



**City of Dillingham
Responsive Brief on
Reconsideration of the December 27¹, 2016 Decision Approving A
Petition to Annex Portions of the Nushagak Commercial Salmon
District waters and Wood River Sockeye Salmon Special Harvest area
waters, together consisting of approximately 275 square miles of
water and 3 square miles of land (small islands)
by the Legislative Review Method**

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BY: 

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¹ The decision was made at a December 1, 2016 decisional meeting of the Commission by a vote of 5-0. Dec. 1 Transcript pp. 188-189. The written decision was approved at a December 20, 2016 meeting of the Commission by a vote of 4-1. Dec. 20 Transcript p. 59. The decision was mailed on December 27, 2016, after the legal description was finalized.

INTRODUCTION

The Local Boundary Commission (“Commission”) has improperly granted reconsideration in response to a request submitted by Ekuk². Without waiving any rights or arguments regarding the improper grant of reconsideration³, the City of Dillingham submits this responsive brief as provided for by the Commission’s January 10, 2017 order.

Granting reconsideration does not compel the Commission to reverse course. The Commission could again approve Dillingham’s petition with the same boundaries, it could expand the boundaries from those previously approved or it could deny the petition. Upon reconsideration, the Commission should approve an enlargement of the previously approved Dillingham boundaries that includes a much larger portion of the Igushik District excluding only the Igushik set net statistical area including 300’ of water parallel to the line of mean low tide in what the City of Manokotak designated as Tract B of its petition. The Commission appears to have assumed including this smaller portion of the Igushik District within Manokotak’s enlarged boundary would vary from existing ADF&G fishing boundaries when evidence in the record indicated exactly the opposite. There is an existing ADF&G boundary between the Igushik set net statistical area and the rest of Tract B⁴.

The Commission should also include the previously excluded east-side set net areas. The Commission never provided a coherent explanation as to what justified exclusion of this territory. Evidence in the record shows there is a significant contingent of Dillingham residents that move to these areas each fishing season. There is no difference between Dillingham residents moving from Dillingham to Ekuk, Queens, Combine, and Clark’s Point set net statistical areas each year and Manokotak residents (and Dillingham residents) moving to Igushik Beach each summer. It was inherently inconsistent for the Commission to approve an annexation of waters within the Igushik set net statistical area adjacent to Igushik Beach by Manokotak and exclude the east side set net statistical areas from Dillingham’s expanded boundaries.

Alternatively, the Commission should again approve annexation of the same area described in the December 27 written decision to Dillingham. If this course is taken Dillingham

² Dillingham reference to “Ekuk” also includes the Native Villages of Clark’s Point and Portage Creek and the City of Clark’s Point.

³ In summary, these include that it is not a “substantial procedural error” to either; 1) have followed Commission regulations on reconsideration, or 2) for Commissioners to have not known about the reconsideration regulation. And the Commission did not “fail to consider” any of the regulatory factors for annexation.

⁴ This was explained in detail at the public hearing by Ms. Brito. Nov. 30 Hearing Transcript pp. 89-94.

requests technical modifications to the legal description contained in the December 27 written decision⁵.

THE COMMISSION SHOULD APPROVE ITS EARLIER DECISION AFTER RECONSIDERATION

Issue on Reconsideration – Best Interest of the State

The Local Boundary Commission can approve a petition for annexation if a larger city is in the best interest of the State⁶. Is it in the best interest of Alaska to prevent the deterioration of city services and infrastructure and allow Dillingham to continue to support state corrections, motor vehicle, educational and law enforcement services by approving expansion of municipal boundaries to increase the local tax base?

What is in the Best Interest of the State of Alaska Should Be Based on Current Conditions

Commissioner Crystal made a statement during the decisional meeting directly applicable to the Commission's consideration of the best interest of the State and more particularly what consideration should be given to the possible future formation of a borough in this area:

CHAIR CHRYSTAL: the answer to this question would be yes if there's a borough getting ready to form or is already in the process. But it may be years and years and years before that happens. So do we answer the question in today's world or the future? I think, today's world. If we start voting on things that may happen 10, 20, 30, 40 years from now, we'll be in trouble.

The opposing view was voiced by Commissioner Hargraves:

COMMISSIONER HARGRAVES: It's clear to me that the creation of a borough would take care of a lot of the problems that we've had presented to us in here. It would be the streamlined, most efficient and, in my estimation, best interest of the State.

Commissioner Wilson agreed with Chair Chrystal's view:

COMMISSIONER WILSON: I agree with the Chair. But the question, particularly the very end of it, is: Or modification of some other political subdivision. I mean, how far down the road are we supposed to be looking here, if we say that?⁷

Commissioners Wilson and Crystal have the better view. The concept it is best to wait for the arrival of a future Borough to access the tax base swimming in Nushagak Bay or that

⁵ LBC staff have been alerted to the changes requested.

⁶ 3 AAC 110.135, 110.030(c)(2).

