

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

In the matter of the Petition by the City of)
Manokotak to Annex the Weary/Snake River)
Tract, The Snake River Section and Igushik)
Section of the Nushagak Commercial Salmon)
District, and the Igushik Village Tract,)
Altogether Consisting of Approximately 37)
Square Miles of Land and 118 Square Miles)
Of Water, by the Legislative Review Method)

**PETITIONER CITY OF MANOKOTAK'S REPLY BRIEF IN SUPPORT OF ITS
PETITION FOR ANNEXATION**

I. INTRODUCTION.

The City of Manokotak (hereinafter "Manokotak") files this reply brief in reply to the Responsive Brief of the City of Dillingham, filed February 26, 2016. No other responsive briefs have been filed in opposition to Manokotak's annexation petition.¹

The Responsive Brief by the City of Dillingham (hereafter "Dillingham") asserts that Manokotak's annexation does not meet a regulatory standard regarding financial feasibility, which is addressed below. Dillingham's brief is noteworthy in that it does not otherwise contest the merits of Manokotak's annexation, nor its compliance with the regulatory standards for annexation.

Dillingham's arguments boil down to two general points:

- (1) Dillingham can better provide services to Manokotak annexation Tract B (the Igushik statistical fishing area) than can Manokotak, because this finding was made

¹ The Southwest Region School District filed a responsive brief to both the Dillingham and Manokotak Annexation Petitions, supporting Manokotak's annexation, including annexation of the Igushik Section contested by Dillingham. (Brief, at p. 21.) The Native Villages of Ekuk, Clark's Point and Portage Creek and the City of Clark's Point filed a joint Responsive Brief conditionally supporting Manokotak's annexation, provided that neither a borough formation nor a tax "compact" among the affected communities occurs. (Brief, at p. 10.)

in a prior LBC decision (which, as discussed below, was reversed by the Superior Court because the inappropriate “local action” annexation process Dillingham utilized afforded insufficient due process opportunities to opponents of Dillingham’s annexation, including Mankotak); and

(2) there is no practical method for determining which commercial fish catches and earnings derive from the Igushik statistical area, and therefore no feasible method for Manokotak to impose a raw fish tax there.

Both assertions are demonstrably erroneous, and are addressed below.

II. **MANOKOTAK’S ANNEXATION OF THE IGUSHIK AREA WILL RESULT IN SUBSTANTIALLY GREATER MUNICIPAL BENEFITS TO FISHERMEN AND SUMMER RESIDENTS THERE THAN WOULD A DILLINGHAM ANNEXATION.**

Before comparing the municipal services to be offered by the respective petitions, this reply must address Dillingham’s persistent misreliance on the prior, vacated LBC decision to approve Dillingham’s proposed annexation. When the Superior Court reversed that decision on grounds that the inappropriate “local action” procedure used by Dillingham operated to deny constitutional due process to opponents, including Manokotak residents, the Court’s reasoned statement of decision was not just “words” to be disregarded as being merely technical but otherwise lacking substantive meaning. The Court’s conclusion meant that opponents to Dillingham’s annexation, including Manokotak, had not had sufficient opportunity to express their facts and arguments in opposition to Dillingham’s annexation petition. As a result, the LBC’s hearing record was incomplete.

While “process” arguments are often disparaged by those who have “gotten their way” with government action, a defective process is vitally important to those who feel they

received the “short end of the stick” as a result. Most importantly, adherence to statutory, regulatory and constitutional requirements of due process supports acceptance by all that the result is fair and impartial. The Court acted to remedy procedural defects by determining that the prior findings and decision were void, such that, the LBC should start afresh in its review, including review of new facts and argument, without being saddled with its prior findings. Dillingham’s effort to resurrect the prior LBC decision on its discredited petition belies its lack of confidence in prevailing when all parties may fairly present their positions.

The LBC’s staff technical review letter of April 3, 2015 pointed out some of the reasons why the Commission’s vacated decision on Dillingham’s 2010 petition should have no probative value in the current consolidated proceedings:

As Mr. Roberty Heyano pointed out in his February 24, 2015 letter, it is incorrect to say that the Local Boundary Commission (“LBC” or “commission”) is bound by its earlier decision and cannot reverse or change its findings. This is a remanded petition. The LBC is not bound by its earlier decision, nor is it bound by its previous findings for the individual standards. Circumstances might have changed since the earlier decision. The composition of the commission has changed since the decision. The commission will examine the petition and the submitted comments and briefs, listen to the testimony, arguments, and public comments given at the hearing, and determine anew whether the petition meets the standards.

In addition to these legitimate reasons, the limited opportunity for Manokotak to oppose Dillingham’s prior annexation effort is and will be illustrated by the much more comprehensive facts and arguments marshaled in its briefing herein, and in the testimony which will be presented in the upcoming hearings. Even more importantly, Manokotak has now had a chance to seek its own annexation, and to place this before the Commission for a side-by-side comparison that demonstrates that it is more appropriate, fair and efficient for

the contested Igushik Section² to be annexed to Manokotak rather than to Dillingham. Such a comparison was not previously before the Commission for its consideration.

