THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Commerce, Community, and Economic Development

DIVISION OF COMMUNITY AND REGIONAL AFFAIRS

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Preliminary Report to the Local Boundary Commission

Regarding the Petition to Incorporate Nikiski as a Home Rule City

May 10, 2017

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This preliminary report was written by Eileen Collins Raese, staff to the Local Boundary Commission (LBC or commission). The staff is part of the Division of Community and Regional Affairs of the Alaska Department of Commerce, Community, and Economic Development (Commerce, DCCED, or department). The report can also be found at the following address: https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/2016PetitionforIncorporationofNikiski.aspx

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Graphic illustration only: This publication's maps are intended to be used only as general reference guides. Source documents remain the official record.

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May 10, 2017

Dear Reader,

This report presents the analysis of the Department of Commerce, Community, and Economic Development regarding the petition to incorporate Nikiski as a home rule city within the Kenai Peninsula Borough. The department prepared this report in its role as staff to the Local Boundary Commission. The commission is an unpaid, independent board created by the Alaska constitution to act on proposals for incorporation, annexation and other municipal boundary changes.

I encourage readers to review carefully and offer comments on this preliminary report. Comments **received** at the address noted below **by 4:30 p.m., June 12, 2017**, will be considered in the preparation of the department's final report on this matter.

Local Boundary Commission staff
Division of Community and Regional Affairs
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The Local Boundary Commission will a conduct public hearing(s) in the territory proposed for incorporation, tentatively scheduled for August 2017. The date will be announced with details of the public hearing with public notice upon release of the department's final report which is tentatively scheduled for July 26, 2017.

Sincerely,

for/ Chris Hladick
Commissioner

EXECUTIVE SUMMARY

The Alaska Department of Commerce, Community, and Economic Development, which serves as staff to the independent Local Boundary Commission (LBC), has issued this preliminary report on the petition to incorporate Nikiski. The proposal is to incorporate as a home rule city with approximately 5,480 square miles and a population of 5,985. The department is required by law to prepare both a preliminary report and final report on the incorporation proposal prior to a public hearing on the matter before the LBC. In this role, the department has carefully reviewed the incorporation petition and presents its analysis with a recommendation to the LBC.

This preliminary report provides a summary of the information and views found in the petition; from respondents, the petitioners' reply brief, as well as from public comments. Alongside that is the department's analysis, findings, and conclusion. The department will issue a final report with a second recommendation to the Local Boundary Commission in July of 2017.

Cities are mechanisms empowered by the Alaska constitution to provide services to populated areas within specific corporate boundaries. The petition's stated goals seek a home rule city of Nikiski in order to provide services more efficiently than those provided by the borough through several service areas and increase representation for Nikiski residents.

The standards for incorporation within an organized borough are higher than those for a city forming in the unorganized borough. The department finds that the petition does not meet most of the standards, and therefore, does not recommend approval of the incorporation petition. Specifically, the petition:

- **Lacks evidence that a city will provide additional services:** The proposed boundaries conform to those of current service areas boundaries each of which, through a transition, will be absorbed into a single municipal government. However, the petition as presented does not plan to offer any new services beyond what is currently provided by the borough as required.
- **Does not adequately demonstrate that services provided by borough are lacking:** The petition does not adequately demonstrate that those services currently provided through the borough service areas are lacking.
    - The petition does describe limited coverage from the Alaska State Troopers, but in its proposal to form a home rule city, the petition does not plan to exercise law enforcement powers to alleviate these public safety concerns.
- **Does not demonstrate a reasonable need for city government:** Despite the petition's reasoning that because the Nikiski Fire Service Area assists oil platforms in Cook Inlet, those entities, owned and serviced by private industry, do not exhibit a reasonable need for inclusion in a city government. There must be a demonstrated need for city government, especially when the proposed area is within an organized borough.
- **Proposes inclusion of large, unpopulated areas and of distinct communities within boundaries:** The department recognizes a community of Nikiski does exist, but the

boundaries as presented reach beyond what is the community of Nikiski without adequate justification. More specifically:

- The boundaries are not on a scale suitable for city government for a community as defined by regulation, and include large unpopulated areas without required justification or anticipated municipal purpose.
- The population density illustrates the imbalanced scale of the proposal: ninety-five percent of the population of the proposed city lives within 1.5 percent of the territory.
- The boundaries also encompass a separate, distinct community, Tyonek, which has expressed opposition to inclusion within a city of Nikiski.

- **Is not in the best interests of the state:** The petition proposes simply transferring powers and revenues from the borough service areas to a municipal government without increasing services. The petition will not increase services or representation, especially for residents of Tyonek, and so does not maximize local self-government, and is, therefore, not in the best interests of the state.
- **Seeks more than it proposes to offer:** This petition proposes to include an extensive tax base in order to exercise local control over services and revenues for the small populated portion of the territory.
    - Separating from the nonareawide borough road service area allows for a city of Nikiski to collect revenue from a much larger area than currently does or will benefit from road maintenance, at the expense of roads and residents throughout the rest of the borough. Incorporation entitles Nikiski only to the revenue collected on behalf of the services that will be provided by a newly formed municipality—not the much larger territory as proposed.

While there are indeed higher barriers to incorporation of cities within organized boroughs, the conclusions found in this report do not preclude future attempts for forming a city of Nikiski. The department envisions that a petition to incorporate a city that proposed providing a higher level of services than currently offered by the borough, with boundaries that match what can reasonably be construed as a community Nikiski—the populated area on the east side of Cook Inlet along the Kenai Spur Highway—could be received more favorably. However, as it stands, the petition does not meet enough of the standards.

Nothing in this preliminary report is binding, and is only presented as staff is required to investigate and analyze all petitions for boundary change by law.

BACKGROUND ON LBC AND LOCAL GOVERNMENT

LOCAL GOVERNMENT IN ALASKA[1]

A city government is a municipal corporation and political subdivision of the State of Alaska. City governments are subject to the "limitation of community" doctrine.[2] The doctrine requires the area taken into the boundaries of a city to be urban or semi-urban in character. (Also see 3 AAC 110.040(b).)

On average, the corporate boundaries of cities in Alaska encompass just over 28 square miles. However, there are wide variations in the size of individual cities. The City of Saint Paul encompasses the largest area (295.5 square miles), while the City of Kiana encompasses the smallest area (0.2 square miles). Current state law restricts the inclusion of large geographical regions or large unpopulated areas in cities. (3 AAC 110.040(b) - (c); 3 AAC 110.130(c) - (d)). In addition, a city is part of the borough in which it is located. (Alaska Const., art. X, section 7)

Like a city, an organized borough in Alaska is a municipal corporation and political subdivision of the State of Alaska. However, organized boroughs are regional governments– much larger than cities. Article X, section 3 of the Alaska Constitution requires that the entire state be divided into boroughs, organized or unorganized. It also requires that each borough embrace a maximum area and population with common interests.

Article X, section 1 of the Alaska Constitution calls for minimum numbers of local governments. Together, sections 1 and 3 of article X promote large boroughs embracing natural regions.

Presently, there are 19 organized boroughs in Alaska. On average, organized boroughs encompass just over 15,866 square miles (528 times the average size of cities). Like cities, the size of individual organized boroughs varies considerably. The largest organized borough is the North Slope Borough (94,762 square miles), while the Municipality of Skagway is the smallest (464.3 square miles)

In 2016, Alaska's 19 organized boroughs were inhabited by 662,486 individuals, or 89.5 percent of the total population of the state.[3]

Organized boroughs encompass about 45 percent of the geographic area of Alaska. State law provides that the part of Alaska outside organized boroughs comprises a single unorganized borough. As it is presently configured, the unorganized borough encompasses 323,440 square miles. The unorganized borough was inhabited by 77,342 residents in 2016.

A "unified municipality" is an organized borough (unified, home-rule borough). A unified municipality is defined as such by the Local Boundary Commission in 3 AAC 110.990(1).

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1 Local Government in Alaska. LBC Staff, DCCED. Revised May 2015, updated numbers provided in this report
2 *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 100 (Alaska 1974)
3 Community Database Online, 2016 Department of Labor Estimates

The Alaska Constitution recognizes only two types of municipalities, cities and boroughs (Alaska, Const., art. X, sec. 2). The legislature consistently treats unified municipalities as boroughs. The Municipality of Anchorage is an example of a unified municipality.

Presently, there are 145 city governments in Alaska. In 2016, those cities were inhabited by 163,008 individuals or 22 percent of Alaska's total population of 739,828. The 2016 population of cities ranged from a high of 31,957 (City of Fairbanks) to a low of 10 (City of Bettles).

There are three different classifications of city governments in Alaska—home rule, first class, and second class cities. A community must have at least 400 permanent residents to form a home rule or first class city. First and second class cities are general law cities—state law defines their powers, duties, and functions. General law is distinct from home rule. Home rule cities have all legislative powers not prohibited by law or charter.

All local governments have certain fundamental duties such as conducting elections and holding regular meetings of the governing bodies. Beyond this, the duties of municipalities in Alaska vary considerably. All organized boroughs as well as home rule and first class cities in the unorganized borough must operate municipal school districts. Second class cities in the unorganized borough and cities in organized boroughs are not authorized to do so.

