KELLEY HORNGREN JONES & WILDER LLP attorneys at law one main place 101 sw main street, suite 1800 portland, oregon 97204-3226

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April 26, 2006

### RESPONSE BRIEF TO PETITION FOR ANNEXATION TO THE KETCHIKAN GATEWAY BOROUGH

#### I. INTRODUCTION.

The Metlakatla Indian Community (the "Community") files this brief in response to the Ketchikan Gateway Borough ("Ketchikan") petition to annex over 4,000 square miles of land and waters surrounding the Annette Islands Reserve. The Community objects to the proposed annexation because it is overly broad and would create an enclave within the proposed borough boundary in violation of law. To protect the Community's interest and to make the petition comply with the law, the Local Boundary Commission ("LBC") should amend the petition's proposed boundary to exclude the areas of Duke Island, its neighboring islets, and the surrounding waters to a distance of 5,000 feet beyond those lands.

Ketchikan simply does not have the connection to those islands, either historically, culturally, governmentally, or economically, held by the Metlakatla Indian Community. Although the Community and Ketchikan have close connections in some contexts, of greater importance is the fact that the two communities have distinct histories and cultures, and that the Metlakatla Indian Community is an independent sovereign with its own system of laws and government. And while the economies of the two communities are interrelated, the Metlakatla Indian Community's economic interests are not always the same as those of Ketchikan.

The proposed annexation encompasses land surrounding the Annette Islands Reserve, including Duke Island and a number of satellite islands. Members of the Community historically have used those islands and the surrounding waters for subsistence hunting, gathering, and fishing. Furthermore, members of the Community have significant cultural and religious connections to the area. Moreover, Metlakatla is pursuing with the federal government an expansion of its Reserve boundaries to include those islands and the adjacent waters to a distance of 5,000 feet and the annexation would unnecessarily complicate the Community's effort in that regard. Accordingly, the Community objects to the petition as proposed.

The proposed borough fails to "embrace an area and population with common interests to the maximum extent possible," in violation of the Alaska Constitution and LBC regulations. As proposed, the annexation fails to adequately balance the different interests of citizens and affected governments in the area identified for change, and it is therefore not in the best interests of the State of Alaska. Finally, the proposed annexation will create a geographic and political enclave within the proposed borough, in violation of LBC standards for annexation to boroughs.

The LBC can avoid these difficulties by amending the petition to redefine the southern boundary. As noted, the Community is currently pursuing an expansion of its Reserve

April 26, 2006

boundaries with the federal government to include southerly extensions of the east and west boundaries to include all of the islands and islets south of Annette Island and the waters 5,000 feet off-shore of those islands, measured at mean low tide. The east-west boundary of the new reserve would either be the Canadian border or would be measured at 5,000 feet of the southerly most point of the shoreline. By excluding those areas from annexation, the petition would comply with the State Constitution and LBC regulations, while facilitating the Community's efforts to maintain its historical economic, social, cultural, and political independence.

#### II. FACTUAL BACKGROUND.

In 1891, the Annette Islands were "set apart as a reservation" by Congress for the Metlakatlans and other Indians, "to be held and used by them in common[.]" 25 U.S.C. § 495. In 1916, in furtherance of the Secretary's plan to establish a salmon cannery at Metlakatla and in recognition of the Community's historical use of the fishery resource, President Wilson by proclamation declared the waters within 3,000 feet of certain of these islands to be used as a part of the Annette Islands Reserve and specifically as a source of supply for the Community's cannery.

Since that time, the Metlakatla Indian Community worked hard to remain a socially and economically vibrant society by using its fishery resource, as well as significant local timber

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resources. In the many years following the establishment of the Reserve, the Community developed its fish cannery into a strong business, and operated two sawmills, both of which contributed substantially to the Community's economic and social well-being.

Given the economic value that the Community retained from these natural resources, and in keeping with its proud tradition of self sufficiency, the Metlakatla Indian Community declined to take part in the Alaska Native Claims Settlement Act, which would have ended the Community's reservation status and allowed the Community to participate in the settlement process. This process would have included large grants of land and money. As a result of preserving its reservation status, the Metlakatla Indian Community remains in a unique trust relationship with the federal government.

The problem facing the Community today is that in the last decade the federal government completely restricted logging in the Tongass National Forest, which is adjacent to the reservation and was the sole source of timber supply for the Community's two sawmills. This logging prohibition forced both sawmills to close, which cost the Community money in lease revenues and municipal fees and 250 full-time jobs for Community members.

Adding to this problem was the recent collapse of the pink salmon market, which cost the Community millions of dollars in revenue from the canning operations. As a result, the

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Community was forced to close its cannery; a tragedy considering that this had been the oldest continuously operated enterprise in Indian Country.

Together, these twin catastrophes have left the Community in an economically depressed state with all the attendant social and economic woes one might imagine. The population is dwindling. The unemployment rate seasonally reaches levels as high as 87%. People are losing hope. This weakening of the Community is directly linked to its decreasing ability to sustain itself through its culturally-significant fisheries operations.

In response to this economic crisis, and in recognition of the federal government's trust obligations to the Community, the Community is seeking a federal expansion of the boundaries of the Annette Islands Reserve. The proposed transfer would confer upon the Metlakatla Indian Community the same rights, governmental authority and obligations as exist within the Annette Islands Reserve, subject to all valid existing rights at the time of the transfer.

The Community has deeply rooted historical ties to Duke Island and the surrounding islets. Spanish explorers documented the first European contact with native people, a meeting with Chief Mountain, a Nish'gaa' Tsimshian Chief, at what is now Cape North-Umberland and Kelp Island, on the Southeast corner of Duke Island. That historical connection persists to this day, as

contemporary Community members use Duke Island and its surrounding islets and waters for subsistence hunting, fishing, and gathering.

Currently, non-Community existing rights in the area are fairly limited. However, some interests in the area of transfer are significant enough to be considered for specific protections. A number of mining claims are currently valid on Duke Island, all of which are owned by a single Canadian company. Those claims would be protected in any transfer action and the federal regulatory control would remain the same.

Commercial Fishing Fleets: The waters surrounding the islands contain some, but not hugely significant fishing interests. The commercial salmon gillnet and seine fleets make little use of the waters. Some limited bottom fishing takes place. The Community's expansion includes some areas used by commercial diving operations that would have to be protected. The state herring fishery had some isolated openings around Cat Island over ten years ago but none in recent years, including the just cancelled season. All of the interests represented by those fleets could be protected with an IFQ system for fishermen who can demonstrate a history of harvest in the area over a significant enough period to justify the right to a quota. Thus, with the exception of the commercial charter fleet, which is discussed below, there should be little or no objection from commercial fishing fleets.

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<u>Commercial Charter Fleet</u>: The waters within the southwest part of the Community's proposed expansion have significant interests for tourist charters operating out of Ketchikan. This use would be subject to complete protection with no anticipated change in operations. What might happen with an expanded Reserve, however, could be a significant boon to this aspect of the southeast Alaska economy. Tamgass Harbor, within the existing Annette Islands Reserve, is an ideal moorage for the charter fleet. With appropriate docking, maintenance and refueling stations, the fleet could cut its running time to the best fishing grounds by at least an hour. Among other benefits, this would significantly reduce fuel costs for the fleet.

The development of Tamgass Harbor as a small boat moorage has not been feasible due to the difficult access to Annette Island from Ketchikan. With the completion of the Walden Point Road, anticipated in 2008, land transportation to the harbor will be available, making its proximity to the fishing grounds a useful reality. The poor economy of the Metlakatla Indian Community also has contributed to the inability to take advantage of the Tamgass Harbor location. The resources to construct the infra-structure necessary to make it a useful moorage for the charter fleet have been lacking. With the boost to the Community's economy anticipated with the transfer, the funds to make the harbor an asset for the charter fleet will be available.

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Cultural and Religious Sites on Duke Island: The Metlakatla Indian Community understands that the Tongass Tribe has significant cultural interests at stake on Duke Island. In addition to those Tongass interests, there are also Tsimshian and Haida burial sites on the island. The Community believes that the transfer of the lands to the Community will make it easier to protect the cultural values of those sites. Some members of the Metlakatla Indian Community also are members of the Tongass Tribe, which creates an inherent interest in religious and cultural protections. Moreover, tribal ownership, by definition, brings cultural sensitivity to any relevant sites.

These are the reasons that the Community is confident that its proposed boundary expansion is a viable reality and why the annexation (as proposed) is a bad idea. Such expansion of the Reserve will provide sorely needed economic opportunity for the Community, will reflect the Community's historical and cultural connection to those islands, and will protect existing users rights in the area of proposed expansion. Ketchikan's proposed annexation, however, does not recognize let alone further this reality. As discussed below, it therefore does not comply with the Alaska Constitution or LBC regulations and, if approved as is, could unnecessarily complicate relations between the two communities.

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#### III. POINTS & AUTHORITIES.

The LBC may only accept proposed changes to municipal boundaries that meet applicable standards of the state constitution and its own regulations and that are in the best interests of the state. AS § 29.06.040(a). The Ketchikan annexation petition currently fails to meet those standards. However, the LBC is authorized to amend an annexation petition to ensure that any proposed change meets those standards. <u>Id</u>. By amending the southern boundary to exclude that area that the Community seeks to include within its reserve boundaries, LBC can ensure that the proposed annexation will comply with those standards.

#### A. <u>The Proposed Annexation does not Maximize the</u> <u>Common Interests of the Proposed Area as Required</u> by the Alaska Constitution.

Article X, section 3, of the Alaska Constitution provides that every borough "shall embrace an area and population with common interests to the maximum degree possible." That constitutional provision requires the LBC to maximize common interests in a proposed borough annexation. <u>Cf. Petitioners for Incorporation of City and Borough of Yakutat v. LBC</u>, 900 P.2d 721, 725-26 (Alaska 1995) (applying Article X, section 3, to borough incorporation statutes). If a proposed boundary can be redrawn so as to maximize the common interests within a borough, the LBC is required to do so. <u>Id</u>. The area proposed by Ketchikan for

annexation fails to maximize common interests because it ignores the interests of the Metlakatla Indian Community to its detriment.

First, the proposed annexation may create additional difficulties to the Community's effort to expand its reserve boundaries. <u>See</u> 25 C.F.R. § 151.10 (in deciding requests of expanded trust land in contiguous areas, Bureau of Indian Affairs must notify local governments with regulatory jurisdiction over requested lands and must consider, among other things, "jurisdictional problems and potential conflicts of land use"). The future goals of the Community are important matters for the LBC to consider in amending the proposed boundary that compel amending the petition to exclude the islands and waters sought by the Community. <u>Yakutat v. LBC</u>, 900 P.2d at 727.

Second, the proposed boundary fails to account for the historical uses that Community members have made of the area, and fails to account for the different cultural and economic interests at stake. The proposed annexation does not recognize that the Community, by virtue of its proximity to the islands and its historical uses of those islands and waters, has a valid claim to those areas. The potential for conflict between Ketchikan and the Community would be unnecessarily increased by the annexation as proposed. One of LBC's primary purposes is to resolve boundary disputes that cannot properly be solved locally. <u>See Oseau v.</u> <u>City of Dillingham</u>, 439 P.2d 180, 184 (Alaska 1968). By amending

the annexation petition now, the LBC can appropriately resolve any such boundary dispute before it arises.

Finally, approval of the annexation as proposed could ultimately lead to a disannexation of those portions of the proposed borough that lie within an expanded Annette Islands Reserve. The Alaska courts have examined the difficulties that arise out of disannexation and have concluded that it should be avoided when possible. <u>See Port Valdez Company, Inc. v. City of</u> <u>Valdez</u>, 522 P.2d 1147, 1153 (Alaska 1974). Such difficulties include the invalidation of corporate action which could create individual liability on the part of borough officials and the voiding of actions taken pursuant to police, taxation, and eminent domain powers. <u>Id</u>. The LBC can avoid any potential for those sorts of disturbances in this case by amending the petition to exclude the area sought by the Community.

As in the <u>Yakutat</u> decision, amending the proposed boundary to avoid a conflict of interests between Ketchikan and the Community is the only appropriate exercise of the LBC's authority. By excluding this small portion from the proposed annexation, the LBC will maximize the common interests of the proposed borough, as required by the Alaska Constitution. It will also fulfill its other obligations to the local people and the State. For those reasons, the LBC must amend the proposed boundaries to prevent incursion by Ketchikan into Duke Island and

the other lands that the Community seeks for its expanded reserve. Yakutat v. LBC, 900 P.2d at 725-26.