In any case, the logic of the Commission's prior vacated decision, as well as its staff's report recommending it, does not support Dillingham's annexation of the Igushik Section, at the expense of a potential Manokotak annexation. The staff's prior recommendation and the Commission's prior decision concluded that Dillingham's annexation was justified because of alleged general and often indirect benefits to Nushagak Bay fishermen and adjacent communities from the existence of a "regional hub" benefitting both. This was a better argument for a borough than for a city annexation, and a city should not be granted territory on the strength of "regional" arguments just because there is no borough in place.

There certainly can be a legitimate justification for a city to extend its boundaries into an adjacent economic area that the city predominately relies upon, and that is of primary importance to the city's residents, as opposed to residents of other cities or villages. But this cannot justify a city's annexation of an area more closely associated with a different city, particularly a different city that is seeking to annex the same area. The indirect "regional hub" arguments of a more distant city cannot prevail, under the city annexation standards, over the annexation interests of a closer city (1) whose residents have substantially greater use and dependence upon the specific area in issue and (2) which has and will provide direct services to this area, as opposed to merely offering to continue indirect benefits resulting from its status as a hub for a broader general geographic region.

² All references to the "Igushik Section" herein are to the area described by ADF&G as the Igushik statistical area (see Exhibit A-4.2, p. 56 to Manokotak Petition, which actually includes both ADF&G statistical areas 325 - 10 (drift fishing) and 325-11 (shore based net fishing), though these encompass the same geographical area. The Igushik Section, as referenced herein, directly corresponds to Manokotak's proposed annexation Tract B.

While regional hub relationships often define the boundaries of Alaska boroughs, they cannot justify super-expansion of a city into a quasi-borough region, usurping areas adjacent to other cities that have demonstrably greater connections. None of the prior examples of LBC approval of city annexations of adjacent fishing districts have authorized their annexation of areas more closely associated with another city or village.

When the Commission first considered Dillingham's annexation petition, Manokotak had not filed its own annexation petition, though it had indicated its intention to explore this possibility. Now the Commission has before it an actual petition by a city more proximate to and more directly affected by one specific area - - the Igushik Section - - in the larger Nushagak District region Dillingham seeks to annex. Coincidentally, the annexation of the Igushik Section to Manokotak would result in a fairly proportional allocation of fish tax revenues between Manokotak (15% of total) and Dillingham (85% of total.) On average, the Igushik Section has produced approximately 15% of the total sockeye harvest and 15% of estimated gross revenues in the entire Nushagak District. See, Manokotak Petition, page 25-26, Tables 7 and 8. Annexation of the Igushik Section by Manokotak would therefore result in Manokotak's receiving approximately 15% of the Nushagak District revenues, with Dillingham receiving the other 85% if it is permitted to annex the remainder of The Nushagak District. According to the same CFEC Fishery Statistics source as used by Dillingham (Ex. D, Dillingham Responsive Brief) Dillingham has approximately three times as many commercial fishing salmon permit holders (197, as of 2014) as does Manokotak (64 salmon permits). See 2014 CFEC fishing statistics, "Permit and Fishery

Accounting By Year...Or City”, Ex. A hereto.³

Conversely, it would be unfair for Manokotak’s fishermen in the Igushik section to pay taxes to a more distant city, where, as discussed in Manokotak’s prior Responsive Brief in Partial Opposition to Dillingham’s Annexation, Manokotak’s resident fishermen make relatively little use of Dillingham’s harbor facilities and services, and already pay for them when they do use them.

A fresh examination of the facts and arguments regarding the relative municipal services to be offered by the respective petitioners, specifically to the Igushik Section fishermen, is therefore required; this is particularly the case because no competing Manokotak annexation petition was previously before the Commission for consideration.⁴

A. Dillingham Offers Little or No Services.

A fair comparison of the services offered to Igushik by the two petitioners must first focus on the reality of what services would be offered by Dillingham: this amounts to little or no services. Dillingham’s petition is primarily focused upon its provision of existing port, harbor and landfill services within its existing jurisdiction, which would be essentially unchanged following annexation. A fair analysis of this justification for annexation and taxation indicates the following:

³ Manokotak’s annexation petition (p. 9, Table 4) showed that there were 90, not 64 Manokotak resident salmon permits in 2014. This figure came from a different data source, also from CFEC’s website (see <https://www.cfec.state.ak.us/plook/#permits>). The discrepancy between these two sources apparently arises from the fact that some Manokotak residents did not activate their permits in 2014; some permits were transferred or cancelled; and CFEC does not reconcile different data compilations when it updates data. (Conversation with Ty McMichael, CFEC, 907-790-6950.)

⁴ This consideration alone undercuts Dillingham’s repeated reliance upon the LBC’s 2011 decision, which found that “no other existing municipality has the ability to provide essential municipal services to the territory to be annexed more efficiently and more effectively” than Dillingham. (Dillingham’s Responsive Brief, p. 5, quoting from the LBC’s December 12, 2011 Decision.) That finding was made in the vacuum in which there was no other pending annexation petitions, and also occurred in the context of a faulty Dillingham approach to annexation which denied Manokotak residents their due process rights to timely notice and sufficient opportunity to comment on and oppose that petition.