All organized boroughs, along with home rule and first class cities in the unorganized borough, must also exercise planning, platting, and land use regulation. Second class cities in the unorganized borough are permitted, but not required, to exercise those powers. Home rule, first class, and second class cities in organized boroughs may exercise planning, platting, and land use regulation powers only if those powers have been delegated to them by the borough.

Organized boroughs also have the duty to collect municipal property, sales, and use taxes levied within their boundaries. Otherwise, municipal powers are exercised at the discretion of local governments. Second class cities are not obligated by law to provide any particular service.

Organized boroughs may provide services on three jurisdictional levels. These are (1) areawide (i.e., throughout the entire borough); (2) nonareawide (i.e., in that part of the borough outside of cities); and (3) service area (the size and configuration of service areas may vary, and they may even include territory within the boundaries of city governments under certain circumstances).

The Alaska constitution (art. X, section 5) and Alaska Statutes (AS 29.35.450) prohibit the creation of new service areas if services can be provided by an existing service area, annexation to a city, or incorporation of a new city.

ABOUT THE LBC

Article X, section 12 of the Constitution of the State of Alaska created the Local Boundary Commission, also referred to as "LBC" or "commission." It states that:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the Legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

The commission is responsible for establishing and modifying proposed municipal government boundaries. The framers of the state constitution believed that local governments should have authority to determine which powers they would exercise. They also asserted their belief that the state should set municipal boundaries because "local political decisions do not usually create proper boundaries." The advantage lies in placing decision-making authority with a state body allows debate about boundary changes to be analyzed objectively, and to take areawide or statewide needs into consideration.[4]

The LBC acts on proposals for several different municipal (cities and boroughs) boundary changes. These are:

- Incorporating municipalities
- Annexing to municipalities
- Detaching from municipalities
- Merging municipalities
- Consolidating municipalities
- Reclassifying municipalities
- Dissolving municipalities

The LBC is an autonomous commission with five members. The governor appoints LBC members for five-year overlapping terms.[5] One member is appointed from each of Alaska's four judicial districts. The chair is appointed from the state at large. Commission members receive no pay for their service.

The present members of the Local Boundary Commission are:

- Lynn Chrystal, chair, serving at large

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4 *Fairview Public Utility District No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962).
5 AS 44.33.810.

- John Harrington, serving from the First Judicial District
- Robert Harcharek, serving from the Second Judicial District
- Debra Mack, serving from the Third Judicial District
- Lavell Wilson, serving from the Fourth Judicial District

Alaska's constitution called for establishing an executive branch agency to advise and assist local governments (article X, section 14). That agency is the Alaska Department of Commerce, Community, and Economic Development (Commerce, or department).[6] Commerce serves as staff to the LBC per Alaska Statute (AS) 44.33.020(a)(4). Within Commerce, the Division of Community and Regional Affairs (DCRA) performs the local government agency's functions. This includes providing staff, research, and assistance to the LBC.

LBC staff is required by law to investigate and analyze each boundary change proposal and to make recommendations regarding it to the commission.[7] For each petition, staff will write at least one report for the commission, each of which is a public document. Staff recommendations to the commission are based on properly interpreting the applicable legal standards and rationally applying those standards to each petition. Due process is best served by providing the commission with a thorough, credible, and objective analysis of every local boundary change proposal.

Besides providing support to the commission, the LBC staff also delivers technical assistance to municipalities, to petitioners, to residents of areas affected by existing or potential petitions, to respondents, to agencies, and to the general public. Assistance the LBC staff provides includes:

- Answering public, legislative, and other governmental inquiries relating to municipal government issues
- Writing reports on petitions for the LBC
- Drafting LBC decisions
- Traveling to communities to conduct public meetings and answer questions about proposed local boundary changes
- Developing and updating municipal incorporation or boundary change forms
- Sending local boundary change forms and materials to interested persons
- Providing a link between the LBC and the public
- Maintaining Alaska municipal incorporation and other boundary change records
- Coordinating, scheduling, and attending LBC public meetings and hearings
- Developing orientation materials and providing training for new LBC members
- Maintaining and preserving LBC records in accordance with Alaska's public records laws

Two staff members serve the Local Boundary Commission and are located in Anchorage.

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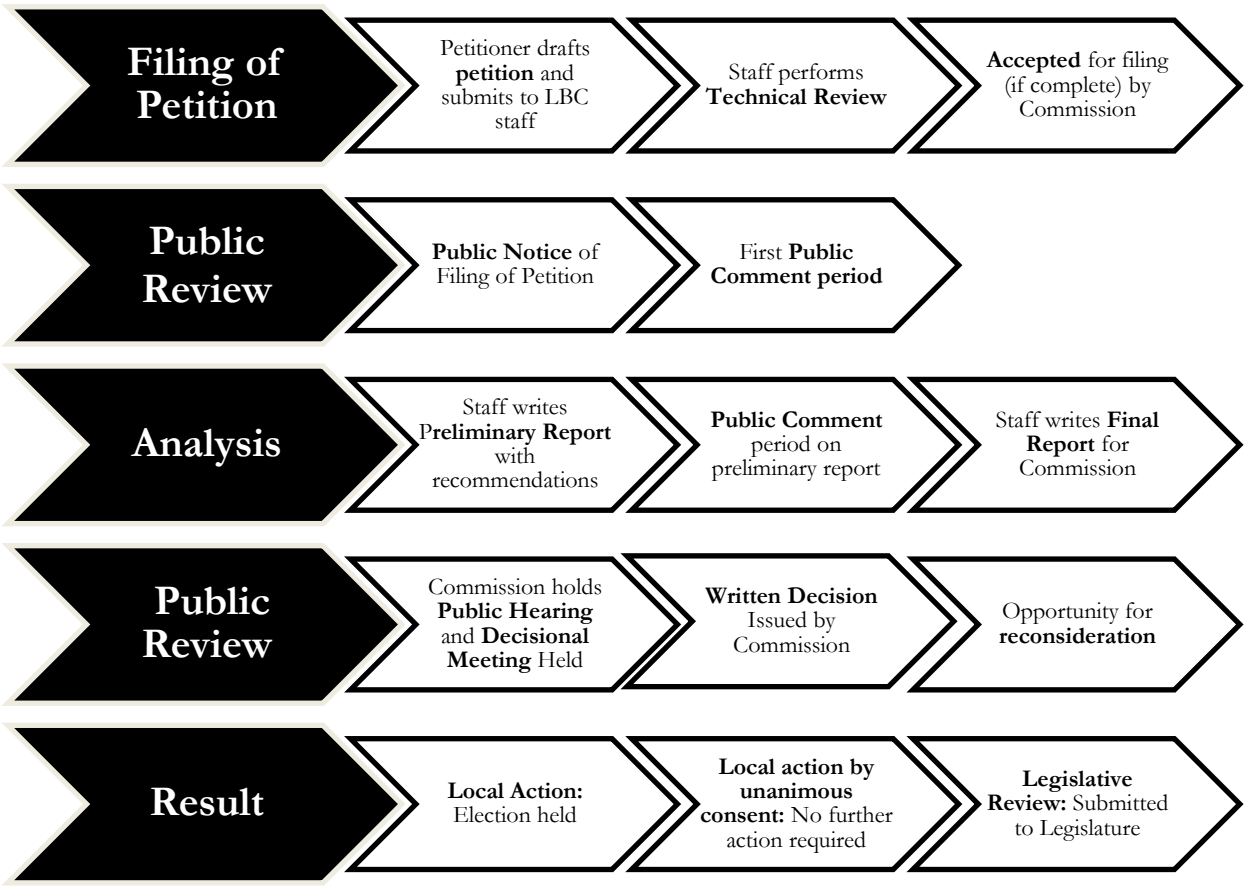
6 AS 44.33.020(a)(1) provides that Commerce "shall (1) advise and assist local governments."
7 S*ee* AS 29.04.040, AS 29.05.080, AS 29.06.110, and AS 29.06.480 - 29.06.490; 3 AAC 110.530.

LBC PROCESS

When the department receives a petition, staff performs a technical review to ensure a petition has all required elements. When staff finds a petition complete, it is accepted for filing. At this stage, staff works with the petitioner to ensure the public is notified and the petition is available for review as required by regulations. There are two public comment periods and two staff reports to the commissioners before the matter comes before the commissioners in a public hearing. At the public hearing, the commission listens to the petitioners, any responding parties, and to any public comments given. At the decisional meeting, the commission discusses the record, and reaches a decision. It may amend, approve, or deny a petition. Depending on the type of petition, either legislative review or local action, and if the LBC approves the petition, the decision is either submitted to the Legislature for the chance to disapprove the LBC's decision, or to the Division of Elections or existing municipality to hold a vote, respectively.



NIKISKI INCORPORATION PETITION

SUMMARY OF THE NIKISKI PETITION

This report examines a petition by residents to establish a city of Nikiski as a home rule city in the Kenai Peninsula Borough. This incorporation petition is subject to review by the LBC.