⁷ Dec. 1 Decisional Meeting Transcript pp. 163-164 (attached).

through denying annexation the Commission can force and/or encourage area residents to petition for Borough formation improperly focuses on pie in the sky future scenarios that are unsupported by evidence in the record. Not a single person other than City of Dillingham representatives or residents indicated unqualified support for Borough formation. None. Yet the “Borough is better” premise continues to be pushed as the basis for a decision denying annexation. While the Commission keeps waiting for something better to come along - the ability of Dillingham to provide public services will continue to decline.

COMPARISON OF EXISTING CITY OF DILLINGHAM TO THEORETICAL BOROUGH

The regulatory phrase referenced by Commissioner Wilson “creation or modification of some other political subdivision” establishes the parameters within which the Commission is to consider whether a borough would be “better” than an enlarged City of Dillingham and is found at 3 AAC 110.970(c)(3). This regulation discusses “the identification of essential municipal services for a city”. 3 AAC 110.970(d) identifies essential city services which the commission may determine to include levying taxes, assessing the value of taxable property, levying and collecting taxes, operating a system of public schools within the city, public safety protection, planning, platting and land use regulation”. As to each of these services the issue for the Commission to consider is whether a theoretical future borough can provide these services “more efficiently and more effectively” than the City of Dillingham. Leaving aside the fundamental problem that this theoretical borough will not be formed due to lack of support from communities other than Dillingham, the answer is a resounding no.

Levying taxes - a future borough would need to have voters approve a fish tax. Dillingham voters have already approved a fish tax and can begin collecting the tax in 2017. This clearly is more efficient and effective than “waiting for a borough”.

Assessing the value of taxable property - a future borough would need to first establish a property tax (an outcome which is politically uncertain even if a borough is formed), hire an assessor, create a finance department from scratch and undertake a property tax assessment process. The City of Dillingham already has a property tax ordinance on the books and has been assessing property for decades. Clearly, it is more efficient and effective for the City of Dillingham to assess the value of taxable property than waiting for a borough.

Levying and collecting taxes - once again a future borough would literally need to start from scratch with no guarantee taxes would be approved either by voters or elected officials much less collected. This process would take years and is filled with uncertainty. The City of Dillingham has existing ordinances in place providing for the levy and collection of a variety of taxes, actually levied and collected a fish tax with no problems during an earlier period when annexation was approved and can levy and collect a fish tax in 2017. Once again, it is easily demonstrated that for levying and collecting taxes it is more efficient to have Dillingham provide this essential municipal service in 2017 than waiting for an indeterminate length of time for a theoretical future borough to do so.

Establishing, maintaining and operating a system of public schools within the city - This is another no brainer. The City of Dillingham School District already operates a system of public schools within the city. It obviously is more effective and efficient to have Dillingham's public schools provided by the City of Dillingham than to wait for a new public school system to be created who knows when in the future by a completely theoretical borough school board.

Public Safety Protection - Very few existing boroughs provide any public safety services. Dillingham has an existing public safety department who, contrary to allegations made by Ekuik actually provided public safety services on the water proposed for annexation during the time that territory was within city boundaries. It would be irrational for the Commission to conclude that an unknown borough which may or may not be established in the future can more efficiently and effectively provide public safety services than the City of Dillingham.

Planning, platting and land use regulation - Dillingham has an existing planning department and zoning laws on the books. Who knows what form land use planning, platting and regulation might take should a borough be conjured over the objections of every single community in the region save Dillingham. It cannot reasonably be concluded that the creation of a borough would provide planning, platting and land use regulation in Dillingham more efficiently and effectively than the existing City of Dillingham planning department.

Ports and Harbors - Although not specifically listed in 3 AAC 110.979(d), it seems obvious that for a rural Alaska fishing community, the provision of a port and a boat harbor are essential municipal services. Dillingham has an existing port and an existing harbor. There is no reason to conclude a theoretical future borough would be able to provide port and harbor services to the commercial fishing community more effectively or more efficiently than the City of Dillingham. There is no location for an alternate port and harbor. There is no money to build a borough port and harbor and, most importantly there is no borough to operate or maintain such a facility.

THERE ARE FACTORS NOT SPECIFICALLY IDENTIFIED IN 3 AAC 110.135 WHICH SHOULD BE CONSIDERED AND WHICH SUPPORT APPROVING ANNEXATION

3 AAC 110.135 indicates the Commission should consider "relevant factors" when deciding if approving annexation is in the best interest of the State. Dillingham has always maintained that this annexation was driven by concerns about the fiscal sustainability of city services. Economic factors are among the "relevant factors" the Commission should consider.

