



**City of Dillingham
Comments on Preliminary Report
On
Petitions to Annex Commercial Fishing Waters
Using Legislative Review Method**

July 14, 2016

BOYD, CHANDLER & FALCONER, LLP

BY:

A handwritten signature in blue ink, appearing to read "BWC", is written over a blue circular stamp.

**Brooks W. Chandler
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Introduction

The Preliminary Report should be revised as follows:

1. Pages 41-60 of the Report should be deleted.
2. Staff should recommend approval of Dillingham's annexation petition.

Making these changes would not preclude future incorporation of a borough. While borough incorporation moves forward revenues which benefit the region will stop swimming away.

The Preliminary Report invites the Local Boundary Commission (Commission or LBC) to enter the cultural, political and legal swamp of mandated borough formation. The City of Dillingham has been "in the neighborhood" with well documented efforts for voluntary borough formation. The journey which Commission staff recommends will, if properly done with appropriate respect for residents of the region, entail several years of effort and careful and considerate navigation. Whether the Commission emerges with an approved borough with a legally authorized fish tax is unknown. Whether forming a borough in this fashion would survive any ensuing legal challenges is unknown. In the meantime, the needs of the region will continue to require services delivered by the City of Dillingham. The Commission has previously recognized those needs could be better served by a fiscally stronger regional hub city made possible by expanding Dillingham's boundaries. Approving Dillingham's annexation petition now, rather than waiting to see if and when a borough is formed, remains just as valid and wise a choice in 2016 as it was in 2011, when its staff recommended and the Commission approved, the identical City of Dillingham annexation. In fact, reduced state funding means the basis for approving annexation is even more compelling now than it was in 2011. The about face recommended by staff is ill-considered and unsupported. The suggestion that the LBC form a Borough in the region on behalf of regional residents is proposed without the careful, thorough analysis and consultation which should precede such an unprecedented dictatorial action by the LBC. Dillingham has previously indicated it would cooperate with such an effort. However, that pledge was conditioned on LBC approval of Dillingham's annexation petition. Dillingham urges the Department to reconsider staff's scheme through issuing a final report which recommends approval of Dillingham's annexation petition now while leaving the door open for a future borough.

Staff Proposed Formation of a Second Class Borough

One of the more disturbing statements in the Department of Commerce report prepared by Staff is “the [forced borough] recommendation did not originate with the LBC staff”¹. This ignores facts. Dillingham has reviewed all of the public comments. One commenter, Ms. Diane Wetter, indicated “the only fair solution is to create a borough”. She did not indicate a preference for a second class borough and did not suggest formation of a borough by legislative review. The Ekuk responsive brief suggests Ekuk “will continue to make efforts to pursue . . . the feasibility of the formation of a borough” but does not actually ask that a borough be formed. (Ekuk responsive brief p.2 (9/18/2015), see also, Ekuk responsive brief p. 25 (9/18/2015)[suggesting consideration of annexation be delayed while “the region decides whether a borough is feasible]; Ekuk Responsive Brief p. 2 (2/22/2016)[delay consideration of petitions pending “a local decision on the filing of a petition to form such a borough”]. Staff enlarged this to “many comments suggested borough formation”² and implied the comments favored borough formation by legislative review. The preliminary report’s distortion of the public record to suggest the idea for a forced second class borough covering the Dillingham Census Area originated from multiple public comments³ demonstrates how staff has strayed from its role of impartial analysis to a role of advocating the Department’s own predetermined agenda for the region despite (or perhaps in reaction to) the Commission’s rejection of the Department’s proposed “solution” (discussed below). And it strikes Dillingham as odd that the Department would seek to disavow its own idea. The Department should “own” what it is proposing not repackage it as someone else’s recommendation.

Considering borough formation in connection with the two annexation petitions did indeed originate with the Department of Commerce. In August 2015, Katherine Eldemar, Division Director of the Division of Community and Regional Affairs,⁴ met with Dillingham city manager Rose Loera. Ms. Eldemar presented the city manager a map of a proposed borough. The following month, the proposed borough Ms. Eldemar mentioned was identified in a petition⁵ prepared either by her or at her direction. The proposed borough was to be a second

¹ Preliminary Report p.1.

² Preliminary Report p. 41.

³ The report also claims formation of a second class borough via legislative review is based on “past borough feasibility studies” (although no study containing this recommendation is referenced in the report) and “past LBC decisions” without identifying which past decision of the LBC authorized borough incorporation of a second class borough via legislative review. Report p.1.

⁴ As indicated in the Preliminary Report letterhead, the report is the work product of the Division of Community and Regional Affairs (“DCRA”). Ms. Eldemar is a supervisor of lower level employees of DCRA including Mr. Williams.