- Seeking incorporation of a home rule city
- Approximately 5,900 people within the boundaries
- Approximately 5,480 square miles within the boundaries
- 5 service areas
- Seeking to absorb the services of each, excepting the Central Kenai Peninsula Hospital Service Area (CKPHSA)

PROCEEDINGS TO DATE

The Local Boundary Commission staff received a petition on October 5, 2016, with signatures for incorporation of Nikiski as a home rule city. More than 278 qualified voters residing in the Kenai Peninsula Borough within the proposed city boundaries signed the petition to the Local Boundary commission to incorporate as a home rule city to be called "City of Nikiski." The voters, or their designated representative, are referred to in this report as "petitioner" or "petitioners."

Staff performed a technical review, and after finding the petition technically complete, LBC staff accepted the petition for filing December 30, 2016. The formal acceptance was announced with public notice, and opened a public comment period.

TIMELINE OF PROCEEDINGS

Date	Action
October 5, 2016	Petition submitted to LBC staff
December 30, 2016	Petition accepted for filing
February 21, 2017	Staff held Informational Meeting in Nikiski
March 8, 2017	Public comment period on petition filing ended
March 29, 2017	Deadline for Petitioner's Reply brief

BRIEFS AND COMMENTS RECEIVED

Total Public Comments	**30**
Support	28
Oppose	1
Neutral	1

Responsive Briefs	Stance
Native Village of Tyonek and Tyonek Native Corporation (Tyonek Group)	Oppose
Kenai Peninsula Borough (KPB)	Oppose
Louis Oliva	Support
Wenda Kennedy	Support

FUTURE PROCEEDINGS

The publication of this report on May 10, 2017, opens a second public comment period which extends through June 12, 2017. Staff will review those comments, and publish a second, final report to the Local Boundary Commission on the petition. This report is estimated to be published in July 2017, and will provide a recommendation to the Local Boundary Commission. That conclusion and recommendation may be the same as this report or may vary. The publication of the final report will be noticed in a paper of general circulation, and will also announce the date of the public hearing on the petition. At this public hearing, petitioners as well as respondents and the general public will have a chance to weigh in before the commissioners. The public hearing is tentatively scheduled for August 2017 in the territory proposed for incorporation.

If the LBC approves the petition, the department will notify the director of the Division of Elections. The division will issue an election order within 30 days of DCCED notification which will provide information on the nomination process for the election of initial city officials. The election must be held between 30 days and 90 days of the election order issuance under AS 29.05.011. The election question will also include the names of those initial officers to serve on the city council. If the incorporation question is rejected, no officials are elected. *(See Appendix A for the Full Petition Schedule.)*

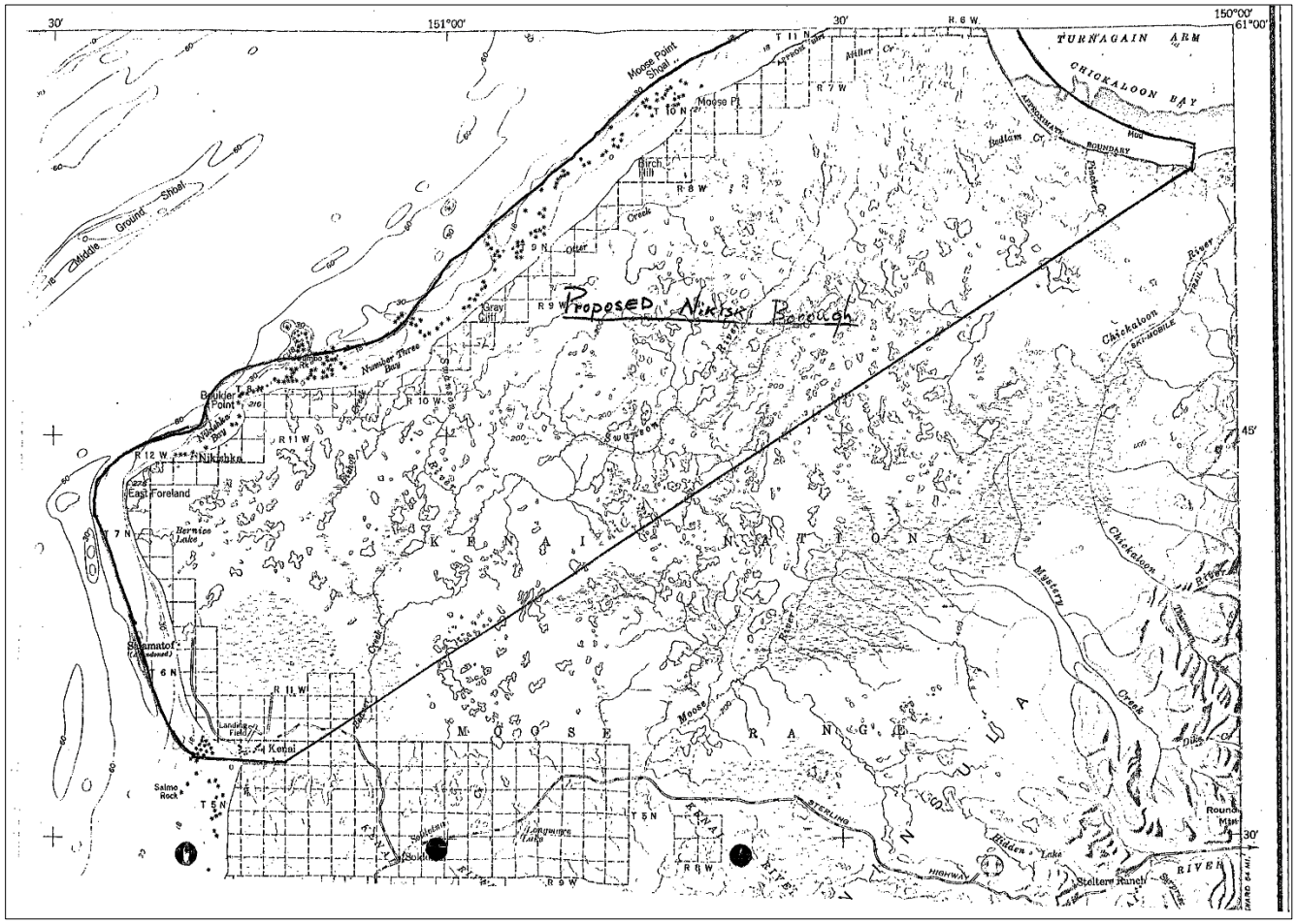
PAST LBC ACTIVITY IN THE REGION: RELEVANT PRIOR PETITIONS

1973: The Local Boundary Commission rejected a petition to incorporate a first class borough in the north Kenai Peninsula Borough. Figure 1 provides a map with the boundaries of the proposed borough. The LBC decision stated that the borough failed to include an area that was interrelated. Specifically, the LBC decision stated that the proposed borough "artificially divide[d] parts of a socio-economic unit," and "that those services that the proposed borough would be authorized to exercise would be duplicative of the powers of the existing Kenai Peninsula Borough, its constituent cities and service areas, and that dual system of administration within one geographically distinct community would be inimical to the interests of the State of Alaska, residents and commercial activities of the area proposed for incorporation and other parts of the Kenai Peninsula Borough."[8]

8 1973 Nikiski Borough LBC Statement of Decision, June 19, 1973

The proposed borough would have been approximately 60 square miles, and would have included the City of Kenai. The proposed borough estimated an eight-mill levy was necessary to provide planned services in 1973, which included law enforcement.[9]

Figure 1. 1973 Proposed Boundaries for Nikiski Borough



1984: Residents of the northern part of the Kenai Peninsula Borough petitioned the LBC to incorporate a first class city called "Nikishka" reasoning that the area was growing and needed services not presently provided by the borough.[10] At that time, the standards found in regulations differed, and required that "the commission will not allow the incorporation of a community located within an organized borough unless the petitioners determine to the satisfaction of the Commission that the services to be exercised by the proposed city cannot be reasonably or practicably exercised by the borough on an areawide or non-areawide basis." The report determined this standard had been met because the proposed city of Nikishka planned to exercise streets and sidewalks, animal control, ports and harbors, cold storage, utilities, planning and zoning, and historical sites.[11]

