

**LOCAL BOUNDARY COMMISSION**

**STATE OF ALASKA**

IN THE MATTER OF THE CONSOLIDATED )  
LEGISLATIVE REVIEW PETITIONS OF )  
THE CITY OF DILLINGHAM FOR )  
ANNEXATION OF NUSHAGAK )  
COMMERCIAL SALMON DISTRICT WATERS )  
AND WOOD RIVER SOCKEYE SALMON )  
HARVEST AREA WATERS, TOGETHER )  
CONSISTING OF APPROXIMATELY 396 )  
SQUARE MILES OF WATER AND 3 )  
SQUARE MILES OF LAND )  
AND )  
OF THE CITY OF MANOKOTAK TO ANNEX )  
THE WEARY/SNAKE RIVER TRACT, THE SNAKE )  
RIVER SECTION AND IGUSHIK SECTION OF )  
THE NUSHAGAK COMMERCIAL SALMON )  
DISTRICT, AND THE IGUSHIK VILLAGE TRACT, )  
ALTOGETHERCONSISTING OF )  
APPROXIMATELY 37 SQUARE )  
MILES OF LAND AND 118 SQUARE )  
MILES OF WATER )

**RESPONSIVE BRIEF OF RESPONDENTS NATIVE VILLAGE OF EKUK, CITY AND TRIBE OF CLARK'S POINT AND NATIVE VILLAGE OF PORTAGE CREEK TO THE LEGISLATIVE REVIEW ANNEXATION PETITION OF THE CITY OF MANOKOTAK FOR ANNEXATION OF THE WEARY/SNAKE RIVER TRACT, THE SNAKE RIVER SECTION AND IGUSHIK SECTION OF THE NUSHAGAK COMMERCIAL SALMON DISTRICT AND THE IGUSHIK VILLAGE TRACT AND SUPPLEMENTAL RESPONSIVE BRIEF TO THE LEGISLATIVE REVIEW PETITION OF THE CITY OF DILLINGHAM FOR ANNEXATION OF NUSHAGAK COMMERCIAL SALMON DISTRICT WATERS, WOOD RIVER SOCKEYE SALMON HARVEST AREA WATERS, AND ASSOCIATED LAND**

**I. INTRODUCTION**

The City of Manokotak filed a legislative review petition to annex the Weary/Snake River Tract, the Snake River Section and Igushik Section of the Nushagak Commercial Salmon District, and the Igushik Village Tract, altogether consisting of approximately 37 Square miles of land and 118 square miles of water. Some of the territory that Manokotak proposes to annex is also territory proposed to be annexed by Dillingham in its pending petition to annex the Nushagak Commercial Salmon District Waters and Wood

River Sockeye Salmon Harvest Area Waters. Quite reasonably, the Local Boundary Commission postponed the review of Dillingham's pending petition in order to allow consideration concurrently with Manokotak's petition. The two petitions are now on the same review and comment schedule.

The Respondents are three native villages and a second-class city. The Native Villages of Ekuk and Clark's Point, and the City of Clark's Point are located on the eastern shore of Nushagak Bay. Portage Creek is located up the Nushagak River approximately 29 miles Southeast from Dillingham. Members and residents of respondents are primarily engaged in the sport, commercial and subsistence fishery centered on Nushagak Bay. Ekuk and Portage Creek have merged their landholdings with Curyung Corporation while Clarks Point keeps its holdings separate. These lands are along the eastern shore from Etolin point to Grassy Island and on the Western shore from the Snake River to Nichols Point. Each of these governments would be directly affected by approval of either proposed annexations. This brief responds to Manokotak's petition and also supplements Respondents' earlier brief responding to the City of Dillingham's legislative review petition to annex the Nushagak Commercial Salmon District and the Wood River Special Salmon Harvest Area.

