

**LOCAL BOUNDARY COMMISSION**

**STATE OF ALASKA**

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

**RESPONDENTS NATIVE VILLAGE OF EKUK, CLARK'S POINT AND  
PORTAGE CREEK, AND CITY OF CLARK'S POINT  
MOTION FOR LEAVE TO SUBMIT COMMENTS ON  
LATE FILED DEPARTMENT RECOMMENDATIONS  
(Corrected)**

Respondents Native Village of Ekuk, Clark's Point and Portage Creek, and City of Clark's Point respectfully ask that the schedule for considering the Manokotak and Dillingham Consolidated Annexation Petitions be adjusted to allow parties to submit further comments to the Department. This request is occasioned by the July 15, 2016 letter from Chris Hladick,

Commissioner of the Department of Commerce, Community, and Economic Development to the Mr. Lynn Chrystal, Chair of the Local Boundary Commission.<sup>1</sup>

July 15, 2016 was the date by which the public was to submit comments on the department staff's preliminary report. Petitioners, respondents, and many members of the public submitted comments. The department staff posted comments received on their website. Included on the list was a copy of a letter from Commissioner Hladick to Chair Chrystal which sets forth new department positions that are not contained in the department's preliminary report.

The process for considering an annexation petition is carefully set out in the LBC's regulations. After the petitions are accepted for filing there is a period for public comment and for the filing of responsive briefs. Following that, petitioners may submit reply briefs. The next step is as follows:

The department shall investigate and analyze a petition filed with the department under this chapter. The department shall prepare a written preliminary and a written final report regarding the petition. Each report must contain the department's findings and recommendations regarding the petition.<sup>2</sup>

"Department" means the Department of Commerce, Community, and Economic Development.<sup>3</sup> The department staff acts as the advisor to the commission, performs the technical reviews, and provides assistance to petitioners, respondents, and interested person who have procedural questions.<sup>4</sup> Throughout the process of the Dillingham and Manokotak legislative review petitions, the department staff advising the commission has communicated with interested parties, ensuring that filings flow through them such that all parties are informed of communications with the department related to the petitions. The staff issued its preliminary

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<sup>1</sup> Exhibit A, Letter from Commissioner Hladick to Chair Chrystal.

<sup>2</sup> 3 AAC 110.530(a).

<sup>3</sup> 3 AAC 110.990(7).

<sup>4</sup> 3 AAC 110.435.

report June 3, 2016. Pursuant to regulation, “interested persons may submit to the department written comments pertaining directly to the preliminary report,”<sup>5</sup> and comments were accepted through July 15, 2016.

Commissioner Hladick’s July 15 letter was sent to Chair Chrystal, not to the department staff advising the commission. By its terms, the letter constitutes comments and recommendations of the department. In his letter the commissioner said he was

providing **DCCEDs comments** on the pending 2015 City of Dillingham and City of Manokotak Annexation Petitions, as well as the draft petition to create a Dillingham or Tikchik Borough[.]

He said he would be “brief in **my comments and recommendations**”. He wrote as head of the department, saying “**As Commissioner, I find . . . [.]**” He concluded, “**my recommendation** is for amending and then adopting the two locally generated annexation petitions . . . [.]”<sup>6</sup>

According to the commission’s regulations, the department’s report “**must** contain the department’s findings and recommendations regarding the petition.”<sup>7</sup> And yet, the department’s recommendations contained in Commissioner Hladick’s letter do not appear in the department’s preliminary report. Moreover, because they were not in the report and the comment period has closed, there is no opportunity for petitioners, respondents and interested parties to comment.

The department’s comments and recommendations set out in Commissioner Hladick’s letter conflict in significant ways with the department’s findings and recommendations set out in the preliminary report. Under these circumstances, it would be a violation of the commission’s own regulations not to permit comments on the newly stated department comments, findings

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<sup>5</sup> 3 AAC 110.530(c).

<sup>6</sup> Exhibit A at pp. 1 and 3 (emphasis added).

<sup>7</sup> 3 AAC 110.530(a) (emphasis added).

and recommendations. The regulations expressly provide that the department's recommendations must be in the report and that interested parties may comment on the report. Failure to follow the commission's own regulation is a defect in the process sufficient to constitute a significant violation of due process.

In Ekuk's reply brief in *Native Village of Ekuk v. Local Boundary Commission*<sup>8</sup> respondent argued that the commission should follow its procedural regulations rather than implement *ad hoc* procedures. Ekuk pointed out:

[t]he Alaska Supreme Court does not condone such a practice. In 1994 it held that the notice requirements of a borough incorporation had not been satisfied, and agreed with the superior court that the "notice violations had prejudiced Villages by abbreviating the time they had in which to voice opposition to the Borough's boundaries[.]"<sup>9</sup> The Supreme Court invalidated the incorporation and remanded it back to the LBC.<sup>10</sup>

In response to these arguments, the Dillingham Superior Court found that a failure to provide the notice and hearing prescribed by regulation for a legislative review petition was a substantial due process violation, declared the annexation invalid, and remanded the case back to the commission with direction to follow the law.<sup>11</sup>

The Commissioner's comments and recommendation are not styled as comments on the preliminary report, but rather as comments on the petitions. To the extent they are intended as public comments on the petitions, they are untimely. The deadline for submitting public comments on the petitions was February 26, 2016. Moreover, public comments are to be made to the department staff that advises the LBC, not to the chair of the LBC. And finally, the

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<sup>8</sup> 3 DI - 12-00022 CI.