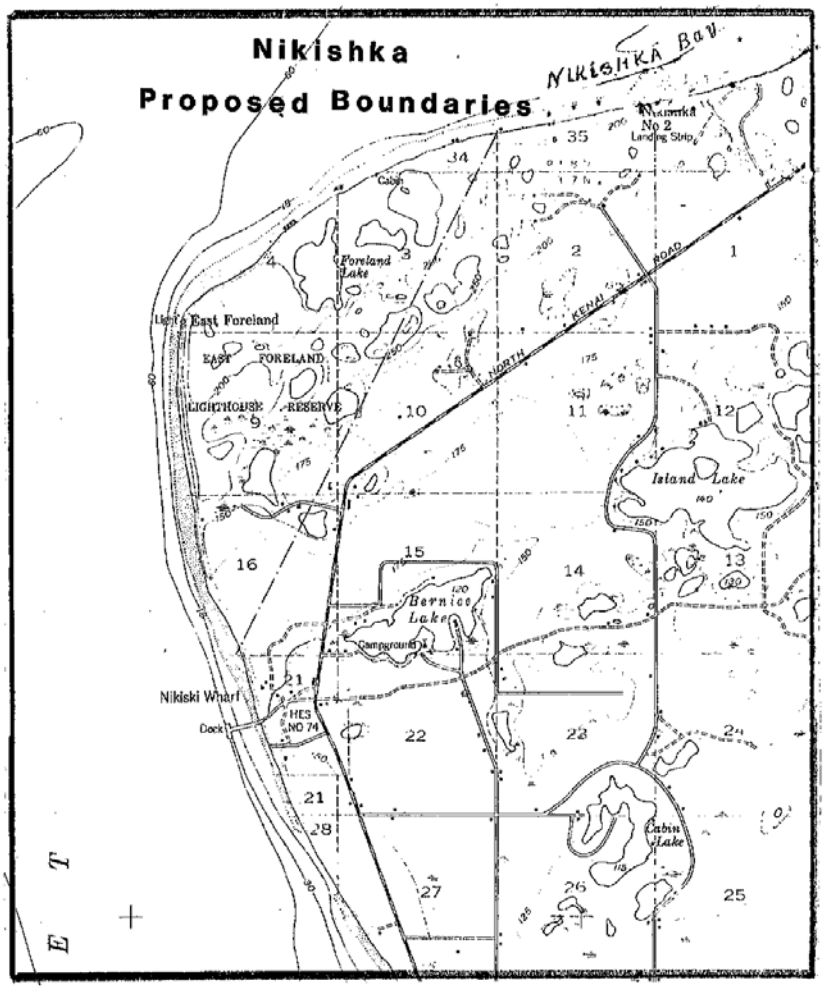
9 Narrative in Support of a First Class Borough in the Kenai-North Kenai Portion of the Kenai Peninsula
10 1984 Petition to Incorporate Nikishka as a First Class City, p. 6
11 LBC Files on 1984 Petition to the LBC to Incorporate Nikishka as a First Class City

The proposed city did not intend to absorb the service areas or supplant their services, but rather to offer the additional services beyond what was provided by the borough.

Though the LBC files indicate there was very substantial opposition (based upon the volume and content of correspondence) to the name and the incorporation in general, the LBC found that the incorporation of a city of approximately 30 square miles called Nikishka met the standards, and should be put to a vote of the people. It therefore approved the petition in 1984. There is anecdotal evidence that some residents thought the issue on the ballot was the name of the city rather than the incorporation of a first class city. LBC files which include the original petition submitted as well as media articles and staff correspondence indicate that threats of annexation by the City of Kenai were an impetus in the push to incorporation at least in part. The issue of whether the community would be Nikiski or "Nikishka" which was the name on the petition to incorporate became a central issue of local dispute as well, according to those same files.[12] The incorporation question was resoundingly voted down—with 570 voting in opposition and 29 voting in favor of incorporation. The proposed boundaries are found in Figure 2.

12 LBC Files on 1984 Petition to the LBC to Incorporate Nikishka as a First Class City

Figure 2. 1984 Proposed Boundaries for the City of Nikishka [13]

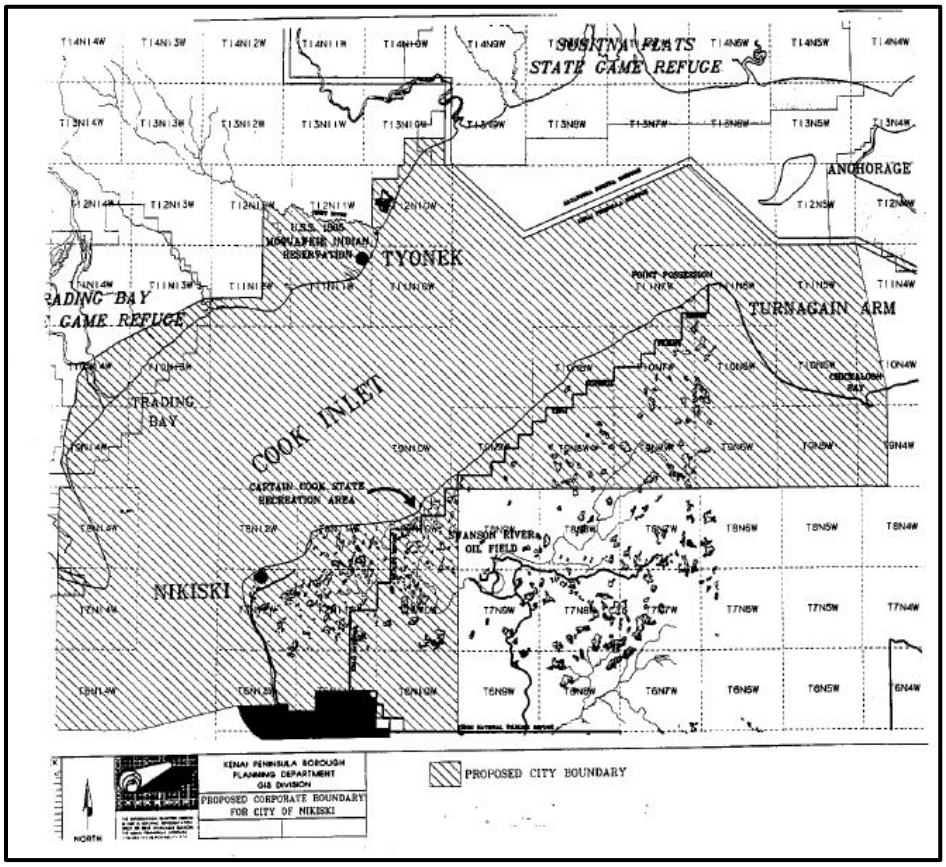


1991-2: A draft petition seeking incorporation of second class city called Nikiski was presented to LBC staff around 1991 or 1992. DCRA has a copy of the draft petition, which included maps indicating that the boundaries initially proposed were identical to the fire service area and to those now proposed in this 2016 petition. The boundaries were then reduced from approximately 5,400 square miles to approximately 600, and still included both Tyonek and Beluga.[14] The boundary proposed would have followed a pipeline on the west side from the Drift River to Beluga.[15] This petition was never formally submitted to the LBC, and therefore, did not come before the LBC in a public hearing. As this petition was only informally reviewed by staff more than two decades ago, the department is unclear of the exact details of the proposal and what prompted the petition not to

13 Report to the State of Alaska Local Boundary Commission on the Petition to Incorporate the Community of Nikishka as a City of the First Class, May 16, 1986, Municipal and Regional Assistance Division (MRAD), Department of Community and Regional Affairs. p. 3
14 "Villages aren't sure they want to become part of Nikiski city," *Kodiak Daily Mirror*, June 24, 1991.
15 "City of Nikiski?: Proponents look at area that's bigger than Connecticut," Cathy Brown, *Peninsula Clarion*, May 29, 1991.

be formally submitted by its proponents. Additional information from the LBC's 1992 Annual Report to the Legislature indicates that petitioners were weighing whether to proceed with incorporation with reduced boundaries because the Native Village of Tyonek had expressed its opposition to inclusion within a city of Nikiski. It is presented in this report only for greater context.

Figure 3. 1991-1992 One Iteration of Proposed Boundaries of a City of Nikiski[16]