The State of Alaska is Currently in a Fiscal Crisis

In the words of Governor Walker, Alaska is facing its "Gravest Fiscal Crisis in State History".⁸ The only limit on what the commission may consider in making the best interest of

⁸ January 18, 2017 State of the State address, p. 2. (Accessed January 19, 2017, at <http://gov.alaska.gov/wp-content/uploads/sites/5/Governor-Walker-State-of-the-State-January-18-2017.pdf>).

the state determination is “relevant factors”. The phrase “best interests of the State of Alaska” does not mean “theoretical ideal boundaries for political subdivisions”. Any decision regarding what is in the best interests of the State of Alaska should not be made in a vacuum. The Commission must consider current State finances - multi-billion dollar deficits and the impact those finances have on existing municipalities when determining what is in the best interests of the State.

The State Fiscal Crisis has Impacted the City of Dillingham

Here is a summary of some of the recent reductions in State funding previously supporting the City of Dillingham’s provision of public services:

- School Debt Reimbursement - cut 20% an annual reduction of \$166,000.
- Community Jails – cut by \$114,000 annually.
- Police Dispatch Services - all State support eliminated. Dillingham now provides Trooper dispatch with no State cost sharing.
- DMV Services – cuts by State require Dillingham to provide \$50,000 annual subsidy.

Given the multi-billion dollar state deficit there is no reason to believe additional cuts impacting Dillingham will not occur.

The City is Operating at a Deficit.

The Commission should consider the benefits of allowing annexation against the City’s fiscal reality; “we’re looking at a deficit of \$667,000 This is in fiscal year ‘17. Budget deficits in this range are expected over the next couple years.”⁹ It is not realistic to cover the deficit with increased fees. Landfill fees would need to be quintupled¹⁰. Dock fees would need to double¹¹. “The City can’t continue to operate by depleting its fund balance. At some point the City will have to consider reducing or totally eliminating certain City services offered to the public until some new revenue source is obtained”¹² “[W]ith reduced revenues we will be forced to make cuts to other city services. Everything from schools, senior services, public safety and all other programs”¹³.

The City of Dillingham Provides City Services to Persons Fishing In Nushagak Bay and Provides Services Outside City Boundaries

The Nushagak Bay drift fleet is based in Dillingham. Many of the vessels are stored year round in Dillingham. Others migrate to the Dillingham small boat harbor for the fishing season. This is evidenced by the number of harbor permits issued by Dillingham¹⁴. Services provided to

⁹ Nov. 29 Hearing Transcript p. 66.

¹⁰ Nov. 29 Hearing Transcript p. 67.

¹¹ Nov. 29 Hearing Transcript p. 68.

¹² Nov. 29 Hearing Transcript p. 69.

¹³ Nov. 29 Hearing Transcript p. 110.

¹⁴ Nov. 29 Hearing Transcript pp. 49-50, Hearing Exhibit D-11 (attached).

the drift fishing fleet include port and harbor¹⁵, landfill¹⁶, police services¹⁷, and the public library¹⁸. The port is a regional facility through which shipments to every community in the Dillingham Census Area pass¹⁹. The City provides fire protection²⁰, police dispatch services²¹, and police services²² outside city boundaries without compensation. EMS services are provided outside city boundaries with limited compensation²³. Repairs and improvements to critical infrastructure cannot be funded without access to additional revenue sources.

Another factor the LBC should consider “relevant” to a “best interest of the State” determination is the State’s interest in equal treatment of similarly situated individuals. This interest is an “inherent right” enshrined in the equal protection clause of the Alaska Constitution.²⁴ Why should only those fishing in the Nushagak district alone among all other Bristol Bay permit holders not pay a local fish tax to support the local public services upon which they rely? As one member of the public put it, “the harvesters of a public resource should have to help support the public infrastructure and facilities that they depend on”²⁵.

Specific 3 AAC 110.135 Factors Favor Approving Annexation

The regulation mentions several “relevant factors” which the Commission “may consider” but is not required to consider. These factors also favor approving annexation. Annexation will promote maximum self-government since it will “extend local government to territory and population of the unorganized borough where no local government currently exists”. 3 AAC 110.981(a)(7). Annexation will promote a minimum number of local government units because there will not be an increase in the number of those units. The “jurisdictional boundaries of an existing city are being enlarged rather than promoting the incorporation of a new city or creation of a new borough service area”. 3 AAC 110.982(7). And contrary to the claims made by Ekuk, approving annexation “will relieve the state government of the responsibility of providing local services”. 3 AAC 110.135(3).

Annexation will relieve the state of the responsibility of providing police protection to portions of Nushagak Bay.

Ekuk’s claim Dillingham “disavowed” providing police protection ignores past history and public hearing testimony of Chief Pasquerillo. Much was made of Dillingham’s plan to continue to have the Alaska State Troopers be the primary law enforcement responders on

¹⁵ Nov. 29 Hearing Transcript pp. 39-42, 52-54.

¹⁶ Nov. 29 Hearing Transcript p. 127.

¹⁷ Nov. 29 Hearing Transcript p. 94 (17% of calls for service in summer are in commercial fishery-related areas).

¹⁸ Nov 29 Hearing Transcript pp. 327-328.

¹⁹ Nov. 29 Hearing Transcript p. 53, p. 322.

²⁰ Nov. 29 Hearing Transcript p. 81-82.

