

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 BRIEF IN SUPPORT OF  
RECONSIDERATION

**I. Introduction.**

The commission granted respondent's request for reconsideration of its May 26 , 2011 decision in the above-captioned annexation proceeding. The commission decided that it would reconsider its decision on two major points:

- (1) whether the decision is final and therefore ripe for appeal to the Superior Court; and
- (2) whether the decision properly reflected the major considerations leading to the decision, specifically whether the condition was added to satisfy the best interests of the state standard imposed by statute.

The matter now before the commission involves reconsideration of the issues stated above. Under reconsideration, the commission may undertake a reexamination of the prior decision on these points and possibly arrive at a different decision of the case.<sup>1</sup>

## **II. Facts.**

The petitioner supported the proposed annexation by claiming that it intended to levy a sales tax on the sales of raw fish in the territory to be annexed. It claimed that the additional tax revenue would make it a sustainable municipal government. It also contended that, as a hub community of the Western Bristol Bay Region, its sustainability was in the best interests of the state. In their preliminary and final reports to the commission, the commission's staff accepted this as being a major factor in favor of finding that the petition served the state's best interests. As to these financial justifications offered by petitioner, respondent contended that petitioner would be adequately sustained by existing sales and other tax revenues. Respondent offered testimony and other evidence that an additional tax burden would not be in the best interests of the state because it would threaten the sustainability of other communities in the region.

During the course of the hearing, testimony was presented to show that petitioner did not adequately consider the effect of its annexation and taxation plans on other permanent residents of the Western Bristol Bay region. Petitioner was focused on taxing the fishing activity of out-of-region fishermen who heavily use the services provided by petitioner and then leave the state with their earnings. Respondent sought to reveal to the commission the plight of residents of the region who consistently have fishery related

---

<sup>1</sup> *Union Oil Co. V State, Dept of Natural Resources*, 526 P.2d 1357 (Alaska 1974).

incomes below the average for the entire fishery and are less able than nonresident permit holders to bear a new tax burden on their main source of earnings. These persons are also less able to cushion the blow in family finances by seeking other employment. Non fishery related income is quite limited in the region relative to other income for permit holders who reside outside of the Nushagak River watershed.<sup>2</sup>

Petitioner's Resolution No.2010-85 was brought up during the hearing as an example of how the region will benefit from the proposed annexation. The department made favorable comments by stating a belief that the resolution shows a willingness on the part of petitioner to provide benefits financed with raw fish tax revenue to other communities in the region. The ordinance would establish a regional fisheries improvement fund

“to provide funds for small capital projects and leverage large capital projects that improve the fisheries in the annexed area by increasing the value of the fisheries through higher quality or increased marketing or the reduction of foregone harvest.”

The resolution provides that the city council will establish a process to seek advice from communities in the region and include them in the decisions for implementation of the fund. Respondent countered that while the resolution was an encouraging development, it would not accomplish the regional benefits that the department envisioned. There was no guarantee that the development fund would ever be adequately or fairly capitalized and the financial assistance needed by those in the region is not limited to the construction of capital facilities. Financing for facilities to improve the fishery does little for those marginal fishers who are being pushed out because of dwindling earnings and ever increasing costs.

---

<sup>2</sup> See Respondent's Brief at 6.

Respondent suggested instead that the petitioner consider sharing any potential tax revenue in part with the region. The preliminary staff report determined that a 2.5 percent tax on raw fish sales will likely produce twice the amount projected by the city.<sup>3</sup> As a consequence, there would be a substantial amount in excess of what the city claimed it will need to sustain its existence. Respondent argued that the surplus amount should be available for revenue sharing with tribal governments in the region. This approach would ensure petitioner's goal of shifting the tax burden for city facilities and services only to the out-of-region permit holders and crew while providing money to local governments to care for their residents according to local need.

Respondent argued that authority for an intergovernmental revenue sharing agreement is granted by Article. X, Section 13, Article. XII, Section 2, and AS - 29.35.010(13). To implement this concept, the city would enter into intergovernmental agreements with federally recognized tribal governments of the region, including the tribal government within the urban area of petitioner. The tribes would spend the money for public purposes and in a non-discriminatory manner as determined by the governing bodies of the tribal governments.