⁵ Exh. A.

class borough. The legislative review method was proposed. The “Petitioner” was to be “State of Alaska staff as designated by the LBC, in the Department of Commerce, Community and Economic Development”. The “Local Government Assistance Section, Division of Community and Regional Affairs” was the designated “Representative”. The proposed boundary was “the Dillingham Census Area” which was to include “the current Southwest Regional Education Attendance Area including the City of Dillingham”. The proposed fish tax was set at 5% projected to yield \$2.3 million annually⁶. The proposed Assembly was a six member body with 3 from Dillingham and 3 from unspecified districts to be formed outside Dillingham. The borough mayor would be elected at large. The borough planning commission was to be elected rather than appointed as is typically the case. The assembly was to have authority to set the tax rate for the raw fish tax; with local fish tax by municipalities within the borough prohibited. For the Department to now claim the idea for a second class borough did not originate with the Department is revisionist history.

Rose Loera was not the only person to whom the Department previewed its preference. The Commissioner of the Department of Commerce was shown the petition and asked to be the petitioner as contemplated by 3 AAC 110.410(a)(2), and AS 44.33.812(a)(3). Obviously he did not agree to do so⁷. Others in the region were also shown the petition. Dillingham is not aware of a single community or regional entity that supported the proposed petition as an alternative to approval of Dillingham’s annexation petition.

Nor did the LBC think designating someone from outside the region to file a borough incorporation petition made sense. A proposal for the LBC to designate the Department to file the Tikchik Borough incorporation petition was specifically considered and rejected by the Commission at its September 16 meeting.

At that meeting Commissioner Harrington moved “that the Local Boundary Commission design[sic.] and direct the Division of Community and Regional Affairs to prepare a petition to incorporate a borough formed within the boundaries comparable to the Southwest Region School District for the Dillingham census area”.⁸ The petition referenced by Commissioner Harrington had been submitted two days earlier by the Division of Community and Regional Affairs. Commissioner Hargraves voted against the motion because “there is no precedent, of course, for it”.⁹ The motion failed on a 2-2 vote.¹⁰ It has never been reconsidered.

⁶ The accompanying proposed budget indicated this would yield a surplus of \$1.2 million which exceeds the projected revenue from Dillingham’s existing 2.5% fish tax. Exh. A, p. 10. This demonstrates approving Dillingham’s annexation should not prevent an economically viable Borough.

⁷ If the Commissioner’s position has changed there is nothing about LBC approval of annexation that prevents the Commissioner from filing a borough petition.

⁸ Exh. B p. 4; (9/16/2015, Tr. p. 9.)

⁹ Exh. B p. 13; (Tr. p. 24).

Bizarrely, LBC staff (without a single Commissioner having moved for reconsideration) two days later notified Dillingham that the LBC would meet again on September 25 with two “primary” items on the agenda including: “whether a petition drafted and submitted by the Division of Community and Regional Affairs staff to incorporate a borough in the Dillingham Census Area may proceed under 3 AAC 110.410(d)¹¹. LBC staff indicated separately this meeting would be held because unidentified Commissioners had trouble hearing during the September 16 meeting¹². This second notice triggered additional questioning of the LBC’s legal authority to take such action from Manokotak¹³. When the September 25 meeting was held, directing filing a borough petition was not on the agenda¹⁴. No explanation was ever provided by staff or the LBC why the agenda for the September 25 meeting posted September 24 differed from the public notice for the meeting posted September 21.

Dillingham did not oppose filing of a borough petition in concept but did reject the notion filing such a petition should delay consideration of or rejection of Dillingham’s annexation petition¹⁵. This continues to be the City’s position.

Given this background, the staff claim that this is not “staff’s” idea can only be true if “staff” is read to exclude Ms. Eldemar, who is a second level supervisor of Mr. Williams. And even if that is accepted, it is obvious staff’s preliminary report has been heavily influenced by the previous decision of the Commission rejecting filing of a borough incorporation petition. Dillingham suggests that the report should focus exclusively on the annexation petitions in front of the LBC rather than on a direction (forced borough incorporation) previously rejected by the LBC and not in front of the LBC. The fact staff’s attention has been diverted in this fashion taints the entire report and helps explain the other deficiencies in the report discussed below.

¹⁰ Exh. B p. 18; (Tr. p. 29).

¹¹ Exh. C, Public Notice of Sept. 25 Meeting.

¹² Exh. D, 9/21 email Williams to Sheinberg.

¹³ Exh. E, 9/22 letter Brennan to Williams.

¹⁴ Exh. F, Agenda 9/25/15 LBC Meeting.

¹⁵ Exh. B pp. 9-10; (Tr. pp. 17-18).