<sup>9</sup> Citing *Lake and Peninsula Borough v. Local Boundary Comm'n.*, 885 P.2d 1059 (Alaska 1994).

<sup>10</sup> Appellant's Reply Brief at p.21.

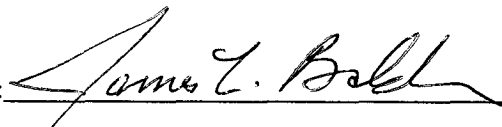
<sup>11</sup> *Native Village of Ekuk v. Local Boundary Comm'n.*, 3 DI -12-00022CI Order on Appeal at 17.

comments are well identified as department positions, not individual comments, although the Commissioner did disclose that he had been city manager of Dillingham for seven years.

In anticipation of being granted an opportunity to provide comments on the department's new comments and recommendations, it would be helpful to understand exactly who is speaking for the department. Did the letter expressing the DCCED's recommendations supersede portions of the department's preliminary report? In quoting from the LBC's 2011 findings, has the department reversed its position that the commission must make new findings on the new petitions? Has the department provided other comments and recommendations to the LBC for which petitioners, respondents and other interested parties are entitled to notice and the opportunity for comment?

In summary, Commissioner Hladick's letter to Chair Chrystal raises a number of issues and concerns, both procedurally and substantively. Respondent Ekuk, *et al* requests that the commission follow its regulations by repeating the procedural steps prescribed in 3 AAC 110.530(a)-(c) of providing a preliminary report containing all of the department's findings and recommendations and providing interested parties and the public with notice and an opportunity to comment.

Dated this 1st day of August, 2016.

By: 

James L. Baldwin  
Counsel for Respondents Ekuk *et al*.



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

Department of Commerce, Community,  
and Economic Development

OFFICE OF THE COMMISSIONER

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July 15, 2016

Mr. Lynn Chrystal, Chair  
Local Boundary Commission  
550 West Seventh Avenue, Suite 1640  
Anchorage, AK 99501-3510

Dear Chairman Chrystal

Before providing DCCED's comments on the pending 2015 City of Dillingham and City of Manokotak Annexation Petitions, as well as the draft petition to create a Dillingham or Tikchik Borough, I want to note my previous service for seven years as the City Manager in Dillingham, and thus my familiarity with these issues from a local perspective.

I am also aware that the Bristol Bay Native Association (BBNA) contracted with the McDowell Group to solicit local input. They are providing basic education and the options for borough formation which includes running the financial numbers to see if it is feasible. There have three meetings left, in September, November and after the first of the year. The purpose is for villages across BBNA to receive an independent view of the issue.

With that background, I will be brief in my comments and recommendations, as follows:

**1. LBC should approve both annexation petitions.**

- The first paragraph of the executive summary states that "The LBC cannot grant both petitions because their proposed annexations overlap." The LBC can amend the boundary for the Manokotak petition to remove Tract B (per staff analysis on page 28 of preliminary recommendation), thus eliminating the overlap and clearing the way for LBC approval of both annexation petitions.

**2. LBC should resolve matters as they now stand.**

- LBC review and action is scheduled for September 2016 on these petitions.
- It is important to have an LBC-approved petition ready for submission to the Legislative Review process within the required time period (the 1<sup>st</sup> 10 days of a Legislative session.)
- There is no need to delay action on the current annexation petitions while the borough formation process works itself out politically and legally, as it would delay the ability to levy a local fish tax during the 2017 fishing season. (Tax was collected during parts of 2012-2014, and brought in approximately \$600,000 annually.)

