

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE LEGISLATIVE
REVIEW PETITION 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)

RESPONSIVE BRIEF OF RESPONDENTS
NATIVE VILLAGE OF EKUK, CITY AND TRIBE OF CLARK’S POINT AND
NATIVE VILLAGE OF PORTAGE CREEK TO THE LEGISLATIVE REVIEW
ANNEXATION PETITION OF THE CITY OF DILLINGHAM FOR
ANNEXATION OF NUSHAGAK COMMERCIAL SALMON DISTRICT
WATERS AND WOOD RIVER SOCKEYE SALMON HARVEST AREA WATERS.

I. INTRODUCTION

Dillingham petitions a second time to annex approximately 396 square miles of water and 3 square miles of land. The first annexation attempt ended when the Superior Court voided and remanded an annexation petition which the LBC previously allowed to proceed under the local action method. (Hereinafter “local action petition.”). Dillingham now petitions to annex the same territory using the legislative review method. (Hereinafter “legislative review petition”). Dillingham argues that the annexation is in the best interests of the state because it would promote “maximum local self-government” and “long-term economic vitality of the city.”¹

The Native Villages of Portage Creek, Clark’s Point, and Ekuk – federally recognized tribal governments – and the second class city of Clark’s Point (hereinafter “respondents”)

¹ Pet. at p.14.

join together to oppose the annexation petition filed by the City of Dillingham (hereinafter “Dillingham” or “the petitioner”) to annex the waters of the Nushagak Commercial Salmon District and the Wood River Sockeye Salmon Harvest Area (WRSSHA).²

This Brief of Respondents includes a section on the respondents and their connection to the Nushagak Bay watershed followed by a section that raises five main arguments: (A) that the proposed annexation ignores the importance and contributions of tribal and municipal governments other than Dillingham and that the tax would cause a significant hardship to them without a corresponding benefit; (B) that contrary to the petition and its summary, the LBC must make findings based on this new, legislative review petition; (C) that the petitioners should be required to start the prefiling process again without misinforming the public that the commission has already made its determinations and findings; (D) that the petition does not meet the regulatory standards for annexation to a city; and (E) that the petition relies on “new interpretations” of the LBC’s regulations that are inconsistent with the plain language or longstanding interpretation of the regulations, and which cannot legally be applied without regulatory amendments made under the Administrative Procedures Act.

The Respondents want the LBC to know that they have made and will continue to make efforts to pursue a regional solution to the problems, including the feasibility of the formation of a borough as an alternative to Dillingham’s annexation petition.

² The affidavit of Council President Robert Heyano, is attached to this responsive brief as Exhibit # 1. The affidavit of Mary Ann Johnson Treasurer of the Council of the Village of Portage Creek is attached as Exhibit #2. The affidavit of Joseph Wassily Mayor of the City of Clark’s Point is attached as Exhibit # 3. In these affidavits, officers representing the Respondents’ group explain the socio-economic connections of their communities to the territory proposed for annexation.

II. RESPONDENTS' CONNECTION TO THE NUSHAGAK BAY WATERSHED.

Respondents are a group comprised of three tribal governments and one municipal government -- the federally recognized tribes of Ekuk, Clark's Point, and Portage Creek, and the second class city of Clark's Point.

Ekuk and Clark's Point are located side-by-side on the Eastern shore of Nushagak Bay. Portage Creek is located 29 miles upriver from Nushagak Bay. Together these villages have over 200 members enrolled who reside in the municipalities and villages of the Western Bristol Bay region and in places outside the Bristol Bay watershed. The City of Clark's Point is located on a spit that juts into Nushagak Bay, 15 miles southeast of Dillingham. According to the United States Census Bureau, the city has a total area of 4.1 square miles, of which 3.1 square miles is land and 0.9 square miles (22.66%) is water. It had a permanent population of 62 persons according to the 2010 U.S. Census. In the summer months approximately 300 persons are present in and around Clark's Point and Ekuk due to the commercial fishery. During the 2015 fishing season, 93 set net sites were operated within Ekuk and 22 more were operated within Clark's Point. There is a salmon processing plant (Ekuk Fisheries) situated between Ekuk and Clark's Point that processes salmon caught at set net sites on both the Western and Eastern sides of Nushagak Bay.

Since 1888 and possibly earlier, Clark's Point has been the site for salmon processing facilities serving Nushagak Bay. Processing on land was phased out in 1952 when the cannery was used as the headquarters for the fishing fleet of the Alaska Packers Association. That facility closed in 2001. The ownership of the facility has devolved to Trident Seafoods, Inc. The city maintains a dock and is exploring other uses and activities it might undertake to serve the commercial fishery.

Nushagak Bay is of regional importance to these tribal and municipal governments and other nearby municipalities and villages. Although Dillingham is an important center for transportation and other purposes, Nushagak Bay and the Wood River are not a part of the community of the City of Dillingham. Dillingham is not alone in having important socio-economic contacts with the territory covered by the petition. The annexation requested in the petition would exclude other villages and municipalities in the region from the benefits that could be derived from administration of these two commercial fishing districts by a regional government or service area. Because of the tax the city intends to levy, it would also impose an unwarranted hardship on them without a corresponding benefit.

III. ARGUMENT

A. The proposed annexation ignores the importance of and contributions by tribal and municipal governments other than Dillingham to the area, and would impose a hardship on those entities through a tax that does not benefit them.

Dillingham's rationale for expansion is that it would allow the city to obtain waters in which substantial sales of salmon occur during the short but productive fishing season of Western Bristol Bay. The fishing season typically averages 40 days from early July through mid-August with periodic openings and closing of districts. Dillingham proposes to levy and collect a sales tax on the sale of raw fish caught in the waters proposed for annexation. Dillingham believes the tax is efficient because many of the fishermen operating in these waters come from outside the city and they should bear the burden of paying for the facilities and services provided by the city.

In its petition, Dillingham represents that it is the regional center for fishing activity carried out in Nushagak Bay. However, persons engaged in that fishery are based in other municipalities of the region as well. The Nushagak Bay fishery is not only made up of drift boats, but also set net operations. Drift net boats are registered to fish in the Nushagak

Commercial Salmon District and other districts including Naknek – Kvichak, Ugashik, Egegik and Togiak.³ All of these districts have municipalities that provide services to the fisheries. A significant percentage of the set netters reside in the municipalities and communities of the region as well.

At present, the city assesses user fees for mooring in the harbor and use of the all tides dock. The city also levies property and sales taxes. Dillingham argues that a new revenue source is needed to make the city more sustainable. It claims that “the City taxes everything that it can, but it is not enough to run the city.”⁴ The reallocation of the cost of fishery related services to raw fish sales tax revenue will benefit residents of the city. It would not, however, benefit other communities of the Western Bristol Bay Region who have residents directly engaged in fishing in the territory proposed for annexation. Upon these governments and persons, the tax burden would fall especially hard.

The hardship on these groups is confirmed by a study prepared by Northern Economics for the Bristol Bay Economic Development Corporation in 2009 and updated in 2012 that found the following economic conditions to exist:⁵

(1) The cost of groceries in the Dillingham area is more than any other area of the state. Heating fuel averages \$6.59 per gallon.

(2) Drift gill net vessels owned by local residents have lower horsepower, less fuel capacity, and on average less capacity for chilling fish than vessels owned by permit holders residing outside the Bristol Bay watershed. These differences in capacity have been increasing over time.

³ Under regulations of the Board of Fisheries, a drift net boat must register for a specific district but may fish in any district of Bristol Bay upon giving 48 hours prior notice. 5 AAC 06.370.

⁴ Pet. at p. 290.

⁵ Exhibit #4.

(3) Residents of the watershed hold only 20 percent of the drift net permits and 38 percent of the set net permits in the fishery. This out migration of permits is a long-term issue for the region.

(4) When the earnings of drift and set net permit holders are adjusted for inflation, there has been a steady downward trend in revenues from the watershed for the period 1984 – 2012. The study describes this loss in graphic terms:

In the 1980's, per capita revenue was over \$10,000 with a peak in 1988 of over \$15,000. However since 2005 watershed permit holders have brought in an average of just \$3,452 per man, woman and child living in the Region.⁶

Based on these economic realities, the use of raw fish sales tax revenues should be considered with great caution. Permit holders and their crew residing in the Nushagak Bay watershed will be taxed along with nonresidents and they are not similarly situated to the taxpayers targeted by petitioner. Any perceived “efficiency” is outweighed by the additional burden placed on the region’s economy which has been significantly affected by the decline in per capita revenue.

Petitioner is offering very little if any new services in the territory to be annexed. It has stated: “[t]he City is not trying to grow services, but to pay for existing services.”⁷ It proposes to provide the same dock and harbor facilities that it provided before annexation, but it will do this by supplanting the funding used for these purposes with revenues generated from the raw fish sales tax. Dillingham disavows the provision of police services in the territory, and will accept only a limited role in search and rescue operations.⁸ The city states that the Alaska State Troopers will remain the agency primarily responsible for providing public safety services. However, the Troopers have not accepted that role and,

⁶ Ex. # 4 at p. 9.

⁷ Pet. at p. 290.

⁸Petitioner proposes to provide better “coordination” of search and rescue services that are provided by other persons. Pet. at p. 12, 20, 43.

according to petitioner, have pointedly refused to sign a primacy agreement with the city.⁹ Dillingham made a one-time capital expenditure of \$35,000 to establish a cache of materials useful in responding to oil spills.¹⁰ In sum, Respondents fear that if the annexation moves forward, Dillingham's treasury will swell with fish tax revenue while the economies and well-being of other communities of the region will continue to decline.

Although Dillingham suggests that its proposed annexation would not preclude the formation of a borough, a 2012 assessment found that "to the extent that annexation gives the City of Dillingham jurisdiction to levy fish tax revenues, it diminishes the financial feasibility of a Western Bristol Bay Borough."¹¹ The LBC and the state have the power and opportunity to develop a regional solution that would more equitably allocate benefits to be obtained from a sales tax on raw fish harvested in the territory proposed for annexation. Respondents support and encourage such a solution.

B. The LBC is required to determine whether the legislative review petition before it meets the applicable annexation regulatory standards.

Petitioner contends that, in adjudicating its legislative review petition, the LBC is bound by all findings relating to the annexation standards set out in its decision on the local action annexation petition.¹² The claim appears both in the prefiling summary and in the petition itself. Although the Department staff informed Dillingham Mayor Ruby that the

⁹ Pet. at p. 45.

¹⁰ The oil spill response cache was purchased with raw fish sales tax revenue under the former tax and located at the Dillingham boat harbor. Petitioner says it will "possibly" put a cache in other places. Pet. at p. 21. In fact, the city does not provide oil spill remediation services in the territory proposed for annexation, only in the harbor. The city did not participate in or provide equipment to remediate the Lonestar oil spill during the 2014 season caused by the sinking of a salmon tender near the mouth of the Igushik River. The spill extended into the territory that Dillingham claims is a part of its community. However, all spill containment equipment and consumables were provided by state and federal oil spill response agencies mobilized out of Anchorage. The spill resulted in an emergency closure of the set net fishery along Igushik Beach, costing most set netters their season.

¹¹ Ex. #7, p. 7 n. 11 (2012 Preliminary Assessment Fiscal feasibility of a Potential Western Bristol Bay Borough).

¹² See e.g. Pet. at p. 84 discussing the "best interest of the state" standard ("The commission is bound both by judicial order and its own previous decision to approve the proposed annexation and submit it to the Alaska Legislature for legislative review").

assertion was incorrect,¹³ the petition continues to make the claim. Accordingly, respondents must object.

The Superior Court vacated the LBC's December 14, 2011 decision approving the local annexation petition. It didn't vacate part of the decision; it vacated the entire decision, including any findings. The Superior Court ordered petitioner to refile a legislative review petition if it intended to proceed with the annexation.¹⁴ It declared the local action petition filed by petitioner "invalid,"¹⁵ and also found that the annexation effected by the petition and subsequent vote was "invalid."¹⁶

Notwithstanding this clear direction from the Court, the petitioner contends that the LBC is bound by its findings in an earlier, vacated decision. Ekuk disagrees and argues that it would be a serious procedural error for the LBC to rely on its earlier findings relating to an invalid petition and decision. In addition to heeding the directions of the Superior Court, the LBC should consider that circumstances have changed since the earlier decision and require a completely new look at the proposed annexation. These circumstances include the following:

- (1) Approximately four years have passed since the decision on the local action petition.
- (2) The membership of the LBC has substantially changed.
- (3) There is a competing petition filed by the City of Manokotak for approximately 25 percent of the territory also sought by petitioner.
- (4) Persons not appearing in the local action petition proceedings are now respondents in the legislative review petition proceedings.

¹³ April 3, 2015 letter from Brent Williams to Mayor Alice Ruby.

¹⁴ Ex. #9 *Native Village of Ekuk v. LBC*, Case No. 3 DI-12-22CI Order on Motion for Reconsideration (May 16, 2014), at p. 2.

¹⁵ *Id.*

¹⁶ *Id.* at p. 6.

- (5) The standards set out in 3 AAC 110.140 applicable to a legislative review annexation differ substantially from the standards applicable to the earlier local action petition.
- (6) Local governments have devoted resources to form a task force to study the creation of a borough for the Western Bristol Bay Region.

Finally, decisions of the Alaska Supreme Court do not support petitioner's argument. In a 2007 case, the Supreme Court cited with approval cases from other jurisdictions holding that agencies on remand are free to address claims anew and make different findings so long as the reviewing court did not circumscribe the agency's authority to do so.¹⁷ There is no evidence in the decision on appeal that the court intended to restrict the discretion of the LBC to reconsider the annexation. Indeed, by vacating the LBC's decision and the annexation, there simply are no prior findings or determinations, and no course remains but to proceed anew as required by regulation.

C. The petition is fatally flawed and should be rejected because the pre-filing summary incorrectly informed the public that the LBC had already found that the petition was in the State's best interests and met applicable regulatory standards.

The petitioner didn't just request that the LBC adopt its earlier findings; it told the public that the LBC was bound by its earlier findings:

Exhibit E to the petition explains how the proposed expansion of the City's boundaries meets the rules [of annexation] and also explains how *the Local Boundary Commission has already decided that making the City bigger is in the best interest of the State of Alaska and meets all the rules for adding area to an existing city.*¹⁸

The unfortunate consequence of this misinformation to the public was a defective pre-filing process that chilled public participation. The petitioner should be required to do the pre-

¹⁷ See *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 792 n. 42 (Alaska 2007).

¹⁸ Ex. #5, Summary of City of Dillingham's Petition at p. 2 (emphasis added). The regulations describe the brief as "a supporting brief that provides a detailed explanation of how the proposal serves the best interests of the state and satisfies each constitutional, statutory, and regulatory standard that is relevant to the proposed commission action. 3 AAC 420(b).

filing again, consistent with the LBC's regulations.¹⁹ Whether intended or not, the effect of this incorrect summary was to chill public comment and stop further resistance to the annexation. Why should the public or an affected municipality comment or participate further in a matter that "has already been decided" by the LBC? In fact, the City of Clark's Point did not incur the substantial expense of preparing and submitting a competing petition after receiving notice that Dillingham's legislative review annexation has already been decided without their involvement.²⁰

The point of the pre-filing and its summary is to inform the public and invite participation in the project. Dillingham's summary had the reverse effect. There is no reason to participate in a process where the critical findings and determinations have already been made. The thrust of the Superior Court's remand was in large part to ensure that the public was given the procedures set out in regulations for a legislative review petition. It is amazing to respondents that petitioner risked another remand by making statements that discouraged public participation.

Respondents appreciate that the staff recognized that the LBC is not, in fact, bound by its findings in its earlier decision on the local option petition.²¹ Because the chilling effect of the summary had already occurred, however, respondents urge that it was erroneous for the Department to determine that the petition was in substantial compliance with statutes and regulations governing city annexation. It should have found the representations in the brief argumentative and deficient. The petition should have been returned to the petitioner

¹⁹ Those regulations require a pre-filing hearing which is preceded by a draft of the proposed petition and a summary of that document. 3 AAC 110.425(a). At the pre-filing hearing, petitioner is required to "address appropriate annexation standards and their application to the annexation proposal, annexation procedures, the reasonably anticipated effects of the proposed annexation, and the proposed transition plan" 3 AAC 110.425(d).

²⁰ Ex. # 3 Affidavit of Wasilly at p. 3.

²¹ Letter of April 3, 2015 from Brent Williams to Mayor Ruby.

for correction with an order that petitioner repeat the pre-filing process required by 3 AAC 110.425(a) and (d) - (e), if it still desired to proceed with annexing the territory.

Now the petition is before the LBC. Respondents ask the LBC to recognize that the described deficiency is significant, tainted the process, and rendered the petition inconsistent with the regulations. The LBC should reject the petition with instructions for the petitioner to redo its process, including a summary that does not falsely inform the public that the LBC has already decided that annexation is in the state's best interests and that other requirements have been met.

D. Dillingham has not satisfied the standards imposed by law for annexation to a city.

The LBC adopted administrative regulations under a delegation from the legislature to provide specific standards for annexation to a city. 3 AAC 110.090 – 3 AAC 110.150. Respondents argue that Dillingham's legislative review petition fails to satisfy these standards.

1. The Boundaries of the Expanded City would not Contain Territory that Includes the Community Associated Exclusively with Dillingham. (3 AAC 110.130).

The proposed expanded boundaries of the city must meet the criteria set out in 3 AAC 110.130. Among other things, the LBC must decide whether over 300 square miles of uninhabited waters is "territory comprising an existing community" to the city of Dillingham,²² or whether Nushagak Bay is regional in scale. Certainly the area is of regional importance; other municipalities and villages of the Western Bristol Bay region have strong connections with respect to population, natural geography, and socio-economic interests in the territory.

²² 3 AAC 110.130(c)(1).

Additionally, respondents and others believe the territory exceeds in scale and importance that which is appropriate for annexation to a city. Guidance on this issue is provided by the LBC's requirements for incorporation as a city: "Territory proposed for incorporation as a city must encompass a community."²³ Thus, a city is a *community-based* municipal government, in contrast to a borough which is based on geography.

The regulations specifically provide that city annexations are subject to a mandatory limitation of community that includes suitability of scale and the presence of "an existing local community," plus enough space for reasonably predictable growth, development, and public safety needs during the 10 years following annexation.²⁴ The limitation of community concept was developed by the LBC and is a long-standing interpretation of statute and the Alaska Constitution. The LBC applied the limitation in a 1986 annexation proceeding involving Dillingham and Nushagak Bay and observed:

The statutes speak to "a community" when addressing city incorporation and "an area" when addressing borough incorporation. The definition of the word "community" as provided in Black's Law Dictionary is a "neighborhood" compared to the definition of the word "area" as "a territory, a region". The instant situation speaks to local boundary actions motivated by problems affecting a territory of people, not a community of people. Clearly a city is not the appropriate vehicle to adequately address problems that are of regional concern.²⁵

That decision rejected Dillingham's attempt to annex both substantial amounts of land and water. The quote set out above was addressing the regional character of water area consisting of Nushagak Bay. Dillingham was allowed to annex substantially less water area than requested, leaving Nushagak Bay outside its boundaries.

²³ 3 AAC 110.005.

²⁴ 3 AAC 110.130(c)(1).

²⁵ Ex. #6 Statement of Decision for Annexation of Territory to the City of Dillingham para. 13 at page 6 (Local Boundary Commission, December 10, 1986).

Dillingham now contends circumstances have changed. The problem with this changed circumstance argument is that it uses the declining economy of a neighboring city in a self-centered attempt to garner the remaining wealth of the region. The regional significance of Nushagak Bay has not changed. Clark's Point, Ekuk, Manokotak, and other communities of the region continue to share common interests in the Nushagak Commercial Salmon District.

Dillingham's assertion that its community extends into the wild and uninhabited reaches of Nushagak Bay is flawed. Dillingham concedes that the territory proposed for annexation does not have permanent residents,²⁶ but argues that temporary seasonal participants in the fishing industry of the region who use city facilities and impact city services form a community with Dillingham that extends to the area to be annexed. However, the LBC regulations state that a community "is a social unit comprised of 25 or more permanent residents."²⁷ The petition describes the community within the territory proposed for annexation as "a seasonal commercial fishing community whose need for public services is limited to port and harbor facilities, landfill services, and public safety."²⁸

A permanent resident is someone who is domiciled in the territory.²⁹ A temporary workforce or persons comprising a transient fishing fleet are not domiciled in the city or the fishing districts to be annexed. They are domiciled elsewhere. They are not a social unit of permanent residents as required by the annexation standards set out in the LBC regulations. Their presence or activity in the area sought to be annexed cannot, under existing

²⁶ Pet. at p. 69.

²⁷ See 3 AAC 110.990(10) (a permanent resident must be domiciled in the city for at least 30 days); *See also* AS 01.10.055(a) (A person establishes residency by being physically present with the intent to remain indefinitely).

²⁸ Pet. at p. 48.

²⁹ See 3 AAC 110.990(10) definition of "permanent resident."

regulations, be used to establish a community of interest between the existing City of Dillingham and the waters of the Nushagak Commercial Salmon District.

Dillingham contends that services and facilities supporting the Nushagak Bay fisheries are now provided “almost exclusively” by and through the City of Dillingham. There is no dispute with Dillingham that it incurs costs in order to provide services and facilities for the Bristol Bay salmon fishery, but the services are delivered entirely within the existing boundaries of the city. The LBC found in 1987 that Dillingham did indeed provide services to seasonal workers and members of the fishing fleet. The LBC wrote in its decision:

The seasonal processors and their crews may, on occasion receive some of these services three months of the year. The critical issue is the relative degree to which these services are required. With the exception of the identified 40 square miles area northwest of the current boundaries of the city, it has not been demonstrated that these services are required to the extent that annexation is warranted.³⁰

In a similar LBC decision regarding the annexation of waters by the City of Togiak, the LBC found that the severity of alcohol abuse and offenses in the area to be annexed and the city’s plans to provide services to the remedy the problem justified annexation.³¹ Thus, the degree to which the services were required and could be provided through annexation by Togiak differed substantially from Dillingham’s petition.

Dillingham’s contention that it is virtually the sole supplier of services and facilities in the territory is an overstatement. Other communities in the region have residents who

³⁰ Ex. #6 Statement of Decision for Annexation of Territory to the City of Dillingham (December 10, 1986 as amended) at p. 4.

³¹ Statement of Decision in the Matter of the Annexation by the City of Togiak, Alaska, Consisting of Togiak Bay, Consisting of Approximately 183 Square Miles (Local Boundary Commission, January 18, 1985) at p. 1 (on file with the division of community and regional development).

participate in the Nushagak Bay fishery.³² Some of these persons operate drift net vessels and some are land-based set net site operators. These communities provide services and support for their residents and also experience the seasonal impact of fishery activities in their community areas. Their permanent and seasonal residents do not use the services and facilities of Dillingham to the extent of fisherman coming from outside the watershed. If Dillingham is allowed to annex the fishing districts of Nushagak Bay, many year round residents of the region would pay the proposed sales tax on their catch for facilities in Dillingham that they use very little or not at all. Other governments in the region might receive nothing for the services that they provide to their residents and outsiders.

The village of Ekuk must deal with the influx of approximately 200 persons engaged in the set net fishery and a seasonally operated salmon processing plant as a neighbor.³³ It employs a health aide and other employees to deal with refuse disposal, potable water, and ice for fishing operations. It has a state-funded airstrip. Clark's Point also has approximately 100 persons engaged in the set net fishery. It has floating processors, and tenders stationed adjacent to and within its boundaries. It has a landfill, a health aide, and a state-funded airstrip. Ekuk and Clark's point are cooperating in the planning and fundraising for a road connecting the two communities in order to provide a new landfill site

³² According to 2014 reports of the Commercial Fisheries Entry Commission, there are 445 limited entry permit holders who reside within the Dillingham census area while 417 fishermen fished their permits. Dillingham has 197 permit holders residing there; 179 of those holders actually fished their permits. <http://www.cfec.state.ak.us/gpbycen/2014/070127.htm> In the Nushagak Bay area alone, the City of Manokotak had 64 permit holders with 57 residents who fished their permits. *Id.* Aleknagik had 15 permit holders with 12 residents who fished their permits. *Id.* New Stuyahok had 21 permit holders with 18 residents who fished their permits. *Id.* Koliganek had 19 permit holders and 16 residents who fished their permits. *Id.* Clark's Point had 9 permit holders and 8 residents who fished their permits. *Id.* Set net permit holders in the Bristol Bay Region are more likely to reside in the region. According to 2010 reports, of 977 active set net permit holders only 335 were nonresidents. Commercial Fisheries Entry Commission - Permit Status Report at http://www.cfec.state.ak.us/bit/X_S04T.htm. The data cited here does not include numbers for drift and set net crewmembers who reside in each community. Respondents brief in opposition to Dillingham's local action petition provided evidence of a substantial number of local residents employed as crewmembers. The CFEC has now ceased providing crewmember residency information.

³³ Ex. # 1 Affidavit of Heyano .

to serve both.³⁴ In fact, under Dillingham’s construction of “community,” the territory associated with the Clark’s Point and Ekuk statistical areas³⁵ should be considered a community of Clark’s Point rather than a community of Dillingham.

If granted, the instant petition would transform Dillingham into a quasi-regional government with territory of a scale that is unsuitable for a city. As predicted in Ekuk’s responsive brief to Dillingham’s local action petition, a move to annex Nushagak Bay has set in motion the Balkanization of Western Bristol Bay by forcing Manokotak to claim territory there in order to fairly allocate fishery related tax revenue to cover the effect of the fishery related to that city. Clark’s Point presently includes water area on the eastern side of Nushagak Bay that would be adjacent to the territory sought by petitioner. That city would face a substantial burden to detach territory from Dillingham if it needed more to support the growth of city government.

Nushagak Bay is a region that is used and served by a number of communities, including Dillingham. It is not Dillingham’s community. The boundaries proposed by the petition do not satisfy the requirements of 3 AAC 110.130.

2. Petitioner Fails to Prove that the Territory has a Need for City Government. (3 AAC 110.090).

To be approved, the territory must “exhibit a reasonable need for city government.”³⁶ Respondents urge that “territory” in this context means the territory to be annexed to a city. If “territory” meant the new expanded boundaries of the city, the standard would have no meaning because the existing city can always establish the need for city government.

³⁴ *Id.*

³⁵ The Clark’s Point and Ekuk Statistical Areas are described in 5 AAC 06.370(l)(4) and (5). It would be reasonable to consider the area to have a seaward boundary extending from as much as three miles from the shore to as little as the maximum legal net length permitted set net operations there.

³⁶ 3 AAC 110.090.

The territory to be annexed does not exhibit a reasonable need for city government and the petitioners have certainly not identified one. The petition is very clear that annexation is sought only to pay for existing services and facilities for Dillingham. Dillingham points to no commercial or residential growth expected in the territory during the 10 years following the effective date of the annexation. The essential municipal services Dillingham provides are exclusively within its existing boundaries. There are no residents in the territory proposed for annexation and no property owners with holdings of submerged land or surface estate within the three square miles of land included in the territory.

Petitioners try to meet the requirement of “property owners” in the territory by noting that transient fishermen possess personal property. Under the LBC’s regulations, however, a “property owner” is one who holds fee simple interest in real property³⁷ The only “service” to be provided in the territory to be annexed is taxation, and even that “service” does not occur in the territory. The tax collection service is performed by seafood processors outside of the territory.

While the expanded boundaries of Dillingham would not leave enclaves within the city’s limits, the annexation would foreclose other nearby municipalities and communities from eventual expansion of their boundaries into Nushagak Bay to accommodate their future growth. Another consequence of the boundaries proposed by petitioner would be the diminishment of existing territory now within the existing boundaries of Clark’s Point and

³⁷ Petitioner concedes that there are no real property owners in the territory but nonetheless argues that a factor showing a need for city government are property owners consisting of vessel owners and permit holders who are engaged in the fishery. Pet. at p. 50. The need requirement addressed in the petition - 3 AAC 110.090(a)(6)- refers to “residents or property owners within the territory who receive the benefit of services provided by the annexing city. A “property owner” is a defined term under the LBC regulations meaning a person who holds fee simple interest in the surface estate of real property. 3 AAC 110.990(12). Petitioner’s justification of need based on the presence of transient personal property owners is without a basis in the regulations.

Ekuk.³⁸ Manokotak is proceeding with an annexation petition of its own which would add the Igushik section of the Nushagak Fishing District. Clark's Point intends to pursue an annexation on the eastern side of Nushagak Bay. The potentially conflicting claims of these communities highlight an important geographic consideration affecting the annexation. Where the boundary is drawn may have a significant effect on the ability of these communities to provide necessary services they provide to the fishery.

The petitioner is very clear about its motivation – to generate revenue from sales of raw fish within the two fishing districts proposed for annexation claiming that it “...taxes everything that it can, but it is not enough to run the city.”³⁹ Dillingham virtually concedes that the territory to be annexed does not have a reasonable need for city government. The petition states, “there will not be any residential growth in the area proposed for annexation.”⁴⁰ Dillingham does not propose to assume new powers or responsibility for new services in the annexed territory, other than the collection of raw fish tax: “The City is not trying to grow services, but to pay for existing services.”⁴¹ It presently provides education, public works, ports and harbors, public safety, and public roads and offers no enhancement

³⁸ The proposed Dillingham city boundaries essentially parallel the mean high tide line of Nushagak Bay except for approximately a square mile of water area associated with the boundaries of the City of Clark's Point. The boundaries described in the petition are not fixed and will change because of erosion. At Ekuk, for example, the Ekuk Bluff eroded about 125 feet between 1912-1981 and an additional 65 feet from 1981-2006, suggesting an annual rate of erosion of 2 feet per year from 1912-1981 and 2.6 feet per year since 1981. (U.S. Army Corps of Engineers, Erosion Information Paper – Ekuk, Alaska, 2008 – http://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/Ekuk_Final%20Report.pdf. Under the boundary description tendered by petitioner, parts of Ekuk would be transferring to the City of Dillingham every year. Clark's Point also has similar erosion loss issues caused by petition boundaries with long term erosion averaging 2.5 to 3.8 feet per year amounting to an erosion loss of 0.2 acres per year. Army Corp of Engineers Erosion Information Paper - Clark's Point, Alaska 2007hhttp://www.poa.usace.army.mil/Portals/34/docs/civilworks/BEA/Clarks%20Point_Final%20Report.pdf.

³⁹ Pet. at p. 290.

⁴⁰ Pet. at p.49. See also Pet. at p. 69: “The value of salmon harvested for the area proposed for annexation will fluctuate within past historical ranges.” This is a concession that there will not be further industrial development in the territory.

⁴¹ Pet. at p. 290.

of these services to the territory to be annexed.⁴² When it states that services will be extended into the new territory, it makes this assurance with quotation marks around the word “extended.”⁴³ Dillingham concedes that the services presently provided to the area sought to be annexed are adequate.⁴⁴

The “need” standard provides that “[t]erritory may not be annexed to a city if essential municipal services can be provided more efficiently and more effectively by another existing city or by an organized borough . . .”.⁴⁵ Once again taking liberties with the LBC’s regulations, Dillingham argues the regulation means whether an existing city or an *existing* borough could better provide government to the territory. That is not the language of the regulation, however. The regulation looks to whether “another existing city” could more efficiently and effectively provide municipal services, or whether “an organized borough” could more efficiently and effectively provide municipal services. A city may be considered as an alternative only if it is already in existence, but the commission must also consider whether an organized borough would be the best means of delivering municipal services even if it does not exist at the time of evaluation. Contrary to the express language of the regulation, Dillingham’s interpretation would prohibit the LBC from considering whether a new borough could more efficiently and effectively provide services in Nushagak Bay. Respondents urge the LBC to follow its regulation more closely and consider whether the need for services in the territory could be provided by the formation of an organized borough for the region.

The intent of the need standard is to determine whether services can be “more efficiently and effectively” provided by Dillingham or another municipality (or organized

⁴² Pet. p. 43.

⁴³ *Id.*

⁴⁴ Pet. at p. 50.

