

**Dillingham Annexation Reconsideration
Staff Analysis and Recommendations**

June 2011

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Introductions

The following analysis and recommendations are presented to the Local Boundary Commission by LBC staff. The recommendations are the result of a detailed analysis of the reconsideration request presented to the LBC by the petition respondent, Native Village of Ekuk. The analysis and recommendations are presented in the same fashion as the respondent has present their case regarding their request for reconsideration. LBC staff paraphrases each point presented by the respondent with analysis and a recommendation on that individual point. Upon concluding the analysis and recommendations for each individual point, LBC staff provides a conclusion and a final recommendation for the LBC commissioners' consideration.

The report was written by Brent Williams and Don Burrell, staff to the Local Boundary Commission. 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>

Commerce complies with Title II of the Americans with Disabilities Act of 1990. Upon request, this report will be made available in large print or other accessible formats. Such requests should be directed to the Local Boundary Commission staff at 907-269-4559 or lbc@alaska.gov.

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.”

LBC staff received a request for reconsideration from the Respondent, Native Village of Ekuk, on Friday, June 14, 2011. The reconsideration request was received within the 18 day period outlined in 3 AAC 110.580 (a). Staff notified the LBC commissioners of the request. Commissioners requested an analysis and recommendations from staff and counsel. This report is the product of the LBC Commissioners’ request.

LBC staff has written an analysis and recommendation for LBC outlining all the points mentioned in the reconsideration request. A meeting of the commissioners to discuss the request has been scheduled for Friday, June 24th at 10:00 a.m. via teleconference. Reconsideration of one, some, all, or none of the points mentioned in the reconsideration request will be made during this meeting. 3 AAC 110.580 (e) outlines the following:

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

- (1) a substantial procedural error occurred in the original proceeding;
- (2) the original vote was based on fraud or misrepresentation;
- (3) the commission failed to address a material issue of fact or a controlling principle of law;
or
- (4) new evidence not available at the time of the hearing relating to a matter of significant public policy has become known.”

If the commission finds one of the above mentioned circumstances has been determined, it will grant reconsideration. 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.”

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.”

Appeal is the only option remaining once the decision on reconsideration has been made. Should the commission vote not to grant reconsideration on any of the requested points, the reconsideration request is denied and no further action by the Local Boundary Commission is required.

Should reconsideration be granted, on this request or upon the LBC’s own motion, then a respondent or petitioner has 10 days to file a responsive brief. The LBC would need to have a decisional meeting to consider the reconsideration request and responsive brief. The staff would then draft a decision. Then the LBC would meet to approve or amend the draft decision. The staff would then mail the report before the 90 days. Per 3 AAC 110.580(g), the LBC’s decision on reconsideration is final on the day that it is mailed. These procedures would be similar to the steps taken after the Dillingham hearing. The difference is that only the reconsideration is being considered.

Analysis & Recommendations

The following seven reasons are outlined by the respondent's request for reconsideration. LBC staff has analyzed each point and provided recommendations for the LBC's consideration.

Point # 1 Procedural Error/Appeal & Language Clarification

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, Ekwok, 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 [s] 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.

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.

Analysis

LBC staff analyzed point #1 and finds some merit to the argument presented. The LBC decision does not clearly state a date the decision is final. This results in potentially unclear dates and timeframes for the then remaining procedural options left to the petitioner and respondent (i.e. reconsideration, appeal, etc). The approved condition, and the written decision, do not plainly state whether the final decision date is the date of the mailing of the decision, or if the final decision date is somehow based on the submission of the report.

Under 3 AAC 110.570(g), the decision on a petition is final when mailed, unless reconsideration occurs. But, per 3 AAC 110.580(g), if reconsideration occurs, the LBC must issue a final decision within 90 days after the

responsive brief arrives. The brief must arrive within 10 days of the date reconsideration is granted or ordered.

The commission's motion establishing the condition attempted to provide a "second chance" for the petitioner to settle obvious disputes with communities that will be affected by this annexation. The motion passed by the Commission requiring a report did not require further action be taken by the Commission following submission of the report. None is necessary.

3 AAC 110.570 (g) states "Unless reconsideration is requested timely under 3 AAC 110.580 or the commission, on its own motion, orders reconsideration under 3 AAC 110.580, a decision by the commission is final on the day that the written statement of decision is mailed, postage prepaid, to the petitioners and the respondents."

