

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE PETITION OF)
THE CITY OF DILLINGHAM FOR)
ANNEXATION OF NUSHAGAK)
COMMERCIAL SALMON DISTRICT WATERS)
AND WOOD RIVER SOCKEYE SALMON)
HARVEST AREA WATERS, TOGETHER)
CONSISTING OF APPROXIMATELY 396)
SQUARE MILES OF WATER AND 3)
SQUARE MILES OF LAND)

AFFIDAVIT OF SERVICE

I, James L. Baldwin, upon oath, depose and state that:

On June 10, 2011 I mailed via first class US mail:

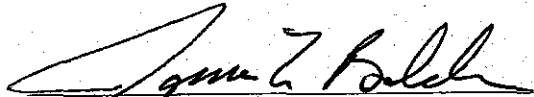
(1) two copies of the Native Village of Ekuk's Request for Reconsideration to:

Alice Ruby, Mayor
City Hall
P.O. Box 889
Dillingham, AK 99576

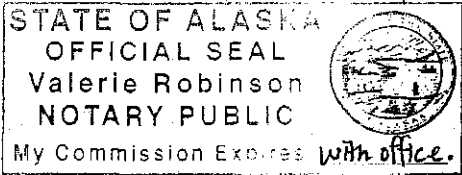
(2) an original and five copies of the Native village of Ekuk's Request for Reconsideration to:


Brent Williams
Staff Local Boundary Commission
Division of Community and Regional Affairs
Department of Community, Commerce, and Economic Development
550 West 7th Ave., Suite 1770
Anchorage, AK 99501-3510

Dated at Juneau, Alaska this 10th day of June, 2011.


James L. Baldwin

SUBSCRIBED AND SWORN TO before me this 10th day of June, 2011.




Notary Public in and for Alaska

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE PETITION OF)
THE CITY OF DILLINGHAM FOR)
ANNEXATION OF NUSHAGAK)
COMMERCIAL SALMON DISTRICT WATERS)
AND WOOD RIVER SOCKEYE SALMON)
HARVEST AREA WATERS, TOGETHER)
CONSISTING OF APPROXIMATELY 396)
SQUARE MILES OF WATER AND 3)
SQUARE MILES OF LAND)

AFFIDAVIT OF RESPONDENT NATIVE VILLAGE OF EKUK

I, James L. Baldwin, upon oath, depose and state that:

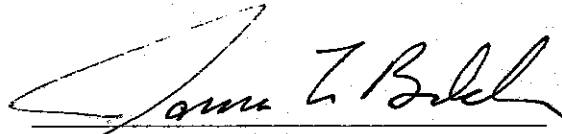
1. I am licensed to practice law in the State of Alaska. I represent the Native Village of Ekuk in connection with the Request for Reconsideration filed along with this affidavit.

2. To the best of my knowledge, information and belief, formed after reasonable inquiry, the pleading described below:

RESPONDENT NATIVE VILLAGE OF EKUK'S REQUEST FOR RECONSIDERATION OF A STATEMENT OF DECISION DATED MAY 26, 2011 IN THE MATTER OF THE JUNE 14, 2010 PETITION OF THE CITY OF DILLINGHAM TO ANNEX APPROXIMATELY 396 SQUARE MILES OF SUBMERGED LAND AND 3 SQUARE MILES OF LAND

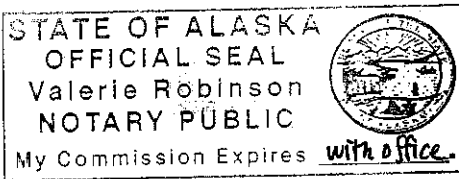
dated June 10, 2011 is founded in fact and is not submitted to harass or cause unnecessary delay or needless expense in the cost of processing the Petition for Annexation filed by the City of Dillingham.

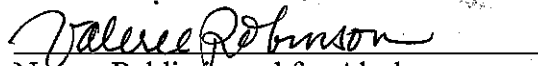
Dated at Juneau, Alaska this 10th day of June, 2011.



James L. Baldwin

SUBSCRIBED AND SWORN TO before me this 10th day of ~~September~~ ^{June}, 2010.




Notary Public in and for Alaska
My commission expires: with office

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE PETITION OF)
THE CITY OF DILLINGHAM FOR)
ANNEXATION OF NUSHAGAK)
COMMERCIAL SALMON DISTRICT WATERS)
AND WOOD RIVER SOCKEYE SALMON)
HARVEST AREA WATERS, TOGETHER)
CONSISTING OF APPROXIMATELY 396)
SQUARE MILES OF WATER AND 3)
SQUARE MILES OF LAND)

RESPONDENT NATIVE VILLAGE OF EKUK'S REQUEST FOR
RECONSIDERATION OF A STATEMENT OF DECISION DATED MAY 26, 2011
IN THE MATTER OF THE JUNE 14, 2010 PETITION OF THE CITY OF
DILLINGHAM TO ANNEX APPROXIMATELY 396 SQUARE MILES OF
SUBMERGED LAND AND 3 SQUARE MILES OF LAND

A. GROUNDS FOR RECONSIDERATION

Respondent Native Village of Ekuk respectfully requests the Local Boundary Commission under the authority granted by 3 AAC 110. 580 to reconsider its decision of May 26, 2001 in the above captioned proceeding. Respondent requests reconsideration for the following reasons:

- (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.¹ 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[;] and file a report of the meeting attempts, whether or not held, and meetings held, if any, with the LBC by [no later than] 11/30/2011.²

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.³

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.⁴ 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.

(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

¹ Decision at 5.

² Decision at 10 (Sic).

³ Decision at 12 (emphasis added).

⁴ See Decision at 14.

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.⁵

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.⁶ 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

⁵ 3 AAC.110. 570(f).

⁶ Respondent requested a copy of the minutes of the decisional meeting but was advised by staff of the commission that the document would not be prepared until some time after the deadline for requesting reconsideration expires.

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.

(3) 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, the basic purpose behind the non delegation doctrine is sound: Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit.⁷

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.

⁷ *Municipality of Anchorage v. Anchorage Police Department Employee Ass'n*, 839 P.2d 1080, 1086 (Alaska 1992)(quoting 1K. Davis Administrative Law, Subsec. 3:15, at 206).

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.

(4) 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 city⁸

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

⁸ 3 AAC 110.150 (emphasis added).

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.

(5) 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.

(6) 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.⁹ 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.

(7) 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 110.135.¹⁰

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

⁹ 3 AAC 110.130((c)(1), 3 AAC 110.920, and 3 AAC 110.990(5).

¹⁰ Decision at 8.

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.

B. DESIGNATION OF REPRESENTATIVE.

The Native Village of Ekuk designates the following person as its representative for purposes of this request for reconsideration and any proceedings regarding the Dillingham Annexation Petition:

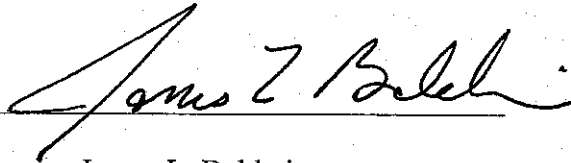
James L. Baldwin
Attorney at Law
227 Harris Street
Juneau, Alaska
99801-1212
e-mail: redalderlaw@ak.net
Tel: 907-586-9988
Fax: 907-586-9988

The village requests that courtesy copies of all correspondence be also provided to the following person:

Robert Heyano
President
Native Village of Ekuk

PO Box 530
Dillingham, Alaska
99576

Dated this 10th day of June, 2011.

By: 

James L. Baldwin
Counsel for Native Village of Ekuk