



City of Dillingham
Reply Brief to Responsive Briefs and Comments
On
Petition to Annex Commercial Fishing Waters,
Using Legislative Review Method

March 18, 2016

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BY:

A handwritten signature in blue ink, appearing to read "B.W. Chandler", with a large, stylized flourish extending to the right.

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Introduction

On June 1, 2015, the City of Dillingham (“City”) filed a petition to annex, via Legislative Review method, the Nushagak Commercial Salmon District waters and Wood River Sockeye Salmon Special Harvest area waters, together consisting of approximately 396 square miles of water and 3 square miles of land (small islands). Pursuant to 3 AAC 110.490, the City submits this reply to the public comments and responsive briefs.

Public Comment Period

The petition was available for public review and comment through February 26, 2016. The deadline for receipt of comments was longer than normal due to the Local Boundary Commission consolidating the Dillingham petition with a petition filed by the City of Manokotak December 1, 2015. Comments received during the pre-filing public hearing and comment period were previously provided to the Commission. 3 AAC 110.490 does not provide for this responsive brief to address those comments although the City has taken them into consideration and has either addressed the concerns expressed in the annexation petition or will do so at the hearing before the Commission.

Comments Received

During the post-filing public comment review period, comments and responsive briefs were received from the following:

1. Dr. Todd Radenbaugh and Michele Masley (Letter);
2. City of Clark’s Point and Clarks Point Village Council (Responsive Brief);
3. Dan Dunaway (Letter);
4. Matt O’Connell (Letter);
5. Manokotak Village Council (Letter);
6. Dianne Wetter (Letter);
7. Paul Liedberg (Letter);
8. Theodore Krieg (Letter);
9. Mark Lisac (multiple Letters);
10. Native Village of Ekuk (Responsive Brief);
11. Mark Carr (multiple Letters);
12. Fred and Lloann Ball (multiple Letters);
13. Earl D. Reynolds (Letter);
14. Norm Aaberg (Letter);
15. Jeff Rasco (Letter);
16. Portage Creek (Responsive Brief);
17. Southwest Region School District (Responsive Brief);

18. Richard Madson (Letter);
19. Christine and John O'Connor (Letter)
20. Melvin Andrew (Letter);
21. Christian Groko (Letter);
22. Susan Ball (Letter);
23. Rob Rasco (Letter);
24. Jamie O'Connor (Letter);
25. Nicholas and Amber Dowie (Letter);
26. Beatrice Reynolds (Letter);
27. Devin Darrough (Letter);
28. Darlene Wyagon (Letter).

Responses to Common Issues Raised

1. Impact of Fish Tax on Income.

Concerns are expressed about the financial impact of a fish tax on residents of the region who prior to 2012 had not paid such taxes. The Southwest Region School District even goes so far as to suggest the fish tax will impact educational performance of its students. This is hyperbole. Here are some facts.

Dillingham, after consultation with others in the region as requested by the Commission, included a low income tax refund of 50% in the fish tax ordinance. DMC 4.21.135(B). Low income is defined as either:

- a. Household income, assets, and financial resources fall within the eligibility standards for the food stamp program under [7 U.S.C. 2011](#) through [2025](#), as amended; or
- b. Who has paid a reduced price annual fee for the taxpayer's fishing permit under AS [16.43.160\(d\)](#) for the calendar year during which raw fish tax was collected from the taxpayer.

DMC 4.21.135(A)(1). The referenced state program similarly provides a 50% discount from standard annual permit fees.

Dillingham issued \$2,909 in low income fish tax refunds during the two years fish tax was collected¹ to three individual permit holders. A larger amount is anticipated in the City's post annexation budget because the City expects more permit holders qualify for the exemption than applied. CFEC data indicates there are an average of 17 Nushagak District permit holders who live in the region and qualify for the low income exemption². Statements that a fish tax burden falls on poor families must be considered in this context.

¹ Exh. A, Affidavit of Rose Loera.

² Exh. B.

The economic impact of Dillingham’s fish tax can be estimated based on information collected by the State of Alaska. Dillingham did so at the previous LBC hearing. The average annual tax bill of permit holder residing in the region but outside Dillingham was \$677. For those who qualify for the tax refund (the lower income Bristol Bay residents) their annual fish tax payment was approximately \$339³.

Using 2014 figures provided by CFEC, and focusing solely on set net permit holders from the region, it estimated average gross earnings per permit holder ranged from \$57,433 in Manokotak to \$28,133 for the 4 Aleknagik set net permit holders⁴. The 2.5% tax would range from \$1,435.82 for set net permit holders from Manokotak to \$703.32 for set net permit holders from Aleknagik. Using a region wide average the tax paid on average by a set net permit holder from the region (85 out of a 131 of which were from Dillingham) would have been \$1,142.47 in 2014.

Manokotak translates similar data into “per capita” earnings (Manokotak Exh. 4). Dillingham believes a per permit holder analysis is more appropriate as it is only permit holders who pay fish tax. But even using these numbers the per capita impact of a 2.5% fish tax on the five year average set net earnings ranges from \$69 in Manokotak to \$13.55 in Aleknagik. The per capita figures show that the idea Dillingham is “rich” and the other communities “poor” is simply not true. When it comes to fishing earnings (which are the only additional earnings subject to fish tax) City of Dillingham residents earn \$39 more per capita than Aleknagik residents and less per capita than residents of Manokotak and Clark’s Point.

Applying this estimate means the Southwest School District is asserting the educational performance of students throughout the region will be diminished because the families of the regional permit holders (which includes both Southwest Region School District students, and students from Aleknagik and Clark’s Point who are City of Dillingham School District students) on average will have \$700-\$1,200 less in annual fishing income⁵.

The Nushagak District is the only fishing district in Bristol Bay where a fish tax is not levied by local government. There is a 3% tax in Pilot Point, a 2% tax in the Lake & Peninsula Borough, a 3% tax in Egegik, a 3% tax in Togiak and a 3 % tax in the Bristol Bay Borough. If the District’s assertion is correct one would expect a demonstrable deficiency in student performance from students in those communities when compared to District students. This is especially true since these fish tax provisions have been in place for many years.

³ Exh. C, (Hearing Testimony of Ms. Sheinberg).

⁴ Exh. D, (CFEC Data).

⁵ In real dollar terms- instead of \$45,699 in gross earnings from fishing the average set net permit holder from the region will have \$44,556.

The annual reports of student progress for Bristol Bay communities with a fish tax do not support the District's claim⁶. Bristol Bay Borough proficiency results were markedly better in all categories in the 2011-2012 school year⁷ and in the 2013-2014 school year⁸. The Lake and Peninsula Borough School District results were similarly superior⁹. There is no logical correlation between the levy of a fish tax and student performance.

There was not a fish tax in place within the Nushagak District before the 2012 and 2013 fishing seasons. So if the District's theory is true one would expect District students would have performed progressively worse on standardized tests given in the 2011-2012 (pre-fish tax), and the 2013-2014 (after two years of fish taxation) school years. The annual reports for the District do not support this theory. In fact, the pre-fish tax school year proficiency results and the results on the same test after fish tax had been in place for two school years are quite similar¹⁰.

The District's paradoxical support for the 2% Manokotak fish tax compounds the District's basic defect in logic. If the District was truly concerned about the relationship between the levy of fish tax and educational performance those concerns would be directed evenly towards both the Dillingham and Manokotak annexation petitions.

Dillingham also suggests it is well past time for residents in the region including professional educators to recognize the new economic reality faced by the State of Alaska, all communities within the State and all residents of Alaska. The era of no taxes is coming to an end. Activity that previously was not taxed will need to be taxed to generate revenue to pay for governmental services including educational services. This most definitely will impact residents throughout the region. But it would be irresponsible and not in the best interests of Alaska for the Commission to deny annexation on the basis that paying fish tax will reduce personal income of residents of the region. And, as previously recognized by the Commission staff, there are poor people that live in Dillingham too¹¹. Not being able to access an expanded tax base through annexation will inevitably increase the economic burden of those living in poverty in

⁶ Exh. E-F. Bristol Bay Borough and Lake and Peninsula Borough School District Annual Report Card to the Public for 2011-2012 and, 2013-2014.

⁷ 53.26% in reading, 53.85% in writing, 39.33% in mathematics and 53.66% in science. Exh. E, p. 2-3.

⁸ 54.76% in reading, 55.29% in writing, 45.88% in mathematics, 32.43% in science. Exh. D, p.2-4.

⁹ Exh. F.

¹⁰ Exh. G. In the 2011-2012 school year 38.8% of all district students were proficient in reading. In the 2013-2014 school year 37.57% of all district students were proficient in reading. In the 2011-2012 school year 30.738% of all district students were proficient in writing. In the 2013-2014 school year 31.66% of all district students were proficient in writing. In the 2011-2012 school year 25.13% of all district students were proficient in mathematics. In the 2013-2014 school year 26.63% of all district students were proficient in mathematics. Science is the only area where proficiency scores decreased significantly. In the 2011-2012 school year 18.84% of all district students were proficient in science. In the 2013-2014 school year 10.34% of all district students were proficient in science.

¹¹ Exh. H, pp. 22-23.

Dillingham and who already pay local sales tax. And the burden on Dillingham residents to continue to support the Dillingham School District will also be increased.

2. Suggestion to Delay Deciding Annexation Petitions or Deny Approving Annexation Petitions Because of Possibility a Borough Study will be Completed.