## **II. SUMMARY OF RESPONDENTS' COMMENTS**

Respondents' comments can be summarized as three alternatives, any one of which is preferable to approval of the Dillingham annexation petition of a massive commercial fishing district, because each recognizes and promotes the interests and needs of the region, while Dillingham's petition ignores those interests. In other words, each alternative presents more of a regional solution for the area than does Dillingham's petition to annex all of Nushagak Bay to itself.

In order of preference, the alternatives are (A) delay consideration of the petitions pending determination of the feasibility of a western Bristol Bay region borough and a local decision on the filing of a petition to form such a borough; (B) join the Department of Commerce, Community and Economic Development as a party to the proceedings to facilitate a tax compact among the petitioners, respondents and other governments in the region so these groups can share tax revenues derived from raw fish tax collected in the region; or (C) approve Manokotak's petition and deny all or some of Dillingham's petition, but specifically

exclude from annexation to Dillingham the waters along the eastern shore of Nushagak Bay within the Nushagak Section designated as statistical areas 325-34 (Ekuk Village), 325-33 (Clark's Point); 325-32 (Queens), and 325-31 (Nushagak-Combine) in which the set net fishery occurs.<sup>1</sup> Each of these alternatives is discussed more fully below.<sup>2</sup>

### III. DISCUSSION OF THE ALTERNATIVES

Alternative A: Delay consideration of the annexation petitions pending the outcome of a borough feasibility study and, if appropriate, the filing of a petition for borough incorporation.

Respondents' long-held view is that if it is financially feasible, the best solution for the region is formation of a borough. The borough would cover the areas sought to be annexed by the two municipalities, allowing for regional governance of a large area within the Western Bristol Bay Region, as contemplated by Alaska's statutes and the Commission's regulations.

In its earlier filed brief in response to Dillingham's legislative review petition, Respondents attached the affidavit of Robert Heyano, president of the village council of the Native Village of Ekuk. He stated that he is a member of the board of directors of the Bristol Bay Native Association; that he and others on the board had worked to establish a task force to study the feasibility of a borough for the Western Bristol Bay region; and that they had applied for a grant to fund the study.<sup>3</sup> Robert Heyano's Supplemental Affidavit attached as Exhibit 1 to this brief reflects the progress that has been made since September. Money to fund the study has been obtained and an Interim Task Force made up of representatives from Ekuk Village Council, City of Dillingham, Dillingham City School District, Southwest Region School District, City of Aleknagik, and Bristol Bay Native Association has issued a Request for Proposal to obtain a contractor to undertake the study, has received responsive proposals, and is preparing to make an award.<sup>4</sup> It would examine aspects of a Western Bristol Bay region borough formation, including financial feasibility of a

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<sup>1</sup> The seaward boundary could run along the outer limit set for set net operations by the Department of Fish and Game for the statistical areas in 5 AAC 06.331(n).

<sup>2</sup> Respondents hereby incorporate by reference their earlier filed brief in response to Dillingham's legislative review petition to annex all of Nushagak Bay.

<sup>3</sup> Brief of Respondents Ekuk, et al to Dillingham's Annexation Petition, exhibit 1, paragraph 12.

<sup>4</sup> See Exhibit 1, Supplemental Affidavit of Robert Heyano.

borough if the city annexations are not approved, financial feasibility of a borough if the annexations are approved, and to determine the level of regional support for the creation of a borough. The area included in the study covers the territory included in the pending petitions and is commonly referred to as the Dillingham Census Area.

Respondents believe that it would be in the best interests of the state and the region to delay a decision on whether either of the pending petitions should be approved in whole or in part until the Interim Task Force has the results of a study addressing this issue. If the task force findings are consistent with borough formation, it is anticipated that the task force will next turn to fostering understanding and support for the creation of a borough. If there is support, then the task force would be in a position to cause a petition to be developed.

Respondents recognize that there may be reluctance to delay the proceedings further, but the potential benefits to the state and the communities of the region far outweigh the costs associated with a delay of these city annexation petitions, which, in the case of Manokotak, presents only a partial solution, and, in the case of Dillingham, presents benefits to Dillingham while creating hardships and inequities throughout the region. Unlike the city annexation petitions, the possibility of a Western Bristol Bay Region borough presents a unique opportunity to address the needs of all the communities in the region, with representation of all the residents, and a sharing of the benefits associated with the borough.

