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July 15, 2016

Local Boundary Commission Staff
550 W. 7th Avenue, Suite 1640
Anchorage, AK 99501

Re: RESPONDENTS NATIVE VILLAGES OF EKUK, CLARK'S
POINT, AND PORTAGE CREEK, AND CITY OF CLARK'S
POINT – COMMENTS ON PRELIMINARY STAFF REPORT
REGARDING CONSOLIDATED ANNEXATION PETITIONS
OF CITIES OF DILLINGHAM AND MANOKOTAK

Dear Mr. Williams:

This letter with attached exhibits is provided by respondents Native Villages of Ekuk, Clark's Point, and Portage Creek, and the City of Clark's Point (Eastside Respondents). This document is provided to take advantage of an opportunity granted in 3 AAC 110.530(c) to comment regarding the PRELIMINARY REPORT TO THE LOCAL BOUNDARY COMMISSION Concerning the Legislative Review Petition to Annex 396 Square Miles of Water and Three Square Miles of Islands to the City of Dillingham and Concerning the Legislative Review Petition to Annex 118 Square Miles of Water and 37 Square miles of Land to the City of Manokotak dated June, 2016. The comments of Eastside Respondents are set out below:

Best Interests of the State Standard

Eastside Respondents agree that annexation of the Nushagak Commercial Salmon District by Dillingham or annexation of the Igushik section of that district by Manokotak would not be in the best interests of the state. They agree with the staff's proposed finding that the Nushagak Commercial Salmon District is a regional resource.¹ They agree with the department that, with local support, a borough may be an appropriate municipal government for the Dillingham Census Area. Both the region and state could benefit if incorporation of a borough provides a means for sharing the wealth of Nushagak Bay with all residents of the region.

Eastside Respondents agree with the department's finding that the consolidated annexations may have a materially adverse effect on the creation of a borough in the region if the revenue produced by Nushagak Bay is partitioned among the cities seeking annexations. Annexation of Nushagak Bay by a city may make the formation of a new borough in the Dillingham Census Area infeasible. The following evidence supports this conclusion:

(1) The mayor of Dillingham conceded during a hearing of the commission that past borough studies have reported that the financing available would make a new borough government within the Dillingham Census Area "minimally feasible".²

(2) Sale of raw fish occurring in the Nushagak Commercial Salmon District can be a source of substantial sales tax revenue which can more effectively be realized by a municipal government covering the entire district.

(3) The rural character of the Dillingham Census Area makes a raw fish sales tax the only substantial new source of funding for a regional borough.

¹ The staff of the Local Boundary Commission are within the division of Community and Regional Affairs of the Alaska Department of Commerce, Community, and Economic Development. Hereinafter they will be referred to as "the department". The Nushagak Commercial Salmon District is comprised of the Nushagak Section and Igushik Section. Hereinafter it will be referred to as "Nushagak Bay".

² *In re* Annexation Petition of Dillingham, Agency Record on Appeal Vol. II, at p. 486.

(4) Conflicting petitions for annexation of the waters comprising Nushagak Bay would

(A) tend to segregate a regional resource for the direct benefit of petitioners thereby eliminating incentive for other communities to support borough formation; and

(B) inflame local rivalries over revenue producing territory causing further disunity in the region.

Eastside Respondents defer the department's judgment in finding that the state's best interests are promoted if the residents of the region are represented by a single municipality that is representative of their collective interests. This kind of extraterritorial representation is difficult for a city to provide. A city will act in the interests of the community rather than the region. Communities in the region must now act alone in dealing with the state and federal governments. Healthy communities need affordable energy, clean water and sanitation systems, transportation options, quality education, and robust economies. As state finances become more and more limited, these public purposes should be addressed through priorities set for the region, so that the population receives the best value from limited public money.

Eastside Respondents agree in principle with the department that a regional borough could be an appropriate form of government for the region. This subject is under study by a local task force. Eastside Respondents urge the department to advise the commission to encourage a previously convened intergovernmental consultation to continue its consideration of the borough form of government for the region.³ Tribes are influential governments in the region providing local services, infrastructure, and setting public opinion. If the commission's decision on the petitions take into

³ The task force operates under the administration of the Bristol Bay Native Association. Other persons have submitted public comment regarding the work of the task force. The membership of the task force includes representatives of cities, tribes, school districts, the regional health corporation, and the regional development corporation. It is funded by a mix of outside grant money and money contributed by the City of Dillingham.

account the results of this consultation, local acceptance of a petition to incorporate a borough is more likely.