Ekuk suggests the Commission kick the annexation can down the road because there a consultant has been hired to complete a borough study which supposedly might lead to “fostering understanding and support” for the creation of a borough amongst an unidentified group. The Commission had the opportunity to direct the Department to file an actual borough petition and to combine that petition with the two pending annexation petitions last September. The Commission voted not to do so¹². Having done this it would be patently unfair to both petitioners for the Commission to now delay or deny annexation based on a borough study being “in progress” or having actually been completed. If the Commission thought completing a borough study before deciding whether to again approve Dillingham’s petition and to consider Manokotak’s petition was critical that direction should have been provided to both Dillingham and Manokotak last fall. Having decided not to do so then it would be fundamentally arbitrary to do so now.

The statement contained in Mr. Heyano’s affidavit and the statements made by the lawyers for Ekuk and Manokotak¹³ hint at heretofore unexpressed support for borough formation in the region or even a willingness to consider borough formation. Such support is reflected in only a single comment submitted in response to either petition¹⁴.

Mr. Heyano may be willing to work with others in his “capacity” as a BBNA board member but the Native Village of Ekuk has not submitted a resolution adopted by the tribe supportive of the borough study process. Counsel for Manokotak’s statement in the city’s responsive brief there could be support for a borough¹⁵ is directly contradicted by statements made by Manokotak. Dillingham doubts Manokotak has any official interest in postponing consideration of their annexation petition while a borough study process is completed or working with others to evaluate borough formation.

¹² Exh. I, Minutes of Sept. 16, 2016 Commission meeting.

¹³ Manokotak’s counsel said Manokotak would “evaluate” a “legitimate” borough proposal. This is not what their Mayor said. [see Dillingham responsive brief p. 8]. Ekuk’s lawyer said Ekuk, Portage Creek and Clark’s Point will “continue to make efforts to pursue a regional solution to the problems including the feasibility of the formation of a borough” and will “support” a regional solution but the accompanying affidavits to the responsive brief make no such commitment to “support” anything and do not describe any “efforts” Clark’s Point, Portage Creek or Ekuk will make. Ekuk brief at p.2, 7.

¹⁴ Comment of Diane Wetter.

¹⁵ Manokotak Brief at p. 27.

An Interim borough study group exists only because Dillingham continued to move forward with annexation. As long as the legal challenge to the Commission's approval of Dillingham's local option annexation petition was pending no interest in studying a borough was expressed by Clark's Point, Portage Creek or the Bristol Bay Native Association despite Dillingham's prior pledge of fish tax revenue towards a borough study and expressed willingness to work with others on a borough study.

It was not until October 16, 2014 when the Dillingham City Council considered a resolution to file a legislative review petition for annexation that a borough study group was first suggested by Bristol Bay Native Association (BBNA). Dillingham agreed to delay filing an annexation petition for sixty days while waiting for the group to be formed and meet. On October 22, BBNA's executive committee authorized BBNA to facilitate forming a study group¹⁶. Dillingham agreed to work with BBNA. On November 14, 2014, City Manager Rose Loera met with BBNA. On November 18, BBNA designated Robert Heyano to act as BBNA's¹⁷ representative on what was designated as an "Interim Borough Feasibility Study Task Force"¹⁸. An initial meeting of the Interim Task Force was held December 19, 2014. It was agreed to invite all communities and tribes in the region to participate and on January 19 a formal invitation to participate was sent by BBNA¹⁹. Not one additional community accepted the invitation and agreed to participate. To date the only communities that have participated in the Interim Task Force are Aleknagik and Dillingham. Nor have any tribal entities participated in the Interim Task Force.

On March 25, 2015 BBNA submitted a grant request based on commitments from Dillingham and Aleknagik to provide matching funds to complement BBNA's in kind matching administrative services²⁰. Dillingham's contribution to the borough study effort fulfilled a commitment Dillingham made at the time annexation was approved by the Commission. A total of \$39,461 was appropriated to the borough study fund from fish tax revenue²¹. The grant was approved October 2, 2015. The original schedule anticipated the award of a contract to a consultant to perform the feasibility study by November 23, 2015 with the date for distribution of the final study set for September 28, 2016²². RFP responses were received by November 9, 2015. But the contract was not actually awarded until March 9, 2016. The process of studying borough formation is more than 3 months behind schedule. It is not realistic to expect this

¹⁶ Exh. J.

¹⁷ Affidavit of Robert Heyano para. 12. That Mr. Heyano is BBNA's representative not Ekuk's representative on the Interim Task Force is significant. Ekuk has not adopted a resolution officially supporting studying formation of a borough or contributed towards the local match for the interim study.

¹⁸ Exh. K.

¹⁹ Exh. L.

²⁰ Exh. M, Exh. N.

²¹ Affidavit of Navin Bissran.

²² Exh. HH [Borough Study RFP].

study to be accelerated from the initially contemplated schedule. More likely is a completion 3-4 months later than originally planned.

Participation in the process is limited. The only entities in the region that agreed to participate in the group were Ekuk, the City of Dillingham, the City of Aleknagik, the Southwest Region School District, the Dillingham School District, and the Bristol Bay Native Association. Aleknagik is the only city other than Dillingham which participated. Manokotak declined to participate. Clark's Point is not part of the group. The only entities that agreed to contribute funding to the borough study effort were the City of Aleknagik and the City of Dillingham. Based on the progress to date, as well as the well documented past history of failed efforts at borough formation, it is not rational to assume that support for Borough formation will materialize in the future regardless of the outcome of any borough study.

There is no practical benefit to delay. Having forcefully proclaimed the Commission not bound by its earlier approval of Dillingham's local option annexation petition Ekuk cannot credibly claim the Commission will be precluded from approving a borough with or without detachment of portions of existing cities by approval of a Dillingham legislative review annexation petition.

Consideration of any future borough formation petition can easily include detachment of any previously expanded boundaries of an existing city²³. Alternatively, if a borough were ever formed in this area, any borough tax is simply added to Dillingham's fish tax as is the case in Pilot Point and Egegik. This is not complicated. It is identical to the situation in the Kenai Borough where both city governments and borough governments levy sales tax on the same transactions. Any new borough formed in the region would displace Dillingham as the tax collector and simply remit to Dillingham and Togiak²⁴ their portion of the fish tax.

The borough evaluation process can take place at whatever pace is deemed appropriate by entities in the region. Dillingham has always been willing to participate in that process as evidenced by its current good faith participation in the Interim borough task force despite knowing for sure that its participation would lead to exactly the request for delay contained in Ekuk's responsive brief.

As opposed to no harm to the Commission there is clear prejudice to the citizens of Dillingham and Manokotak from further delay. Namely the potential loss of a tax base for an indeterminate length of time during a period where an expanded local tax base is of greater significance than at any point in recent history.

²³ AS 29.06.040, 3 AAC.110.257.

²⁴ It is inconceivable to Dillingham that a borough would not include Togiak.

The Commission, having declined to direct filing of a borough petition should not assume a petition to create a borough will be submitted any time in the near future. The idea that a petition will originate from within the region as a result of the feasibility study is utter speculation²⁵. The Commission should not shirk from its duty to evaluate the Dillingham and Manokotak petitions on such a speculative basis.

Ekuk suggests the Commission “promote” a cooperative solution for revenue sharing via a “tax compact” agreement between Dillingham, Manokotak and unidentified persons. The Commission does not have authority to attach “conditions” requiring sovereign governments to reach agreements. Those governments alone have that responsibility. The Commission can and has directed consultation but it cannot mandate agreements.

3. Suggestion of Requiring a Tax Compact.

A “tax compact” is an agreement between two governmental entities with taxing authority which are taxing the same transaction. A tax compact is not used between governments not taxing the same transaction. Ekuk, Portage Creek and the tribe of Clark’s Point do not have taxing authority. Manokotak has taxing authority but has yet to adopt a fish tax. The Commission can “promote” borough formation all it wants but without prior approval of annexation there will be no incentive for engagement as evidenced by the lack of participation in the interim borough study group. The best thing the Commission could do to facilitate or “promote” such discussions is to approve Dillingham’s annexation petition. Ekuk, Manokotak and the District can then take their complaints to the Alaska Legislature and then to the courts should they desire. Based on past actions it will only be after that process is completed and annexation approved that substantial discussions of borough formation will proceed. And if annexation is not approved those discussions will simply not occur. Instead, the historical resistance to borough formation will continue.

4. Use of the Area Proposed for Annexation by Residents of Other Communities.

Several comments and portions of responsive briefs reference the “regional” nature of the Nushagak and Wood River fishing districts. Use of Nushagak Bay by residents from areas in addition to Dillingham does not require rejection of the current Dillingham petition. The existence of businesses in other communities is not threatened by annexation. Dillingham’s petition is not based on claims the City is the exclusive supplier of goods and services to each and every person and vessel fishing in the territory proposed for annexation.

²⁵ Even if it did, the process of preparing and submitting a Borough petition would require a great effort and face an uncertain reception from communities in the region and potential legal challenges from a wide array of players in the region. It is quite rational to project a 5 year process during which time the tax base would continue to escape taxation.

This situation is analogous to Wasilla residents who work in Anchorage. They live in one city yet regularly commute to another city to work. These Wasilla residents clearly have economic, social and transportation connections to Anchorage. It is common for transportation, economic, and social connections to exist among municipalities and regions.