Moreover, in this time of declining state revenues, it is particularly important to consider and give weight to the fact that a borough may eliminate some of the redundancies in multiple municipalities, and also interface more efficiently with state government for the provision of services within the region. This opportunity for financial and administrative efficiencies should not be foreclosed simply because it takes some time for a comprehensive study to fully evaluate the borough feasibility. And as noted in Respondents' earlier filed brief, while it is legally possible for a borough to be created even if the annexation petitions are

granted, the far-reaching annexation and taxation proposed by Dillingham clearly would harm the financial viability of a future borough in the region.<sup>5</sup>

Dr. Victor Fischer, one of the 1955 Alaska Constitutional Delegates and a former Alaska State Senator, spoke to the Commission in November, 2015 and emphasized that the Alaska Constitution gave the Commission considerable authority to consider local government options. His book, *Alaska's Constitutional Convention*, provides a history of the committee discussions surrounding the drafting of the constitution. He is a recognized authority on this topic and his book has been cited by the Alaska Supreme Court as evidence of the intent of the framers of our constitution.<sup>6</sup> His chapter on local government and the development and purpose of the formation of boroughs concept are particularly instructive, and he described the committee's identification of the borough principles as follows:

- Provision should be made for subdividing all Alaska into local unities (boroughs) based on economic, geographic, social, and political factors; initially, not all need be organized.
- Units should be large enough to prevent too many subdivisions in Alaska; they should be so designed as to allow the provision of all local services within the boundaries of a single unit, thus avoiding multiplicity of taxing jurisdiction and overlapping, independent districts.
- The state should have power to create, consolidate, subdivide, abolish, and otherwise change local units.
- Creation of units should be compulsory, with provision for local initiative.
- Boundaries should be established at the state level to reflect statewide consideration as well as regional criteria and local interests, and must remain flexible in order to permit future adjustment to growth and changing requirements for the performance of regional functions.
- Units should cover large geographic areas with common economic, social, and political interests.<sup>7</sup>

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<sup>5</sup> See Responsive Brief of Respondents to Dillingham's legislative review annexation petition, pp. 23-27.

<sup>6</sup> See, e. g., *Thomas v. Bailey*, 595 P.2d 1, 7 (Alaska 1979) and *City of Fairbanks v. Fairbanks Convention & Visitor's Bureau*, 818 P.2d 1153 (1991).

<sup>7</sup> Victor Fischer, *Alaska's Constitutional Convention*, pp. 119-20, University of Alaska Press, 1975.

Dr. Fischer also spoke to the importance of borough-city relations, saying that the delegates to the constitutional convention stipulated

that the city should be an integral part of the borough in which it was located, and other provisions were made with the intent of encouraging cooperation between cities and boroughs . . . [t]he objective throughout was to assure that wherever functions overlap they should be integrated. It was the committee's belief that maximum cooperation would result from coordination between the city council and the borough assembly.<sup>8</sup>

This historical commentary reflects the importance of a regional form of governance – the borough. It would be well within the Commission’s authority and discretion to take steps on its own to establish a western Bristol Bay borough. Here, Respondents ask only that the Commission relax the time frame for considering pending city annexation petitions in order to provide the necessary time to ensure that all government options for the region, including borough formation, are carefully considered.

Alternative B: Join the Department of Commerce, Community and Economic Development as a party to the proceedings to facilitate a tax compact for tax revenue sharing among the petitioners, respondents and other governments.