#### B. <u>The Annexation Petition, as Proposed, is not in the</u> <u>Best Interests of the State of Alaska.</u>

The LBC may not approve a borough annexation that is not in the best interests of the State of Alaska. AS § 29.06.040(a). The LBC must decide whether a proposed annexation is in the State's best interests on a case-by-case basis, based on a review of the policy benefits to the state as a whole and whether the proposed boundaries serve the "affected local governments" and the "balanced interests of citizens in the proposed area for change." 3 AAC § 110.980.

In this case, the boundary proposed by Ketchikan does not serve the affected local governments or the balanced interests of citizens in the area proposed for change because it ignores the Community's vital interest in Duke Island and the surrounding islets and waters. As described above, the Metlakatla Indian Community is facing an economic crisis. One of the ways for the Community to lead itself out of that crisis is to increase the area of its sovereign reserved rights, particularly in regard to the fishing rights that would accompany the expanded Reserve boundary.

Duke Island and the surrounding islets and waters are only a small fraction of the proposed annexation, which adds minimal benefit to Ketchikan's overall proposal while adding potentially significant burdens to its administrative costs given

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the distance and difficult access from Ketchikan. Conversely, that area would have a significant beneficial impact on the people of the Metlakatla Indian Community. Ignoring that interest by approving the petition as proposed fails to balance the interests of the citizens and local governments of the affected area. However, amending the boundary to exclude the area sought by the Community would satisfy the LBC's responsibility in that regard. Such an amendment would balance the competing interests of the affected citizens and governments in the area proposed for annexation, and therefore would ensure that the annexation is in the best interests of the State under 3 AAC § 110.980.

### C. <u>The Annexation Petition, as Proposed, Improperly Creates</u> an Enclave Within the Proposed Borough.

In deciding whether the proposed boundaries contained in an annexation petition are appropriate, the LBC applies a presumption <u>against</u> approving a boundary that creates enclaves or that encompasses territory that is not contiguous. 3 AAC § 110.190(b). Further, the standards for annexation to boroughs require that the "social, cultural, and economic characteristics and activities of the people in the territory must be interrelated and integrated with the characteristics and activities of the people in the existing borough." 3 AAC § 110.160.

In this case, the proposed Ketchikan boundary would create an enclave of the Annette Islands Reserve; the Reserve would be entirely surrounded by the new borough. The proposed boundaries would leave Duke Island and the adjacent islets subject

to the jurisdiction of the Borough during the pendency of the Community's expansion of its Reserve boundaries. Because the Borough does not share the same history, values, and composition as the Community, it may not necessarily be responsive to the Community's interests or desires with regard to those lands and waters.

Further, after the Community's expansion of its Reserve boundaries, the area of the proposed annexation would contain two sovereign entities competing for the same resources. Those distinct cultural communities hold different historical and cultural attitudes towards those resources, and correspondingly different ideas about how to best utilize them. This could result in the sort of conflict that the regulations are designed to avoid by requiring integration of the "social, cultural and economic characteristics and activities" and "compatibility of economic lifestyles" between the people in an existing borough and those in the area of proposed expansion.

While the social, cultural, and economic characteristics of Ketchikan and the Community are to a degree connected, they cannot reasonably be described as "interrelated and integrated." Both communities have a distinct culture, history, and government. Further, the economies of both communities are independent. Neither Ketchikan nor the Metlakatla Indian Community would be served by the annexation as proposed because those communities could not be integrated, as required by 3 AAC § 110.160.

Furthermore, Duke Island and the surrounding islets are not contiguous to the existing Ketchikan Gateway Borough; the Annette Islands Reserve stands between the two.<sup>1</sup> Duke Island and those islets, however, are contiguous with the Annette Islands Reserve. By virtue of that contiguity to the areas described, the Community is in a better position to provide necessary services in an efficient manner.

Thus, the boundary proposed by Ketchikan's petition does not meet the standards imposed by LBC regulations. However, the LBC can fulfill its regulatory mandate and satisfy those standards by amending the southern boundary of Ketchikan's annexation to exclude the area sought by the Community for its expanded Reserve. IV. CONCLUSION.

As described above, the Metlakatla Indian Community is facing an economic crisis. In order to restore some level of prosperity, the Community is pursuing an expansion of its Reserve boundaries with the federal government. The Ketchikan petition fails to recognize or make room for that ambition, and in so doing, it fails to comply with the applicable constitutional and regulatory standards for annexations to boroughs. However, the Community does not seek to invalidate Ketchikan's petition for annexation entirely. The Community, rather, is seeking merely what is just; an amendment to the proposed boundary that will

<sup>&</sup>lt;sup>1</sup> Under LBC regulations, territories are contiguous if they are "adjacent, adjoining, and touching each other." 3 AAC § 110.990(6).

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exclude the areas of Duke Island, its surrounding islets, and the waters beyond those areas of land to 5,000 feet. Such an amended boundary will both fulfill the standards for borough annexation under Alaskan law and allow the Metlakatla Indian Community to pursue its historic economic and social independence. For those reasons, the Community respectfully requests that the LBC accordingly amend the Ketchikan petition for annexation.

DATED this 26th day of April, 2006.

HAGLUND KELLEY HORNGREN JONES & WILDER LLP

Wilder By:

LeRoy W. Wilder, Christopher Lundberg Attorneys for the Metlakatla Indian Community (503) 225-0777

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#### V. DESIGNATION OF REPRESENTATIVE

The Metlakatla Indian Community designates the following person as its representative for purposes of this responsive brief and any proceedings regarding the Ketchikan Gateway Borough Annexation Petition:

> LeRoy W. Wilder 101 SW Main Street, Sutie 1800 Portland OR, 97204-3226 e-mail: lwilder@hk-law.com tel: (503) 287-7975 fax: (503) 225-1257

The Community requests that courtesy copies of all

correspondence be also provided to the following person:

Mayor Victor C. Wellington, Sr. Post Office Box 8 Metlakatla Indian Community, AK 99926

### **RESPONDENT'S AFFIDAVIT**

STATE OF OREGON ) ss: COUNTY OF MULTNOMAH )

I, LeRoy W. Wilder, being first duly sworn, under oath, state as follows:

1. That the attached Responsive Brief and exhibits, if any, to the best of my knowledge, information, and belief, were formed after reasonable inquiry, and that the Responsive Brief and exhibits, if any, are founded in fact and are not submitted to harass or to cause unnecessary delay or needless expense in the cost of processing the petition.

2. That two copies of the attached Responsive Brief and exhibits, if any, were delivered by U.S. First Class Mail, postage prepaid, to the Petitioner on the 26<sup>th</sup> day of April. 2006:

> Roy Eckert, Borough Manager Ketchikan Gateway Borough 344 Front Street Ketchikan, Alaska 99901

(Wilder

Attorney for Metlakatla Indian Community

Subscribed and sworn to before me by LeRoy W. Wilder this 26<sup>th</sup> day of April, 2006.



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Notary Public of Oregon My Commission expires: May 2603

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# Appendix C

# Letters from Department of Education and Early Development





**Division of Community Advocacy** 

Sarah Palin, Governor Emil Notti, Commissioner Michael Black, Director

August 2, 2007

Mr. Eddy Jeans, Director School Finance and Facilities Section Alaska Department of Education and Early Development P.O. Box 110500 Juneau, Alaska 99811-0500

## RE: Petition for annexation to the Ketchikan Gateway Borough

Dear Mr. Jeans:

This is a follow up to your conversation last week with Dan Bockhorst concerning the pending petition for annexation of 4,701 square miles to the Ketchikan Gateway Borough (KGB). As you discussed, 3 AAC 110.190(d) provides that "The [Local Boundary C]ommission (LBC) will consult with the Department of Education and Early Development (DEED) in the process of balancing all standards for annexation to a borough."

One means of fulfilling that requirement is for the LBC to receive and consider written comments from DEED regarding the KGB annexation proposal. Presently, interested individuals and groups, including DEED, are invited to comment on this agency's Preliminary Report regarding the KGB annexation proposal.<sup>1</sup>

In your discussion with Mr. Bockhorst, you expressed particular interest or concern over the possibility that the proposed 205-square mile Hyder enclave might remain indefinitely. You asked for information about any KGB policy position articulated regarding that matter. The following statements in the annexation petition are representative of the KGB's posture regarding that the enclave issue.

 "[R]egional ties [between the area proposed for annexation and the area within the existing KGB] also include the community of Hyder although they are not

<sup>&</sup>lt;sup>1</sup>Under AS 44.33.020(a)(4), the Department of Commerce, Community, and Economic Development (DCCED) serves as staff for the LBC. The provisions of 3 AAC 110.530(a) state DCCED, "shall investigate and analyze a petition filed with the department under this chapter, and shall submit to the commission a written report of its findings with recommendations regarding the petition." Under 3 AAC 110.530, DCCED is required to prepare both a preliminary report for public comment and a final report regarding the KGB annexation proposal. Copies of DCCED's Preliminary Report regarding the KGB annexation proposal were mailed to DEED Commissioner Sampson and you on July 13, 2007. The deadline for receipt of comments on the Preliminary Report is 4:30 p.m., September 4, 2007.

strong enough to justify extension of local government [to Hyder] at this time." (Petition, p. 4.)

- "[T]he community of Hyder, in practical terms is relatively isolated, has only nominal air service, and has stronger local economic and social ties to Stewart, British Columbia and its adjoining road system. It is expected that this Hyder territory, which represents 3% of the model territory, will be phased in at a later time. A full discussion regarding the justification for postponing the annexation of Hyder and the future circumstances which lead to its inclusion in the Ketchikan Borough is provided in Exhibit K." (Petition, p. 4.)
- "[W]hile Hyder is logically a part of a future Ketchikan Gateway Borough expansion, several regional links and local factors must evolve further to justify local government expansion in this area. It is the Borough's belief that annexation is in the best long term interest of developing local government in southern southeast Alaska and will serve to enhance regional economic development as well as the provision of cost-effective public services, as needed and desired, to citizens throughout the area proposed for annexation." (Petition, p. 5.)

As noted above, Exhibit K of the KGB petition provides "A full discussion regarding the justification for postponing the annexation of Hyder and the future circumstances which lead to its inclusion in the Ketchikan Borough." A copy of Exhibit K is enclosed. The complete KGB annexation petition is available for review online at: <a href="http://www.dced.state.ak.us/dca/lbc/ketchikan4.htm">http://www.dced.state.ak.us/dca/lbc/ketchikan4.htm</a>.

DCCED addressed the issue of the proposed enclave on pp. 86 - 90 and in Appendix E of its Preliminary Report. As mentioned in n. 1 above, a copy of the report was provided to you previously. As a reminder, the law requires that the LBC – DEED consultation occur "in the process of balancing <u>all standards for annexation to a borough</u>" (emphasis added). DCCED's preliminary effort to balance all applicable borough annexation standards is presented on pp. 4 – 114 of the Preliminary Report. That work is summarized on pp. 114 – 117 of that Report.

Please feel free to contact me if you have questions or wish to discuss any aspect of the KGB annexation proposal.

Sincerely,

Jeanne Mc Pherren

Jeanne McPherren LBC Staff

Enclosure

#### EXHIBIT K

### JUSTIFICATION FOR EXCLUDING APPROXIMATELY 205 SQUARE MILES NEAR HYDER FROM THE MODEL BOUNDARIES

The proposed territory to be annexed to the existing Ketchikan Gateway Borough includes all territory of the State's model boundaries except for approximately 205 square miles of public and private land surrounding and including the community of Hyder, hereinafter referred to as Hyder. While the Petitioner agrees that this area should eventually be included into the Borough, the current cultural, social, economic and other ties between this area and the Borough does not justify inclusion at this time. Following is: (1) a review of the State's decision making history as it relates to incremental or phased annexations; (2) a geographically logical boundary established to adhere to State guidelines; (3) explanation for excluding the Hyder area from the Model Borough Boundaries; and, (4) discussion of context for phasing-in or future annexation of Hyder.