²¹ Nov. 29 Hearing Transcript pp. 88-89 (noting that state funding for such services was recently eliminated).

²² Nov. 29 Hearing Transcript pp. 87-88, pp. 101-103.

²³ Nov. 29 Hearing Transcript pp. 82-83.

²⁴ Alaska Constitution Art. I, Sec. 1.

²⁵ Nov. 29 Hearing Transcript p. 312, (Testimony of Mr. Lisak).

Nushagak Bay following annexation. But since the annexation petition was filed, the Troopers have made it quite clear they will not go along with this plan. This means even though it did not plan to do so, Dillingham will be the primary provider of law enforcement on those areas of Nushagak Bay approved for annexation thus relieving the state of this responsibility. This leads to the logical question of whether the City is capable of doing so. As explained by Chief Pasquerillo at hearing we know the answer is an unqualified YES because this is exactly what the City did after its last petition for annexation was approved and the State declined to enter into an agreement with the City. Dillingham provided police protection in the area both before and after annexation was approved. As the Chief said:

During the active annexation period which was the summer of 2013 when we used to have annexation . . . and when DPD handled the police calls in the waterways, we only had three calls²⁶. Those incidents were responded to with the assistance of AST and the Alaska Wildlife Troopers (who enforce fish and game laws) who have larger vessels and more boating experience than DPD.

The Wildlife Troopers gave DPD a ride. There is no indication in the AST letter that the Wildlife Troopers would not continue to work with Dillingham police in this fashion if annexation is once again approved just as DPD frequently backs up AST and the wildlife troopers on calls when requested. And if a ride is not available, DPD will use its own vessel²⁷.

Transportation is only one component of police services. Getting to the scene is not investigating, taking statements, writing up reports and sending information to the DA to determine if charges will be filed. And, it is not testifying in court if charges are filed. All of these essential components of police services will in fact be provided by Dillingham in response to calls for police services on the water should the city remain unable to reach an agreement with AST as appears to be the case.

Annexation will help Dillingham continue to relieve the state of the responsibility of providing correctional services.

The City currently operates a state jail under a contract with the State. The jail houses inmates from 9 other communities²⁸. 46% of the prisoners are from other communities. 49% of the Title 47 protective custody detainees are from other communities. Annexation will ensure the City remains financially able to provide state correctional services even as State payments for community jails continue to be cut²⁹.

Annexation will help Dillingham continue to relieve the state of the responsibility of providing Division of Motor Vehicle services.

The City currently subsidizes the provision of state DMV services for the region through an office in Dillingham staffed with a city employee at an unreimbursed annual cost to

²⁶ Nov. 29 Hearing Transcript p. 95.

²⁷ Nov. 29 Hearing Transcript p. 96.

²⁸ Nov. 29 Hearing Transcript pp. 89-90 (noting 46/% of prisoners from other communities).

²⁹ Nov. 29 Hearing Transcript p. 90 (noting reduction of \$114,000 in annual state funding).

Dillingham residents of \$50,000. The demand for state DMV services in Dillingham is especially high during the commercial fishing season³⁰. Annexation will ensure the City remains financially able to do.

Annexation will allow the City to continue to support the state mandate of providing educational services.

Primary education is a state responsibility mandated by Alaska's constitution³¹. The State fulfills this responsibility by providing partial funding to city school districts while requiring a minimum local contribution. Dillingham has consistently contributed well above the minimum to fund educational services³². Dillingham's public library serves as the school library.³³ These educational services are provided not just to Dillingham residents but also to residents of area communities³⁴. Dillingham has a school bond. State reimbursement of the debt service on the bond was recently cut at a cost to Dillingham of \$166,000 annually³⁵. Annexation will ensure the City continues to be able to fund educational services at funding levels above the minimum. It will also provide an alternative revenue stream to repay the bond should State reimbursement continue to decline.

Annexation will allow for formation of a future borough when and if a borough has local support.

The other factor raised by Ekuik as part of the "best interest of the state" consideration is the impact of annexation on the formation of a future borough. If Dillingham's petition had been opposed by active, committed borough proponents this factor would be more worthy of consideration. Even the Commission itself rejected placing an actual petition for borough formation "on the table" when it voted in September of 2015 to reject an actual borough incorporation petition prepared by DCRA.

LBC cannot force people to form a borough. "If you're trying to use denying Dillingham the ability to extract revenue from Nushagak Bay in hopes that it will force Dillingham into a borough... this would be a failed mission"³⁶. Any borough will have to be funded by a fish tax which requires voter approval. There is no evidence LBC denial of annexation will lead to borough formation. Not a single person at the public hearing other than City of Dillingham residents and representatives voiced support for borough formation. There is a long anti-borough history in the region. It is extremely unlikely a borough will be formed in the near future. The LBC cannot base this decision on an assumption that something will happen when there is no evidence to support that assumption. But if anti-borough sentiments fade as the years go by,

³⁰ Nov. 29 Hearing Transcript p. 97-98 (noting annual City subsidy of \$50,000 to provide state DMV services).