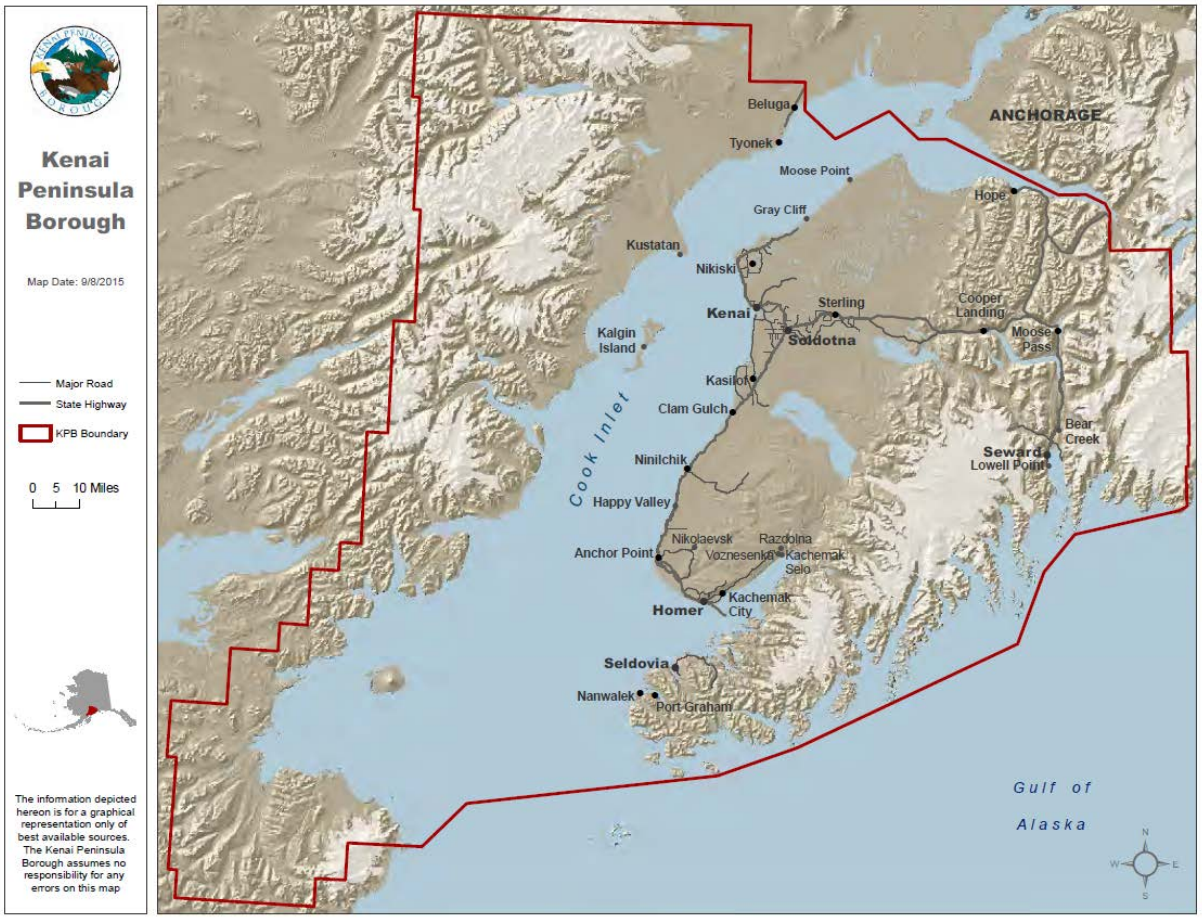


From the 1990s forward to the mid-2000s, residents in Nikiski expressed varying levels of interest in incorporation, but stopped short of formally petitioning the LBC. The borough expressed opposition to the Nikiski borough in 1973, but offered its support in the form of a resolution in the 1990s for the proposed second class city. It is unclear whether the borough took a formal position in 1984 when Nikiski was proposing to form a first class city, but minutes from the department's public hearing indicate a representative from the KPB stated that since the city would not be attempting to supplant the hospital or recreation service areas, the borough did not oppose the incorporation.[17]

16 DCRA Local Boundary Commission physical files on Nikiski and Nikishka
17 DCRA LBC physical files on Nikiski and Nikishka

PROFILE OF THE KENAI PENINSULA BOROUGH AND TERRITORY PROPOSED FOR CITY INCORPORATION

Figure 4. Map of Kenai Peninsula Borough[18]



The Kenai Peninsula Borough is one of eight boroughs formed in 1964 after the Mandatory Borough Act of 1963. It is a second class borough with approximately 21,330 square miles of land and water.[19] The total population in 2016 is estimated at 58,060.[20] Table 1 provides the population and area distribution of the six incorporated cities within the borough and compares it with the total population.

18 Kenai Peninsula Borough, GIS department, accessed March 29, 2017
19 DCRA Community Database Online, accessed April 4, 2017
20 2016 Department of Labor Estimate. Community Database Online, accessed March 13, 2017

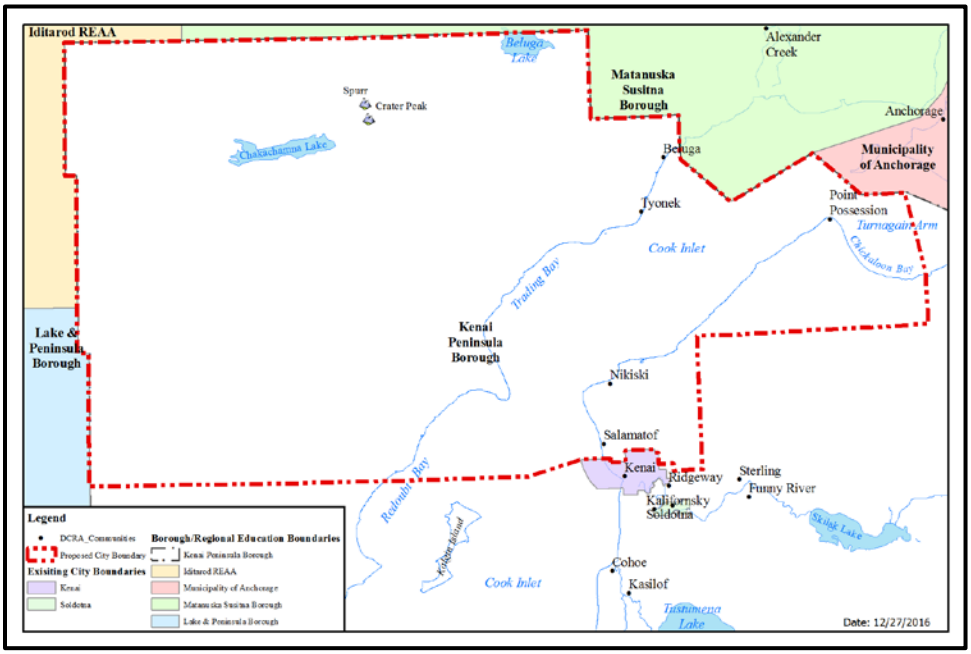
Table 1. Cities in the Kenai Peninsula Borough						
City	**Type**	**Year Incorporated**	**2016 Population**	**Square mileage of land**	**Square mileage of water**	**Total Square Mileage**
Kenai	Home rule	1960	7,098	29.9	5.6	35.5
Seldovia	First class	1945	206	0.4	0.2	0.6
Seward	Home rule	1912	2,663	14.4	7.1	21.5
Kachemak	Second class	1961	479	1.61	-	1.61
Homer	First class	1964	5,252	10.6	14.9	25.5
Soldotna	Home rule	1967	4,376	6.9	0.5	7.4
Total population in all incorporated cities			20,074			
Totals in Kenai Peninsula Borough			58,060			21,330 sq. miles
Source: DCRA Community Database Online						

Nearly two-thirds of KPB's population lives outside an incorporated city. The average size of a city is 15.35 square miles including land and water. No new cities have formed since 1967 although Soldotna reclassified from a first class city to a home rule city in 2016.

The City of Soldotna is the borough seat. The Kenai Peninsula Borough Assembly has nine members elected by district and meets in Soldotna. The borough operates the Kenai Peninsula School District. The borough exercises the required powers under AS 29.35.150-.180 which include education, assessment and collection of taxes, ports and harbors, and land use regulation. As a second class borough, the borough, under AS 29.35.210, may adopt additional powers on a nonareawide basis if voters approve the acquisition at an election of voters inside the borough but outside the cities. It also exercises economic development on a nonareawide basis.

Home rule cities have all legislative powers not prohibited by law or charter. A home rule city in an organized borough has no specific requirements regarding services it must provide.

Figure 5. Boundaries of Proposed City of Nikiski

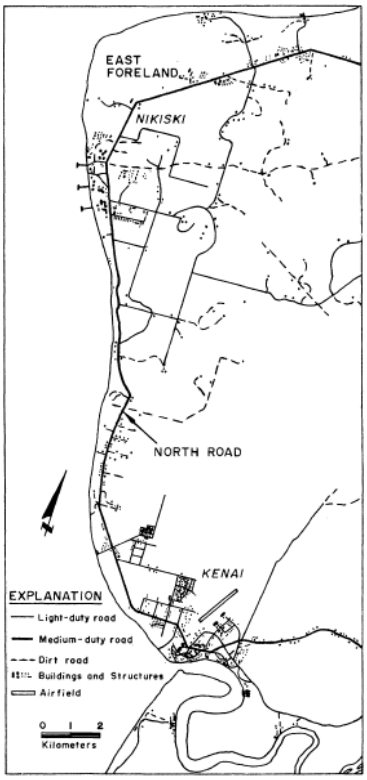


The territory proposed for incorporation is shown in Figure 5. The boundaries adjoin the City of Kenai to the South, cross Cook Inlet and border the KPB boundaries on its western edge with Lake and Peninsula Borough, the Iditarod Regional Attendance Education Area (REAA), Matanuska-Susitna Borough, and the Municipality of Anchorage. The territory encompasses five census designated places (CDPs).