Comments on Specific Topics

1. The Commission has the Authority to Adjust Boundaries of the Manokotak Petition or to Grant Dillingham’s Petition and Deny Manokotak’s Petition [pp. 18-19]

The textbook example of arbitrary action is acting one way on one day and the opposite way the next day. As the Commission well knows, in 2011 it determined that an annexation petition filed by the City of Dillingham proposing boundaries identical to those contained in the current petition met all applicable legal and regulatory standards. The preliminary report claims “[m]uch has changed since 2011”. But the only change identified is that “Manokotak has also filed an annexation petition”, whose proposed boundaries overlap with Dillingham’s proposed boundaries. Staff reasons that because of this fact “the LBC cannot grant both petitions”¹⁶. But the fact the LBC cannot grant both petitions does not logically lead to a conclusion the LBC cannot grant either petition. The LBC could grant Dillingham’s petition and deny Manokotak’s petition. The LBC could adjust the boundaries of either of the petitions and grant both¹⁷. Staff’s conclusion that everything is different because another municipality has filed for annexation is driven by Staff’s directive to reach a predetermined outcome not by logical analysis.

The conclusion “everything is different” now ignores staff’s own review of the Manokotak petition. Staff concludes Manokotak’s proposed annexation does not meet regulatory standards for reasons that have nothing to do with whether a borough is “better” than an enlarged Manokotak. Staff comments that Tract B does not need city government by Manokotak. Manokotak does not have the human resources to provide essential municipal services. Manokotak is not able to provide the essential municipal service of planning.¹⁸ This means Manokotak’s petition would be recommended for denial whether or not Manokotak’s proposed boundaries overlapped Dillingham’s proposed boundaries. It is arbitrary and illogical to say that one city’s annexation petition must be denied when it was previously granted because another city has filed a petition which does not meet regulatory standards.

The conclusion everything is different due to Manokotak’s petition is also contrary to the method employed by the Commission in considering Petersburg’s annexation petition after Juneau filed to annex some of the same territory requested by Petersburg. The Commission did not deny Petersburg’s petition simply because another municipality wanted to annex some of the same territory. Rather the Commission considered whether Petersburg met regulatory

¹⁶ Preliminary Report p. 1, 18.

¹⁷ 3 AAC 110.570(c)(1). (LBC can amend petition). For example, Manokotak’s petition could be amended to eliminate Tract B thus eliminating all overlapping boundaries.

¹⁸ Preliminary Report pp. 28-29, 38-40.

standards.¹⁹ The preliminary report here is not only an about face from the 2011 recommendation, it is an about face in logic and analysis from that employed by the Commission in its recent overlapping boundary situation.

2. Regional Nature of Tax Base

In several places in the preliminary report, Staff asserts annexation should be denied because Dillingham seeks to tax a “regional” resource²⁰. Indeed, this is the sole reasoning underlying Staff’s determination granting Dillingham’s petition is not in the best interests of the State. Dillingham’s comment on this assertion is “why is a salmon swimming on the west side of Bristol Bay different than a salmon swimming on the east side of Bristol Bay”? The City of Egegik taxes a “regional” resource. The City of Pilot Point taxes a “regional” resource. Chignik taxes a “regional” resource. And, a bit further afield, Sand Point and King Cove both levy a fish tax even though both cities are part of a “region” that contains a borough government.

Indeed, these communities are sound examples of how a local fish tax is not inconsistent with borough formation. In both the Lake and Penn Borough and the Aleutians East Borough a local fish tax and a borough fish tax are levied on the same fish. These communities are concrete proof annexation should not be denied because Dillingham will tax a resource that can also be taxed by a future Borough.

3. Provision of Essential Services to Region by City of Dillingham Means Dillingham Residents are not Exclusive Beneficiaries of a City Fish Tax

Staff declares “borough formation is a way to provide services that benefit an entire region”²¹ but never mentions in the report a single service that will be provided by the theoretical future borough. This is why staff can only guess that Dillingham “might” not be able to provide the undisclosed services.

Some clues to the Department’s thinking here may be gleaned from the Department’s draft borough incorporation petition. The draft petition references taxation, planning and educational services²². It is not true Dillingham cannot provide taxation services should a borough be formed. The new borough could contract with Dillingham allowing Dillingham to collect the borough fish tax and bed tax (a borough property tax is not included in the draft petition). AS 29.35.010(13). Dillingham cannot provide planning services outside city

¹⁹ City & Borough of Juneau v. LBC, 361 P.3d 926, 928-930 (2015).

²⁰ Preliminary Report p. 1, 19.

²¹ Preliminary Report p. 1.

²² Exh. A, p. 12.

boundaries but the draft petition recognizes “zoning in the remote areas of the Borough would likely be quite general”.²³ This is just another way of saying planning and zoning is not a needed borough service. This leaves education as the only substantial service that can only be provided by a borough. There is nothing in the preliminary report which shows approving Dillingham’s annexation petition will not prevent a future borough from providing educational services.