Even in Bristol Bay this situation is the rule, not the exception. Table One below presents Commercial Fisheries Entry Commission (CFEC) data for Bristol Bay in 2008. The residency of fishermen who participate in each of the five Bristol Bay fisheries is shown. Each fishery and all the Bristol Bay commercial fishing district waters are regional in nature to the extent that fishermen from not only the adjacent home community, but also from all over Bristol Bay, all over Alaska, and from outside the state, use the waters and have economic, social and transportation connections to them. In Togiak, just under half the fishermen are from outside of Togiak, yet, Togiak was allowed to annex the entire 183 square miles of its adjacent commercial fishing district into its municipal boundary, thus enabling it to derive tax benefits from the adjacent fishery resource that is harvested by people from throughout the region and state.

In Bristol Bay’s five commercial fishing districts, participation rates by:

- the adjacent community varies from 2% to 55%;
- Bristol Bay region fishermen, but not from the adjacent community, varies from 4% to 18%;
- Alaskans from outside Bristol Bay varies from 12% to 41%;
- Non-Alaskan residents varies from 14% to 61%.

Bristol Bay commercial fishing waters are all “regional” in nature. What the Local Boundary Commissioners must examine and determine is whether Dillingham has an economic, social and transportation connection to these waters it is proposing to annex, and, if the totality of the facts in this case warrant annexation. 3 AAC 110.135.

Table One - 2008 Bristol Bay Fisheries Participation and Harvest, by Residency
also showing Local Fish Tax in Effect in the District

District	Residency of Persons with Commercial Landings	Percentage of Total Pounds of Harvest
TOGIK DISTRICT		7,000,839
• Togiak 3% Local Fish Tax in effect	207 total persons	total pounds
Togiak/Twin Hills residents	55%	76%
Other Local Bristol Bay residents	18%	8%
Other Alaskan residents	12%	8%
Non Alaskan residents	14%	7%
Unknown	3%	2%
UGASHIK DISTRICT		14,157,202
• Pilot Point 3% Local Fish Tax in effect	341 total persons	total pounds

<ul style="list-style-type: none"> • Lake and Peninsula Borough 2% Local Fish Tax in effect • Total = 5% Local Fish tax in effect 		
Pilot Point residents	3%	3%
Other Local Bristol Bay residents	9%	8%
Other Alaskan residents	41%	41%
Non Alaskan residents	46%	49%
Unknown	1%	0%
NAKNEK DISTRICT		
<ul style="list-style-type: none"> • Bristol Bay Borough 3% Local Fish tax in effect 	1,088 total persons	62,367,864 total pounds
Naknek/Kvichak residents	13%	11%
Other Local Bristol Bay residents	5%	4%
Other Alaskan residents	26%	22%
Non Alaskan residents	54%	62%
Unknown	2%	2%
EGEGIK DISTRICT		
<ul style="list-style-type: none"> • Egegik 3% Local Fish Tax in effect • Lake and Peninsula Borough 2% Local Fish Tax in effect • Total = 5% Local Fish tax in effect 	584 total person	41,582,661 total pounds
Egegik residents	2%	1%
Other Local Bristol Bay residents	4%	3%
Other Alaskan residents	31%	24%
Non Alaskan residents	61%	71%
Unknown	2%	1%
NUSHAGAK DISTRICT		
<ul style="list-style-type: none"> • No Local Fish Tax in effect 	807 total persons	43,742,147 total pounds
Dillingham residents	19%	19%
Other Local Bristol Bay residents	13%	10%
Other Alaskan residents	28%	30%
Non Alaskan residents	38%	40%
Unknown	2%	1%

Source: Commercial Fisheries Entry Commission

The following are important notes to the figures generated for harvests and participation in the Bristol Bay fishing districts:

- 1) The figures represent commercial catches on S03T and S04T permits only. Test fishing, confiscated catch, personal use or discards are not included.
- 2) Harvests represent all species of salmon.
- 3) Harvest pounds are represented by "round pounds" - the weight of whole fish.
- 4) Alaska resident and Nonresident status is determined by declared residency. Some recipients of emergency transfers of permits do not have declared residencies.
- 5) Local / Nonlocal Alaska resident status is taken only from persons with declared residencies.
- 6) Participation represents the number of persons who recorded landings on fish tickets. More than one

person can fish a permit during the year.

- 7) An individual can fish more than one district in a year.
- 8) Not all permit holders who actively fish will be counted in these statistics. Since 2004, dual permit operations have been allowed in the Bristol Bay drift gillnet fishery, and deliveries of fish are frequently recorded by only 1 of the 2 persons in the operation. Similarly, set gillnet operations often involve groups or families of permit holders where not all persons who are fishing will record landings. For more information on the extent of Bristol Bay drift gillnet dual permit operations, see CFEC report 09-6N.

5. A 30 Year Old LBC Analysis is Neither Binding Nor Persuasive.

As specifically discussed by the City in its initial brief, and by the LBC staff in its last report recommending approval of Dillingham's local option annexation petition, 1986 action related to Bristol Bay regional boundaries is no reason to reject the City's 2016 legislative action annexation petition²⁶. As previously recognized by LBC staff: "What happened in the past, while pertinent, does not necessarily establish precedence".

The proposed annexation meets the statutes and regulations in effect today. This annexation, which enables a local fish tax to be enacted in Nushagak Bay, is critical to Dillingham and the region, is in the state's best interest, and is fair and equitable.

The current version of the regulations contains a specific exception. 3 AAC 110.130(c)(2) ("except if those boundaries are justified by application of the standards of 3 AAC 110.090-3 AAC 110.135"). This exception allows the Commission to include large areas of water such as proposed by Dillingham within proposed expanded municipal boundaries if the resulting city meets regulatory standards regarding any one of, "need" 3 AAC 110.090, "character" 3 AAC 110.100; "resources" 3 AAC 110.110; "population" 3 AAC 110.120, "boundaries" 3 AAC 110.130, and is in the "best interests" of the state. 3 AAC 110.135. As demonstrated in its initial petition and elsewhere herein, Dillingham's request meets the standards of these specific requirements. Accordingly, the inclusion of a large area of water in the annexation petition is not of itself mean the area is not part of the Dillingham community.

In addition to the changed regulatory environment other conditions have changed significantly since 1986. Many efforts at Borough formation have floundered evaporating the argument annexation will prevent a Borough from forming. Clearly annexation by Dillingham (which never occurred) cannot be said to have caused the failure of a borough to be formed.

The most logical reading of the historical record results in the conclusion a borough is unlikely to be formed in this area for reasons unrelated to the instant petition for annexation.

²⁶ Exh. H, p. 27-28; Exh. O, p. 56-59; In fact, if the LBC's decision on Dillingham's legislative review petition was based only on precedent, the most recent precedent is Commission approval of Dillingham's local option petition.

Other communities have increased connections with Dillingham since 1986. Aleknagik regularly sends high school students to the City of Dillingham School District's high school.²⁷ Dillingham's provision of educational services to communities indirectly impacted by the proposed annexation emphasizes Dillingham's function as a regional hub for an area that extends even beyond the boundaries of the territory proposed for annexation. There are other examples of communities more tightly connected to Dillingham in 2016 than they were in 1986. Aleknagik's solid waste is deposited in the Dillingham landfill three times a week and residents of Aleknagik receive services daily from the Dillingham Senior Center.

Perhaps the most significant changed circumstance since 1986 is Dillingham's construction of millions of dollars in infrastructure supporting the commercial fishing community. A new landfill has been built at a cost in excess of three million dollars. Nearly thirty million dollars has been spent since 1986 on multiple boat and harbor improvements some of which are currently being either designed (bank stabilization) or constructed (bulkhead extension)²⁸. These include bulkhead improvements, a new dock, new boat ramps, a new crane for loading and unloading vessels and substantial bank stabilization projects. These facilities must be maintained and eventually replaced. Many of the original funds came from state and federal grants; however it is simply irresponsible to assume grants will fund replacement of these facilities. The facilities benefit the commercial fishing community. A tax levied on the fish harvested in the area proposed for annexation is an obvious and rational source of maintenance and replacement funds.

6. The Existence of Facilities or Plans for Future Facilities in Other Communities does not Diminish Dillingham's Ties to the Territory Proposed for Annexation.

Ekuk continues to perpetuate the notion of a geographic "village of Ekuk". Ekuk is not the sole property owner of property adjacent to Ekuk Beach. The referenced health aide and clinic is provided by Bristol Bay Area Health Corporation ("BBAHC") and another corporation (Ekuk Fisheries LLC). This service is not being provided by a municipality, it is being provided by a private corporation - BBAHC. BBAHC is based in Dillingham. See, <http://www.bbahc.org/>. BBAHC is part of the community of Dillingham and receives City services (police, fire, water, sewer, roads). Accordingly, BBAHC's ability to provide health service to those fishing for Ekuk Fisheries is not properly considered a service from another municipality. BBAHC operates a major hospital in Dillingham and the medical services available are used by those participating in the commercial fishery within the area proposed for annexation. Dillingham is the primary base for delivery of extensive medical services to those permit holders fishing in the Nushagak District.

²⁷ Affidavit of William McLeod.

²⁸ Exhibit P.

The Native Village of Ekuk references plans for future cooperation between Ekuk and Clark's Point²⁹ village councils for a road and landfill support. Ekuk said the same thing five years ago but does not explain how this plan has progressed over the past 5 years. Pending Clark's Point – Ekuk joint projects will be allowed to exceed regardless of annexation. There are lots of planned future improvements that may or may not ever come to fruition. For example, Dillingham is currently working with Manokotak on a cooperative basis to support building a road between the two communities.