Respondents agree with the department's recommendation that the commission should give borough incorporation a higher priority than city annexation when annexation petitions include an area of regional significance. An important state interest to consider is that borough creation would lead to the assumption of certain mandatory powers including education which is a state responsibility presently undertaken by the Southwest Region School District. It is unknown whether there will be efficiencies resulting from this assumption of the education power. There will be local concern over a perceived loss of control over the education of children of the region. The department's findings regarding borough incorporation lack the detail regarding these and other questions regarding borough formation.

The Power to Initiate a Petition to Create a Borough.

The department proposes to advise the Local Boundary Commission that it has the power to convert the consolidated annexation petitions into a petition to incorporate a borough and then approve the petition subject only to legislative review under Article X, Sec. 12 of the Alaska Constitution. In support of this advice the department states:

(1) an incorporation petition is appropriate because the territory identified for annexation covers a socio-economically integrated region which is of such a scale and character as to only be appropriate for borough rather than city government;⁴ and

(2) borough incorporation is an appropriate response when cities are in dispute over territory for annexation.

⁴ This is consistent with December 10, 1986 decision of the Local Boundary Commission regarding an effort by Dillingham to annex over 900 square miles of territory including the waters of Nushagak Bay.

Whether the department is correct regarding the commission's powers will be disputed by counsel for other parties. Eastside Respondents support in part the department's preliminary recommendation that the commission consider an incorporation petition in response to the conflicting annexation petitions. Eastside Respondents have urged the commission to deny annexation of Nushagak Bay by Dillingham on the grounds that these waters were of such a scale and character as to be only appropriate for incorporation within a borough. Eastside respondents continue to support creation of a borough covering the Dillingham Census area. However, they have encouraged and are participating in an intergovernmental consultation as a means of achieving this goal and do not want to depart from this course without exhausting possibilities for achieving the consent of the governing bodies involved. Eastside Respondents prefer that the department and commission consult with local tribes, municipalities and organizations to determine local support before resorting to the direct action method recommended by the department.

Eastside Respondents agree there is support for the department's interpretation of the commission's territorial dispute resolution powers in the text of the Alaska Constitution and history of the deliberations of the Constitutional Convention. The department has collected excerpts from this history at pages 11 – 13 of a report by the Alaska Boundary Commission entitled "Unorganized Areas of Alaska that Meet Borough Incorporation Standards", dated February, 2003.⁵

The argument in support of this direct action power focuses on the creation of the Local Boundary Commission in the state constitution along with a statement that it has the power to consider "any proposed local government boundary change".⁶ It is anticipated that petitioners will cite to

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<https://www.commerce.alaska.gov/web/Portals/4/pub/2003%20Unorganized%20Areas%20of%20Alaska%20that%20Meet%20Borough%20Incorporation%20Standards.pdf?ver=2015-06-19-104800-957>.

⁶ Alaska Const. Art. X, Sec. 12. Provides in pertinent part:

A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change.

statutes which purport to interpret and make specific the commission's powers by prohibiting the term "boundary change" from being "construed" as including the incorporation of a borough.⁷

The statutes purporting to limit the direct action power of the commission are poorly worded and may conflict with the text of the Alaska Constitution. Interpretation of the Alaska Constitution presents a question of law to which the courts apply independent judgment.⁸ The legislature's use of its law making powers to "construe" the commission's constitutional powers may not withstand judicial review and could be declared an invalid limit on the powers of the commission.