⁴⁵ 3 AAC 110.090(b).

borough). Thus, the petitioner must show that its cost of service to the territory is superior to that of another municipality.⁴⁶ Petitioner fails to meet this burden because no services are or will be provided within the new territory; virtually all the services are provided within the existing boundaries of the city at the same or similar cost presently incurred. The petition also fails to acknowledge the services provided by other governments in the area and makes no provision for financing these costs.

Dillingham fails to satisfy this standard because there is no showing that it will provide essential municipal services in the territory to be annexed. It merely offers a plan to supplant existing budgetary expenditures with raw fish sales tax revenues while leaving other communities without a funding source for all they do for the fishery. The plan is neither efficient nor cost effective.

3. Petitioner does not Carry its Burden of Proving that the Territory is Compatible in Character with Dillingham. (3 AAC 110.100).

The LBC's regulations provide that the territory must be "compatible in character with the annexing city." 3 AAC 110.100. Four of the seven subparagraphs of the character standard set out in section 100 pertain to population which is not relevant in this case because the territory does not have a permanent population. The remaining three subparagraphs focus on the suitability of the territory for community purposes, the extent of existing and reasonably anticipated transportation patterns and facilities, and finally, natural geographical features and environmental factors.

The sole purpose that Dillingham proposes for the territory is to provide a tax situs for revenue generation purposes. There are existing transportation patterns where a part of the persons and vessels operating in Nushagak Bay use the facilities available in Dillingham.

⁴⁶ Regulations Public Meeting Transcript 06-26-06 at p. 97 (produced by LBC staff upon order of Judge Douglas, copy on file with staff of the LBC).

However, there are no concrete plans to add to the facilities beyond those in now existence, or to make capital improvements in the territory proposed for annexation. The natural and geographical features of Nushagak Bay do not favor annexation solely to Dillingham. Other communities of the region have socio-economic connections as well. The number of vessels fishing in the Nushagak fishing district but registered to other Bristol Bay fishing districts proves this point. Some of these vessels enter only to fish but never visit Dillingham. The municipalities in which they originate have as strong a connection to Nushagak Bay as does Dillingham.

Dillingham does not establish that it alone meets the compatibility standard required by 3 AAC 110.100. Any competing petitions for city annexations would have the same compatibility as Dillingham.

4. Petitioner Fails to Prove that it will Devote Resources to Provide Essential Services in the Territory. (3 AAC 110.110).

The LBC regulations provide that the economy within the proposed expanded boundaries “must include the human and financial resources necessary to provide essential municipal services on an efficient and cost effective level.”⁴⁷ Dillingham does not satisfy this standard because no one is domiciled in the territory. No human resources are added through annexation to support expansion into the new territory. The population within Dillingham’s existing boundaries has slightly declined since the last decennial census so there will not be a source of additional workers to meet the needs identified for the territory.⁴⁸ The fishery is cyclical and subject to market pressure from foreign farmed fish making it a volatile funding source for government. Even if the LBC were amenable to attributing residents of

⁴⁷ 3 AAC 110.110.

⁴⁸ In the 2000 decennial census Dillingham had a population of 2466. The 2010 census count was 2329 persons. The American Community Survey for the period 2009 – 2013 shows a total population of 2156. The state Department of Labor and Workforce Development research and analysis section most recent estimate shows a population of 2369.

Dillingham to the territory, the economic trend in the region has been that fishing permits are being lost by residents of the region and transferred to persons whose domicile is elsewhere.

Dillingham does not propose to offer services in the territory other than tax collection. The dock, harbor, solid waste, and public safety services that Dillingham intends to provide will be limited to the existing city boundaries. Dillingham offers a transition plan where virtually none of these services will be delivered in the territory proposed for annexation. If the assumption concerning police services is not correct, the city likely will struggle to provide even basic police services in the new territory with having to rely on volatile earnings and little population growth for support.

Dillingham uses a legal fiction to “attribute” services provided within existing boundaries to the new territory. Dillingham has adequate revenue to provide fishery related facilities and services that it presently offers while generating a surplus.⁴⁹ It seeks the new territory only for revenue generation purposes to make the city more “sustainable” which appears to mean wealthier. The petition does not establish that Dillingham will devote adequate (or even any) resources to expand services into the territory proposed for annexation.

5. The Population will not be Sufficiently Stable to Support Annexation. (3 AAC 110.120).

The LBC regulations require that the population within the proposed boundaries must be “sufficiently large and stable to support the extension of city government.”⁵⁰

Petitioner fails to satisfy this standard because it is targeting territory that is devoid of

⁴⁹ See City of Dillingham Basic Financial Statements – Management Discussion - Year ended June 30, 2014 at p. 4. Dillingham reports \$6,191,596 million of liquid reserves.

http://www.dillinghamak.us/vertical/sites/%7BC84DE958-9EE4-4CFE-90E3-D1666668A90E%7D/uploads/Dillingham_City_of_FS_Final_2014.pdf

⁵⁰ 3 AAC 110.120.

population. As the Superior Court found in its Order on Appeal, “it is uncontested that no one resides permanently in the annexed portion of Nushagak Bay.”⁵¹ The new territory will not add new population to the City of Dillingham. The same facts discussed in the previous section apply to this standard as well. The population that Dillingham claims for the territory is not stable, and population for the city itself is declining. The seasonal workforce involved in the fishery is subject to extreme volatility caused by salmon run cycles and world market influences. A large part of this seasonal population consists of employees of land-based processors who are present within the existing city boundaries, not in the territory to be annexed. None of this population will be available to support government services within the unoccupied and vacant waters of the two fishing districts involved. There will be no extension of services to the population within the expanded boundaries by Dillingham, other than tax collection.

In summary, the seasonal population is not available to help Dillingham extend services and, even if it was, the literal requirement of 3 AAC 110.120 that there be an “extension of city government” to the expanded boundaries of the city is not met. As in the past, the services will be provided only within the existing boundaries of the city.

Petitioner has not carried its burden of showing that it has a sufficiently stable population to provide an extension of services into the territory proposed for annexation.

6. Annexation of the Territory is not in the Best Interests of the State because it Harms the Viability of a Future Borough in the Region. (3 AAC 110.135).

The LBC regulations interpret and make specific the statutory requirement that the commission consider whether an annexation to Dillingham is in the best interests of the state.⁵² The LBC regulations specifically mention two factors bearing on a best interest

⁵¹ Ex. #8 Order on Appeal p. 13.

⁵² 3 AAC 110.135.

determination: (1) whether the annexation will promote maximum local self- government and (2) whether the annexation will result in a minimum of local government units. The LBC is not limited to considering only these factors. The regulations acknowledge that there may be other relevant factors bearing on a best interest determination.

To establish that annexation to a city promotes maximum local self-government a petitioner must prove the following:

for city ...annexation in the unorganized borough, whether the proposal would extend local government to territory and population of the unorganized borough where no local government currently exists.⁵³

The petitioner does not meet this standard. The only government service it intends to provide in the territory -- tax collection -- will not actually be provided in the territory but only within the existing boundaries of the city. Further, local government would not be extended to population of the unorganized borough because there is no population in Nushagak Bay

In determining what serves the best interests of the state, the LBC should evaluate whether the petition's proposed annexation would establish the appropriate kind of local government for the region. The fishing districts at issue here consist of an area in which a number of communities share socio-economic connection. To favor one community over the others presents a quandary for state policy. It is contrary to the best interests of the state to deny communities access to the wealth of a region in which they too have strong financial and social interests. Without access to this wealth, these communities and their residents are more likely to be dependent on the state for services. Petitioner provides no guarantee that the revenues received by the city through annexation will benefit anyone beyond its boundaries. The petitioner's argument is that existence of and support for a hub city is the

⁵³ 3 AAC 110.981(7) (emphasis added).

best way to benefit a region. Not only would such a policy require a new regulation (as discussed more fully below), it should be critically evaluated before being advanced because of its potential to harm the viability of small communities.

A factor mentioned in the regulations which bears on the best interests determination is whether the annexation would relieve state government of the responsibility of providing local service.⁵⁴ The instant annexation petition expressly states petitioner would not relieve the state government of a single expense or obligation. Dillingham makes it plain that the Alaska State Troopers will continue to provide police protection in the territory to be annexed. Nor will Dillingham assume responsibility for financing the cost of search and rescue in this territory. The capital expense for an oil spill cache funded from tax proceeds is really supplementary to the state's own cache, so there would be no savings for this either.

Communities of the Western Bristol Bay region have joined together to form a task force to study the feasibility of a borough for the region. Respondents would support the LBC suspending action on the annexation requested by petitioner while the region decides whether a borough is feasible. A drawn out dispute among communities of the region over boundaries will be divisive and not in the best interests of the state.

The commission can take notice of the history of attempted borough formation in the Bristol Bay region and the part that Dillingham has played in that history.⁵⁵ Respondents are mindful of the difficulties experienced by Dillingham in attempting to bring regional government to Western Bristol Bay. There is no factual dispute between respondents and petitioner that the revenue sources available to a new borough in the region are marginal.

⁵⁴ 3 AAC 110.135(a)(3).

⁵⁵ See Alaska Department of Community and Economic Development, Chronicle of Borough Developments in the Bristol Bay Region and Update of Revenue Projects Concerning the Proposed Annexation to the Lake and Peninsula Borough (March, 2000) (on file with the division of community and regional affairs at <http://www.commerce.state.ak.us/dca/lbc/pubs/BBstudy.pdf>).

Dillingham contends that it is legally possible that a city and borough could both levy a raw fish sales tax and for this reason city annexation and borough formation are compatible. Respondents agree that this occurs in other boroughs of the state. However, a preliminary feasibility study commissioned by Ekuk in 2012 shows that a new borough would require a 5 percent raw fish sales tax to make it fiscally viable if Dillingham also levied such a tax in the fishing districts.⁵⁶ If that tax is combined with the 2.5 percent tax to be levied by the city under this petition, the highest raw fish sales tax in the state would be imposed on the Nushagak Bay fishery. This additional tax burden combined with the condition of the local economy would make it very difficult to convince the residents and communities of the region to support creation of a borough.

The numbers look different if this legislative review annexation is not approved. According to the study,

if the City of Dillingham annexation of Nushagak Bay is not finalized or if the [new] borough does not adopt policies to (a) hold harmless the cities from any revenue loss caused by borough incorporation and (b) continue the City of Dillingham's excess contribution of local funds to support the city schools, then the borough would appear feasible with a 3 percent or 4 percent areawide raw fish tax.⁵⁷

Thus, a borough would be much more feasible if Dillingham's annexation petition is not approved.

So while Dillingham is correct that it is theoretically *possible* for both the city and a borough to tax, it has provided no evidence that in reality there would be enough revenue available from the taxation of raw fish sales to support both Dillingham's proposed annexation and provide an incentive for a new borough.⁵⁸ The proposed annexation would make the possibility of a borough very remote. Dillingham should act consistent with its

⁵⁶ Ex. #7 - *Preliminary Assessment Fiscal Feasibility of a Potential Western Bristol Bay Borough*, Kevin Waring and Associates (February 2012) at p.36.

⁵⁷ Ex. #7 at 5 (emphasis added).

⁵⁸ *Id.*

past efforts to promote a regional government rather than create a disincentive to a regional solution. In 1986, the LBC made a similar finding:

If either City annexes any of the waterways proposed, that City can expect to receive increased raw fish taxes. This would not only allow the city to obtain additional revenues without the encouragement to pursue borough formation, but it would constrain the area in terms of a potential revenue base for any future borough. The ultimate result would be a disincentive for borough formation.⁵⁹

Ekuk's 2012 study concluded "to the extent that annexation gives the City of Dillingham jurisdiction to levy fish tax revenues, it diminishes the financial feasibility of a Western Bristol Bay Borough".⁶⁰ While petitioner's motives regarding borough formation are good, it must realize that the new city boundaries it desires would maximize its financial resources to the detriment of a possible new borough for the region and would not be in the best interests of the state and region.

Respondents urge the LBC to reject the legislative review petition because it fails to meet the standards for annexation to a city, or at least to stay proceedings while local representatives study the financial and political feasibility of a Western Bristol Bay Borough. Things are different now than when Dillingham's local action annexation petition was considered by the LBC. Now there is a local task force under the sponsorship of the Bristol Bay Native Association with the goal to prepare the region for a decision on borough government.

In light of restrictions on state spending for local purposes caused by the ailing economy of the state, it is not in the best interests of the state to approve an annexation that serves as a disincentive to borough formation in the Western Bristol Bay Region. The LBC

⁵⁹ Ex. # 6 at. p. 5.

⁶⁰ Ex. # 7 at P.37, note 11. The study concludes that a borough would be feasible with a 3 or 4 percent raw fish sales tax if Dillingham did not levy such a tax. *Id* at p. 37.

should apply the best interests standard in a way that ensures sharing of a valuable revenue source for the common good of the region.

7. Other Annexations of Water Approved by the LBC are Distinguishable from the Present Proceeding.

Dillingham cites to examples of LBC decisions where existing municipalities were allowed to annex unoccupied water area. The thrust of this argument is that the LBC has established a precedent that such annexations are appropriate for a city and therefore, the petition should be granted. This argument presumes that all annexations of submerged lands are similar in character, but each petition must be judged individually on the facts presented. Togiak's approved annexation of 183 square miles of water is not a basis for allowing Dillingham to annex 396 square miles of water.

In resolving the Togiak petition the LBC believed that Togiak proved the "frequency and severity of public safety problems attributable to heavy traffic in liquor in Togiak Bay during the fishing season."⁶¹ There was also proof of the futility of efforts to prevent the sale and importation of alcohol within the present municipal boundaries of Togiak." *Id.* The LBC found that "additional revenues generated by raw fish taxes would enable Togiak to purchase needed equipment such as a boat and to hire trained personnel to enforce the City's prohibition of the sale and importation of alcohol in the community."⁶² Finally, the LBC indicated that it took this action in part because the legislature failed to establish a special service area in Togiak Bay for the purpose of providing law enforcement.

Dillingham also cites to an annexation approved for the City of St. Paul located in the Pribilof Islands. St. Paul petitioned for the annexation of two islands and waters a distance of three nautical miles out from its land area. The annexation was granted because

⁶¹ Statement of Decision (Local Boundary Commission, January 18, 1985) at p. 1 (on file with the division of community and regional affairs).

⁶² *Id.* at p. 2.

of the use St. Paul's residents made of the waters, the need and desire of the city to exercise coastal zone planning in the waters, and the necessity of the city to legally carry out search and rescue powers in these waters to protect residents and others engaged in the developing bottom fishery.⁶³

Dillingham also cites the original incorporation of the City of Egegik as supporting its position that it may annex the waters of a fishing district and that it would not be a disincentive to borough formation because Egegik serves as an example of a city and borough exercising concurrent taxation over the sales of raw fish. As for the incorporation of Egegik, it was proposed that the land area of the community be included in the municipal boundaries along with area of the Egegik Commercial Salmon District. The petitioners there supported this request showing a need for the raw fish tax revenues to cover the cost of the new city's port development, land fill, and police powers because the new city would have no other source of revenue. The LBC observed that there was no other community within 40 miles of Egegik and that while the territory for the city was within an organized borough, the borough did not object to incorporation along with the territory identified. In this regard, the LBC stated:

The borough's policy stance supporting this incorporation is a significant factor in determining whether the desired additional services can be provided to the community by annexing to an existing city or to an existing service area (of which there are none). According to borough officials, the borough lacks the financial resources and personnel to provide these additional local services on either an areawide or nonareawide basis.⁶⁴

⁶³ Statement of Decision In the Matter of the Petition for Annexation by the City of St. Paul, Alaska of Approximately 194 Square Miles Consisting of Otter Island, Walrus Island and the Territory Three Nautical Miles Seaward from These Islands (Local Boundary Commission, January 19, 1986) (on file with the division of community and regional affairs).

⁶⁴ Statement of Decision In the Matter of the March 15, 1194 Petition for Incorporation of the City of Egegik at page 11 (Local Boundary Commission, January 11, 1995) (on file with the division of community and regional affairs).

The relationship between the Lake and Peninsula Borough and its included cities was an important factor in the LBC's decision that was tailored to the facts presented there.

Petitioner also cites the incorporation of Pilot Point as example of the LBC allowing a city to include the waters of a fishing district in its boundaries. For that annexation, it should be noted that Pilot Point drew its boundaries to exclude the village of Ugashik and its set net sites from the territory proposed for annexation. Again, in this case the Lake and Peninsula Borough consented to the incorporation, and the revenues from the fishing district waters were necessary to finance the cost of new services that the city would be providing. Pilot Point was not intending to merely supplant funding sources for existing services.

It is not known what form of borough government might be proposed for the area encompassing Nushagak Bay, so it is not appropriate to argue that compatibility in one region means there will be a similar compatibility in another. A borough organized in the Dillingham Census Area might not follow the model of the Lake and Peninsula Borough. Therefore, reliance on the Egegik and Pilot Point incorporations within the Lake and Peninsula Borough is premature. In the past, the LBC has been attuned to whether and when there will be a borough formed in the region. It should maintain that focus until there is a regional government in existence to comment on the question of compatibility.

8. The petitioner fails to satisfy the specific annexation standards adopted in 3 AAC 110.140 for a legislative review annexation.

Petitioner argues that the standards set out in 3 AAC 110.140 do not alter the basic city annexation standards set out in 3 AAC 110.090 – 3 AAC 110.135. Section 140 adds “circumstances” that must be considered.⁶⁵ However, section 140 prescribes more than mere circumstances; it contains discrete standards in addition to those prescribed in 3 AAC

⁶⁵ Pet. at 79.

110.090 – 3 AAC 110.135 that must be applied to set a higher bar for a city annexation imposed without a local vote. The section 140 standards are intended to provide sufficient protection to ensure that the annexation is in the public interest.

A. Sec. 140(2). Petitioner argues that the petition meets the circumstances of sec. 140(2) because the general economic welfare of the city is at “risk,” and the risk identified is the fishing fleet’s use of the city’s harbor and other related facilities without being taxed. But section 140(2) literally requires that the circumstances cause the health, safety, or general welfare to be “endangered.” And it has to be endangered by conditions existing or developing in the territory. Here “territory” means the territory to be annexed, because the beginning of the regulation states that “Territory may be annexed to a city[.]” Endangered means “exposure to harm or danger, or to imperil.” The finances of the city are in very good shape and have consistently shown a surplus year- end balance in the general fund. The danger described by the city has been manufactured out of exaggerated expectations. The city is prospering from the levy of its sales and property taxes. A large part of the sales tax is likely derived from sales to the seasonal participants in the fishery. The city should consider other reasonable alternatives like raising user fees before it resorts to an annexation of such a large geographic area that limits the expansion of other municipalities in the region. Petitioner fails to prove that its residents are endangered by conditions in Nushagak Bay, and therefore fails to satisfy this annexation standard.

B. Sec. 140(3). The petitioner argues that the petition meets section 140(3) which requires a finding that the extension of services “into the territory” be “necessary” to provide adequate services to its residents. Elsewhere in its petition the city concedes that it has been providing adequate services to its residents even without the annexation. It also concedes that the raw fish tax is to provide more revenue to pay for services and facilities

“that the region’s commercial fishermen and fleet use while in town.”⁶⁶ There is no promise of an extension of services into the territory. There is an additional requirement in the sec. 140(3) standard that it be “impossible or impractical” to extend the services unless the territory is within the boundaries of the city. Services have been delivered by the city while carrying forward a surplus year after year. This was accomplished without annexing the territory. Petitioner fails to show that it is necessary to obtain the territory in order to continue providing service; it therefore fails to satisfy this standard.

C. Sec. 140(4). This standard focuses on whether residents or property owners within the territory receive the benefit of city government without having to pay for it. The petitioner argues that the standard set out in sec. 140(4) is satisfied because the fishing fleet benefits by services the city provides to shore processors which in turn provides a market for the fleet to sell their fish. Respondents counter that persons making up the fleet do not live in the territory, do not own land or interests in land there, are not domiciled there and do not reside there.⁶⁷

This standard also requires a showing that there is “no practical or equitable alternative method ... available to offset the cost of providing these benefits.” Petitioner alleges, without any factual basis provided, that there is no way to recalculate harbor fees to pay more of the cost of the harbor, but fails to consider either creating or increasing user fees for any other services provided. Petitioner asks the commission to assume that it is patently unreasonable to cover some of the cost of the harbor and related services from the general fund. General fund revenues are partly derived from a sales tax that intuitively must have a seasonal increase during the summer months when people come to Dillingham to participate in the fishery. The sales tax together with user fees are equitable ways for

⁶⁶ Pet. at 8.

⁶⁷ As explained earlier at note 37 “property owner” is a defined term which means a landowner.

nonresidents to pay for the services provided. By ignoring the contributions of the fleet to the sales tax revenues of the city, there would be in effect a double charge placed on them for the service. This is neither practical nor equitable. Petitioner fails to satisfy this standard.

D. Sec. 140(5). Petitioner does not claim that it meets the standard set out in sec. 140(5) of proving that the annexation of the territory would enable it to plan for and control reasonably anticipated growth in the territory to be annexed. This is a concession that the annexation exceeds the scale of a permissible city annexation because it goes far beyond the territory needed to provide for the next 10 years of growth of the city. There will be no growth within the territory and there will be no adverse impact on the city. For these reasons the annexation violates the limitation of community set out in 3 AAC 110.130(c)(1).

E. Sec. 140(7). Maximum local government with minimum of units. The standard set out in sec. 140(7) has two parts: the first requires a showing that the annexation would extend local government to territory and population. The second part requires a showing that the annexation would result in a minimum number of governmental units.

(1) Extension of local government to territory. A reading of the petition discloses that the argument on this standard starts on page 78 of the petition but refers the reader to page 86 where there should have been a detailed discussion under the best interests of the state standard. However, at page 86 the reader is referred back to a nonexistent discussion of this issue on page 78. This is obviously an error and presumably petitioner will try to supply its reasons for meeting this standard at a later time.⁶⁸

A more serious error is the petitioner's misstatement of the applicable standard. At page 85 of the petition the standard is described as requiring the extension of local

⁶⁸ Respondents will not have the opportunity to brief a counter argument. It is hoped that the LBC will take this into account.

government to territory or population of the unorganized borough. The standard set out in 3 AAC 110.981(7) actually requires the extension of local government to territory and population. There is not an official census numeration of population occurring in the territory proposed for annexation. Hence, according to the U.S. Census the territory is devoid of population. The commission's regulations do not define the term "population" so that petitioner can support the claim that it satisfies this standard. Out of fairness to the public, a definition of "population" is critical to the meaning of the limitation of community and this extension of local government standard. Under these circumstances it must be the subject of a regulation. Petitioner fails to satisfy this standard.

(2) Minimum of government units. Petitioner urges the commission to use its substantial discretion to consider other factors regarding the effect of the proposed annexation on the number of governmental units in the Western Bristol Bay Region. It is true that extension of Dillingham's boundaries avoids the creation of a new city or service area. But what about the effect of city annexation of territory on a regional scale that includes a substantial revenue source necessary to the feasibility of a regional borough? Respondents respectfully ask the commission to take a hard look at this effect before accepting the justification offered by petitioner. Petitioner is correct that a borough and a city can both levy a sales tax on raw fish. But none of the existing municipalities doing that are levying more than a combined total of 5.5%. Please reference respondents' argument regarding the best interest standard and the effect of city annexation on borough feasibility.

The State would benefit from the creation of a borough in the Western Bristol Bay region. A regional school district and a city school district could be replaced by a single borough school district. The borough could act as an effective intermediary with the state to provide service to the region. It would not be in the best interests of the state for the LBC

to approve a city annexation that effectively precludes a borough formation. Petitioner fails to satisfy both prongs of this annexation standard.

F. Sec. 140(8). This standard requires that the petitioner prove that annexation will enhance the extent to which the existing city meets the standards for incorporation of cities. In the extensive discussion set out in the petition, the petitioner never comes to grips with the basic problem posed by the annexation: a city is proposing to annex over 400 square miles of area without providing service there. This would make it the largest city by area in the state - equivalent in size to the lone first class borough in the state.⁶⁹ Petitioner makes no effort to correlate the land and water area of the proposed annexation with predictable growth, development, and public safety needs during the 10 years following annexation. These facts alone violate the limitation on community set out in the city incorporation and annexation standards. The relaxation of these standards as proposed in the petition would eliminate the distinction between cities and boroughs that the Alaska Constitution created and the statutes require.

In order to accept petitioner's justification, the commission must assume that a transitory fishing fleet populates the territory and that tax collection based on sales in the territory constitutes a service that will be enhanced. In fact, the tax collection is done by seafood processors outside of the territory. It is a legal fiction that tax collection occurs in the territory. And finally, the services that benefit the fishing fleet are performed not in the territory to be annexed, but within the boundaries of the existing city. No enhancement of that service will occur. The city will simply supplant existing funding sources for the services it presently provides with raw fish tax revenue. The same service provided to the fishing fleet will continue as before. The annexation would permit petitioner to act like a borough

⁶⁹ The average size for a city in the state is approximately 30 square miles of territory.

with jurisdiction over a large area rather than a discrete community. For that reason, it fails to satisfy this standard, which requires a showing that annexation improves its qualifications as a community based government.

The petition fails to meet the standards specifically applicable to a legislature review annexation by a city. The petitioner offers no compelling evidence that justifies it taking over territory in the face of objections from other persons and communities that also legitimately claim they have connection to the territory as a part of their community.

E. The Petitioner's new interpretations of the LBC's regulations and definitions cannot be applied unless the LBC amends its regulations through the Administrative Procedures Act.

The Native Village of Ekuk was successful in appealing the LBC's approval of petitioner's local option petition. The Superior Court vacated the decision, and remanded for a new process. Ekuk had also argued that the LBC's decision had effectively adopted and applied new interpretations to existing regulations without following the due process requirements of the state Administrative Procedure Act (AS 44.62.). Specifically, Ekuk argued that the LBC had employed a new standard for annexations by "hub cities," new definitions of "population" and "unpopulated," and materially changed the scope of the exception to the prohibition on a city annexing large unpopulated areas. The Superior Court found "that it need not reach Ekuk's remaining [regulatory] arguments because they pertain to a petition that may change once the legislative review process is commenced on remand."⁷⁰

The new legislative review petition did not change significantly from the local option petition. The new petition relies on the same arguments made in its first

⁷⁰ Ex. #8 Order on Appeal p. 5, dated March 27, 2014.

petition, and, to be approved, would require the LBC again to apply new regulatory standards and definitions. Respondents hope that the LBC will agree with them that the legislative review petition does not meet the regulatory standards. If the LBC is inclined to grant the petition based on new interpretations, however, respondents urge the LBC to protect the public interest by following the state Administrative Procedure Act (AS 44.62)(hereinafter “APA”), rather than making findings based on *ad hoc* interpretations of regulations.

Respondents also point out that in ruling on the local option issue, the Superior Court consistently applied the LBC’s regulations as written and in a way that was consistent with the entire regulatory structure. The court declined to stretch the meanings of the regulations to fit the petitioner’s and the LBC’s arguments. The following examples evidence the Court’s adherence to the regulations as written:

(1) Over the LBC’s and the City’s opposition, the Court agreed with Ekuk that the LBC’s regulations clearly authorized the commission to specify the method of annexation and required that the petition be one for legislative review.⁷¹

(2) In its Order on Motion for Reconsideration⁷² the Court rejected the LBC’s argument that the letter of non-opposition from the Department of Natural Resources was “analogous to a vote” making the annexation valid under 3 AAC 110.150(3).”

⁷¹ *Id* at pp.9-12.

⁷² Ex # 9 Order on Motion for Reconsideration pp. 3-6.

(3) The Court rejected the argument that the DNR letter substituted for a petition signed by property owners, which could have allowed annexation without a vote under 3 AAC 150(2).

(4) The Court also rejected the City's argument that its pre-filing and post-filing processes for the local option petition were the functional equivalent of the pre-filing hearing required under 3 AAC 110.425, paying special attention to the express language of the regulations.

In each of these cases the Court based its ruling on the regulations as written. Respondents are encouraged by the Court's adherence to the language of the regulations and hopes the LBC will take the same approach. Nevertheless, respondents must make all its objections to the petition in this brief. Thus, set out below is a recounting of the arguments presented to the Superior Court which were reserved for possible later consideration. The LBC is presently in a position to avoid litigation of these claims by either applying current regulations in the way they have consistently been applied and interpreted in the past, or taking the time to properly amend existing regulations or adopt new ones.

(1) The LBC must follow the existing statutory and regulatory standards for cities – not newly created standards for a “regional hub city.”

“General law municipalities are of five classes: first class boroughs; second class boroughs; third class boroughs; first class cities; and second class cities.”⁷³ There is no recognition in statute or regulation for a hybrid “regional hub city.” The LBC's vacated decision on the local action annexation petition had created the classification as a means to

⁷³ AS 29.04.030.

attribute services and facilities provided within the existing boundaries of Dillingham to a 400 square mile area within which other communities in the region also share social, cultural, and economic connections. This was done even though in a 1986 decision the LBC concluded that this same territory was not suitable for annexation to a city but was an area of regional scale and concern.⁷⁴

Alaska case law takes an extremely broad view of what constitutes a regulation, requiring compliance with the APA's notice and hearing provisions whenever a regulation is required to enable official action.⁷⁵ The APA defines a “regulation” as follows:

every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it . . . [w]hether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.⁷⁶

This definition compels the conclusion that the announcement and application of a new category of municipal government and new standards for its annexation of large, unpopulated areas is a regulation that must be adopted consistent with the APA.

The requirement that only regulations adopted under the APA may be applied serves at least two important purposes. First, it provides notice to those petitioning for annexation and those opposing the petition as to what standards must be satisfied, thus providing the opportunity to prepare accordingly. This notice is the essence of the due process requirement. Second, the standards permit a reviewing court to determine whether a decision reasonably meets the established standards. *Mukluk Freight Lines, Inc. v. Nabors*

⁷⁴ See Ex. # 6 at p. 5.

⁷⁵ See *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 904-05 (Alaska 1981). See also *Gilbert v. State*, 803 P.2d 391, 396 (Alaska 1990)(legislature has "broadly defined what constitutes a regulation" under state APA); [*Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 415 \(Alaska 1973\)](#)(legislative policy clearly suggests that agency should not conduct its procedures on an ad hoc basis).

⁷⁶ AS 44.62.640(a)(3).

*Alaska Drill, Inc.*⁷⁷ is instructive. There the court found the appellant had no advance notice that the agency would apply a new modified procedure and was prejudiced by the lack of notice.⁷⁸

The legislative policy behind AS 42.07.141(b), which requires the adoption of regulations in conformity with due process guarantees . . . clearly suggests that the Commission should not conduct its procedures on an ad hoc basis. A consistent application of these regulations would preclude ad hoc considerations and create standards that could be judicially reviewed in accordance with the due process guarantees anticipated in AS 42.07.141(b).⁷⁹

There are no regulations setting new standards describing what “community,” “territory” and “unpopulated” mean in the context of “hub cities.” Respondents and other regional groups had no opportunity to prepare for and respond to whether Dillingham’s petition fit those standards, since they were first announced by decision. Similarly, a reviewing court has no basis to determine whether the LBC correctly applied its new standards, since those standards do not appear in the existing regulations.

The Alaska Supreme Court has held that a state agency’s interpretation defining the statutory word “population” used to compute a tax limitation applicable to the North Slope Borough amounted to inappropriate *ad hoc* rulemaking.⁸⁰ The court stated that the department’s interpretation of ‘population’ is a regulation because “it makes specific a law which the agency administers and because it is used by the agency in dealing with a segment of the public.”⁸¹ The LBC is required by law to adopt annexation standards in the form of regulations, removing any argument that it has discretion to amend a standard by interpretation. It cannot be seriously argued that the new regional hub annexation standard has no effect on the public.

⁷⁷ 516 P.2d 408 (Alaska 1973).

⁷⁸ *Id.* at 414.

⁷⁹ *Id.* at 414-15.

⁸⁰ *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 182 (Alaska 1986).

⁸¹ *Id.*

In another case with relevance to this appeal, the court was faced with the question of whether a policy determination concerning procurement should have been adopted by regulation.⁸² The Alaska Supreme Court held that an agency's interpretation of an existing regulation did not itself constitute a regulation, but based its decision in part on the fact that the agency had *consistently* interpreted the existing regulation the same way earlier and that “such an interpretation of an existing, valid regulation, on the facts of this case, does not trigger the procedures mandated by the APA.”⁸³ A *change* in interpretation, however, would require the procedures.