Dillingham has documented real costs it bears to provide several municipal services and infrastructure used by fishing and processing industry. Manokotak claims these calculations were not explained but they were³⁰. Allocation of landfill costs as related to the fisheries business is explained at page 54 of the petition. Allocation of public safety costs attributable to commercial fishing activity is explained at pages 54 and 55 and is based on a reasonable allocation of 7% of costs. These costs are totaled on Exhibit C-1 (lines 39" a" through 45).

7. Dillingham's Annexation Petition Meets Annexation Standards.

A. Previous Interpretation of Annexation Regulations

Ekuk, Manokotak and the District state the Commission is not bound by its earlier decision approving Dillingham's petition for annexation of the same territory by local option. But that petition should not have been approved if it failed to satisfy applicable regulatory standards for annexation. The same legal arguments based on regulatory standards raised by Ekuk, Manokotak and the District were raised in the previous annexation proceeding. In the course of deciding to approve Dillingham's local option annexation petition it was necessary for the Commission and LBC staff with assistance from the Attorney General to interpret and apply the agency's regulations. In particular it was necessary to decide and apply standards relating to community, need for government and to assess whether annexation of the large unpopulated area of Nushagak Bay was "justified by the applications of the standards in 3 AAC 110.090-1.35 and are otherwise suitable for city government"³¹.

These interpretations and applications establish agency precedent. There has been no change in the language of the annexation regulations since 2011. The area Dillingham seeks to annex is identical to the area covered in the previous petition. The basis for annexation is identical to that presented previously. It would be the height of arbitrary administrative action for the Commission or LBC staff to interpret identically worded regulations differently when

²⁹ Ekuk's claim Clark's Point has "approximately 100 persons engaged in the set net fishery" should not be treated as an assertion those persons are either; 1) Clark's Point residents or 2) fishing within city boundaries. This is not the case.

³⁰ Manokotak Brief at pp. 11-12.

³¹ Exh. Q.

presented with a petition in which the same city seeks to annex the same territory using the legislative review procedure rather than the local option procedure. The only difference between Dillingham's local option annexation petition and Dillingham's legislative review annexation petition is procedural not substantive.

The prior agency interpretation of the regulations is found in the preliminary and final staff report and briefing submitted by the Attorney General. They include a determination that the territory proposed for annexation to Dillingham constitutes a community and satisfies the "limitation of community" standards. Ekuk's repeated arguments, parroted by Manokotak and the District ignore the exception clause of 3 AAC 110.130 (c)(2). The prior legal conclusion that entire geographical regions may be annexed if justified by the standards in 3 AAC 110.090-.135 and are otherwise suitable for city government" remains a logical and valid agency interpretation of the Commission's regulation.

Dillingham recognizes that Manokotak's annexation petition requires the Commission to make a decision about where the boundary between Dillingham and Manokotak should be located. The decision about where to draw the boundary between competing annexation petitions should proceed applying the same interpretations of annexation regulations made when Dillingham's local option petition was considered. Determining where the Dillingham-Manokotak boundary should not result in denying Dillingham's legislative review annexation petition.

The other claimed differences between the current petition and the 2010 petition do not merit a 180 degree departure from the previous interpretation and application of annexation regulations. Ekuk notes Mr. Hargrave's appointment but the author of the LBC staff reports has not changed. That the Southwest District, Clark's Point, and Portage Creek are respondents is not a reason to change regulatory interpretations. These entities all commented and opposed Dillingham's local option annexation petition. The existence of the interim borough study group has been previously discussed. The work of the group can proceed after annexation.

B. Community and Limitation of Community

LBC staff has previously determined under an identical factual setting the "existing community" factor is met³². As previously mentioned by the LBC staff, "[i]nterpreting the limitation of community doctrine in the way respondent urges would mean that no unpopulated lands could be annexed into a city." In addition, Ekuk's suggested interpretation "would greatly limit the city's ability to grow" and would "limit the city's ability to anticipate and be prepared for anticipated growth." It also would "mean that no waters (submerged lands) could be annexed to a city, unless the waters constituted a community," again something directly contrary to past agency action in approving annexations. This interpretation of its

³² Exh. H, pp. 17-21; Exh. O, p. 57.

regulation brings a state-wide perspective to the boundary adjustment process. The phrase “limitation of community” does not establish an annexation standard more restrictive than the specific standards in existing regulations.

Ekuk and Manokotak repeatedly mention the “limitation of community doctrine” which it claims is a “long-standing agency interpretation but ignores application of this interpretation to Dillingham’s local option annexation petition. Ekuk references Mobil Oil v. Local Boundary Commission, 518 P.2d 92 (Alaska 1974), as the source of the limitation of community doctrine. There, the “limitation of community doctrine” argument was raised by an oil company opposing formation of the North Slope Borough. The Alaska Supreme Court rejected the argument. The Court analyzed “limitation of community” as a matter of substantive due process. The due process argument, in turn, was based on whether the alleged lack of benefits to those potentially subject to local taxes provided by the annexing government made the annexation “arbitrary.”³³

The existence and application of “limitation of community” in Alaska must be based on an interpretation and application of substantive LBC regulations. The inclusion of the phrase “limitation of community” in those regulations should be applied in the substantive due process context to limit annexation of “largely unpopulated areas” or “geographic regions” when doing so would result in an “arbitrary” municipal boundary by inclusion of an area not receiving or anticipated to receive municipal services. The “doctrine” does not incorporate by reference some additional requirements not mentioned in the Commission’s regulations.

Ekuk and Manokotak apparently believe limitation of community is a blanket prohibition of a city ever annexing vacant territory or ever annexing adjacent water. This is an incorrect view. Any “limitation,” must be grounded in the context of the Mobil case—as a matter of substantive due process. Limitation of community would come into play if an annexing municipal corporation has so little connection with the persons doing business in the territory proposed for annexation as to raise substantive due process issues regarding the city’s ability to extend regulatory and taxing powers into the area. Dillingham’s historical connection to the Nushagak District and provision of municipal services to those who do business there easily passes this “limitation of community” test.

Ekuk and Manokotak argue examining the relationship of an existing city to territory proposed for annexation to determine if the territory may be considered part of the same community is always a self-fulfilling requirement. This is most decidedly not the case. For example, if a hard rock mine was opened outside existing city boundaries and Dillingham proposed to annex the mine, Dillingham- a fishing community would be proposing to annex a mining community. There would not be, as there is here, any current or historical relationship between the existing community of Dillingham and the mining industry. There would not be, as there is here, a decade’s long history of providing municipal services to miners. The current

³³ Antieu on Local Government Law, Sec. 1.10 (2nd. Ed).

annexation is one where an existing fishing community seeks to annex adjacent fishing grounds. The connection between the adjacent fishing grounds and Dillingham has existed since before Alaska was a state and before Dillingham was incorporated³⁴. It was correct for the Commission to conclude the adjacent fishing territory is part of the greater community of Dillingham in 2011. It would be equally correct to reach the same conclusion 5 years later.

The presence of residents of other communities with Nushagak District permit holders does not require the Commission to change the manner in which it previously interpreted community and limitation of community. Non-resident permit holders also make up a significant portion of permit holders in other cities with a local fish tax. Seasonal populations are not inherently inconsistent with the notion of community.

The presence of a large area of water within the proposed new boundaries of the City of Dillingham is not inconsistent with the existence of a community based in Dillingham. Other towns in Alaska include areas of water used by seasonal participants in commercial fisheries. St. Paul, (255 sq. miles of water, 40 sq. miles of land), Togiak, (45 sq. miles of land, 183 sq. miles of water); Unalaska (110 sq. miles of land, 110 sq. miles of water); Pilot Point, (25 sq. miles of land, 115 sq. miles of water); and Sand Point (7 sq. miles land, 21 sq. miles of water) for example. Clearly, the mere presence of a large area of water within a boundary is not determinative of the existence of a community connected with an incorporated city.

That Dillingham's need for annexation is based on securing a source of funding for continued maintenance, operation and improvement of existing infrastructure to support commercial fishing while Togiak's need for annexation was based on securing a source of funding to address alcohol abuse problems resulting from commercial fishing is not significant. The underlying justification is addressing on shore impacts and expenses related to commercial fishing. Dillingham's need for annexation is fundamentally the same need which the Commission found compelling in approving Togiak's annexation and Egegik's incorporation. There is no conceptual difference between a need for revenue to address seasonal commercial fishing related alcohol expenses and a need for revenue to operate, maintain and enhance significant public infrastructure such as docks and harbors supporting seasonal commercial fishery efforts. Both are genuine community needs and both are appropriately funded in part by a local fish tax levied within an expanded municipal boundary.

Dillingham submits that the following factors are relevant in considering the persons seasonally fishing in the territory proposed for annexation part of the community of Dillingham:

1. They have a common interest in the health and welfare of the commercial and subsistence salmon fishery. This would include a common interest in: (a) regulatory issues impacting the salmon fisheries, (b) potential impact to the fishery from proposed offshore oil and gas development or onshore mineral development, (c) the

³⁴ Exh. R.

availability of air transportation from the Dillingham airport for shipment of processed fish out and needed supplies in to Dillingham.

2. They have a common interest in the operation, maintenance and upgrade of port and harbor facilities in Dillingham.
3. They have a common interest in the availability and adequacy of medical services, vessel repair services and supply services in Dillingham.

This community of interests among and between persons commercial fishing in the area proposed for annexation is sufficient to qualify these persons as a “community” as that term is used in 3 AAC 110.130(c)(1).