³¹ Alaska Constitution Art. VII, Sec. 1.

³² Nov. 29 hearing Transcript p. 300 (noting Dillingham provided \$735,000 over the minimum local contribution).

³³ Nov. 29 Hearing Transcript p. 301.

³⁴ Nov. 29 Hearing Transcript pp. 74, 299 (Dillingham providing education services to residents of Aleknagik, Clark's Point and Koliganek).

³⁵ Nov. 29 Hearing Transcript pp. 65-66 (Testimony of Finance Director Bisram).

³⁶ Nov. 29 Hearing Transcript p. 333. (Public testimony of Paul Nelson).

approval of annexation will not preclude borough formation. As Ms. Sheinberg explained, the Nushagak Bay tax base is sufficient to provide both borough and city revenue as is done elsewhere in Alaska³⁷.

And as Mr. Cotten explained, LBC approval of annexation does not prevent Nushagak Bay from being detached from Dillingham (the community that supports borough formation) and incorporated into a new borough. There is a specific example of this happening when LBC simultaneously approved formation of the Northwest Arctic Borough contingent on an affirmative vote of residents of the proposed borough and detached territory from the North Slope Borough by legislative review also contingent on voter approval of borough formation. That is how Red Dog mine came to be included in the Northwest Arctic Borough. Inclusion of the mine created a tax base for the new borough³⁸. Nothing has changed in regulations or procedures that would prevent the Commission from repeating this coordinated action in the Dillingham Census Area should area residents propose a borough.

DILLINGHAM'S PROPOSED BOUNDARY MEETS THE BOUNDARY STANDARD – 3 AAC 110.130.

The order on reconsideration indicates the LBC failed to adequately address the boundary standard (3 AAC 110.130) and best interests of the state standard³⁹. Whatever additional “addressing” is done upon reconsideration should again lead to approval - not just of the boundaries approved on December 1 but of nearly all the boundaries originally requested by Dillingham⁴⁰.

3 AAC 110.130(a) - Proposed expanded boundaries of the city must include all land and water necessary to provide the development of essential municipal services on an efficient, cost-effective level.

This section of the boundary regulation includes the phrase “and water”. Adding water to Dillingham is contemplated by the boundary regulation. Tax collection is an essential municipal service⁴¹. The difficulties of “splitting” the drift fishing district into segments inconsistent with existing fish ticket reporting systems for efficient tax collection was explained in the City’s responsive brief and by the hearing testimony of Ms. Brito⁴². With the exception of distinct set net statistical areas, all of the water Dillingham has asked to annex is necessary to provide for

³⁷ Nov. 30 Hearing Transcript pp. 73-76.

³⁸ Nov. 29 Hearing Transcript p. 174, Nov. 30 Transcript p. 99.

³⁹ The *Order on Reconsideration* referenced 3 AAC 110.140. 3 AAC 110.140(8) mentions “best interest of the state” but this is only 1 of a list of 7 subsections meeting any one of which allows for annexation by legislative review. 3 AAC 110.135 is the more straightforward statement of this standard.

⁴⁰ Dillingham will accept a modification which excludes set net waters 300’ seaward of the mean low tide line within the Igushik set net statistical area which could be included within the City of Manokotak.

⁴¹ 3 AAC 110.970(d).

⁴² Nov. 30 Hearing Transcript pp. 89-94, Feb. 26, 2016 Responsive Brief, pp 5-7 (attached).

efficient and cost-effective collection of the city’s existing fish tax. Collection of this tax, in turn, is what will allow Dillingham to maintain and develop existing services provided to the drift fishing fleet. These are also essential municipal services. Adding water and the tax base contained therein is necessary to be able to continue to provide and develop essential municipal services⁴³.

One of the “relevant factors” the Commission “may consider” in determining whether this standard is met is “population density”. Mayor Ruby explained at the public hearing the post-annexation population density of Dillingham will exceed the population density of other cities who have been allowed to include adjacent waters within their municipal boundaries⁴⁴. The information provided by Mayor Ruby came from the Department’s own website and included the following examples of communities which include surrounding water.

<i>City</i>	<i>Water</i>	<i>Density</i>
Egegik	101 sq. mi.	.78 persons per sq. mi.
St Paul	255 sq. mi.	1.45 person per sq. mi.
St. George	147 sq. mi.	.45 person per sq. mi.
Dillingham (proposed)	397 sq. mi.	5.40 person per sq. mi.
Togiak	183 sq. mi.	3.89 person per sq. mi.

There is no basis to change the Commission’s December 1 determination this standard was met.

3 AAC 110.130(b) - Contiguous territory/enclaves

This standard is not in dispute.

3 AAC 110.130(c)(1) - To promote the limitation of community, the proposed expanded boundaries of the city:

(1) must be on a scale suitable for city government and may include only that territory comprising an existing local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the effective date of annexation,

The Commission was required to clarify its determination as to whether the standards of 3 AAC 110.130(c)(1) had been met during the December 20 decisional meeting⁴⁵.