Respondent urged the staff to comment in the final report as to whether an ordinance embodying the foregoing elements would provide a more definite and fair regional benefit than the approach offered by the petitioner. Respondent argued that its plan would allow Dillingham to tax the fishery but not harm the communities of the watershed. The department did not comment on the proposal put forward by respondent as a means of resolving the adverse impact of the annexation and subsequent taxation of fishery related income. However, during the hearing on the merits and the decisional

---

<sup>3</sup> Preliminary Report at 41.

meeting, the commission demonstrated that it was well aware of the competing concepts for extra-territorial use of the proposed fish tax revenue by referring to them during the course of the hearings.<sup>4</sup>

During the decisional meeting, a commission member made a motion which required the petitioner meet with communities and other entities of the region for the purpose of providing an exemption for local residents to payment of the raw fish tax.<sup>5</sup> The motion arose out of sympathy for the plight of residents of the region who testified that a proposed sales tax on the fishery would cause them disproportionate harm and as a consequence, not be in the best interests of the state. The motion was subsequently withdrawn and restated to a requirement for the petitioner to meet and confer regarding post annexation financial matters.<sup>6</sup> Plainly, the commission wanted the petitioner to open a dialogue with residents of the region who would be dramatically affected by the annexation to determine how the effect of the new tax can be ameliorated within the region. Respondent was greatly encouraged by this development because the commission believed that it was in the state's best interest to encourage a sharing of the wealth to be obtained from the shared fishery.

The Commission's decision contained the following reason for the condition imposed:

... the uniqueness of the territory proposed for annexation coupled with the longstanding tribal, cultural, and economic relationships that persist in this

---

<sup>4</sup> Commissioner Chrystal – capturing the fish tax from nonresidents is worthwhile if there is some way to mitigate the effect on local fishers. Decisional Meeting Minutes at page 2. Commissioner Harcharek – will offer an amendment requiring petitioner to communicate and share some revenue with villages. Decisional Meeting Minutes at pages 3 and 4. Commissioner Harrington – agreed with Commissioner Harcharek's point about the effect of the tax on surrounding villages being considered during deliberations on the best interests of the petition. Minutes of Decisional Meeting at page. 4.

<sup>5</sup> Minutes of the Decisional Meeting at page 6.

<sup>6</sup> Minutes of the Decisional Meeting at page 7.

region demand that additional conversation among the villages, tribal entities, municipalities, and the City of Dillingham be held.<sup>7</sup>

As a consequence, the commission imposed the following condition on the approval of the petition:

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.<sup>8</sup>

The record of the decisional meeting shows that the approach of attaching a condition arose during the commission's debate regarding whether the petitioner carried its burden of showing that the proposed annexation is in the best interests of the state. As a consequence of this debate, there is nothing in the minutes of the decisional meeting recording a specific ruling or other determination that the best interest standard had been satisfied by petitioner. Rather, a motion was later made to approve the petition as presented but conditioned as described above.<sup>9</sup> The motion passed unanimously.

### **III. Argument.**

#### **1. The decision is not a final decision because it is subject to later agency action.**

The following court decision succinctly states the requirement for finality required of agency proceedings:

---

<sup>7</sup> Decision at 12 (emphasis added).

<sup>8</sup> Decision at 10 (Sic).

<sup>9</sup> Minutes of Decisional Meeting at page 8.

The 30 days period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. Alaska R. App. Proc. 602(a)(2). [W]here an administrative agency's decision is communicated in a letter that fails to do either of these things, it is an abuse of discretion not to relax Rule 602(a)(2)'s thirty-day appeal deadline.<sup>10</sup>

Here, the agency did not state that the decision was final, and only conditionally approved the petition, leaving respondent to wonder whether the decision was or could be final before the condition (the filing of the report) was met. Further, the agency did not inform the respondent that it had 30 days from the date of the decision to appeal. 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.

Respondent urges the commission to find that it has not rendered a final judgment at this time. Normally, a party that has had little success before a tribunal wants finality and thus a clear path for an appeal in the Superior Court. However, if the parties meet as mandated by the commission to discuss the financial aspects of the sales tax on raw fish, it may come to pass that the respondent will no longer be aggrieved by the annexation and an appeal will no longer be necessary. Therefore, it makes good sense and promotes judicial economy, for the commission to retain jurisdiction until after the parties go through the process mandated by the commission.

The test in Alaska for determining whether a judgment is final is "essentially a practical one."<sup>11</sup> As the United States Supreme Court noted,

[t]he core question [in determining when an agency action is final] is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the

---

<sup>10</sup> *Skudrzyk v. Reynolds*, 856 P.2d 462, 463 (Alaska 1993).