C. Compatible in Character.

Ekuk’s compatibility argument is premised on an assumed requirement that Dillingham must show it is the only community compatible community or the “most” compatible community. This is not the regulatory standard as previously interpreted by the LBC staff. Dillingham is a fishing community and is compatible with the adjacent fishing waters.

D. Territory/ Reasonable Need for City Government.

“Territory means the geographical lands and submerged lands forming the boundaries in a petition regarding city government.”³ AAC 110.990(32) The “territory” in Dillingham’s petition includes both the land and submerged land within existing city boundaries and the land and submerged land within the proposed expanded city boundaries. The LBC staff included both areas in its analysis and determination of whether this territory met the regulatory requirement of an existing “community.” It is also logical to apply this definition of territory in determining whether there is a reasonable need for city government.

Dillingham has consistently maintained that the historical provision of city services to support the commercial activity taking place within the territory proposed for annexation shows there is a reasonable need for city government. Use of city services within this territory both by existing city residents and residents from outside the city meets the standard. These are not services provided “for Dillingham” but services provided “for” and “to” a community of commercial fishing permit holders within the territory proposed for annexation many of whom do not help pay for those services. That these services are provided from shore does not change the fact that the benefits of these services are received by persons within the territory proposed by annexation whose economic pursuits are supported by Dillingham’s services. Ekuk’s arguments this fails to establish a “reasonable need” for these services focuses on semantics while ignoring the actual benefits provided by Dillingham to those participating in the commercial fishing business within the territory proposed for annexation.

Similarly, Ekuk 's claim a nonexistent borough can more reasonably provide services than an existing city elevates semantics over logic. No borough is ever going to replicate the public infrastructure supporting commercial permit holders already built, operated and maintained by Dillingham. A borough is not going to build an entirely new port or harbor facility at some other location outside Dillingham. A borough is not going to build and operate a landfill that duplicates the existing Dillingham landfill. Rather, the existing infrastructure centered in Dillingham will be the focus of support to the commercial fishing fleet. A rational practical examination of the history of this area, and the City's existing facilities, compels the conclusion that extension of existing City of Dillingham boundaries, rather than the theoretical, formation of a new borough is the most efficient and effective way to serve the area proposed for annexation.

E. Human and Financial Resources.

Dillingham has been providing services to the commercial fishing industry for years. Ekuk's claim Dillingham does not have the capability necessary to continue to do so ignores this history. Ekuk's analysis is limited to the area proposed for annexation and ignores an obvious fact. Dillingham's expanded boundaries will include the existing population and financial resources of Dillingham. Under Ekuk's and Manokotak's proposed approach it is unlikely any annexation petition would ever be approved unless the added territory was itself capable of providing services. This is contrary to a basic concept of annexation- that an existing city is either already providing services or capable of providing services over an expanded area.

F. Stable Population.

Similarly Ekuk suggests the Commission ignore the existing population of Dillingham when determining whether the post annexation population will be sufficiently stable to support city government. Dillingham is not aware of any annexation proceeding in which the existing population of the annexing city is ignored in determining whether this standard is met. It makes no sense to apply this standard using the approach suggested by Ekuk.

Perhaps recognizing this, Ekuk references the 2010 census and an unspecified possibility of "volatility" in seasonal populations to claim the population fails to satisfy the "sufficiently" stable population standard. The most recent population figures for Dillingham undercut Ekuk's argument. Dillingham's population has increased since 2010³⁵. And the 2,447 people in Dillingham compare favorably to the populations of other fishing communities in Bristol Bay³⁶.

³⁵ See, Exh. B to Dillingham's Responsive Brief.

³⁶ Exh. S. (Togiak 765, Pilot Point 69, Egesik 109).

The Bristol Bay commercial fishery has existed for 125 years. There are numerous instances of generations continuing to commercial fish in the area proposed for annexation. Many of the same permit holders return year after year after year. Permit data compiled by the Commercial Fisheries Entry Commission calculated an annual statewide permit turnover rate of 8 per cent.³⁷ Even assuming that none of the permit transfers are to children of original permittees (which is certainly not the case); this transiency of the commercial fishing community is similar to Anchorage or State of Alaska residents. (Only 41% of Anchorage residents lived in the same house in 2000 as they did in 1995). (169,000 people left Alaska between 2005 and 2007, while 108,000 people moved to Alaska during the same period). Based on a population of 683,000, there is an annual transiency rate statewide of between 8.2% (outbound) and 5.2% (inbound)³⁸. Participants in commercial fishing are as “stable” as the average Alaska resident.

G. “Best Interest of the State”.

Ekuk’s claim that a determination that a strong “hub” community is a change in existing agency regulation fails to understand the scope of the phrase “best interest of the State”. That is the context in which staff and the commission previously determined Dillingham’s petition should be approved. This was not a changed interpretation of agency regulations it was an application of a standard- “best interest of the State” to a petition submitted by the same city seeking to annex the same territory. The LBC has especially broad discretion to interpret and apply the “best interests of the State” regulatory standard.

H. The “except” clause of 3 AAC 110.130(c)(2).

The LBC and LBC staff also relied on the “except” clause when approving Dillingham’s previous petition. The except clause provides an alternate basis for approval of Dillingham’s petition. Ekuk claims the except clause swallow the rule. That is an incorrect approach. The except clause provides the LBC with flexibility in the exercise of discretion provided by the Constitution to apply a state-wide perspective to proposed expansion of a municipality’s boundaries on a case by case basis.

³⁷ Exhibit T is an excerpt from the executive summary of a CFEC report titled “Changes in the Distribution of Alaska’s Commercial Fisheries Entry Permits, 1975 to 2009”. The table identifying all permit transfers in this period appears at p.11 of the report.

³⁸ See <http://www.fedstats.gov/qf/states/02/0203000.html> and <http://pewsocialtrends.org/maps/migration/>, titled “Who Moves, Who Stays Put, Where’s Home”, Pew Research Center (Dec. 2008). The complete report may be found at <http://pewsocialtrends.org/assets/pdf/Movers-and-Stayers.pdf>.

I. Legislative Review Annexation Standards are Not Substantively Different from Local Option Annexation Standards, 3 AAC 110.140 Standards are Met.

Ekuk's claim regulatory standards are substantially different for a legislative review petition is not correct as evidenced by Ekuk repeating the same arguments addressing the same regulations in its responsive brief. Dillingham does not agree.

3 AAC 110.140 first requires a legislative review petition to meet the same annexation standards (3 AAC 110.090-135) a local option petition must meet. This is obviously identical to a local option petition. Then 3 AAC 110.140 requires the petition to meet one of 8 enumerated "circumstances". Ekuk's argument these "circumstances" are not met hinges on; 1) interpreting "territory" to exclude the existing city and its residents (who make up a significant portion of the permit holders commercial fishing within the Nushagak District); and, 2) ignoring that city facilities and services are already provided to permit holders and have been for years; and, 3) simply ignoring the fact enlarging a city promotes local control and fewer governmental units.

The LBC staff has previously interpreted territory as including the existing city of Dillingham. And the definition of territory applies equally to all uses of the word in 3 AAC 110. And it makes no sense to Dillingham that "maximum local self-government, as determined under 3 AAC 110.981" and "a minimum number of local government unites as determined under 3 AAC 110.982" means one thing when used in 3 AAC 110.135 and some "higher standard" under 3 AAC 110.140(7). If, as previously determined, Dillingham's annexation petition passes the 3 AAC 110.935 test it passes the 3 AAC 110.140(7) test. Annexation would extend local government to a territory or population of the unorganized borough where no local government exists thereby meeting the requirement of 3 AAC 110.981(7). It would enlarge the boundaries of an existing city thereby meeting the minimum number of local governmental units test of 3 AAC 110.982(7).

Similarly, 3 AAC 110.140(8) references standards for incorporation of cities and "the best interest of the State". One incorporation standard is a constitutional policy of maximum local government with a minimum number of local governmental units. This means the same thing for purposes of 3 AAC 110.140(8) as it does for 3 AAC 110.140(7) and 3 AAC 110.135³⁹. The best interest of the state means the same thing in 3 AAC 110.140(8) that it does in 3 AAC 110.135 and 3 AAC 110.042.

Dillingham maintains the difference between a local option petition and a legislative review petition is procedural not substantive. An annexation that is in the best interest of Alaska under the local option procedure is also in the best interest of Alaska under the legislative review procedure.

³⁹ The discussion of this standard in 3 AAC 110.140(8) not 3 AAC 110.981 is what should have been referenced at page 86 of Dillingham's Petition.

Ekuk, claims city finances are not exposed to harm or danger claiming Dillingham is “prospering”. A similar argument is made by Manokotak and the District. This is simply not true. The city has provided ample evidence of the exposure to financial harm resulting from providing services to persons harvesting public resources from waters immediately adjacent to the city without fully paying for those services. These persons are obviously a population. The makeup of that population is substantially tracked by statistics many of which have been submitted by Manokotak, Dillingham and Ekuk. There is no need for a regulatory definition of population. Having those services provided by an existing city obviously results in a minimum of governmental units. The city has also shown what has been done in the past is impractical to continue doing in the future absent annexation. The improvement in the financial stability of the city enhances the city’s ability to meet incorporation standards which include an examination of financial viability of a proposed city⁴⁰.