Brief History of the Area

Homesteaders in the Nikiski area built the North Road from the City of Kenai, and both residential and industrial development clustered along this road as the area developed.[21]

Figure 6. Land Use After Oil Development, 1972 Source: Lins, p. 297



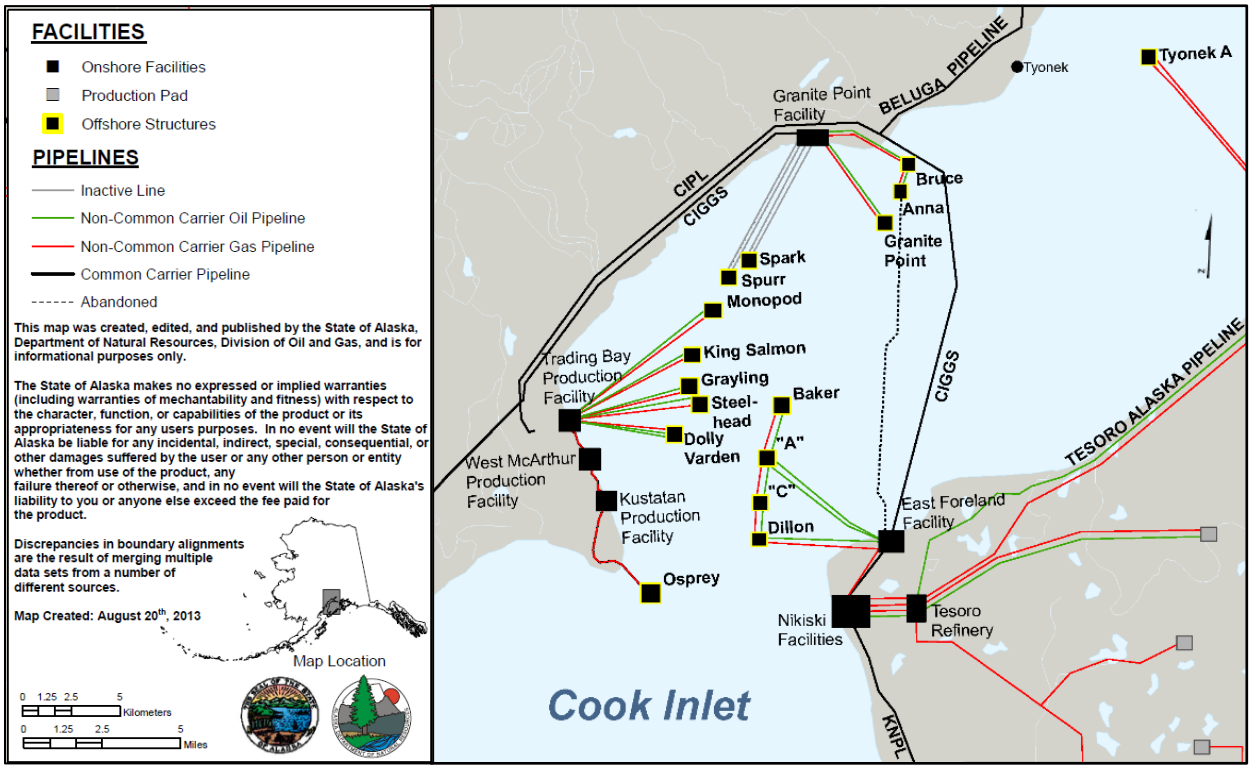
21 Harry F. Lins, Jr. "Energy Development at Kenai, Alaska." 1979. *Annals of the Association of American Geographers.* Vol. 69. No. 2, June 1979, p. 300

The Swanson River Oil Field was the site of the first discovery of oil in Alaska in 1957. The Nikiski area developed in conjunction with the onshore and offshore oil developments of the 1960s along the North Road, also called the Kenai Spur Highway as depicted in Figure 6. This highway connects the area to the state highway system and to Anchorage.[22]

Offshore development further built up the area as facilities were built in the Nikiski area in order to accommodate oil and gas production, related service entities, as well as the workers in this industry. By the 1970s, Nikiski became more than an outgrowth of the City of Kenai and had its own commercial and residential centers, as well as its own schools.[23]

Title 43, Chapter 56 of the Alaska Statutes (AS 43.56) provides for a levy on oil and gas related property at a fixed rate of 20 mills. Any taxes a municipality (borough and/or city) levies in property tax that would be applied to properties taxable under AS 43.56 must be applied at the same rate that is applied to other similarly situated, taxable property. That portion of the 20 mills levied by the State of Alaska is allocated accordingly to the local taxing authority. The balance, or all of the tax collected if no municipality levies a property tax, is retained by the state.

Figure 6. Cook Inlet Infrastructure[24]



22 Lins, p. 292
23 Lins, p. 299-300
24 Department of Natural Resources, Division of Oil and Gas, 2013, area of focus adjusted by DCRA

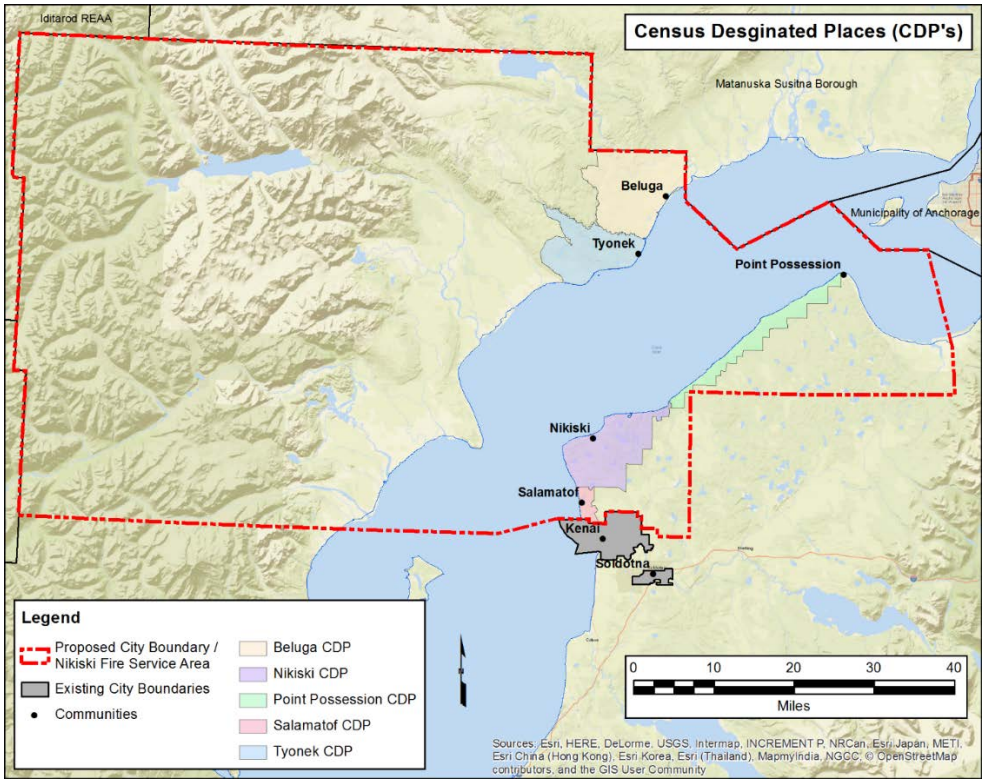
Characteristics Today

Nikiski is currently classified as a CDP, and is one of five with such designations within the boundaries proposed for incorporation. Details are listed in Table 2. CDPs are designations with boundaries determined by the state of Alaska and the U.S. Census Bureau as an administrative tool for keeping statistics on population centers without corporate borders. Beginning with the 1980 Census, unincorporated places were defined as census designated places for closely settled population centers without corporate limits. In Alaska, CDPs only had to have 25 people though the threshold in other states was much higher. Though CDPs have no legal status, they are useful in comparing data of unincorporated places. The boundaries of these CDPs may shift between census counts. All numbers listed in this document will combine these CDPs unless specifically specified that the report is referring to a specific place or otherwise.

Table 2. Population	
CDP Name	**2016 Population Estimate**
Nikiski	4,616
Salamatof	1,097
Point Possession	3
Beluga	16
Tyonek	182
Total	5,914

Source: 2016 Department of Labor Estimates, DCRA Community Database Online

Figure 7. CDPs within Proposed Boundaries



Nikiski[25]

Traditionally in Kenaitze Indian territory, the area was homesteaded in the 1940s and grew with the discovery of oil on the Kenai Peninsula in 1957. By 1964, oil-related companies that located here included Unocal, Phillips 66, Chevron, and Tesoro. The Sterling Highway provides access to Anchorage. Nearby Kenai offers an airport and docking facilities. The Port Nikiski docks service offshore drilling platforms. There are two private airstrips in the vicinity.

Salamatof

Salamatof was first reported in 1911 by the U.S. Geological Survey as a Dena'ina Indian village. A portion of the Salamatof population is Athabascan, although the surrounding area on the Kenai Peninsula is largely non-Native. There is a village corporation, Salamatof Native Association, based in Kenai.

Beluga

Beluga is a CDP in the Kenai Peninsula Borough. It has a low population density, with a total area of approximately 100 square miles and 16 year-round residents as 2016.[26] The population increases significantly in the summer, as residents of Southcentral Alaska utilize the many recreational cabins in the community. Year-round residents tend to work in field services for the oil and gas industry. The majority of Beluga's landowners are involved in sport fishing and hunting. Chugach Electric Association operates a power plant here which provides some electricity to Anchorage.

Point Possession

Point Possession, just south of Anchorage near Nikiski, was sold to the federal government in 2009, and is part of the Kenai National Wildlife Refuge. It was formerly the site of Possession Village and some of the land in the area was owned by Point Possession, Inc. Point Possession was one of the areas that Captain Cook was said to have visited in Alaska during a voyage in 1777. There was already an established native village there. U.S. Census records from 1900 show that members of the Knik Tribe lived there. Point Possession has not met the threshold for CDPs, and will likely be eliminated in the 2020 Census; the department is unclear why it was counted at all.