#### State History of Incremental (Phased) Annexations

Since statehood, compromise and discretion, rather than wholesale annexation,

has defined the pace and terms of borough formation and the expansion of local government in Ketchikan and elsewhere in the In fact, this pattern of State. prudence has led to Ketchikan's present day boundaries (which fall short of its model boundaries) and the circumstances surrounding the submittal of the current petition for expansion of Ketchikan the Gateway Borough. Although Ketchikan's model boundaries are nearly identical to its boundaries defined under the Model Borough Act of 1963, a series of decisions since that time have set the contemporary stage for the current annexation proposal. The Borough's incorporation in 1963 represented the State's first action which allowed Ketchikan to deviate from its approved boundaries. Rather than assuming



responsibility for the entire (then mandated) territory, the Borough initially proposed incorporation of an area including only that land within the Ketchikan Independent School District and an additional portion of territory including roughly that area encompassed by the present day Naha LUD II within the Tongass National Forest. This represented only a small fraction of the larger territory mandated under the act. While the State agreed that this area proposed by the Borough demonstrated the level of integration necessary to justify incorporation, it also noted that "The boundaries of the proposed borough, however, appear to be arbitrary."<sup>1</sup> Instead, the State recommended, and subsequently approved, an interim solution to include all of Gravina and Revillagigedo Islands "which are included in the Ketchikan trading area and represent <u>at least partially</u> (*emphasis added*) the "rural" portion of the Ketchikan Community of interests."<sup>2</sup> In essence, this left the remaining 74% of the territory (4,906 square miles), including the communities of Hyder and Meyers Chuck, to be phased into the Borough's local government system at a later date. It should be noted that even this compromise, which incorporated only 26% (1,754 square miles) of the mandated borough, was opposed by some in the community as representing undue State interference in local government affairs.

The second State-approved departure from Ketchikan's previously defined borough boundaries occurred in 1992 with the adoption of the Model Borough Boundary Act which excluded Metlakatla and the Annette Island Indian Reservation from Ketchikan's model boundaries (see, <u>Map Figure 1, Model Borough Boundary Map</u>). While the island's independent reservation status made it a logical candidate for exclusion, it is interesting to note that the strength of its cultural, social, and economic ties to Ketchikan might otherwise justify its inclusion within the Borough.

A more recent exception to the State standard requiring boundaries which embrace an area and population with common interests to the maximum degree possible occurred in 2001 when the LBC approved the petition for consolidation of the City of Ketchikan and the Ketchikan Gateway Borough. According to the LBC Statement of Decision, 3 AAC 110.060(b) required consideration of the Borough's model boundaries in the context of the consolidation petition.<sup>3</sup> The decision noted that "the Commission (LBC) takes the view that the lack of conformity to model borough boundaries is not an impediment to consolidation" and issued a finding of consistency with boundary standards contained in AS 29.05.031(a)(2) and AAC 110.060(b).<sup>4</sup>

<sup>4</sup> Ibid, page 9.

<sup>&</sup>lt;sup>1</sup> Source: Incorporation of the Gateway Borough. Report to the Local Boundary Commission. May, 1963, page 7.

<sup>&</sup>lt;sup>2</sup> Ibid.

<sup>&</sup>lt;sup>3</sup> State of Alaska Local Boundary Commission Statement of Decision in the matter of the petition for consolidation of the City of Ketchikan and the Ketchikan Gateway Borough, April 27, 2001, page 9.

The State's practice of permitting local government formation, expansion, and unification in areas representing less than complete model boundaries, and the maximum sphere of common interests, is not limited to the history of State decisions in Ketchikan. In fact there are a number of instances where the State has allowed local government to be phased in stages with the recognition that "ideal municipal boundaries and governmental structure are goals which may not be achieved in the near future, but toward which progress may be attained incrementally over time."<sup>5</sup>

In the case of Juneau's 1989 petition to annex 140 square miles, the LBC did not follow the State Department of Community and Regional Affairs recommendation that Juneau's petition be approved on the condition that it annex all of the territory within its newly developed model boundaries. Instead, the LBC concluded that "The social, cultural, economic and transportation characteristics of the 140 square mile area are most closely linked to the CBJ. Thus, annexation of this territory would <u>more fully satisfy</u> (*emphasis added*) the constitutional provisions concerning boroughs."<sup>6</sup> Even though the LBC eventually decided to conduct hearings prior to the approval of the model boundaries, it concluded that it shouldn't prevent it from acting upon the annexation petition.

The LBC pursued a similar pattern of discretion in its May 11, 1990 decision to approve incorporation of the Denali Borough. In its decision, the LBC not only established model boundaries for the Denali Borough but approved a petition which did not incorporate all of the territory within it and specifically excluded the community of Nenana. Again, the LBC found, in summary, that in order to meet the State's best long-term interest, it may be necessary to take actions which fall short of the long-term ideal. In its decision, the LBC noted "...the exclusion of the Greater Nenana area from the area proposed for incorporation is found to be warranted in the short-term on the basis of broad judgments of political and social policy. The preponderance of testimony in the Denali region was in strong opposition to the inclusion of Nenana at this time. Opposition stemmed from differences in social, cultural, and economic considerations. For example, the Denali and Valleys petitions and testimony demonstrated divergent views among the residents of the two areas concerning means of generating local government revenues and philosophies of government operations."<sup>77</sup> Because of this

<sup>&</sup>lt;sup>5</sup> lbid, page 9.

<sup>&</sup>lt;sup>6</sup> State of Alaska Local Boundary Commission Statement of Decision in the matter of the of the annexation of the Greens Creek Mine and surrounding territory to the City and Borough of Juneau, October 8, 1990, page

<sup>&</sup>lt;sup>7</sup> State of Alaska Local Boundary Commission Statement of Decision in the matter of the (1) "Ideal" borough boundaries of the Denali and Nenana regions, (2) petition for the incorporation of the Denali Borough, (3) petition for incorporation of the Valleys Borough and (4) petition for annexation to the Matanuska-Susitna Borough, May 11, 1990, page 3.

opposition, the LBC found it necessary to exclude Nenana in the short-term to ensure the political support necessary for establishment of the Denali Borough. Upon appeal to the Alaska Supreme Court, the Court upheld the LBC decision to exclude Nenana on the basis "that the Greater Nenana area and the Denali region are not cohesive enough at this time to include both territories within the same organized borough."<sup>8</sup> This administrative approach, and its judicial affirmation, will be revisited in this petition when discussing the specific circumstances regarding the need to phase-in the community of Hyder into the Ketchikan Gateway Borough at a later date.

A final example of how the LBC has found it necessary to establish local government boundaries that fall short of ideal boundaries while still embracing an area and population with common interests to the maximum degree possible can be found in its review of Haines' petition to consolidate the City of Haines and the Haines Borough. In its decision, the LBC allowed creation of an enclave, including the City of Skagway and community of Klukwan, within the boundaries of the Haines Borough. In its Statement of Decision, the LBC noted that the existing and proposed boundaries of the Haines Borough do not conform to its model boundaries in the same manner of other communities, including Ketchikan. The LBC found in the case of Haines that "... consolidation is a highly favorable development with respect to local government... The positive direction resulting from consolidation is more than sufficient to overcome shortcomings with respect to the model boundaries of the Haines Borough. In other words, the Commission recognizes that ideal municipal boundaries and governmental structure are goals which may not be achieved in the near future, but toward which progress may be attained incrementally (emphasis added) over time."9

#### Re-Definition of Hyder Exclusion Area

In its 1999 Statement of Decision regarding the Borough's previous annexation petition (which excluded Hyder and Meyers Chuck), the LBC concluded that "...the exclusion of Hyder and Meyers Chuck from the annexation proposal precludes the satisfaction of the requirement that the Borough conform generally to natural geography and include all areas necessary for full development of municipal services on an efficient, cost-effective level."<sup>10</sup> In particular, the LBC noted, among other items, that the previously proposed boundaries near Hyder

<sup>&</sup>lt;sup>8</sup> Valleys Borough Support Committee v. Local Boundary Commission, November 12, 1993. 863 Pacific Reporter, 2<sup>nd</sup> Series, Alaska, page 233.

<sup>&</sup>lt;sup>9</sup> State of Alaska Local Boundary Commission Statement of Decision in the matter of the March 31, 1998 petition for consolidation of the City of Haines and the Haines Borough, August 21, 1998, pages 11-12.

<sup>&</sup>lt;sup>10</sup> State of Alaska Local Boundary Commission Statement of Decision in the matter of the February 28, 1998 petition of the Ketchikan Gateway Borough for annexation of 5,524 square miles, April 16<sup>th</sup>, 1999, page 7.

followed the thread of the Salmon River and constituted the division of a natural drainage inconsistent with the Commission's interpretation of the natural geography standard.

As shown in Exhibit C, Detail Map A, the current Petition proposes the boundary near Hyder to be the existing boundary separating Misty Fjords National Monument from unrestricted National Forest lands, thus establishing an area of approximately 205 square miles surrounding Hyder. This proposed boundary is based upon a long recognized boundary which conforms to natural geography as required by the State guidelines.

### Justification for exclusion of Hyder from the State Borough Model Boundaries

The Petitioner does not dispute that the State's model boundaries accurately reflect, in the long-term, a territory of common cultural, social and economic interests, however, the strength of these common interests at the present time are not as strong as they should be for the successful expansion of local government there. Due to the strength of Hyder's physical, economic, and social connections to immediately adjacent Stewart, British Columbia, and its isolation from rest of Alaska, Hyder's social, cultural, economic, and other community of interest with the Ketchikan Gateway Borough does not justify annexation at this time.

Specifically, residents of Hyder depend on Stewart for economic services including shopping and banking. Hyder merchants accept Canadian money and utilize Canadian banks as there are no U.S. banks in Hyder. Transportation of people, goods and services to Hyder is primarily through Canada via the Canadian road system. Intermittent ferry service from Ketchikan to Hyder, approximately 175 miles, was discontinued in 2001 which had the effect of further isolating the community from Ketchikan. Hyder is connected to the Canadian phone and electric systems and time zone. Finally, Hyder receives little local media (radio or television) from Ketchikan, and receives almost exclusively Canadian television and radio broadcast signals.

Clearly, the economic, cultural, social and other community of interests between the Ketchikan Gateway Borough and Hyder is weak. In addition, the Hyder community strongly opposes annexation and the Ketchikan Gateway Borough is not inclined to annex this territory until such time that the physical, social, and economic ties between the two communities strengthen further. For these reasons, Hyder does not justify inclusion to the Ketchikan Gateway Borough at this time.

#### Conditions When Phase-in of Hyder Should be Reconsidered

As mentioned above, the economic, social, cultural and other community of interest ties between the Ketchikan Gateway Borough and Hyder is weak and

does not justify inclusion into the Borough at this time. While there are no indications that the strengthening of ties will occur in the near term, at some future time conditions will change that will justify the inclusion of Hyder into the Ketchikan Gateway Borough. Following are examples of when phasing-in of Hyder to the Ketchikan Gateway Borough should be reconsidered and possibly warranted. This list is not meant to present specific "triggers" for annexation but to describe the circumstances and context within which annexation would be re-examined.

• Hyder desires to create a political subdivision of the State.

At some time in the future, the residents of Hyder may desire to create some type of political subdivision in order to receive State funding or to establish a governmental entity to collect money for providing community services. When such a situation occurs, the Borough should petition the State to annex Hyder with Hyder becoming a Service Area of the Borough.

• Economic Development within the Hyder area.

The most likely economic development activity in Hyder will be the growth of commercial tourism. This growth could initiate the need for expansion, renovation, or improvement of municipal infrastructure including roads, harbors, utilities, or other items to support new economic opportunities. In addition, there is some possibility that mineral deposits in the region may be re-examined as world markets and economics change.

• Community demand for municipal services.

In the future, residents of Hyder may want municipal services to address development concerns, address health issues or to provide a service that benefits the community. As examples, the community may want to establish planning and zoning regulations to insure hotels or tourism lodges are not constructed next to residential properties or to regulate the potential growth of commercial tourism. The community may desire municipal services to address water, wastewater or solid waste issues to insure public safety or to address State and Federal regulations. The community may desire road powers to address safety concerns or to simply construct and maintain roads that can be funded by the entire community. At such a time, the Borough would be poised to fill local government's logical role to assist Hyder with the planning and provisions of these services.

• Increase in transportation, communication, commerce.

The isolation of Hyder is in large part due to the lack of transportation, communication and commerce between Hyder and the Borough. Annexation of Hyder into the Borough will be justified or should be pursued when there is:

. .

.

established regular and frequent ferry service between Ketchikan and Hyder or other systems which would move goods, services, and people between the community in manner and scale consistent with a unified region. Such transportation improvements would also lead to strengthening sector ties in finance, insurance and real estate between the two communities.



# **Department of Education & Early Development**

**Division of School Finance** 

August 22, 2007

P.O. Box 110500 Juneau, Alaska 99811-0500 Telephone: (907) 465-8679 Fax: (907) 463-5279 E-mail: eddy.jeans@alaska.gov

801 West 10th Street, Suite 200

SARAH PALIN, GOVERNOR

Goldbelt Place

ECEIVE AUG 27 2007 Local Boundary Commissio

Jeanne McPherren Department of Commerce Community and Economic Development 550 West Seventh Ave., Suite 1770 Anchorage, AK 99501-3510

Dear Ms. McPherren:

The Department of Education & Early Development (EED) has reviewed your August 2 letter regarding the petition for annexation to the Ketchikan Gateway Borough.