⁴³ For example, development of the small boat harbor though a breakwater has a projected cost of \$21,500,000, replacing deteriorating floats will cost \$3,000,000 and there are ongoing erosion issues with the harbor. Nov. 29 Hearing Transcript pp. 44-48 (“the City of Dillingham cannot keep up with the costs of everything . . . that is failing without additional funds”).

⁴⁴ Nov. 30 Hearing Transcript p. 130-132.

⁴⁵ Dec. 20 Transcript pp. 43-44, 48-50, (attached). This provided the Commission the practical equivalent of reconsideration outside the confines of the reconsideration regulation. The chance to say “oops” Commissioner Harrington said he wanted.

Commissioner Wilson, who by now had had more than two weeks to think about his “yes” vote on December 1 stated unequivocally “I feel both standards have been met”. Commissioner Harrington said “using the logic we used with former petitions⁴⁶, we have to say yes”.

The proposed expanded boundaries of Dillingham including the entire Nushagak Bay fishing district are on a scale suitable for city government. The entire area was governed by the City of Dillingham for two years following the Commission’s previous approval of annexation. No difficulties in governing within these boundaries were encountered. There were no difficulties in the “scale” of the area governed by the City of Dillingham. This included the Dillingham police department responding as needed on Nushagak Bay waters. It also included the City of Dillingham implementing and administering a tax collection system covering the new territory. And, it included the City of Dillingham continuing to provide dock, harbor, landfill and other public services to the commercial fisherman who worked within city boundaries. Actual past experience is the best proof the expanded boundaries are on a scale suitable for city government. That this territory could also theoretically be governed by a borough does not mean it is not “suitable” or amenable to being governed by the City of Dillingham.

The “territory comprising an existing local community” includes the existing City of Dillingham. A significant portion of persons fishing in Nushagak Bay are from Dillingham. This includes the east side set and Igushik set net permit holders.⁴⁷ The seasonal residents participating in the drift fleet are part and fabric of the community of Dillingham. Simply put, Dillingham is a fishing community and Nushagak Bay is part of that fishing community. It is true that many fish live under the Nushagak Bay water but those salmon are the reason for Dillingham’s existence. There is no Dillingham without Nushagak Bay.

Ekuk, referencing 3 AAC 110.920, has argued the word “community” in 3 AAC 110.130(c)(1) operates as a prohibition on annexation of water. 3 AAC 110.920 is a “determination” of “community” regulation not a definition of community. The regulation only applies to “determining whether a settlement is a community”. This determination is only relevant to questions of incorporation - which are based on the presence of communities. “Territory proposed for incorporation as a city must encompass a community”. 3 AAC 110.005. There is no parallel annexation standard requiring that territory proposed for annexation to an existing city “must encompass a community”.

The standards for incorporation of cities, in addition to requiring a “community”, also require: need, resources, population, boundaries and best interest of the state. The standards for annexation also require findings regarding resources, population, boundaries and best interest of

⁴⁶ Id. The former petitions which included large areas of water that had been approved by the Commission included: Togiak, Egegik, Pilot Point, St. Paul and St. George and the just approved Manokotak petition.

⁴⁷ Hearing Exhibit D-1 (38% of 2013 set net permit holders in Clark’s Point, Combine, Coffee Point were Dillingham residents and landed 45% of fish), D-7 (85 Dillingham residents fished set net permits in all set net districts in 2014 vs. 36 Manokotak residents), D-10.

the state. But instead of a “community” requirement, the annexation standards have a “character” requirement.

This difference between incorporation standards and annexation standards is rational. Cities do not annex “settlements” or “communities” they annex “territory”. The “character” standard does not establish that a community must be a “settlement”. Instead the requirement is for the “territory” to be “compatible in character” with the annexing city. While the commission “may consider” population density, no population standard is established by regulation.

and, 2) may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of the standards in 3 AAC 110.090 - 3 AAC 110.135 and are otherwise suitable for city government.

This is the “exception” and is applicable only if the Commission concludes Dillingham proposes to annex a large unpopulated area or an entire geographical region. Ekuk’s argument Dillingham is annexing a “region” is wrong. Nushagak Bay is not a geographical region. The Dillingham Census Area identified in the draft petition presented to the Commission by DCRA staff and rejected by the Commission is a region. Dillingham’s proposed annexation is only of fishing waters adjacent to an existing city.

The seasonal presence of the drift fishing fleet and set net permit holders means Nushagak Bay is not an “unpopulated area”. The Commission cannot logically decide Igushik Beach is “populated” by seasonal set net permit holders but that Ekuk Beach, or Clark’s Point or Queens areas are not populated by seasonal set net permit holders. In fact, as shown at hearing, many of the set net permit holders at Ekuk, Coffee Point and Queens are Dillingham residents just as many of the set net permit holders at Igushik are Manokotak residents⁴⁸. The same logic applies further out into the Bay. The drift boats are the equivalent of a floating fish camp. And the permit holders and crew living on board are in some respects more attached to Dillingham than the set net permit holders because they routinely return to port and tie up in the Dillingham harbor.⁴⁹

Boundaries are justified by the application of the standards in 3 AAC 110.090 - 3 AAC 110.135.