What have been characterized as interpretations of existing regulations actually constitute a new regional hub city annexation standard. The manner in which this new standard was developed in the present case is comparable to the agency action found to be a regulation in *Matanuska - Susitna Borough*. The holding in *Northern Bus* is instructive because the LBC cannot claim that its “interpretations” applied to the territory identified for annexation are the product of a consistent course of conduct. The record discloses that the LBC’s earlier determination that Nushagak Bay is a community departed from its previous interpretation applied to the same territory concluding that the territory was regional in character and not appropriate for annexation to a city.⁸⁴

(2) The petitioner’s local option petition and the LBC’s approval departed from the plain meaning of the regulations and longstanding interpretations by redefining the regulatory terms “territory,” “unpopulated” and “community.”

In order to approve Dillingham’s first petition to annex nearly 400 square miles of unpopulated territory, the LBC had to find that all the regulatory requirements were met. The proposed annexation did not readily fit a regulatory scheme written to apply to city

⁸² *State v. Northern Bus Co., Inc.*, 693 P.2d 319, 323 (Alaska 1984).

⁸³ *Id.*

⁸⁴ Ex. #6 at p. 5.

annexations, as distinguished from borough annexations. To cure these problems, new meanings were applied to regulatory definitions that have been in use for some time. Application of the definitions to the legislative review petition raises the same issues.

A. The definition of “territory”

The decision on the local action petition interpreted the term “territory” as defined in 3 AAC 110.990(32) as referring to both the territory to be annexed and the territory of the annexing city.”⁸⁵ This interpretation allowed petitioner to attribute conditions in the urban areas of the existing city to the new territory. But it makes no sense when it is applied to the regulatory standards. For example, 3 AAC 110.090 requires that “[t]he territory must exhibit a reasonable need for city government.” If “the territory” included both the territory to be annexed and the annexing city, this standard would mean nothing because the annexing city will always be able to show its need for city government. Likewise, 3 AAC 110.100 requires that “[t]he territory must be compatible in character with the annexing city.” Again, the annexing city can always show compatibility with itself. This new interpretation served petitioner’s purpose, but is not an interpretation that can be harmonized with the entire regulatory structure.

B. The definition and limitation of “community”

Interpreting “territory” as applying to both the territory to be annexed and the annexing city was a necessary predicate to a new regulatory pronouncement that allowed an unpopulated area to be considered a “community.” The LBC’s regulations provide that “[t]o promote the limitation of community, the proposed expanded boundaries of the city . . . may include only that territory comprising an existing local community[.]”⁸⁶ The plain meaning is that the territory to be annexed must itself be a community. Following the statutory

⁸⁵ Pet. at p. 101 (Ex. I, p. 8).

⁸⁶ 3 AAC 110.130(c).

distinctions between cities and boroughs, the existing regulations require that a *city* provide government to “that territory comprising an existing local community” rather than a geographic area for which *borough* government is more appropriate.⁸⁷ The regulations promote the doctrine of limitation by prohibiting a city from annexing entire geographical regions or large unpopulated areas.⁸⁸

The definition section of the existing regulations provides that a community is “a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920[.]”⁸⁹ For both petitions, Dillingham provided the following evidence of the residency of those fishing in Nushagak Bay:

There were 675 unique individuals with landings in the Nushagak Commercial Salmon District, yet only 143 (21 percent) were Dillingham residents and 243 (36 percent) were non-Alaskans. In 2013, 19 percent of the gill net fleet vessels with commercial fish harvest in the Nushagak District were registered to Dillingham residents and 35 percent were registered to non-Alaskans.⁹⁰

Dillingham’s evidence makes clear that 100% of the permit holders reside outside of the territory to be annexed. They are members of other communities. It strains credulity to argue that the water of Nushagak Bay constitutes a “social unit comprised of 25 or more permanent residents.” Moreover, the Superior Court’s Order on Appeal found that “it is uncontested that no one resides permanently in the annexed portion of Nushagak Bay.”⁹¹

Additionally, the requirement of a finding of community is expressed in 3 AAC 110.130(c). While stated as “non-exclusive factors” that “may” be considered by the LBC, the mandatory words of limitation that are used must be given meaning. The only

⁸⁷ Title 29 of the Alaska Statutes (Municipal Government) provides that “a community” may incorporate as a city. AS 29.05.011(a). The code further provides that “an area” may incorporate as a borough. AS 29.05.031(a).

⁸⁸ There is an exception to this limitation if inclusion of such territory is justified by application of the annexation standards. This exclusion is discussed below.

⁸⁹ 3 AAC 110.990(5).

⁹⁰ Pet. at p.8.

⁹¹ Ex. #8 Order on Appeal p. 13.

interpretation of the regulation that can be harmonized with other provisions is that the territory to be annexed must itself be a community by having permanent residents. This interpretation is consistent with 3 AAC 110.920, which determines the existence of community by reference to a “settlement of permanent residents” in “geographical proximity” that are a “discrete and identifiable social unit.” This regulation is based entirely on determining whether “a settlement” comprises “a community.” The factors are whether (1) the settlement is inhabited by at least 25 *permanent residents*; (2) whether the *permanent residents* live in a geographical community; and (3) whether the *permanent residents* are a discrete and identifiable social unit. Each of the three factors contemplates the presence of permanent residents

The pronouncement that permit holders who reside outside of Nushagak Bay and fish seasonally in Nushagak Bay can constitute a community for purposes of annexation by a city constitutes a new definition of the limitation of “community.” This new definition cannot be applied unless adopted through the administrative rule making procedures of the APA.

C. The definition of “unpopulated”

The existing regulations also do not support the notion that seasonal fishermen who are domiciled elsewhere may change an area from “unpopulated” to populated for purposes of the limitation on community. In Dillingham’s words, “[t]he newly annexed territory is not an ‘unpopulated’ area. It is a “seasonally populated area.”⁹² The Superior Court was not persuaded by this view of uninhabited territory: “To the extent that the Commission suggests that seasonal fishers may “populate” the bay . . . , the court rejects this argument.”⁹³

⁹² Pet. at p. 84.

⁹³ Ex. #8 Order on Appeal p. 13 n. 36.

“Territory,” “community,” and “unpopulated” were all given new meaning in order for the LBC to be able to approve Dillingham’s local action petition. Dillingham argues that it was a reasonable application of the definition of “community” set out in 3 AAC 110.920,⁹⁴ contending that so long as it (Dillingham) constitutes a community, any annexation of fishing grounds to it would also satisfy the community requirement. This interpretation effectively nullifies any concept of limitation intended by the regulation, is arbitrary and unreasonable, and should not be used for the purposes of the instant legislative review petition.

The LBC must follow regulations requiring the territory to exhibit some attributes of a permanent community with Dillingham or by establishing a presumption of no community in the territory because of lack of permanence caused by the transient nature of persons who are there temporarily. It must impose an enhanced level of proof of community to overcome the presumption that is required by 3 AAC 110.920(b). These provisions of the regulations must be either repealed or amended if the LBC is inclined to relax the limitation of community to accommodate annexation by a regional hub city.

The Alaska Supreme Court discussed the limitation of community doctrine in a case challenging the LBC’s approval of the incorporation of the North Slope Borough.⁹⁵ In that case appellants cited a series of cases striking down city annexations and incorporations based on the limitation of community doctrine that could be inferred from constitutions and statutes, but the Alaska court found those authorities “unpersuasive when applied to borough incorporation” and noting that “aside from the standards for incorporation in [former] AS 07.10.030, there are no limitations in Alaska law on the organization of borough government. . . . [a]nd boroughs are not restricted to the form and function of

⁹⁴ Pet. at p. 81, 85.

⁹⁵ *Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974).

municipalities.”⁹⁶ Underscoring the differences between cities and borough, the court observed that the limitation of community “requires that *the area taken into a municipality* be urban or semi-urban in character.”⁹⁷

There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty[.]⁹⁸

This doctrine is reflected in the differentiations made between cities and boroughs in Alaska’s constitution and statutes, and this doctrine is set out in the LBC regulations as well. The application of new standards for hub cities blurs this important distinction.

D. The regulatory exception to the prohibition of a city annexing large unpopulated areas must be applied as written with meaning given to all the words.

The regulations provide that the proposed new boundaries of a city “may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of standards in 3 AAC 110.090 – 3 AAC 110.135 and are otherwise suitable for city government.”⁹⁹ The earlier LBC decision on the local option petition found the exception was met, thereby ducking the issue of the prohibition of annexing “large unpopulated areas.”¹⁰⁰ Following Dillingham’s argument, it simply found that the petition “meets the annexation standards of 3 AAC 110.090 – 3 AAC 110.135.”¹⁰¹ This is an example of an exception swallowing a rule. It effectively repeals the regulatory prohibition against inclusion of large geographic areas, since every petition must meet the annexation standards.

⁹⁶ *Id.* at 100-101.

⁹⁷ *Id.* at 100 (emphasis added).

⁹⁸ *Id.*, quoting *State ex rel. Davis v. Town of Lake Placid*, 109 Fla. 419, 147 (So. 468, 471 (1933)).

⁹⁹ 3 AAC 110.130(c)(2); Pet. at p 101 (Exh. I, p. 8).

¹⁰⁰ Pet. at p. 101 (Ex. I, p.8)

¹⁰¹ *Id.*

The exception in the regulation clearly requires more: it is the proposed *boundaries*, not the petition, that must be justified by the application of all the other annexation standards set out in 3 AAC 110.090 – 3 AAC 110.135. The regulation prohibits annexation of geographic areas or unpopulated areas unless those new boundaries can be justified by all of the annexation standards.

In its legislative review petition Dillingham again argues that a large geographic area may be annexed notwithstanding the limitation on community simply if the petition “meets the standards of 3 AAC 110.090- 3 AAC 110.135”.¹⁰² Once again, it failed to even attempt to apply the annexation standards to the expansive boundaries it proposes.

Respondents hope the LBC will apply the facts of this legislative review petition to the regulatory standards and definitions as written, with all words given meaning. If it does, respondents believe the LBC will find that the petition does not meet existing standards. If the LBC desires to apply new interpretations or to change standards, respondents ask the LBC to provide notice and an opportunity to comment and all the other procedures required by law. Finally, Respondents reiterate their desire and willingness to work with the LBC, communities and governments of the region to find a fair and equitable regional solution to the issues that face all those who reside in the Nushagak Bay watershed.

IV. CONCLUSION

For the reasons discussed above, respondents respectfully ask the LBC to either deny the petition, or suspend it pending further investigation into borough formation or other regional solutions to serve the best interests of the state and the Western Bristol Bay Region. Respondents are open to discussing with petitioner and others the means of resolving their objections to the petition.

¹⁰² Pet. at p. 76.

DESIGNATION OF REPRESENTATIVE

The Native Villages of Ekuik, Clark's Point, and Portage Creek, and the City of Clark's Point designate the following person as their representative for purposes of this responsive brief and any proceedings regarding the Dillingham Annexation Petition:

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The governments listed above request that courtesy copies of all correspondence be also provided to the following persons:

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Mayor
City of Clark's Point
P.O. Box 9
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Mary Ann Johnson
Treasurer
Native Village of Portage Creek
1327 E. 72nd, Unit B
Anchorage, Alaska 99518

Dated this 18th day of September, 2015.

By: James L. Baldwin
James L. Baldwin
Counsel for Respondents

By: Janice Gregg Levy
Janice Gregg Levy
Counsel for Respondents

AFFIDAVIT OF ROBERT HEYANO PRESIDENT

NATIVE VILLAGE OF EKUK

STATE OF ALASKA

)

)ss.

THIRD JUDICIAL DISTRICT

)

I Robert Heyano, upon oath, depose and state that:

1. I am the president of the village council of the Native Village of Ekuk, a federally recognized tribe.
2. Ekuk is located on the east coast of Nushagak Bay, approximately 17 miles south of Dillingham. It is spread out for about two miles along a narrow gravel spit that extends from the Ekuk Bluffs in the shape of a hook. The community lies at approximately 58.814986° North Latitude and -158.557684° West Longitude. (Sec. 12, T016S, R056W, Seward Meridian.)
3. The word Ekuk means "the last village down," reflecting that Ekuk is the farthest village south on the Nushagak Bay. The village is mentioned in Russian accounts of 1824 and 1828 as Village Ekouk and Seleniye Ikuk. It is thought that Ekuk was a major Eskimo village at one time. Russians employed Natives as guides for their boats as they navigated up Nushagak Bay to the trading post at Aleksandrovsk after 1818. Before the North Alaska Salmon Company opened a cannery at Ekuk in 1903, many residents

had moved to the Moravian Mission at Carmel. In addition, numerous canneries sprang up during 1888 and 1889 on the east and west sides of the bay, which drew many residents away from the village. Ekuk had a school from 1958 to 1974. Today, the only year-round residents are the cannery watchman's family. In the summer, the village comes alive with approximately 200 persons engaged in commercial fishing and subsistence activities. The Ekuk Fisheries processing plant has a number of employees residing at the cannery site.

4. Historically a Yup'ik Eskimo village, Ekuk is now used only as a summer commercial and subsistence-use fishing site with an operational salmon processing plant. Many families have set net sites in Ekuk. According to the records of the Alaska Department of Fish and Game there were 93 set net operations in the Ekuk Statistical Area of the Nushagak Bay Commercial Salmon District during the 2015 fishing season.

5. During the summer months the tribal government in partnership with Bristol Bay Area Health Corporation and Ekuk Fisheries maintains a health aide and clinic in the village area.

6. Air transport is the most frequent means of getting to Ekuk. Ekuk Village Council owns and maintains a 1,200' long by 40' wide dirt/gravel airstrip. Scheduled and charter flights are available from Dillingham during the summer months. A private dock is in use in connection with the processing plant. The cannery has two docks. Clark's Point, two miles north, can be reached by snow machine during winter and all terrain vehicles in the summer.

7. The Wards Cove Packing Company closed in 2002. During its peak, it employed 200 workers each summer, providing a market for about 80 commercial fishing

boats and over 160 beach set net sites. The cannery reopened in 2004 under the management of Ekuk Fisheries. The cannery is now the principal facility for processing salmon caught from set net sites within the Ekuk Statistical Area of Nushagak Bay.

8. Ekuk cooperates with the Clark's Point Village council in an effort to resolve a landfill problem shared by these two communities. Ekuk is without a landfill to handle the trash produced from the various fishing operations and habitations in the vicinity of the village. Clark's Point has a landfill but has been notified that the landfill used by the residents of the City of Clark's Point must be relocated further from the state funded airport for safety reasons. Ekuk presently covers the cost of the operation of a waste disposal burn box that handles only a part of the trash accumulated in the village area. Ekuk and Clark's Point are actively planning for a new landfill to be operated by the city. As a part of this plan Ekuk and Clark's Point would jointly work for funding and construction of a road between Ekuk and Clark's Point which would provide access to the landfill and provide an all weather road connection between the two communities. A grant was recently approved that would award money to begin engineering work on the road.

9. The road would also allow Ekuk and Clark's Point the option of sharing costs for police protection and public health aide services. Health aides are now located in both places during the summer months. This would permit these two communities to avoid duplication of services.

10. Ekuk maintains the only source of potable water outside of the cannery available to the set netters in the area of the village. Ekuk owns and operates an ice machine that sells ice to set netters involved in the Nushagak fishery.

11. During the fishing season approximately 200 persons are present in the vicinity of the village and are involved in set netting and subsistence activities. These persons reside in various places, including Dillingham, Aleknegik, outside the state of Alaska and other places within the state. A part of the set netters operating within the village are members of Ekuk village.

12. I am a member of the board of directors of the Bristol Bay Native Association. In that capacity I have worked with others on the board to establish a task force to study the feasibility of a borough for the Western Bristol Bay region. We have applied for a grant from Administration for Native Americans to fund the study, and we hope to have a favorable decision by October 1, 2015.

Dated at Dillingham, Alaska this 9 day of September, 2015.

Robert Heyano
Robert Heyano

SUBSCRIBED AND SWORN TO before me this 9th day of September, 2015.



D. Folsom
Notary Public in and for the State of Alaska
My commission expires: 6/5/2019

AFFIDAVIT OF MARY ANN K. JOHNSON

NATIVE VILLAGE OF PORTAGE CREEK

STATE OF ALASKA

)

)ss.

THIRD JUDICIAL DISTRICT

)

I Mary Ann K. Johnson, upon oath, depose and state that:

1. I am the treasurer of the village council for Portage Creek Village. Portage Creek is an unincorporated village and federally recognized tribe within the Dillingham Census Area. Portage Creek is located at the mouth of Portage Creek, a tributary of the Nushagak River, 29 miles southeast of Dillingham.


2. This village site was used as a mail route camp. The Yup'ik name for this place is "Ohgsenakale." It is believed, Portage Creek was so named, by non-natives, because it was used for a portage from the Nushagak River to the Kvichak River. By using the portage, travelers could avoid the open waters of Bristol Bay and the long trip around Etolin Point. The village was permanently settled in 1961 by some families from Koliganek and other villages up the Nushagak River. A BIA school was established in 1963, and, during the winter of 1964-65, 11 families lived in Portage Creek. In 1965 the village was served by a local, scheduled air carrier. Through the mid-1980s, Portage

Creek was an active community, but the population has since declined to a population of 2 as recorded by the 2010 Decennial Census. There are 12 houses located in the village, with only one of them being occupied year round.

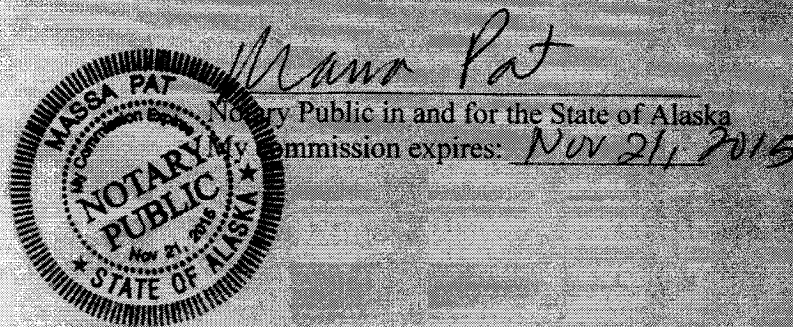
3. The village is a popular recreational fishing and camping site from May through September and a hunting location for Yup'ik residents. There is a seasonal Sportfishing lodge located in the village which is operated by village members who live there permanently.

4. The Native Village of Portage Creek has 76 base roll members and 147 – 300 direct descendants, many who reside in Koliganek, New Stuyahok, and Dillingham within the Western Bristol Bay Region.

Dated at Anchorage, Alaska this 9th day of September, 2015.


Mary Ann K. Johnson

2015 SUBSCRIBED AND SWORN TO before me this 9th day of September,



AFFIDAVIT OF JOSEPH WASSILY

MAYOR, CITY OF CLARK'S POINT

STATE OF ALASKA)

)ss.

THIRD JUDICIAL DISTRICT)

I Joseph Wassily, upon oath, depose and state that:

1. I am the mayor of the City of Clark's Point.

2. The city of Clark's Point is a second Class City in the Dillingham Census Area. The 2010 Decennial Census show the population of the city to be 62 persons. Clark's Point is located on a spit on the northeastern shore of Nushagak Bay, 15 miles from Dillingham and 337 miles southwest of Anchorage. The boundaries of the city include .9 square miles of the waters of the Nushagak Bay Commercial Salmon District. The point originally had an Eskimo name, "Saguyak,". A settlement at the site was recorded beginning around 1888 when the Nushagak Packing Company cannery was established. The community was named for John Clark, who was the manager of the Alaska Commercial Company store at Nushagak. Clark operated a saltery prior to the establishment of the cannery. In 1893 the cannery became a member of the Alaska Packers Association. In 1901 a two-line cannery was built. During World War II, the canning operation ceased, and only salting was done at Clark's Point. The plant was shut down permanently by 1952, and the Alaska Packers Association

used the facility as the headquarters for its fishing fleet.

3. The city was incorporated in 1971. The village has been plagued by severe erosion. A housing project in 1982 was constructed on high and safe ground on the bluff. The community was founded on fishing operations of non-Native settlers, although presently the permanent residents are predominantly Yup'ik Eskimo. Approximately 300 persons in addition to the permanent residents are present in and around the city in summer months due to the commercial fishery. During the 2015 fishing season, 23 set net sites were operated within the Clark's Point statistical area.

4. Air transport is the primary method of reaching Clark's Point. Regular and charter flights are available from Dillingham. There is a state-owned 3,200' long by 60' wide gravel runway, and float planes land on Nushagak River. Freight is brought by barge to Dillingham and then flown or lightered to the community.

5. Boat moorage is available along a spit dock owned by the city; boats also land on the beach. Trident Seafoods owns a private dock. ATVs and snow machines are the primary means of local transportation.

6. Ekuk cooperates with Clarks' Point Village council to resolve a landfill problem shared by these two communities. Ekuk is without a landfill to handle the trash produced from the various fishing operations and habitations in the vicinity of the village. Clark's Point has a landfill but has been notified that the landfill used by the residents of the City of Clark's Point must be relocated further from the state funded airport for safety reasons. Ekuk and Clark's Point are planning for a new landfill to be operated by the city to serve both communities. As a part of this plan Ekuk and Clark's Point are jointly pursuing funding and construction of a road between Ekuk and Clark's Point which would provide access to the landfill and provide an all weather road connection between the two communities. Funding is available from the state for engineering work on the route chosen for the intended road facility. The road is expected to cost \$10 million. Maintenance of the road after construction will be the responsibility of the city.

7. The road would also allow Ekuk and Clark's Point the option of sharing costs for services for police protection and public health aide services. Health aides are now located in both places during the summer months. This would permit these two communities to avoid duplication of services.

8. The city would very much like to annex new territory to include Ekuk Village, Ekuk Fisheries, and enough waters within Nushagak Bay to provide for future growth and finance city operations. We were reluctant to spend our limited money to move forward with our own annexation petition because Dillingham was claiming that the Local Boundary Commission had already decided that Nushagak Bay should be within their new city limits.

Dated at Clark's Point, Alaska this 17th day of September, 2015.



Joseph Wassily

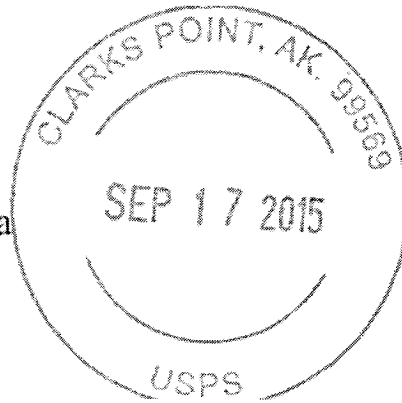
Mayor

SUBSCRIBED AND SWORN TO before me this 17th day of September, 2015.

July A. George

Notary Public in and for the State of Alaska

My commission expires: Term



PC 57

The Importance of the Bristol Bay Salmon Fisheries to the Region and its Residents: An Overview

Prepared for

Bristol Bay Economic Development Corporation

November 2012

Prepared by



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The Importance of the Bristol Bay Salmon Fisheries to the Region and its Residents

This document is an updated overview of the importance of Bristol Bay Salmon harvesting to region residents. A larger and more in-depth analysis is forthcoming, and is an update of the work Northern Economics published in 2009. Bristol Bay Economic Development Corporation again sponsored this project to continue developing an understanding of how the fishery affects Bristol Bay Region residents.

This overview addresses the following:

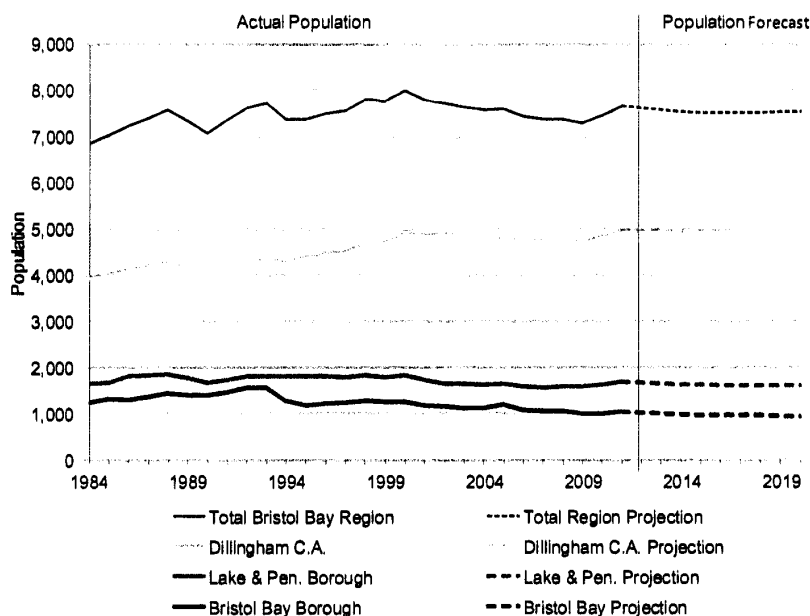
- Population in Bristol Bay
- Cost of Living in Bristol Bay
- The Drift Gillnet Fishery
- Capitalization of Drift Gillnet Vessels
- The Set Gillnet Fishery
- The Bottom Line

This summary, as well as our forthcoming analysis, consists of a series of figures, each with a paragraph or two of explanatory text. While Northern Economics developed the figures, the information is derived almost entirely from publically available data.

Population in Bristol Bay

The total population in the Bristol Bay rose from 1984 through the turn of the century before slipping into a decade-long decline. The current population of the region is roughly the same as it was 15 years ago and the 5-year forecast is basically flat. Population in the Dillingham Census Area increased in the 1990s but fell slightly through 2009. Population in the Lake and Peninsula Borough declined steadily from 2000 – 2009, but has move slightly higher with the census in 2010. Population in the Bristol Bay Borough dropped sharply in the early '90s with closure of the air force base, and has been relatively stable since then. The Bristol Bay region, and it's sub-regions, all saw population increases in with the 2010 census between 0.2 and 4 percent.

Figure 1. Population of the Bristol Bay Region 1984 – 2011 and Projections to 2020



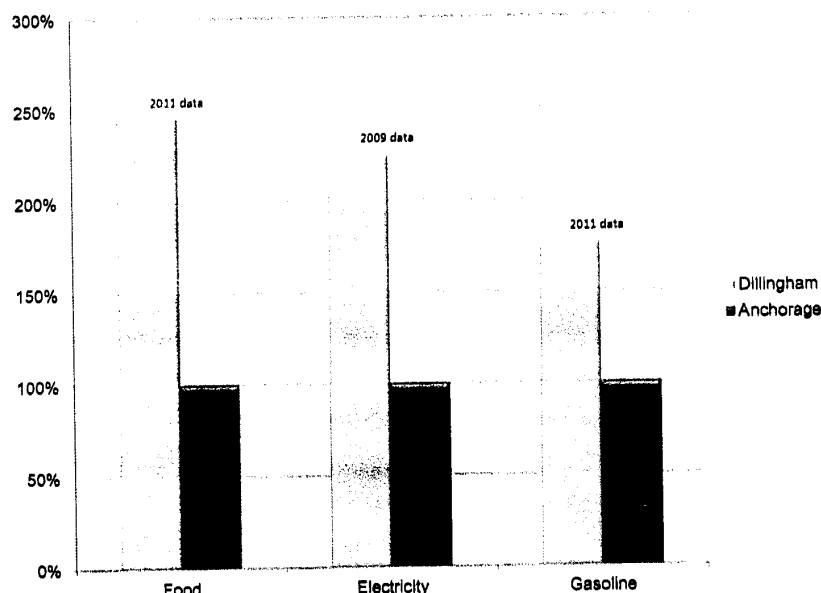
Source: Northern Economics, Inc. using ADOLWD 2012

Cost of Living

Figure 2 compares the cost of living in Dillingham versus Anchorage in select categories. Each quarter the University of Alaska in Fairbanks (UAF) conducts a survey of household costs in communities across the state. The most recent survey shows that prices for food and gasoline in Dillingham were more than 150 percent of the prices in Anchorage. The most recent survey capturing electricity cost for both Dillingham and Anchorage was completed in June 2009—these data show that electricity prices in Dillingham are more than double the prices in Anchorage. The July 2012 *Alaska Economic Trends* issue focuses on the cost of living in Alaska, and also cites the UAF survey stating that groceries in the Dillingham area cost more than in any other surveyed community in the state. Using a sample of grocery items meant to mimic average consumer purchases, the article notes that \$132 worth of groceries in Anchorage would cost \$354.72 in Dillingham.

In addition to the commodity prices surveyed by UAF, the Department of Commerce, Community, and Economic Development's Fuel Price Report compares the cost of heating fuel across the state. The January 2012 report shows that prices for heating fuel #1 in Western and Southwestern Alaska are some of the highest in the state, averaging \$6.59 and \$5.92 per gallon, respectively. Unfortunately, the report does not list Anchorage fuel prices, so the information is not included in the graphic.

Figure 2. The Cost of Living in Dillingham Compared to Anchorage as of March 2011/June 2009



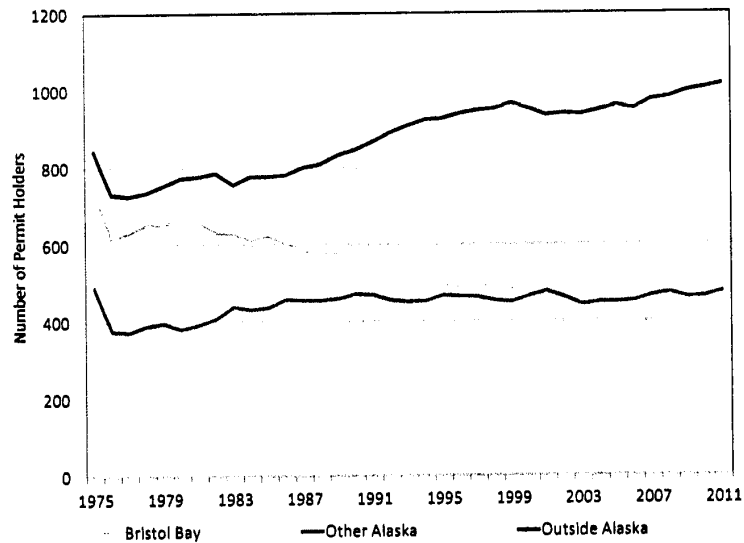
Source: Figure developed by Northern Economics based on data from UAF Cooperative Extension Service Alaska Food Cost Survey (UAF Cooperative Extension Service, 1996 – 2011). Gasoline data for Anchorage are from GasPriceData.com by GasBuddy.

Drift Gillnet Fishery

In our examination of the fishery we divided permit holders into three groups: Bristol Bay residents, Other Alaska residents and permit holders from Outside Alaska.

Figure 3 shows that the number of locally owned drift gillnet permits has declined at a relatively constant rate over the past 30 years. Currently there are less than 400 drift gill net permit holders residing in the watershed; only 20 percent of the permits in the fishery. The out-migration of drift gillnet permits is a long-term issue for the region. The data reveal that the out-migration of permits from the Bristol Bay region has not slowed in recent years and has continued at a relatively constant rate over the past 30 years. The majority of these permits are eventually held by individuals who live outside of Alaska; the number of "other Alaska" permits has stayed relatively constant over the last decade. It is not clear whether these data represent an out-migration of individuals, an out-migration of permits, or both.

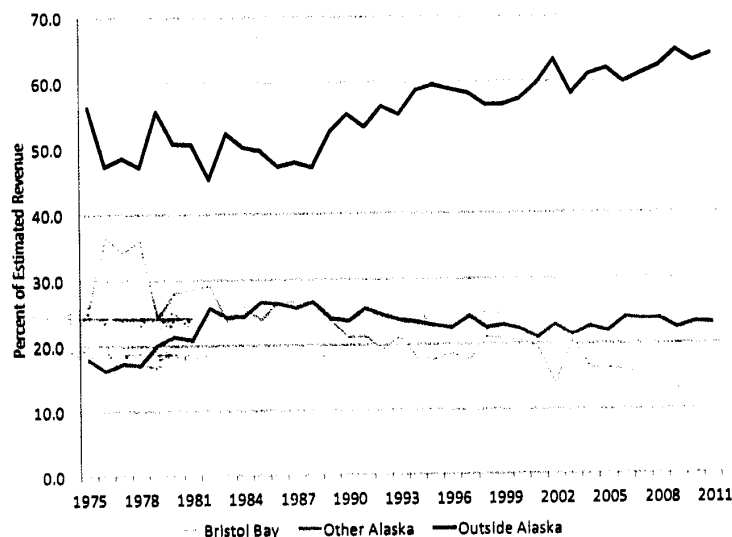
Figure 3. Number of Drift Gillnet Permit Holders By Residence, 1975 - 2012



Source: Figure developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and (CFEC, 2012).