If the Commission determines that a delay described in Alternative A above is not in the best interests of the state, Respondents ask the Commission to join the Department of Commerce, Community and Economic Development as a party to these annexation proceedings. The Department has many statutory duties in the area of local government, including serving as staff to the Local Boundary Commission under AS 44.33.020(a)(4), and requiring that the department “shall promote cooperative solutions to problems affecting more than one community or region, including joint service agreements, regional compacts, and other forms of cooperation[.]”<sup>9</sup> The purpose of the joinder would be exactly that: for the department to promote (through facilitation, mediation, round table discussions or other format) a cooperative solution such as a tax compact to share the revenue collected from a raw fish sales tax to be levied by municipalities that include waters of the Nushagak Commercial Salmon District. The revenues

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<sup>8</sup> Victor Fischer, *Alaska’s Constitutional Convention*, at 121.

<sup>9</sup> AS 44.33.020(a)(6).

would be derived from an area that is clearly regional in nature and not associated solely with one or two municipalities.

Dillingham has criticized Manokotak's petition because it is intended to permit Manokotak to impose a raw fish tax on sales of fish caught in the Igushik Section of Nushagak Bay. Dillingham contends that there is no way to separate fish caught in the Igushik Section from fish caught in the Nushagak Commercial Salmon District and that this administrative problem prevents a division of the tax revenues between competing municipalities. A tax compact would provide a reasonable solution to this problem by attributing through negotiation and agreement a part of the catch to each municipality, tribe, or village of the region. Dillingham's petition would enable it to receive a disproportionate share of the revenue from all fish sales in the commercial salmon districts to the detriment of other communities and groups in the region. A tax compact is a means to fairly distribute this revenue to the region and to provide a bridge to creation of a regional government for participants in the compact. If the department and the Commission determine that such a tax compact would be in the state's best interest, the Commission should make any approval or partial approval of the annexation petitions subject to the negotiation and execution of such a tax compact.

Alternative C: Approve Manokotak's proposed annexation and deny either all of Dillingham's proposed annexation or those portions of water included in Manokotak's petition for annexation and the waters along the eastern shore of Nushagak Bay associated with the Clark's Point and Ekuk communities and set net fisheries.

Finally, if the Commission determines that neither Alternative A nor B above are in the best interests of the state, respondents support approval of Manokotak's proposed annexation of the Weary/Snake River tract, the Snake River and Igushik Sections and the Igushik Village Tract. Manokotak's petition identifies its interest in and connection to the lands and waters it proposes to annex, and adequately refutes Dillingham's claim to the same areas. Dillingham has not provided any historical, social, cultural or economic connection to the area, and does not propose to offer any services to the area. If a more regional organization such as a borough is not pursued or a revenue sharing compact is not developed, then Respondents fully support approval of Manokotak's annexation petition.

In contrast, Respondents ask the commission to deny the annexation of the Nushagak Commercial Salmon District contained in the petition of the city of Dillingham for all the reasons set out in Respondents' earlier filed Responsive Brief to Dillingham's legislative review annexation petition. Dillingham's over-reaching proposed annexation does not meet the department's statutory or regulatory standards under any plain reading or under the Commission's longstanding interpretations of annexation standards. The "territory" it proposes to annex is really an area more suitable for a borough.

If, however, the Commission finds that it is in the best interests of the state to approve a portion of Dillingham's proposed annexation to enable petitioner to levy a raw fish sales tax, Respondents ask the Commission to exclude not only the waters Manokotak petitioned to annex as discussed above, but also the waters along the eastern shore of Nushagak Bay within the Nushagak Section designated as statistical areas 325-34 (Ekuk Village), 325-33 (Clark's Point); 325-32 (Queens), and 325-31 (Nushagak-Combine) in which the set net fishery occurs. Respondents make this request for three reasons, any one of which constitutes a sufficient basis to disapprove Dillingham's petition to annex that portion of Nushagak Bay.