Tyonek

It is a Dena'ina Athabascan village. Various settlements in this area include Old Tyonek Creek, Robert Creek, Timber Camp, Beluga, and Moquawkie Indian Reservation. Captain Cook's journal provides a description of the Upper Cook Inlet Athabascans in 1778, who possessed iron knives and glass beads. He concluded that the Natives were trading indirectly with the Russians. Russian trading settlements were established at "Tuiunuk" and Iliamna prior to the 1790s, but were destroyed due to dissension between the Natives and the Russians. Between 1836 and 1840, half of the region's Indians died from a smallpox epidemic. The Alaska Commercial Company had a major outpost in

25 All CDP history and culture information from DCRA Community Database Online, accessed April 20, 2017
26 DCRA Community Database Online, 2016 Department of Labor Estimate

Tyonek by 1875. In 1880, "Tyonok" station and village, believed to be two separate communities, had 117 residents, including 109 Athabascans, six "creoles," and two whites. After gold was discovered at Resurrection Creek in the 1880s, Tyonek became a major disembarkment point for goods and people. A saltery was established in 1896 at the mouth of the Chuitna River north of Tyonek. In 1915, the Tyonek Reservation (also known as Moquawkie Indian Reservation) was established. The devastating influenza epidemic of 1918-19 left few survivors among the Athabascans. The village was moved to its present location atop a bluff when the old site near Tyonek Timber flooded in the early 1930s. The population declined when Anchorage was founded. In 1965, the federal court ruled that the Bureau of Indian Affairs (BIA) had no right to lease Tyonek Indian land for oil development without permission of the Athabascans themselves. The tribe subsequently sold rights to drill for oil and gas beneath the reservation to a group of oil companies for $12.9 million. The reservation status was revoked with the passage of the Alaska Native Claims Settlement Act in 1971. There are two primary entities associated with Tyonek. The Native Village of Tyonek (NVT) is a federally recognized tribe, a designation from the U.S. Bureau of Indian Affairs, which signifies a relationship with the federal government and entitles that community to benefits and protections relating to tribal sovereignty.[27] Tyonek Native Corporation is a village corporation formed under the 1971 Alaska Native Claims Settlement Act (ANCSA).

Service Areas

Article X, Section 5 of the Alaska constitution provides for services areas:

> Service areas to provide special services within an organized borough may be established, altered, or abolished by the assembly, subject to the provisions of law or charter. A new service are shall not be established if, consistent with the purposes of this article, the new service area can be provided by an existing service area, by incorporation as a city, or by annexation to a city. The assembly may authorize the levying of taxes, charges, or assessments within a service area to finance the special services.

Title 29 of the Alaska Statutes provides further detail on service areas, but, fundamentally, service areas are functions of the borough in which they are located. They provide a mechanism to fund services within specific boundaries, and dedicate those funds. They are not independent entities, however, and have been used throughout Alaska in organized boroughs. An examination of service areas is vital to understanding the conflict described by this petition.

Thomas A. Morehouse, in *Alaska's Urban and Rural Governments*, explains that service areas, in addition to providing services to a smaller area, rather than on an areawide or nonareawide basis, were often used as tools to keep tax revenue locally, and keep areas from being annexed.[28] He added that service areas can result in two manners: increased local autonomy in service delivery, but also in "grossly unequal distribution of the property tax resources on which the service areas depend."[29]

27 Bureau of Indian Affairs, "Frequently Asked Questions," https://www.bia.gov/FAQs, accessed April 24, 2017
28 Morehouse, p. 57
29 Morehouse, p. 55

Service areas should be through these lenses—that they create more responsive governing structures in the absence of city governments and where gaps in service exist, but that they are also capable of capturing tax revenue and keeping it for a local community, which precludes its use for larger distribution across a borough.

The proposed city boundaries encompass or are within several Kenai Peninsula Borough service areas: Nikiski Senior Service Area, North Peninsula Recreation Service Area, Central Kenai Peninsula Hospital Service Area, Nikiski Fire Service Area, and the Road Service Area. Because the service areas are relevant to the proposed incorporation, each is described in this section.

Table 3. Service Areas Mill Rates

Service Area	**Details**	**Mill rate**
Central Kenai Peninsula Hospital Service Area (CKPHSA)	Boundaries are much larger than the proposed city	0.1
Nikiski Senior Service Area (NSSA)	Boundaries very similar to those proposed excluding Salamatof, above the City of Kenai	0.2
North Peninsula Recreation Service Area (NPRSA)	Boundaries substantially similar to those proposed, slightly larger	1.0
Nikiski Fire Service Area (NFSA)	Boundaries identical to those proposed	2.9
Road Service Area (RSA)	Nonareawide throughout borough	1.4