We would not be aiding the commission in its adjudicatory role unless we also discuss a legal argument that may not support the department's preferred interpretation. A court would also consider the text of other sections in Article X to discern the framer's intent regarding limits on the power of the commission.⁹ In Article X, section 3, the Alaska Constitution provides that the manner in which boroughs are formed must be prescribed by law. The text is clear that the framers intended to give the legislature a substantial role in enacting enabling legislation for how boroughs are organized. This was confirmed in *Mobil Oil Corp. v. Local Boundary Commission*.¹⁰ In *Mobil Oil*, the Alaska Supreme Court found valid a statute which allowed incorporation of the North Slope Borough to be approved by the commission without being submitted for legislative review under Article X, Sec. 12. The court reasoned that Art. X, Sec. 3 "vests in the legislature power to prescribe procedures for borough incorporation without restriction".¹¹

The decision in *Mobil Oil* should be analyzed in the proper context. In that case the court addressed the legislature's delegation to the commission of the power to approve incorporation without

⁷ See AS 29.05.115(b) and AS 44.33.812(a)(3).

⁸ *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)(court rejects validity of statute defining "available for appropriation" in Alaska Const. Art IX, Sec. 17(d) as overly restrictive).

⁹ *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975).

¹⁰ 518 P.2d 92 (Alaska 1974).

¹¹ 518 P.2d at p.103.

further legislative review. The powers of the commission were expanded by statute, not limited. Whether the legislature' power under Article X, Section 3, also includes the power to prevent the commission from proposing and presenting a borough incorporation for legislative review is not answered in *Mobil Oil*. The *Mobil Oil* court found persuasive the fact that a borough was being created out of the unorganized borough without the potential for disputes over boundaries.¹² The instant proceeding would involve a borough incorporation presented to the legislature to resolve conflicting claims for the same territory asserted by two municipalities. A court could find that, under these facts, the commission is acting within constitutional powers which are beyond the legislature's power to define away.

The commission should anticipate that the direct action recommended by the department may be challenged in court, the outcome of which cannot be predicted. Preparation of a borough incorporation petition is costly and time consuming. The financial stress experienced by the state will likely be felt by local governments before a locally sponsored petition can be available for consideration by the commission. The remedy recommended by the department is simple, direct, and economical. However, the department and the commission should proceed cautiously so that the benefits of acting directly are not lost in the course of protracted litigation.

It would be reasonable for the department to advise the commission to deny the consolidated annexation petitions for failure to meet annexation standards and then open a new docket to provide a notice and an opportunity for a hearing of an incorporation petition. It is not consistent with established procedure to add the Dillingham Census Area consisting of 25,682 square miles to a proceeding heretofore involving only 400 square miles of territory without appropriate notice and opportunity to be heard for other affected entities and property owners. Without this notice and

¹² 518 P.2d at p. 104.

process, entities and property owners in the Dillingham Census Area may successfully assert procedural and substantive due process violations.

As mentioned above, a local task force is at work studying the borough form of government. Eastside Respondents are engaged in this effort along with others in the region. The task force was created to provide a means for local leaders of cities, villages, and tribes in the region to learn what is involved in borough formation and how the tribes and a borough could jointly operate. The department is requested to recommend to the commission that it wait until after the task force concludes its work before it takes action on a borough incorporation petition. Once the task force issues its report to the region, the commission should take whatever action it considers in the best interests of the state regarding borough incorporation.

Specific findings and recommendations of the department:

Page 13: Sec. 090(a):

Eastside Respondents do not agree with the department's findings that Nushagak Bay is a territory that has a need for city government provided by Dillingham. Some of this territory is closely associated with the community served by Dillingham.¹³ But other parts of the district are better served by other communities. An example of this is the eastern shore of Nushagak Bay which hosts an intensive set net fishery.¹⁴ The eastern shore is divided into statistical areas. In those areas north of Ekuk, set net fish are delivered to tenders and floating processors anchored north of Clark's Point. From Ekuk to Etolin Point, set net fish are delivered by truck to Ekuk Fisheries, a processor located in Ekuk Village, which processes only set net fish. All of this activity, involving well over 100 sites and over 200 persons has significant seasonal impact on the city of Clark's Point and the Native Village of Ekuk.

¹³ Respondents have earlier conceded that the Wood River Special Harvest Area is of this character.

¹⁴ Exhibit IV is a series of photographs provided to illustrate the level of activity along the eastern shore during the 2016 fishing season.