Figure 4 shows ex-vessel revenue for each group as a percent of total ex-vessel revenue for the fishery. Revenue of local drift permit holders has fallen from over 30 percent of the total in the late 70's to about 12 percent in recent years. The decline is due in part to the decline in the number of locally owned permits and in part due to the fact that locally owned permits are generating less revenue per permit fished. (See Figure 5.)

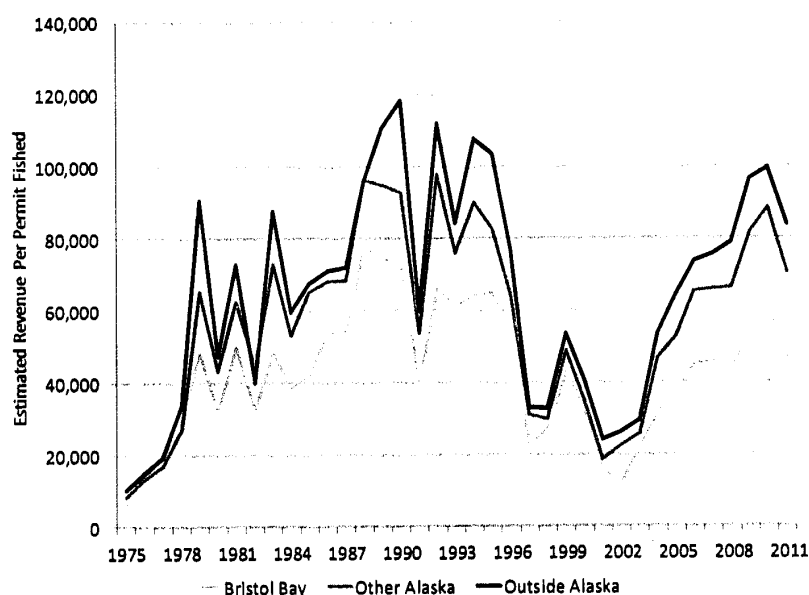
Figure 4. Percent of Total Revenue in the Drift Gillnet Fishery by Residence, 1975 - 2011



Source: Figure developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and (CFEC, 2012).

In 2011, the revenues of the average watershed resident were only 63 percent of the average revenue for permit holders from outside Alaska. We do not have data that can fully explain these differences, but they appear primarily due to lower overall catches per permit and not due to lower ex-vessel prices paid to locals. The gap in earning per permit between Bristol Bay residents and the other groups has increased steadily since 2003.

Figure 5. Average Revenue per Drift Permit by Residency Group, 1975-2011

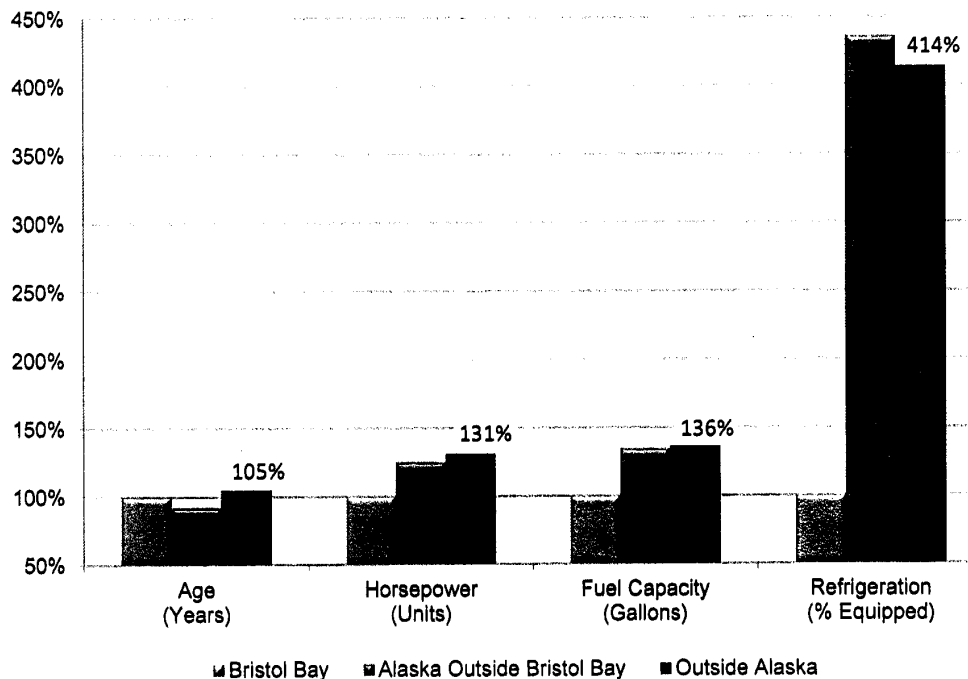


Source: Figure developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and (CFEC, 2012).

Some of the differences in revenues for watershed permit holders can be attributed to difference in vessel capacity. This figure compares vessel age, horsepower, fuel capacity, and refrigeration capacity by residence groups as of 2012. Because the different characteristics all have their own units we have set the average of each characteristic for vessels operating in the Bristol Bay drift gillnet fishery, residing in the watershed, to 100 percent. We then show the relative value of the vessels registered for the Bristol Bay drift gillnet fishery, owned by other residency groups. For example, the average age of locally owned vessels was 28.5 years, while the average age of vessels owned by permit holders outside Alaska was 29.9 years (or 105 percent of the age of vessels owned by watershed residents).

Drift gillnet vessels owned by local residents on average have lower horsepower, less fuel capacity, and have significantly less capacity for chilling fish. These differences have been increasing over time as is shown Northern Economics' more detailed study available from BBEDC (Northern Economics, Inc., 2009).

Figure 6. Comparison of 2012 Drift Gillnet Vessel Characteristics across Residency Groups

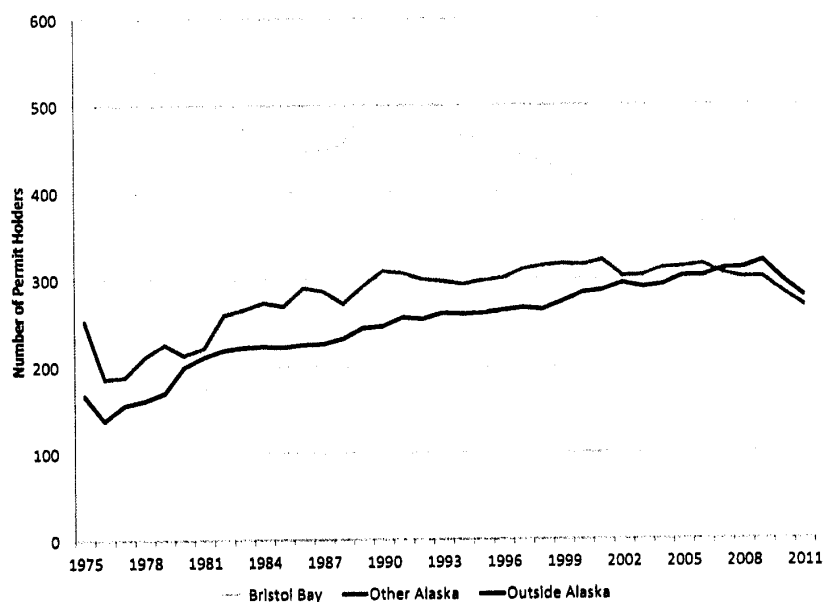


Source: Figure developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1982 - 2012).

Set Gillnet Fishery

The next two figures examine the set gillnet fishery in Bristol Bay. In the Set Gillnet fishery the number of permits owned and fished by watershed residents has continued to decline over the past 15 years but has leveled out at about 350 permits. Watershed residents now own about 38 percent of the total number of permits, the largest of the three groups. The out-migration of set net permits was nearly zero in 2002 and 2003 then increased steadily from 2003 to 2009, and has recently dipped back down. Also note that the destination of out-migrating permits has been almost equally distributed between the "Other Alaska" and "Outside Alaska" groups.

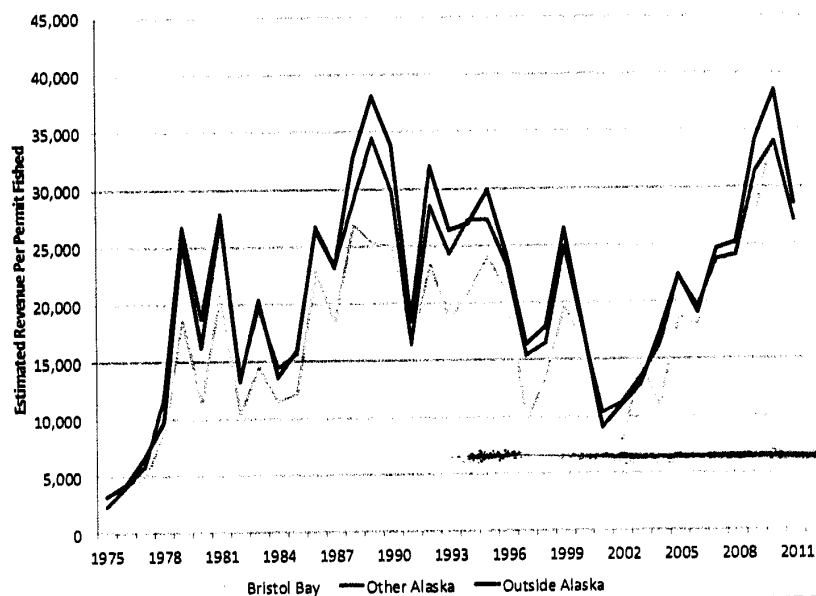
Figure 7. Number of Set Gillnet Permit Holders by Residence, 1975-2011



Source: Based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and (CFEC, 2012).

Historically, set net permit holders from the watershed have had lower average gross earnings per permit than permit holders from outside the region. In recent years however, watershed residents are basically on par with other groups. This is very different than in the drift gillnet fishery.

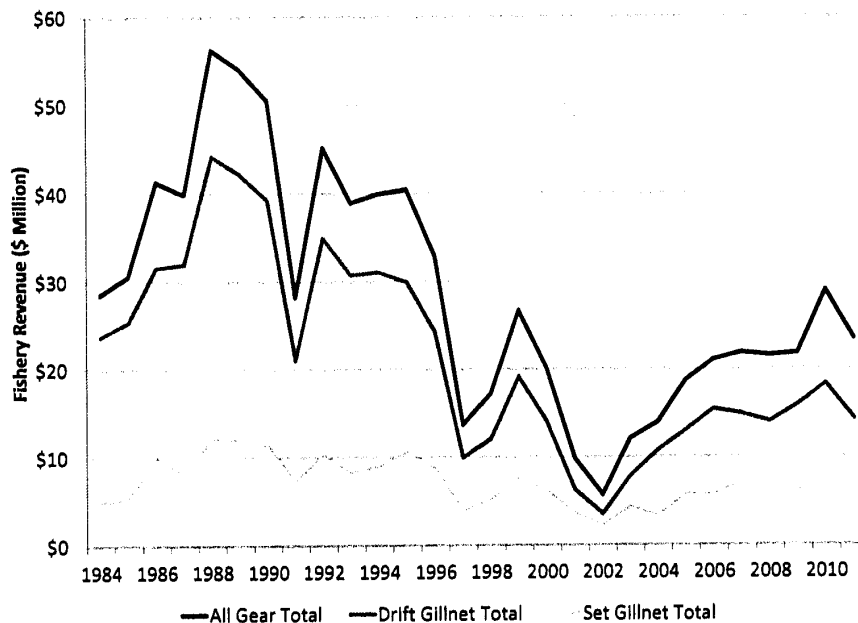
Figure 8. Revenue per Set Permit by Residency Group, 1975-2011



Source: Based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and (CFEC, 2009).

Figure 9 combines gross revenues of watershed residents for both the drift and set gillnet fisheries. The drift fishery has been much more volatile than the set net fishery. Overall there was been a markedly downward trend in total revenue from the 1980s through 2002 followed by increases nearly every year since then with the exception of the declines seen in 2011.

Figure 9. Combined Revenue of All Watershed Permit Holders

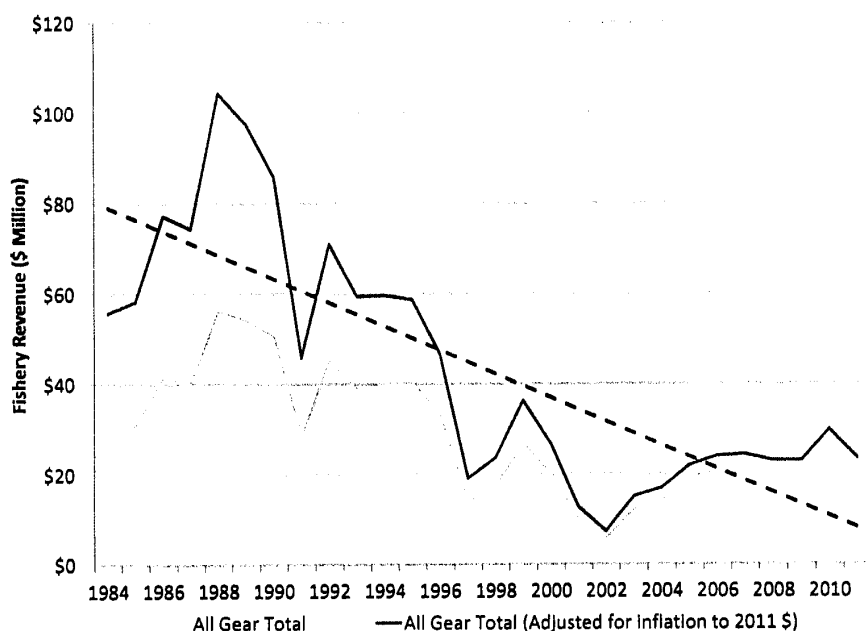


Sources: Both Figure 8 and Figure 9 were developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2008).

In Figure 10 we adjust the combined set and drift revenues of all watershed residents for inflation. The inflation adjustment shifts revenues from previous years upward because a dollar in earlier years would buy more goods than it does now. After adjusting for inflation the downward trend in revenues from the watershed (as shown in the dashed blue line) is very apparent.

Sensitivity testing on some of the factors contributing to this decline indicates that approximately 30 percent of the decline is due to the out-migration of permits, and another 60 percent is due to the fact that ex-vessel prices have not kept up with inflation. The remaining 10 percent of the decline is not explained by the variables that we examined.

Figure 10. Inflation Adjusted Revenue of Watershed Permit Holders



Sources: Figure developed by Northern Economics based on data from Commercial Fishery Entry Commission (CFEC, 1980 - 2011) and the US Bureau of Labor Statistics (US BLS, 1980 - 2011).

The Bottom Line

We conclude with the following statements and a final figure.

- The decline in value derived from the fishery by watershed residents has had a significant impact on the region's economy.
- The decline however does necessarily diminish the fishery's overall importance to residents.

The final figure shows the inflation adjusted per capita revenue from the Bristol Bay drift and set gillnet fisheries of permit holders residing in the Watershed. Over the last 25 years per capita revenue from the Bristol Bay fisheries (in real dollars after adjusting for inflation) has fallen an average of \$340 per year.

In the 1980s, per capita revenue was over \$10,000 with a peak in 1988 of over 15,000. However, since 2005 watershed permit holders have brought in an average of just \$3,452 per man, woman, and child living in the Region.

SUMMARY OF THE CITY OF DILLINGHAM'S PETITION TO THE LOCAL BOUNDARY COMMISSION FOR ANNEXATION OF NUSHAGAK COMMERCIAL SALMON DISTRICT WATERS AND WOOD RIVER SOCKEYE SALMON SPECIAL HARVEST AREA WATERS AND LAND

The City of Dillingham has prepared a Petition to add to city boundaries. This summarizes the contents of the Petition by: 1) Describing what area is proposed to be added to Dillingham; 2) Describing why the City is asking to be bigger; 3) Explaining how the draft Petition meets the legal rules for making the City larger; and 4) Explaining the next step in the annexation process.

AREA PROPOSED TO BE ADDED TO THE CITY OF DILLINGHAM

Two commercial fishing districts- Nushagak Commercial Salmon District and Wood River Sockeye Salmon Special Harvest Area. This is shown on the map on page 4 of this Summary.. It is 396 square miles of water and 3 square miles of islands.

WHY DILLINGHAM IS ASKING TO BE BIGGER

The City of Dillingham provides many valuable services to people who do not live in the city and do not pay city property tax. Limited entry permit holders harvest millions of dollars of fish from the front door of Dillingham but do not pay a lot of local taxes. Most of these people live outside the Bristol Bay region and more than 1 in 3 do not live in Alaska. Yet the services paid for by taxes from Dillingham residents are used to support non-resident commercial fishing in the two fishing districts. This leaves the residents of Dillingham to pay for the docks, harbor, roads, water, sewer and landfill used by the canneries and the fishing fleet. Dillingham residents also pay to provide public safety services and generally fund the entire support structure allowing those fishing just outside city boundaries to make money from fishing. Some of this structure has been built with State money but the City alone pays to operate and maintain it. So the City needs to expand its tax base to raise money needed to operate and maintain basic services like the small boat harbor, All-Tide dock, police department, landfill, water and sewer utilities. Many of these improvements are getting older and more expensive to maintain.

When these two fishing districts become part of the city a fish tax will apply to sales of fish harvested from these districts. The fish tax is estimated to raise \$710,000 per year. (Page 17). In the two years it was in place it raised about \$665,000 per year. (Exhibit C-1). Some of this money has been saved for funding a study looking into forming a borough if other communities in the region agree this should be done and also contribute. (Exhibit C-2). Some of this money has been used to help pay costs of operating city services used by those fishing for salmon. (Page 12).

Expanding the tax base is critical to the City's future. Otherwise eventually the City will not be able to take care of the harbor, docks, roads, landfill and water and sewer used by those

fishing in the two fishing districts. The obvious way to expand the tax base is to enlarge city boundaries and have a fish tax just like they do in most of the other Bristol Bay municipalities next to commercial salmon fishing districts.

The petition explains this in detail with statistics about the number of non-resident commercial fishing permit holders, (Page 7), the total value of the salmon harvested in the two districts (Page 17-18), the expense of operating city services used by the commercial fishing fleet and processors (pages 8-12 and Exhibit C-1), how the small boat harbor is subsidized by taxes because harbor fees do not cover operating costs (Page 12), the current state of city finances (Exhibit C-2), the expense of recent upgrades of the landfill and waste water treatment plant, and the cost of providing public safety services and how the demand for public safety services rises during the fishing season (Pages 8-12).

HOW THE DRAFT PETITION MEETS THE LEGAL RULES FOR MAKING A CITY LARGER

The Alaska Legislature and the Local Boundary Commission have adopted rules about making a city larger. Some of these rules are mandatory but most of them just identify things for the people on the Local Boundary Commission to think about before they decide on an up or down vote on a City's petition. Exhibit E to the petition explains how the proposed expansion of the City's boundaries meets the rules and also explains how the Local Boundary Commission has already decided that making the City bigger is in the best interest of the State of Alaska and meets all the rules for adding area to an existing City. This includes an explanation of how the City is providing services already to this area and has the capability to continue to do so and how these fishing grounds are logically considered part of the fishing community of Dillingham.

Sections of the Petition other than what have been described above are as follows:

Section 9 explains there are about 1,000 people working during the fishing season in the two fishing districts and about 2,400 residents of the City of Dillingham.

Section 10 and Exhibits B, I and J explain that public notice of the petition and this draft was given by posting in public places, by advertising in the newspaper, by announcements on the radio and by posting on the City's web site. These also explain past public notices and consultation about annexation.

Section 11 has information about the total existing tax base of the City of Dillingham (total valuation of property is about \$121,000,000 in real property and \$40,000,000 in personal property), annual sales tax without a fish tax equals about \$2,860,000) and also estimates how much additional tax money will be received from the fish tax if the City adds the two fishing districts (estimated at \$710,000 per year, two years of actual data averaged \$665,000 per year).

Section 13 shows the long term debt of Dillingham. (\$15,105,000).

Section 14 lists city powers (planning, education, police, tax collection, water and sewer, ports and harbors).

Exhibit D explains how the current city will take on the extra area and what new services will be provided in the fishing districts in addition to the services that have been provided in those districts for decades.

Section 16 has information about how many people are on the City Council (7) and how they are elected under a designated seat system.

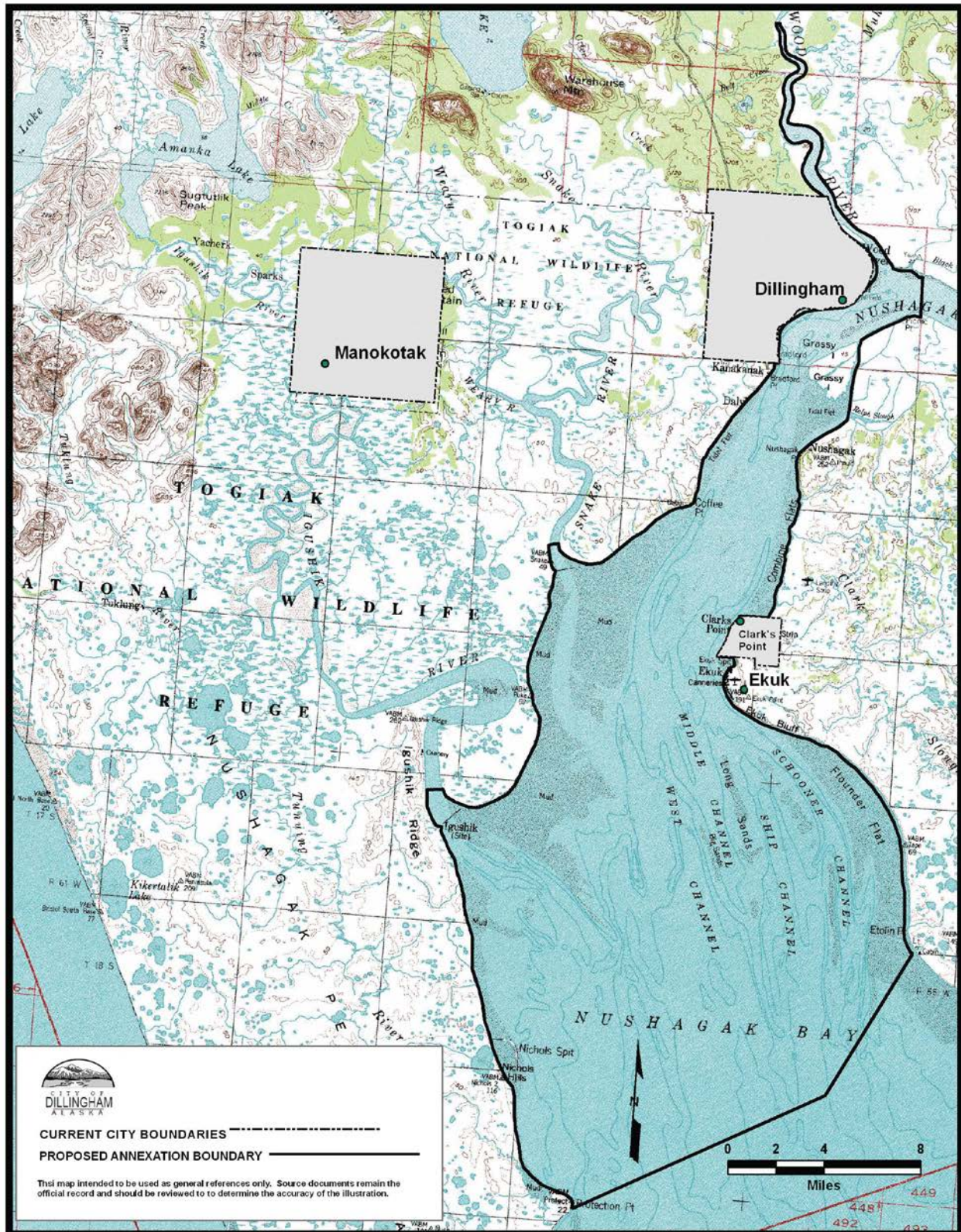
Section 18 has information about the impact of enlarging the city on civil and political rights.

Section 19 and Exhibit G will show the City Council authorized filing the petition. This has not happened yet so this exhibit is blank.

WHAT HAPPENS NEXT

This petition is only a draft. It still needs to be officially and finally approved by the Dillingham City Council before it is submitted to the Local Boundary Commission. Before the Dillingham City Council makes that decision it will hold one public hearing. People can talk to the City Council about whether they think adding to the City is a good idea. The public hearing will be held September 24 at 6 p.m. in the City Council chambers as a special meeting of the Dillingham City Council. The City Council invites all those with an interest in this subject to talk at this meeting or to submit written comments to the City Council. Written comments must be received by 5 p.m. on September 25. There may be changes to the petition that are made as a result of comments made about the draft petition. In addition to the public hearing representatives of the City have offered to travel to other places where permit holders who fish in the two districts live to explain the petition and take more comments. If this offer is accepted these sessions will be advertised by posting in these communities and on KDLG. Please participate in this most important process.

DILLINGHAM - PROPOSED ANNEXATION BOUNDARIES



STATE OF ALASKA
LOCAL BOUNDARY COMMISSION

STATEMENT OF DECISION

IN THE MATTER OF THE PETITION)
FOR ANNEXATION OF TERRITORY TO)
THE CITY OF **DILLINGHAM**, ALASKA)

SUMMARY OF ACTIVITIES

In accordance with 19 AAC 10.490(a)(4), the City Council of Dillingham passed a resolution on April 24, 1986 authorizing the filing of a petition for annexation of 918.25 square miles of territory under the provisions of AS 29.06.040(b). On May 1, 1986, the Department of Community and Regional Affairs received the authorized petition. Under 19 AAC 10.530, the City published notice of the filing of its petition on June 27 and July 4, 1986, in the Bristol Bay Times.

On April 23, 1986, the City of Clark's Point's submitted a petition for annexation of area included within the territory proposed for annexation by the City of Dillingham. It was accepted by the Department in terms of form and content and was subsequently transmitted to the Local Boundary Commission (LBC) with the Department's report and recommendation. This presented a novel problem for the LBC in that it was now having to consider competing annexation requests.

On May 25, the Department received a letter from Clark's Point Native Corporation formed under ANCSA (Saguyak Incorporated) "protesting" the Dillingham annexation and supporting the Clark's Point annexation. On June 12, 1986 the Department received a letter from the Dillingham Native Corporation formed under ANCSA (Choggiung Limited) objecting to "certain portions, if not all, of this annexation". On July 24, the Department received a letter from the Secretary for the City Council of Manokotak opposing the petition from the City of Dillingham.

On October 4, 1986, a public hearing was conducted by the LBC in Dillingham and one in Clark's Point. At that time the City of Dillingham presented a revised boundary request to the LBC. It reduced the territory proposed for annexation by approximately one-half. However, the City testified that the original boundaries of the proposed annexation were justified, though the City redrew the boundaries to accommodate landowners in the area.

At this point it became apparent that the submission of competing annexation requests was motivated by the desire of each City to obtain the revenue generated by raw fish taxes. This revenue would be available to them only through annexation of at least a portion of Nushagak Bay. The LBC directed the two Cities to examine the conflict and on November 10, 1986, present it with any proposed compromise in terms of boundaries or agreements for the sharing of revenues and municipal services. Work sessions were held between the Councils of the respective Cities, and staff from the Department of Community and Regional Affairs participated in a meeting held on October 24. Ultimately the two Cities were unable to come to an agreeable solution to the conflict. On November 6, 1986, the City Council of Dillingham passed Resolution #86-66. This resolution requested the LBC judge the competing annexation petitions on their own merits.

On November 3, 1986 the Bristol Bay Native Corporation submitted a letter to the Department regarding the proposed annexation from Dillingham. Although the letter states that the corporation takes no position on the City of Dillingham's annexation petition, it raises several issues of concern, many of which were reflected in the Department's report and recommendation to the LBC.

STATEMENT OF DECISION
FOR ANNEXATION OF TERRITORY
TO THE CITY OF DILLINGHAM
PAGE TWO

On November 4, 1986, Marie Luckhurst submitted to the Department a letter and an accompanying "protest petition" signed by approximately 70 landowners in the area proposed for annexation. This petition argued that the respective landowners believed the area failed to warrant annexation. In response to this, Mr. John Pearson, Councilmember of the City of Dillingham, submitted a letter rebutting the arguments presented by the protest petitioners. This was received by the Department on November 21, 1986. On that same day another letter suggesting the City of Dillingham drop the annexation proposal was received by the Department. The letter was submitted by William P. Johnson and it questioned the revised western boundaries of the annexation area. It noted that "the City Council pulled back the boundaries sufficiently to exclude all City Council and immediate family members who staked land within the State open to entry area".

The Alaska Attorney General's Office was requested to provide advice on how the LBC should handle two proposals for annexation where the proposals overlap in the area to be annexed. On November 13, 1986, the Attorney General advised the Department of Community and Regional Affairs that the common law doctrine of "prior jurisdiction" should be applied in this instance. This requires the LBC to consider and act upon the petition submitted first, in this case, that from the City of Clark's Point. A decisional session of the LBC was conducted on November 22, at which time the LBC considered and acted upon the proposed annexation request from the City of Clark's Point and subsequently considered and acted upon the proposed annexation request from the City of Dillingham.

PROFILE OF PROPOSED ANNEXATION

The area originally proposed for annexation is located generally to the northwest, west and south of the existing municipal boundaries of the City of Dillingham. It includes waterways of Nushagak Bay and lands south and west of the City of Aleknagik and east of the City of Manokotak. In the course of the boundary's southeastern traverse it borders the existing corporate limits of the City of Clark's Point. The western territory includes Nunavaugaluk Lake, headwaters of the Snake River.

The area is rural in nature. Onshore areas are inhabited on a seasonal basis by local and non-local residents for purposes of subsistence and commercial fisheries activities. There are an unspecified number of fish camps and set-net sites in the territory. The permanent population of the area is estimated at 75.

The petitioner has asserted that the area proposed for annexation is in need of municipal services which the City can provide more efficiently than another municipality. This contention is based upon the belief that seasonal and permanent residents of the area require and already utilize City services to the extent that annexation of the waterways and land areas are warranted. The petitioner also believes that current and anticipated development in the area requires control and regulation which the City will provide. Additionally, the petitioner feels that the health, welfare or well-being of City residents is endangered by conditions existing in the area proposed for annexation, and that annexation will enable the City to remove or relieve these conditions. The City of Dillingham further desires to enhance its revenues by receipt of the raw fish taxes available from floating processors within the territory proposed for annexation. It is felt by the City that these additional revenues will offset the anticipated decline in state and federal assistance.

STATEMENT OF DECISION
FOR ANNEXATION OF TERRITORY
TO THE CITY OF DILLINGHAM
PAGE THREE

At its November 22 decisional meeting, the LBC approved an approximate 40 square mile area for annexation to the City of Dillingham. It is referred to as "the identified 40 square mile area northwest of the City of Dillingham" in the remainder of this statement.

FINDINGS OF FACT

In arriving at its findings, the LBC has considered documents and evidence including, but not limited to: the petition for annexation, accompanying brief, revised boundary request and City Resolution #86-66 all from the City of Dillingham; the report and recommendation of the Department of Community and Regional Affairs; the letters of non-support from Saguyak Corporation, Choggiung Limited, Bristol Bay Native Corporation, City Secretary of Manokotak, Marie Luckhurst, and William Johnson; the letter of support from John Pearson; and oral testimony provided at the October 4, 1986, public hearing. As listed below, findings of fact are not necessarily limited to the standards provided in state regulations.