EED had a particular concern over the exclusion of the 205 mile Hyder enclave might remain indefinitely. The department requested more information regarding that section of land and what the Ketchikan Gateway Borough's position was regarding the future of it. After reviewing Exhibit K, the justification for excluding the Hyder enclave, it appears the Ketchikan Gateway Borough has addressed the department's concerns. EED is not opposed to the proposed annexation of the Ketchikan Gateway Borough.

Thank you,

Eddy Jeans School Finance Director

cc: Lance Mertz Business Manager, KGBSD



# Appendix D

Major Activities of the LBC and Staff from February 2006

# Workload of LBC Staff

The LBC staff currently consists of two permanent Local Government Specialist (LGS) positions assigned to LBC component. Those employees also carry out significant other duties within Commerce. For example, the supervisor of LBC staff is also Commerce's senior local government specialist and, as such, supervises other LGS positions, with the attendant duties of hiring, training, evaluations, work overview, budget, leave, etc. He also is frequently called upon to provide local-government expertise on matters dealing with legislation, regulations, and policy. Adjusting for the other duties of LBC staff, the support they provide to the LBC is, at most, equivalent to one and one-half full-time staff. There is also one long-term nonpermanent LGS hired for the LBC's in-depth review and revision of its regulations and one vacant LGS.

## • "Routine" Workload

Staff members routinely work fifty to seventy hours a week to meet deadlines and still meet the heavy demand for information and assistance from the LBC Commissioners, municipal officials, the general public, the Legislature, other departments, and other divisions of Commerce. The additional hours that each works is uncompensated. When possible, LBC staff members have been aided to a limited extent by other Commerce staff. However, that work must still be reviewed by LBC staffers to ensure compliance with LBC statutes, regulations, and case law and the Constitution of the State of Alaska.

Once staff has prepared required reports or other documents, it must also arrange, schedule, and notice the public meetings or hearings in which the Commissioners must participate. Such meetings frequently require travel on the part of the Staff, as well as Commissioners. Staff must also prepare for and conduct informational meetings on petitions, as required. While attending such meetings and hearings, the other work of LBC staff is deferred.

Following LBC hearings or meetings, LBC staff is required to ensure that decisional statements are drafted, revised, and issued; reports. Staff must also ensure that legislation, regulations, etc., are drafted, revised, or issued based on LBC meetings or hearings; petition forms and informational documents are updated to reflect necessary changes; annual reports are prepared and issued as directed by the LBC; minutes are prepared of hearings and meetings. Staff must also oversee appeals of LBC decisions and ensure that records of appeals are prepared and handled, as required.

## • Training of New Commissioners

Other LBC staff duties include training and orientation of new LBC Commissioners (three of the five current LBC Commissioners were appointed in

2007) and ensuring that they each have the information required to adequately perform their duties.<sup>1</sup> In addition to providing fundamental constitutional, statutory, and regulation training to the Commissioners, LBC staff frequently provides Commissioners education in public-meeting and adjudicatory laws, including the concepts of due process, *ex parte* contact, ethics laws, evidence, precedence, collegial decisionmaking, and public/confidential records. Staff recently conducted orientation training for LBC members in August 2007. The training lasted for two days and will be completed in December 2007.

In addition to Staff's other responsibilities as set above, is a list of other major activities of LBC Staff in the period it has had Ketchikan annexation proposal for review and analysis:

- Skagway Borough Incorporation
- Consolidation of the City of Ketchikan and the Ketchikan Gateway Borough
- Deltana Region Borough Incorporation
- Wrangell Borough Incorporation
- City of Petersburg Annexation
- City of Wasilla Annexation
- City of Soldotna Annexation
- LBC Annual report to the Alaska Legislature
- Appeal of Apportionment of Aleutians East Borough Assembly
- Comprehensive Revisions to LBC Regulations and Bylaws
- City of Naukati Incorporation

<sup>&</sup>lt;sup>1</sup>LBC Commissioners are uncompensated "volunteers." As noted in the text of this Report, Commerce is required under AS 44.33.020(4) to serve as staff to the LBC. Because of the volunteer, part-time nature of the LBC, the Commissioners rely heavily on the services and assistance provided by Commerce staff.

# Appendix E

# February 1956 Alaska State Constitution Election Districts Map


# Appendix F

KGB Comments Filed in Wrangell Borough Incorporation Proceedings



Office of the Borough Manager, Manager Roy Eckert • roy.eckert@borough.ketchikan.ak.us • 907/228-6625 • Fax 907/247-6625

July 14, 2006

Mr. Dan Bockhorst Division of Community Advocacy Department of Commerce, Community, and Economic Development 550 West 7<sup>th</sup> Avenue, Suite 1770 Anchorage, AK 99501-3510

RE: Written comments regarding Petition to the Local Boundary Commission for Incorporation of the City and Borough of Wrangell as a Unified Home Rule Municipality

Please accept the enclosed comments submitted on behalf of the Ketchikan Gateway Borough regarding Wrangell's pending petition before the Local Boundary Commission (LBC) for Incorporation of the City and Borough of Wrangell as a Unified Home Rule Municipality. These comments are submitted pursuant to 3 AAC 110.480.(d).

The purpose of this correspondence is to clarify various items of record in Wrangell's petition and to express support for an LBC decision that is consistent with state law and constitutional provisions. The present work of the LBC will establish a spirit of precedence and it is the KGB's wish that this precedence will support a sound basis for future local government expansion in Southeast Alaska and the state as a whole.

Generally speaking, the Ketchikan Gateway Borough (KGB) supports and encourages Wrangell's efforts to expand local government in the region. This effort complements other efforts, including Ketchikan's, to build a stronger system of local government in Southeast Alaska. With respect to Wrangell's petition to annex a portion of Ketchikan model territory including the settlements of Meyers Chuck and Union Bay, it should be noted that the Ketchikan Gateway Borough Assembly, at its meeting of February 6, 2006, approved an annexation petition application that proposes annexation of this same territory into an expanded Ketchikan Borough. The petition includes ample evidence regarding the consistency of this petition with all state regulations. In a separate action, the Borough Assembly also indicated "that the Borough would register no objection if Wrangell chose to include the enclave (of Meyer's Chuck) in their borough."

The KGB offers the following notes regarding Wrangell's petition:

<u>Page 8</u> of the petition lists 13 area-wide services which will be provided to all residents of the proposed municipality including residents in outlying areas. The ability of the proposed municipality to pay for all of these services based upon a 4 mil minimum area-wide property tax is unconvincing.

<sup>&</sup>lt;sup>1</sup> Borough Assembly minutes of February 6, 2006

http://www.borough.ketchikan.ak.us

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KTN GATEWAY BOROUGH

Page 11 of the petition states that all communities within the proposed borough (including Meyers Chuck and Union Bay) are connected to Wrangell by a public roadway, regularly scheduled airline flights on at least a weekly basis, a charter flight service based in the proposed borough, or sufficient electronic media communications as required by 3 AAC 110.045(d). The KGB would note for the record that charter air service between Wrangell and Meyers Chuck/Union Bay is infrequent according to the one air operator based in Wrangell that provides non-scheduled, charter only air-service and that carries limited freight.<sup>2</sup> This is compared to air service from Ketchikan which has weekly scheduled service to Meyers Chuck. Combined air carrier statistics to Meyers Chuck for 2004 (approximately 40 air miles distant) indicate 210 regularly scheduled passenger trips, 3,648 pounds of freight, and 13,609 pounds of mail out-bound and 88 trips, 335 pounds of freight, and 221 pounds of mail in-bound to Ketchikan<sup>3</sup>. In addition, Wrangell's public radio station KSTK, sends to Meyers Chuck only a "weak signal that would be difficult to receive with standard radio equipment".<sup>4</sup> This contrasts to the fact that Meyers Chuck and Union Bay residents receive broadcasts, or are within the service areas of four Ketchikan radio stations; KRBD FM (public radio)<sup>9</sup>, KTKN AM/KGTW FM,<sup>6</sup> and KFMJ FM<sup>7</sup>

<u>Exhibit C, page 2</u> does not list Ketchikan-based KRBD FM (public radio) as a communication service provider in the area proposed for annexation. The other radio stations listed in the petition apparently do not reach Meyers Chuck or Union Bay with sufficient strength or predictability to constitute reliable service.

<u>Exhibit D-1, Note 9:</u> should be clarified to accurately state that emergency 911 calls from Meyers Chuck and Union Bay are routed to, and dispatched by Ketchikan-based service providers (State Troopers or City Police).<sup>8</sup> In addition, it is not clear in the event of annexation who would dispatch 911 calls to the Meyers Chuck/Union Bay area.

<u>Exhibit H, page 6</u>. The petitioner notes that the proposed City and Borough of Wrangell (CBW) boundary will depart from the existing Wrangell Ranger District Boundaries and include part of the Ketchikan Ranger District on the Cleveland Peninsula in order to follow natural geography. In fact, the boundaries of the two ranger districts (which also follow model boundaries) are already based upon natural geography (watersheds) and other long established features and no departure from these boundaries is necessary for the petition to comply with 3 AAC 110.060 (Boundaries).

<u>Exhibit H, page 10.</u> The petitioner states that at least 25 people live in the Meyers Chuck Union Bay area. State estimates for Meyers Chuck are 15<sup>9</sup> and there are no estimates for Union Bay although the CBW petition contains one (1) signature from a Union Bay resident. Resident testimony suggests that the year-round population of Meyers Chuck is smaller than the 15 estimated by the state. At the special Assembly meeting of June 27, 2005, it was noted that perhaps six or so people were commuters (i.e. Ketchikan) and another 20 or so were summer only residents and a few people were residents at least nine months of the year.<sup>10</sup>

<sup>&</sup>lt;sup>2</sup> Source: Sun Rise Aviation, 6/1/06.

<sup>&</sup>lt;sup>3</sup> Source: ProMech Air and Pacific Airways, March 8, 2005 and Federal Dept. of Transportation Bureau of Transportation Statistics website <u>www.bts.gov</u>, March 7, 2005.

<sup>&</sup>lt;sup>4</sup> KSTK Radio Staff, July 6, 2006.

<sup>&</sup>lt;sup>5</sup> Signal received according to KRBD staff.

<sup>&</sup>lt;sup>6</sup> Weak signal according to KTKN staff.

<sup>&</sup>lt;sup>7</sup> Meyers Chuck is within their service area although the strength of the signal is unknown according to KFMJ staff.

<sup>&</sup>lt;sup>8</sup> According to AP&T staff, July 3, 2006 and State Troopers, July 7, 2006.

<sup>&</sup>lt;sup>9</sup> DCEED 2005 Certified Population. Union Bay is not included in the list of Alaska communities.

<sup>&</sup>lt;sup>10</sup> Special Assembly Meeting Minutes, June 27, 2005, page 3.

http://www.borough.ketchikan.ak.us

JUL-14-2006 09:34 KTN GATEWAY BOROUGH 9072476625 P.04/05 One resident noted that she was there by herself for a while during the winter of 2004/2005.'' As such, the KGB questions whether or not Meyers Chuck constitutes a community under 3 AAC 110.920.

<u>Exhibit H, page 27.</u> The CBW petition places a great deal of relevance and importance upon the historic boundaries of aboriginal uses and ownership within the Wrangell Territory as presented in <u>Haa Aani, Our Land, Tlingit and Haida Land Rights and Use</u> prepared by Goldschmidt and Haas. This is presented to satisfy the requirement under 3 AAC 110.045, Community of Interest standard. The KGB agrees that these historic boundaries should be considered during contemporary decisions. However, it also believes that the particular relevance of these boundaries in these decisions should be the result of deliberations by the tribal organizations affected and not simply by previous studies presented by local government. The petition contains no record that such consultations occurred with the affected tribal groups or that these groups share the boundary claims and their relevance as presented in the petition.

Exhibit H, pages 34-36. In support of consistency with 3 AAC 110.045, Community of Interest standard, the CBW petition presents the fact that the City of Wrangell, including the area proposed for incorporation, lies outside any of the "Nonsubsistence" areas designated by the State, including the Ketchikan Nonsubsistence Area. The relevance of this, according to the petition, is to distinguish Wrangell as a rural area more compatible with the needs and sentiments of rural settlements such as Meyers Chuck as opposed to urban areas such as Ketchikan. Ketchikan responds that aside from the fact that all Alaskans, including Ketchikan and Wrangell residents, have access to the state's fish and game resources under Article 8 of the Alaska's constitution, that the conclusions drawn here are far from obvious. Specifically, 5 AAC 99.016, which governs activities in a non-subsistence area, allows all of the same fish and game harvest activities allowed in subsistence areas under personal use regulations. The principal difference is not cultural (Ketchikan residents also hunt and fish a great deal) as it is regulatory. The non-subsistence designation makes it easier to manage the sustainable yield of the resource since, under the code, subsistence hunting and fishing regulations do not apply in this area and the subsistence priority does not apply. Finally, the Borough finds Wrangell's claim somewhat specious that, as an urban area similar, but smaller than Ketchikan, it is somehow more dependent upon fish and game for household survival than Ketchikan.