Clark's Point and Ekuk have been impacted by the set net fishery for decades and have provided services there as well. Each community has air strips and provides facilities for solid waste disposal. There are joint plans to provide safer transportation between communities which will benefit the fishery. Eastside Respondents do not agree with the department's findings that all of the needs for city government can be fulfilled by Dillingham with regard to the territory offshore of the eastern shore. The department should find that the contiguous communities of Clark's Point and Ekuk provide for needed city government there as well and that by virtue of their proximity and past history should be given consideration for the need for future expansion. By reserving additional near shore waters to the City of Clark's Point, existing revenue sources are protected for the enhancement of existing facilities and services in the city.¹⁵ Dillingham has no intent to expand into this territory, only to pay for things it is already doing. A further consideration is that the ANSCA village corporation of Clark's Point, Saguyak Corporation, owns much of shoreline going north from the city up to and including Grassy Island and across Nushagak Bay to the mouth of the Snake River.¹⁶ This corporate land will have a need for city services in the future, but by accepting Dillingham's plans to deliver services only within existing city limits, future expansion of Clark's Point to obtain revenue producing waters necessary to finance city services on Saguyak land is precluded.

Respondents request the department to advise the commission to exercise the powers granted in AS 29.06.040(a) to amend Dillingham's petition to keep waters along the eastern shore reserved for the expansion of the City of Clark's Point. This protection is requested only if the commission determines to grant Dillingham's petition.

Page 16 : Sec. 130(b) Contiguity:

¹⁵ Attached to this letter is a set of three maps designated Exhibits I – III showing territory that should be excluded from the territory sought by Dillingham. The territory marked on these exhibits was determined as those waters necessary to exclude set net operations on the eastern shore and to extend city boundaries to include more territory of an existing anchorage to the north of the City of Clark's Point used by tenders and floating processors.

¹⁶ Exhibit II shows Saguyak holdings.

The department finds that Tract B as described in Manokotak's annexation petition (also known as the Igushik section of the Nushagak Commercial Salmon District) is contiguous to both Dillingham and Manokotak. These findings appear to conflict. Contiguous territory is territory which is "bordering or touching".¹⁷

... a contiguous district may contain some amount of open sea. However, the potential to include open sea ...is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim.¹⁸

In this instance every community that borders Nushagak Bay, consisting of approximately 396 square miles, could be considered contiguous with all sub districts and statistical areas of the bay identified by the Department of Fish and Game. The conclusion of contiguity accepted by the department should be harmonized with other findings regarding the community requirement and regional integration of these waters. These recommended findings lead to a conclusion that even water area must meet some type of compactness criteria in order to be considered contiguous.

For this reason, if the department were to change its preliminary findings regarding the regional nature of Nushagak Bay in the final report, it is not reasonable to find that all of the water area of the Nushagak Commercial Salmon District is contiguous to Dillingham. Eastside Respondents Clark's Point and Ekuk believe that waters adjacent to their land holdings and village site are contiguous to those communities and not Dillingham or Manokotak. This territory is described in Exhibits I- III to these comments. If the commission decides to grant Dillingham's petition, respondents request that waters contiguous to Ekuk and Clark's Point be excluded from annexation so that future expansion of these communities is possible.

¹⁷ Hickel v. Southeast Conference, 846 P.2d 38, 45 (Alaska 1992).

¹⁸ *Id.*

Sec. 130(c)(1) Scale:

Eastside Respondents agree that the size and character of the territory to be annexed by Dillingham exceeds the scale appropriate for city government.

Eastside Respondents agree that the standard set out in 3AAC110.130(c) has not been met.

Page 19: Sec. 140 Legislative Review Standards

Eastside Respondents agree that Dillingham's petition does not satisfy the standards set out in sec. 140 (1), and (3) – (9).

Sec. 140(2) Dangerous Conditions:

Eastside Respondents do not agree with the department's finding that Dillingham's petition satisfies the annexation standard set out in Sec. 140 (2) that annexation will enable the city to regulate or control the detrimental effects of dangerous conditions occurring in the territory. The department finds that the residents of Dillingham will be endangered by conditions in the territory. The department reasons that danger exists because residents of the city fish in the territory which requires the city to provide expensive harbor related services. This is not the type of danger that is contemplated by the regulations. The regulation requires that annexation will allow the city to "regulate or control the detrimental effects" of the danger.