1. THE CONTIGUOUS TERRITORY IS NOT TOTALLY SURROUNDED BY THE CITY'S BOUNDARIES [19 AAC 10.070(1)].

2. THE LAND IN THE TERRITORY IS NOT WHOLLY OWNED BY THE CITY [19 AAC 10.070(2)].

3. WITH THE EXCEPTION OF THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM, THE TERRITORY IS NOT URBAN IN CHARACTER [19 AAC 10.070(3)].

The area proposed for annexation is largely uninhabited. There is a significant, though relatively small section currently developed. This development is residential and consists of approximately 75 people adjacent to the Aleknagik Lake Road. They reside in single and multiple family dwellings. The majority of these residents are located in four subdivisions, portions of which are within the City limits and portions of which are outside the City limits but within the territory proposed for annexation. These are known as Ahklun View Estates, Ahklun View Estates North, Ahklun Subdivision III and Lars D. Nelson Subdivision.

The ratios of permanent residents to each square mile within the original and revised areas proposed for annexation do not approximate that of the annexing City. The settlement patterns of the City suggest that only the residents located north of the City along the Aleknagik Lake Road, particularly those in the above noted subdivisions, are indeed located there as a result of natural growth of the City beyond its legal boundaries. With the exception of this inhabited area, the territory proposed for annexation is not generally close to the population center of the City. Again, with the exception of the area adjacent to the Aleknagik Lake Road, the territory proposed for annexation is not accessible to a major land transportation route. With the exception of the property in this same area, the territory is not served nor can it be served in the immediate future by public services and utilities (e.g. water, sewer, electricity and telephone). Thus, the factors which collectively identify urban territory apply to only that portion of the identified 40 square mile area northwest of the City of Dillingham.

4. WITH THE EXCEPTION OF THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM, THE TERRITORY IS NOT IN NEED OF MUNICIPAL SERVICES TO THE EXTENT THAT ANNEXATION OF THE TERRITORY IS WARRANTED [19 AAC 10.070(4)].

STATEMENT OF DECISION
FOR ANNEXATION OF TERRITORY
TO THE CITY OF DILLINGHAM
PAGE FOUR

The City of Dillingham has made a number of City services available to the seasonal and permanent residents of the area proposed for annexation. These services include operation and maintenance of the sanitary landfill, provision of police and fire protection, emergency medical and education services. The permanent residents of the identified 40 square mile area northwest of the current City boundaries avail themselves of these services on a year-round basis. The seasonal processors and their crews may, on occasion, receive some of these services three months of the year. The critical issue is the relative degree to which these services are required. With the exception of the identified 40 square mile area northwest of the current boundaries of the City, it has not been demonstrated that these services are required to the extent that annexation is warranted.

5. WITH THE EXCEPTION OF THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM, THE DEGREE OF LIKELIHOOD THAT FUTURE GROWTH AND DEVELOPMENT WILL OCCUR WITHIN THE TERRITORY IS INSUFFICIENT TO WARRANT ANNEXATION [19 AAC 10.070(5)].

Given the settlement patterns occurring from usual urban growth, it appears likely that the identified 40 square mile territory northwest of the current boundaries of the City will experience additional settlement. Additionally, the State "Open to Entry" land disposal within the area to the northwest of the current City boundaries has been subdivided. This is an area generally accessible by road and these facts collectively demonstrate there is adequate potential for development in this area to warrant annexation.

For areas within the territory proposed for annexation other than those noted above, the "development" referenced by the petitioner consists of the floating processors who anchor within the waters of Nushagak Bay. While recognizing that floating processors represent "development", they do not constitute the type of development applied in this standard. The development suggested here is of one impacting a community on a permanent, constant and year-round basis.

6. THE HEALTH, WELFARE OR SAFETY OF CITY RESIDENTS ARE NOT ENDANGERED BY CONDITIONS EXISTING OR DEVELOPING IN THE TERRITORY [19 AAC 10.070(6)].

The petitioner has presented no evidence to confirm that there are conditions in the area proposed for annexation which endanger the City residents. It has been suggested that residents along the north end of the Aleknagik Lake Road who dispose of their solid waste at an unauthorized gravel pit present a danger to the health, welfare or safety of City residents, the nearest of whom is ten miles away. This has not been demonstrated. Nor has it been demonstrated that the health, welfare or safety of City residents is endangered by the floating processors who may discharge refuse in the waters of Nushagak Bay. It is observed that, for the most part, these same processors burn their garbage onboard or dispose of it at the Clark's Point sanitary landfill. No conditions have been presented to demonstrate that annexation of the territory is warranted based on this standard.

7. THE EXTENSION INTO THE TERRITORY OF CITY SERVICES OR FACILITIES IS NOT NECESSARY TO ENABLE THE CITY TO PROVIDE ADEQUATE SERVICE TO CITY RESIDENTS NOR IS IT IMPOSSIBLE OR IMPRACTICAL FOR THE CITY TO EXTEND THE FACILITIES OR SERVICES UNLESS THE TERRITORY IS WITHIN THE CITY'S BOUNDARIES [19 AAC 10.070(7)].

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TO THE CITY OF DILLINGHAM
PAGE FIVE

The petitioner has presented no evidence which satisfies the application of this standard.

8. WITH THE EXCEPTION THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM, RESIDENTS OR PROPERTY OWNERS WITHIN THE TERRITORY DO NOT RECEIVE OR ARE NOT REASONABLY EXPECTED TO RECEIVE, DIRECTLY OR INDIRECTLY, THE BENEFIT OF CITY GOVERNMENT WITHOUT COMMENSURATE PROPERTY TAX CONTRIBUTIONS, TO THE EXTENT THAT ANNEXATION OF THE TERRITORY IS WARRANTED [19 AAC 10.070(8)].

The seasonal residents of the area do occasionally receive the type of City services referenced in this standard, (services provided by the City's general fund, e.g. fire, solid waste disposal, emergency medical services). It should be noted that although property taxes assist in funding some of these services, in many cases additional revenues could be obtained through user fees. This notwithstanding, when the services are rendered, they are not been rendered to the degree or frequency that justifies annexation of the entire territory under this standard. However, the permanent residents of the identified 40 square mile area northwest of the City of Dillingham do receive these City services to the degree and frequency to warrant annexation of that area.

9. THE ANNEXATION IS NOT OTHERWISE NECESSARY TO ACCOMPLISH A VALID PUBLIC PURPOSE.

No evidence was presented to identify accomplishment of a valid public purpose through the annexation.

10. THE ANNEXING CITY HAS DEMONSTRATED THAT IT IS CAPABLE OF AND WILLING TO EXTEND FULL MUNICIPAL SERVICES TO THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM IMMEDIATELY UPON ANNEXATION.

The City of Dillingham has demonstrated that it is capable of and willing to extend full municipal services to the area approved for annexation immediately upon annexation.

11. ANNEXATION OF THE WATER AREAS SOUGHT BY THE CITIES OF CLARK'S POINT AND DILLINGHAM WOULD ULTIMATELY REDUCE THE INCENTIVES FOR THE FORMATION OF A BOROUGH IN THE AREA.

If either City annexes any of the waterways as proposed, that City can expect to receive increased raw fish taxes. This would not only allow the City to obtain additional revenues without the encouragement to pursue borough formation, but it would constrain the area in terms of a potential revenue base for any future borough. The ultimate result would be a disincentive for borough formation.

12. IN THE PRESENT SITUATION, THE PROBLEMS EXPRESSED BY THE CITIES OF CLARK'S POINT AND DILLINGHAM ARE DEFINITELY REGIONAL IN NATURE.

Clearly, the problems of service delivery, revenue enhancement, public health and welfare threats, and management of "development" are shared by these two Cities located fifteen miles apart. The Cities claim these problems are largely generated by an industry upon which they both share an economic dependence. With these concerns in mind, the door must remain open for these regional problems to be addressed by a regional form of government. Approval of this annexation would discourage this from occurring.

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13. THE STATUTES AND REGULATIONS ESTABLISHING STANDARDS FOR INCORPORATION OF CITIES AND BOROUGHES SHOULD BE CONSIDERED IN THIS ANNEXATION PROPOSAL. WHEN DOING SO, THEY DO NOT SUPPORT THIS PETITION.

The statutes speak to "a community" when addressing city incorporation and "an area" when addressing borough incorporation. The definition of the word "community" as provided in Black's Law Dictionary is a "neighborhood" compared to the definition of the word "area" as "a territory, a region". The instant situation speaks to local boundary actions motivated by problems affecting a territory of people, not a community of people. Clearly a city is not the appropriate vehicle to adequately address problems that are of regional concern.

14. USE OF A METHOD OTHER THAN LEGISLATIVE REVIEW FOR ANNEXATION OF THE IDENTIFIED 40 SQUARE MILE AREA NORTHWEST OF THE CITY OF DILLINGHAM WOULD HAVE BEEN INAPPROPRIATE.

In accordance with 19 AAC 10.600, the LBC has considered alternative methods of annexation. For the reasons stated below, the legislative review method is the most appropriate.

The four alternative processes are not viable for the following reasons.

Local Action/Election - The process of local election by the voters residing within the territory proposed for annexation is impractical because the voters within the area proposed for annexation have not initiated the action and there are no indications they want to do so, or will do so.

Additionally, this process is inappropriate because it fails to adequately protect the interests of all property owners of the area. The size of the territory proposed for annexation is 918.25 square miles and the number of permanent residents is estimated at 75. However, the number of registered voters within the area is estimated to be only 35 based upon the percentage of resident registered voters statewide. The ratio of resident voters to the size of the area is disproportionately large. With such a disparity between the size of the area proposed for annexation and the number of voters residing within the area, the interests of non-resident property owners appear to be inadequately represented. This local action/election method was not designed for use in situations where there is such disparity in size of the territory and number of voters deciding the question.

Local Action/Municipally owned property - The process of annexation through local ordinance of the adjoining City if the territory proposed for annexation is solely and entirely owned by the adjoining City is unavailable because the City of Dillingham does not own the territory proposed for annexation.

Local Action/100% of Voters and Property Owners - The process of annexation through local ordinance of the adjoining City if all property owners and registered voters within the area petition the City Council for annexation is impractical because these individuals have not petitioned the City for annexation of territory and there is no indication they want or are willing to do so.

Step Annexation - The process of local election and legislative review with graduated extension of services is inappropriate because the disparity in size of the territory and number of

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residents makes local election an unfair and inappropriate method of annexation.

CONCLUSIONS OF LAW

The proposed annexation of approximately 918.25 square miles of territory to the City of Dillingham does not, in its entirety, satisfy the applicable requirements of state statute and regulation regarding annexation of contiguous territory to a City. There is an approximate 40 square mile area northwest of the City which has been found to satisfy the requirements for annexation of contiguous territory.

Based upon the FINDINGS OF FACT and CONCLUSIONS OF LAW stated herein, IT IS ORDERED THAT the following described territory shall be annexed to the City of Dillingham upon tacit approval of the First Session of the Fifteenth Legislature, in accordance with the provisions of Article X Section 12 of the State Constitution:

Beginning at the northwest corner of Section 7, Township 12 South, Range 56 West, Seward Meridian (S.M.); thence south to the southwest corner of Section 18, Township 12 South, Range 56 West, S.M.; thence east to the southeast corner of Section 18, Township 12 South, Range 56 West, S.M.; thence south to the southwest corner of the northwest one-quarter of Section 29, Township 12 South, Range 56 West, S.M.; thence east to the southeast corner of the northeast one-quarter of Section 28, Township 12 South, Range 56 West, S.M.; thence south to the southwest corner of Section 34, Township 12 South, Range 56 West, S.M.; thence east to the northwest corner of Section 3, Township 13 South, Range 56 West, S.M.; thence south to the southwest corner of Section 34, Township 13 South, Range 56 West, S.M.; thence east to a point at 158 degrees 35 minutes West Longitude; thence due south to a point at 59 degrees 00 minutes North Latitude; thence east to a point on the line of mean low water of Nushagak Bay; thence northerly and easterly along the mean low water line of Nushagak Bay and the Nushagak River to the mean low water line on the right bank of the Wood River; thence northerly along the mean low water line on the right bank of the Wood River to a point on the northern section line of Section 9, Township 12 South, Range 55 West, S.M.; thence west to the northwest corner of Section 9, Township 12 South, Range 55 West, S.M.; thence south to the southwest corner of Section 16, Township 12 South, Range 55 West, S.M.; thence west to the northwest corner of Section 24, Township 12 South, Range 56 West, S.M.; thence north to the northeast corner of Section 14 Township 12 South, Range 56 West, S.M.; thence west to the northwest corner of Section 15, Township 12 South, Range 56 West, S.M.; thence north to the northeast corner of Section 9, Township 12 South, Range 56 West, S.M.; thence west to the northwest corner of Section 7, Township 12 South, Range 56 West, S.M.; the point of beginning, excluding the territory presently within the boundaries of the City of Dillingham.

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ORDERED THIS 10th DAY OF December, 1986.

ALASKA LOCAL BOUNDARY COMMISSION

BY:

Robert O Eder
Robert Eder, Chairman

ATTEST:

Gene Hine
Staff

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS
OFFICE OF THE COMMISSIONER
JUNEAU, ALASKA

CERTIFICATE

BOUNDARIES OF THE CITY OF DILLINGHAM, ALASKA

I, David G. Hoffman, Commissioner of the Alaska Department of Community & Regional Affairs, hereby certify that the following is a true and accurate description of the jurisdictional boundaries of the City of Dillingham, Alaska. The boundaries described below include territory tacitly approved for annexation by the Second Session of the Fifteenth Alaska State Legislature effective February 29, 1988, consisting of approximately 12.25 square miles of territory plus that water area beginning 1,000 feet east of the northern boundary of the City of Dillingham and paralleling the mean low water line on the right banks of the Wood and Nushagak Rivers to a point at 59 degrees 00 minutes North Latitude.

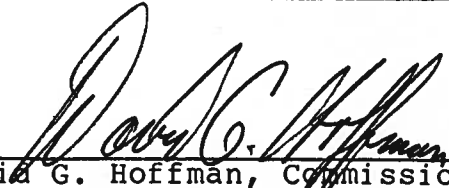
Beginning at the northwest corner of protracted Section 31, T12S, R55W, Seward Meridian (S.M.); thence east to a point 1,000 feet east of the mean low water line on the right bank of the Wood River; thence meandering in southeasterly, southerly and southwesterly directions along a line 1,000 feet east of and paralleling the mean low water line on the right banks of the Wood and Nushagak Rivers to a point at 59 degrees 00 minutes North Latitude; thence west to the intersection with the line common to Sections 3 and 4, T14S, R56W, S.M.; thence north to the northwest corner of Section 3, T13S, R56W, S.M.; thence west to the southwest corner of Section 31, T12S, R55W, S.M.; thence north to the northwest corner of Section 31, T12S, R55W, S.M., the point of beginning, containing 36.5 square miles, more or less, all in the Third Judicial District, State of Alaska.

Signed this 2nd day of MARCH, 1988.

RECEIVED

APR 13 1988

Dept. of Comm. & Reg. Affairs
Div. of Municipal & Reg. Asst.


David G. Hoffman, Commissioner
Alaska Department of Community
and Regional Affairs

ACKNOWLEDGMENT

STATE OF ALASKA)
)
) SS.
)

This is to certify that on the 2 day of March, 1988, before me, the undersigned, a Notary Public, duly commissioned and sworn as such, personally came David G. Hoffman, to me known to be the Commissioner of the Alaska Department of Community & Regional Affairs, who signed this foregoing Certificate of Boundaries of the City of Dillingham, Alaska.

William Rolger
 Notary Public

My commission expires: 3/12/91



Record in Bristol Bay Recording District and return to:
 Dan Bockhorst
 Municipal and Regional Assistance Division
 949 E. 36th Ave., Suite 404
 Anchorage, AK 99508

(No Charge, State Business)

88-140

RECORDED - FILED <u>NC</u>	
<u>BRISTOL BAY</u> REC. DIST.	
DATE <u>3-25</u> 19 <u>88</u>	
TIME <u>1:00</u> <u>P</u> M	
Requested by <u>Municipal</u>	
Address <u>& Regional Assistance Division</u>	

Preliminary Assessment Fiscal Feasibility Of a Potential Western Bristol Bay Borough

**Prepared by
Kevin Waring and Gillian Smythe
January 2012**

Kevin Waring Associates

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EXECUTIVE SUMMARY

The purpose of this report is to give a preliminary assessment of the fiscal feasibility of a potential borough for the Western Bristol Bay region. The report also examines the net fiscal impact of borough formation on the SWR Regional Educational Attendance Area (REAA), the cities of Dillingham and Togiak, and other communities.

The findings of this preliminary fiscal feasibility study are necessarily qualified by the time constraints under which it was prepared. Many assumptions were made, much information was quickly compiled and analyzed, and some “guesstimates” were made. Inevitably, a more thorough and leisurely analysis could refine the assumptions, add factual detail, and narrow the range of uncertainty about the major findings. Moreover, different assumptions about such key factors as borough service levels or future revenues, might alter the findings. The findings and conclusion presented here represent our best judgment, based on the information obtainable and analyzable within the constraints of this preliminary fiscal analysis.

Major Assumptions

- The home rule borough will be governed by a seven-member elected assembly and mayor, with a seven-member appointed planning commission, based in Dillingham.
- The borough will exercise minimal powers (local education and regional development planning, borough advocacy).
- The borough will be staffed with a part-time manager and a full-time borough clerk/finance officer and regional planner, funded by a minimal operating budget.
- The Dillingham School District and the SWR REAA will transfer their assets and liabilities to the unified borough school district. The borough school district will maintain existing educational service levels after transfer, including Dillingham’s excess local contribution to its schools.
- The borough will levy a 4 percent areawide raw fish tax and a 10 percent bed tax outside Dillingham. Otherwise, it will depend on state and federal revenues.
- The borough will not levy areawide property or sales taxes. Cities levying those taxes will continue to collect and retain those revenues.
- The City of Dillingham will drop its effort to annex Nushagak Bay and will forego the raw fish tax revenues it might thereby gain.
- Some means will be found to compensate the City of Togiak and other communities for lost federal PILT payments and raw fish tax or other revenues.
- Revenues and expenditures are estimated in current dollars (FY2011 and FY2012). It is assumed that existing service levels will be maintained.

Major Findings

- Assuming an areawide 4 percent raw fish tax, total general fund operating revenues are estimated at about \$3.1 million annually, with about \$1.7 million from local sources and \$1.4 from state and federal sources.
- Raw fish tax revenues tend to be variable year-to-year. The long-term fate of federal funding for PILT payments, a major source (about \$800,000 annually) of borough revenue, is uncertain.
- Total annual expenditures, including a hold-harmless adjustment for Dillingham schools, are estimated at about \$2.5 million.
- With an areawide 4 percent raw fish tax, the borough would have an excess of revenues over expenditures of about \$614,000.
- However, the City of Togiak and other communities would lose about \$547,000 in federal PILT payments, raw fish taxes, and other revenues to the borough **unless** the borough offsets these losses.
- With a borough offset for these local revenue losses, the borough would have an annual deficit of revenues compared to expenditures of about \$67,000.
- Under the State Foundation Program, the borough would become responsible for the local required contribution, equivalent to a 4-mill levy on all taxable real and personal property in the borough, toward the unified school district's operating expenses.
- Under the State's grant program for school construction and major maintenance projects, the unified district would become responsible for a 10 percent participating share of the cost of qualifying school capital improvements.
- The City of Dillingham would shed about \$1,550,000 annually in school expenses. It would also lose about \$711,000 in raw fish tax revenues, \$410,000 in federal PILT payments, and \$123,300 in fisheries business taxes. In balance, with borough incorporation, the City would enjoy an annual net gain of \$305,7.
- Dillingham schools will lose the City's excess contribution (about \$565,000 annually) to its schools and a reduction in service levels **unless** the borough continues to make an excess contribution to Dillingham's schools.
- Without a steady margin of surplus revenues over expenditures, the borough will not be able to accumulate reserves to cover fluctuations in revenue and other revenue uncertainties.

Conclusion Regarding Financial Feasibility

Based on the assumptions specified for this report, it appears that:

- **with a 3 percent areawide raw fish tax, a Western Bristol Bay Borough would have a negative balance of \$578,519 annually, and would not be financially feasible.**
- **with a 4 percent areawide raw fish tax, a borough would have a negative balance of \$183,088 annually, and would fall short of financial feasibility.**

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- **with a 5 percent areawide raw fish tax, a borough would have a positive balance of \$211,343 annually; this surplus would enhance the borough's year-to-year financial stability and enable it to accumulate some financial reserves against the possibility that revenues fell substantially below an average year.**

However, if the City of Dillingham annexation of Nushagak Bay is not finalized or if the borough does not adopt policies to (a) hold harmless the cities from any revenue loss caused by borough incorporation and (b) continue the City of Dillingham's excess contribution of local funds to support the city schools, then the borough would appear feasible with a 3 percent or 4 percent areawide raw fish tax.

Purpose of report

This report presents the findings of a preliminary assessment of the fiscal feasibility of a potential borough government for the Western Bristol Bay region. The report also examines the fiscal impact of borough formation on the Southwest Region Regional Educational Attendance Area (SWR REAA), the City of Dillingham and its City School District, the City of Togiak, and other communities in the region.

Background and previous studies

Almost since statehood, borough formation has been a frequent and controversial topic in the Greater Bristol Bay Region. The Bristol Bay Borough, which incorporated as a second class borough in 1962, was Alaska's first borough. In 1989, the Lake and Peninsula Borough incorporated as a home rule borough. Before and after the Lake and Peninsula Borough incorporated, there were several proposals and feasibility studies to incorporate the Dillingham Census Area, or parts of it, as a third borough in the Greater Bristol Bay Region. There were also proposals to combine it, or parts of it, in some configuration with the two existing boroughs. There have been numerous local conflicts over suitable borough and city boundaries, often motivated by a desire to obtain municipal jurisdiction over natural resources and local tax assets. As background for the present report, some of these earlier proposals are briefly reviewed here.

- In 1976, the Bristol Bay Borough submitted a petition, later abandoned, to annex most of the territory that was later incorporated as the Lake and Peninsula Borough.
- In 1986, the Local Boundary Commission denied separate petitions by the cities of Dillingham and Clark's Point to annex much of Nushagak Bay (LBC, 1986). At that time, the Commission found that,

If either of the Cities annexes any of the waterways as proposed, that City can expect to receive increased raw fish taxes. This would not only allow the City to obtain additional revenues without the encouragement to pursue borough formation, it would constrain the area in terms of a potential revenue base for any future borough. The ultimate result would be a disincentive for borough formation.

- A 1988 feasibility study by the Department of Community and Regional Affairs concluded that a borough government that encompassed the SWR REAA and the City of Dillingham was "financially feasible and would offer benefits to residents of the region" (ADCRA, 1988). This conclusion was based on the assumption that the borough would levy a one percent sales and use tax that would be applied to general retail sales, services relating to the region's recreational fisheries, and commercial raw fish sales. The study recommended a general sales tax in part to offset the variability of raw fish tax revenue. The study

also observed that the “local tax burden assumed in this study would be among the lowest of any of the existing boroughs in the state.”

- In 1989, at the request of local residents, the Alaska Department of Community and Regional Affairs prepared a feasibility study for a Northwest Bristol Bay Borough that would include the Western Bristol Bay communities of Aleknagik, Clark’s Point, Ekuk, Manokotak, Togiak and Twin Hills, plus the Kuskokwim communities of Goodnews Bay and Platinum. The study concluded that a borough would be financially viable but would probably fail to satisfy other state standards for incorporation (ADCRA, 1989).
- A 1992, as part of its statewide review of “model borough boundaries”, ADCRA examined a wide range of borough options for the Greater Bristol Bay Region, defined to include the Dillingham Census Area plus the existing Bristol Bay and Lake and Peninsula boroughs (ADCRA, 1992b). At that time, the Department concluded that,

(A) super borough which consolidated the existing Bristol Bay and Lake and Peninsula boroughs, along with the communities of the Dillingham Census Area, would be best able to represent the interests of the region. Rather than having a number of relatively small boroughs, cities and unincorporated communities each acting independently, a super borough would be able to represent the entire Bristol Bay region with a single voice. Further, a super borough would have greater financial resources to promote the interests of the region. A super borough would be best able to employ technical staff, lobby and otherwise advocate for the region.

The Department concluded that a stand-alone borough for the Dillingham Census Area, including the City of Dillingham, would also have – but to a lesser extent – the advantages of a super borough.

Finally, the Department found that, in the absence of a super borough, unification of the Bristol Bay and Lake and Peninsula boroughs best met the standards for the model borough boundaries study.

The Department did not advocate for any of these borough options, leaving their pursuit to the initiative of local residents of the region.

- In 1997, the cities of Aleknagik and Dillingham jointly submitted a petition to annex the Dillingham-Nushagak-Togiak Territory to the Lake and Peninsula Borough (City of Aleknagik and City of Dillingham, 1997). The cities ultimately did not pursue the petition. Instead, in 2000, by agreement with the petitioners, the Department updated the revenue projections in the 1997 annexation petition (ADCED, 2000). Ultimately, the sponsors decided not to pursue the annexation.

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- In 2010, the City of Dillingham submitted to the Local Boundary Commission a petition to annex Nushagak Bay, mainly to gain jurisdiction over its untapped raw fish tax revenue potential (City of Dillingham, 2010). The Native Village of Ekuk, located on Nushagak Bay about 16 miles southeast of Dillingham, objected to the proposed annexation on grounds that the annexation, if approved, would unfairly deprive Ekuk and other Nushagak Bay communities of potential revenue and would diminish the fiscal feasibility of a future borough for Western Bristol Bay communities. Ultimately, the Local Boundary Commission approved the City of Dillingham's petition, subject to approval by city voters. The prospect of lost jurisdiction for other Nushagak Bay communities, or shared jurisdiction for a future borough, prompted the Native Village of Ekuk to commission this assessment of whether borough incorporation might be fiscally feasible and more advantageous to the City of Dillingham and other communities in the region than the city annexation.

Assumptions

Without a settled profile of the features of a potential Western Bristol Bay Borough, it is necessary to make some reasonable assumptions about the boundaries, class of borough, and powers and functions of the prospective borough. Based on these assumptions, an example budget with projected revenues and expenditures can be developed to assess a borough's fiscal feasibility.

Boundaries

This assessment assumes that the upland boundary of the Western Bristol Bay Borough would coincide with the Dillingham Census Area. The offshore boundary would correspond with the State of Alaska's jurisdiction offshore of the Dillingham Census Area.

The 2010 federal census reports that the Dillingham Census Area had 4,847 residents, most of them living in nine settlements (Table 1).¹ Seven settlements (Aleknagik, Clark's Point, Dillingham, Ekwok, Manokotak, New Stuyahok, and Togiak) are incorporated cities; two (Koliganek, and Twin Hills) are traditional villages with tribal governments. Additionally, two traditional villages with few year-round residents (Ekuk and Portage Creek) are recognized under the Alaska Native Claims Settlement Act. There are also some scattered residents outside any of the above settlements.

¹ As of the 2010 federal census, eight of Alaska's eighteen boroughs (Aleutians East, Bristol Bay, Denali, Haines, Lake and Peninsula, Skagway, Wrangell, and Yakutat) had fewer residents than the Dillingham Census Area.

Table 1
Population, Dillingham Census Area, 2010

Community	Population	Percent of Total
Aleknagik	219	5%
Clark's Point	62	1%
Dillingham	2,329	48%
Ekwok	115	2%
Ekuk	N/R	N/R
Koliganek	209	4%
Manokotak	442	9%
New Stuyahok	510	11%
Portage Creek	2	--
Togiak	817	17%
Twin Hills	74	2%
Balance of Census Area	68	1%
Total	4,847	100%

N/R = Not separately reported.

Source: ADL&WD, 2011.

Class of Borough

Alaska's statutes allow for three classes of boroughs: home rule, first class, and second class. According to a Local Boundary Commission staff report (LBC, 1994),

(t)he difference in the powers available to and the duties required of home rule, first class, and second class boroughs is minimal. Home rule boroughs, first class boroughs and second class boroughs all have broad capacity to take on various powers.

However, the means by which different classes of boroughs acquire and exercise their powers differ. Home rule boroughs must adopt home rule charters. A charter is, in effect, the local government's constitution. A home rule borough or city may exercise all legislative powers not prohibited by state law or charter. First class or second class boroughs, known as general law municipalities, can only adopt and exercise the legislative powers delegated to them by state law, i.e., Title 29 of the Alaska Statutes. In practice, home rule boroughs have greater flexibility to define and exercise their governmental powers than first and second class boroughs which are more constrained by some elements of Title 29.

This report assumes that a Western Bristol Bay Borough would incorporate as a home rule borough, governed by its own charter, to take advantage of a home rule borough's flexibility to fit itself to this rural region's particular circumstances.

Because Dillingham is central to the region's transportation, communications, administrative, and other infrastructure, the assumption is the borough would be headquartered there.

Powers and Functions

AS 29.35.150-180 mandates that all boroughs exercise three areawide powers: education, assessment and collection of taxes, and planning, platting, and land use regulation. The manner in which a borough can exercise these mandatory powers, and adopt and exercise other powers, differs for home rule and first and second class boroughs.

This assessment assumes the prospective borough would initially exercise only the minimal powers required by state law, reserving the option to adopt additional powers in the future as called for by circumstances and as allowed by growth in the borough's fiscal and administrative capabilities.

A borough that exercised minimal powers would not materially affect the activities of tribal governments, quasi-governmental organizations, and the private ANCSA regional and village corporations that serve the region's communities and residents. In particular, the prospective borough would not overlap with or replace such existing community service entities as the Bristol Bay Area Health Corporation, the Bristol Bay Economic Development Corporation, the Bristol Bay Housing Authority, and the Bristol Bay Native Association.

Borough Powers and Functions

Next, the administrative and fiscal implications of borough exercise of the three mandatory areawide powers (education, assessment and collection of taxes, and planning, platting, and land use regulation) are examined.

Education

Two school districts, the Dillingham City School District and the SWR REAA, now provide local education (kindergarten through high school) in the Dillingham Census Area. A new borough would be mandated to provide local education on an areawide basis. This would be achieved by transfer of the responsibilities, assets, and liabilities of the existing City School District and the SWR REAA to a new unified borough school district. State law allows a two-year transition period after borough incorporation to complete this transfer. After incorporation, administration and funding of local education would be the borough's most important responsibility.

The rest of this section assesses the net fiscal impact of borough formation on the region's school districts. The State of Alaska, through its State Education Foundation Entitlement Program (Foundation Program) is the major source of operating budget

revenues for Alaskan school districts. The State also provides capital grants and loans that fund most of the capital costs of qualifying school construction and major maintenance projects. Both programs are administered through the Alaska Department of Education and Early Development (ADEED).

This assessment primarily compares statute-based, formula-driven state funding support levels for a unified borough school district to state support for the existing city and REAA school districts. The State's Foundation Program and capital grants or loans are the largest variable revenue sources for local school districts. A changeover from separate city and REAA school districts to a unified borough district would alter the results of the funding formulas used to calculate Foundation Program funds and capital improvement grants and loans. Most other funding sources involve lesser money amounts, and would experience relatively little or no net change following school district unification. For comparability, we have made these simplifying assumptions:

- The unified borough school district will maintain the level of educational services now provided by the City and SWR REAA school districts.
- School district unification will not change overall cost factors.²
- Apart from the Foundation Program and state capital grants and loans, borough incorporation will not materially change the amount the borough school district receives from other revenue sources, including federal school aid, compared to the status quo.

The assessment does not develop a comprehensive estimated operating budget for the new unified school district. That task is not feasible within the limits of this report, nor is a comprehensive budget necessary to determine whether school district unification would have a positive or negative net fiscal impact compared with the status quo. The fiscal status quo of the two existing school districts and the fiscal implications of a new unified borough district are next examined in turn.

1. Dillingham City School District

The City of Dillingham is a first class city in the unorganized borough. As such, state law requires it to maintain and help support its own municipal school district.

a. FY 2011 and FY 2012 Operating Budgets

Table 2 shows the City School District's audited (actual) operating budget revenues and expenditures for FY 2011 and the operating budget revenues and expenditures adopted for FY 2012. (These operating budgets omit revenues and expenditures for several educational and support programs that are funded almost wholly by federal and state

² In fact, school unification may bring both added costs and cost savings after the former two districts' administration, curriculum, personnel, facility maintenance, purchasing and other functions are merged. Evaluating these implications are beyond the scope of the present study.

grants.) The City School District's FY 2011 average daily membership (ADM) was 478.70 students and its operating budget expenditure per ADM was \$17,181.