LBC staff recognizes this regulation as the guide in determining when a decision is final, unfortunately, this regulation was not specified or outlined in the decision and therefore did not clearly communicate the intent of the commission had it been included in the written decision. Based on this regulation, the commission's decision was final and the condition had no bearing on the effective date of the decision. LBC staff realizes that the original inquiry by the Commission at the April 26 – 27 decisional meeting was whether its desire for additional discussion between the petitioner and named entities could be in the form of a "recommendation." But a "recommendation" is not enforceable, so the LBC went the way of a condition. The Commission expressed its underlying assumption and desire that the petitioner and named entities discuss the concerns in good faith and that otherwise, in all other respects, the annexation was approved as final.

Recommendation

LBC staff recommends that reconsideration of point one be granted. Granting reconsideration on point 1 would clarify that the reconsideration decision would be final as of the date that it is mailed. The decision should also explain that if the petitioner does not submit such a report, that the final decision is voided.

Point # 2 Procedural Error/Decisional Meeting & Decisional Statement Differences

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 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.

Analysis

LBC staff agrees that the circumstance of the petition decisional meeting were unique, at best. The decision, however, does not warrant a full, comprehensive, and detailed account of the meeting. That is reserved for the meeting minutes which summarize the meeting's proceedings per 3 AAC 110.570 (e). The decision must "explain all major considerations leading to the decision," per 3 AAC 110.570 (f), which it adequately does. The decision may, however, be re-written to include more than just the predominant factors that led to the final decision made. Other factors that shed better light on the reluctance of the commission to approve the petition without the condition may be included if a rewrite is ordered, based upon reconsideration.

LBC staff would suggest clarification of the limitation of LBC's authority and powers at a later time.

The only enforceable part of the condition placed on the approved petition is the filing of a report outlining the required information specified in the approved motion. If the petitioner does not file a report on or before November 30, 2011, the final decision, whose effective date is based on 3 AAC 110.580(g), becomes null and void. However, should the petitioner complete, and submit a one page report, for example, outlining the "meeting attempts, whether or not held, and meetings held, if any," that report will satisfy the condition. Staff suggests that petitioner submit a more substantial report.

Recommendation

We don't feel that the condition necessarily fits into the best interests of the state standard (3 AAC 110.135 and AS 29.06.040(a)). Instead, page 10 of the petition decision placed the condition under 3 AAC 110.900(d), which allows the LBC to condition approval upon executing an agreement for assuming powers, duties, rights, and functions, and for the transfer and integration of assets and liabilities.

Notwithstanding, LBC staff recommends that point #2 be reconsidered. Although we feel that page 10 of the decision adequately explains why the LBC imposed that condition, it would help to explain that the decision is final when the reconsideration decision is mailed, and not when Dillingham submits its report. The condition is independent of the decision's finality.

The condition is that Petitioners must attempt to meet with [the] cities of Aleknagik, Clark's Point, New Stuyahok, Ekwok, 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 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.

3 AAC 110.570(c) allows the LBC to impose conditions. The condition can stand on this basis alone. We suggest that this point be stated in the reconsideration decision.

Point # 3 Delegation of Powers

If it was the commission's determination that it did not intend to retain any power to review compliance with the condition imposed on the petitioner, then respondent requests reconsideration on the alternative ground that the commission failed to address a controlling principle of law. The effect of imposing a non enforceable, non reviewable condition to resolve a mandatory standard for annexation is that the commission made an unlawful delegation to the petitioner of the power of determining a means to satisfy the requirement that the annexation be in the best interests of the state. In making this delegation, the commission failed to address the provision of any explicit or implicit standards for the exercise of the delegated power. The Alaska Supreme Court has stated:

Review of our decisions which have addressed delegation issues leads to the observation that whether one employs explicit or implicit standards, ' {t}he basic purpose behind the non delegation doctrine is sound: Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit.

If the decision stands as presented in the statement, the city would have complete discretion to determine whether to provide relief to the residents of the region. The decision provides no oversight of the public interest to determine if the city has properly exercised the discretion granted.

Respondent does not believe that the duty imposed by law to determine whether the annexation is in the best interest of the state should be left entirely in the hands of an interested party. This would violate the intent of the framers of the Alaska Constitution who intended that the Local Boundary Commission would be the final arbiter of local government boundary disputes. The commission must remedy its failure by reconsidering its decision and addressing the legal principle of whether the commission's power to determine whether the

annexation of territory is in the best of the state can be delegated to the city, and if that power can be delegated, under what standards the delegation will be exercised.