The harbor has been touted by Dillingham as a costly service it provides to the fishing fleet and argues that this facility alleviates a danger that exists or arises "in the territory." In fact, the harbor was constructed to alleviate a danger that occurs within the existing city limits of Dillingham. Before the harbor existed, boats were either anchored or beached and left exposed to flooding and erosion caused by the Nushagak River. This was documented in Dillingham Harbor Small Boat Harbor Upgrades April,

2009 prepared by Bristol Environmental Engineering .¹⁹ The harbor was built to protect these vessels from conditions happening near shore, not in the territory identified for annexation. In fact, petitioner disavows any action to regulate or control danger in the territory by leaving public safety enforcement with the state where it now resides. The department acknowledges this fact when it observes on page 25 of the preliminary report that there is no agreement between the city and the Alaska State Troopers regarding public safety services in the territory sought to be annexed. If there is a danger to residents in the territory, the city does not propose to deal with it.

The department should reconsider its recommendation and find that sec. 140(2) has not been met.

Comments regarding Manokotak's Annexation petition

Page 28: Sec. 090 Reasonable need for government by City of Manokotak:

Eastside Respondents do not agree with the department's finding that tract B (Igushik section) does not have a need for city government. The set net fishing operations that occur on Igushik Beach within Tract C extend into the waters of Tract B and would support a need similar to the set net operations on the eastern shore that the department finds as showing a need for city services. The fishers situated on Tract C use similar services provided by Manokotak in order to get themselves, their supplies, and their gear to their sites. Once there, they extend their nets into Tract B which will serve as an important revenue source to pay for city services. It would be reasonable to evaluate need in regard to services provided to set net operations in the same manner for both the eastern shore and for tract B of Manokotak's petition. The department should find that Tract B sought by Manokotak meets the need standard set out in sec. 090.

¹⁹

http://www.agnewbeck.com/pdf/bristolbay/Dillingham_Comp_Plan/Small%20Boat%20Harbor%20Planning%20Document.pdf)

Page 29: Sec. 110 Necessary Human Resources to Provide Essential Services:

The department finds that Manokotak lacks the human resources to provide necessary municipal services. In support of this finding the department cites the past inability of Manokotak to collect municipal sales taxes. The department should reconsider this finding based on the difference between the existing city sales tax and a raw fish sales tax. Under the latter tax, the ordinances used as models for such a tax regime have processors collecting tax proceeds on behalf of the city and remitting them to the city's treasury. Tax collection would not be a burden directly undertaken by the city.

The department should reconsider its finding regarding the lack of human resources to provide essential tax collection services.

Page 31: Sec. 130(c)(1) and (2) Scale Suitable for City Government:

The department finds that the territory Manokotak seeks to annex exceeds the scale suitable for a city. The department relies on the size of the area – 155 square miles- and the socio-economic connections to the territory which it finds to be an area more suitable for inclusion in a borough. Eastside Respondents defer to the expertise of the department to make these findings. However, if the department determines to reconsider these findings for the final report and changes its preliminary findings which recommend disapproval of city annexations of large unpopulated areas of water, the department could find that reservation of limited waters offshore of set net statistical areas within the Nushagak Commercial Fishing District is suitably limited in scope and does not impair the value of the remaining waters of the district as a borough asset. In Tract B, only 6 percent of the total catch in the Nushagak Commercial Salmon District is allocated to set net permit holders.²⁰ Within the Igushik

²⁰ 5 AAC 06.367(b)(2)(A).

section, set nets may extend only 300 feet from the mean low tide mark.²¹ Annexation limited to this water would substantially reduce the scale of Manokotak's proposed annexation.

The department could make a similar finding regarding the set net fishery on the eastern shore of Nushagak Bay where only 20 percent of the total catch is allocated to set net permit holders. Within statistical areas on the eastern side, there are various distances from shore in which the set net fishery operates. If the district is to be partitioned among contiguous municipalities, this territory should be reserved for future expansion of the City of Clark's Point. An additional reservation is indicated on Exhibit II to preserve Clark Point's revenue sharing from fishery business taxes paid by floating processors operating within or near city boundaries. Eastside Respondents can provide a legal description of these reservations if the commission finds merit in this request.

Annexation of land and water associated with the shore fishery could be justified as appropriate in scale for the contiguous communities while still leaving 74 percent of the revenue from the district available to support a regional government.