Dillingham is already providing essential services to permit holders and others in the region. For example, check the letterhead of virtually every regional entity (Bristol Bay Health Corporation, Bristol Bay Native Association, Southwest Region School District, Bristol Bay Economic Development Association, Bristol Bay Housing Authority). All of these organizations are based in Dillingham. They function using utility services provided by the City of Dillingham. Their physical assets are protected by the Dillingham fire department. The personal safety of their employees is protected by the Dillingham police department. The vehicles owned by these organizations and their employees travel on roads maintained by the City of Dillingham. Many of the clients served by these regional entities travel to or through Dillingham on a regular basis and make use of city services. All of these entities provide benefits to the region, not just to the City of Dillingham. Many of them are tax exempt. By providing services to these regional entities and their clients the City of Dillingham is providing services to the region.

The preliminary report states “Dillingham provides numerous services to the fishers, including docks, a harbor, trash collection, water and ice, public safety, roads and utilities. These services would not be available to the fishers unless Dillingham provided them. [F]ishers in the territory rely on city services”²⁴. Staff also finds “[i]t is financially detrimental to Dillingham to provide services to the fishers without commensurate tax contributions from the fishers”²⁵. This conclusion is consistent with the Commission’s previous determination Dillingham did indeed provide essential services²⁶. And, this statement directly contradicts Staff’s conclusion granting Dillingham’s annexation petition means Dillingham would be “the exclusive beneficiary of fish in these waters”²⁷. These types of internal inconsistencies are sprinkled through the report and are what happens when staff is more focused on a theoretical outcome of a theoretical borough incorporation petition than the actual annexation petitions in front of staff for review.

²³ Exh. A, p. 13.

²⁴ Preliminary Report p.13, see also, Exh. G (Testimony of Gene Barrett Dillingham Harbormaster).

²⁵ Preliminary Report p. 19.

²⁶ Portions of the 2011 preliminary report are attached hereto as Exhibit H. Exh. H p. 13; (2011 Preliminary Report p. 30); Exh. I p. 1 (2011 Decisional Meeting minutes, p. 1, 5). LBC Dec. 14, 2011 Decision p. 9, (approving Dillingham Annexation).

²⁷ Preliminary Report p. 1.

This “exclusive beneficiary” claim is not only internally inconsistent. It is also indisputably wrong - very wrong. Allowing Dillingham to expand municipal boundaries does not result in Dillingham being “the exclusive beneficiary of the fish in these waters”. Rather, it improves Dillingham’s ability to provide services which benefit many people throughout the region. The Commission expressly determined this in 2011. That Manokotak has filed an annexation petition does not change the level of historic services Dillingham has provided and should not change the Commission’s conclusion that the residents of the region and those from outside the region who fish in Nushagak Bay will be beneficiaries of an expanded City of Dillingham tax base.

Staff recognized this in 2011 when it said “If Dillingham cannot financially sustain itself, these other communities will suffer if these services are no longer available, or are of diminished quality.” And, “The sustainability of this regional hub is the sustainability of this region.”²⁸

The Department’s preliminary report never identifies any services Dillingham “might” not be able to provide but a Borough could. In fact, the preliminary report concludes “no other municipality is likely to provide the fishers the services that Dillingham provides”²⁹. And that “Dillingham provides education, utilities, public works, a port and harbor, taxation, public safety, and planning. . . . these city services cannot be provided more efficiently and more effectively by the creation” of a borough.³⁰ The draft borough incorporation petition does not suggest the Borough provide utility services. The draft petition does not suggest a future Borough will construct a duplicative borough port facility in Dillingham or a duplicative landfill in Dillingham or “buy out” Dillingham’s landfill.

Education is the primary borough service which Dillingham, even with expanded boundaries, cannot provide throughout the region. Whether a borough school district will improve the provision of education services over those provided by the current Dillingham city school district and the Southwest Region School District is a valid issue for discussion as a borough incorporation process moves forward. But again, while those discussions unfold, Dillingham should be allowed to expand its tax base to better provide existing services to people throughout the region.

²⁸ Exh. H p. 16, 38; (2011 Preliminary Report p. 36, 82).

²⁹ Preliminary Report p.14.

³⁰ Preliminary Report p. 26.

4. Suitable for City Government

Staff concludes in 2016 as it did in 2011, “the boundaries of the proposed city do include all land and water necessary to provide essential municipal services on an efficient, cost effective level”³¹. This means the territory is “suitable” for government by Dillingham and that Dillingham is not biting off more than it can chew by adding this area to the existing city; i.e. that the “scale” of the area is suitable for city government. For what is “government” other than the provision of essential municipal services on an efficient cost effective level? This is the essence of a “suitably” sized city.

Yet in a reversal from its conclusion in 2011, Staff finds the area is not “suitable” for city government. The “suitable” conclusion applies both to 3 AAC 110.120(c)(1) and the “exception” clause of 3 AAC 110.130(c)(2)³². “Suitable” is not defined in LBC regulations. The dictionary definition is “acceptable”³³. It appears Staff’s conclusion is that the area is “too big” for city government. Staff’s focus on the size of the area alone is inappropriate when considering adding bodies of water to an existing municipality³⁴. There are a number of isolated cities with large boundaries. Especially where, as here, the municipality is already providing services to permit holders fishing in the area the city seeks to annex.