The “Dillingham does not need the revenue” comments ignore an elephant in the room. Dillingham has substantial deferred maintenance including bank stabilization and erosion control at the Dillingham harbor⁴¹. There is a current backlog of more than \$27 million of needed capital projects. Existing property tax and sales tax revenue is not sufficient to address this need⁴². This concept has already been “effectively rebutted” by Dillingham.⁴³

Establishing that Dillingham is in a financial crisis is not a specific regulatory standard for annexation. As previously recognized by the LBC staff an imminent financial crisis is not required. Staff’s previous conclusion that without an additional source of local revenue Dillingham would be “tipping toward a gradual decline”⁴⁴ is not refuted by the City’s most recent financial reports. That additional revenue would strengthen Dillingham economically cannot rationally be disputed.

Moreover, Manokotak has a basic misconception about what a “reserve” account is and why funds are held in reserve. Of the amount held in reserve as of July 1, 2015 more than \$2,000,000 was designated or restricted for a variety of purposes.⁴⁵ And, the primary reason for the City’s ability to reverse deficit spending in FY 2012 and FY 2013 was the influx of fish tax revenue. This stopped in FY 2014.

The petition demonstrated the financial strains experienced by Dillingham from operating the small boat harbor at deficit levels. The FY 2016 budget is a deficit budget. A

⁴⁰ 3 AAC 110.020.

⁴¹ Exh. U.

⁴² Exh. V; Exh. Z.

⁴³ Exh. H; Exh. O.

⁴⁴ Exh.H at p. 24 and pp. 30 – 32.

⁴⁵ Affidavit of Navin Bissram.

transfer of \$486,958 from the fund balance has been appropriated to balance the budget. The City cannot continue to operate at a deficit without having to reduce or eliminate services⁴⁶.

Nor are the City's tax rates irresponsibly low. Manokotak criticizes the City for not having raised sales tax, alcohol and bed tax or property tax rates since 2004. The inference Dillingham residents are undertaxed compared to other Alaska communities is simply not true. Dillingham's property tax rate last fiscal year was 13.00 mills. This is identical to the Bristol Bay Borough (who has a fish tax) mill rate. It is more than the mill rate of other fishing communities⁴⁷. Only 6 municipalities in Alaska have a higher mill rate⁴⁸.

Dillingham's sales tax rate is 6%. This is 3 times Manokotak's tax rate. Only three out of 128 municipalities in Alaska have a higher rate⁴⁹. Dillingham's alcohol tax rate is 10%- this is the highest alcohol tax in Alaska. Dillingham's bed tax rate is 10%. Only Anchorage and Bethel have a higher bed tax⁵⁰. The implication Dillingham has a low per capita tax burden compared to other Alaska municipalities is false⁵¹.

The implication made by both Manokotak and Ekuk that Dillingham's petition should be viewed with disfavor because the city has not employed deficit spending every year is misplaced⁵². There is no basis in annexation regulations to disqualify Dillingham from seeking to expand an existing tax base through annexation for exercising fiscal responsibility. That the citizens of Dillingham have avoided deficit spending and have approved annexation⁵³ in advance of a fiscal crisis should be applauded. This is evidence of the city's capability of providing services on a continuing basis to commercial permit holders. The concept advanced by Respondents- that Dillingham should first go broke and then start an annexation process, is stupid. The need for additional sources of revenue to maintain, operate and improve existing fishing-related facilities is financially obvious. The need will only grow as existing facilities age. Ongoing maintenance is not appropriately funded from reserves. The City's annexation petition represents prudent realities. The facilities historically used in support of commercial fishing in the area proposed for annexation will not continue to exist without additional funding sources for their maintenance.

⁴⁶ Id.

⁴⁷ Exh. W, (Cordova, Homer, Kodiak, Kodiak Island Borough, Petersburg Borough, Unalaska).

⁴⁸ Id. (Anchorage (no sales tax), Fairbanks (no sales tax), Fairbanks North Star Borough (no sales tax), North Slope Borough(no sales tax- NSB mill rate applies to property in Anaktuvak Pass, Atkasuk, Barrow, Kaktovik, Nuiqsut, Point Hope, and Wainwright) , Valdez(no sales tax) and North Pole(4% sales tax).

⁴⁹ Id. (Wrangell Borough, Selawik and Kodiak)

⁵⁰ Id.

⁵¹ As is the implication the Alaska Taxable data includes state fisheries tax revenue sharing in its calculation. There is no indication in the publication this revenue is included in calculation of per capita taxes.

⁵² It is also not current, the City needed to access reserves to balance its budget in FY 2015. Exh. V.

⁵³ Manokotak suggests that Dillingham voters barely approved annexation. In fact, the vote was 54.8% in favor of annexation and 45.2% opposed. A 9.6% margin of victory is not a close election.

Manokotak also questions the City's retention of fish tax received after annexation⁵⁴. Manokotak ignores the fact the LBC's annexation decision was under appeal. It would not have been smart for the city to commit to using these funds on a regular basis until knowing the outcome of the appeal. Luckily the city did not make long term commitments based on the fish tax revenue source. The City did, however, follow through with its commitment to contribute fish tax revenue to a borough study and to establish and maintain a fund for future fisheries related capital improvements⁵⁵.

Dillingham has a significant need for improvements in basic infrastructure⁵⁶. The City must replace and upgrade infrastructure previously funded with state and federal grants which cannot realistically be expected to recur⁵⁷. The City's harbor revenues are not sufficient to cover operating costs.

A rational analysis of Dillingham's financial situation cannot simply ignore the need for local support of the city's school district. That support currently involves a combination of state funding and local taxpayer funding. It is not realistic to expect state funding of education will not be reduced when the state is facing a \$3 billion dollar budget deficit. Expanding the tax base generates revenue that will assist Dillingham in continuing funding of local schools⁵⁸.

The tax base represented by the salmon that return to the Nushagak District is unquestionably important to the long term fiscal stability of Dillingham. Any suggestion this tax base does not "need" to be accessed by Dillingham is wishful thinking. We cannot continue to live in the past. As previously stated by the Commission's lawyer it "would be irresponsible" for the Commission and not in the best interest of the state of Alaska to continue to allow this tax base to swim away⁵⁹. It would be even more irresponsible to allow this to occur based on an assumption revenue sharing under AS 29.60.450 and general revenue sharing will continue to be immune from legislative reduction.

8. Manokotak Applies Standards to Areas Dillingham Does Not Seek to Annex.

⁵⁴ Fish tax revenue was received over multiple fiscal years. Manokotak focuses on the 848,910 received in fiscal year 2013. Because of the timing on when payments are due this includes tax revenue from fish harvested after July 1, 2012 and in June of 2013. A more complete picture is provided by averaging the \$1,329,063 in fish tax revenue in fiscal years 2012, 2013 and 2014 averaging them at \$443,021 per year. Exh. X.

⁵⁵ As the Commission may recall, these commitments were made by Resolution 2010-85. Exh. Y. The commitment was codified. DMC 4.07. The City accounts for this commitment in 2 separate funds which are part of the consolidated fund balance of the City. Fund 2720 has an accumulated balance of \$67,480. The borough study fund (Fund 2725) has an accumulated balance of \$37,441. Dillingham's contribution to the ongoing borough study fund (\$10,000) will be debited against this fund. See also, Exh. II.

⁵⁶ Exh. Z, Affidavit of Rose Loera.

⁵⁷ Exh. AA.

⁵⁸ Exh. Q, p. 23.

⁵⁹ Id., p. 36.

Manokotak’s discussion of annexation standards focuses on areas Dillingham does not seek to annex- the uplands of Tract C of Manokotak’s petition. Dillingham is not seeking to deprive Manokotak of the opportunity to provide services in this area if Manokotak desires to do so.

9. Disincentives to Borough Formation or Future City Annexations are not a Practical Concern.

Ekuk again argues approving the City’s annexation petition is approved that will provide a “disincentive’ to Borough formation. In doing so, they harken back to similar concerns expressed by the LBC in 1986.

Even if the Commission believes impact on theoretical future borough formation should be examined, a review of past history indicates annexation by Dillingham is not a realistic impediment to borough formation. This was previously recognized by LBC staff. The current process of the Interim Borough Study Task Force can continue regardless of approval of Dillingham’s legislative review annexation petition. It is also worthy. Furthermore, of the many commenters responding to Dillingham’s petition only a single person promised to support Borough formation!

The basic premise regarding “disincentives” to borough formation is itself a flawed assumption. It is assumed a local Dillingham fish tax would result in a “loss” of “over half the Nushagak salmon tax base”. The experience of other communities demonstrate the feasibility of municipal fish tax within a borough.

Annexation is in the best interests of the State for other reasons as well. Dillingham is today, and will always be, the most logical local government to provide essential public services and facilities to support the commercial fishing fleet harvesting salmon in Nushagak Bay. The proposed annexation provides a means (levy and collection of a local fish tax on transactions that currently are not taxed) that has proven successful in the development of sustainable communities in Alaska. A fiscally sustainable Dillingham is certainly in the state and region’s best interest. Capturing revenue escaping the region from non Alaskans is in Dillingham’s and the region’s best interest.

10. Increasing Harbor Fees is Not a Feasible Option to Ensure Services.

Manokotak (and others) suggest Dillingham should simply raise its current harbor fees⁶⁰. Manokotak suggests Dillingham match the harbor fees charged by Valdez, Cordova, Seward, Whittier, Homer and Unalaska (collectively “other harbors”). This appears grounded in an

⁶⁰ The tariff submitted by Manokotak is a May 2015 tariff. This implemented a substantial fee increase. The comparison port used as a basis for the fee increase was in Bristol Bay. Affidavit of Gene Barrett.

assumption that Dillingham's harbor is equivalent to these harbors. This is not true. As can be seen by the attached photographs⁶¹, Dillingham's harbor facilities are not the equivalent of any of these other harbors.