Table 2

Dillingham City School District FY2011 and FY2012 Operating Budgets¹

	FY 2011²	FY 2012³
Operating Funds (Revenue)		
City Appropriation	\$1,300,000	\$1,300,000
Less Bond Contribution	(100,000)	(100,000)
State of Alaska Foundation Program	5,641,477	5,695,870
TRS On-Behalf (State)	782,875	923,640
PERS On-Behalf (State)	112,398	85,027
Federal Impact Aid (Federal)	763,262	864,727
E-Rate	286,771	213,358
Interest	1,344	2,000
Other Revenue	211,831	147,000
Total Revenues	\$8,999,958	\$9,131,622
Operating Expenditures	\$8,224,368	\$9,131,622
Excess of Revenues over Expenditures	775,590	
Net transfers out	(335,198)	
Net change in fund balance	420,392	
Fund balance beginning of year	\$1,354,426	
Fund balance end of year	\$1,774,820	

1. The school operating fund budget omits substantial revenues and expenditures for certain educational and support programs funded almost wholly by federal and state grants.

2. Altman, Rogers & Co., 2011a.

3. Dillingham City School District, 2011.

In FY 2011, the Foundation Program was the City School District's largest source of operating budget revenues, accounting for 63 percent of the total. Other state funds for retirement programs (TRS and PERS) accounted for another 11 percent, with the balance coming from the City of Dillingham (13 percent), federal impact aid (8 percent), the E-Rate program³ (3 percent), and miscellaneous other sources (2 percent).

³ The Telecommunications Act of 1996 authorizes the Federal Communications Commission to require companies providing telecommunications services to fund discounted telecommunications and internet services for schools and libraries.

The Foundation Program funding level for each school district is determined by a formula that takes into account numerous factors, including a district cost factor specific to each school district.⁴ For FY 2012, the City School District's cost factor was 1.336; it will be 1.346 for FY 2013.

The Foundation Program stipulates a required local contribution at AS 14.17.410(b)(2):

the required contribution of a city or borough school district is the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110, not to exceed 45 percent of a district's basic need for the preceding fiscal year as determined under (1) of this section.

Dillingham's full and true value (full value determination or FVD) in FY 2010 was \$158,824,500. By the formula in AS 14.17.410(b)(2), the City of Dillingham's minimum required contribution in FY 2012 would equal a four-mill (0.4 percent) tax levy on its FY 2010 FVD of \$158,824,500 or \$635,298. While the City's required contribution amount is calculated as a property tax levy, it can fund its contribution from any local revenue source, such as a sales tax, bed tax, raw fish tax, or other source.

The City of Dillingham has traditionally appropriated more than its minimum required local contribution to support its schools. For example, in FY 2011 and FY 2012, the City appropriated \$1,200,000 to the City School District's operating budget. For FY 2012, that local contribution exceeds the required contribution of \$635,298 by \$564,702.

For FY 2011, the City District had a net operating surplus of \$420,392 (Altman, Rogers & Co., 2011a). At the end of FY 2011, the district had an operating fund balance of \$1,774,820.

b. School debt and future capital improvements

The City of Dillingham's only school-related debt stems from general obligation school bonds in the original amount of \$15,105,000 issued in 2008 for school improvements. Table 3 summarizes the annual debt service payments required through 2028 to retire these bonds. The annual debt service payment, with minor year-to-year variations, is around \$1,175,000.

⁴ ADEED, September 2011.

Table 3**Annual Debt Service, General Obligation School Bonds, City of Dillingham**

Annual Debt Service			
Fiscal Year	Principal	Interest	Total
2011	\$520,000	\$657,840	\$1,177,840
2012	545,000	631,840	1,176,840
2013	570,000	604,590	1,174,590
2014	600,000	576,090	1,176,090
2015	630,000	646,090	1,176,090
2016-2020	3,615,000	2,268,550	5,883,550
2021-2025	4,450,000	1,433,263	5,883,263
2026-2028	3,210,000	324,980	3,534,980

Source: Altman, Rogers & Co., 2011a.

Under the State of Alaska's State Aid for Costs of School Construction Debt program,⁵ the State absorbs 70 percent of the City of Dillingham's annual debt service payment for its outstanding school debt. Accordingly, in FY 2010, the City paid \$353,481 (30 percent of that year's total debt service payment of \$1,177,590) while the State of Alaska paid \$824,109 (70 percent). For the future, assuming the State continues to allocate funds, the City will be responsible for annual school debt service expenses of approximately \$350,000 annually until 2028.

The State of Alaska also has state grant fund programs for school construction⁶ and major maintenance⁷ projects. Program funds are used to make grants to local school districts for school construction and major maintenance projects. ADEED annually prepares a statewide list of prioritized school capital improvement projects – both construction and major maintenance projects – according to which appropriated grant funds are awarded. The list is compiled from 6-year capital improvement plans submitted by districts. ADEED's current (as of December 2011) priority lists do not include any projects for the Dillingham School District (ADEED, 2012a and 2012b).

2. Southwest Region REAA

The SWR REAA, headquartered in Dillingham, delivers educational services to all the communities in the Dillingham Census Area except Dillingham. It operates kindergarten through grade 12 schools in eight communities, including 6 second-class cities (Aleknagik, Clark's Point, Ekwok, Manokotak, New Stuyahok, and Togiak) and 2 unincorporated communities (Koliganek and Twin Hills).

⁵ AS 14.11.100(a)(16)

⁶ AS 14.11.005

⁷ AS 14.11.007

A. Operating budget

Table 4 summarizes the audited (actual) SWR REAA's operating budget for FY 2011 and the adopted budget for FY 2012. (These operating budgets omit revenues and expenditures for several educational and support programs that are funded almost wholly by federal and state grants.) The REAA's FY 2011 average daily membership (ADM) was 627.45 students, and its operating budget expenditure per ADM was \$22,716.

As with municipal school districts, the Foundation Program largely funds REAA school district operations, supplemented by various other state and federal governments transfers. Unlike municipal school districts, however, REAAs do not have to make a required local contribution to their operating budgets to qualify for Foundation Program funds.

In FY 2011, the Foundation Program was the SWR REAA's largest source of operating budget revenues, accounting for 54 percent of the total. Federal impact aid amounted to another 29 percent, with the balance coming from other state funds: TRS and PERS (9 percent), the E-Rate program (5 percent), and miscellaneous other revenue sources (2 percent).

For FY 2011, the SWR REAA had a net operating surplus of \$183,177 and its accumulated operating fund balance was \$6,592,540 (Altman, Rogers & Co., 2011b).

Table 4**SWR REAA School District FY2011 and FY2012 School Operating Budgets¹**

Operating Funds	FY 2011²	FY2012³
City Appropriation	\$ 0	\$ 0
Less Bond Contribution	0	0
State of Alaska Foundation Program	9,062,106	9,026,654
TRS On-Behalf	1,294,998	1,749,162
PERS On-Behalf	182,606	268,434
Federal Impact Aid	4,874,681	4,854,630
E-Rate	884,410	1,132,612
Interest	3,367	1,200
Other Revenue	344,772	65,160
Total Revenues	\$16,646,940	\$17,097,852
 Total Operating Expenditures	 \$14,253,234	 \$17,097,435
Excess of Revenues over Expenditures	2,393,706	
Net Transfers	(2,210,529)	
Net change in fund balance	183,177	
Fund balance beginning of year	\$6,409,363	
Fund balance end of year	\$6,592,540	

1. The school operating fund budget omits substantial revenues and expenditures for certain educational and support programs funded almost wholly by federal and state grants.

2. Altman, Rogers & Co., 2011b.

3. Southwest Region REAA, 2011.

B. School debt and future capital improvements

As earlier noted, ADEED annually prepares a statewide ranked list of prioritized school capital improvement projects that qualify for capital grants. ADEED's FY 2013 priority lists identify four projects in the SWR REAA. The Koliganek K-12 School Replacement is priority #2 on the school construction grant fund list and. On the major maintenance grant fund list, Twin Hills K-8 School Renovation is #51, the Aleknagik K-8 School Renovation is #82, and Manokotak K-12 School Sewer and Water Upgrades is #116. Table 5 shows ADEED's recommended funding amounts for these projects, including the state share and the local participating share. State grant funds for these projects await future legislative appropriations.

Unlike municipal districts, the required local participating share for REAAs is only two percent of the total cost. That share may be satisfied by local or non-local funding

sources or by local in-kind contributions. Under certain hardship conditions, ADEED may waive even that required share.⁸

Table 5
School Construction and Major Maintenance Grant Fund Priority, Final List, FY 2013

Priority	Project Name	ADEED Recom- mended Amount	State Share	Participating Share
Construction Grants				
2	Koliganek K-12 School Replacement	\$25,425,321	\$24,916,815	\$508,506
Major Maintenance Grants				
51	Twin Hills K-8 School Renovation	\$2,312,424	\$2,266,176	\$46,248
82	Aleknagik K-8 School Renovation	\$4,230,333	\$4,145,726	\$84,607
116	Manokotak K-12 School Sewer and Water Upgrades	\$250,830	\$245,813	\$5,017

Sources: ADEED, 2012a and 2012b.

The state capital budget requested by Governor Parnell in January 2012 included a request for \$24,916,815 for the state share of the Koliganek K-12 school replacement.⁹

3. Western Bristol Bay School District

a. Required Local Contribution to the Operating Budget

The Foundation Program funding level for each school district is adjusted by a district cost factor established by the legislature for each district. This factor reflects the varying cost by district to deliver educational services. The district cost factors differ for the two

⁸ AS 1411.008(c) states,

(c) The required participating share for a regional educational attendance area is two percent. The participating share for any district may be satisfied by money from federal, local, or other sources, or with locally contributed labor, material, or equipment.

(d) If a district with full value per ADM of \$200,000 or less can demonstrate in writing that it is unable to provide the required participating share or that the participating share required under this section will jeopardize receipt of federal assistance, the commissioner may waive all or a portion of the required participating share.

⁹ Senate Bill No. 160, Twenty-seventh Legislature, Second Session.

school systems. The City School District's factor is set at 1.336 for FY 2012 and 1.346 for FY 2013; the SWR REAA's at 1.653 for FY 2012 and 1.685 for FY 2013. (The legislature has not yet approved district cost factors beyond FY 2013). It is not possible to predict the district cost factor that the legislature would approve for a unified school district. ADEED staff advise that a reasonable approach would be to use an average of the current district cost factors. This report simply uses the anticipated Foundation Program funding in the adopted FY 2012 budgets for the City School District and the SWR REAA. The result is, in effect, a weighted average of the current district cost factors and Foundation Program funding for the two separate districts.

The Foundation Program would require a unified borough school district, like the current City School District, to make a minimum local contribution equal to a 4-mill levy on the areawide FVD. None of the Dillingham Census Area communities outside Dillingham now assess or tax real or personal property, so their FVD is unknown. Therefore, we estimated the FVD of the territory outside Dillingham, and combined that figure with Dillingham's FVD to estimate an areawide FVD. Based on the FY 2010 average per capita FVD (about \$22,000) for a group of 18 small rural communities¹⁰ with similar levels of economic development in the Lake and Peninsula, North Slope, and Northwest Arctic boroughs, a FY 2010 FVD of \$25,000 per capita seemed reasonable for the territory outside Dillingham.

Finally, based on the REAA's population we estimated the FVD for the REAA and the total FVD for the entire region, including Dillingham (Table 6). For illustration only, Table 6 also shows the FVD for estimated FVDs per capita of \$30,000 and \$35,000 for the territory outside Dillingham.

Table 6
Estimated Areawide Full Value Determination, Western Bristol Bay Borough

Full Value Determination			
Estimated FVD P/C SWR REAA	Estimated SWR REAA FVD	City of Dillingham FVD	Estimated Areawide Total FVD
\$25,000	\$65,075,000	\$158,824,500	\$223,899,500
\$30,000	\$78,090,000	\$158,824,500	\$236,914,500
\$35,000	\$91,105,000	\$158,824,500	\$249,929,500

Sources: DCCED, April 2011; consultant estimates.

Next, the 4-mill levy was applied to the estimated areawide FVD to estimate the unified district's required borough contribution. The estimated annual required borough contribution was \$895,598, of which \$635,298 was attributable to Dillingham and \$260,300 to the balance of the region (Table 7). This amount is substantially less than the City of Dillingham's current actual annual contribution of \$1,200,000. (For illustration

¹⁰ The 18 communities were Newhalen, Nondalton, Pilot Point, Port Heiden, Anaktuvak Pass, Atkasuk, Kaktovik, Nuiqsut, Point Hope, Wainwright, Ambler, Buckland, Deering, Kiana, Kobuk, Noorvik, Selawik, and Shungnak.

only, Table 7 also shows what the required borough contribution would be for higher FVDs for the area outside Dillingham.)

Table 7
Estimated Required Local Contribution, WBB Borough

Estimated FVD P/C SWR REAA	Estimated Required Local Contribution SWR REAA	Required Local Contribution City of Dillingham City	Estimated Areawide Required Local Contribution
\$25,000	\$260,300	\$635,298	\$895,598
\$30,000	\$312,360	\$635,298	\$947,658
\$35,000	\$364,420	\$635,298	\$999,718

Source: Consultant estimate.

The Foundation Program permits new municipal school districts to make gradually increasing contributions during a three-year transitional period. With some possible adjustments, AS 14.17.410(e) requires the equivalent of a one mill contribution in the first fiscal year, two mills in the second fiscal year, three mills in the third fiscal year, and the full four-mill equivalent beginning the fourth fiscal year. This transitional period may allow the new school district time to ramp up its revenue collections or accumulate operating reserves. This analysis uses the post-transition required local contribution for the example budget as more reflective of the unified district's long-term local school district operating budget obligation.

b. Required Local Share for School Capital Improvements

The unified school district would assume the assets and liabilities of the two existing school districts. This would include the City of Dillingham's share (\$350,000) of the annual debt service obligation for its outstanding school bonds. The unified district would continue to qualify for state aid in the amount of 70 percent of the total assumed annual debt service.

The unified school district would also become responsible for planning for future capital projects and for securing funds, including required local funds, to pay for new school construction or upgrades, and for major maintenance projects. It is unlikely that the new borough would be able to bond for major school capital projects. Therefore, it is assumed that the district would seek to take advantage of the State's school construction and maintenance project grants.

As a municipal school district, the new district would become responsible for the participating share toward state capital grants for school construction and major maintenance. AS 14.11.008(b) specifies the participating share of qualifying project costs that a municipal school district must contribute to qualify for state school construction and major maintenance grant funds. In a given fiscal year, the local

district's participating share is fixed by the placement of the district's FVD divided by its Average Daily Membership (ADM) along the sliding scale shown in Table 8.

Because its FVD per capita is below \$250,000, the unified school district's participating share would be 10 percent rather than the 30 percent that would now be required of the City School District.

Table 8

Municipal School District Participating Share for State Grants for School Construction and Major Maintenance

FVD per ADM	District Participating Share
\$1 – \$150,000	5 percent
\$150,001 – \$275,000	10 percent
\$275,001 – \$800,000	30 percent
over \$800,000	35 percent

Source: AS 14.11.008(b).

Assessment and Collection of Taxes

Assessment and collection of areawide property and sales taxes is a mandatory power of home rule boroughs. However, the borough is not expected to levy areawide property or sales taxes. Therefore, it is assumed that by mutual agreement the cities that levy property or sales taxes will continue to administer those functions without the involvement of the borough. This is the practice in several other boroughs that do not levy such taxes but include cities that do.

Planning, Platting, and Land Use Regulation

It is assumed the borough is will focus initially on regional development planning and areawide exercise of the platting function, and will delegate other local planning and land use regulation to cities wishing to exercise those powers.

D. Projected Revenues and Expenditures for Example Year and for Non-recurring Start-up Costs

For purposes of this preliminary assessment of financial feasibility, we developed an example budget with revenues and expenditures for a typical year. We also identified certain non-recurring expenses and revenues associated with borough start-up period. For comparability and to nullify the effect of inflation, all dollar figures are in current (2012) dollars.

Potential Sources of Borough Revenues

Rejected Options

Two potential locally generated sources of revenue for a Western Bristol Bay Borough, an areawide property tax and an areawide sales tax, were examined and rejected.

1. Property Tax

The City of Dillingham is the only local government in the Western Bristol Bay region that levies a tax on real and personal property. Per City of Dillingham Ordinance No. 2011-05 (Amendment A), the FY 2012 mill rate is currently set at 13 mills.

The imposition of a boroughwide property tax was rejected on the grounds of financial feasibility and fairness. The cost of developing and maintaining a property tax roll for areas outside the City of Dillingham cannot be justified in terms of the very limited revenue that would accrue. Large tracts of land are owned by the federal and State governments, including the Wood-Tikchik State Park and the Togiak National Wildlife Refuge, and by regional and village ANCSA corporations, and are generally exempt from local property taxes. Moreover, imposing a property tax is fundamentally unfair in villages where a large share of land is held under restricted title and is therefore not subject to municipal taxation.

2. Sales Tax

Sales taxes are currently an important source of municipal revenue for several cities in the region, including the City of Dillingham (6 percent), Aleknagik (5 percent), Clark's Point (5 percent), Manokotak (2 percent) and Togiak (2 percent).

The feasibility of layering a borough sales tax on top of existing municipal sales taxes was examined and rejected on the grounds that it would impose too high a tax burden on households in the region. Given relatively high existing municipal sales tax rates, particularly in Dillingham, Aleknagik and Clark's Point, the amount of additional revenue that could feasibly be derived from this source is very limited. Furthermore, second class cities have very few alternative sources of municipal revenue available to provide a broad range of local government services. It would not be possible for them to defer local sales taxes in favor of a new borough which does not propose to provide those city services on an areawide basis. Dillingham is also heavily dependent on sales taxes, which are currently the City's largest single source of revenue.

If a Western Bristol Bay Borough levied a 2 percent areawide sales tax, Dillingham taxpayers would pay the highest sales tax rates in the State. Furthermore, the new borough would be required to assume areawide responsibility for administering the assessment and collection of sales taxes levied by local governments within its boundaries.

Potential Locally Generated Revenue Options

1. Raw Fish Tax

a. Background

A raw fish tax is a form of sales tax. It is typically collected by the buyer at the time of sale and is applied to all fish caught or harvested within the boundaries of the levying jurisdiction, regardless of the location of the actual sale.

Raw fish taxes are a primary source of borough revenue in the Bristol Bay and Alaska Peninsula / Aleutians region. The Bristol Bay Borough levies a 4 percent raw fish tax plus a local property tax. The Lake and Peninsula Borough and the Aleutians East Borough both levy a 2 percent raw fish tax as their main source of municipal revenue. In Western Bristol Bay, the City of Togiak currently levies a 2 percent raw fish tax, while the City of Dillingham proposes to levy a 2.5 percent raw fish tax.

Raw fish taxes work well as a source of municipal revenue in areas with major fishery resources. However, in the Bristol Bay region, salmon runs fluctuate widely from year to year. Similarly, prices paid for the region's salmon catch also fluctuate according to availability and demand for the product. In particular, competition from farmed salmon has served to depress prices for Alaska wild salmon over the past 20 years. As a result, a raw fish tax is a much less stable and predictable revenue source than property taxes which, barring a major disaster, typically increase from year to year.

There are two commercial salmon fishery districts in the Western Bristol Bay region. The Nushagak District, centered on Nushagak Bay, has boundaries that coincide with the area recently annexed by the City of Dillingham. The Togiak District extends from Cape Newenham to the eastern side of Kulukak Bay. Togiak Bay is within the boundaries of the City of Togiak. Both districts are within the Bristol Bay fishery management area.

In 2010, the total salmon catch in the Nushagak District was 10,203,647 fish (Table 10). Slightly over 80 percent of the catch were sockeye salmon, about 14 percent were pinks and most of the remainder (almost 5 percent) were chums. The total salmon catch from the Togiak District was 862,240 fish. Almost 78 percent were sockeye salmon and most of the rest (about 14 percent) were chums.

By contrast, preliminary 2011 figures indicate a total salmon catch from the Nushagak District of 5,328,833 fish, only about 52 percent of the 2010 total. One factor is the lack of pink salmon in odd years. However, the 2011 commercial sockeye harvest was only about 60 percent that of the previous year. Furthermore, it was 27 percent below the Alaska Department of Fish and Game's forecast.

Preliminary 2011 figures (876,080 fish) for the overall salmon catch in the Togiak District were slightly higher than 2010 (862,240 fish), including 747,727 sockeye

salmon. It was the only Bristol Bay district that exceeded expectations in 2011, with a sockeye run 9 percent higher than the State forecast.

The Togiak area also has Alaska's largest herring fishery. The Togiak Herring Fishing District covers an approximately 119 square mile area between Cape Newenham in the west and Cape Constantine in the east and south to a line extending west from Cape Menshikof on the Alaska Peninsula. It is a highly seasonal fishery, typically taking place over a 1-2 week period in May.

The total allowable herring harvest is limited to 20 percent of the estimated biomass. A small amount is allocated to a Togiak spawn-on-kelp fishery, although this fishery is seldom utilized. Seven percent of the remainder is allocated to the Dutch Harbor food/bait fishery which takes place outside the immediate Togiak area. The remaining allowable harvest is allocated to the Togiak sac roe fishery. This fishery is managed so that 70 percent of the catch is taken by purse seine (18,134 tons in 2010) and 30 percent by gillnets (7,772 tons in 2010). There are usually about a half dozen processors on the grounds and the processing capacity effectively limits the daily catch.

The total ex-vessel value of the Togiak herring fishery was estimated by the Alaska Department of Fish and Game at about \$3.8 million in 2010 and \$2.3 million in 2011. About half of the biomass in 2011 was recorded in Togiak Bay.

The Department considers the Togiak herring population to be stable. However, there are still significant fluctuations from year to year, with annual biomass estimates since 1990 ranging from 83,000 tons in 1991 to 194,000 tons in 1993. The forecasted 2012 biomass is 123,745 tons, about 16 percent below the recent 10-year average.

b. Potential Fish Tax Revenue

Projecting annual tax revenues to be derived from a resource that shows wide fluctuations from year to year is a hazardous exercise. It will be necessary for a local government dependent on those revenues to budget wisely in "good" years and hold funds in reserve for the "bad" years that will surely come.

With the above limitations in mind, the 2000-2009 and 1990-2009 ten and twenty-year averages for the different salmon species caught in the Nushagak (Table 10) and Togiak (Table 11) districts were taken and 2010 weights and values were applied to those averages to derive a "most probable" estimate of fish tax revenues that might be generated. Using a ten-year average, it is estimated that a 1 percent raw fish tax on the Nushagak and Togiak salmon fisheries would yield \$374,110 and \$36,407 per year respectively, for a combined total of \$410,517. Using a twenty-year average, a 1 percent raw fish tax on the same salmon fisheries would result in slightly lower annual revenues of \$308,627 and \$31,804, and a combined total of \$340,431.

Potential fish tax revenue from the Togiak herring fishery was derived by using the average sac roe harvest between 1990 and 2009 of about 21,000 tons, worth an

average of about \$5.4 million per year according to the Alaska Department of Fish and Game. The application of a 1 percent raw fish tax could therefore be expected to yield approximately \$54,000 per year.

Since 1998, the International Pacific Halibut Commission has permitted commercial halibut boats fishing for certain Community Development Quota (CDQ) organizations in Area 4E to retain and sell undersized halibut. In 2010, ten Bristol Bay Economic Development Corporation CDQ fishermen landed 245 undersized halibut weighing a total of 2,155 pounds, primarily at Togiak, plus a minor amount delivered at Naknek. None were delivered to Dillingham, although this has happened in prior years. The CDQ halibut catch is considered to be a subsistence fishery by the International Pacific Halibut Commission and is not considered here.

In projecting “probable” fish tax revenues that could be expected to accrue to a Western Bristol Bay Borough, the more conservative 20-year average salmon catch figures were used for the purposes of this analysis. Including the Togiak area, a 1 percent fish tax could be expected to generate about **\$394,431** in annual revenue from salmon and herring catches. Excluding the Togiak area, the same level of taxation would generate about \$308,627 annually.

Table 9
Commercial Salmon Catch by District and Species, Nushagak and Togiak Districts, 2010 (Numbers of fish)

River System	Sockeye	Chinook	Chum	Pink	Coho	Total
Nushagak District						
Wood River	5,813,715					
Igushik River	836,767					
Nushagak River	1,658,801					
Total	8,309,283	25,580	509,628	1,289,970	69,186	10,203,647
Togiak District						
Togiak Section	541,953	4,684	105,646	38,293	20,409	710,985
Kulukak Section	128,038	398	18,057	1,441	3,321	151,255
Matogak Section	0	0	0	0	0	0
Osviak Section	0	0	0	0	0	0
Total	669,991	5,082	123,703	39,734	23,730	862,240
Combined Total	8,979,274	30,662	633,331	1,328,704	92,196	11,065,887

Note: Species other than sockeye salmon are not apportioned to individual rivers.

Source: ADF&G, April 2011.

Table 10**Commercial Salmon Catch by District and Species, Nushagak District, 10 and 20 Year Averages (Numbers of fish)**

Time Period	Sockeye	Chinook	Chum	Pink	Coho	Total
1990-99 Average	4,181,807	60,861	335,844	52,470	16,258	4,647,240
2000-09 Average	6,775,834	44,386	651,303	48,392	39,251	7,559,166
20-Year Average	5,478,820	52,624	744,852	50,431	27,754	6,354,481
2010 Catch	8,309,283	25,580	509,628	1,289,970	69,186	10,203,647

Source: ADF&G, April 2011.

Table 11**Commercial Salmon Catch by District and Species, Togiak District, 10 and 20 Year Averages (Numbers of fish)**

Time Period	Sockeye	Chinook	Chum	Pink	Coho	Total
1990-99 Average	419,703	10,384	155,666	41,800	25,339	652,892
2000-09 Average	610,237	7,222	162,092	45,091	3,129	827,771
20-Year Average	514,970	8,803	141,371	43,446	14,234	722,824
2010 Catch	669,991	5,082	123,703	39,734	23,730	862,240

Source: ADF&G, April 2011.

Estimated Annual Revenue Per 1 Percent Raw Fish Tax: \$394,431

2. Bed Tax

A bed tax is a form of sales tax that is widely used by city and borough governments in Alaska. In Western Bristol Bay, the City of Dillingham and the City of Aleknagik currently levy 10 percent and 5 percent bed taxes respectively. The nearby Lake and Peninsula Borough levies a 6 percent tax and Bristol Bay Borough has a 10 percent bed tax.

Provided that some accommodation could be worked out with Dillingham, Aleknagik and other incorporated cities, an areawide bed tax is a potential source of revenue for a Western Bristol Bay Borough. The City of Dillingham currently receives about \$80,000 annually from this source.

The world class sport fishing opportunities available in the region, particularly on the Nushagak River system, have encouraged the establishment of a significant number of remote fishing lodges catering to a worldwide clientele. A bed tax could not generate enough revenue to be the primary source of funds to support a future Western Bristol Bay Borough. However, it could provide a relatively consistent source of supplementary funds.

There is considerable variety in the types of remote lodge facilities in the region, ranging from tent camps to relatively luxurious accommodations. Each lodge operator offers a variety of fishing and, in some cases, hunting packages at prices ranging up to \$7,650 per person per week for fishing trips. The fishing operations are highly seasonal, generally coinciding with the king and silver salmon runs.

A list of lodge facilities located outside Dillingham was culled from online sources and is probably incomplete (Table 12). Given the range of packages offered, it is difficult to determine exactly how much revenue a bed tax might generate.

According to the State Assessor (ADCCED, 2011), the Lake and Peninsula Borough's 6 percent bed tax generated \$141,812 in FY 2010, while the Bristol Bay Borough's 10 percent bed tax generated \$92,863. Given the similarities in the types of lodge operations in these areas, it is calculated that a 10 percent bed tax levied by a Western Bristol Bay Borough would generate at least **\$100,000** per year from areas outside the City of Dillingham.

Estimate Annual Bed Tax: \$100,000

Table 12

Lodge Operations Outside the City of Dillingham, Western Bristol Bay Area, 2011

Name of Lodge / Camp	Location	Advertised Rates Per Person
Alaska King Salmon Adventures	Nushagak River	\$3,195 for guided king salmon fishing package (June / July)
Alaska's Legend Nushagak King Salmon Camp	Nushagak River, 20 miles upriver from Dillingham	3 days at Nushagak Camp plus 3 days at Lodge (outside area) - \$2,899
Aleknagik Island Lodge	Wood River / Tikchik Lakes	Lodge with 5 guest rooms. Rates for 6 nights / 5 days \$3,595
Aleknagik Schoolhouse Inn	Aleknagik	\$150 plus tax single per night; \$250 plus tax double per night
Alla's Lodge	New Stuyahok	\$4,000 for 8 days plus \$200-\$300 per day for guiding services

Table 12**Lodge Operations Outside the City of Dillingham, Western Bristol Bay Area, 2011**

Name of Lodge / Camp	Location	Advertised Rates Per Person
Bearclaw Lodge	Lake Aleknagik	Lodge available for 6 nights / 5 days of fishing but 3-4 day packages also available. Lodge also operates the Nushagak King Camp, a tent operation, in June/July. Rates unknown
Bristol Bay Adventures – Nushagak River Lodge	Nushagak River	\$3,000 - \$3,550 for 5-7 days, king salmon season; \$3,250 for 5 days, silver salmon season
Bristol Bay Lodge	Lake Aleknagik	Lodge / cabins accommodate up to 26 guests. Also 2 outpost camps. Rates, \$7,650 per week. Open June 23 – September 8.
Fishing Bear Lodge	Wood River / Tikchik Lakes	Cabins. Rates 6 days / 6 nights, \$3,950
Ketok Lodge	Koliganek	Lodge and guided fishing tours. Rates unknown
Koliganek Lodge	Koliganek	Services and rates unknown
L & P Enterprises	Ekwok	Guided fishing and hunting trips. Rates unknown
McCanna's Fish On Lodge	Nushagak River	Offers king salmon silver salmon and rainbow / grayling / pike trips for 5, 7 and 9 nights. Prices range from \$1,500 to \$2,300
Nushagak Paradise Lodge	Nushagak River	King salmon (June 13 – July 15) and silver salmon (July 24 – August 20) packages. Rates unknown except that a four-person unguided package costs \$6,500
Nushagak River Camp	Nushagak River	Tent operation for king (June 19 – July 31) and silver (July 18 – September 15) salmon. Rates range from \$2,000 for 3 nights to \$3,950 for 6 nights
Nushagak River Fishing Lodge	Nushagak River	King salmon (June 15 – July 17) and silver salmon (July 24 – September 2) packages. Rates \$3,895 to \$3,995, depending on package

Table 12

Lodge Operations Outside the City of Dillingham, Western Bristol Bay Area, 2011

Name of Lodge / Camp	Location	Advertised Rates Per Person
Nushagak Wilderness Lodge	Nushagak River	Tent operation. 6 night guided fishing package rate \$2,995; 6 night unguided package rate \$1,600
Northern Wilderness Adventures	Nushagak River	Tent operation. Rates unknown
Royal Coachman Lodge	Nuyakuk River	Lodge and cabins. Can accommodate groups of up to 12 people. Rates, \$7,450 per week
Tikchik Narrows Lodge	Wood River / Tikchik Lakes	Main lodge plus 7 duplex cabins. Rates, \$7,400 per week. Open June 23 through September 15
Togiak Outfitters	Togiak	Guided fishing, eco-tourism and camping operations. Rates unknown
Togiak River Lodge	Togiak River, 6 miles from Togiak Bay	6 double occupancy guest rooms. Rates are \$2,600 for 3-day package; \$4,250 for 5-day package; \$4,400 for 7-day package
Williams Guides & Kennels	Ekwok	Lodge. Guided (\$3,200) and unguided (\$1,600) fishing packages for 6 days / 5 nights. Hunting packages for brown bear (\$12,500) and moose (\$11,500)

Source: Operator web sites.