The proposed size of Dillingham has not changed since 2011. There is no evidence Dillingham was not able to serve the additional area added to the city from 2012-2014. And staff does not even try to explain why it feels in 2016 the area is “too big” when in 2011 staff stated ““The City is the appropriate government for the territory because the rest of the region's communities need a stronger regional hub for their sustainability.”³⁵ Once again, the report is internally inconsistent and employs arbitrary reasoning to reach a pre-determined result.

5. Borough Formation

Pages 41-60 of the Preliminary Report analyzes borough formation despite the facts; 1) no borough incorporation petition has been submitted, and 2) the Commission previously rejected combining consideration of borough formation with these two annexation petitions.

³¹ Preliminary Report p. 23.

³² Preliminary Report p. 17.

³³ Webster’s College Dictionary p.1288. (Random House (1997 ed.).

³⁴ Valdez boundaries cover 240 square miles, Togiak’s boundaries include 225 square miles. A sizable portion of the territory of these cities include water.

³⁵ Exh. H p. 31; (2011 Preliminary Report p. 66).

This is a serious transgression of LBC procedures. This entire segment of the report violates resident's due process rights and should be deleted from the final report.

The proper scope of a preliminary report is set by LBC regulation. 3 AAC 110.530 authorizes and requires the Department of Commerce to investigate "a petition filed with the department". No borough petition has been filed with the department. Staff only has legal authority to prepare a written preliminary report "regarding the petition". 3 AAC 110.530(a).

There is no legal authority in LBC regulation for the staff to issue a preliminary report regarding a theoretical unfiled boundary change petition. Staff's departure from proper LBC procedure creates a significant problem for the LBC. This is why.

A preliminary report is one of the steps of a substantial public process designed to allow those impacted by proposed boundary changes to make their views known to the Department, the petitioner and the Commission. That process begins with the filing of a petition which itself may be preceded by public hearings³⁶. Then the petition is reviewed by the Department. If the petition is accepted for filing, those impacted are provided the opportunity to comment and file responsive briefs followed by petitioner reply briefs. It is only after this extensive public process has concluded that staff is to issue a preliminary report. With regard to annexation, Judge Douglas found this process was a personal due process right of all citizens of Alaska³⁷. Staff has decided to trample on its own regulations and proceed directly to the preliminary report phase of the borough incorporation process. That it is doing so when the only reason Dillingham's annexation petition is again before the LBC is the process followed in 2011 makes one wonder whether staff "got the message" conveyed by the Superior Court.

There is another problem created by Staff proceeding prematurely to issue a preliminary report on borough formation. Any Commissioner considering any of the information in this section of the Preliminary Report and directing filing of a petition will no longer be able to provide an unbiased and impartial review of any ensuing borough incorporation petition. An unbiased decision maker is a fundamental component of due process. It will be extremely difficult for both Dillingham and Manokotak to receive a fair and impartial hearing on their petitions before the Commission as a result of staff's unprecedented decision to ignore the first 5 steps of a borough incorporation process and proceed directly to the preliminary report phase. Dillingham's comments which follow are made without waiving any due process objection to the initial inclusion of this material in this report and the bias it has introduced into consideration of Dillingham's annexation petition.

³⁶ 3 AAC 110.425(a)[requiring pre-filing public hearing for legislative review annexation petitions].

³⁷ Ekuk v. LBC, Case No. 3DI-12-22 CI, Order on Appeal pp. 14-15, 19 (March 27, 2014).

6. Legal Authority for Forced Borough Formation

Staff asserts the Commission “has the constitutional authority to submit [a forced borough petition] to the Legislature under article 10, section 12 of the Constitution of the State of Alaska”³⁸. This appears to be a conclusion based on statements made to the Commission by Mr. Vic Fisher at an LBC meeting in November of 2015³⁹.

Dillingham declines to engage in any legal analysis of this statement. The Commission’s focus should be on Dillingham’s and Manokotak’s petitions, not some theoretical future borough petition. However, Dillingham does point out that constitutional authority must be exercised in the manner proscribed by statute and regulation⁴⁰. So staff’s reliance on the Constitution alone needs to be amplified to include the full body of law applicable to borough incorporation in order for the Commission to have a full understanding of the scope of its legal authority to force borough incorporation by legislative review.

7. Failure to Consult

Dillingham’s efforts to reach out to other communities around Nushagak Bay is well documented and remains ongoing⁴¹. Despite literally hundreds of hours spent in consultation prior to the April 2011 Commission hearing, Dillingham was excoriated at hearing by Commissioner Harcharak:

If I were a resident of one of the villages I would take offense, and in the culture – the Yupik culture, now the spirit of collaboration is extremely necessary. And, you know, that’s part of keeping closer to what it is. Most of the people that testified from the villages that are indigenous residents of long standing in the community, I believe they should have been contacted prior to filing this petition, when the petition was being considered and drafted. Because right now it seems to be after the fact and my concern is that the impact that it’s going to have on those communities – you know, you’re basically taxing everything outside of them. You’re going to. And it’s going to have a negative

³⁸ Preliminary Report p. 1.