First, removal of the described eastern shore from Dillingham's requested annexation would not have a significant negative impact on Dillingham's overall annexation proposal, but its annexation to Dillingham would present an unreasonable and unnecessary hardship on the set net fishery of the area.<sup>10</sup> A significant part of the people who engage in the set net fishery there are locals – residents of Alaska and of the communities of the Western Bristol Bay Region. As compared to the overall fisheries in the bay, they take a minority share of catch and are among the least wealthy. A raw fish tax by the City of Dillingham would impose a hardship on them, as their businesses are already marginal, and Dillingham offers them little or no services or other benefits in return. Moreover, Dillingham should target the more profitable drift gillnet fisheries that are of a bigger scale, and a large percentage of which take their profits out of state without contributing to the region, and so it should out of fairness exclude this area from its annexation. In

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<sup>10</sup> According to regulation, the Department of Fish and Game allocates 26 percent of the harvestable surplus of salmon in the Nushagak Commercial Salmon District to set gillnet operations. Of this allocation, 6 percent is for the Iguhshik section and 20 percent is for the Nushagak Section. 5 AAC 06.367(b)(2).



short, it is simply inequitable, and thus not in the state's best interests, to burden the set net fishery conducted within the statistical areas on the eastern shore of the Nushagak section by allowing Dillingham to tax their marginal business operations with little or no benefit in return.

Second, unlike Dillingham, Clark's Point and Ekuk actually provide services to that area and support the set net fishery. The Native Village of Ekuk and the City and Village of Clark's Point have been working together to resolve a landfill problem, and they are jointly pursuing funding and construction of a road between Ekuk and Clark's Point. The completion of such a road would open up even more opportunities for sharing costs of police protection and public health services.<sup>11</sup> In other words, the waters around these communities is not a part of Dillingham's community; these waters are associated with the land and the communities abutting it, and should not be annexed by the City of Dillingham.

Finally, the waters of the eastern shore should not be annexed by Dillingham because they should remain available for what Respondents hope will be an eventual annexation of those waters by the City of Clark's Point. The City has long been interested in annexing an area "to include Ekuk Village, Ekuk Fisheries, and enough waters within Nushagak Bay to provide for future growth and finance city operations."<sup>12</sup> According to Clark's Point Mayor Joseph Wassily, Clark's Point was "reluctant to spend our limited money to move forward with our own annexation petition because Dillingham was claiming that the Local Boundary Commission had already decided that Nushagak Bay should be within their new city limits."<sup>13</sup> As a further impediment the city has a shortage of financial and administrative resources, and thus it is not

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<sup>11</sup> See affidavit of Joseph Wassily, Ex. 3, paragraphs 6-7 and affidavit of Robert Heyano, Ex. 1, paragraphs 8-9, to Brief of Respondents Ekuk, et al to Dillingham's Annexation Petition.

<sup>12</sup> Affidavit of Joseph Wassily, Ex. 3, paragraph 8 to Brief of Respondents Ekuk, et al to Dillingham's Annexation Petition.

<sup>13</sup> *Id.* Respondents are aware that Manokotak will point out that the boundaries proposed by Dillingham will have the effect of denying Clark's Point a 50 percent share of fishery business taxes collected from floating processors anchored offshore from that city. Clark's Point is investigating this claim. Even if this claim proves correct, the anchorages off shore of Clark's Point have been within the *de facto* boundaries of that city under the statement of that doctrine in *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147, 1154 (Alaska 1974). Recognition of this status is evident by the many years of past payment by the state of revenue sharing attributable to the presence of floating processors. The payment and receipt of this shared revenue has always been in good faith. Respondents believe that Dillingham has never intended to interfere with Clark's Point's long standing revenue source. If that intent has changed, it should proceed with a detachment petition along with the one now before the Commission.

feasible for it to submit an annexation petition at this time. It struggles to merely maintain its status as a municipality of the state.