<u>Exhibit H, page 37.</u> The CBW states that "Wrangell serves as a hub for nearly all economic activity in the area..." No evidence is offered to support the claim that residents in the Meyers Chuck area secure any services from Wrangell. To the contrary, all evidence, based upon air freight and passenger manifests, Postal Service data, and newspaper ads, suggests that Meyers Chuck residents secure most of their services from Ketchikan. In addition, the petition presents no real evidence that Clarence Strait somehow impedes the existing social and economic activity between Ketchikan and Meyers Chuck/Union Bay.

<u>Exhibit H, page 38.</u> According to KSTK Wrangell public radio staff, their radio signal is too weak to provide adequate service to Meyers Chuck/Union Bay using typical consumer radio equipment there. This contradicts the petition's claim that KSTK provides broadcasts to the Meyers Chuck area.

<u>Exhibit H, page 42.</u> The petition documents four search and rescue service calls by the Wrangell Volunteer Fire Department in the Meyers Chuck/Deer Island area between 1998 and 2005. In contrast, the Ketchikan-based State Troopers had 29 service calls in the Meyers Chuck/Union Bay area during the same time period.<sup>12</sup>

http://www.borough.ketchikan.ak.us

<sup>&</sup>lt;sup>11</sup> Ibid.

<sup>&</sup>lt;sup>12</sup> Source: Alaska State Troopers, Ketchikan Office

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#### KTN GATEWAY BOROUGH

Exhibit H. page 52. The petition states that due to the abandonment of some joint venture mineral claims in the Union Bay area, that the potential for mineral development is not a sound basis for annexation of this area by the Ketchikan Gateway Borough. While it's is true that a number of mineral claims have been abandoned in the Union Bay area, it is also true that there are still 78 claims covering 1,560 acres in the area as of May 2006.<sup>13</sup> The potential for commercially viable mineral deposits in the Ketchikan region, and for that matter throughout Southeast Alaska, is well known. Commercial mineral recovery is inevitable depending upon world market forces. In addition, the existence of oil and gas deposits in British Columbia's Queen Charlotte Basin (adjacent to the southern model boundary) is also well documented<sup>14</sup> and underscores the importance of developing a local government perspective and response to any future recovery activities.

In summary, the Ketchikan Gateway Borough supports the expansion of local Borough government as proposed by the City of Wrangell petition. Such a proposal, if successful, will shift the management of local government services to local citizens and their elected officials where they are best suited. The KGB also does not formally object to Wrangell's proposal to include a portion of Ketchikan's model territory (the Meyers Chuck/Union Bay area) within Wrangell's proposed boundaries. However, it is our conviction that the merits of such a decision should be evaluated on a complete and factual record in order to assure that the decision complies with state constitutional policies and laws to the greatest extent possible.

Thank you for your consideration.

Best regards,

Roy Eckert Borough Manager

C: Borough Assembly Borough Attorney Principal Planner

<sup>13</sup> Source: USFS, Realty Department, May 19, 2006.

<sup>14</sup> Source: http://www.cwilson.com/pubs/energy/legalshoals.pdf and http://temagami.carleton.ca/jmc/cnews/01042005/n4.shtml

http://www.borough.ketchikan.ak.us

# Appendix G

Decision of Interior Board of Land Appeals 127 IBLA 1

## INTERIOR BOARD OF LAND APPEALS

State of Alaska and Forest Service, U.S. Department of Agriculture

127 IBLA 1 (July 12, 1993)

Title page added by: ibiadecisions.com

Editor's note: The Director, OHA, assumed jurisdiction; Board decision affirmed -- 11 OHA 53 (Nov. 22, 1994)

#### STATE OF ALASKA

## FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

#### IBLA 92-277, 92-441

Decided July 12, 1993

Appeals from a decision of the State Director, Alaska, Bureau of Land Management, denying protest of proposed official filing of survey. U.S. Survey No. 9630, Alaska.

Reversed.

1. Alaska: Indian and Native Affairs--Boundaries--Indians: Lands: Generally--Surveys of Public Lands: Generally

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

APPEARANCES: Gary I. Amendola, Esq., Office of the Attorney General, State of Alaska, Juneau, Alaska, for the State of Alaska; Robert A. Maynard, Esq., Office of the General Counsel, Forest Service, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Marsha Kostura, Esq., Washington, D.C., for the Metlakatla Indian Community; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska and the Forest Service, U.S. Department of Agriculture, have appealed from a January 23, 1992, decision of the State Director, Alaska, Bureau of Land Management (BLM), denying a State protest against the official filing of a survey of the "Annette Islands Indian Reservation" (U.S. Survey No. 9630, Alaska). At issue is whether "Warburton Island," situated off the western shore of Annette Island in Nichols Passage, in unsurveyed T. 78 S., R. 91 E., Copper River Meridian, Alaska, was properly included in the reservation, and whether the surveyors were correct in using the baseline method to establish the boundaries of the reservation.

Pursuant to section 15 of the Act of March 3, 1891, 25 U.S.C. § 495 (1988), Congress set apart the body of lands known as the Annette Islands

as a reservation for the use of the Metlakahtla Indians, now referred to as the Metlakatla Indian Community (Community), who have participated in this appeal. The Annette Islands were described in the Act as "situated in Alexander Archipelago in Southeastern Alaska on the north side of Dixon's entrance." The "Annette \* \* Islands" were excluded from the Tongass National Forest when it was enlarged in 1909. See 35 Stat. 2226, 2228 (1907-09).

In 1918, the Supreme Court found that the reservation included all of the uplands that make up the Annette Islands (described as a group of small islands), as well as intervening and surrounding waters and submerged lands. <u>Alaska Pacific Fisheries</u> v. <u>United States</u>, 248 U.S. 78, 87, 89 (1918). The Court, however, did not define the geographic extent to which the reservation created by Congress encompassed such waters and submerged lands. That action was accomplished by President Wilson in Proclamation No. 1332 (39 Stat. 1777 (1915-17)), issued on April 28, 1916. <u>Metlakatla Indian Community</u> v. <u>Egan</u>, 369 U.S. 45, 54, 56 (1962). The proclamation established the "Annette Island Fishery Reserve," that reserved the fishery in certain waters surrounding the "Annette Islands" for the benefit of the Metlakahtla Indians (39 Stat. 1777 (1915-17)). Those waters were described as "the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation." Following the proclamation, the Metlakatla Reservation included the waters within the outer boundary of the reserve, <u>i.e.</u>, the line 3,000 feet of "Annette and adjacent islands." <u>Metlakatla Indian Community</u> v. <u>Egan</u>, supra at 54.

Exactly what was included in the Annette Islands Indian Reservation has been the subject of some dispute in recent years, especially as a result of a continuing effort by the State, Community, and Bureau of Indian Affairs (BIA) to delineate the boundary between State and reservation waters for the benefit of Community and non-Community fishermen. Since April 1988, BLM has, at the request of BIA, sought to resolve the dispute by surveying the boundaries of the reservation.

Special Instructions were issued by the Deputy State Director for Cadastral Survey, Alaska, BLM, on March 18, 1988, instructing Cadastral Survey to determine the seaward boundary line 3,000 feet from the mean low tide line of "Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets." <u>Id.</u> at 1. At that time, Cadastral Survey apparently did not regard Warburton Island as part of the reservation since it was then included in the Tongass National Forest. <u>See</u> Attachment to Letter from Deputy State Director for Cadastral Survey, to Area Director, BIA, dated May 2, 1988, at 2. Questions were raised by the Community and BIA regarding whether Warburton Island should be included in the reservation, since the waters adjacent to it were a significant source of salmon and would not be reserved to the Community unless the island were to be part of the reservation. The island

and adjacent waters had long been regarded as part of the reservation by the Indians.

The Community requested inclusion of the island in the survey of the reservation by letter to BIA, dated June 28, 1988. In turn, BIA informed BLM by letter dated April 13, 1989, that it likewise regarded the island as part of the reservation. A formal opinion was obtained from the Regional Solicitor, Pacific Northwest Region, on April 23, 1991. After a lengthy exegesis, he concluded that Congress intended to include Warburton Island in the reservation because it was "known" to be part of the "Annette Islands," within the meaning of the 1891 Act. See Memorandum to BIA from Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 21. That opinion was concurred in by the Office of the Regional Solicitor, Alaska Region, on April 29, 1991.

On May 22, 1991, the Chief, Branch of Survey Preparation and Contracts, Alaska, BLM, issued Amended Special Instructions for survey of the Indian reservation. Cadastral Survey was instructed to determine the seaward boundary line measuring 3,000 feet not only from the islands named in the 1916 proclamation, but also from "Warburton Island." The survey was completed May 1991. It was accepted by the Deputy State Director for Cadastral Survey on August 22, 1991.

On October 15, 1991, BLM published in the <u>Federal Register</u> a notice of the proposed official filing of the plats for U.S. Survey No. 9630, Alaska. 56 FR 51727 (Oct. 15, 1991). The notice provided an opportunity to file protests objecting to the proposed filing before the official filing date of November 14, 1991. The State filed a protest challenging the proposed filing on November 13, 1991. No protest was filed by the Forest Service. Under the terms of the <u>Federal Register</u> notice, the filing of the survey plats was stayed until final administrative resolution of the protest. In his January 1992 decision, the State Director denied the State's protest, addressing each of the arguments raised by the State. Both the State (IBLA 92-277) and the Forest Service (IBLA 92-441) appealed timely.

The Community and BLM have requested the Board to dismiss the Forest Service appeal as untimely filed. BLM has also filed a motion to dismiss the Forest Service appeal for lack of standing to appeal under 43 CFR 4.410(a). BLM argues that the Forest Service cannot be considered a "party to [the] case," within the meaning of that regulation, because it did not protest the proposed filing before appealing. The Community has joined in BLM's motion to dismiss.

Standing to appeal from a BLM decision is founded in part on an appellant being a "party to [the] case" under 43 CFR 4.410(a). <u>See Storm Master Owners</u>, 103 IBLA 162, 177 (1988). This generally means that the appellant has participated in the decisionmaking process which led up to the decision on appeal (by filing a protest or otherwise). <u>See Stanley Energy, Inc.</u>, 122 IBLA 118, 120 (1992). The purpose of this requirement is to ensure that BLM has already considered the impact of its decision on the appellant, thus promoting the proper use of administrative resources.

<u>See California Association of Four Wheel Drive Clubs</u>, 30 IBLA 383, 385 (1977). The Forest Service did not protest the proposed official filing of the Annette Islands survey or otherwise join in the State's protest, despite having been duly notified of the proposed filing by publication in the <u>Federal Register</u> (56 FR 51727 (Oct. 15, 1991)). <u>See Federal Crop Insurance Corp.</u> v. <u>Merrill</u>, 332 U.S. 380, 384-85 (1947). The record shows that the Forest Service was also not directly involved in the decisionmaking process which led up to the inclusion of Warburton Island in the proposed BLM survey of the reservation. On the record before us, therefore, it appears that the Forest Service lacks standing to appear as a party to the appeal. <u>Edwin H.</u> <u>Marston</u>, 103 IBLA 40 (1988).

Nonetheless, the Forest Service is clearly interested in the substance of this appeal and will be directly affected by our decision inasmuch as the island that is the subject of dispute will be subject to administration by the Forest Service if it is not included in the reservation. It is therefore appropriate to allow the Forest Service to participate as an amicus. The statement of reasons (SOR) filed by the Forest Service will therefore be considered on the same basis as that received from the Community. Nor can we discern any prejudice to the Community in proceeding in this fashion with the appeals. In order to aid the Board in determining whether to decide the case, remand it to BLM, or refer it for a hearing, the Community has been free to present any arguments and evidence in opposition to the Forest Service claim concerning the accuracy of the 1916 diagram.