3. Severance Tax

No significant revenue is projected to accrue immediately from a severance tax levied on mineral and oil and gas resources in the Western Bristol Bay region. However, the region does have some potential for mineral and oil and gas development. It is recommended that a new borough in this region make provision for the collection of revenues from those resources prior to any development activities. At its discretion, a new borough may decide if it wishes to exclude the extraction of sand / gravel resources under its severance tax ordinance.

4. Municipal General Grant Land

Under AS 26.65.030, newly incorporated municipalities are entitled to select “10 percent of the maximum total acreage of vacant, unappropriated, unreserved [state] land within the boundaries of the municipality between the date of its incorporation and two years

after that date.” The process by which municipalities may obtain their state land grants are more fully described in AS 29.65.

The potential value of the prospective borough’s state grant land entitlement, and the ability of the borough to convert that value into cash income at any future date, are very uncertain and are therefore ignored for the present analysis.

Other Sources of Revenue

In addition to revenues generated from sources within the region, a Western Bristol Bay Borough would also receive federal and State funds under several different programs. These include the PILT (Payment in Lieu of Taxes) program administered by the U.S. Department of the Interior, the State Shared Revenue program administered by the Alaska Department of Commerce, Community and Economic Development, and several shared taxes and fees programs administered by the Alaska Department of Revenue. In addition, newly formed boroughs and unified municipalities are entitled to receive organizational grants from the State.

1. State Organizational Grant

Under the provisions of AS 29.05.190, a borough incorporated after December 31, 1985 is entitled to receive organizational grants totaling \$600,000 over three years to help defray the cost of transition to borough government and to provide for interim governmental operations. The initial grant is \$300,000 for the first full or partial fiscal year; the next is \$200,000 for the second fiscal year; and the last is \$100,000 for the third fiscal year.

Although a State Organizational Grant is not a long-term source of municipal revenue, it can and does play an important role in helping a new borough get through the initial organizational period.

2. Payment in Lieu of Taxes (PILT) program

Under the PILT program, payments are made by the U.S. Department of the Interior to local governments to help offset losses in property taxes because of non-taxable federal lands within their jurisdiction. In Alaska, the payments are made directly to organized boroughs, regardless of whether or not they levy property taxes. Payments for “counties” (i.e. census areas) in the unorganized borough are made to the State, which then allocates them to city governments.

In FY 2010, the PILT entitlement for the Dillingham Census Area was \$799,182, based on the existence of 3,012,370 acres of federal land, most of it in the Togiak National Wildlife Refuge, within the census area. Because there is no organized borough in the census area, the funds were distributed by the State to seven cities. Dillingham received \$411,446, the City of Togiak received \$140,596, and the cities of Clark’s Point,

Aleknagik, Ekwok, Manokotak and New Stuyahok shared the remainder. The FY 2011 PILT entitlement for the Dillingham Census Area is \$814,050.

If a Western Bristol Bay Borough was incorporated, it would receive all PILT funds allocated to what is now the Dillingham Census Area. On that basis, a new borough could expect at least **\$800,000** per year from this source.

The long term viability of the PILT program is not assured. With scheduled major budget cuts in federal government spending, this program could very well disappear in the not too distant future. Thus, while it is an important potential source of borough funds, it would not be wise to depend on it in the long term.

Estimated Annual PILT Payment: \$800,000

3. Community Revenue Sharing

The State Community Revenue Sharing program is an important source of local government funds in Alaska. The program is currently forward funded at the rate of \$60 million per year by the State Legislature and deposited in the Community Revenue Sharing Fund per AS 29.60.850. The program is fully funded through FY 2013, with reduced amounts available for FY 2014 and 2015. However, the current Administration is supportive of the program and an additional \$60 million in the Governor's FY 2013 budget. As a result, the program's availability as a source of local government assistance seems assured, at least in the short term.

At current funding levels, all boroughs (except for unified home rule boroughs which receive a higher amount) receive a base allocation of \$384,000 per year for FY 2012. To that amount is added a per capita formula based on the amount of funds unexpended after base payments to cities, boroughs and unincorporated communities are made. For FY 2012, that amount is \$49.71 per capita. However, a borough only receives the additional amounts for persons living outside the boundaries of incorporated cities. According to the 2010 Census, only 353 people in the Dillingham census area fell into this category. When the per capita formula is applied, the total amount that a new Western Bristol Bay Borough could currently anticipate receiving would be **\$401,548** per year.

Estimated Annual Community Revenue Sharing: \$401,548

4. Other State-Shared Revenue Programs

The Alaska Department of Revenue operates several shared taxes and fees programs. A Western Bristol Bay Borough could expect to share in several of those programs, including the Fisheries Business Tax (AS 43.75.130), Fishery Resource Landing Tax (AS 43.77.060), Electric Cooperative Tax (AS 10.25.570), and Telephone Cooperative Tax (AS 10.25.570) programs.

a. Fisheries Business Tax. Half of the fisheries business tax collected by the State is shared with the municipalities where the fish resources were processed. When processing occurs within a city in an organized borough, the 50 percent local share is split between the city and the borough. Where processing occurs outside an incorporated city, the entire 50 percent local share goes to the borough.

However, for boroughs incorporated after June 16, 1987, the percentage of Fisheries Business Tax to which a new borough is entitled phases in according to a sliding scale. In the calendar year that it is incorporated, a new borough is entitled to 5 percent of the taxes collected. In successive years, the borough's entitlement rises to 10 percent, 15 percent and 20 percent, until by the fifth year it is eligible for its full 25 percent entitlement. State law also includes a provision for cities to be able to transfer a portion of their funds to a new borough should they choose to do so.

The total amount paid out under this program to Alaska cities and boroughs over the past five years ranged from a low of \$16,079,365 in FY 2007 to a high of \$22,216,898 in FY 2011. Three cities in Western Bristol Bay – Clark's Point, Dillingham and Togiak – received funds, averaging a combined annual total of \$387,805 over the five-year period (Table 13). If those cities were located in a borough, they would eventually receive only half that amount. However, because of the "phase-in" requirement, the new borough would initially receive about \$38,780, increasing to \$77,560 in year 2, \$116,340 in year 3, and \$155,120 in year 4. In the fifth year, it would receive its full annual entitlement of **\$193,902**.

Table 13
State Fisheries Business Tax Shared Revenue, Western Bristol Bay Communities, FY 2007 – FY 2011

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
City of Clark's Point	\$134,862	\$113,191	\$100,787	\$53,989	\$50,510
City of Dillingham	183,743	176,261	187,259	238,589	446,588
City of Togiak	37,620	40,784	42,595	46,940	85,308
Total	\$356,225	\$330,236	\$330,641	\$339,518	\$582,406

Source: Alaska Department of Revenue.

It should be noted that the Fisheries Business Tax payments vary significantly from year to year, depending on the amount of fish caught and processed. For example, in the FY 1997 – FY 2011 period, payments to the City of Dillingham ranged from a "low" of \$176,261 in FY 2008 to a "high" of \$446,588 in FY 2011.

Estimated Annual Fisheries Business Tax: \$193,902

b. Fishery Resource Landing Tax. Under this program, a borough receives half of the tax revenue collected under this chapter on fishery resources landed in areas outside

cities. For tax revenue collected from landings in cities within its boundaries, the borough's share drops to 25 percent.

There is a sliding scale of eligibility for boroughs incorporated after January 1, 1994, with 5 percent of the tax revenue collected going to the borough in the first year and increasing incrementally to 25 percent by year five. However, the amount of revenue that would accrue to a Western Bristol Bay Borough would be very small, even at its full entitlement.

Togiak is currently the only city in the region to receive funding under the Fishery Resource Landing Tax program. The amounts it has received are small and have fluctuated widely. During the five-year period from FY 2007 to FY 2011, Togiak received as little as \$455 in FY 2010 and as much as \$15,782 in FY 2008. Even if an average of \$5,072 is used, a new borough in the region would receive no more than **\$2,536** by year five from this source.

Estimated Annual Fisheries Resource Landing Tax: \$2,536

c. Electric Cooperative Tax. Proceeds from the State's electric cooperative tax, minus collection expenses, are refunded to cities and boroughs, with boroughs receiving funds only for areas outside cities. Two electric cooperatives, Nushagak Electric and Telephone Cooperative (Dillingham, Aleknagik, Clark's Point, Ekuk, Manokotak and Portage Creek) and the Alaska Village Electric Cooperative (Ekwok, New Stuyahok and Togiak), currently serve most communities in the region.

In FY 2011, a combined total of \$11,143 was received by the cities of Aleknagik, Dillingham, New Stuyahok and Togiak under this program. Funds received by a new borough in Western Bristol Bay would not come from any city entitlement as they currently go to the State's general fund. However, the funding level would be very modest and unlikely to exceed **\$500** per year.

d. Telephone Cooperative Tax. This program is operated in the same manner as the Electric Cooperative Tax. Cities in the Western Bristol Bay region that currently receive funding under this program are those served by Nushagak Electric and Telephone (Dillingham, Aleknagik, Clark's Point and Manokotak). In FY 2011, eligible cities in Western Bristol Bay collected a combined total of \$73,693 from this source.

A new borough in Western Bristol Bay would receive a limited amount of funding under the Telephone Cooperative program, based on taxes collected on areas outside incorporated cities. The amount collected would likely be slightly higher than that from the Electric Cooperative Tax program, but unlikely to exceed **\$1,000** per year.

Estimated Annual Electric and Telephone Cooperative Tax: \$1,500

Estimated Total Borough Revenues

Table 14 presents estimates of total borough revenues for raw fish tax rates ranging from three to five percent. All other revenue sources are kept constant. Also, the revenue estimate omits federal and state revenues that must be dedicated for borough school district support. In the following section, these varying revenues estimates will an example year borough budget to determine what level of raw fish tax is required for the borough to be financially feasible.

Table 14
Estimated Western Bristol Bay Borough Revenues at Three Alternative Raw Fish Tax Rates

Estimated Revenues	3 Percent Raw Fish Tax	4 Percent Raw Fish Tax	5 Percent Raw Fish Tax
Local Revenues			
Raw fish taxes	\$1,183,293	\$1,577,724	\$1,972,155
Bed tax	100,000	100,000	100,000
Subtotal	1,283,293	1,677,724	2,072,155
State and Federal revenues			
PILT payment	800,000	800,000	800,000
Community Revenue Sharing	401,548	401,548	401,548
Fisheries Business Tax	193,902	193,902	193,902
Fisheries Resource Landing Tax	2,536	2,536	2,536
Electric/Telephone Tax	1,500	1,500	1,500
Subtotal	1,399,486	1,399,486	1,399,486
Total Revenues	\$2,682,779	\$3,077,210	\$3,471,641

Example Year Expenditures Budget and Explanation

The example annual expenditure budget (Table 15) assumes that the borough will exercise a limited range of powers, initially prioritizing the areawide powers of education and regional development planning, plus advocacy for the region before state and federal governments. As the borough is not expected to levy areawide property or sales taxes, it is assumed that by mutual agreement the cities that levy property or sales taxes will continue to administer those functions. It is also assumed that the borough will delegate local planning functions to cities wishing to exercise that function. Subject to its goals for borough government and available revenues, the borough may decide to exercise additional powers in the future.

The example budget assumes an elected seven-member assembly, meeting monthly, with an assembly member selected to serve as major. It also assumes an appointed seven-member Planning Commission, meeting bi-monthly.

The example budget assumes a minimum staff, consisting of a half-time borough manager, a full-time borough clerk/finance manager, and a full-time regional planner/grant writer, all based in Dillingham. Depending on borough priorities and the administrative workload, this staff structure could be reconfigured or partly contracted out. Additional staff may be added in the future, if the borough elects to exercise additional powers.

Expenditures consistent with the level of borough operations characterized above are itemized below. The current budgets of the Lake and Peninsula Borough, the Bristol Bay Borough, and the City of Dillingham were reviewed as a basis for establishing reasonable expenditure levels.

The example budget addresses only ongoing expenditures. It does not include non-recurring start-up costs and revenues.

Mayor and Assembly

The seven assembly members, including the mayor, each receive a monthly stipend of \$300 (\$3,600 yearly), with an additional 35 percent benefits expense, for a total of \$34,020.

Planning Commission

Planning commission members receive a meeting stipend of \$100 per meeting.

Borough Staff

Borough staff personnel costs were calculated at \$182,000 in salaries, plus 35 percent benefits expense (\$63,700) for a total personnel cost of \$245,700.

Half-time professional manager @ \$42,000 yearly

Full-time borough clerk/finance manager @ \$75,000 yearly

Full-time regional planner/grant writer @ \$65,000 yearly

Legal Support

The budget assumes that the borough will contract for legal support services on an as-needed basis at \$25,000 annually.

Travel expenses

For purposes of the example budget, the assembly and planning commission are assumed to meet in Dillingham usually, but in another community occasionally. Three members of each body are assumed to reside in Dillingham. Allowance is included for staff attendance at meetings outside Dillingham. Average intra-regional roundtrip airfare is set at \$250. For travel away from home, lodging expense is estimated at \$120 daily, plus 1.5 days per diem at \$30 daily. Additionally, allowance is made for eight trips to Anchorage or Juneau at average roundtrip airfare of \$600, plus 16 days lodging and per diem expenses.

If the borough was able to make use of teleconferencing facilities, intra-regional travel costs might be reduced.

Rent & utilities

This budget item assumes the borough will rent its own office space. There might be substantial savings, if the borough was able to share office space and support services with the school district.

Office equipment and supplies

This item covers the ongoing cost of maintaining and replacing office equipment, computers, telecommunications equipment, etc.

Telecommunications services

This item, estimated at \$1,500 per month, covers the ongoing costs of telecommunications services and equipment. Use of school district teleconferencing facilities, if practical, might increase this cost, but achieve offsetting savings in travel expenses.

Insurance

As the borough will own limited facilities and equipment, the allowance for insurance beyond that provided in personnel benefits is modest.

Contractual services

This item provides for essential contractual services such as borough lobbyist, audits and professional planning contractual services.

Transfer to school district operations and capital projects

The example budget shows the annual required contribution the borough is required to transfer to school district operations to qualify for Foundation Program funds. The

budget also includes a supplementary hold-harmless contribution of \$565,000 to maintain existing funding levels for Dillingham schools.

The capital project expense partly represents the borough's assumed responsibility for the City of Dillingham's 30 percent share (approximately \$350,000 yearly) of the annual payment toward its outstanding school debt, with the other 70 percent paid by the State of Alaska.

Additional allowance is made for the borough's 10 percent participating share of future school construction or major maintenance projects funded by state capital grants. The actual amount of future state grants is unknown. The example budget assumes an average annual borough commitment of \$400,000, which would match an average annual state grant of \$3,600,000. Together, these amounts would fund an annual average of \$4,000,000 in school capital projects.

Table 15
Example Annual Expenditure Budget, Western Bristol Bay Borough

Operating expenditures	
Mayor and Assembly	\$34,020
Planning commission	4,200
Borough staff	245,700
Legal support	25,000
Travel	37,080
Rent and utilities	48,000
Office equipment and supplies	4,000
Telecommunication services	18,000
Insurance	12,000
Contractual services	75,000
Subtotal	\$503,000
Education expenditures	
Required contribution to borough school district operations	895,598
Dillingham schools hold-harmless supplement	565,000
School district capital projects	750,000
Subtotal	\$2,210,598
Total Expenditures	\$2,713,598

Financial Feasibility

Financial feasibility depends on a Western Bristol Bay Borough's ability to secure a reliable surplus of revenues over expenditures, while accumulating sufficient reserves to weather occasional revenue shortfalls. The example annual expenditure budget (Table 15), after adjustments to offset in-region revenue changes due to borough incorporation (Table 16), can be matched with the revenue scenarios for alternative raw fish tax rates (Table 14) to determine the required local tax revenues needed for feasibility (Table 17).

In-Region Revenue Adjustments

Borough incorporation, with unification of the Dillingham City School District and the SWR REAA into a borough school district, would relieve the City of Dillingham of the burden of supporting its local school system.

Borough incorporation would also redirect the flow of certain local and intergovernmental revenues from city and tribal governments to the new borough. This feasibility assessment assumes that any borough areawide raw fish tax would be in place of, not in addition to, Togiak's existing 2 percent raw fish tax and the 2.5 percent raw fish tax that the City of Dillingham would collect if its annexation of Nushagak Bay were finalized. Moreover, federal PILT payments, now allocated to city governments, would go the borough instead of the cities after borough incorporation. Similarly, state fish business taxes, which are now shared among the cities, would be split between the borough and cities.

As matters stand as of January 2012, the Local Boundary Commission has approved the City of Dillingham's petition to annex Nushagak Bay, subject to approval by city voters. If annexation is approved, the City intends to levy a 2.5 percent raw fish tax. The Native Village of Ekok has a pending appeal of the Local Boundary Commission's decision. If Dillingham's annexation is finally implemented, and the 2.5 percent raw fish tax levied, the City of Dillingham, in its annexation petition, estimates that its raw fish tax levy would raise about \$711,000 annually in new revenue in FY 2013 (City of Dillingham, 2011).

Table 16 summarizes the estimated in-region revenue adjustments related to borough incorporation. Borough incorporation would relieve the City of Dillingham of \$1,550,000 in annual school expenses, but also cause loss of \$1,244,300 in presumptive raw fish tax revenues, PILT payments, and fisheries business taxes, for a net yearly gain of \$305,700 for the City.

The City of Togiak would lose about \$252,300 annually in raw fish taxes, PILT payments, and fisheries business taxes. Other communities would lose about \$249,000 in PILT payments, and the City of Clark's Point would lose \$45,400 in fisheries business taxes. As explained below, the borough feasibility assessment assumes that the borough would employ some means to compensate adversely affected communities for

these revenue losses so that the communities would not experience actual loss of revenue from borough incorporation.

Table 16
In-Region Revenue Adjustments Related to Borough Incorporation

Revenue Adjustments	Dillingham	Togiak	Others	Total
Schools – operating	\$1,200,000	\$0	\$0	\$1,200,000
Schools – debt service	\$350,000	\$0	\$0	\$350,000
Raw fish tax revenues	(\$711,000)	(\$86,000)		(\$797,000)
PILT payments	(\$410,000)	(\$141,000)	(\$249,000)	(\$800,000)
Fisheries Business Tax	(\$123,300)	(\$25,300)	(\$45,400) ¹	(\$194,000)
Net Revenue Adjustments	\$305,700	(\$252,300)	(\$294,400)	(\$241,000)

Note:

1. Clark's Point would lose half (\$45,400) of its fisheries business tax revenue.

Conclusions Regarding Financial Feasibility

Table 17 combines selected financial information from the three previous tables to determine the raw fish tax rate that would be required to make a Western Bristol Bay Borough financially feasible. The feasibility assessment assumes that the borough would employ some means to offset the loss of any local governmental revenues losses redirected to the borough as a result of borough incorporation. It is assumed that the City of Dillingham would retain any revenue gains accruing to it from borough assumption of the areawide education power.

Based on the assumptions specified in this report and the figures in Table 17, it appears that:

- with a 3 percent areawide raw fish tax, a Western Bristol Bay Borough would have a negative balance of \$578,519 annually, and would not be financially feasible.
- with a 4 percent areawide raw fish tax, a borough would have a negative balance of \$183,088 annually, and would fall short of financial feasibility.
- with a 5 percent areawide raw fish tax, a borough would have a positive balance of \$211,343 annually; this surplus would enhance the borough's year-to-year financial stability and enable it to accumulate some financial reserves against the possibility that revenues fell substantially below an average year.

Table 17**Estimated Western Bristol Bay Borough Revenues and Expenditures at Three Raw Fish Tax Rates**

	3 % Raw Fish Tax	4% Raw Fish Tax	5% Raw Fish Tax
Revenues (from Table 14)	\$2,682,779	\$3,077,210	\$3,471,641
Expenditures (from Table 15)	\$2,463,598	\$2,463,598	\$2,463,598
Revenues less Expenditures	\$219,181	\$613,612	\$1,008,043
In-region Revenue Losses (from Table 16)			
Togiak	(\$252,300)	(\$252,300)	(\$252,300)
Others	(\$294,400)	(\$294,400)	(\$294,400)
Total Revenue Losses	(\$546,700)	(\$546,700)	(\$546,700)
Balance After Adjustment for In- region Revenue Loss	(\$327,519)	\$66,912	\$461,343

The above conclusions must be immediately qualified by highlighting the effect of two key report assumptions on borough feasibility.

First, the report presupposes that the City of Dillingham's pending annexation of Nushagak Bay will ultimately be approved, entitling the City to levy a 2 ½ percent raw fish tax over the Bay. If, however, the annexation is rejected at local election or as a result of litigation, then the City of Dillingham would not "own" the fish tax revenues, and would not be presumed to forgo \$711,000 in annual fish tax revenues as part of borough incorporation. In that case, that amount would not count as a loss to the City (Table 16) but as an addition to the borough's available revenues.¹¹ With this revenue shift, borough incorporation would appear financially feasible with a 3 percent or 4 percent raw fish tax. Also, under these circumstances (rejection of the annexation), borough incorporation would become more advantageous to the City of Dillingham.

Second, the report assumes that the newly incorporated borough would adopt policies to (a) recompense the cities for \$546,000 in revenues that would be redirected from the cities to the borough after incorporation and (b) voluntarily continue the excess local contribution of \$565,000 that the City of Dillingham now makes to support the city

¹¹ That is to say, to the extent that annexation gives the City of Dillingham jurisdiction to levy fish tax revenues, it diminishes the financial feasibility of a Western Bristol Bay Borough.

school system. Without these hold-harmless policies, which are not required by law, the borough would be financially feasible with a 3 percent or 4 percent raw fish tax.

Finally, it should be noted that the financial figures in this report are presented in current (2012) dollars. Information reviewed during preparation of this report suggests that the cost of local government, particularly the cost of education, has generally been rising at a steeper rate than revenue growth. If this trend continues, as seems likely, it might pose future fiscal challenges for a new borough and for other local governments in the region as well.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT DILLINGHAM

NATIVE VILLAGE OF EKUK,)
Appellant,)
)
v.)
)
LOCAL BOUNDARY)
COMMISSION; CITY OF)
DILLINGHAM)
Appellees.)
)
)

Case No. 3DI-12-22CI

ORDER ON APPEAL

The Native Village of Ekuk appeals the Local Boundary Commission's approval of the City of Dillingham's petition to annex 396 square miles of Nushagak Bay for the purposes of collecting a tax on the fish caught there. The petition, initially filed in June 2010, received final approval from the Commission in December 2011. Voters in Dillingham ratified the annexation in an election held on April 10, 2012. The court now **GRANTS** Ekuk's appeal in part, **VACATES** the Commission's December 14, 2011 decision approving the annexation, and **REMANDS** the petition to the Commission for processing by legislative review.

FACTS

Nushagak Bay is an enormously productive fishing ground. In 2013, 3.7 million fish, a fifth of the total harvest of sockeye, king, pink, and chum salmon in all of Bristol Bay, were caught in the Nushagak fishing district.¹ For centuries, the culture and livelihoods of the people in the region have revolved around fishing. Today, fishing

¹ Cora Campbell & Jeff Regnart, 2013 Bristol Bay Salmon Season Summary, ADFG, at 5 (Sept. 23, 2013).

remains the primary economic activity in all the communities located on the Nushagak Bay or in the watershed.

However, the biggest portion of the catch (and the biggest portion of the revenue from the catch) is netted by fishers from out of state or other parts of Alaska. Of the 2010 catch, only 19% was harvested by Dillingham residents, who make up 19% of the fishing fleet; and 10% was harvested by fishers from other parts of Bristol Bay, who made up 13% of the fishing fleet.² Moreover, the profit margins of local fishers are slimmer than those of their out-of-town counterparts. Citing a 2009 study by the Bristol Bay Economic Development Corporation, Robert Heyano, the president of Ekuk Village Council, stated that "the watershed resident fisherman on average earns less money from the fishery than other Alaskans and non-residents," in part because "he earns less money from employment outside of fishing, and resides in an area with a significantly higher cost of living."³

In 2010, Dillingham decided to annex a large portion of Nushagak Bay in order to impose a 2.5% raw fish tax on all salmon caught and sold from the bay. Arguing that it supplied most of the infrastructure for commercial fishing in the bay, the City wished to recapture some revenues from non-resident fishermen, who do not contribute to the town's coffers by paying property tax or any considerable portion of sales tax. Despite this rationale, the tax would, of course, apply to Dillingham and village fishermen, too.

Annexations of large, uninhabited bodies of water for the purpose of imposing fish taxes are not unusual in Southwest Alaska. Several other communities have effected similar annexations in the past, including Egegik, which annexed part of the

² Pub. Hearing Transcript, at 201 (April 26, 2011)(comments of Barbara Sheinberg).

³ Pub. Hearing Tr., at 106 (April 25, 2011)(comments of Robert Heyano); see also Pub. Hearing Tr., at 153-154 (April 26, 2011)(comments of Nick Johnson).

adjacent bay in 1991; Togiak, which annexed Togiak Bay in 1985; and the City of St. Paul, which annexed its surrounding waters in 1986.⁴

However, the annexation of Nushagak Bay is unique in that a large number of communities other than Dillingham not only use the Bay but directly adjoin it. Thus, Clarks Point and Ekuk are, like Dillingham, on the shores of the Bay. Meanwhile, five villages are situated on rivers that empty into the bay: Ekwok, New Stuyahok, and Koliganek are not far from the estuary on the Nushagak River; Aleknagik is a few miles up the Wood River; and Manokotak is a few miles up the Igushik River. The culture and economies of Dillingham and the villages are inextricably tied to fishing.⁵

Ekuk itself has only two year-round residents. However, it supports a more robust summer population, who come from Aleknagik, Dillingham, and other communities to operate approximately 60 set-net sites. Because there is a cannery at Ekuk, and because large fishing vessels are not necessary to run a set-net operation, Ekuk set-netters do not have to make heavy use of Dillingham's harbor and other fishing infrastructure in order to commercial fish.⁶

On June 14, 2010, the City of Dillingham first posted its petition in several public locations around town, including on Dillingham's website. On July 9, Dillingham formally filed its petition with the Local Boundary Commission. It was not until July 26 that Dillingham provided copies of the petition to the villages. The City accepted written comments until October 4, 2010, and the Village of Ekuk timely filed its responsive brief on that day. In addition to Ekuk, Aleknagik, Manokotak, Ekwok, New Stuyahok and

⁴ Annexation Petition, at 8 (June 14, 2010).

⁵ Pub. Hearing Tr., at 89-95 (April 25, 2011)(comments of Molly Chythlook, natural resource director for BBNA).

⁶ Pub. Hearing Tr., at 99-100 (April 25, 2011)(comments of Robert Heyano).

Clarks Point submitted comments opposing the annexation.⁷ Koliganek did not submit comments. The City also filed its response to comments on October 4.

The Department of Commerce scheduled two public informational meetings to discuss the annexation in January 2011 – one in Dillingham and one in Manokotak. Both were cancelled due to inclement weather, and neither was rescheduled. In late January, the Department distributed a preliminary report on the annexation; public comments were accepted until late February. Both the City of Dillingham and the Village of Ekuk timely filed comments. On April 4, 2011, the Department issued its final report on the annexation, and a public hearing was scheduled for April 25. The hearing began on April 25 and continued until late on April 26, and the Commission held its decisional meeting immediately after public comments closed. At 1:00 AM on April 27, 2011, the Commission approved annexation.

The Commission attached a condition to its approval, requiring the City of Dillingham to attempt to consult with the villages to try to work out a revenue sharing agreement and to file a report on its efforts by November 30, 2011. There was some discussion as to whether approval of the annexation was final, or whether it would not be final until the Commission had received the report. The Commission seemed to decide that the report was merely pro forma, and that the approval was final as of April 27.

On June 10, 2011, the Village of Ekuk filed for reconsideration of several aspects of the annexation, including the Commission's determination that it could not allow the petition to proceed by legislative review, and its decision not to condition approval of the annexation on fulfillment of the consultation requirement. The Commission only granted

⁷ LBC Decision, at 3 (May 26, 2011).

the reconsideration on the second point, so final approval of the annexation was postponed until after Dillingham had submitted its consultation report. On November 30, 2011, the Commission found that the City had satisfied its consultation obligations, and thus that approval of the annexation could take place.⁶ On December 14, 2011 the Commission formally approved the annexation.

The Village of Ekuk appealed in early 2012 and this court held oral arguments on October 7, 2013.

DISCUSSION

The respondent raises a number of points on appeal, arguing that the Commission abused its discretion in allowing the petition to proceed by local action, rather than legislative review; that the Commission had redefined the terms "unpopulated," "large geographical area," and "existing community," thereby developing new annexation standards in violation of the Administrative Procedure Act; and that the Commission had abused its discretion in determining that the annexation was in the best interests of the state. After much deliberation, the court finds that it need only address the first point. The court agrees that the petition should have been processed by the legislative review method, and REMANDS the petition to the Commission for further proceedings consistent with this finding. The court finds that it need not reach Ekuk's remaining arguments because they pertain to a petition that may change once the legislative review process is commenced on remand.

STANDARD OF REVIEW

⁶ Pub. Meeting Tr., at 27 (Nov. 30, 2011)

The Commission's decisions involve agency expertise, so the court must uphold them as long as they have a reasonable basis.⁹ Specifically, "the policy decision as to the mode of annexation is an exercise of lawfully vested administrative discretion, which [the court] will review only to determine if administrative, legislative, or constitutional mandates were disobeyed or if the action constituted an abuse of discretion."¹⁰ Here, the court concludes that the Commission disobeyed legislative mandates and abused its discretion in allowing the petition to proceed by the local action method, so the court VACATES the Commission's approval of the annexation.

I. BACKGROUND

Alaska law allows cities to annex adjacent territory by two methods: legislative review and local action. Before beginning its analysis, the court finds it useful to provide a brief description of the key features of each method.

A. Legislative Review

The process for annexation by legislative review is outlined in Alaska's Constitution.¹¹ No vote is required to annex territory by legislative review; instead, the annexing municipality must hold a public hearing "within or near boundaries proposed for annexation" before submitting its petition to the Commission.¹² The Commission must then hold a one or more additional hearings "within or near the boundaries of the proposed change" before rendering its decision.¹³ Upon approving the annexation, the Commission presents the petition to the state legislature during the first ten days of any

⁹ *Mobil Oil Corp. v. LBC*, 518 P.2d 92, 98 (Alaska 1974).

¹⁰ *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147, 1151.

¹¹ ALASKA CONST. art. X, § 12.

¹² 3 AAC 110.425(a),(d).

¹³ 3 AAC 110.550(a).

regular session.¹⁴ Unless the legislature disapproves of the proposed annexation "by a majority of the members of each house," the annexation will "become effective forty-five days after presentation or at the end of the session, whichever is earlier."¹⁵ The upshot of this process is that the Commission's approval of an annexation almost always means the annexation will take place.

Because it requires such limited public input, annexation by legislative review has been called "forced annexation" by its critics.¹⁶ However, the framers of Alaska's Constitution created the legislative review procedure expressly to insulate boundary-making from one-sided or purely political considerations. As the Alaska Supreme Court found in *Fairview Public Utility Dist. No. 1 v. City of Anchorage*, the rationale for legislative review, and for the creation of the Commission generally, was "that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level."¹⁷ The litigation often attending Commission determinations (including this one) indicates that politics are hardly absent from boundary-making today, but legislative review nonetheless remains the most common method of annexation.¹⁸ The legislature has likewise affirmed the preference for legislative review, providing that a boundary change by legislative review "prevails over a boundary change initiated by local action, without regard to priority in time."¹⁹

¹⁴ AS 29.06.040(b).

¹⁵ *Id.*

¹⁶ Vi Jerrel and Doris Cabana, "Opposition to Annexation," in *Homer News* (April 24, 2003). Accessed at http://homernews.com/stories/042403/let_20030424024.shtml on March 21, 2014).

¹⁷ *Fairview Public Utility District, No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962)(citing Alaska Constitutional Convention, Committee on Local Government, Nov. 28 and Dec. 4, 1955); see also *LBC Regulations & Powers: Hearing on H.B. 133 before the H. Jud. Comm.*, 24th Leg. 36 (April 18, 2005).

