

**LBC STAFF RECOMMENDATIONS REGARDING
THE DILLINGHAM ANNEXATION PETITION
RECONSIDERATION DECISIONAL MEETING**

SEPTEMBER, 2011

Introduction

This recommendation is outlined similar to the LBC staff recommendation on the Respondent, Native Village of Ekuk reconsideration request. Staff makes recommendation in this document that is based on the evidence presented by the respondent and the petitioner for the purpose of the Local Boundary Commission's Reconsideration Decisional Meeting. Contrary to previously presented staff recommendations, this report reserves its recommendations for the final conclusion of this report.

This report was written and reviewed by Don Burrell and Brent Williams, Local Boundary Commission staff. The staff are part of the Division of Community and Regional Affairs of the Alaska Department of Commerce, Community, and Economic Development (Commerce). The report can also be found at the following address:

<http://www.commerce.state.ak.us/dca/lbc/dillingham.htm>

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Process and Proceedings

3 AAC 110.580. Reconsideration states,

“(a) Within 18 days after a written statement of decision is mailed under 3 AAC 110.570(f), a person may file an original and five copies of a request for reconsideration of all or part of that decision, describing in detail the facts and analyses that support the request for reconsideration.” and,

“(b) Within 30 days after a written statement of decision is mailed under 3 AAC 110.570(f), the commission may, on its own motion, order reconsideration of all or part of that decision.”

As indicated in the LBC staff Recommendation on Reconsideration of the Dillingham Annexation Petition, LBC staff received a request for reconsideration from the Respondent, Native Village of Ekuk, on Friday, June 14, 2011. A meeting of the commissioners to discuss and take action of the request for reconsideration was held Friday, June 24th. The commissioners vote 4-0 to reconsider only points one and two of the Respondent's request. The points were approved for reconsideration on the basis of 3 AAC 110.580 (e)(3) as outlined:

“The commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision only if the commission determines that

(3) the commission failed to address a material issue of fact or a controlling principle of law; or

Since reconsideration was granted 3 AAC 110.580 (f) further outlines that,

“ . . . If it [LBC] orders reconsideration or grants a request for reconsideration within 30 days after the decision was mailed under 3 AAC 110.570(f), the commission will allow a petitioner or respondent 10 days after the date reconsideration is ordered or the request for reconsideration is granted to file an original and five copies of a responsive brief describing in detail the facts and analyses that support or oppose the decision being reconsidered. The petitioner or respondent shall provide the department with a copy of the responsive brief in an electronic format, unless the department waives this requirement because the petitioner or respondent lacks a readily accessible means or the capability to provide items in an electronic format.”

Upon verbal request made by the respondent during the reconsideration meeting, the commissioner relaxed the specific time limit of ten (10) days to allow for the distribution of the April 25th, 26th, and 27th Dillingham Public Hearing and Decisional Meeting minutes. Those minutes were sent, electronically, to both parties on July 21st, 2011. LBC staff clearly indicated that the deadline for receipt of the reconsideration briefs was 4:30 pm, Monday, August 1, 2011. The respondent, Native Village of Ekuk, and petitioner, the City of Dillingham timely produced responsive briefs for the purpose of addressing their argument for or against the two specific points approved for reconsideration by the Local Boundary Commission.

Reconsideration points

At the June 24th LBC reconsideration meeting, the LBC voted to reconsider the decision on the Dillingham annexation decision made at the April 26 and 27, 2011, decisional meeting, in order to address matters of a controlling principle of law noted by the respondent in points one and two in its reconsideration request. The LBC also relaxed the rules to allow either party to provide a brief on the matter of reconsideration within 10 days after receipt of the minutes. Both the respondent and the petitioner submitted reconsideration briefs in a timely manner.

The two reconsideration points were:

Point #1:

There may have been a substantial procedural error committed by the commission in advising the parties of the deadline for an appeal in order to preserve any claims arising out of the decision. It is not made clear in the decision that it is intended to be a final agency decision and whether the appeal deadline is measured from the mailing date of the decision or some other date in the future.