1. Many of the drift net vessels, and most of the set net skiffs used by commercial fishermen in the Nushagak District, make at most only sporadic use of the Dillingham port, harbor and landfill, such that Dillingham's justification for its fish taxation throughout Nushagak Bay is highly suspect.

Many of the Nushagak District drift net vessels anchor up near the fishing grounds between fish openings during the short (4 - 6 weeks) season. They do not go into "town," because the emergency opening practices of ADF&G present the risk that travel to Dillingham may result in failure to arrive on the grounds in time to participate in the prime fishing time at the beginning of each opening. Drift net fishers deliver their catch to floating processors anchored in east Nushagak Bay near Clark's Point, or to tender vessels who pick up fish deliveries on the fishing grounds, many of which deliver this pack to processors outside of Nushagak Bay, including in the Naknek area. Staying on the fishing grounds, drift net boats also buy their groceries and fuel from the on-site floating processor or from tender vessels. They offload their garbage to tenders, many of which are bound for Naknek, not Dillingham.⁵ These fishermen would be paying a raw fish tax for Dillingham services which they rarely if ever require or use.⁶

Dillingham's disconnect between taxes and proposed municipal services is even more pronounced with set netters, who conduct their fishing activities from remote beach sites around Nushagak Bay, using small skiffs. During the fishing season, they purchase fuel and food and obtain ice and water from the fish buyer tender vessels that come directly to

⁵ The facts in this paragraph were obtained from conversations with Robert Heyano (907-843-1333), longtime Nushagak Bay drift net fisherman; and with Bob Waldrop, former Executive Director of the Bristol Bay Regional Seafood Development Association (907-223-1588.)

⁶ More of the drift net fishermen are from outside of Bristol Bay than Dillingham represents. Its Responsive Brief overstates the number of Bristol Bay resident drift net permittees, by misinterpreting its own Exhibit C (CFEC report) at p. 10. Only 349 out of the total of 1,863 Bristol Bay drift net permits, not 829 as represented by Dillingham, are held by Bristol Bay residents. CFEC's Table 3 describes only "Local" residents as being residents of Bristol Bay; both "Nonlocal" and "Nonresident" drift net permit holders are from elsewhere.

the Igushik Village area. During the off-season, few Manokotak set netters store their boats in Dillingham. The Nushagak set net fishery represents a substantial share of commercial fishing in the Bay. There are nearly half as many set net permits fishing the Nushagak District (275 permits) as there are drift net permits (546).⁷

These factors illustrate the shortcomings of Dillingham's shotgun fish tax on all drift netters and all set netters - - including many who use Dillingham's facilities very little or not at all - - instead of simply raising direct user fees for harbor and landfill use, which would fairly impose costs directly upon users responsible for the costs.

2. Those vessels that *do* use Dillingham's facilities already pay the cost of their usage through moorage and landfill fees.

While Dillingham asserts an annual shortage of \$75,000 in harbor revenues, Dillingham's overall fish revenues related to fishing fleet use substantially exceed its overall commercial fishing-fleet related costs.⁸ And again, if Dillingham's moorage rates are so low as to result in a budgetary shortfall, the shortfall can be more directly addressed through user fee increases rather than through a shotgun raw fish tax imposed throughout Nushagak Bay. Dillingham's annual moorage rate of \$280 for a 32 foot vessel is far below - - less than a quarter of - - the \$1,270 average rate charged by other comparable Alaska ports.⁹ In that context, it is pertinent that Dillingham residents (46% of harbor permits) are the primary

⁷ See "CFEC Permit Holdings and Estimates of Gross Earning in Bristol Bay, Exhibit C to Dillingham's Responsive Brief at pp. 16 and 23. The total gross earnings by set netters in Nushagak Bay (12.9 Million Dollars) are approximately one-third of the total gross earnings of Nushagak Bay drift netters (38.8 Million Dollars). *Id.* Dillingham's equal tax rate would therefore be imposed upon set netters who constitute a substantial share of the fishery, despite the fact that they make very little use of Dillingham's port, harbor and landfill facilities.

⁸ See Table "Comparison of City of Dillingham Commercial Fishing Fleet-Related General Fund Expenditures and Revenue", p. 13, Manokotak's Responsive Brief in Partial Opposition to Dillingham's Petition.

⁹ As reviewed in Manokotak's responsive brief in partial opposition to the Dillingham petition, at pp. 9 - 10.

beneficiaries of its underpriced moorage rates. Residents of all the region's villages combined account for only 6% of all Dillingham harbor permits. Other Alaskans (17%) and nonresidents of Alaska (30%) account for the balance.¹⁰

3. Most importantly with regard to the Igushik Section contested by the two petitioners, Igushik fishermen make relatively little use of Dillingham's port, harbor and landfill (and again, pay user fees when they do so.)