<sup>11</sup> *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980).

parties.<sup>12</sup>

The conditional nature of the decision means that finality will occur until some time in the future.<sup>13</sup> The cosmetic changes which staff recommends will not remedy the lack of finality. Merely saying that a decision is final does not make it so.

The record does not contain evidence of an intention to completely and finally dispose of the petition.<sup>14</sup> The decisional minutes provide evidence that the condition was a requirement that must be met in order for the approval to be effective.

Following the motion to approve the condition, and second to the motion (the third attempt at formulating the wording of the motion, that passed), the following discussion ensued.<sup>15</sup>

Commissioner Wilson asked what happens when the report is filed. The chair clarified that the condition on the petition is to file a report outlining the above stated motion and the LBC would **make a decision at that time.**<sup>16</sup>

The foregoing statement indicates an intent that the decision would not be final when rendered. AAG Johansen then opined:

... the petition is approved, but if the report is not filed by the date specified, **then the petition's approval is void.**<sup>17</sup>

Counsel's opinion suggests that the approval is made, but is not yet final until the report is filed. Commissioner Semmons appeared to disagree with counsel, stating

---

<sup>12</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773, 120 L.Ed.2d 636 (1992).

<sup>13</sup> According to the American Heritage Dictionary (Second College Ed.), the legal definition of a "condition" is "A provision making the effect of a legal instrument contingent upon the occurrence of an uncertain future event."

<sup>14</sup> See, *Breeze v. Smith*, 501 P.2d 159, 163 (Alaska 1972)(holding that a memorandum opinion and order which showed the judge's present intention to 'completely and finally dispose of a complaint for injunctive relief constituted a final judgment within the meaning of former Supreme Court Rule 6).

<sup>15</sup> Quotes are not from the commissioners but from the minutes.

<sup>16</sup> Minutes of the Decisional Meeting at page 8.

<sup>17</sup> *Id.* (emphasis added).

the LBC was asking for a good faith attempt for the petitioner to meet with the entities, and a report, and that did not condition the approval of the petition.<sup>18</sup>

So although he maintains it's not a condition, the decision adopted by the commission made it a condition. But he notes that commission was asking for a report. His point seems to be that the petition is not conditioned on a meeting taking place, but it is conditioned on a good faith attempt to meet and a report. If that's what he means, the decision is not final. Commission Harcharek confirms this understanding, stating

the LBC would decide on the petition tonight, **with one condition, that the petitioner attempt to meet and to send the LBC a report.**<sup>19</sup>

Clearly, commissioner Harcharek understood that the body was imposing a condition. A member of the commission's staff also advised on finality by offering an opinion:

Brent Williams opined that the LBC would need to meet again to determine if the condition had been met.<sup>20</sup>

Again, this was affirmation that the action of the commission was not final because it must later determine if the condition was met. Counsel for the commission is recorded as advising "that the most effective way was **to get finality that night.**"<sup>21</sup> But then he went on to undermine such finality: "If a report comes in **then** tonight's LBC decision would be final. Meaning the decision is not final now. Commissioner Harrington described his understanding that

"if the amendment and the motion passed, tonight, **and a report was filed, then the decision is approved, regardless of the report's content.**"<sup>22</sup>

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

He apparently understood that the decision was not final until the report is filed. The Chair agreed with that summary, adding

that it did not mean that the LBC could not take further action.<sup>23</sup>

The thrust of the discussion appeared to be that the decision to approve the annexation petition would be final if a report was submitted by November 30, signifying a good faith attempt to meet and confer with respondent communities. In other words, the LBC was not going to revisit the issue based on the content of the report, if any, but the approval was still contingent on a good faith attempt to meet and confer and the timely submission of a report of those efforts.

These meeting minutes, the language of “condition”, and the lack of any statement in the decision that the decision itself was a final agency action demonstrate that the decision was not final and could not be final unless and until the petitioner’s submitted their report of their attempts to meet and confer “regarding post-annexation financial matters affecting such parties due to the annexation.”

It would not be rational or workable to have an annexation become automatically void. For a boundary change to cease to be effective on the condition imposed in the instant case, there should be some affirmative action by the commission to determine what transpired between the parties. If an election is held and the proposition fails, an event marks the end of the annexation. An annexation creates rights and obligations for ordinary citizens as well as the municipal government involved. As a result, there must be some bright line event which establishes when the petition becomes void. Through the condition, the commission holds out the possibility that there will be further action on

---

<sup>23</sup> *Id.*

the petition which affects the rights of the parties. Finality cannot be achieved short of a hearing by the commission upon completion of the process.