¹⁸ *LBC Regulations & Powers: Hearing on H.B. 133 Before the H. Comm. on Cmty. & Reg'l Affairs*, 24th Leg. 8 (Feb. 24, 2005)(statement of Dan Bockhorst).

¹⁹ AS 29.06.040(d).

B. Local Action

The framers did, however, envision some circumstances where annexations would be approved by voters, rather than legislators. Thus, the Alaska Constitution also provides that the Commission "may establish procedures whereby boundaries may be adjusted by local action."²⁰ First, the Commission must, following a public hearing, approve the annexation.²¹ Then, the Commission's approval may be ratified or rejected by one of three local action methods: first, by "city ordinance if the territory [to be annexed] is wholly owned by the annexing city; second, by city "ordinance and a petition signed by all the voters and property owners of the territory;" and third, with "approval by a majority of votes....cast by voters residing in the territory and the annexing city."²² AS 29.06.040 sections (c)(1) and (c)(2) make clear that the votes of residents of the annexing municipality and the territory to be annexed may not be aggregated, but that a majority of votes from *each* area must approve the annexation before it can take place.

II. THE COMMISSION ABUSED ITS DISCRETION IN ALLOWING THE PETITION TO PROCEED BY LOCAL ACTION

At the decisional meeting, Commission Chair Chrystal opined that the Commission could not direct the City to switch the annexation method from local action to legislative review. Commission staff member Brent Williams seconded him, asserting that under 3 AAC 110.610 "you could go from legislative review to local action" but not "the reverse."²³ Thus, the Commission concluded that it could not send the petition back to the city to make the annexation more palatable to the villages and found that it had to

²⁰ ALASKA CONST. art X, § 12.

²¹ 3 AAC 110.150.

²² 3 AAC 110.150(1)-(3).

²³ Pub. Hearing Tr., at 302 (April 26, 2011).

rule on the petition in its present form. This stunted interpretation of the Commission's authority to change annexation methods does not have a reasonable basis: the interpretation is contradicted by case law and legislative history, and counterbalanced by regulations affirming the Commission's authority to alter petitions and to proceed by legislative review. Here, in fact, the particularities of Dillingham's petition required the Commission to change the annexation method to legislative review: proceeding by local action violated the respondents' due process rights.

A. The Commission has authority to specify the method of annexation.

Although the municipality makes the initial selection of annexation method when it prepares its petition, the Commission has authority to change the annexation method as it sees fit.²⁴ In *Port Valdez Co. v. Valdez*, the Alaska Supreme Court rejected the contention that the Commission had to proceed by "step annexation," finding instead that the Commission had discretion to choose, and that "the selection of annexation method made by the Commission... [was] controlling."²⁵ The Supreme Court's holding is supported by more recent legislative history. Testifying on behalf of the Commission at a hearing on a 2005 bill that prohibited aggregate votes in local action elections, Commission staff member Dan Bockhorst explained that "the petitioner... makes the initial determination as to the process it wants to pursue. However, in the course of considering the petition, that process can be amended."²⁶ Thus, both case law and

²⁴ See *Valdez*, 522 P.2d at 1151; *LBC authority to amend petition for municipal boundary change*, OAG, File No. J-66-585-81, *1, n.2 (Oct. 25, 1982); *Hearing on H.B. 133 Before the H. Comm. on Cmty. & Reg'l Affairs*, 24th Leg. 8-9 (Feb. 24, 2005)(statement of Dan Bockhorst, Staff, LBC); see also *LBC Public Meeting 7*, 15 (Jan. 11, 2007)(where Commissioners concluded they had authority under 3 AAC 110.660 to allow the City of Soldotna to annex a 1.6 acre lot "using the least controversial" and the "easiest method").

²⁵ *Valdez*, 522 P.2d at 1151.

²⁶ *Hearing on H.B. 133*, 24th Leg 8-9 (statement of Dan Bockhorst, Staff, LBC).

legislative history firmly support the Commission's authority to choose among annexation methods.

Nor is the Commission's authority to choose an annexation method limited by regulation. 3 AAC 110.610(a), the provision that the Commission claims supports its position, does not disallow conversion of local action petitions to petitions for legislative review at all. Rather, 3 AAC 110.610(a) *authorizes* converting petitions from legislative review to local action in certain circumstances, and says nothing about the reverse. Contrary to the Commission's assertions, this silence does not mean that local action to legislative review conversions are prohibited. Indeed, the Commission's discretion to guide and effectuate boundary changes in the absence of explicit authority has been regularly affirmed.²⁷ Moreover, the Commission's broad authority to alter petitions and to proceed by legislative review includes the authority to switch annexation methods.²⁸

a. The Commission's authority to alter petitions enables it to switch annexation methods.

The Commission may alter the annexation method by which a petition proceeds under 3 AAC 110.440(c) and 3 AAC 110.570(c)(1). 3 AAC 110.440 gives the Commission chair oversight over the Department of Commerce's technical review of a petition. Where "the petition or supporting materials are deficient in form or content," the department, with approval from the Commission, "shall determine whether the

²⁷ *Petitioners for Incorporation of Yakutat v. LBC*, 900 P.2d 721, 725-726 (Alaska 1995) (affirming LBC's power to redraw boundaries upon determination that boundaries in petition do not satisfy statutory requirements); *Oesau v. Dillingham*, 439 P.2d 180, 183-184 (Alaska 1968) (upholding LBC's authority to dissolve the City of Wood River in the absence of express authority); *LBC authority to detach an area from an organized borough*, OAG, File NO. 386-034-86, at *1-*2 (July 23, 1985) (concluding that the LBC has the authority to condition a detachment petition upon subsequent incorporation of a new borough); *LBC authority to amend petition for municipal boundary change*, OAG, File No. J-66-585-81, *1 (upholding LBC's authority to amend boundaries of proposed area to be annexed).

²⁸ See 3 AAC 110.140; 3 AAC 110.440(c); 3 AAC 110.570(c)(1).

deficiencies are significant enough to require new authorization for the filing of the corrected or completed petition."²⁹ Thus, 3 AAC 110.440(c) enables the Commission to rectify not only minor flaws in a petition, but also errors serious enough to require the petition to be refiled. If a petition is "deficient in form or content" because it followed the incorrect annexation method, then 3 AAC 110.440(c) authorizes the Commission to send the petition back to be refiled according to the proper method.

Even after the technical review of a petition has taken place, the Commission still has the opportunity to correct errors in the petition. Under 3 AAC 110.570(c)(1), if the commission determines that a proposed municipal annexation "must be altered or a condition must be satisfied before the proposed change can take effect, the commission will include that condition or alteration in its decision." Certainly, requesting the petitioner to recommence his petition according to an alternate method would be a significant alteration. However, the Commission is not limited to imposing minor alterations or conditions.³⁰ Indeed, the Commission may reconsider a prior boundary change if there was a "substantial procedural error in the original proceeding."³¹ The court sees no reason why the Commission could not, under 3 AAC 110.570(c)(1), correct an analogous procedural error, such as the choice of the wrong annexation method, before the boundary change becomes final.

b. The Commission's authority to proceed by legislative review also includes the authority to switch annexation methods.

²⁹ 3 AAC 110.440(c).

³⁰ See *LBC authority to detach an area from an organized borough*, OAG, File NO. 366-034-86, at *1-*2 (July 23, 1985)(concluding that the LBC could condition approval of detachment upon subsequent voter approval of incorporation of a new borough).

³¹ 3 AAC 110.580(e)(1).

The legislative review regulations reinforce the Commission's authority to change a petition's annexation method. 3 AAC 110.140 makes clear that *any* "territory that meets the annexation standards specified in 3AAC 110.090 – 3AAC 110.135 may be annexed to a city by the legislative review process," if the Commission determines that one of nine enumerated circumstances exists. The Commission's authority is *not* contingent on the petitioner having first specified a particular annexation method. Considered in light of the Commission's authority under *Valdez* and 3 AAC 110.440(c), 3 AAC 110.140 enables the Commission to switch a local action petition to one for legislative review if the petition is up to standards and falls within one of the nine circumstances. Here, the Commission did not even consider whether the requirements of 3 AAC 110.140 were met. Therefore, the Commission's conclusion that it could not convert the City's local action petitions to one for legislative review lacked a reasonable basis.

In fact, if the Commission had looked at 3 AAC 110.140(9) it would have found strong justification for proceeding by legislative review in Dillingham's case. 3 AAC 110.140(9) allows territory to be annexed by legislative review when "the commission determines that specific policies set out in the Constitution of the State of Alaska, AS 29.04, AS 29.05, or AS 29.06 are best served through annexation of the territory by the legislative review process, and that annexation is in the best interests of the state."³² Here, the petition violated the statute governing local action elections – set forth in AS 29.06.040 – because no voters (or people at all) resided in the territory to be annexed. Thus, the "specific policies set out in... AS 29.06" would unquestionably be served by proceeding by legislative review.

³² 3 AAC 110.140(9).

B. Indeed, the violation of AS 29.06.040 required the Commission to convert the petition to legislative review.

Because the petition could not satisfy the dual election provisions of AS 29.06.040, the city's choice to proceed by local action was improper, and the Commission abused its discretion in *not* requiring the petition to proceed by legislative review. Agency action taken without first complying with a statutory requirement is invalid.³³ As explained above, AS 29.06.040 provides that local action annexations are only valid if a majority of votes from both the annexing municipality *and* the territory to be annexed approve of the annexation.³⁴ Aggregating the votes from both areas is not allowed.³⁵ Here, it is uncontested that no one resides permanently in the annexed portion of Nushagak Bay.³⁶ A vote, certainly, was never held in that area. Thus, only one of the two statutorily required votes could even take place. Because compliance with the local action requirements was impossible, the local action annexation was invalid and the petition should have proceeded by legislative review.

Holding otherwise would permit the City to manipulate the local action process to require less public involvement, rather than more. Where both the annexor and annexe are populated areas, local action elections ensure that both areas support the annexation. However, where the territory to be annexed is unpopulated, proceeding by

³³ See *State v. Eluska*, 725 P.2d 514, 516 (Alaska 1986)(acknowledging that Board of Game's failure to regulate subsistence hunting may have been invalid, but finding it did not constitute a defense to unregulated hunting); *United State Smelting, Refining & Mining Co. v. LBC*, 489 P.2d 140, 141-142 (Alaska 1971)(finding LBC's approval of boundary change invalid where it had first failed to comply with statutory mandate).

³⁴ AS 29.06.040(c)(1)-(2).

³⁵ *Id.*; see also *Hearing on H.B. 133 Before the Senate Committee on Regional Affairs* 7 (May 1, 2006)(comments of Rep. John Coghill).

³⁶ To the extent that the Commission suggests that seasonal fishers may "populate" the bay (see e.g., Pub. Hearing Tr., at 320 (April 27, 2011)(comments of Chair Lynn Chrystal)), the court rejects this argument. Fishers do not spend enough time in the bay to establish residency for voting purposes, no procedures are in place to allow "residents" of Nushagak Bay to vote, and it is uncontested that no vote ever took place there.

local action avoids both the additional hearing required by the legislative review process and a meaningful election. This is exactly what happened here. The people whom the annexation would affect most seriously had inadequate opportunities for public comment, yet were also unable to vote.

C. Proceeding by local action violated the respondents' due process rights.

As explained above, the hearing requirements for annexation by local action differ from the hearing requirements for annexation by legislative review. Whereas a municipality wishing to annex by local action need not hold a hearing prior to submitting its petition to the Local Boundary Commission,³⁷ a pre-filing hearing is required for annexation by legislative review.³⁸ 3 AAC 110.425(a) provides that "*before* a petition for annexation by the legislative review process may be submitted to the department... [t]he prospective petitioner shall also conduct a public hearing on the annexation proposal" (emphasis added). Only after the hearing may the municipality file the petition with the Commission: the municipality must "submit evidence of compliance" with the hearing requirement along with its petition.³⁹

Here, the City chose to proceed by local action, so it did not hold a public hearing prior to filing the annexation petition.⁴⁰ Rather, the City merely placed copies of its proposed petition in three physical locations in Dillingham and on Dillingham's website, several weeks before filing the petition on July 2, 2010. It was not until late July that the city even provided copies of the petition to the villages.⁴¹ Written comments on the petition were allowed until October, 2010, but the only public hearing on the petition was

³⁷ 3 AAC 110.420

³⁸ 3 AAC 110.425(a),(d)-(e).

³⁹ 3 AAC 110.425(h).

⁴⁰ LBC Decision, at 1-2.

⁴¹ LBC Decision, at 3.

in Dillingham on April 25, 2011, almost ten months after filing and only a day before the Commission approved the petition.⁴² Thus, by the time local citizens were able to express their views on the petition, the petition had already been finalized, and, indeed, the Commission was about to render its decision. The Commission itself was uneasy with the timing of the public comment period. As Commissioner Harcharak observed at the decisional meeting, "I believe [the people who testified from the villages] 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... it's going to have a negative impact on every one of them."⁴³ Having found that the City should have proceeded by legislative review, the court concludes that the failure to hold a pre-filing hearing violated the respondents' due process rights.

a. The notice violation was substantial.

The lack of a pre-filing hearing was a substantial due process infringement because the villages were not able to contribute to (nor, indeed, were even aware of) the preparation of the annexation petition. "Failure to adequately inform and include the public in decision-making is a matter of public importance."⁴⁴ Here, the City failed to include the outlying villages in its decision to annex a huge swath of a shared resource. Even though the disposition of the bay affected village residents directly, they were denied a chance to have their suggestions incorporated into the petition. By the time of the April 25 hearing, the LBC had only blunt tools with which to modify the annexation: it

⁴² LBC Decision, at 3-4 (two informational meetings had been scheduled for January 2011, but they were cancelled due to inclement weather).

⁴³ Pub. Hearing Tr., at 170 (April 26, 2011).

⁴⁴ *Mullins v. LBC*, 226 P.3d 1012, 1018-1019 (Alaska 2010)(discussing *Lake and Peninsula Borough v. LBC*, 885 P.2d 1059 (Alaska 1994)).

could either reject the petition, or it could attach conditions to approval. However, as the Chair noted, the Commission could not impose the types of conditions – such as tax exemptions for local fishermen – that the respondents were requesting.⁴⁵ By contrast, earlier participation by the respondents and other affected individuals at a pre-filing hearing might have enabled the City, whose taxation authority is not so restricted, to have included such suggestions in the petition itself. Thus, the erroneous decision to allow the petition to proceed by local action substantially infringed on the ability of the respondents to participate in the annexation process.

The subsequent vote by Dillingham residents did not rectify the failure to hold a pre-filing hearing. As the transcript of the April 25-26 hearing makes clear, the people who objected most strongly to the annexation are not Dillingham residents, but residents of outlying communities who are now obliged to pay taxes to Dillingham. Because they are not Dillingham residents, they were not able to participate in the vote.⁴⁶ However, they would have been able to participate in the pre-filing hearing. Hearing attendance under 3 AAC 110.425(a) is not limited to residents of the municipality doing the annexation, and the hearing need not even be held in that municipality. Rather, the hearing may be held “within or near the boundaries proposed for annexation.” Thus, presumably, the City could have scheduled the hearing (or hearings) in one of the affected communities, further facilitating public participation.

b. The remedy for the notice violation is remand.

⁴⁵ Pub. Hearing Tr., at 339 (April 27, 2011).

⁴⁶ Ekuk itself has only two permanent residents, but neither party presented concrete evidence about where the summer residents live during the rest of the year.

Where a government entity provides deficient notice of proposed boundary changes, and the notice violations are substantial, the boundary change is invalid.⁴⁷ In *Lake and Peninsula Borough v. LBC*, the school district filed a local action incorporation petition proposing to change the boundaries of the Lake and Peninsula Borough. Although the choice of annexation method was proper, the district failed to notify villages whose subsistence hunting and fishing grounds would be excluded from the new Borough. Later telephonic hearings on the proposed changes did not include the villages.⁴⁸ Determining that these violations were substantial, the court remanded to the Local Boundary Commission to reconsider the boundary change after complying with the statutory notice requirements.⁴⁹ Here, too, the notice violations were substantial, so the annexation was invalid. Therefore, the court remands the petition and orders the Commission to direct refiling in accordance with the requirements for legislative review.

CONCLUSION

The court finds that the Commission abused its discretion in not requiring the City of Dillingham to process its annexation petition according to the legislative review method. Because proceeding by local action caused a substantial violation of the respondents' due process rights, the court VACATES the annexation and REMANDS to the Commission to process the petition by legislative review.

Signed this 21th day of March, 2014 at Dillingham, Alaska.



Patricia Douglass
Patricia Douglass, Superior Court Judge

⁴⁷ *Mullins*, 226 P.3d at 1019 (finding that "public participation claims remain live and can be adjudicated where the public votes for adjudication"); *Lake and Peninsula Borough*, 885 P.2d at 1067.

⁴⁸ *Lake and Peninsula Borough*, 885 P.2d at 1060.

⁴⁹ *Lake and Peninsula Borough*, 885 P.2d at 1067.

I certify that on 3/27/2014
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT DILLINGHAM

NATIVE VILLAGE OF EKUK,)
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_____)

Case No. 3DI-12-22CI

ORDER ON MOTION FOR RECONSIDERATION

On March 27, 2014 this court granted the appeal of the Native Village of Ekuk having found that the annexation of Nushagak Bay was procedurally deficient. Both the Local Boundary Commission and the City of Dillingham moved separately for reconsideration. Addressing their arguments together, the court now DENIES both motions for reconsideration.

FACTS

A city may annex territory by two primary means: local action and legislative review. To proceed by the local action method at issue here, a majority of voters in both the annexing municipality and the territory to be annexed must vote in favor of the annexation. Proceeding by legislative review does not require a vote, but does require the municipality to hold two public hearings on the annexation petition, one before the petition is filed, and the second after. Here, the City proceeded by local action, even though the lack of a voting population in the Bay meant the City could not hold the two statutorily required votes. In its March 27 order, the court found that the Commission

had abused its discretion in allowing annexation to proceed by local action when doing so violated the statute; that the annexation was invalid because there had not been two votes; and that the city had to proceed instead by legislative review. The court also found that the Commission could not simply submit the petition, as is, to the legislature, because the City had not held the pre-filing hearing that is a prerequisite for legislative review. The twin procedural deficiencies – the failure to hold two votes and the failure to hold a pre-filing hearing – amounted to a significant notice violation because they curtailed village residents' opportunities for public participation. Therefore, the court remanded the petition to the Commission, so that it could direct the City to refile the petition following a public hearing. These motions for reconsideration followed.

DISCUSSION

The Commission and the City take issue with different aspects of the court's March 27 order. The Commission asks the court to validate the local action annexation by allowing a letter of non-objection to stand in for a vote, while the City asks for the current petition to be submitted to the legislature, arguing that pre-filing meetings about annexation were equivalent to a public hearing and that the failure to hold a hearing violated neither notice requirements nor procedural due process standards. The court reaffirms its previous holdings. There is no precedent for treating a letter as a vote, and the law is clear that two votes are required, so Dillingham's annexation of Nushagak Bay with one vote was invalid. Similarly, the City's pre-filing meetings and workshops did not amount to a hearing because they failed to satisfy the requirements for pre-filing hearings under 3 AAC 110.425. Given the importance of a pre-filing hearing in ensuring that the villages had an adequate opportunity for comment, the Commission may not

simply submit the existing petition to the legislature. Rather, the City must refile the petition after holding a hearing and meeting the other procedural requirements for legislative review.

I. THE COMMISSION'S MOTION

Annexation by local action may take place by three different means: first, by ordinance if the territory is owned by the annexing municipality;¹ second, by city ordinance and a petition signed by all the voters and property owners of the territory;² and third, by approval of a majority of votes among voters in both the annexing municipality and the territory to be annexed.³ Here, the City purported to proceed by the third method and held a vote in Dillingham on the question of annexation. However, because no one lives in Nushagak Bay, no vote could be held in the territory to be annexed. As the court stated in its March 27 order, the lone vote in Dillingham did not satisfy local action procedures. Therefore, the court found that the annexation was invalid, and ordered that the petition be filed according to legislative review procedures.

Now, the Commission asks the court to reconsider its decision, arguing that a letter of non-opposition from the Department of Natural Resources, the agency that manages the waters of Nushagak Bay, was either “analogous to a vote,” making the annexation valid under 3 AAC 110.150(3); or amounted to a “petition signed by all the... property owners of the territory,” making the annexation valid under 3 AAC 110.150(2). The court rejects both of these arguments, and reiterates its previous decision that the only proper way to annex the Bay was by legislative review.

A. The letter of non-objection is not “analogous to a vote.”

¹ 3 AAC 110.150(1).

² 3 AAC 110.150(2).

³ 3 AAC 110.150(3)(A)-(B).

Nothing in the case law or legislative history indicates that an agency can avoid the democratic process by obtaining assurances that another agency does not object to the proposed action. Indeed, the Commission cites no authority for this proposition. Neither the local action statute, AS 29.06.040, nor the local action regulation, 3 AAC 110.150(3), allow substitutions or alternatives to voter approval for municipal annexations by local action. By contrast, changes to the Commission's local action regulations, as well as the legislative history of AS 29.06.040, strongly support the conclusion that annexations under 3 AAC 110.150(3) may only take place after two separate votes.

The elimination of provisions for annexing uninhabited territories with *one* vote supports the conclusion that two votes are now always required. An earlier version of 3 AAC 110.150 allowed for local action annexation of uninhabited areas with only one vote. Thus, former 3 AAC 110.150(5) provided that a municipality could annex uninhabited territory with "approval by a majority of the voters who vote on the question within the annexing city...."⁴ However, subsection (5) was dropped from the current version of 3 AAC 110.150, which no longer specifically addresses annexations of uninhabited areas, nor lists equivalents to a vote where a vote is not possible. Therefore, under the current version of 3 AAC 110.150, a municipality may only annex territory by means of a vote if voters in *both* the municipality and in the territory to be annexed approve the annexation.

The legislative history of AS 29.06.040 underscores the conclusion that two separate votes are essential to validating an annexation. The version of the local action statute in effect prior to 2006 allowed for aggregation of votes cast in both the annexing

⁴ 3 AAC 110.150(5) (July 2002).

municipality and the territory to be annexed.⁵ Concerned that aggregation would allow pro-annexation municipalities (generally with larger populations than the territories they were annexing) to overwhelm any opposition by voters in areas to be annexed,⁶ the legislature eliminated provisions for aggregate votes.⁷ The current version of the statute requires two votes to validate an annexation, and does not make exceptions for annexations of uninhabited territories.⁸ Because, by definition, uninhabited areas do not have a voting population, AS 20.06.040 has the effect of requiring most annexations of uninhabited territory to proceed by legislative review.⁹ This result is consistent with the legislature's concern about municipalities acquiring territory by force of numbers, as well with the longstanding preference in Alaska for making significant boundary decisions at the state level.¹⁰

In light of the legislative and regulatory history of eliminating alternatives to the two-vote requirement, the court declines to accept a letter of non-objection as a substitute for one required vote, especially when there is no precedent for such a course of action.

B. The letter of non-objection does not validate the annexation under 3 AAC 110.150(2), either.

⁵ See also 3 AAC 110.150(4) (July 2002).

⁶ See, e.g., *Hearing on H.B. 133 Before the Senate Committee on Regional Affairs* 7 (May 1, 2006)(comments of Rep. John Coghill).

⁷ AS 29.06.040(c)(1)-(2).

⁸ AS 29.06.040.

⁹ The exceptions would be when the uninhabited territory is owned by either a municipality (and can be annexed by ordinance under 3 AAC 110.150(1)) or by people who unanimously approve of the annexation (and can be annexed by petition plus and ordinance under 3 AAC 110.150(2)).

¹⁰ *Fairview Public Utility District, No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962)(citing Alaska Constitutional Convention, Committee on Local Government, Nov. 28 and Dec. 4, 1955); see also *LBC Regulations & Powers: Hearing on H.B. 133 before the H. Jud. Comm.*, 24th Leg. 36 (April 18, 2005).

The Commission never argued in the proceedings below that DNR's letter was the equivalent of a petition that would, in conjunction with a city ordinance under 3 AAC 110.150(2), allow the annexation to take place without any vote at all. Certainly, the Commission never suggested that the vote in Dillingham was entirely incidental, or that the annexation would have been valid in its absence. Parties may not generally raise arguments for the first time on appeal, so the court will not consider the Commission's arguments now. The court does observe, however, that DNR is not the owner of the Bay, but merely the manager of it; that the agency's letter does not take the form of a petition, but expressly states that the agency is not "not taking a position in support of the annexation;"¹¹ and that the City never enacted an ordinance in conjunction with or in response to the letter. Without the property owner, signed petition, or ordinance required by 3 AAC 110.150(2), the court fails to see how the annexation could be valid under this provision.

C. Conclusion

The court rejects the Commission's arguments that DNR's letter of non-objection was equivalent to a vote or a petition. Because the City held only one vote on the question of annexation, its attempt to annex the Bay by local action violated 3 AAC 110.150(3) and AS 29.06.040. The Local Boundary Commission abused its discretion in allowing the City's petition to proceed by an annexation method that violated the law, and the annexation itself was invalid.

II. THE CITY'S MOTION FOR RECONSIDERATION

Prior to filing a petition for processing by legislative review, a municipality must hold a hearing that addresses the details of the petition and at which the public is allowed to

¹¹ Thomas E. Erwin, DNR Commissioner, "Non-Objection for Dillingham Annexation," at 1 (May 14, 2010).

comment.¹² The city did not hold such a hearing, but contends that workshops and city council meetings held in 2009 and 2010 provided equivalent opportunity for public comment. Only two of these meetings were held after copies of the petition were made public, but notice for both of them fell short of that required under 3 AAC 110.550, and the City neither provided information about the items presented or discussed at the meetings, nor furnished the Commission or the court with an audio recording or transcript of the proceedings. The court therefore finds that neither meeting was an adequate substitute for a full pre-filing hearing.

The failure to hold a pre-filing hearing and the decision to proceed by a deficient local action process significantly curtailed the ability of village residents to participate in the annexation process. As the court stated in its March 27 order, they did not have adequate opportunity to comment on the petition but were also unable to vote on it. The court in that order used “due process” and “notice” violations interchangeably. The court finds that it need not decide whether the failure to hold a pre-filing hearing violated procedural due process because notice violations alone can invalidate administrative decisions.¹³ Thus, the court reiterates that without a pre-filing hearing, villages received inadequate notice of the annexation and opportunity to comment on it. Therefore, before the petition can properly be submitted to the legislature for review, it must be refiled following a full public hearing.

A. The City’s pre-filing process was not the functional equivalent of a hearing under 3 AAC 110.425(a).

¹² 3 AAC 110.425.

¹³ See *City of St. Mary’s v. St. Mary’s Native Corp.*, 9 P.3d 1002, 1010 (Alaska 2000); *Lake and Peninsula Borough v. LBC*, 885 P.2d 1059, 1062-1063 (Alaska 1994).

Under 3 AAC 110.425, a municipality that annexes territory by legislative review must hold a hearing on the petition prior to filing the petition with the Commission. The hearing must be publicly noticed pursuant to 3 AAC 110.550 – that is, the date, time and location of the hearing must be advertised in a newspaper at least three times, announced over the radio, and posted in multiple locations around town. In addition, the “prospective annexation petition and the summary must be made available to the public on or before the first publication of notice of the hearing.”¹⁴ The hearing itself must address the details of the prospective annexation petition, including the “appropriate annexation standards and their application to the annexation proposal, legislative review annexation procedures, the reasonably anticipated effects of the proposed annexation, and the proposed transition plan.”¹⁵ The public must be allowed to comment on the proposal at the hearing. Following the hearing, the petitioning municipality must submit evidence that it has properly noticed the hearing, as well as “a written summary or transcript of the hearing, a copy of any written materials received during the hearing, and an audio recording of the hearing.”¹⁶

Here, the City concedes that it did not hold a hearing on the petition, which was published in Dillingham on June 14, 2010, prior to filing it with the Commission on July 9, 2010.¹⁷ Instead, the city argues that city council and “Public Outreach Committee” meetings and a series of annexation workshops in 2009 and 2010 are the equivalent of the pre-filing hearing under 3 AAC 110.425. The court disagrees.

¹⁴ 3 AAC 110.425(c).

¹⁵ 3 AAC 110.425(d).

¹⁶ 3 AAC 110.425(h).

¹⁷ The City did not provide copies of the annexation petition to the villages until July 26, 2010, after the petition had already been filed.

Of all the meetings to which the City refers, only two – an annexation workshop held June 23, 2010¹⁸ and a city council meeting held June 17, 2010¹⁹ were held after the publication of the annexation petition. Thus, only these two meetings could potentially have provided the community an opportunity to review the petition and comment on it equivalent to that offered by a pre-filing hearing under 3 AAC 110.425. However, despite their timing, these meetings are still a far cry from public hearings.

First of all, the City did not notice these meetings as extensively as required pursuant to 3 AAC 110.425: while it advertised them over the radio, it did not publish notice in any newspaper.²⁰ Second, the meetings took place before the villages had even received the petition, which was not until late July. Third, there is no evidence that either meeting addressed the petitions in the same depth that a hearing would have. The city council meeting only addressed annexation as part of the council's "unfinished business."²¹ The city does not describe the content of the June 23 annexation workshop at all, except to say that the workshops generally were held "to discuss the developing petition and answer questions."²² The city did not provide an audio record or transcript or even a summary of either meeting, as would have been required under 3 AAC 110.425(h). In the absence of compliance with notice requirements, evidence that the petition and the implications of the annexation were discussed in detail at the meetings, or evidence that the Commission considered the comments made at the meetings in evaluating the city's petition, the court declines to find that either the city

¹⁸ Dillingham Consultation Report, at 4 (Nov. 15, 2011).

¹⁹ *Id.*, at 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, at 4.

council meeting or the annexation workshop was the functional equivalent of a pre-filing hearing.

B. Without a pre-filing hearing, village residents did not have an adequate opportunity for public participation.

The City makes much of the post-filing process, including a comment period and a public hearing held on the eve of the Commission's decisional meeting, and argues that residents of the villages had ample opportunity to voice their opinions before the Commission approved the annexation. However, this emphasis on post-filing process glosses over the significance of adequate pre-filing process. As explained above, legislative review regulations require a pre-filing hearing, and the City did not have one. This shortcoming is significant. The standards for procedural due process – which require notice and a hearing *before* a person is deprived of a protected property interest – reinforce the court's conclusion on this point. As the Alaska Supreme Court noted *DNR v. Greenpeace*, "if the right to notice and a hearing is to serve its full purpose, then, it is clear that [the hearing] must be granted at a time when the deprivation can still be prevented."²³

Here, village residents faced a significant economic burden – one that the neither the City nor the Commission has discounted – associated with the annexation. Their best opportunity to mitigate – for instance, by proposing revenue sharing options, tax breaks, altered boundaries that excluded, e.g., set-net sites used by villagers from the territory to be annexed – was before the petition had been submitted to the Commission. Pre-filing meetings that were not adequately advertised and that did not discuss the proposed petition or its specific implications did not provide this same

²³ *DNR v. Greenpeace*, 96 P.3d 1056, 1064 (Alaska 2004).

would have offered an irreplaceable opportunity for residents' specific suggestions to be incorporated into the petition that was submitted to the Commission. Because there was no such hearing, the respondents denied adequate opportunity for public participation.

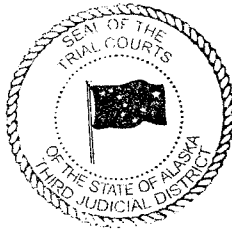
C. Conclusion

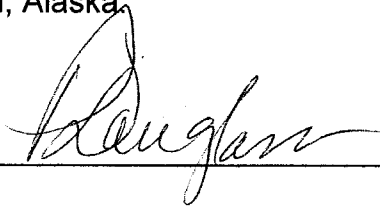
Because the pre-filing process failed to satisfy the requirements of 3 AAC 110.425, the Commission may not submit the current petition to the legislature until a pre-filing hearing has been held.

III. CONCLUSION

For the foregoing reasons, the Commission's and the City's motions for reconsideration are DENIED.

Signed this 16 day of May, 2014 at Dillingham, Alaska.





Patricia Douglass, Superior Court Judge

I certify that on 5/16/14
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