As previously noted, the great majority of set net sites in the Igushik Section are operated by Manokotak residents. The makeup of the drift net fishermen who fish the Igushik Section cannot currently be derived from ADF&G or CFEC statistics because, as previously noted, ADF&G has not been requiring fishermen and processors to identify the specific statistical area where they have harvested fish.¹¹ By local knowledge,¹² however, approximately one-third of the Igushik statistical area drift fishermen are Manokotak residents, while less than 10% of these fishermen are from Dillingham, and the remainder are from elsewhere.¹³ Unlike the aggregate of all fisheries in Bristol Bay or even Nushagak Bay, wherein most of the fish catch and gross earnings is by drift netters, the drift net

¹⁰ Dillingham petition, at page 7.

¹¹ The Dillingham brief's focus on aggregate data regarding the makeup of drift net permit holders and income throughout Bristol Bay is not particularly probative as to the drift net participation in the Igushik section fishery in issue in Manokotak's proposed annexation. Manokotak is not petitioning to annex the entire Nushagak District, nor to tax or deliver services to the significant majority of the Nushagak District drift fleet that does not fish the Igushik District.

¹² Conversation with Moses Toyukuk, Sr., past president of the Manokotak Village Council and former city mayor (907-289-6256), who is a drift net fishermen who has long fished in the Igushik area. His estimates are based upon his observation of the Manokotak and Dillingham boats fishing the Igushik district, and of the typical markings of drift net boats from the more eastern districts of Bristol Bay, e.g., Nushagak.

¹³ One reason most Nushagak District drift fishermen avoid the Igushik section is that it is an increasingly tricky area to fish, with increasing shoaling outside the Igushik River mouth resulting from depositions of soils carried out by the river, also resulting in numerous shifting channels requiring local knowledge. (Conversation with Moses Toyakuk, Sr. (907-289-6256.) A drift net boat which accidentally goes aground, or has part of its drift net go aground, can be held to be fishing illegally, because a drift netting operation must not be connected to land. As a result, the Igushik District is disproportionately drift fished by Manokotak residents.

fishery in the Igushik Section accounts for a minority of the fishing harvest and earnings there.¹⁴ With regard to total set net and drift net fishing effort in the Igushik Section, most of this is conducted by Manokotak residents, with a much smaller share by Dillingham residents.

Because the Igushik Section harvest historically represents only 15% of the total Nushagak District harvest, approval of Manokotak's petition would have minimal impact on Dillingham's tax revenues. Exclusion of the Igushik Section from Dillingham's tax base is further warranted because any Igushik Section drift netters who actually use Dillingham's fleet-related services are already paying Dillingham's fees and charges, sales taxes, and other applicable taxes. Igushik Section drift netters who also fish other parts of the Nushagak District (including Manokotak resident drift netters who sometimes fish in the Nushagak District outside of the Igushik Section) would be paying Dillingham fish taxes on their harvest there, if it were annexed to Dillingham, even if Igushik were annexed to Manokotak.

To summarize, Dillingham offers no new or direct municipal services to the annexation area, other than an ephemeral "enhanced public safety response", based in Dillingham. Even in this case, Dillingham acknowledges that the Alaska State Troopers would remain the primary responder throughout Nushagak Bay.¹⁵ The extent of this search and rescue commitment, with respect to either the Igushik area in issue or the entire Nushagak District, is not apparent from Dillingham's annexation petition. Its petition does not budget any specific sum for search and rescue operations, in Dillingham or in the

¹⁴ Conversation with Moses Toyukuk, Sr.

¹⁵ Dillingham Petition for Annexation, p. 43.

proposed annexation territory. Neither Dillingham's current budget¹⁶ nor its most recent audit¹⁷ identifies any specific expenditure for the limited search and rescue support it claims it already provides in the city and in the territory.

Other than in this non-specific commitment, Dillingham's Transition Plan¹⁸ acknowledges that "no specific action" would be required of the City upon annexation, stating that "[t]he City will simply continue to provide [its existing municipal] services as it has done for decades".

Dillingham's responsive brief (at p. 3) argues that "[t]here is a difference between a need for government and a desire for services." Actually, these two concerns ordinarily go hand-in-hand. It might be more accurately stated that "there is a difference between a need for government and a need for additional tax revenues". The latter appears to be Dillingham's sole basis for annexing territory far from its current boundaries, where new taxes would not be used to support new services into the annexation area.

B. Manokotak Offers Local, Needed Services in the Proposed Annexation Area.

In contrast to Dillingham's proposed annexation of the Igushik area, Manokotak's annexation and accompanying raw fish taxation¹⁹ would result in a city tax which would primarily be imposed upon its own residents, unlike Dillingham's effort to tax primarily

¹⁶ Dillingham 2015 budget adoption ordinance, see pages 13-30, http://www.dillinghamak.us/vertical/sites/%7BC84DE958-9EE4-4CFE-90E3-D1666668A90E%7D/uploads/Packet_-_June_18_2015.pdf.