The chair of the commission has been careful to state that the commission relies heavily on the good faith of the parties to meet and confer on financial and cultural matters arising out of the annexation. It would be a complete relinquishment of authority for the commission to allow pro forma meetings to satisfy the condition imposed. Without some subsequent action, the commission has only created an illusion of regulatory power. Once the commission is presented with the petitioner's report, there is a possibility that the parties will be affected by a voiding of the petition, for that reason the decision is not final. And the commission should properly give notice of that effect in the decision adopted upon reconsideration.

**2. The decision should be reconsidered to acknowledge that the condition to meet and confer is required in order to satisfy one or more of the mandatory annexation standards and restated to require commission review and approval.**

Respondent asked for reconsideration regarding the manner in which the decision described a condition that was imposed on petitioner. Respondent believed that the decision did not properly record the major considerations that lead to the imposition of the condition.<sup>24</sup> The final decision dated May 26, 2011 lacked any reference that a condition imposed on petitioner was related to the commission's best interests findings. Respondent's observations and recollections of the decisional hearing left it with the belief that the condition was imposed as a further means of ensuring that the annexation

---

<sup>24</sup> According to 3 AAC 110.570(f): "Within 30 days after the date of its decision, the commission will issue a written decision explaining all major considerations leading to the decision."

would be in the best interests of the state. Review of the minutes of the decisional meet now confirms those recollections. However, staff argued that the condition had nothing to do with the best interest determination but appears to agree that the initial decision adopted by the commission did not adequately describe how the commission arrived at its conditioned decision. The staff recommended reconsideration so that the commission can clarify this part of the decision and presumably remove any perceived defect.

Respondent believes that the imposition of the condition in this proceeding is a proper exercise of the commission's regulatory power. The Alaska statutes provide that the commission may approve a boundary change if it finds the change is in the best interests of the state, and it "may impose conditions on the proposed change."<sup>25</sup> The implementing regulations give broad authority to the commission in making the determination, providing that "the commission may consider relevant factors[.]"<sup>26</sup> The regulation lists three factors that may be considered, and the commission determined those factors were met, concluding that "the petition satisfies 3 AAC 110.135's requirement for annexation."<sup>27</sup>

Satisfaction of the three factors set out in regulation is not sufficient for a commission finding that either the regulatory or statutory requirement that the annexation is in the best interests of the state. Those three factors are among the factors that *may* be considered. The ultimate determination to be made is not whether any particular factor is met, however, but whether the commission finds that the boundary change is in the best interests of the state. In a case involving similar principles, the Alaska Supreme Court explained the review it will give to similar agency findings:

---

<sup>25</sup> AS 29.06.040(a).

<sup>26</sup> 3 AAC 110.135.

<sup>27</sup> Decision at page 9.

Once we have determined whether and to what extent the relevant law allows phasing, both DNR's best interests determination and its determination that a project is consistent with the Alaska Coastal Management Plan's habitat standard are subject to a deferential reasonable basis review. This standard properly reflects the fact that in these cases, DNR's determination "is almost entirely a policy decision, involving complex issues that are beyond this court's ability to decide.... This court has neither the authority nor competence to decide whether the public interest is 'best served' by a proposed disposition of land for offshore oil and gas exploration and development.

However, while deferential, this is not a toothless standard of review. On the contrary, we have stated that our duty is to ensure that DNR has taken a "**hard look** at the salient problems and has genuinely engaged in reasoned decision making. Further, we have held that such decisions "will be regarded as arbitrary where an agency fails to consider an important factor in making its decision."<sup>28</sup>

If indeed the commission seeks to wash its hands of the problems brought to it by respondent by imposing a self executing, non mandatory condition, it falls short of giving the best interests standard the required hard look.

Respondent identified serious concerns regarding its cultural and financial well being under the proposed annexation. The commission discussed these concerns in its debate of the best interests requirement. The two days of hearings preceding the decisional meeting contain a great deal of evidence which moved the commission to do something for respondent and the residents of other communities in the Western Bristol Bay Region to ameliorate the potential adverse financial effects of the annexation.

According to statute:

If the commission determines that the proposed [boundary] change, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations and is in the best interests of the state, it may accept the proposed change. <sup>29</sup>

---

<sup>28</sup> *Kachemak Bay Conservation Society v. State, Department of Natural Resources*, 6 P.3<sup>rd</sup> 270, 275 (Alaska 2000) (emphasis added)(footnotes omitted).