BLM, joined by the Community, has requested the Board to summarily affirm the State Director's January 1992 decision because the State has failed to affirmatively assert any reason why the decision on appeal is in error, but rather merely reiterated the arguments advanced below. The State opposes the motion. We have held that failure to state why a BLM decision denying a protest to a proposed BLM action is in error will be treated as fatal to the appeal. See Burton A. McGregor, 119 IBLA 95, 98 (1991), and cases cited therein. The remedy in such circumstances is generally to dismiss the appeal for failure to file an adequate SOR, or the Board may summarily affirm the BLM decision. In Re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991). The reason for either action is that the appeal does not provide any basis for the Board to determine whether the BLM decision (that is then subject to Board review), as opposed to the underlying BLM action, was wrongly decided.

We do not disagree that the State's SOR does not deviate in any significant respect from its protest. While this approach fails to address the State Director's specific responses to the protest arguments in his decision, we cannot say that the SOR is inadequate in this case. Rather, it provides an adequate basis for the Board to determine whether BLM should have included Warburton Island in the reservation and thus to decide whether the protest was wrongly denied. Accordingly, the motions to summarily affirm the State Director's January 1992 decision are denied. We will decide this appeal on the merits.

[1] BLM argues first that, because it is ambiguous, the statutory language creating the Annette Islands Indian Reservation should be construed liberally, with doubtful expressions resolved in favor of the Indians, under a longstanding doctrine of statutory construction. The State and Forest Service do not dispute the general application of this doctrine. Further, BLM is correct that the doctrine is properly applied when Congress has conveyed land to Indians. See Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). Moreover, section 15 of the Act of March 3, 1891, would seem proper for application of the doctrine since it is unclear what Congress meant to include in the reservation of the "Annette Islands." Therefore, such ambiguity should be resolved in favor of the Indian beneficiaries of the Act. See Alaska Pacific Fisheries v. United States, supra at 89. Nothing in the doctrine itself, however, aids the resolution of the alleged ambiguity in the 1891 Act, i.e., the meaning of the "Annette Islands." Nor does it allow us to specifically conclude, as BLM and the Community would have us do, that Warburton Island should be declared to be part of the "Annette Islands."

The State purports to find a basis for the exclusion of Warburton Island from the reservation in the fact that the island is not expressly included in the reservation in either the 1891 Act or the April 1916 proclamation. We are not persuaded by this argument. It has also been said that Warburton Island should not be included in the Indian reservation because a February 13, 1921, Executive Order (No. 3406) reserving the island for lighthouse purposes indicates that the United States did not regard the island as part of the reservation. We attribute little significance to this action since it was accomplished "subject to any existing valid rights." Consequently, it was not necessarily inconsistent with inclusion of the island in the Indian reservation. <u>See</u> Memorandum to BIA from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 2.

The islands included in the 1891 reservation were simply identified collectively as the "Annette Islands." 25 U.S.C. § 495 (1988). No significance can therefore be attached to the fact that Warburton Island is not referred to in the 1891 Act. By contrast, the 1916 proclamation did refer to specific islands, but makes no mention of Warburton Island. We might attribute the President's failure to expressly include the island in the reservation to a desire to exclude it since we cannot attribute that failure to any other reason. His failure to include the island was not owed to the fact that the island was unnamed. Warburton Island was named at the time of the proclamation. Indeed, it had been named in 1883. See Donald J. Orth, Dictionary of Alaska Place Names, 1028 (Geological Survey Professional Paper 567 (1971) (Orth)).

Having said that, we do not regard the list of islands in the 1916 proclamation to be exhaustive. As the Supreme Court said in <u>Metlakatla</u>

<u>Indian Community</u> v. <u>Egan</u>, <u>supra</u> at 49, the proclamation only referred to "<u>certain</u> of the[] [Annette] [I]slands." (Emphasis added.) The remainder of the "Annette Islands" (although unnamed in the proclamation) are also included in the reservation. The diagram attached to the proclamation includes other islands named in 1883 (Pow, Gull, Scrub, and Murdo) in the

reservation. <u>See</u> Orth at 396, 666, 775-76, 846. We therefore can attach no significance to the fact that Warburton Island is not referred to in the 1916 proclamation.

Nevertheless, we can say that evidence that Warburton Island was intended to be included in the reservation is not to be found in the fact that it qualifies as an "islet" that is "adjacent" to Annette Island or any of the other islands named in the 1916 proclamation (within the meaning of that proclamation), since it does not. While those terms are not defined in the proclamation or elsewhere, Warburton Island has long been referred to as an island. It cannot be considered an "islet." In addition, as the Forest Service correctly points out, Warburton Island is further from Annette Island than certain of the islands shown to be excluded from the reservation on the 1916 diagram, such as Bold and Hotspur. See Forest Service SOR at 6; Attachment B to Exh. 1 attached to Forest Service SOR at 1, 3, 5. This is directly contrary to the statement in the State Director's January 1992 decision, at page 3, that Warburton Island is located "in closer proximity to the group of islands clearly recognized as the Annette Islands than any other \* \* \* islands." See also Memorandum to BIA from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 8 ("[Warburton Island] is far closer to Annette Island than any other island"). We do not, therefore, consider Warburton Island "adjacent" to Annette Island or any of the other islands named in the 1916 proclamation.

The parties discuss at some length the significance of the diagram attached to the 1916 Presidential proclamation in solving the mystery of whether Warburton Island was intended to be included in the reservation. The State and Forest Service contend that the diagram clearly excludes the island from the reservation. BLM and the Community disagree, arguing that it provides an insufficient basis upon which to draw a conclusion, but that it could just as likely support inclusion of the island in the reservation.

The diagram makes no reference to Warburton Island by name. At best, it depicts two islets and/or rocks just west of Annette Island relatively near where Warburton Island is to be found. No other island, islet, or rock is depicted anywhere west of these islets and/or rocks. The number of islets and/or rocks shown and their close proximity to Annette Island indicates that they are not Warburton Island. That island is a solitary island with no associated islets or rocks and is situated over 1-1/2 miles from Annette Island. See Attachment B to Exh. 1 attached to Forest Service SOR at 3. Also, the two islets and/or rocks are depicted on the diagram as situated at the outer edge of the mean low tide line of Annette Island. There is nothing in the record indicating that Warburton Island is at the edge of that tide line. Indeed, that is unlikely given that the island is more than a mile out into the Nichols Passage.

By contrast, the record indicates that there is a reef, with one or two exposed rocks or islets, very close to the shore of Annette Island in that area. A current Geological Survey (Survey) topographic map of the Annette Island area (Ketchikan (A-5), Alaska (1955, updated 1962)) shows

one exposed rock or islet. See Attachment B to Exh. 1 attached to Forest Service SOR at 3. Moreover, the 1991 survey plat shows two exposed rocks or islets. These rocks or islets could be the two rocks or islets depicted on the 1916 diagram. Overall, the relative accuracy of the diagram with respect to the placement of islets and rocks is attested to by the fact that it properly depicts Pow Island and the islets or rocks near Annette, Reef, and Direst points and in Port Chester and Canoe Cove.

It is clear, therefore, that the 1916 diagram fails to depict Warburton Island within the seaward boundary line of the reservation. This indicates that the island is situated outside that line. We might be wary to attribute too much importance to this failure to depict the island since the diagram otherwise shows other named islands that are excluded from the reservation, viz., Bold, Revillagigedo, Gravina, Percy, Hotspur, Duke, Dog, Cat, and Mary Islands. Warburton Island is, however, considerably smaller than these other islands. Further, it is situated farther from the coast of Annette Island, which, together with its small size, explains the failure to include the island on the diagram. David I. Wood, a Forest Service surveyor, notes that the island is situated considerably more than 3,000 feet west from the nearest islet or rock off the coast of Annette Island. The distance to Warburton is 5,700 feet from the nearest islet or rock.

Moreover, the Forest Service has provided evidence that the diagram was drawn reasonably accurately to scale and, as such, places Warburton Island outside the reservation. In his June 1992 declaration, Wood states that, by comparing the 1916 diagram with the 1955 Survey topographic map and a current National Oceanic and Atmospheric Administration (NOAA) nautical chart of that area, he determined that the diagram was drawn reasonably accurately to scale (Wood Declaration at 1-2). He asserted that the scale was about 1 inch: 16,428 feet. Using this scale and the known location of Warburton Island in relation to the western coast of Annette Island, Wood was able to place that island on the 1916 diagram in relation to the boundary line of the reservation. In this way, he determined that the island was 3,000 feet west from the closest point on the boundary line, and thus beyond it. BLM and the Community have not rebutted this evidence.

Other conclusions can also be drawn from the 1916 diagram regarding the rationale for inclusion of nearby islands. Excluded from the reservation were a number of named islands (Bold, Revillagigedo, Gravina, Percy, Hotspur, Duke, Dog, Cat, and Mary), which are situated in relatively close proximity to Annette Island. These islands could just as likely have been included in the reservation. But the reason for their exclusion becomes clear when the reason is given for <u>inclusion</u> in the proclamation of the named islands (Ham, Walker, Lewis, Spire, and Hemlock). Each of the included islands is either within 3,000 feet of Annette Island (Ham, Spire, and Hemlock) or within 3,000 feet of any island situated within that limit (Lewis and Walker). This is not true of the excluded islands. This approach, whereby once islands are included within the territorial limits of the reservation they serve to extend those limits further out into the surrounding waters thus encompassing other islands, is consistent

with a recognized standard for determining the limits of a territorial sea adjacent to a body of land. <u>See</u> 2 Aaron L. Shalowitz, <u>Shore and Sea Boundaries</u>, 379, 380 (Figure 93, Example "A") (Publication 10-1, U.S. Department of Commerce (1964)) (Shalowitz). The territorial sea (or "maritime belt") is "that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens." <u>Louisiana</u> v. <u>Mississippi</u>, 202 U.S. 1, 52 (1906). As such, it is akin to the belt of open water surrounding the "Annette Islands" set aside as a fishery reserve in 1916.

Using the standard described by Shalowitz, off-shore islands (as well as rocks and islets) found within the territorial sea limits of a body of land serve to extend those limits further out into surrounding waters, thus encompassing other islands. This was the survey approach initially advocated by the Community (see Memorandum to State of Alaska and BIA, dated Sept. 17, 1987, attached to Oct. 9, 1987, letter to BLM (Sept. 1987 Memorandum), at 9-12) and adopted by BLM (see Amended Special Instructions, dated May 14, 1991, at 2; Attachment to Memorandum, dated Feb. 25, 1992, from Acting Chief, Branch of Mapping Sciences, Alaska, BLM, to Chief, Branch of Examination and Records, Alaska, BLM, at 2) in deciding whether to include other islands (with the exception of Warburton), along with islets and rocks, in the reservation. The Regional Solicitor, Pacific Northwest Region, endorsed this approach, stating that "BLM's use of accepted surveying principles [for surveying marine boundaries] to implement the language of the Proclamation is the proper method by which to locate the boundary of the fishery reserve" (Memorandum to BIA, dated Apr. 23, 1991, at 12).

The method was not used by BLM, however, in the case of Warburton Island because it would have excluded that island from the reservation since the island is admittedly not within 3,000 feet of Annette Island (or any other island, islet or rock within 3,000 feet of Annette Island). See September 1987 Memorandum at 14, 16. To include Warburton Island required BLM to create a substantial westward bulge in the seaward boundary of the reservation, as depicted on the survey plats. This evidence establishes that Warburton Island is not one of the islets and/or rocks depicted in the 1916 diagram. Moreover, it proves that the island is beyond the boundary line of the Indian reservation, as it is drawn 3,000 feet from the mean low tide line of any island, islet, or rock included in the reservation.

The State challenges the method used by BLM in surveying the boundary of the reservation. The State argues that use of this method has resulted in an "expansive boundary" by allowing all islands, rocks, and islets within 3,000 feet of the mean low tide line of Annette and the other named islands to extend even further the boundary of the reservation, contrary to the 1916 proclamation (State SOR at 8). Except in the case of Warburton Island, the BLM survey located the boundary line of the reservation 3,000 feet seaward from the mean low tide line of Annette Island and the other named islands, as well as all "adjacent rocks and islets," which

were considered to be those within the original 3,000-foot limit. <u>See</u> Attachment to Memorandum, dated Feb. 25, 1992, from Acting Chief, Branch of Mapping Sciences, Alaska, BLM, to Chief, Branch of Examination and Records, Alaska, BLM, at 1, 2. In this way, BLM used international survey rules, accepted by the United States, for locating the boundary of a territorial sea. <u>See</u> 1 Shalowitz, 28, 225; 2 Shalowitz, 379, 380.