Eastside Respondents appreciate the opportunity to comment on the department's preliminary report. The fact that comment is not made on a specific finding or recommendation in the preliminary report should not be considered a waiver of respondents' right to contest any final finding or recommendation made by the department or the commission.

Respectfully submitted,

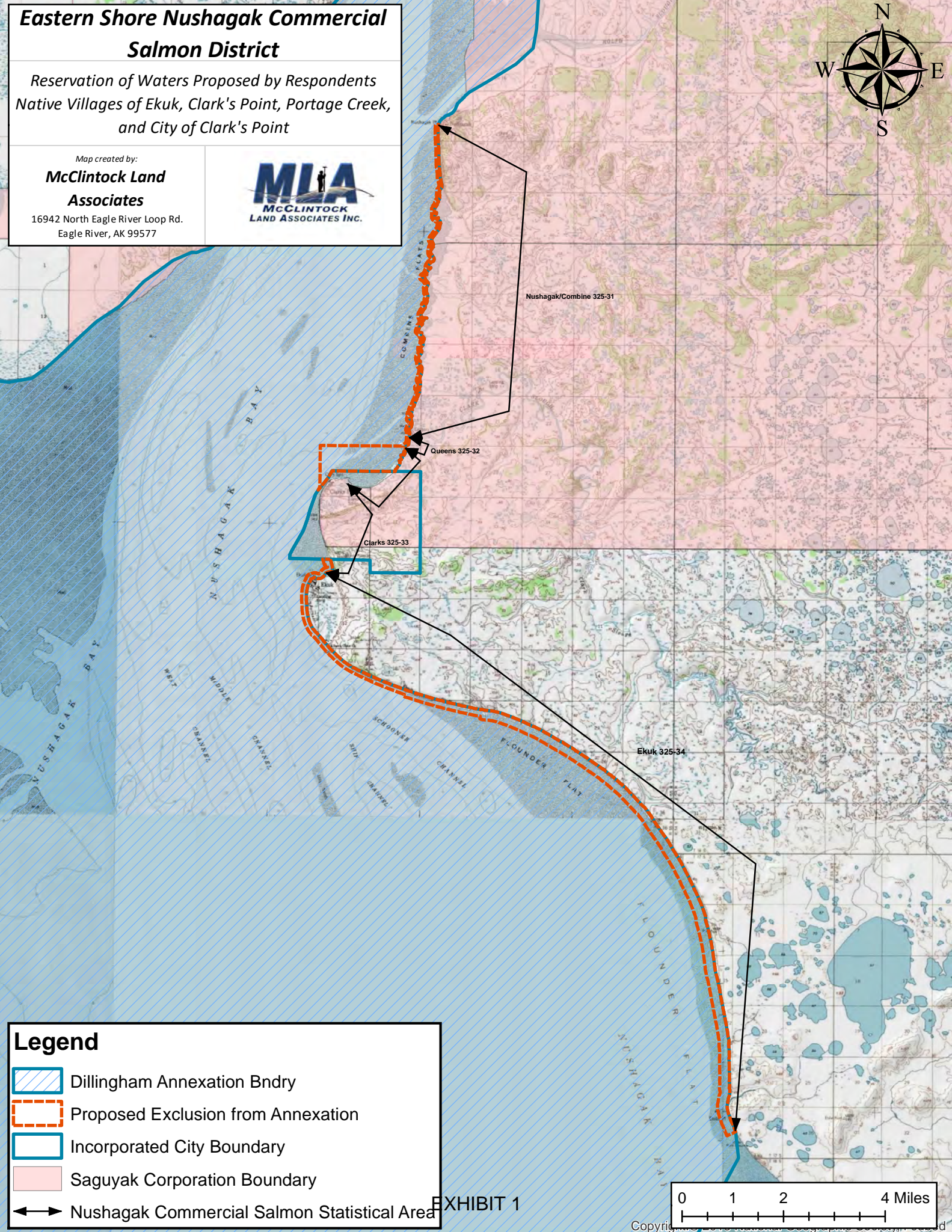
James L. Baldwin
Counsel for Eastside Respondents

²¹ 5 AAC 06.331(c) and (i).