¹⁷ City of Dillingham FY 2014 Audit, see http://www.dillinghamak.us/vertical/sites/%7BC84DE958-9EE4-4CFE-90E3-D1666668A90E%7D/uploads/Dillingham_City_of_FS_Final_2014.pdf.

¹⁸ Exhibit D, p. 43, Dillingham Annexation Petition.

¹⁹ Because annexation of the fishing area must precede Manokotak's adoption of a raw fish tax, and because raw fish tax revenues are directly linked to Manokotak's annexation goals, it would be appropriate for the LBC to condition approval of the annexation upon adoption of such a tax.

non-residents of Dillingham. There is a direct nexus between the proposed annexation and Manokotak's proposed city services in the annexation area. Expansion of Manokotak's jurisdiction is needed to equip the City with the jurisdictional powers and fiscal resources to deliver essential city services to the 400 summer occupants who live at Igushik Village and fish the shores and waters of the Igushik Section. Most of these occupants are Manokotak residents. Through their city government, they have said that they need government in the annexation areas, desire essential city services there, and are willing to tax themselves for that purpose. The annexation petition seeks to provide needed government and services.

The essential city services Manokotak proposes to provide within its annexed territory are a raw fish tax and:

- a. a reliable potable water source;
- b. ice-making equipment for fishers and domestic use;
- c. solid waste management;
- d. small boat haulouts and boat storage at Igushik Beach and Weary River;
- e. alcohol control and other general welfare powers;
- f. search and rescue support; and
- g. comprehensive planning.

In contrast, Dillingham has not offered to provide the desired services at Igushik Village or in the Igushik Section, perhaps because it realizes that it cannot provide such services in a cost-effective and efficient manner in areas so distant from Dillingham. Approving a Dillingham annexation of Igushik would not only unfairly impose a tax burden there; it would also frustrate Manokotak's effort to deliver needed services to the occupants

and users of the Igushik area.

Dillingham's responsive brief also makes the novel argument that Manokotak's annexation should not be approved because the services Manokotak proposes could be delivered by Manokotak extraterritorially, without need for annexation. Because some of Manokotak's envisioned projects and services would occur in coordination with federal funding which is not restricted to municipal corporations, Dillingham argues that Manokotak needs no annexation.

There are at least two problems with Dillingham's argument. First, it bears no relationship to the regulatory standards for city annexation. The proposed area needs municipal services, the area is compatible with the character of the annexing city, the city has the financial resources necessary to provide services to the area, and Manokotak's ability to meet these and the other standards for annexation is not undercut by an assertion that the city could provide such services on an extraterritorial basis without annexation. In essence, Dillingham argues that it should be allowed to annex the Igushik Section itself, but that Manokotak, not Dillingham, should extend municipal services there.

Annexation of the Igushik area by Manokotak is the simple, cost-effective and efficient means for Manokotak to deliver and help fund ongoing services in Tracts B and C. Dillingham's suggestion that Manokotak deliver proposed services on an extraterritorial basis into an area to be annexed by Dillingham is not practical, cost-effective, efficient nor fiscally sustainable - - particularly where the fish tax revenues which would help fund these services would go to Dillingham, not to Manokotak.

Dillingham challenges Manokotak's need for, and ability to deliver, some of the services it proposes to extend into the annexation area. It asserts there is no evidence of need

for prohibition of alcohol possession in the Igushik Area, nor is there evidence as to how such prohibition would be enforced by the City. Both assertions are incorrect. There have, in fact, been past periodic problems with alcohol consumption in the area. The Village Police Safety Officer (VPSO) stationed in Manokotak takes a new VPSO 20-foot runabout from Manokotak to Igushik to address alcohol abuse and other reports of criminal conduct during the summer months when the area is occupied by most of Manokotak's residents.²⁰ The drift net fishermen quite frequently fish close in to the Igushik Beach area and communicate with residents there via VHF radio, such that indications that a drift netter is intoxicated would become known and subject to municipal enforcement.

Dillingham asserts that there is no "haphazard development" in Igushik that requires planning and zoning ordinances, and that Manokotak in any case lacks planning powers. It is true that Manokotak, like Dillingham, has not adopted zoning powers. However, consistent with A.S. 29.35.260(c), Manokotak actively exercises comprehensive planning powers, and has completed and adopted comprehensive plans in 2002 and 2005; and in 2015 it completed a 64-page comprehensive plan update. Its petition budgets funds for land use and capital project planning at Igushik. All this compares favorably with Dillingham's own comprehensive plan efforts. Manokotak's planning can and will address the need for appropriate separation of residential houses in Igushik from more industrial activities, such as solid waste management and locations for a potable water source, a local ice-making facility and boat storage.

²⁰ Conversation with Melvin Andrew (907-717-8259), mayor of Manokotak, who was himself the VPSO for 23 years, until 2010.

Annexation would support Manokotak's exercise in the annexed area of several important jurisdiction-dependent powers already authorized under its code of ordinances, including ordinances relating to control of intoxicating liquors and beverages, protective custody (including of inebriates), dog control, disposal of garbage and trash, motor vehicle use (including 4-wheelers) and gambling. Most importantly, it would allow the city to exercise eminent domain powers in the annexation area, which is potentially important for site acquisition and control, in order to qualify for capital grants.

