

**PETITIONER'S REPLY BRIEF - SUPPLEMENT**  
**[NATIVE VILLAGE OF TYONEK/TYONEK NATIVE CORPORATION]**

The Native Village of Tyonek and Tyonek Native Corporation have submitted a joint Responsive Brief which objects to the Petition for the incorporation of Nikiski as a home rule city on the following grounds:

- (1) The definition of a "community" under AS 29.05.011(1) and related regulations -- inclusion of the Tyonek;
- (2) The boundaries of the proposed city - AS 29.05.011(a)(2) and 3 AAC 110.040;
- (3) The need for city government - AS 29.05.011(a)(4) and 3 AAC 110.010.

Primarily, the two organizations oppose incorporation because the proposed city boundaries include the unincorporated village of Tyonek.

The two organizations request that the Local Boundary Commission reject the Petition in its entirety. This is not warranted in the circumstances. In addition, the organizations' grounds for rejection are flawed and should not be determinative to a decision on Nikiski incorporation.

The organizations' brief is remarkably similar to the responsive brief of the Kenai Peninsula Borough. Therefore, this Reply Brief may be somewhat duplicative of the Reply Brief to the Borough's responsive brief.

**1. The definition of a "community" under AS 29.05.011(1) and related regulations -- inclusion of the Tyonek.**

In the 1963 Mandatory Borough Act, the Alaska Legislature established the Kenai Peninsula Borough boundaries to include the west side of the Cook Inlet, including the village of Tyonek. The Legislature could have, but did not put Tyonek into the Anchorage borough, even though the Anchorage Borough was established in that Act.

The Kenai Peninsula Borough, following suit, established all the Nikiski service areas to include the west side of Cook Inlet ("west side"), including the unincorporated village of Tyonek.<sup>1</sup> As shown in the Petition, pp.10-12, the Nikiski service areas provide services to the west side, either directly or through contracting with other providers. The City of Nikiski proposes to continue services to the west side; and will be able to provide additional local government services to that area, which the Borough cannot, as discussed above.

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<sup>1</sup> Petition, pp. 24-30 and Exhibit C.

As discussed in the Petitioner's brief, Nikiski is **overlaid with 5 different Borough service areas**:

(1) Three (3) service areas with boundaries generally within the proposed City: Nikiski Fire Service Area, North Peninsula Recreation Service Area, and Nikiski Senior Service Area;

(2) One (1) service area, Road Service Area (formerly North Kenai Peninsula Road Maintenance Service Area), which used to have most of its boundaries within the proposed City, but which the Borough in 1991 merged with three other road service areas;<sup>2</sup>

(3) One (1) service area, Central Kenai Peninsula Hospital Service Area, which is larger than the proposed City.

Since 1969, Nikiski service residents (including those residing in Tyonek) have voted to establish or join 6 overlay Nikiski service areas: 1969 and 1982, Nikiski Fire Service; 1969, Central Kenai Peninsula Hospital Service Area; 1973, Nikishka Service Area; 1974, North Peninsula Recreation Service Area; 1981, North Kenai Peninsula Road Maintenance Service Area; 1993, Nikiski Senior Service Area; 2004 and 2015, Nikiski Law Enforcement Service Area.<sup>3</sup>

The Organizations' Responsive Brief, at pages 4-5, argues that Tyonek is "restricted" and therefore 3 AAC 110.920(b)(1) applies. 3 AAC 110.920 provides a presumption that a population does not constitute a community where "public access to or the right to reside at the location of the population is restricted." The term "restricted" is not defined in the regulations.

However, this regulation does not apply to the Nikiski Petition. First, the regulation applies to the "a" (the whole) population of the proposed territory, not discrete segments or selected private property, such as that owned by the two organizations. Second, there is nothing in the Petition about restricting public access or the right to reside within the proposed Nikiski boundaries.

Under AS 29.05.011(a), a community that meets the standards listed in the statute may incorporate as a first class or home rule city. See also 3 AAC 110.005. 3 AAC 110.920 provides criteria the Commission may consider in determining "whether a settlement comprises a community," including ones listed at 3 AAC 110.920(1), (2) and (3). One factor is discrete and identifiable social unit, at 3 AAC 110.920(a)(3).