There are statements made in the decision that indicate that the decision is not a final agency action on this matter. The decision states that the commission voted 5 to 0 to conditionally approve the annexation petition.' The condition imposed by the commission requires that

“Petitioner shall attempt to meet with [the] cities of Aleknagik, Clark's Point, New Stuyahok, Ekkwok, and Manokotak, and the entities of New Koliganek Village Council (DBA Native

Village of Koliganek) and respondent Native Village of Ekuk regarding post-annexation financial matters affecting such parties due to the annexation[;] and file a report of the meeting attempts, whether or not held, and meetings held, if any, with the LBC by [no later than] 11/30/2011.”

The Commission's order states:

... the uniqueness of the territory proposed for annexation coupled with the longstanding tribal, cultural, and economic relationships that persist in this region demand that additional conversation among the villages, tribal entities, municipalities, and the City of Dillingham be held.

The conditional approval of the petition coupled with the finding that the facts presented to the commission demand that further discussion be held by a clear deadline are not statements consistent with finality, nor should they be. Confusion is further compounded by the notice regarding appeal rights contained in the decision which does not provide that it is this decision that is final or whether it refers to a later decision occurring after satisfaction of the condition. **The commission is requested to reconsider its decisional statement and correct it to make it clear that it will be considered a final decision only after the condition has been satisfied [emphasis added].**¹

Point #2:

(2) There has been a substantial procedural error committed by the commission in that the statement of decision does not reflect a full and fair rendition of the decision announced during the decisional meeting. Admittedly, the decisional meeting was held under unusual circumstances and as a result there may be confusion as to what transpired. It began late in the evening following the conclusion of two days of hearings on the merits of the City's petition. The decisional meeting extended until 1 AM of the following day.

Respondent believes that proper administrative procedure requires that the statement of decision contain a discussion of the salient issues considered. This is reinforced by a regulation adopted by the commission which provides:

Within 30 days after the date of its decision, the commission will issue a written decision explaining all major considerations leading to the decision.

Based on information and belief, the decisional statement issued on May 26 does not accurately reflect the contentions of respondent made regarding salient issues and what was decided regarding those contentions by the commission during the meeting. It is a violation of procedure for the decisional statement to omit any of the major considerations that led to the commission's decision. The commission imposed a condition on the approval of the petition. The condition was imposed because there was reluctance on the part of a majority of the membership of the commission to determine that the annexation was in the best interests of the state. Respondent recalls that at least

¹ Respondent Reconsideration Request, pp. 1-2

three members of the commission expressed concerns that the annexation would unduly harm residents of the Nushagak River watershed who are dependent on the fishery for their income. Evidence of this harm was a salient issue raised by respondent's claim that the annexation was not in the best interests of the state. But none of these major contentions are mentioned or considered in the decisional statement. The condition adopted by the commission was the result of a compromise which permitted the concerned members to vote to find that the petition was in the best interest of the state.

The decisional statement declares that the commission finds that the petition as presented is in the best interests of the state without discussion of the issues and contentions of the parties and the department regarding that mandatory statutory standard. The decision makes it seem that the condition imposed on the petitioner was unrelated to the best interest determination and was only added so that the parties could hold additional conversations about longstanding tribal, cultural and economic relationships. This is in variance with the way in which the decisional meeting unfolded and does not faithfully record that the condition was a major consideration for the best interest finding of the commission.

The decisional statement does not accurately record the nature of the condition as understood by respondent. Upon conclusion of the decisional meeting, respondent believed that the condition imposed would require the City of Dillingham to meet with the communities of the region to attempt to agree on a plan to lessen the financial impact of a raw fish tax on residents of the Nushagak River watershed. Respondent understood that the petition would not be considered approved until after a report of the meeting was filed with the commission. It was understood by respondent that because the commission has the duty to determine whether the petition is in the best interests of the state, it was retaining the ability to undertake further proceedings if it believed the meetings did not provide a remedy that would make the annexation serve the best interests of the state.

The commission is requested to reconsider the statement of decision and to accurately and faithfully include all of the major considerations leading to the decision as required by regulation [emphasis added].²

² Respondent Reconsideration Request, pp. 2-5

Commission's Options

Summary of Parties' Positions:

In the respondent's reconsideration brief, Attorney James Baldwin stresses the point that the commission's decision could not be final because it is subject to later agency action. Second, he argues that the decision should be reconsidered to make the condition part of the best interests of the state standard, rather than a condition not attached to the best interests of the state standard. He argues that doing so would lead to greater commission oversight of the condition.