Manokotak's authority and ability to exercise its existing extraterritorial services in the Igushik area would be reinforced by annexation. Manokotak has a VPSO who responds not only to criminal matters but also to public safety emergencies. Manokotak also has a well-established cadre that has and will provide important safety assistance to both residents and fishermen (set netters and drift netters) in the Igushik area. This includes about 25 men, along with several women who assist in handling VHF radio communications. The search and rescue group has its own 18-foot skiff and outboard and can, when necessary for a search, also mobilize the new VPSO boat as well as private boats owned and operated by search and rescue group members. Some of the members are emergency medical technicians and are capable of administering CPR. One member has a "six-pack" license for carrying passengers. The group undertakes periodic first responder training. The group is available for summer and winter search and rescue service. It has also responded to requests for assistance from Dillingham, Togiak and Twin Hills. City officials assist the search and rescue group by maintaining VHF communications from the City office.²¹

²¹ Search and rescue information herein is based upon a conversation with Manokotak resident Arlene Franklin (907-538-2511).

Additionally, Manokotak has a health aide, who is CHP and EMT certified, and who moves to Igushik along with most Manokotak residents for the summer months, where she resides and maintains contact with the community by VHF radio. She can provide first responder assistance to village residents, set netters or drift net fishermen in the area.²²

Dillingham asserts that Manokotak will not be able to fund its proposed services to the Igushik Area even if it is able to impose a raw fish tax. Its primary argument here is the anticipated decline in state revenue sharing. However, unlike Dillingham, Manokotak has prudently and realistically declared that it is not relying on state capital grants to fund capital projects. The City, in cooperation with the Manokotak Village Council and Manokotak Natives Limited, the village corporation, has been successful in obtaining capital grants and sites to implement several major community improvements. If state community revenue sharing funds are in fact to be reduced, this is all the more reason to approve Manokotak's petition, so that it may supplement its direct revenues with a raw fish tax.

Dillingham asserts that the only way to manage solid waste disposal is through a \$1 Million landfill;²³ there are cheaper alternatives to accomplish this. As to the lack of municipal ownership of property suitable for solid waste disposal or a potable water source, this only underscores the need for annexation, which would allow Manokotak to exercise eminent domain in the annexation area to acquire property sites for which there is a public need.

²² Conversation with Tessa Nickerson (907-444-5185).

²³ Dillingham's brief appears to contradict itself in simultaneously contending that (a) Manokotak can fund its capital improvements at Igushik without raw fish taxes but that (b) even with raw fish taxes, Manokotak cannot afford a landfill improvement.

Dillingham also questions Manokotak's estimate of \$25,000 in annual sales tax receipts. In FY 2013, Manokotak's sales tax revenues were \$28,653.24²⁴. These sales tax revenues for FY 2014 severely dropped off, to less than \$5,000, because of delayed payment of taxes by the major local store, which is the source of most of these revenues. Manokotak's projection of \$25,000 in annual sales tax revenues is supported by its sales tax history; cf. Alaska Taxable 2015 (p. 23), showing FY 2015 sales tax revenues of \$20,290.

III. MANOKOTAK'S PROPOSED FISH TAX CAN BE FEASIBLY IMPLEMENTED

As stated in its petition, Manokotak intends to adopt a 2.5% raw fish tax in the Igushik Section.²⁵ Like the raw fish taxes adopted by Dillingham and other municipalities, this would be both a severance tax and a sales tax, imposed upon fish either harvested or sold in Tract B, the Igushik commercial fishing statistical area.²⁶ All set net fish now harvested there are sold to fish buyers who come to the Igushik Beach area, while drift net sales are typically made to fish tender vessels working from shore plants located in the Naknek area or, to a lesser extent, to shore plants in Dillingham, or to a floating processor in east Nushagak Bay.

²⁴ Manokotak FY13 Certified Financial Statement, page 4, attached as Exhibit B.

²⁵ What is referred to in this brief as the Igushik Section comprises both ADF&G statistical areas 325-10 (drift fishing) and 325-11 (shore-based set net fishing), though these encompass the same geographic area.

²⁶ Where a severance tax is imposed by Manokotak for fish harvested in the Igushik Section, but such fish are sold elsewhere in the Nushagak District in an area annexed by Dillingham, this would not result in double taxation. Dillingham's raw fish tax code provides, at section 4.21.055, that the amount a fisherman would otherwise be required to pay under Dillingham's sales tax "...shall be reduced by the amount of severance tax levied upon fish caught within the boundaries of another municipal cooperation the sale of which is subject to tax under this chapter." This typical municipal sales tax provision assures that, where a drift net catch is reported to have come from the Igushik Section, the only raw fish tax imposed upon it would be in the Igushik Section area annexed to Manokotak, rather than the point of sale where this occurs elsewhere in the Nushagak District.