³⁹ Exhibit J [Minutes of Nov. 16, 2015].

⁴⁰ For example, the Alaska Constitution specifically provides for the rights of initiative and referendum and recall. Art. II. But the exercise of these constitutional rights by the people to whom they have been provided must be undertaken in compliance with subsequently adopted state statutes. E.g. AS 15.45, AS 29.26.110.

⁴¹ See, Exh. J, to Dillingham Petition (Consultation Report). Dillingham committed to use fish tax revenue to support studying formation of a borough while making it clear that Dillingham would not “lead” such a study. Dillingham followed through. See, Affidavit of Navin Bissran (Dillingham Reply Brief 3/18/2016).

impact on every one of them. And that's not a minor negative impact. If I have been a part of your committee pursuing this, I would consider going out prior, way prior to June 14th, 2010, and making the point to each of those villages and explain to them how it was going to affect them with the tax.

* * * * *

Because being the mayor of Barrow, anything that the City of Barrow does that may have potential impact on one of our surrounding villages (indiscernible), anything that would have an impact on them I would be totally amiss if I did not make a direct effort in advance of submitting a petition or a document like this of not going out to the villages prior to the writing.

Exh. K. The approach now recommended by Staff is directly contrary to Commissioner Harcharak's position regarding engaging with the local community. And his position ultimately was embraced by the entire Commission which conditioned annexation approval on additional efforts at consultation which Dillingham accomplished and documented in a consultation report.

Dillingham predicts with a high degree of certainty that multiple orchestrated and coordinated comments will be submitted from throughout the region asking for the Commission to "hold off" directing submission of a borough incorporation petition until the borough study group has completed its "work". These will be accompanied by written representations from many entities promising to "work with" the study group with relatively uniform "commitment" to the process. Perhaps there will even be a resolution or two. None of these representations will contain a meaningful commitment to support borough incorporation. All of them will urge immediate denial of annexation. This is Lucy holding the football for Charley Brown.

Dillingham predicts this with certainty because this is precisely what Dillingham was told in 2011. Many communities promised that if Dillingham would just postpone its annexation election they would "come to the table" and seriously discuss borough formation⁴². Due to a lack of support for borough formation this did not happen.

⁴² By way of example Dillingham attaches Exh. L letters from Moses Toyakuk of Manokotak promising "to engage in the process to petition the Local Boundary Commission with the rest of the Western Bristol Bay Region" and to "define the scope of the petition process, provide our fair share of needed funds" and from Charlie Johnson of the Portage Creek Village Council "requesting consultation". Manokotak is currently a bit more straight forward about its position- "We're opposed to the petition to form a borough". Exh. B p. 12; (Sept. 16, 2015 Transcript p. 23).

Then again in 2014, during and after Dillingham held its pre-filing public hearing, folks came forward asking Dillingham to delay filing its annexation petition in return for a promise to “meet and confer” on Borough formation⁴³. Dillingham agreed but after several months concluded there was insufficient demonstrated and genuine interest and support throughout the region in moving forward at a reasonable pace and refiled its petition. It was not until after Dillingham committed to continue pursuit of annexation that the existing borough study group came together.

The Commission will be trapped by its precedent on the importance of consultation. The Commission cannot with a straight face direct anyone to submit a borough petition without engaging in on the ground consultation in each impacted village⁴⁴. Based on Dillingham’s past experience this process, if conducted in good faith with a proposed petition in hand, will take years not months. Even then there will be claims that consultation has not been sufficient.

None of which is to say Dillingham opposes borough incorporation. But in deciding whether this possibility compels denial of Dillingham’s annexation petition the Commission needs to face the reality based on well documented past history that; 1) interest in borough formation will wane once annexation is off the table, and 2) the process of borough formation will be lengthy. Both of these realities argue in favor of granting Dillingham’s annexation petition now while recognizing aspects of annexation (such as Dillingham’s fish tax rate) may be altered if a borough is incorporated and relieves Dillingham of expenses for providing services currently provided by Dillingham. That is the best way to keep all the people now pledging to participate in good faith in “studying” borough formation engaged in a meaningful pre-filing process.

8. Empowerment of Residents

Another head scratcher in the preliminary report is the assertion that forced borough formation is best because it will “empower” local residents⁴⁵. So the Department of Commerce makes region residents form a borough without letting them vote on it. The Department tells them what the borough boundaries will be. The Department tells them it will be a second class borough (as opposed to a home rule borough like Lake & Penn). The Department tells them there will be a fish tax and what the rate of taxation will be. The Department tells them what

⁴³ Exh. M, Oct. 14, 2014 letter Anderson to Ruby.