The petitioner's brief argues that clarifying the written decision does not constitute valid grounds for reconsideration. Two, attorney Brooks Chandler argues that the decision does not differ from statements made at the April 26th and 27th decisional meeting. Third, he argues that the decision explains all the major considerations leading to the decision. Fourth, he states that the decision should be revised to identify 3 AAC 110.570(c) as the proper regulation to attach the condition to (it is presently mentioned in 3 AAC 110.900(c) (Transition)).

When LBC Must Make a Reconsideration Decision By:

Per 3 AAC 110.580(g):

“Within 90 days after the department receives timely filed responsive briefs, the commission, by means of the decisional meeting procedure set out in 3 AAC 110.570(a) - (f), will issue a decision on reconsideration. **A decision on reconsideration by the commission is final on the day that the written statement of decision is mailed, postage prepaid, to the petitioner and the respondents [emphasis added].**”

The briefs were timely received on August 1, 2011. 90 days after that would effectively be October 31, 2011. The October 4, 2011, meeting is well within that timeframe.

Options for LBC

The commission's decision can also be reconsidered on points 1 and 2 only. The staff suggests that the best approach for the commission is to examine point one, and then to consider point 2. Our recommendations are laid out in that manner.

Point 1:

The petition process after the hearing has not been sedentary. There have been several meetings held after the decisional meeting regarding this petition. In the view of staff, the LBC has been proactive in considering points raised. As part of that path, the LBC staff is now revising some of its earlier recommendations. We do so based upon the briefs submitted.

We respectfully suggest that the LBC approve reconsideration on point 1. Specifically, we suggest that it approve respondent's request that the decision will be considered final only after the condition is satisfied.

The condition reads:

“Petitioner shall attempt to meet with the cities of Aleknagik, Clark’s Point, New Stuyahok, Ekwok, and Manokotak, and New Koliganek Village Council (dba Native Village of Koliganek) and the respondent Native Village of Ekuik regarding post-annexation financial matters affecting such parties due to the annexation[;] and file a report of the meeting attempts, whether or not held, and meetings held, if any, with the LBC by [no later than] 11/15/2011.”

The due date for motion was later changed per both parties' request, to reflect a report due date of November 30, 2011.

The decision has been mailed. While we agree with respondent that per 3 AAC 110.570(g) the decision is final when it is mailed (unless reconsideration is requested or ordered), the regulation perhaps does not anticipate the current situation. We feel that the LBC could rightfully contend that the decision is indeed final, and that the finality has been communicated to the respondent. But we feel that it is better to for the LBC to reconsider, and change the date in which the decision is final.

Respondent states on page 11 of its brief that “[o]nce the commission is presented with the petitioner’s report, there is a possibility that the parties will be affected by a voiding of the petition . . .” Staff acknowledges that the decision could indeed be voided, and that is why the reconsideration should be granted as to point 1.

Staff suggests that the LBC hold yet another meeting after the petitioner submits its report. The meeting’s purpose would be to review the report and for the **LBC** to determine if the condition has been met. Presently the staff would report to the LBC if the petition has been received. Staff now suggests that it is more appropriate for the commission to consider whether the condition has been met, rather than the staff reporting whether the report has been received. The decision would need to be reissued to reflect whether or not the petitioner met the condition.

It is the staff’s belief that approving this reconsideration request will help all concerned. It would, in effect, add “teeth” to the condition because now the LBC itself would review the report and determine if the condition was satisfied. This would benefit the respondent because there is the possibility that the petitioner would not meet the condition. It is also possible that the discussions would result in a financial agreement between the parties (although not required by the condition). The respondent (and other entities and communities specified in the condition) would further benefit because the petitioner would possibly go to further lengths in meeting and discussing with the specified communities and entities. Such efforts would be consistent with the intent of the condition. While the petitioner would no doubt independently exercise good faith efforts, having the condition undergo commission review would be an incentive to further those efforts.

Staff does not believe that making the petition's finality dependent upon the LBC determining if the condition was met would unduly delay the petition. A LBC meeting can be arranged soon after the petitioner submits its report to determine if the condition was met. The appropriate venue is a meeting, and not a hearing, as respondent suggests.