Dillingham's harbor does not offer year round access to adjacent water. All of the other harbors do. Dillingham does not have finger floats and boats must raft together to use common floats. All of the other harbors do. Dillingham's harbor does not offer electric hookups. All of the other harbors do. Dillingham's boat harbor does not even offer all tide access- it is only available at mid to high tide⁶². All of the other harbors offer all tide access. Lower fees are consistent with fewer amenities, services and more restricted access to the basic purpose of a harbor- launching a vessel.

11. Clark's Point did not Lose State Fish Tax Because of Annexation.

Manokotak (but not Clark's Point in its initial responsive brief) expresses a concern that expanding Dillingham's municipal boundaries will increase the amount of fish processed within the city by floating processors to the detriment of Clark's Point. (Manokotak brief at 6). If Manokotak's theory on Clark's Point past entitlement is correct, Clark's Point, in effect, has been receiving a windfall from the State in the form of shared commercial fisheries tax to which Clark's Point was not legally entitled. Losing revenue a municipality was not legally entitled to receive cannot be attributed to approval of Dillingham's annexation petition. Such a result would be required by existing law regardless of whether annexation is approved.

If floating processors were in fact located outside the boundaries of Clark's Point, Clark's Point would never have received a portion of the state fisheries business tax⁶³. That clearly is not the case as shown in the information submitted by Manokotak. Clark's Point received \$53,989 in 2010 (pre-annexation) and 45,332 in 2012 (post annexation). The variation is not properly attributable to annexation but whether floating processors decide to operate inside the city of Clark's Point.

There is no reason to believe the past determinations of the State as to whether floating processors are inside the boundaries of Clark's Point for purposes of the shared fisheries

⁶¹ Exh. BB.

⁶² Affidavit of Gene Barrett.

⁶³ The boundaries of Clark's Point extend to mean low water so it clearly is feasible for a floating vessel to be within Clark's Point boundaries. The state fisheries business tax is AS 43.75.13 and the state landing tax, AS 43.77.060 shared based on AS 29.60.450. Processing that occurs outside of any municipality is tallied from the Bristol Bay Fishery Management Area (FMA) and placed into a statewide pool. This is commonly called the state shared or extraterritorial fish tax. It is distributed to municipalities based on how much was collected statewide, from within the FMA, and then a formula is used to distribute it based on a combined per capita split and per community split. Dillingham does get a share of this revenue, as does Aleknagik, Clarks Point, Ekwok, Manokotak, New Stuyahok, Togiak and the Aleutians East Borough.

business tax would change as a result of annexation. If Clark's Point was entitled to shared revenue in the past it will continue to be entitled to shared revenue in the future⁶⁴.

12. Dillingham's Plan for Law Enforcement is Similar to Other Bristol Bay Communities.

Manokotak, Ekuk and the District incorrectly claim Dillingham's police department will not be providing services in the territory to be annexed. This overlooks what the City actually said in the petition. It also ignores the services provided after Dillingham's local option annexation petition was approved. The Dillingham police department will be providing emergency response and Trooper support up to a mile off shore⁶⁵. These services were provided after annexation⁶⁶. It is simply not true to say no police services will be provided within expanded city boundaries.

The City's transition plan is consistent with how law enforcement services are actually provided in other Alaskan coastal communities. The Bristol Bay Borough police department does not provide law enforcement response on the water within borough boundaries. The Aleutians East Borough, the Kodiak Island Borough and the Lake and Peninsula Borough do not have police departments⁶⁷. The City of Kodiak does not regularly provide on the water law enforcement within city boundaries⁶⁸. The City of St. Paul will respond up to 3 miles out but only if transportation is provided by others as the St. Paul department does not own a boat⁶⁹.

Even if the City was the only law enforcement presence within the Nushagak District, the City's ability to respond would be limited by conditions at the small boat harbor. This is not an "all tide" facility. Vessels can be launched only at certain tide levels⁷⁰. Objections to annexation based on Dillingham not having previously reached an agreement with the State of Alaska regarding mutual aid for law enforcement services on the waters within the Nushagak District are not a valid basis on which to deny annexation. The State Troopers themselves do not regularly and routinely respond on waters within the Nushagak District other than to

⁶⁴ There is reason to be concerned about whether the State will continue to share this tax with municipalities at all. The current law is found at AS 29.60.450. For any municipality including Clark's Point or Dillingham to assume this category of revenue sharing will remain "off the table" during the present state fiscal crisis is not prudent. In fact, the risk all forms of state revenue sharing will be reduced or eliminated has increased since Dillingham's local option annexation petition was initially approved.

⁶⁵ Dillingham Petition p. 21.

⁶⁶ Dillingham Petition pp. 10-11.

⁶⁷ This can be verified both by looking at the web sites for these municipalities and by reviewing their municipal codes.

⁶⁸ Exh. CC, Aimee Kniazowski e-mail to B. Chandler.

⁶⁹ Id., Ron Baird e-mail to B. Chandler.

⁷⁰ Affidavit of Jean Barrett.

retrieve bodies⁷¹. So the notion that there are standard Trooper law enforcement services provided within the territory Dillingham seeks to annex is simply not accurate.

Ekuk's claim that annexation would not relieve the state government of the responsibility of providing local service reflects an assumption that state revenue coffers will remain at existing levels and continue to allow the state to fund the replacement and repair of infrastructure originally constructed with state grant funds. This ignores the looming fall in state revenue. Expanding the local tax base most definitely will provide more funds for the maintenance and replacement of port and harbor infrastructure originally constructed with state grants. While the state is not legally "responsible" for such expenses, the state has historically funded most of the cost of these improvements and will be expected to do so in the future absent an alternate funding source. Annexation creates that source.

13. Use of City Services by All Permit Holders is not Required to Meet Annexation Standards.

The City explained in detail how annexation is justified because persons fishing within the Nushagak District are presently receiving the benefit of city services without being subject to city taxation. In response both via individual comments and responsive briefs, persons have suggested; 1) I don't use city services so should not be taxed; 2) I pay city sales tax so should not be taxed more; and 3) the city benefits through my fishing activity by receiving a share of the state fishery business tax so I should not be taxed.

The city understands both the general reluctance to pay additional tax and the feeling that if "I" don't use city services I should not pay tax to the city. Nor does the city dispute that within the universe of hundreds of permit holders that would be subject to a city fish tax some permit holders receive more city services than others. But demonstrating 100% of permit holders receive the full universe of city services is not the regulatory standard⁷². Nor is it a legal standard. If that were the case, any annexation which subjected persons without children to taxation to support the public school system would not be approved. This is not the case in any community in the State of Alaska. Local schools are supported with property tax payments made by individuals with no children attending school. Local libraries are funded by tax payments from individuals who, for whatever reason, choose not to use the library. Fire departments are funded by tax payments made by individuals who are fortunate enough never to have a fire anywhere near their property. Tourists who make minimal use of city facilities contribute to their operation and maintenance through sales tax and bed tax payments. The standard to be applied by the Commission is whether people within the area to be annexed will receive or could reasonably be expected to receive municipal services. 3 AAC 110.090(a)(6). This does not require a showing that 100% of persons subject to annexation will make use of City services.

⁷¹ Affidavit of Rose Loera.

⁷² Exh. H, pp. 14-15.

The fact is all permit holders benefit from a viable and financially sound City of Dillingham. For example, anyone whose commercially caught salmon is processed in Dillingham benefits from the city services provided to the shore based processor even if that person never themselves sets foot in Dillingham.

As previously recognized by LBC staff both persons who use specific municipal services and those who do not use those services were properly included within a municipal tax base. The LBC staff did not find it contrary to the best interests of the State that some persons subject to the fish tax might not use Dillingham’s harbor⁷³.

Dillingham is the “hub” city for the Nushagak District. The regional hospital is located in Dillingham. The large landfill used extensively by those fishing in the Nushagak District⁷⁴ is in Dillingham. Dock and harbor infrastructure—used by more than 400 commercial fishing boats annually—is owned, operated and maintained by the City of Dillingham. The life blood of Dillingham is commercial fishing⁷⁵. Commercial fishing fuels the city’s economy. More than 50 million pounds of fish each year are shipped from the Dillingham dock⁷⁶. The participants in commercial fishing use the city’s services at a cost to city residents⁷⁷. The largest on-shore processing facility is down the street from City Hall. Boat storage and repair businesses are in Dillingham. Dillingham has the largest airport critical to transport of fresh product. Most, if not all, regional service providers are based in Dillingham⁷⁸. During fishing season, 20% of calls for the City’s public safety services originate from the harbor, boat launch, city dock or processing plant.

Ekuk and Manokotak both repeat claims the Dillingham will not provide “new” services to the territory to be annexed. These statements ignore the fundamental underlying premise of Dillingham’s petition- Dillingham is already providing services in the territory proposed for annexation. These services emanate from within current city boundaries. They “count” every bit as much as if the Dillingham was proposing a “new” service within the annexed area. Nor is it necessary for Dillingham to propose a “new” dock service. The underlying financial premise of Dillingham’s annexation petition is allowing the City to maintain the infrastructure it already has that is used by and necessary for the commercial livelihood or permit holders fishing the Nushagak District.

14. Dillingham’s Prefiling Notice and Hearing Met Commission Regulations

Ekuk claims Dillingham misinformed the public by accurately reporting the Commission’s previous decision approving annexation by Dillingham of the identical territory. But this is

⁷³ Id., pp. 24-25.