We find no error in BLM's methodology. We conclude that BLM's method is consistent with the 1916 proclamation since it is clear that the proclamation itself relied on the same method. The proclamation provided for placing the boundary line 3,000 feet seaward from the mean low tide line of certain named islands. The only apparent basis for inclusion of Lewis and Walker islands in that list was that they were intersected by a boundary line drawn 3,000 feet from the mean low tide line of Ham Island, which was itself within 3,000 feet from the mean low tide line of Annette Island. That this was the approach generally taken by the United States in 1891 and thereafter is evident in a May 28, 1886, letter from Secretary of State Bayard to Secretary of the Treasury Manning, quoted by Shalowitz at page 29: ""[T]he seaward boundary of th[e] zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt." See also id. at 342 ("That each offshore island should have its own [maritime] belt goes naturally with the fact that these islands are part of the territory of the nation to which the mainland belongs. \* \* [T]he rule \* \* has traditionally been the position of the United States in international relations"). We believe that the proclamation similarly intended that this longstanding rule be operative to define those "adjacent rocks and islets" from which an additional 3,000 feet was to be measured in this case.

The argument for deviating from the standard method, advanced by the Community and recently adopted by BLM for Warburton Island alone, is that, at the time the reservation was established and thereafter, the Metlakahtla Indians used Warburton Island and regarded it as part of the reservation. Accordingly, the island was "known" to be part of the "Annette Islands," within the meaning of the Act of March 3, 1891. 25 U.S.C. § 495 (1988). The record contains affidavits by Metlakahtla Indians attesting to personal use of Warburton Island and surrounding waters for subsistence purposes and the fact that the island has, since it was first settled by the Indians, been regarded as part of their reservation. See Exh. 3 attached to Forest Service SOR at 1-6. None of these individuals was alive at the time of the 1891 Act. Some were either children or youths (ranging in age from 4 to 22) at the time of the 1916 proclamation and were presumably aware of whether the Indians regarded Warburton Island as part of their reservation. We do not dispute their competency to attest to that belief. Nonetheless, we do not find that this evidence shows the island was generally "known" to be part of the "Annette Islands" in 1891 and was so regarded by Congress when it enacted the 1891 Act (let alone by President Wilson when he issued his 1916 proclamation). Compare with Pearcy v. Stranahan, 205 U.S. 257, 266 (1907). Nor are we persuaded that Congress in 1891 regarded Warburton Island as "known" to be part of the "Annette Islands" because many years later the Army believed during the Second World War that it

needed the permission of the Indians to locate a lookout facility on the island or, in more recent times, the Forest Service has never taken any management action with respect to the island. <u>See Memorandum to BIA</u> from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 21.

Mention is also made of a February 5, 1890, letter from Father William Duncan, a Christian missionary who was instrumental in persuading Congress to establish the reservation (see 21 Cong. Rec. 10,092 (1890)), to his legal counsel. In that letter, he stated that "three or four little islets on the bay and a small island in close proximity to the main island" should be included in the reservation. There is nothing to indicate that Father Duncan was referring to Warburton Island. The Forest Service also argues persuasively that he was likely not referring to that island since it is comparable in size to the "islets" in the bay to which he was also likely referring, i.e., Gull, Scrub, and Murdo. See Forest Service SOR at 8. Rather, it is more likely that he was referring to Hemlock Island, which is situated in closer proximity to the main island and is significantly greater in size than the "islets." In any case, there is no evidence that the "small island" mentioned by Father Duncan (even if it was Warburton) was subsequently included in the reservation by Congress. There is no proof that Congress, in enacting the Act of March 3, 1891 (or President Wilson, in proclaiming the boundaries of the reservation in 1916), was aware of the 1890 Duncan letter. Therefore, we cannot conclude that Duncan's letter indicates that Congress saw Warburton Island as part of the "body of lands known as Annette Islands." 25 U.S.C. § 495 (1988).

We therefore conclude that the State Director improperly denied the State's protest to the proposed official filing of U.S. Survey No. 9630, Alaska, because BLM had improperly surveyed the boundaries of the Annette Islands Indian Reservation so as to include Warburton Island. That island should now be deleted from the survey. Otherwise, we find no error in the survey.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Franklin D. Arness Administrative Judge

I concur:

David L. Hughes Administrative Judge

#### ADMINISTRATIVE JUDGE BURSKI DISSENTING:

Were the question as to the status of Warburton Island to be decided as an initial matter by this Board, unconstrained by certain principles of adjudicatory interpretation and appellate practice (which I examine below), I believe that the position of the majority, viz. that Warburton island is not part of the Annette Island Reserve, <u>1</u>/could be sustained. Unfortu-nately, I believe the factual questions are sufficiently close that, when considerations of burden of proof analysis and the rule that ambiguities in language affecting grants to Indians are to be construed favorably to the Indians are brought to hear, they are sufficient to tilt the balance in the enposite direction. Thus, I must

the Indians are brought to bear, they are sufficient to tilt the balance in the opposite direction. Thus, I must dissent from the majority's deter-mination that the decision below should be reversed.

I approach this case under the following analysis. First of all, as we have said countless times, decisions of the Bureau of Land Management (BLM) are presumptively valid, and accordingly, any appellant has the affirmative burden of establishing error in the decision being appealed by a preponderance of the evidence. See, e.g., In re Pacific Coast Molybdenum, 75 IBLA 16, 22, 90 I.D. 352, 355-56 (1983). Secondly, as even the majority agrees, this appeal properly invokes the recognized rule of construction that ambiguities in grants to Indians should be resolved on the Indian's behalf. It seems to me, therefore, that, consistent with the foregoing principles, in order to succeed in its appeal the State must show, by a preponderance of the evidence, that there is <u>no</u> ambiguity with respect to the status of Warburton island. I simply do not believe that it has carried this burden.

I reach this conclusion despite my agreement with the majority that a number of contentions of BLM and the Metlakatla Community are properly rejected. Thus, for example, I do not find any sustenance for BLM's position in the letter from Father Duncan. I agree with the majority that there is no indication that this letter was ever conveyed to any member of Congress and that, in any event, it is far more likely that the island which he referenced was Hemlock Island rather than the considerably smaller and more distant Warburton Island.

Similarly, I am not greatly impressed with the affidavits submitted for the purpose of establishing that the Metlakatla Community always considered Warburton Island to be within the Annette Island Reserve. The real question is whether or not the term "Annette Islands" was generally thought of as including Warburton Island at the time Congress adopted section 15 of the Act of March 3, 1891, 25 U.S.C. §495 (1988), and when President Wilson

<sup>1/</sup> The Supreme Court referred to this reserve as the "Metlakatla Reserve" in its decision styled <u>Metlakatla Indians</u> v. <u>Egan</u>, 369 U.S. 45 (1962). However, in adopting section 19(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1618(a) (1988), Congress used the term "Annette Island Reserve," which practice has been followed in the text of this dissent.

issued Proclamation No. 1332 on April 28, 1916. <u>See</u> 39 Stat. 1777. The reliance which BLM and the Metlakatla Community place on the principle that uncertain language in treaties are interpreted as the Indians would have understood them is, I would suggest, totally misplaced.

The relevance of the Indian interpretations of treaty language is that, since the treaty language was presumably the result of negotiations between the Indians and the United States Government, the United States should be bound, out of fairness to what were then considered to be dependent populations, to interpret the provisions as the Indians would have understood them. See Antoine v. Washington, 420 U.S. 194, 197 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). This principle should have no application in the instant case since the 1891 Act was not the outgrowth of any negotiations between arguably sovereign entities but rather was an act of grace by Congress to permit non-Native Indians to reside, unmolested, on the lands upon which they had settled. See generally Metlakatla Indians v. Egan, 369 U.S. 45 (1962).

The core issue of this appeal, in my opinion, turns on the question as to the effect of the diagram which accompanied the 1916 Presidential Proclamation and the inferences which can fairly be drawn from it. At the outset, I think that BLM's attempt to belittle the importance of this diagram as merely a "sketch" misses the point. The diagram is, by the express terms of the proclamation, made a part of it. In this regard, it is no different that a metes and bounds description of land in a withdrawal that fails to obtain the limits of closure. While obviously such a description could not literally be followed, clearly the description would be of importance in determining the actual parameters of the withdrawal. Similarly, while the diagram herein cannot be given conclusive weight, I agree with the majority that the diagram must be accorded considerable importance in determining the extent of the Annette Island Reserve.

Notwithstanding the foregoing, however, there are two arguments which do provide some support for the conclusion that Warburton Island is properly deemed to be part of the "Annette Islands." First of all, the 1891 Act did refer to the "Annette Islands." (Emphasis added.) Obviously, this means that a group of islands were intended to be set aside for the Metlakatla Community. The question is, which ones?

I believe that the starting point of any analysis of the scope of the 1891 Act should be the Presidential Proclamation of 1916, which could be read as the initial administrative interpretation of the meaning of the term "Annette Islands." The proclamation expressly refers to Annette, Ham, Walker, Lewis, Spire and Hemlock Islands as part of the "Annette Islands." By definition, therefore, these islands would clearly be considered part of the Annette Islands. The foregoing cannot be considered a definitive list, however, since it omits three other named islands (Pow, Gull, and Snipe) and numerous small unnamed islands and islets, which all parties concede are part of the Annette islands.

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The majority attempts to develop a rationale for including these islands and excluding Warburton island by arguing that all of the islands properly included are either within 3,000 feet of Annette island or within 3,000 feet of an island located within that limit. <u>Supra</u> at 7. Unfortunately for this hypothesis, an analysis of the survey maps submitted with the appeal indicates that the distance from Ham Island to Walker Island, even at mean low tide, is approximately 50 chains, <u>i.e.</u>, 3,300 feet. Thus, the inclusion of Walker Island in the list of islands constituting the Annette Islands in the Presidential Proclamation cannot be justified on the theory of the majority. 2/

Moreover, I think that the majority clearly misinterprets an argument made by BLM and the Metlakatla Community, which argument, if correctly understood, does tend to support the inclusion of Warburton Island as part of the Annette Islands. Thus, the majority decision recounts that the State Director's decision had stated that "Warburton Island is located `in closer proximity to the group of islands clearly recognized as the Annette Islands than any other \* \* \* islands." Supra at 6. The majority expressly rejects this statement, noting that "Warburton Island is further from Annette Island than certain of the islands shown to be excluded on the 1916 diagram, such as Bold and Hotspur." Id. In effect, the majority interprets the Director's decision as asserting that Warburton Island is in closer proximity than any other excluded island to Annette Island. That, however, is not what the Director meant. What the Director meant is that Warburton Island is closer to Annette than Warburton Island is to any other island. That statement is, in fact, true. Its relevance lies in the fact that this is probative of the question whether Warburton was generally considered part of the "Annette Islands" or was generally deemed part of another island grouping (as, for example, the many small islands southeast of Hotspur which are known as the Percy Islands). It seems to me that the relatively small size (5 acres) of Warburton together with the fact that it is far closer to Annette Island than it is to any other island, is supportive of BLM's argument that Warburton Island is properly considered to be part of the "Annette Islands" as that phrase was used in the 1891 Act.

The second point which argues in favor of BLM's decision relates to the diagram which accompanied the 1916 Presidential Proclamation. As the Metlakatla Community points out, the diagram shows two islands adjacent to the northwest corner of the southwestern peninsula in the general direction of Warburton Island's location. Admittedly, these depicted islands are significantly closer to the shore of Annette Island than is Warburton, but the Metlakatla Community argues that this could well be an unintentional misplatting of the actual position of Warburton Island.

The majority examines this contention and rejects it. <u>Supra</u> at 6-7. The majority bases its rejections on two points. First, they note that a recent Geological Survey topographic map shows one exposed rock or islet

<sup>2/</sup> Moreover, it should be noted that Walker Island is, in fact, considerably farther from Annette Island than is Warburton Island.

near the location of the two islands depicted on the 1916 diagram. Second, they point out that the orthophotographic survey shows two exposed rocks or islets. Thus, the majority suggests that the diagram actually depicts two islets rather than a misplaced Warburton Island.

The majority also argues that, since

[o]verall, the relative accuracy of the diagram with respect to the placement of islets and rocks is attested to by the fact that it properly depicts Pow Island and the islets or rocks near Annette, Reef, and Direst points and in Port Chester and Canoe Cove[,] \* \* \* [i]t is clear, therefore, that the 1916 diagram fails to depict Warburton Island within the seaward boundary line of the reservation.

While I would certainly agree that it is open to dispute <u>whether</u> the diagram depicts Warburton Island, I cannot agree with the assertion of the majority that it is <u>clear</u> that it does <u>not</u> depict Warburton Island.

First of all, the islands depicted on the Geological Survey topographic and the orthophotographic maps are <u>not</u> in the same position (being noticeably to the north) as the islands shown on the diagram. While it may be that this is the result of a misplatting of these islets on the original diagram it is just as likely that this could be the result of a misplatting of Warburton Island on the original diagram.