<sup>29</sup> AS 29.06.040 (emphasis added).

This statute plainly requires that the decision as conditioned must meet the best interest determination. The foregoing statute has been further implemented by regulations adopted by the commission:

If the commission determines that a proposed [boundary] 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.<sup>30</sup>

Under this regulation, a condition may be imposed only when a deficient petition must be altered to meet the mandatory requirements for annexation. In proposing and adopting the condition the commission acted consistent with this regulation and the advice of counsel.<sup>31</sup> The condition was intended to meet the strongly stated and well documented objections to the annexation presented by respondent and other communities in the region. Once imposed, there can be no uncoupling of the condition from the rest of the best interest findings of the decision.

The outcome of the discussion was an amendment that should have addressed the concerns raised in debate regarding the best interests standard regarding the financial and cultural implications of the annexation. To now insist that the condition has nothing to do with making the petition acceptable under the mandatory requirements of the Alaska Constitution, regulatory standards or the best interest determination imposed by statute is a step backwards and an effort to recast the outcome of the decisional meeting. It also

---

<sup>30</sup> 3 AAC 110.570(c).

<sup>31</sup> Decisional Meeting Minutes at page 7.

would mean that the commission believes the best interests of the state are protected more by protecting the financial health of a hub city than protecting the financial health of the villages of the region which are the spokes that support the hub. The commission guarantees this impression by relinquishing any oversight over the discussions of the parties.

Respondent assumes that the strategy of divorcing the condition from the mandatory standards is an attempt to bolster the decision to deny reconsideration on respondent's claim that an unsupervised "meet and confer" condition is defective for being an improper delegation of its power to the petitioner. The record established in these proceedings provides ample support that the condition imposed here is necessary to meet a mandatory standard. The commission regularly imposes conditions related to taxation in incorporation proceedings. Additionally, it is well within the commission's power in this proceeding to determine that the tax rate is either too little or too great in order for petitioner to finance the assumption of powers under a transition plan.<sup>32</sup>

It is reasonable for the commission to nudge the parties into face-to-face discussions regarding a tax on a shared fishing ground, monitor those discussions, and withhold final approval of the petition until after the results of those discussions are reported back to it. The requirement for the petitioner to meet with the communities of the region provides a balanced approach to a process where differences between the petitioner and the surrounding communities could be reconciled. There should be no question that this is in the best interests of the state. To deny that it has any connection as proposed by the staff would amount to a failure to give the issue the required hard look and would be an abuse of discretion.

---

<sup>32</sup> See 3 AAC 110.900(d) (Commission may require execution of an agreement as part of a transition plan).

The commission should not despair that the respondent and the residents of the region are ungrateful of the innovative approach devised to arrive at a regional solution, because they are grateful. However, in the parlance of the Denali Commission, these communities are “distressed” and as a result they lack the money and other resources necessary to engage in protracted litigation. They need the state to remain engaged to make certain the parties carry out the intent of the condition for the benefit of all residents of the Western Bristol Bay region. Respondent hopes that the commission would also agree that it is not appropriate to delegate to the petitioner alone the state’s power to determine what action satisfies the best interest determination without retaining state oversight. The Alaska Supreme Court has observed:

The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.<sup>33</sup>

The commission is the agency of the state responsible for ensuring that the state’s interests are protected. It must make the parties accountable to it for engaging in good faith discussions regarding post annexation finances of the region.

#### **IV. Conclusion.**

Respondent urges the commission to restate its decision so that it is clear that the major consideration leading to the imposition of the condition is the need to perform the activities specified in good faith to ensure that the annexation is in the best interests of the state. The commission is requested to amend the condition so that petitioner is required to consult with officials of each existing, city, and organized village listed in its decision for the intended purpose. If, upon consideration of the petitioner’s report, the commission determines that the petitioner acted in good faith and that further efforts to consult with

---

<sup>33</sup> *Fairview Pub. Util. dist. No. 1 v. City of Anchorage* 368 P.2d 540 (Alaska 1962).

the officials would not be productive in a reasonable period of time, the commission may waive the requirement for consultation. In that way, it is the state that is determining what is in the best interests of the state, rather than the petitioner.

The commission is also requested to restate its decision to make it clear that the decision is not final until after the commission has received the petitioner's report at a hearing called for that purpose.

Dated this 1<sup>st</sup> day of August, 2011.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "James L. Baldwin". The signature is fluid and cursive, with a large initial "J" and "B".

James L. Baldwin

Counsel for Native Village of Ekuk