Contrary to Dillingham's assertion, Manokotak's imposition of a raw fish tax is quite feasible. Manokotak itself, in its Responsive Brief in Partial Opposition to Dillingham's Petition (p. 8, n. 13) pointed out that Alaska Department of Fish and Game (ADF&G) policy regarding fish ticket reporting presents issues regarding imposition of a tax on fish caught or sold in the Igushik section; but this problem is hardly insurmountable. In Nushagak Bay (and elsewhere in Bristol Bay) ADF&G does not currently require that fishermen delivering/selling salmon to a fish buyer report the statistical area or areas wherein the fish were harvested. Despite this practice, it is nevertheless possible to determine which fish were caught by set net fishermen in the Igushik Area²⁷.

However, ADF&G's current practice makes it difficult to determine whether and to what extent sales by Nushagak District drift net fishermen were of salmon caught in the Igushik Section. ADF&G's failure to require catch reporting by each statistical area (including the Igushik Section) in the Nushagak District is, however, out of step with the requirements of statute,²⁸ with ADF&G's own statewide regulation²⁹, and is contrary to

²⁷ Fish tickets issued to SO4T (set net) fishermen in the Igushik Section show the selling fisherman's CFEC permit number, from which the fixed location where that permit was fished may be determined. Unlike the mobile drift net fishermen, sales by set net permit owners may be specifically tracked to the Igushik Section. As a practical matter, the fish buying companies (of which there are currently two) who send fish buying vessels to the Igushik Beach area can earmark the fish tickets documenting sales from that area, and deduct the 2.5% Manokotak tax when they later make payments to the fishermen and remit tax collections to Manokotak.

²⁸ A.S. 16.05.690(a) requires that

[e]ach buyer of fish shall keep a record of each purchase showing the name and number of the vessel from which the catch involved is taken, the date of landing,...and the department of Fish and Game statistical area in which the fish were taken, and other information the department requires. (Emphasis added.)

²⁹ 5 AAC 39.130(c) states that fish tickets "must include":

the ADF&G statistical area, district and subdistrict, and the nearest headland or bay in which the fish were taken.... (Emphasis added.)

ADF&G's practice in all other commercial fishing areas of the State of Alaska, where statistical area reporting of catches is routinely required.³⁰

In the early stages of its annexation effort, Manokotak initiated an effort to have ADF&G's noncompliant practice in the Nushagak District rectified, so that catches from the Igushik statistical area will be separately reported. A letter dated November 10, 2015 from Manokotak's counsel to the ADF&G Commissioner seeking such corrective action was attached as Exhibit L to Dillingham's Responsive Brief. However, Dillingham's exhibit omitted an accompanying legal memorandum which was sent to the Commissioner which, together with its attachments, is Exhibit C to this Reply Brief. The memorandum demonstrates that there is no legal or practical reason why the department should not extend its statistical area reporting to Nushagak Bay.

Manokotak's efforts to seek compliance by ADF&G with the clear and unambiguous mandates of statute and regulation are ongoing, and Manokotak is hopeful of achieving this result by the time of the Commission's September, 2016 hearings and decision in this consolidated matter. If this timetable is not achieved, however, the current practice of ADF&G should not be a basis for denying Manokotak's annexation of the Igushik Section, or for granting Dillingham's annexation thereof, for two reasons.

First, if the LBC otherwise finds, in applying the standards for annexation, that Manokotak has superior ties with the disputed area than does Dillingham, it would be a travesty of the annexation process and its purposes for the Commission's decision to be

³⁰ Under ADF&G's standard type A fish ticket form, used everywhere in coastal Alaska except Bristol Bay, the ticket reports the statistical area from which the fish were harvested; and where the fisherman is selling fish caught in more than one statistical area, he is required to estimate the amount taken from each. See Exhibit C, hereto.

driven by a state agency's (ADF&G) administrative inertia in failing to bring its practice into compliance with statute and with its own practice elsewhere in Alaska.

Second, if ADF&G does not timely take corrective action, there are alternative ways to approve the Manokotak and Dillingham annexations in a manner which results in a fair apportionment of fish taxes between them. The LBC may grant conditional approval³¹ of both³² annexation petitions, subject to an agreement between the petitioners within a specified deadline, that, unless and until ADF&G requires statistical area reporting, the parties will agree to apportionment of fish tax collections from all fish sales in Nushagak Bay. While several approaches to an agreement between Manokotak and Dillingham might be utilized, the most obvious would be an agreement which uses ADF&G's annual management reports of salmon harvests from the Igushik Section and from the entire Nushagak District. For example, the petitioners could agree to a "look-back" period of 5 years, to determine a fair allocation of the taxable fish harvest in a given year.

In all likelihood, the ADF&G policy will at some point resolve in favor of compliance with the law, but Manokotak cannot now give the LBC a guarantee or assurance that this will occur prior to the Commission's decision in these consolidated proceedings. Certainly, an LBC conditional approval as described above would motivate both Manokotak and Dillingham to follow through with efforts to gain ADF&G compliance with statute and its own regulation, such as would facilitate imposition of fish taxes by each municipality.