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<sup>2</sup> Petition, Attachment B.

<sup>3</sup> The 1973 Nikishka Service Area, and 2004 and 2015 law enforcement service area votes failed.  
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The Responsive Brief pp. 5-8 argues that the Petition does not meet this factor. The Responsive Brief exclusively singles out differences between the northeast side of Cook Inlet and Tyonek; but the comparisons are flawed because Brief leaves out and fails to acknowledge the many similarities between the northeast side and the west side, including Tyonek. Both areas have commercial fishing sites and industry. Tyonek Native Corporation has pursued many industrial and commercial projects in the Tyonek area, including a dock. Both areas have daily, regular transportation routes by air and water traffic. See, Exhibit L and M. The northeast side has a substantial number of Native Alaska residents, some of whom are relatives of Tyonek residents. Northeast side residents also practice a subsistence culture. Because of Cook Inlet, students attend different schools, but all public schools in both areas are operated by the Kenai Peninsula Borough School District. Some Tyonek students live on the east side of Cook Inlet in order to attend 4-year high schools. Nikiski Junior-Senior High School, the closest 4-year high school to Tyonek, is advantageous to Tyonek students for this purpose. While there may only be 7 commercial enterprises located within the village of Tyonek (which aren't identified in the Brief), there are many more businesses that travel to or near Tyonek. See, Exhibits L and M.

The organizations note that the Nikiski Community Council did not include Tyonek in their Community Action Plan, the Council is a private nonprofit corporation that is not related to the Petition.

**2. Boundaries - AS 29.05.011(a)(2) and 3 AAC 110.040.**

AS 29.05.011(a)(2) provides that in order to incorporate, a community's boundaries must include all areas necessary to provide municipal services on an efficient scale. 3 AAC 110.040 contains a list of factors that the Commission "may" consider. One of the factors is whether the proposed boundaries include entire geographical regions or large unpopulated areas, unless those are justified by the standards in 3 AAC 005 - 3 AAC 110.042. The Petition, Exhibit G, Petitioner's Brief, page 23-24 explains that the Nikiski boundaries do contain some unpopulated areas, but that these areas are justified by the fact that the Nikiski service areas have been providing local government services within the proposed City's boundaries for the last 48 years.

The organizations' Responsive Brief, pp. 8-10, contains the organizations' boundary arguments. Although the organizations argue that the proposed Nikiski boundaries are too big, the Nikiski service area boundaries established by the Borough, which include Tyonek, are the same boundaries as the proposed City of Nikiski, and the service area boundaries have been in existence for decades, starting in 1969. The Nikiski service areas already provide and have been providing local government services to the west side of Cook Inlet, including Tyonek, for decades, including fire and emergency services and recreation services. The Petition propose to continue providing those services, plus acquire the ability to provide additional services a home rule city could provide, as opposed to a limited-power, second-class Borough.

The Borough cannot and will not provide any further municipal services to the west side of Cook Inlet; as a second class borough, it cannot provide municipal services without a vote. In the 53 years since it was incorporated by legislative mandate, the Borough itself has exercised only the barest minimum of areawide powers; and has few nonareawide powers that it actually exercises. If Nikiski does not incorporate, the west side of Cook Inlet will probably never have any further municipal services provided to the area.

**3. Need for city government - AS 29.05.011(a)(4) and 3 AAC 110.010.**

AS 29.05.021 provides:

**Sec. 29.05.021. Limitations on incorporation of a city.** (a) A community in the unorganized borough may not incorporate as a city if the services to be provided by the proposed city can be provided by annexation to an existing city.

(b) A community within a borough may not incorporate as a city if the services to be provided by the proposed city can be provided on an areawide or nonareawide basis by the borough in which the proposed city is located, or by annexation to an existing city. [Emphasis added]

The Petition addresses this statute in Exhibit G, Petitioner's Brief, pp. 13-16.