But even if the Commission concludes Dillingham seeks to annex an “entire” geographical region or a “large unpopulated area” this does not justify denial of Dillingham’s petition. There is an exception allowing for annexation of entire geographical regions or large unpopulated areas. On December 1, the Commission found Dillingham’s proposed boundaries “were justified by the application of standards in 3 AAC 110.090-3 AAC 110.135”⁵⁰. Upon

⁴⁸ Nov. 29 Hearing Transcript p. 40, Hearing Exhibit D-1 (copy attached). Commission approval of the Manokotak petition would logically lead to approval of the very areas previously excluded from Dillingham as part of expanded Dillingham boundaries.

⁴⁹ Nov. 29 Hearing Transcript p. 39. “We host anywhere between upwards of 400 to 600 boats each salmon season”.

⁵⁰ Dec 1 Transcript pp. 139-140.

reconsideration the finding Dillingham qualified for the 3 AAC 110.130(c)(2) exception should be confirmed.

This exception was intended to cover Dillingham's situation - a situation where a city provides services to persons who harvest resources in an unpopulated area. Here those persons are drift fishery permit holders. The City provides many services to those permit holders as testified to in the public hearing and elsewhere in the record. This is not a situation where a city is trying to add an unpopulated area because the pipeline runs through it but yet the city has no connection to the company operating the pipeline or the persons that might work to maintain the pipeline and provides no services to either the pipeline company or its employees. Here Dillingham is directly connected and intertwined with the persons harvesting the natural resource in the area to be added to the city. The area should be added to the city to allow the city to collect taxes to support provision of those services. That Dillingham's proposed boundaries qualify for the exception is apparent from a review of 3 AAC 110.090-3 AAC 110.135.

3 AAC 110.090 - Reasonable need for city government

Those fishing in Nushagak Bay need City of Dillingham services. The City of Dillingham needs a way to fund the continued provision of those services. It is reasonable to collect tax from the natural resource tax base in order to fund the continued provision of city services used by those fishing in Nushagak Bay.

3 AAC 110.100 – Compatible in Character

Fishing grounds are “compatible in character” with a fishing community.

3 AAC 110.110 – Human and Financial Resources Necessary to Provide Municipal Services

This is not in dispute.

3 AAC 110.120 – Sufficiently Large and Stable Population

This is not in dispute.

3 AAC 110.130 – Boundaries

This does not need to be discussed twice.

3 AAC 110.135 – Best Interest of the State

This was discussed earlier in this responsive brief which discussion is incorporated in this section.

THE COMMISSION SHOULD ADD TO THE PREVIOUSLY APPROVED BOUNDARIES

Having reconsidered and reconfirmed Dillingham's petition meets annexation standards the Commission should then turn its attention to reconsideration of its action deleting two areas from the city's enlarged boundary - Tract B and the east side set net statistical areas.

The Commission Failed to Consider Material Evidence About ADF&G Statistical Areas, Fish Ticket Reporting and Fish Tax Collection When Excluding All of Tract B

The Commission used the wrong Fish and Game boundary in establishing the boundary of the City of Manokotak. They used the drift fishery boundary when the set net fishery boundary should have been used. There were a number of Commissioners who felt only the set net area including Igushik Beach uplands plus waters immediately adjacent thereto should be excluded from the western boundary of an expanded City of Dillingham. For example, Commissioner Harrington stated it was “just that massive inclusion of the bay that I have problems with”⁵¹. Commissioner Wilson suggested extending a line “partway” from Tract A continually down to the very bottom of Tract B made sense because “Their basic need is along the shore, not way out in the bay”⁵².

The Manokotak decisional document glosses over these expressed Commissioner statements. For example, in discussing 3 AAC 110.090 and 3 AAC 110.100 in its findings and conclusions, Tract B is not mentioned⁵³.

Including the entire Tract B within the City of Manokotak was claimed to be based on a finding “Tract B is made up of established statistical areas set by the Alaska Department of Fish and Game”. The related finding was “splitting this section of the Nushagak District further than the way it is described by ADFG for Manokotak is impractical”⁵⁴. Both of these are misstatements which fail to address material facts pertaining to the Fish and Game boundary between the Igushik set net fishery and the Igushik drift fishery.

The Igushik set net area is ADF&G statistical area 325-11. This distinct ADF&G statistical area is reflected on fish tickets submitted by processors and Igushik set net permit holders fishing within Tract B⁵⁵. By far the predominate statistical area reported on fish tickets, which include fish caught by drift permit holders within Tract B, is 325-00⁵⁶. This statistical area includes fish harvested both in Tract B and outside Tract B. If the Commission wanted to be “practical”, only statistical area 325-11 should be included within the expanded boundaries of Manokotak.