⁴⁴ Togiak and Twin Hills were not engaged in either the current or previous Nushagak Bay annexation process and presumably are learning for the first time about the Department’s plan for incorporating a borough that includes their communities without letting them vote on the matter. Dillingham suspects they will not be supportive.

⁴⁵ Preliminary Report p. 1.

powers the second class borough will exercise on an area wide basis and what powers will be reserved for cities within the Borough. The Department tells them the Planning Commission will be elected not appointed. The Department tells them how many members the Assembly will contain and how they will be elected (by District not at large). And all of this is done because this will “empower” folks who heretofore have expressed at best tepid interest in such “empowerment”? This is an odd way to proceed to empower people. Sort of like telling a kid you are “empowering” him by making him eat his vegetables.

It is fundamentally dishonest to make this claim. What staff should say is “we are making you eat your vegetables because we think they are good for you”. That would be a more honest statement.

9. Savings to State from Borough Formation vs. Loss to State from Years with No Local Fish Tax.

The preliminary report declares in conclusory fashion that denying annexation in favor of borough formation will “save the State money”. Exactly how or how much money will be saved is not identified. And in yet another internal inconsistency, staff also says “it is unwise to project accurately specific numbers for the proposed borough”⁴⁶. Actually the opposite is true. It is unwise to recommend a course of action without projecting accurately specific numbers. In fact, it is more than “unwise” - LBC regulations require one proposing a borough to project basic information about costs and expenses.

There are reasons to doubt staff’s conclusory statement. First, denying annexation will result in an immediate loss of fish tax revenue which benefits the region of \$600,000 to \$750,000 per year. Assuming a three year borough formation process (and assuming a borough is actually formed) this is a cost to the region of lost tax revenue between \$1.8 and 2.25 million dollars. Services currently provided by Dillingham will have to be reduced. Second, the State will incur significant costs in preparing and filing a borough petition. These costs will include staff time, consultant time, and Commission expenses. Court costs are an unknown. Third, the State will be required, at a minimum, to provide \$600,000 in “organization” funding⁴⁷. The State may need to provide additional “startup” funding to a new regional government beyond the minimum requirement in an undetermined amount. No such funds need to be provided to an enlarged Dillingham. Fourth, the State will need to administer borough elections. Fifth, the State will lose the value of any land transferred to the new Borough. None of these costs are analyzed in the preliminary report. The statement the state will “save money” is unsupported. Assertions such as this should be based on estimated numbers.

⁴⁶ Preliminary Report p. 48.

⁴⁷ AS 29.05.190.

Dillingham assumes Staff is referencing the State saving money on education. But, the per student funding formula will remain the same. Indeed under current AS 14 formulas the state might well spend more money not less money over time on education. Any implied education savings must assume that the costs of maintaining existing school structures and any additional education costs not covered by foundation formula funding can seamlessly be transferred to a brand new borough and covered by fish tax revenue. Dillingham suggests Staff should at least look at the existing Southwest Region budget to test this conclusion.

10. Benefit to Region of Sharing Fish Tax vs. Uncertainty Fish Tax will Actually Exist

Among the more obvious deficiencies in the Department’s thought process is how a fish tax will be adopted by the theoretical borough⁴⁸. AS 29.05.100 provides the Commission authority to “impose conditions on incorporation”. The typical condition is voter approval of a proposed sales tax.

A fish tax is a form of sales tax. It must be approved by voters. AS 29.45.670. Even if voter approval of a fish tax was not required because an excise tax was chosen, there is no guarantee a borough assembly would pass a tax ordinance. So should the Department force a borough incorporation via legislative review there is no guarantee a fish tax will actually be adopted and implemented. On the other hand, an incorporation by election can be combined with adoption of a fish tax. AS 29.45.680.

None of these uncertainties exist with regard to Dillingham’s annexation petition. Dillingham voters have already approved a fish tax and it remains part of the Dillingham municipal code⁴⁹. Staff naively proclaims “residents of the proposed borough would likely feel better about paying fish taxes if the taxes went to the proposed borough rather than the City of Dillingham⁵⁰”. This conveniently ignores the many comments previously opposing a 2.5% fish tax based on the impact of the tax on personal income, not who was receiving the money.

11. Staff Makes a Recommendation Without a Thorough Analysis

The idea that a legislative review borough not vetoed by the legislature will function over substantial local opposition to borough formation has not been fully considered. The Commission cannot “make” people run for the Borough Assembly⁵¹. The Commission cannot

⁴⁸ Dillingham assumes Commission approval of submission of the borough petition to the Legislature will be conditioned on adoption of fish tax as otherwise the risk of borough dissolution will be great. 3 AAC 110.065(4).

⁴⁹ DMC 4.21, 4.22.

⁵⁰ Preliminary Report p. 56.

⁵¹ AS 29.05.120(petition required to nominate initial municipal officials).