Moreover, the general accuracy of the 1916 diagram is clearly open to debate. Thus, I would suggest that, contrary to the majority's assertion, the diagram's depiction of Canoe Cove is <u>not</u> substantially accurate. Furthermore, the diagram clearly mislocates, by a considerable distance, Snipe Island on the southeast side of Annette Island. Finally, the bathographic depictions on Exhibit 13 in the Supplement to the Administrative Record filed by BLM do <u>not</u> support the existence of an island at the location shown on the orthophotographic plat, thereby undercutting the majority's reliance on this plat. 3/

<sup>3/</sup> I would suggest that this apparent contradiction is occasioned by the fact that "islands" are, by definition, normally considered fixed parcels of land above mean <u>high</u> tide (see, e.g., Article 10 of the Convention on the Territorial Sea and the Contiguous Zone), whereas the orthophotographic process in determining islands was supplemented by helicopter flights at <u>low</u> tide to determine the existence of islands for the purpose of establishing the seaward boundary of the Annette Islands. <u>See</u> Memorandum dated June 20, 1989, from Lead Photointerpreter to Chief, Branch of Photogrammetry. Thus, what might be considered an "island" for purposes of the orthophotographic mapping would not necessarily have been considered an island for other purposes, including the drawing of the 1916 diagram.

## IBLA 92-277, 92-441

In my view, the status of Warburton Island is sufficiently ambiguous that an argument could be made either that it is part of the Annette Islands or that it is not part of the Annette Islands. But, given such an ambiguity, it seems to me that we have no choice but to affirm BLM since the State bears the affirmative burden of showing that Warburton Island is not part of the Annette Islands and we are required, as the majority readily admits, to construe any ambiguities in the 1891 Act and 1916 Presidential Proclamation in favor of the Metlakatla Community. Accordingly, I cannot agree with the majority's reversal of BLM's determination that Warburton Island is part of the Annette Islands. I must respectfully dissent.

James L. Burski Administrative Judge

# Appendix H

Southeast Alaska Regional Facilities and Services

## Southeast Alaska Regional Facilities and Services

Juneau is the largest community in Southeast Alaska, followed by Ketchikan and Sitka. These three communities are regional centers for retail as well as medical, business, transportation, and other services. Five other communities in the region have populations over 1,000 – Petersburg, Haines, Wrangell, Metlakatla, and Craig. All other Southeast Alaska communities had populations of less than 1,000 in 2005. The following table shows Southeast Alaska communities that are included in the economic inventory listed by population size. Communities not in the inventory all had fewer than 100 residents in 2005.

Southeast Alaska	2005 Population	
Community	Estimate	
Juneau	31,193	
Ketchikan	13,125	
Sitka	8,947	
Petersburg	3,155	
Haines	2,207	
Wrangell	1,974	
Metlakatla	1,397	
Craig	1,102	
Hoonah	861	
Skagway	834	
Klawock	780	
Yakutat	618	
Kake	589	
Angoon	497	
Thorne Bay	486	
Gustavus	459	
Hydaburg	369	
Coffman Cove	156	
Hollis	137	
Pelican	115	
Naukati	106	
Tenakee Springs	98	
Hyder	91	
Whale Pass	76	
Source: Alaska Department of Lab	or and Workforce Development, 2	

## Southeast Alaska Communities by Population Size

Source: Alaska Department of Labor and Workforce Development, 2005.

Note: These are location population estimates, and represent the grouped population in a particular location. In some cases the estimate is for a borough. In some cases the estimate is for a community, and in some cases (such as Haines) the estimate is a combination of a borough (Haines) and a community (Klukwan) which is not technically within the borough, but it physically exists in the same location.

This is a summary of Southeast Alaska regional transportation systems and regional facilities such as health care, colleges, and ship repair facilities.

#### **Transportation – Road Links**

Southeast Alaska is connected to the continental road system at three locations as follows:

- Hyder links to the Cassiar Highway via a 40 mile paved access road.
- Haines links to the Alaska Highway (in Canada) via the 146 mile Haines Highway.
- Skagway links to the Alaska Highway (in Canada) via the 99 mile South Klondike Highway.

With the exception of the communities on Prince of Wales Island, most Southeast Alaska communities do not have road connections to any other c ommunities. Prince of Wales Island has about 1,500 miles of road that connects most communities on the Island.

#### **Transportation – Air Links**

Air service in Southeast Alaska includes jet service from Seattle in the south and Anchorage in the north, to and between th e major communities (Juneau, Ketchikan, Sitka, Petersburg, Wrangell, and seasonally – Gustavus). Air cargo and air courier services are also available. Smaller air carriers in 4 to 12 seat wheel or float planes provide service within the region. There is no scheduled service from Southeast to Prince Rupert, British Columbia. Scheduled air service is available to most communities, and charter service is also available. Currently, two companies provide medical evacuation service via jet aircraft in the region. The U.S. Coast Guard has an air station at Sitka which provides medical evacuations via helicopter when necessary, as well as search and rescue services.

Southeast Alaska has several types and sizes of airports, and virtually every community has an air facility of some kind. Many are airport runways, but some are seaplane bases. Following are the larger airports as classified by the Alaska Department of Transportation and Public Facilities' 1996 Alaska Aviation System Plan Update.

Regional Center Airports (jet serviced)

- Juneau
- Ketchikan

District Airports (jet serviced)

- Sitka
- Petersburg
- Wrangell

Transport Airports

- Yakutat (jet serviced)
- Klawock (jet capable, not currently jet serviced)

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Smaller local airports are generally hubbed for purposes of mail delivery to one of the regional or district airports. The following table lists community airports with their respective postal hub airports.

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Postal Hub Airport	Community Airport	
Ketchikan	Annette	
	Coffman Cove	
	Craig	
	Edna Bay	
	Hollis	
	Hydaburg	
	Hyder	
	Kasaan	
	Klawock (Transport Airport)	
	Metlakatla	
	Meyers Chuck	
	North Whale Pass	
	Petersburg (District Airport)	
	Point Baker	
	Port Protection	
	Thorne Bay	
	Wrangell (District Airport)	
Petersburg	Kake	
Sitka	Port Alexander	
Juneau	Angoon	
	Chatham	
	Elfin Cove	
	Excursion Inlet	
	Funter Bay	
	Gustavus (seasonally jet serviced)	
	Haines	
	Hawk Inlet	
	Hoonah	
	Kake	
	Pelican	
	Petersburg (District Airport)	
	Sitka (District Airport)	
	Skagway	
	Tenakee Springs	
	Wrangell (District Airport)	
	Yakutat (Transport Airport)	
Aviation System Dian Lindata	Jacks Department of Transportation and Public Easil	

## Community Airports and Their Postal Hubs

Source: Aviation System Plan Update, Alaska Department of Transportation and Public Facilities, 1996.

## **Transportation – Ferry Links**

The Alaska Marine Highway System provides year round, public ferry service to the region. The system has seven conventional-speed and two high-speed vessels that are used in Southeast Alaska. The mainline system connects major Southeast Alaska communities together, and to road systems in British Columbia via Prince Rupert, to Washington via Bellingham, and to Southcentral Alaska via Whittier. These ferries take passengers, vehicles and freight, and often have stateroom s, restaurants and lounges on board. The following table shows running times and distances for mainline routes.

From	То	Running Time	Miles Nautical/Statute
Bellingham	Ketchikan	37 hours	595 / 676
Prince Rupert	Ketchikan	6 hours	91 / 103
Ketchikan	Wrangell	6 hours	89 / 101
Wrangell	Petersburg	3 hours	41 / 47
Petersburg	sburg Juneau	8 hours	123 / 140
Petersburg	sburg Sitka 10 hours		156 / 177
Sitka	Juneau/Auke Bay	8 hours, 45 min.	132 / 150
Juneau/Auke Bay	Haines	4 hours, 30 min.	68 / 77
Haines	Skagway	1 hour	13 / 15

## **Mainline Routes and Running Times**

Source: Alaska Marine Highway System. 2005.

Feeder routes connect smaller communities to regional hubs (Juneau, Ketchikan and Sitka) and to each other. Ferries used for feeder service travel at conventional speed and take passengers, vehicles and freight. These ships generally do not have staterooms. The following table shows running times and distances for feeder routes.

From	То	Running Time	<b>Miles</b> Nautical/Statute
Petersburg	Kake	4 hours	65 / 74
Kake	Sitka	8 hours	115 / 131
Kake	Angoon	4 hours	60 / 68
Sitka	Angoon	5 hrs, 30 min.	67 / 76
Angoon	Hoonah	4 hours	63 / 72
Angoon	Tenakee	2 hrs, 30 min.	35 / 40
Tenakee	Hoonah	3 hrs, 15 min.	49 / 56
Hoonah	Juneau	3 hrs, 15 min.	48 / 55
Hoonah	Pelican	4 hrs, 15 min.	64 / 73
Juneau	Pelican	6 hrs, 30 min.	91 / 103

## Feeder Routes and Running Times

Source: Alaska Marine Highway System, 2005.

The Alaska Marine Highway System will sometimes dedicate a vessel to a particular route, especially during the summer months. These shuttle ferries can be either conventional-speed or high-speed vessels. Currently, a dedicated vessel provides year round service between Ketchikan and Metlakatla.

In addition, the Interisland Ferry Authority (quasi-governmental ferry service provider) provides year round passenger, vehicle and cargo service on a conventional speed ferry between Hollis on Prince of Wales Island, and Ketchikan. In the sum mer of 2006, another Interisland Ferry Authority vessel will begin providing at least summer passenger, vehicle and cargo service between Coffman Cove on Prince of Wales Island, Wrangell and Petersburg. Private companies in the region provide charter ferry service, but generally only for passengers and cargo.

## **Transportation – Barge Links**

Three major barge lines serve SE Alaska from Seattle, delivering freight, vehicles and equipment. One line serves the communities of Ketchikan, Wrangell, Petersburg, Sitka and Juneau weekly, and some smaller communities less frequently (in some cases, seasonally). A second line serves Ketchikan, Petersburg, Sitka and Juneau twice weekly; Wrangell, Craig, Klawock, Thorne Bay, Haines and Skagway weekly; and Angoon, Pelican, Hoonah, Gustavus and Yakutat seasonally. A third line serves Craig and Sitka every two weeks, and then continues on to Alaska destinations north and west. Following are the approximate transit times between Seattle and the several Southeast Alaska ports.

## Barge Transit Times to SE Alaska Ports

	Transit Time	
Port	From Seattle	
Ketchikan	4 Days	
Metlakatla	6 Days	
Prince of Wales Island	5 Days	
Wrangell	5 Days	
Petersburg	5 Days	
Sitka	5 Days	
Juneau	5 Days	
Courses Design convice providers' websites 2005		

Source: Barge service providers' websites, 2005.

## **Regional Health Care Facilities**

The health care facilities in the region are as follows.

Hospitals:

- Ketchikan General Hospital 46 beds
- Sitka Community Hospital 13 beds
- SEARHC Hospital (Sitka) 64 beds
- Bartlett Memorial Hospital (Juneau) 56 beds.

Medical Centers (resident doctors):

- Petersburg Medical Center (14 beds)
- Wrangell Medical Center (8 beds)
- Craig Clinic (outpatient)
- Haines Clinic (outpatient)

Many other Southeast Alaska communities have local outpatient clinics that are generally staffed by a nurse practitioner or a physician's assistant, but no resident doctor.

#### Colleges

The University of Alaska Southeast has campuses in Ketchikan, Sitka and Juneau. Sheldon Jackson College has a campus in Sitka.

#### **Regional Ship Repair Facilities**

Southeast Alaska has several boat haulout and repair facilities. Moving from South to North, they include:

Ketchikan -

- 50-ton lift
- 200-ton marine railway
- Dry dock for ships up to 10,000 tons
- Full shipbuilding and repair services

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## Wrangell -

- 130-ton marine railway
- Plans for a 150-ton lift and uplands work yard

## Petersburg -

- Floating dry dock for vessels up to 45 ft.
- 300-ton marine railway with multiple cradles
- Full shipbuilding and repair services

## Sitka -

- 80-ton lift
- Full shipbuilding and repair services

#### Juneau –

- 15-ton lift
- 35-ton lift
- Full shipbuilding and repair services

#### Hoonah --

- Hydraulic Trailer 40 ft./20-ton maximum
- Developing a bulkhead and uplands wor k yard with a 150-ton lift.

#### Haines -

- Hydraulic Trailer 40 ft./20-ton maximum
- Small storage yard
- Plans to develop an uplands work yard with a 70 to 100-ton lift.

## Skagway -

- Hydraulic Trailer 40 ft./20-ton maximum
- Storage yard
- Mechanic/electronic repair services