³¹ The LBC has broad authority under regulation AAC 110.570(c)(1) to require that a proposed change, including a municipal annexation, cannot take effect until a condition is satisfied, and it can state such condition in its decision. The Commission has relied on this authority in past decisions.

³² If the LBC approves Manokotak's annexation of the Igushik Section, or even if the Commission withholds annexation of the Igushik Section to Dillingham, then Dillingham will also be unable to distinguish taxable from non-taxable drift net salmon harvests in the Nushagak District, such that it will be in the interests of both cities for ADF&G to bring its fish ticket reporting into compliance with law.

IV. DILLINGHAM'S SUBSIDIARY ARGUMENTS.

A. Manokotak's annexation should not be denied because of possible future borough formation.

While Manokotak is participating in BBNA's Regional Government Study, it reserves the option to oppose formation of a borough in this region, and has previously opposed such formation. While Manokotak's City Council and residents have retained open minds on this issue, previous discussions have not convinced them that a borough would be either feasible or fair. In any case, it is extremely unlikely that a future borough would provide the local city services that Manokotak seeks to deliver to the area proposed for annexation.

Manokotak's justifications and motivations for annexation have concerned the positive benefits it proposes to deliver to the annexation area. However, the timing of Manokotak's annexation effort was at least partially motivated by Dillingham's own prior effort to obtain a city annexation of all of Nushagak Bay, including the Igushik area predominately used by Manokotak residents. Dillingham itself first initiated city annexation efforts in this area, and should not now be heard to complain that city annexation will discourage consideration of a future borough.

B. Manokotak's annexation would not create an enclave.

All of the areas proposed to be annexed by Manokotak are connected and would be joined with the existing boundaries with the City of Manokotak; see Exhibit A 4.1 (p. 55) of Manokotak's annexation petition. While Tract B includes only waterways, it is adjacent to and connects the landforms in Tract A and Tract C. It does not include any distinct remnant which would remain disconnected from the City following annexation.

The Commission's regulation (3 AAC 110.130) creates a presumption against "enclaves", which term is undefined in regulation. To the extent various dictionary definitions refer to an area completely surrounded by foreign territory, the proposed annexation would not result in such an enclave. Particularly in coastal Alaska, the Commission has recognized the importance of saltwater areas, not just uplands, to city or borough incorporations or annexations. Such connecting waterways are not viewed as creating "enclaves" simply because various lands or islands within the city or borough are connected only by water. The recently formed Petersburg Borough and City and Borough of Wrangell each feature numerous islands whose only geographical connection with the borough seat city is via water. Cook Inlet, which is nearly 50 miles wide, separates lands on its west side from the Kenai Peninsula; yet all were included in the Kenai Peninsula Borough without reference to any presumption against an enclave. Shelikof Strait separates Kodiak Island from Alaska Peninsula lands, but both sides were included in the Kodiak Island Borough. In 2011, the LBC approved an annexation by the City of Akutan of lands on Akun Island which were entirely separated by water from the existing city boundaries, specifically finding (p. 8, Decision) that the resulting city boundaries "would not create enclaves." Dillingham's own annexation petition seeks to include Grassy Island, which would be separated by water from the remainder of city lands.

The realities of life in Manokotak are such that the Igushik Beach area is essentially the summer location of Manokotak itself, and Tract A and Tract B comprise the primary waterway connection between these two areas, as well as the maritime areas where Manokotak residents make their living.

V. CONCLUSION.

Dillingham does not contest the Manokotak annexation petition's compliance with nearly all of the LBC's annexation standards. Dillingham argues, however, that its existing services, delivered within its own existing city limits, automatically provide greater indirect benefits to fishermen in the Igushik Section than would Manokotak's proposed direct extension of services to the fishermen in the Igushik Section. Dillingham's argument cannot withstand scrutiny. Most of the fishermen in the Igushik Section are local (Manokotak/Igushik Village) set netters, and many of Manokotak's services would be extended directly into the Igushik Village area adjacent to the Igushik Section. While both cities propose a raw fish tax, Manokotak's proposed tax would apply only in the Igushik Section, and would largely fall upon Manokotak's own residents, resulting in them taxing themselves for services provided therein by the City of Manokotak. In contrast with this, a large majority of Dillingham's fish tax would burden nonresidents of Dillingham, and would amount to a scattershot approach toward assessing these fishermen for use of Dillingham's harbor and related infrastructure, which could be more fairly and efficiently accomplished through an increase in direct user fees, e.g., harbor moorage fees.

Issues regarding Manokotak's ability to impose a raw fish tax on the Igushik Section's catches alone can and will be addressed, and this may be assured through conditions upon annexation approval which may be imposed by the LBC under its regulatory authority.

While Manokotak does not actively oppose Dillingham's annexation of the remainder of the Nushagak District, the Igushik Section should be excepted from this and instead annexed to Manokotak, which has closer ties to this section, and will provide greater

services to it. Annexation of the Igushik Section is of far greater importance to Manokotak than to Dillingham.

DATED this 15th day of March, 2016.


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