Analysis

3 AAC 110.570 (c) states,

“If the commission determines that a proposed change must be altered or a condition must be satisfied to meet the standards contained in the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, or this chapter, and be in the best interests of the state, the commission may alter or attach a condition to the proposed change and accept the petition as altered or conditioned. A motion to alter, impose conditions upon, or approve a proposed change requires at least three affirmative votes by commission members to constitute approval. If the proposed change is a

- (1) municipal annexation, detachment, deunification, dissolution, merger, or consolidation, a city reclassification, or a legislative-review borough incorporation under AS 29.05.115, and if the commission determines that the proposed change 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;”

LBC staff does not find any implication that the Local Boundary Commission has in any way delegated its power to the petitioner. The commission found the petition met the best interests of the state standard. Further, the condition was not based on the best interests of the state standard. It was based (under 3 AAC 110.900(d) – see Point #2) on the need for the petitioner to reconcile itself with the neighboring communities before holding an election of the Dillingham residents. The LBC set this condition knowing that the ties among all affected communities could very well be negatively affected if the petitioner did not make a sincere effort to mend cultural and political ties with the other communities. The condition was a courtesy that was not required by regulation or statute, but rather extended for the benefit of the entire Nushagak Bay including, but not limited to, the petitioner.

Recommendation

LBC staff recommends that the commission does not reconsider its decision based on the merits of point #3.

Point # 4 Petition change from Local Action to Legislative Review

Respondent alleges that the commission's decision failed to address a controlling principle of law in that the commission was under the mistaken belief that the choice of the local action annexation method for the city's annexation petition was entirely in the hands of the petitioner. During final argument, respondent asked the commission to reject use of the local action annexation method so that petitioner would be required to process the petition according to the legislative review annexation method. Respondent objected to the local action method because only voters of the city would be entitled to vote on the question thereby leaving residents of the region who testified as to their connection to the territory without any say in the matter. By requiring legislative review, residents of the region would have another forum in which to air their grievances. The chairman advised respondent that the commission could not grant this relief because the choice of the form of the petition was entirely in the hands of the petitioner, not the commission. However, the regulations of the commission provide:

Territory contiguous to the annexing city, that meets the annexation standards specified in 3 AAC 110.090 - 3 AAC 110.135 and has been approved for local action annexation by the commission. may be annexed to a city by . . . approval by a majority of votes on the question cast by voters residing in

- (A) the territory; and

(B) the annexing city

The foregoing regulation provides that use of the local action method is subject to the approval of the commission. Nowhere in the documents filed in the docket for this petition has respondent located evidence that the commission expressly approved of the use of the local option method for this annexation. Such approval is required. The regulation plainly contradicts the ruling of the chair in that it provides that it is the commission, not the petitioner that has the power to determine whether the local action method may be used. There was substantial credible testimony during the hearing that the residents of the communities in the region were not adequately informed about the effect of the requested annexation. Respondent submits that the more rigorous notification process required by 3 AAC 110.450 for annexation by legislative review would possibly have given the local communities a better notice and understanding of the contents of the petition and its possible effects. The commission is requested to reconsider its decision in order to correct its failure to address this controlling principle of law regarding the proper exercise of the power to determine the appropriate method of annexation to be used. The commission must first remedy the absence of a determination regarding the method to be used. The commission is then requested upon reconsideration of this issue to take action to disapprove use of the local action method and thereby allow petitioner to proceed with the legislative review method to effect the annexation. This action, if implemented, could provide the communities of the region with the notice and other due process to which they are entitled.

Analysis

LBC regulations allows the commission to change a legislative review petition to a local action petition, however, regulation does not call for the reverse to be allowable. 3 AAC 110.610(a) states,

“(a) The commission may determine during the course of proceedings that a legislative review petition must be amended and considered as a local action or local option petition if the commission determines that the balanced best interests of the locality and the state are enhanced by local participation.”

Nowhere in 3 AAC 110.600 Local action/local option elections does it allow the commission the option to change a local action to a legislative review petition. This was a question that the chair specifically asked during the proceedings. Even if the LBC had that broad power, it is not required to change the method of the petitioner under 3 AAC 110.150. Further, the rigorous notification process required by 3 AAC 110.450 applies to both legislative review and local action methods.

Recommendation

LBC staff recommends that the commission does not reconsider its decision based on the merits of point #4.

Point # 5 Region of the State - Controlling Principal of Law

The decision should be reconsidered because the commission failed to address a controlling principle of law in that it assumed it was appropriate for a city to provide government to a region of the state. In this regard, the commission fails to address the distinction required by the law between cities and boroughs. The effect of the decision, if finally approved by the voters of the city, would be to allow a city to govern a region of the state, rather than only the area encompassing a present existing community associated with the city. By allowing a city to annex over 400 square miles of unpopulated territory within which several other communities of the region also have direct and significant political and socio-economic connections, the commission would create a municipality that exceeds the scale appropriate for a city. In effect, the decision would create a putative borough government that lacks the responsibility to govern in the best interests of all the residents of the

region. In this regard, the commission should reconsider its decision and consider whether the creation of a new borough, or annexation to an existing borough should provide government to the territory identified for annexation.