But the inability of Clark's Point to be able to file a competing petition at this time is not a sufficient basis to allow Dillingham to annex what is clearly the front yard of other communities. Respondents ask the Commission to recognize the cooperation that exists among the City and Village of Clark's Point and the Native Village of Ekuk, and the services those entities provide, and their dependence on the set net fishery. Recognizing those factors compels the conclusion that Dillingham's request to annex the waters along the eastern shore of Nushagak Bay designated as statistical areas 325-34 (Ekuk Village), 325-33 (Clark's Point); 325-32 (Queens), and 325-31 (Nushagak-Combine) in which the set net fishery occurs should be denied. Fish caught in these statistical areas are accounted for separately from other fish in the district and could be excluded from any catch attributed to territory annexed by another municipality. This territory is not a part of Dillingham's community under any reasonable construction of the regulations, and it is in the best interests of the state to preserve these waters for a potential future petition by the City of Clark's Point to annex land and these waters so as to better finance services to the residents and commercial activity occurring there.

#### **IV. CONCLUSION**

In summary, Respondents ask the Commission to delay the annexation proceedings to allow for consideration of the feasibility of a borough. Alternatively, Respondents ask the Commission to join the Department of Commerce, Community and Economic Development to assist the parties in developing a tax compact for sharing of the raw fish tax revenues. Finally, as a third alternative, Respondents ask the Commission to grant Manokotak's petition for annexation and decline to grant Dillingham's petition for annexation, but if Dillingham's petition is to be approved in part, Respondents ask that the waters along the eastern shore of Nushagak Bay described more fully herein be excluded from annexation to Dillingham.

DESIGNATION OF REPRESENTATIVE

The Native Villages of Ekuk, Clark's Point, and Portage Creek, and the City of Clark's Point designate the following person as their representative for purposes of this responsive brief and any proceedings regarding the Dillingham Annexation Petition:

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The governments listed above request that courtesy copies of all correspondence be also provided to the following persons:

Robert Heyano  
President  
Native Village of Ekuk  
PO Box 530  
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99576

Betty Gardiner  
President  
Clark's Point Village Council  
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Clark's Point, Alaska 99569

Joseph Wassily  
Mayor  
City of Clark's Point  
P.O. Box 9  
Clark's Point, Alaska 99569

Mary Ann Johnson  
Treasurer  
Native Village of Portage Creek  
1327 E. 72nd, Unit B  
Anchorage, Alaska 99518

Dated this 22nd day of February, 2016.

By: James L. Baldwin  
James L. Baldwin  
Counsel for Respondents

By: Janice Gregg Levy  
Janice Gregg Levy  
Counsel for Respondents

**AFFIDAVIT OF ROBERT HEYANO PRESIDENT**

**NATIVE VILLAGE OF EKUK**

**STATE OF ALASKA** )

)ss.

**THIRD JUDICIAL DISTRICT** )

I Robert Heyano, upon oath, depose and state that:

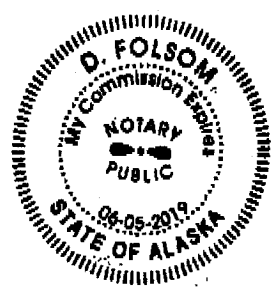
1. I am the president of the village council of the Native Village of Ekuk, a federally recognized tribe.
2. I am a member of the board of directors of the Bristol Bay Native Association. In that capacity I have worked with others on the board to establish a task force to study the feasibility of a borough for the Western Bristol Bay region. Funding for the task force amounting to a grant of \$110,000 was obtained.
3. The task force met and solicited proposals for a consultant to conduct a borough feasibility study considering the interests of tribes, cities and school districts in the present environment of dwindling state and federal funding. The task force received two viable proposals which are presently under evaluation. An award of a contract is imminent.

4. The feasibility study is to be completed by August 31, 2016. The task force will use the feasibility analysis as part of an inclusive process to achieve maximum participation by local residents so that they have the best information available to decide whether a borough form of government is in the best interests of their local government and the Dillingham Census Area in general.

Dated at Dillingham, Alaska this 21<sup>st</sup> day of February, 2016.

Robert Heyano  
Robert Heyano

SUBSCRIBED AND SWORN TO before me this 21<sup>st</sup> day of February, 2016



D. Folsom  
Notary Public in and for the State of Alaska  
My commission expires: 6/5/2019