⁷⁴ Exh. DD, p. 184.

⁷⁵ Affidavit of Jean Barrett; Exh. EE, testimony of Ms. Seitz.

⁷⁶ Affidavit of Jean Barrett.

⁷⁷ Exh FF.

⁷⁸ Id.

exactly what the Commission did. And, as described above, the public was fully engaged in Dillingham’s four month prefiling process. More than 18 months have passed since the notice was issued. Nothing in the notice or the ensuing year and a half has prevented Clark’s Point from filing an annexation petition. Indeed, that one community (Manokotak) did file a petition after the City provided notice of and held a prefiling public hearing demonstrates the content of the notice and draft petition did not “chill” filing of other annexation petitions.⁷⁹

Response to Specific Comments and Briefs

Avi Friedman.

Dillingham disputes that set netters with sites in Ekuk do not use or benefit from Dillingham facilities. Ekuk is supplied directly from the Dillingham Small Boat Harbor typically by landing craft⁸⁰. And while the Dillingham airport is a state facility, access to the airport occurs over city-maintained roads and the airport is protected by city fire and police services. Dillingham has presented data which of necessity looks at permit holders as a whole rather than focusing on permit holders who fish in one specific location in the Nushagak District. The data demonstrates permit holders receive the benefit of city services without commensurate tax contributions.

The concern that 50% of City residents “do not support themselves in ways that residents almost everywhere else do” is not specific. As of December 2015 the unemployment rate in the Dillingham census area⁸¹ was 11%. In July the unemployment rate was 7.4%⁸². This is higher than most areas on the road system in Alaska but certainly a far cry from 50%.

Mr. Friedman wonders, “Is it not a fact that approximately 50% of Dillingham residents contribute zero property tax monies to the City in which they live as residents? Dillingham does not think an analysis of property tax based on comparing the number or persons paying tax to the number of residents would validate the apparent concern that the City consists of a lot of “freeloaders” trying to support themselves by taxing out of state permit holders. For example, a family with 3 children has 5 people yet only one of those 5 people may be subject to property tax on the family home. This does not justify a conclusion that 80% of the family is not paying property tax.

Detailed information on property tax in Dillingham is contained in Alaska Taxable⁸³. There are 826 parcels of taxable real property in Dillingham⁸⁴. Federal, state and tribal property

⁷⁹ That Manokotak was not “chilled” as Ekuk claims is also evidenced by Manokotak’s acceptance of the City’s offer to hold an informational session in Manokotak. Similar invitations (which are not required by LBC regulation) were sent to communities, tribes, BBNS, BBEDC, BBAHC and BBBAHC. See Petition Exh. K.

⁸⁰ Affidavit of Jean Barrett.

⁸¹ The Dillingham Census area includes a number of villages in addition to the City.

⁸² Exh. GG; <http://live.laborstats.alaska.gov/labforce/labdata.cfm?s=9&a=0>

⁸³ www.commerce.alaska.gov/dkra/DCRARepoExt/RepoPubs/Taxable/2014-Full.pdf

as well as property used exclusively for religious, educational and charitable services is exempt from property tax. Native Allotments and property owned by senior citizens (which may be what Mr. Friedman has in mind) are either fully (allotments) or partially (senior citizens) exempt from local property tax per state and federal law. There are a significant number of exempt properties including tax exempt allotments within city boundaries. But eliminating or reducing these exemptions is not within Dillingham's control.

7.2% of the value (personal property) is exempted from tax by choice of the city⁸⁵. 79 senior citizens in Dillingham received the senior citizen partial tax exemption⁸⁶. The City believes the more relevant information regarding the existing tax burden on local residents is that discussed at pp. 24-25 in this brief.

The City appreciates Mr. Friedman's past payment of sales tax (which would amount to \$180 per year if \$3,000 of taxable goods and services were purchased in Dillingham) but believes it is appropriate for Mr. Friedman to pay fish tax in addition to local sales tax just as he would if he fished commercially in any other fishing district in Bristol Bay. The City hopes he will be able to pass on this additional cost of doing business to his retail customers by raising the price of what the City agrees is a superior product for which it appears he has a stable customer base.

Dr. Todd Radenbaugh and Michele Masley.

The City agrees Dillingham "needs more diverse revenue streams in order to maintain the high level of services provided to residents and seasonal visitors. The annexation with the associated fish tax provides a sustainable and much needed revenue stream to support the local economy, where the remote location results in higher maintenance costs than other areas of Alaska and in an era of rising operating costs".

Dan Dunaway.

The City agrees annexation will not "negatively impact the surrounding area, and in fact may help it. By approving Dillingham's annexation proposal, the city may be less of a financial burden to the state during the coming period of austerity". Dillingham also agrees "there have been numerous efforts to form a borough here since statehood but an ingrained fear of Dillingham as the largest population center has resulted in paralysis".

Mayor Melvin Andrew, City of Manokotak.

The concerns expressed by Mayor Melvin are discussed in pages elsewhere in this brief. The City appreciates the City of Manokotak's willingness to consolidate their annexation with Dillingham's annexation but feels the continued opposition of the Native Village of Ekuk, the

⁸⁴ Id. Table 13, p.59.

⁸⁵ Id. p. 47 Table 6B.

⁸⁶ Id. p. 64, Table 14B.

Southwest Region School District, the City of Clark's Point, Portage Creek and the Native Village of Clark's Point make any effort of Dillingham and Manokotak to combine petitions impractical.

Diane Wetter.

The City is not proposing to annex the upland beaches at Ekuk, Nushagak, and Clark's Point. See, Petition, Exhibit A-1, para. 6 (boundary parallels mean low water line); see also, Petition, p.48 (no uplands included). The City has always been supportive of borough formation and will continue to be supportive of borough formation after annexation is approved.

Theodore Krieg

The city agrees that "[e]veryone who comes into Dillingham will benefit if Dillingham's application is approved".

Paul Liedberg

The City agrees with Mr. Liedberg that it is "critical" for Dillingham to "seek ways to support the infrastructure that allows the community to continue serving as a hub community for the region".

Mark Lisac

The City agrees with Mr. Lisac that "Harvesters of a public resource should help support the public infrastructure and facilities that they depend on".

Mark Carr

The City does not believe the current situation in Dillingham is analogous to the situation in Los Angeles described by Mr. Carr. The ability to raise funds through an increase in harbor fees is discussed at page 28 of this responsive brief.

Fred and Lloann Ball, Susan Ball

The link between City of Dillingham services and Ekuk beach is discussed in Mr. Barrett's affidavit and elsewhere in this reply brief. The city is not proposing to take over the fishing industry in the Nushagak District. The fishing industry will continue to be regulated by the State of Alaska. Dillingham is proposing that participants in the industry pay a local fish tax just as the participants do in every other fishing district in Bristol Bay. The ability of Dillingham to generate revenue through increasing port and harbor fees is discussed at page 27 of this reply brief. Any increase in the rate of taxation would need to be approved by the voters. The city has no intention of annexing other portions of Bristol Bay.

Earl D. Reynolds, Norman Aaberg, Jeff Rasco, Rob Rasco, John and Christine O'Connor, Jamie O'Connor, Nicholas and Amber Dowie, Beatrice Reynolds, Devin Darrough, Darlene Wyagon

The services provided to Ekuk set net permit holders are discussed in Mr. Barrett's affidavit and elsewhere in this reply brief. The concept that a fish tax should apply in the Nushagak District just as is done in every other commercial fishing district within Bristol Bay is

discussed at pages 5-6 of this reply brief and further explained in the city's Petition. Dillingham recognizes that the Ekuk set net fishery involves the use of trucks not skiffs. Many of those trucks are shipped to Ekuk through the Port of Dillingham as explained by Mr. Barrett.

Richard Madson

Personal property tax (which includes a tax on fishing vessels) is included with the property tax receipts information found in the Petition. Alaska Taxable also quantifies Dillingham's personal property tax revenue⁸⁷. The assessed value of personal property in Dillingham is \$42,994,852. The assessed value of real property in Dillingham is \$143,103,300. The combined assessed value of real and personal property in Dillingham is \$186,098,152⁸⁸. The assessed value of personal property is 23 per cent of this total. Ekuk is not an incorporated city and would never have the legal capability to enact an Ekuk fish tax unless it became an incorporated city. It is not possible to incorporate a city with no permanent residents. Processors located outside the Nushagak District who took deliveries of fish harvested from the Nushagak District would still be required to collect a Dillingham fish tax. The harvest location would be identified on the fish ticket as explained in pages 5-8 of the City's responsive brief. The notice provisions applicable to annexation petitions do not require individualized notice of each permit holder and do not require publication outside the boundaries of the area proposed for annexation and immediately adjacent areas.

Manokotak Village Council.

The concerns about the economic impact of the 2.5% fish tax enacted by Dillingham are addressed at the beginning of this reply brief. The City notes that the difference between the 2.5% tax proposed by Dillingham and the 2% tax proposed by Manokotak is, on average, \$288 per Igushik District set net permit holder.

Conclusion

The comments received in response to Dillingham's petition are not surprising and repeat issues previously considered and properly decided by the Commission. A careful review of the facts and application of regulations to those facts compels the conclusion that granting Dillingham's legislative review annexation petition is in the best interests of the State of Alaska just as granting Dillingham's local option annexation petition was in the best interests of the State of Alaska.

⁸⁷ Id. p. 49 Table 7B.

⁸⁸ Id. p. 50 Table 7C.