Analysis

The argument presented in this point is similar, if not the exact same argument presented by the respondent in its responsive brief, preliminary report comments, and deliberation in the public hearing. LBC staff presented its preliminary report and final report findings based on the information provided and available to it. The commission rendered its decision based on the merits of the information provided by all, including the recommendation of the respondent, petitioner, LBC staff, and upon public comments.

Recommendation

LBC staff recommends the commission does not reconsider its decision based on the merits of point #5.

Point # 6 Existing Community - Procedural Error

The commission committed a substantial procedural error when it determined that there was a present existing community included within the territory identified for annexation. The commission accepted as fact that the territory identified for annexation contained a population of transient fishers and that these persons constituted a present existing community identified with the petitioner. Under regulations of the commission, a community consists only of permanent residents, not persons who lack intent to be domiciled in the community. If the commission believes that it is appropriate to consider transient persons for purposes of establishing a community, it must amend the regulations in the manner required by AS 44.62.180 - 44.62.290 of the Administrative Procedure Act. To apply a new definition of "community" and "permanent resident" without first amending the administrative regulations constitutes a substantial procedural error which requires reconsideration. The commission is requested to reconsider the decision and either apply the regulations as written or suspend action on the petition until the regulations are amended as required by law.

Analysis

As with point #5, the commission considered all the information provided to them before and during the public hearing. LBC staff sees no new information has been provided warranting the need to reconsider this point made by the respondent. LBC staff also does not find any "substantial error" made or occurring that led the commission to render the decision it unanimously chose to deliver.

Recommendation

LBC staff recommends the commission does not reconsider its decision based on the merits of point #6.

Point # 7 Misapplication of Regulation - Controlling Principle of Law

The commission failed to address a controlling principle of law when it misapplied its own regulation. In the decision, the commission concluded that it need not consider whether the boundaries of the territory identified for annexation contained entire geographical regions or large unpopulated areas. The commission reasoned that it need not disapprove the petition on this basis because it concluded

The petition meets the standards of 3 AAC 110.090 - 3 AAC 110.135.

The regulations permit a petition to include unpopulated areas and geographical regions if the boundaries are "justified" by application of those standards. 3 AAC 110.130(c)(2). This regulation requires a finding that is higher than simply that the petition meets the other standards for annexation. It requires that the boundaries be justified by these other standards. The decision announced by the commission does not contain the required justification, which absence was presumably based on a failure of the commission to address this controlling principle of law. For this reason, respondent requests that the question of annexing over 400 square miles of an unpopulated region be reconsidered using the correct standard imposed by regulation.

Analysis

Staff feels that respondent has a point, but that the point doesn't have sufficient merit to validate reconsideration. We feel that respondent is putting undue emphasis on the word "justified" in the term "justified by the application of standards in 3 AAC 110.090 – 3 AAC 110.135" to suggest that "justified" is a higher standard than being synonymous with "meets." We have interpreted "justified" as being synonymous with "meets." As indicated above, LBC staff does not find any "substantial error" made or occurring that led the commission to render the decision it unanimously chose to deliver.

Recommendation

LBC staff recommends the commission does not reconsider its decision based on the merits of point #7.

Conclusion

As outlined in 3 AAC 110.580(e) Reconsideration, “The commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision only if the commission determines that

- (1) a substantial procedural error occurred in the original proceeding;
- (2) the original vote was based on fraud or misrepresentation;
- (3) the commission failed to address a material issue of fact or a controlling principle of law; or
- (4) new evidence not available at the time of the hearing relating to a matter of significant public policy has become known.

LBC staff concludes that points #1, 2, and 6 warrant reconsideration due to the “unusual circumstances” of the public hearing and decisional meeting. LBC staff believes the simplest resolution to the reconsideration of this item is to re-issue the decision with the addition of the language necessary to clarify the commission’s decision, with clarification of the intent behind the condition, as well as the addition of a clear final date. LBC staff recommends that the grounds for the reconsideration are under the second part of (3), that the “commission failed to address . . . a controlling principle of law.” The controlling principle of law would be the need for clearly stating that the decision was final, specifically 3 AAC 110.570(f)(g), 3 AAC 110.580(g), and 3 AAC 110.900(d). 3 AAC 110.130(c) would also apply. Respondent had based them all on [substantial] procedural error, which we do not feel applies.

All other points for reconsideration do not merit reconsideration.