“make” the Assembly actually exercise any of the powers available or identified in an incorporation petition. All of these reactions to a forced borough incorporation are available. None have been considered by staff.

This is not all that has not been analyzed. Staff unabashedly says “there are no precise budget numbers available”, and “the reasonably anticipated income of the proposed borough cannot be calculated at this time”⁵². “No valuations of property are available in the proposed borough outside of Dillingham”⁵³. Staff justifies concluding a borough meets all regulatory and statutory standards (which require all of these things) by saying “no petition exists”.

A petition does exist. It is right in Staff’s back pocket (Ms. Eldemar’s petition). The Department simply lacks the courage and integrity to admit this. In part because they know bringing back the same petition previously rejected as part of Commission consideration of these annexation petitions is disrespectful to the LBC, Manokotak, and Dillingham. Ms. Eldemar’s draft petition, rejected by the Commission, contained projected revenue and expenses for a theoretical second class borough. Instead of using those projections, Staff pretends it does not exist by referencing outdated studies.

When it comes to education funding, staff makes a curious assumption. Staff claims “the City of Dillingham would no longer have to pay for its own school system and have more money for its other expenses”. This seems to ignore Dillingham’s existing bonded indebtedness among other issues. It also is not fully explained how the educational infrastructure owned by Dillingham would be transferred to the new borough. Indeed the lack of a transition plan is just one more example of the Department’s implied position that none of the many regulations otherwise applicable to borough incorporation petitions apply to the Department itself.

12. Approving Annexation Does not Preclude or Delay Borough Formation

As opposed to this uncertainty consider the alternative of expansion of Dillingham’s boundary. Dillingham already has a fish tax in place, already has adopted a low income tax refund process, and has already implemented tax collection. Moreover, Dillingham has functioned effectively and efficiently as a municipal government for years. Revenue which undisputedly benefits the region will be realized. Dillingham’s ability to continue to provide necessary services on an efficient cost effective basis will be enhanced.

Should an unbiased rational economic analysis lead the region to conclude that services now provided by Dillingham can be transferred to a borough and funded by doubling Dillingham’s 2.5% tax rate Dillingham can easily justify reducing the city fish tax. And should

⁵² Preliminary Report p.49, 50.

⁵³ Id.

the Commission conclude an actual incorporated borough nets more benefits to the region the Commission has tools available to implement such a conclusion⁵⁴. Approving Dillingham's annexation petition does not preclude borough formation by legislative review. Nor does it doom future borough finances.

Dillingham has committed to work with others in the region to examine a borough. Dillingham's commitment included providing funding for the current study along with the Bristol Bay Native Association and the City of Aleknagik. Frankly, Dillingham is skeptical significant regional support for a borough will emerge through this process. But Dillingham is participating in good faith and will continue to do so. Dillingham will not abandon its previous commitment while the current regional process is ongoing. That process is a long way from being over. It may or may not result in the filing of a borough incorporation petition. If it does not, the Department could take a good look at whether to force borough incorporation. In the meantime, it remains just as valid a decision to expand city boundaries today as it was in 2011. Staff's failure to recognize this is just one more inconsistency in an incomplete analysis.

Conclusion

The preliminary report is an outcome-driven document that makes a recommendation with a lack of practical critical thought, data gathering, and analysis. The report is not the impartial analysis those who have participated in this process for many years should have been provided. As a result, Staff is recommending the Commission reverse both the vote taken September 16, 2015 under identical circumstances, and a written Commission decision made in December 2011 approving boundaries for an enlarged Dillingham identical to those proposed in 2016. This recommendation is made based on the preposterous pretext that reversal is justified because another petition which has never been found to meet regulatory standards has been filed seeking to annex some of the same territory. This reasoning is directly contradicted by Commission precedent from 2014, and does not withstand a basic common sense logic test.

Staff needs to return to the drawing board and actually think through what it is proposing, rather than put forth undemocratic paternalistic proposals which are an insult to those in the region working slowly but surely to review borough formation.

The final report should recommend approval of Dillingham's petition, either denial or a boundary adjustment for Manokotak's petition, and explicitly recognize that these boundaries and the level of a city fish tax might be impacted later should borough incorporation be approved by the Legislature or the voters. In doing so, the Commission and LBC staff should commit to working with the existing borough formation study group rather than ramming the

⁵⁴ AS29.05.100(a).

Department's petition through the Legislature. Dillingham's annexation petition, if approved, will be a positive addition to the growth and maturity of local government in our State as envisioned in the Alaska Constitution.

Annexation can be both a catalyst for and a bridge to borough formation. Discussions within the region concerning future borough formation can include the issue of whether Dillingham's fish tax should remain "on the books" and at what rate. But without approval of annexation, borough formation may not move forward in any meaningful way. This is not in the best interest of the State since literally millions of dollars of tax revenue will continue to swim away.

The Commission and staff need to think more pragmatically about the future of the region. Should the staff do this, it will once again recommend approval of Dillingham's annexation petition.