While the petitioner might feel otherwise, staff sees no real harm coming from the LBC's approval of this request to reconsider point 1. We feel that it is better to change and modify, rather than decline to change. That is not to say that staff agrees with every aspect of respondent's brief – indeed, there are many parts which we disagree with. But, we feel that if the LBC approves the reconsideration request, that doing so will help all concerned. We feel that doing so will promote even more dialogue. We predict that the specified communities and entities, while still presumably unhappy with the annexation, will feel more satisfied because they have been heard out. This will help the petitioner because the more satisfied that the communities and entities specified in the condition are, the more likely it is that the voters will approve the annexation. In the end, staff sticks to its conclusion that the annexation will help all the communities because it will strengthen the hub of Dillingham.

The respondent mentioned that the LBC could monitor the discussions. The condition did not call for that, and we do not recommend the LBC doing so. We recommend that the LBC approve the point 1 reconsideration request to make the petition final if and upon the petitioner meeting the condition. We recommend that the LBC meet after the petitioner submits its report, in order to determine whether the petitioner met the condition.

Point 2:

The condition is presently lodged on page 11 as part of 3 AAC 110.900(c) (Transition). We agree with petitioner that it should be moved. We differ from petitioner in that we do not suggest that it be placed under 3 AAC 110.570(c). 3 AAC 110.570(c) concerns the LBC's power to place conditions as part of approving a petition. In taking a closer look at 3 AAC 110.570(c), it seems to us (and to respondent) that the LBC can add a condition only to enable a defective petition to meet the standards and be in the best interests of the state.

We concur with respondent that the appropriate place for the condition is 3 AAC 110.135 (Best Interests of the State). The condition has been, and remains, a requirement that petitioner must meet. We find that the condition cannot exist unless under 3 AAC 110.570(c) it helps elevate a petition that would not otherwise meet the standards and be in the best interests of the state. We reverse our earlier finding that the condition is independent and autonomous. It must relate to a standard, and also be in the best interests of the state.

In placing the condition, the LBC's goal was for the petitioner to meet with the specified entities and communities and discuss. Reconciliation can be within the best interests of the state standard. We again point out that while an agreement to share tax resources is possible, that the condition does not call for it. It does say that the petitioners shall attempt to meet with the specified communities and

entities regarding post-annexation financial matters affecting such parties and file a report of the meeting attempts, whether or not held.

We do not agree with respondent's suggestion that the condition be amended "so that the petitioner is required [emphasis added] to consult. . . ." Such a modification seems to us to be beyond the grounds for reconsideration. Even if it were within the grounds, the LBC made it clear at the decisional meeting that it was looking for a good faith attempt, not a rigid requirement.

It occurs to staff that imposing such a requirement would effectively increase the condition's requirements by imposing a rigid checklist of officials consulted which the petitioner would have to meet. That does not seem to us to be part of the condition's letter or spirit.

We reject respondent's argument that the LBC has delegated to the petitioner oversight of whether the condition is met. The state, through the LBC, always had oversight of the condition because it had required that a report be submitted. By meeting after the report is submitted to determine if the condition was met, the LBC further increases its oversight.

We suggest that the LBC make the condition part of 3 AAC 110.135, but not change the condition's wording.

Conclusion

Staff believes the intent of the commission in placing the conditional approval on the petitioner needs to be clear to all parties. The condition's intent must be adhered to in order for any approval of the petition to meet the needs of the petitioner, respondent, and ultimately the affected communities and individuals. If the petitioner truly puts forth a good faith effort to satisfy the condition, as indicated in the respondent's brief,

“... it may come to pass that the respondent will no longer be aggrieved by the annexation and an appeal will no longer be necessary. Therefore, it makes good sense and promotes judicial economy, for the commission to retain jurisdiction until after the parties go through the process mandated by the commission.”³

We recommend that the LBC approve the point 1 reconsideration request to make the petition final upon determining whether the condition is met or not. We recommend that the LBC meet after the petitioner submits its report, in order to determine whether the petitioner met the condition. We further recommend that the LBC grant the point 2 reconsideration request by making the condition part of 3 AAC 110.135. We recommend that the LBC limit the reconsideration of points 1 and 2 to those grounds.

³ Respondent's Reconsideration Brief, P. 7