Doing so will make things a lot easier for collection of fish tax by Dillingham and Manokotak. This was explained in detail by Ms. Brito at hearing in Dillingham and also discussed in detail in Dillingham’s responsive brief⁵⁷. In summary, Igushik set netters fill out fish tickets identifying a specific statistical area. This means it is simple to collect and remit fish

⁵¹ Dec. 1 Transcript p. 35.

⁵² Dec. 1 Transcript pp. 17, 47.

⁵³ Dec. 27 Decision pp. 2-3.

⁵⁴ Dec. 20 Decision p. 4.

⁵⁵ Nov. 30 Hearing Transcript pp. 89-94, Exhibit J to Feb. 26 Responsive Brief.

⁵⁶ The Igushik drift harvest statistical area 325-10 is only identified on fish tickets when the Igushik District is the only area in Nushagak Bay open for drifters. This happens infrequently.

Id.

⁵⁷ Feb. 26 Responsive Brief, pp. 5-7, (Responsive Brief Excerpts attached).

tax on fish caught by set net permit holders. But fish caught within Tract B by drift fishermen are not reported as a distinct statistical area. These fish are combined with fish caught outside Tract B in a single delivery to the processor and identified on fish tickets as having been harvested in statistical area 325-00. This means differentiating between fish subject to the Dillingham fish tax and fish subject to the Manokotak fish tax will involve lots of guesswork. The Commission overlooked these facts when including all of Tract B within the expanded boundaries of the City of Manokotak. On reconsideration, Tract B should be part of Dillingham not part of Manokotak.

That it is “practical” for the Commission to consider the ADF&G boundary between the Igushik set net fishery and the Igushik drift net fishery is evidenced by the Commission’s use of just that boundary to set the eastern boundary of an enlarged City of Dillingham. The Commission set Dillingham’s eastern boundaries based on the ADF&G boundary between statistical areas established for set net fisheries (325-32, 325-32, 325-38, and 325-34) and statistical area 325-00, which encompasses only the Nushagak Bay drift fishery⁵⁸. If it was “practical” to reduce Dillingham’s boundary to exclude east side set net waters, it is equally “practical” to reduce Manokotak’s boundaries to include only west side (Igushik) set net waters. Doing so would result in two consistent boundary decisions.

There was no Rational Basis to Distinguish Between East Side Setnetters and Igushik Set Netters

A significant portion of the Manokotak set net permit holders were from Manokotak which formed the basis for the Commission decision approving including Igushik set net waters within Manokotak. A significant portion of the east side set net permit holders are from Dillingham. Yet the Commission with no explanation excluded east side set net permit waters from Dillingham’s expanded boundaries. On reconsideration if the Commission includes Igushik set net waters within Manokotak’s boundaries, east side set net waters should be included in Dillingham’s boundaries. If the Commission is not including the Nushagak drift fishing district in Dillingham, the Commission should include a similar “corridor” to connect those waters to existing Dillingham boundaries.

Technical Corrections to the Legal Description Should be Made

If the Commission reconfirms its December 1 decision on reconsideration, technical corrections to the legal description contained in the December 27 written decision should be made. Since the Commission left the original legal description up to Staff - these corrections are being communicated to Commission staff by the city’s surveyor.

CONCLUSION

The LBC has a role to play in ameliorating the effect of the state’s fiscal crisis on Dillingham citizens. The LBC, by approving annexation, can partially offset the cuts made in school debt reimbursement, community jails, revenue sharing, dispatch services, and DMV services, as well as provide more resources to maintain port and harbor facilities used by both residents and non-residents of Dillingham. This will be done by expanding the city’s tax base.

⁵⁸ Dec. 20 Statement of Decision on Dillingham Petition, p. 1.

Given the fish ticket reporting system, the most practical and efficient way to do so is to include all of Nushagak Bay to the “south line” within city boundaries. An expanded tax base benefits residents of Dillingham, permit holders who fish in Nushagak bay, and residents of other communities in the Dillingham Census Area who rely on and use city services. It is precisely this rationale that has led the Commission to twice approve annexation. There is no reason to reverse this rationale. The Commission should be part of the solution not part of the problem. It is in the best interest of the State that the Commission extend a helping hand to Dillingham.

Part of Governor Walker’s vision is “An Alaska where local governments have the authority and resources to meet their communities’ needs”⁵⁹. Approving Dillingham’s annexation petition would be consistent with this vision for Alaska. The Commission is independent of the Governor of course but it would be nice if it was pulling on the same rope. Providing a helping hand to Dillingham’s existing local government in order to provide resources to meet the communities’ needs is this Commission’s “place on the rope” pulling towards a better state. Do not walk away from the rope you were pulling on such a short time ago. After further reconsideration approve Dillingham’s annexation.

⁵⁹ Jan. 18, 2017, State of the State Address, (supra n. 8) p. 15.