EXHIBIT A

- The LBC Staff Preliminary Recommendation does not have any specific timeline about when borough petition would be submitted to legislature, no specific explanation about who would prepare the petition and how long it would take to prepare, no specific pre-filing process (such as Dillingham and Manokotak both followed before filing their legislative review annexation petitions) to explain petition to residents before it is filed.
- 3. Borough formation discussions are proceeding in the region now. This process should be encouraged to proceed and there is no need to impose terms and ideas as to what a Dillingham Census Area Borough should be.**
- Borough formation discussions are underway in the region via the just initiated BBNA study (Dillingham and Aleknagik provided the fiscal match for the grant funding). The McDowell Group thus is already under contract for outreach and education throughout the region.
  - The BBNA study is scheduled to conclude early in 2017. Even if this schedule is met, it will take time to work out details regarding the legal and political process.
- 4. Approving both annexation petitions does not delay or negate the possibility of a successful future borough.**
- The LBC stated in their December 2011 findings on the Dillingham annexation (identical, except for process for approval) the following:  
“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. We find that the city of Dillingham is the appropriate government for the territory because the city is the region’s hub, because the annexation could encourage, not hinder, borough formation, and because approving the annexation petition does not remove any present or future fish tax revenue for existing communities or a future borough.”  
We find that the petition satisfies 3 AAC 110.135’s requirement for annexation.” (page 10)
  - There can be both post-annexation (enlarged) Dillingham and Manokotak local fish taxes AND a future Borough local fish tax. This is how it works in other places in western Alaska:
    - The cities of Egegik, Pilot Pt, and Chignik levy a local fish tax AND the Lake and Peninsula Borough also levies a borough tax on these same fisheries. The cities of Sand Point and King Cove levy a local city fish tax AND the Aleutians East Borough levies a borough fish tax on these same fisheries.
  - In the examples cited above the combined city and borough local fish tax rates vary from 3- 5%. Dillingham previously collected and proposes again to collect a 2.5% fish tax, leaving an opportunity for a future borough fish tax.
- 5. The region should decide for itself what to do and the current analysis is incomplete for decision-making.**
- The Preliminary Recommendation on page 59 states that if approved a transition plan will be needed. The transition plan needs to be developed in close consultation with various local entities including the Southwest REAA

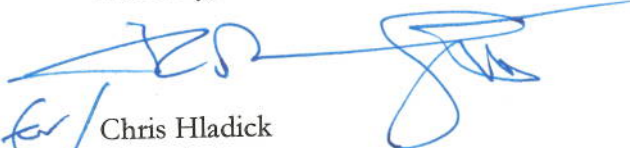
School District, Dillingham School District and others to insure that the potential initiation of a Borough School District and the orderly transition of other powers and services are properly planned.

- In another Preliminary Recommendation on page 60 it states that:  
“(14) There is no petition, but the recommendation is that the LBC propose a second class borough, not a home rule borough. The LBC staff finds that 3 AAC 110.981 is met.” As Commissioner, I find this conclusion premature, as local entities should decide whether to form a second class or home rule borough.
- Another Preliminary Recommendation on page 48 states that:  
“The LBC staff is recommending that the LBC propose forming a borough. As a proposed borough would need to determine its preferred levels of service, it is unwise to project accurately specific numbers for the proposed borough.” This preliminary recommendation leaves unanswered numerous vital questions, as follows:
  - What rates of taxation and types of taxes are necessary as part of the borough formation proposal?
  - What powers and services will the new borough offer?
  - What apportionment scheme will be in effect in the new borough- how many seats will there be on the Assembly?
  - Typically borough formation petitioners must present a three year budget with assumptions about tax types and rates as well as the cost of providing services. Who should prepare this budget and offer a fiscal analysis?

In summary, it is my belief that the formation of a borough in the region is first and most properly a regional question, and the draft petition for borough formation is premature and not ripe for decision by the LBC at this time. To wait is to delay revenue to local governments during the current fiscal shortfall. Further, boundaries can be amended at the time of borough formation by the LBC.

Thus, my recommendation is for amending and then adopting the two locally generated annexation petitions, which do not impede further regional discussions regarding borough formation.

Sincerely,



Chris Hladick  
Commissioner

cc: Local Boundary Commission Members  
Fred Parady, Deputy Commissioner, DCCED  
Katherine Eldemar, Director, DCRA



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**PROOF OF SERVICE**

I James Baldwin, certify that : on August 1, 2016 I sent electronic files by email containing Respondents Native Villages of Ekuk, Clark's Point, and Portage Creek, and City of Clark's Point corrected MOTION FOR LEAVE TO COMMENT dated August 1, 2016. An attachment containing this motion and exhibit was sent to:

LBC Staff at [LBC@alaska.gov](mailto:LBC@alaska.gov)

City of Dillingham: Janice Williams City Clerk at [cityclerk@dillinghamak.us](mailto:cityclerk@dillinghamak.us)

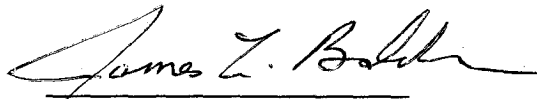
Brooks Chandler, counsel for petitioner City of Dillingham at [bchandler@bcfaklaw.com](mailto:bchandler@bcfaklaw.com)

City of Manokotak : Nancy George at [panilkuk@yahoo.com](mailto:panilkuk@yahoo.com)

James Brennan, counsel for petitioner City of Manokotak at [jbrennan@law-alaska.com](mailto:jbrennan@law-alaska.com)

Lea Filippi, Counsel for Respondent Southwest Region School District at [filippi@alaskalaw.pro](mailto:filippi@alaskalaw.pro).

DATED at Juneau, Alaska this 1<sup>st</sup> day August, 2016.

A handwritten signature in cursive script, reading "James L. Baldwin". The signature is written in black ink and is positioned above a horizontal line.

James L. Baldwin  
Counsel for Respondents  
Ak Bar No. 7610071