**Eastern Shore Nushagak Commercial
Salmon District**

*Reservation of Waters Proposed by Respondents
Native Villages of Ekuk, Clark's Point, Portage Creek,
and City of Clark's Point*

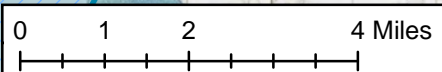
Map created by:
**McClintock Land
Associates**
16942 North Eagle River Loop Rd.
Eagle River, AK 99577



Legend

- Dillingham Annexation Bndry
- Proposed Exclusion from Annexation
- Incorporated City Boundary
- Saguyak Corporation Boundary
- Nushagak Commercial Salmon Statistical Area

EXHIBIT 1



Eastern Shore Nushagak Commercial Salmon District

Reservation of Waters Proposed by Respondents
Native Villages of Ekuk, Clark's Point, Portage Creek,
and City of Clark's Point

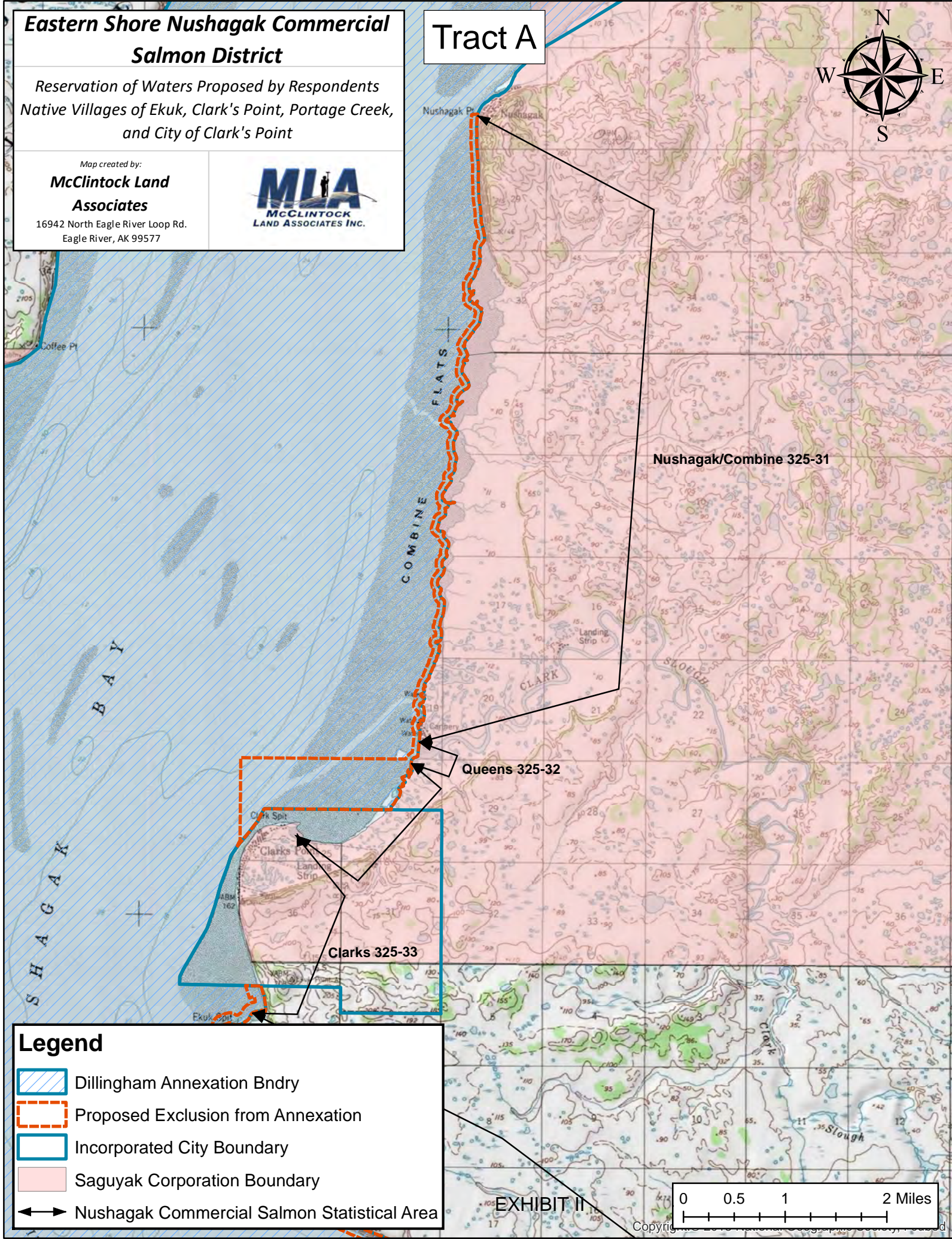
Map created by:

**McClintock Land
Associates**

16942 North Eagle River Loop Rd.
Eagle River, AK 99577



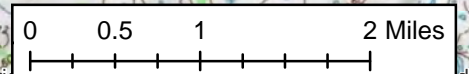
Tract A



Legend

- Dillingham Annexation Bndry
- Proposed Exclusion from Annexation
- Incorporated City Boundary
- Saguyak Corporation Boundary
- Nushagak Commercial Salmon Statistical Area

EXHIBIT II





Tract B

Eastern Shore Nushagak Commercial Salmon District

Reservation of Waters Proposed by Respondents
Native Villages of Ekuk, Clark's Point, Portage Creek,
and City of Clark's Point

Map created by:

**McClintock Land
Associates**

16942 North Eagle River Loop Rd.
Eagle River, AK 99577



Legend






-  Dillingham Annexation Bndry
-  Proposed Exclusion from Annexation
-  Incorporated City Boundary
-  Saguyak Corporation Boundary
-  Nushagak Commercial Salmon Statistical Area

EXHIBIT III

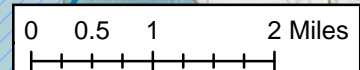


Exhibit IV—Photographs from 2016 Salmon Fishing Season,
Eastern Shore of Nushagak Bay, Alaska



South of Ekuk



Ekuk Cannery



Clark's Point



Queen's Slough



Ekuk



Sockeye salmon



Ekuk Beach



Ekuk Cannery



Ekuk



Combine area



South of Ekuk



Queen's Slough



Ekwik



Ekwik Beach



Nushagak Point



Ekwik Beach



Ekuk Beach set net site



Ekuk Beach set net site



Ekuk Beach set net site



Clark's Point



Clark's Point



Ekuk Beach



Ekuk Beach commercial set net site



King Salmon strips



Ekuk Beach



Ekuk Beach



Ekuk Beach set net site



Delivery at Ekuk Cannery



Ekuk Beach



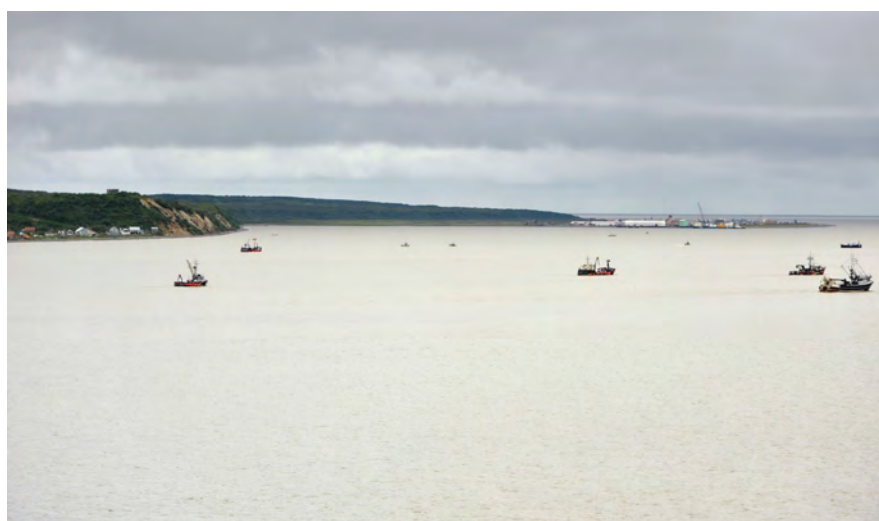
Processors off of Clark's Point



Processor between Ekuk and Clark's Point



Processor between Ekuk and Clark's Point



Processors between Ekuk and Clark's Point