Commission regulations at 3 AAC 110.970(c) defines essential municipal services for a city to include those that are reasonably necessary to the community, which promote maximum, local self-government, and which cannot be provided more efficiently or effectively by creation or modification of some other political subdivision. 3 AAC 110.970(d) further allows the Commission to consider a list of services that are essential.

The Responsive Brief pp. 11-14 contains the organizations' arguments on this point: (1) the Borough already provides services; and (2) the organizations' interests may be negatively impacted by incorporation.

The AS 29.05.021(b) standard does not apply because the Borough does not provide services, and will not provide services on an areawide or nonareawide basis. As stated above, the Borough provides only the minimum mandatory services in state statutes: education, taxation and planning/zoning/land use regulation. The Borough has few nonareawide services it actually provides. If the Borough wants to provide any more services at all, areawide, nonareawide, or through service areas, there has to be a vote. AS 29.45.300(b). Adding another service area on top of the Nikiski service areas would potentially violate the Alaska Constitution Article X, Section 5, which prefers incorporation of a city to adding one new service area.

On the other hand, incorporation of Nikiski as a home rule city would allow the city to provide any government service not otherwise prohibited by law. AS 29.04.010.

Contrary to the Brief, page 11, many of the services proposed by the Petition are new or enhanced, including law enforcement (which the Borough does provide) and economic development (which the Borough has the power to provide, but doesn't). Tyonek admits that it "struggles to secure local services it needs to provide," it will not obtain those services from the Borough. In fact, if the Commission amends the Petition to exclude Tyonek, it is doubtful that the Borough can provide Tyonek with the current services it receives from the Nikiski service areas. Service areas are required to be integrated into a new city under AS 29.05.130, and if Nikiski incorporates, the Nikiski service areas will merged into the City. The Borough itself cannot provide the Nikiski service area services, because it does not have the power to. In order to join the central Borough service area, there would have to be a vote. AS 29.45.450(c).

Although the Alaska Constitution, at Article X, Section states that the purpose of that section is to provide for maximum local government services with a minimum of local government units, this section does not mean that cities within Boroughs are prohibited.

The organizations, as private organizations, are concerned for their increased tax and regulatory burden if Nikiski incorporates. However, this may happen to any private property owner in a city within a borough. These concerns are not included of the standards and factors to be considered for incorporation in AS 29.05 of 3 AAC Chapter 110; and should not be given great weight by the Commission.

Finally, the Brief claims that if Tyonek is included in the boundaries, the entire Petition must be void. This claim is not supported by the incorporation statutes and regulations. This would be a gross injustice; because it would leave the thousands of residents of the proposed city with no ability to incorporate, just because two large private property owners object. It should be noted that no person who actually resides in Tyonek has submitted an opposition to incorporation. If the Commission determines that the proposed boundaries are too large it can amend the petition or establish conditions, under its regulations. It does not have to be an all or nothing decision -- accept or reject; as claimed in the Reply Brief.

The Petitioner's Reply Brief to the Borough's brief also has references to Tyonek and the arguments made in the organizations' brief, and is incorporated by reference into this Supplement.

DATE: 29 Mar 17

Stacy Oliva  
PETITIONER'S REPRESENTATIVE

**AFFIDAVIT OF SERVICE**

STATE OF ALASKA            )  
  )  
THIRD JUDICIAL DISTRICT    )    ss.

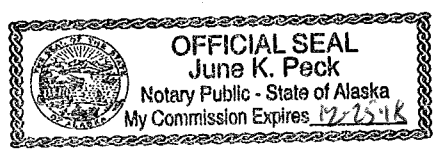
STACY OLIVA, being first duly sworn, deposes and says that:

I caused the Petitioner's Reply Brief to Responsive Brief of Kenai Peninsula Borough, with exhibits/attachments to be served by mail on 3/29/17 on the following respondents: Lou Oliva, Kenai Peninsula Borough, Native Village of Tyonek, Tyonek Native Corporation at their addresses of records with the Local Boundary Commission.

DATED: 29 March 17

Stacy Oliva  
STACY OLIVA

SUBSCRIBED AND SWORN TO before me this 29 day of March, 2017.



June K. Peck  
Notary Public, State of Alaska  
My Commission Expires: 12-25-18