Source: Petition

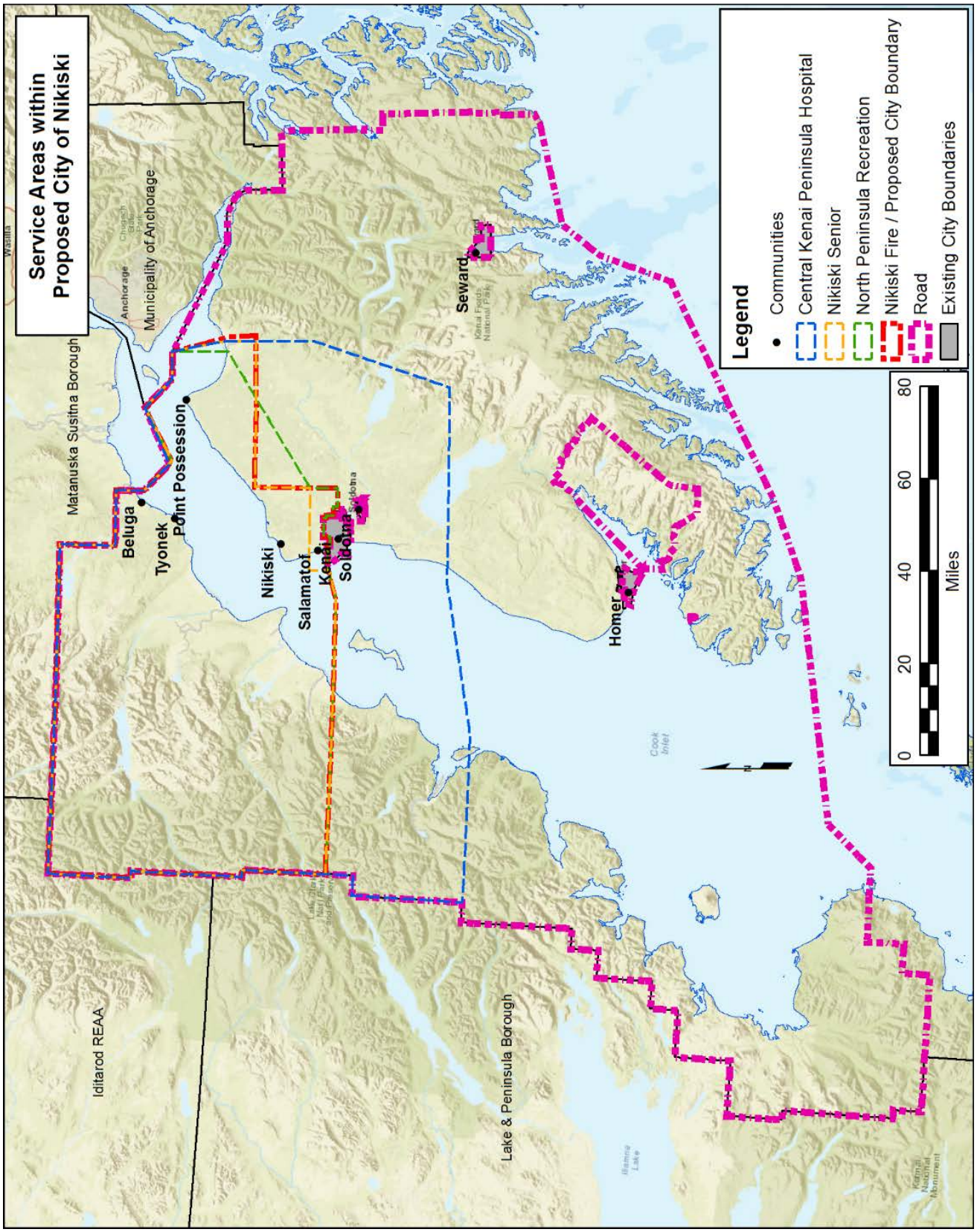


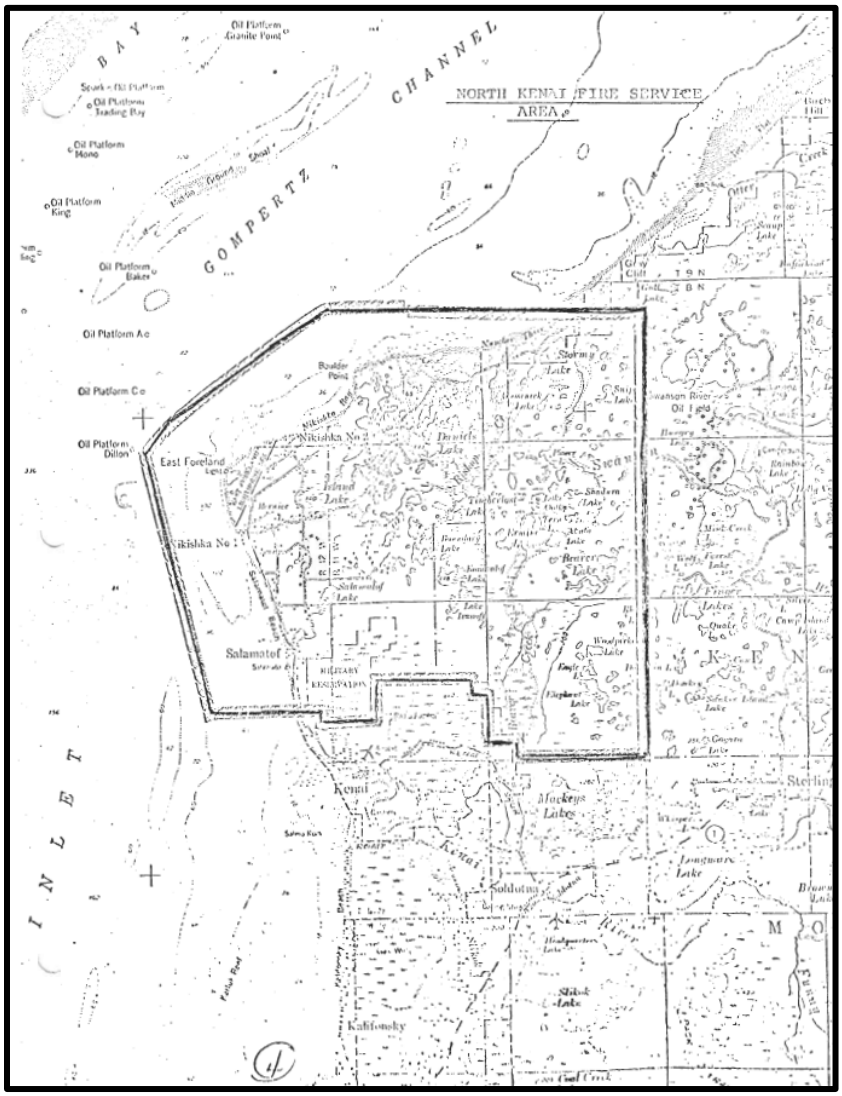
Figure 8. Service Areas Boundaries within Proposed City

History of the Service Areas

Nikiski Fire Service Area (NFSA)

The fire service area was formed as the North Kenai Fire Service Area in 1969, just a few years after the borough was incorporated in 1964. At that time, the North Kenai Fire Service Area, as it was called until 1977[30], encompassed a much smaller territory as seen in the Figure 10.

Figure 9. 1969 North Kenai Fire Service Area Boundaries[31]



It was the first fire service area in the borough.[32] Its formation was spurred in part when the adjacent City of Kenai stopped providing protection outside its borders.[33] The service area borders

30 Ordinance 77-59. Kenai Peninsula Borough Assembly. The name was voted on, and Nikiski won over Nikishka.
31 Ordinance 69-12. Kenai Peninsula Borough Assembly
32 Petition, Exhibit E, p. 4
33 Ordinance 69-12. Kenai Peninsula Borough Assembly

extended out three miles offshore—the limit of state waters and the extent of the waters included within the City of Kenai's original boundaries when that city incorporated in 1960.[34] Figure 10 depicts the original boundaries. The first fire service board was composed of five appointed members.[35]

In 1982, the service area boundaries were expanded, and were described by the enabling KPB Assembly ordinance as an attempt to standardize boundaries by creating ones that were substantially similar to the North Peninsula Recreation Service Area, which were created in 1974 and described later in this section.[36] It is unclear whether any services were expanded as a result of this expansion, however.

The assembly-approved ordinance called for an election on the measure; the question on the ballot asked voters whether they favored an expansion of the current boundaries to include the Cook Inlet area in which oil platforms are located, and the Tyonek village area, and the area of the Beluga Coal Fields.[37]

The enabling ordinance stated that the proposed change would permit the boundaries to reflect the fact that the service area was presently servicing oil platforms in the Cook Inlet.[38] The Nikiski Fire Chief Al Willis testified at that time that expansion of the boundaries was necessary to capture the tax revenue locally; he also stated that while the fire department would be able to work with industry to provide for Trading Bay and the coal fields, but since industry had their own fireboats, the service area would mostly provide search and rescue functions in Cook Inlet.[39] The Beluga Coal Fields are the location of the recently scrapped Chuitna Coal Mine project in the extreme northern part of the west side of Cook Inlet within the borough boundaries.[40]

The description provided on the ballot measure only described part of the expansion. The boundaries proposed expanded all the way to the Kenai Peninsula Borough boundaries despite there being little population on the west side. As in 1982, there are still a very small percentage of borough residents on the west side of the inlet. The election result was favorable and the service area expanded. However, it is unclear whether additional services to Tyonek were part of the expanded service area.

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34 Ordinance 69-12. Kenai Peninsula Borough Assembly
35 Ordinance 69-13. Kenai Peninsula Borough Assembly.
36 Ordinance 82-13. Kenai Peninsula Borough Assembly.
37 Ordinance 82-13. Kenai Peninsula Borough Assembly.
38 Ordinance 82-13. Kenai Peninsula Borough Assembly.
39 Kenai Peninsula Borough Assembly Meeting Minutes, March 16, 1982
40 Zaz Hollander, "Controversial Chuitna coal mine 'shelved' after investor backs out." *Alaska Dispatch News.* April 3, 2017

Current Operations

The NFSA has 22 employees and 30 volunteer members, and is managed by an elected seven-member board. The NFSA provides emergency services, search and rescue, and firefighting and is specially trained for high-angle, confined space, industrial firefighting, cold water surface and dive rescues.

There are four stations; the two located at mileposts 17.9 and 26.5 of the Kenai Spur Highway are owned by the NFSA and have full time staff. The fire stations in Beluga and Tyonek are owned by other entities, and operate volunteer forces in conjunction with those on the west side of the inlet.[41]

In 2016, there were nine volunteer firefighters in Tyonek and six in Beluga. Since 2009, there have been 30 calls the two stations responded to, in total.[42] Table 4 provides the calls for a single calendar year by station in 2016.[43]

Table 4. Call Rates by Station in 2016

Station	Alarms
Beluga	3
Nikiski Fire Station 1	406
Nikiski Fire Station 2	547
Tyonek	11

Source: Alarm Analysis by Districts, January 1, 2016 through December 31, 2016. Provided by KPB to LBC staff

North Peninsula Recreation Service Area

The North Peninsula Recreation Service Area was created by the KPB assembly by enacting "An Ordinance Establishing the North Peninsula Recreation Service Area for the Construction and Maintenance of Recreation Services and Providing for an Elected Board" in 1974. The hearing was postponed until after the school board discussed the possible inclusion of a swimming pool in their budget which was the alternate means of funding a local pool.

The new service area was created solely to build a pool in the Nikiski area, but taxed boundaries far larger than the Nikiski area. Though no services would be provided in Tyonek at the time, it was explicitly stated at the public hearing on the ordinance that the boundaries were purposely large to include the oil and gas revenues in the inlet and on the west side of the inlet.[44] In the years since, recreation powers have been expanded beyond a pool, and now provide recreation services to Tyonek through a contract of the borough annually through the Boys and Girls Club of Southcentral, which is based in Anchorage.[45] While the reasoning for this boundary's specific twists

41 Petition, Exhibit E, p. 4,
42 NFSA information provided by KPB to LBC staff
43 Alarm Analysis by Districts, January 1, 2016 through December 31, 2016. Provided by KPB to LBC staff
44 Minutes from April 23, 1974, KPB Special Assembly Meeting.
45 Tyonek Group Responsive Brief, p. 7

and turns is not documented in the original language, the general size and scope of this boundary is important because the NFSA was later expanded to substantially match it.

The NPRSA currently has an elected five-member board and 9.25 employees.[46] The service area operates a number of services on the east side including the Nikiski Community Recreation Center. The NPRSA offers many services now including an ice rink, playgrounds, fitness activities, golf, gym, skate parks, multi-purpose fields, and many activities for a variety of ages. The Nikiski Community Recreation Center also hosts a library, and many organized activities and space for rentals as well.[47]

Nikiski Senior Service Area

The borough created a senior service area in 1993 after the loss of federal revenue sharing money for senior services to fund existing senior service centers.[48] However, Salamatof was excluded from the service area because of testimony provided to the assembly.[49] It is not clear whether any services were provided on the west side of the inlet when the service area was initially created.

The NSSA is now managed through a nonprofit, Nikiski Senior Citizens, Inc. which has its own board, and owns all the assets of the NSSA including two community centers, and eight senior housing units. The NSSA has a five member elected board., and is funded by property tax as well as grant money from the KPB provided to all senior citizen groups in the borough.[50] The KPB provides grants for seniors based on the number of seniors in each election precinct and the percentage of seniors in the population. The FY17 KPB budget specified that there were 738 seniors making up about eight percent of the population, and $52,981 was transferred to the NSSA fund.[51]

The KPB budget states that the mission of the NSSA is to provide funding to the NSSI and provides meals, transportation, social services and referral services to seniors in the Nikiski area. The budget indicates that $25,000 was allocated in FY17 for the administration of Tyonek senior citizen programs.

Central Kenai Peninsula Hospital Service Area

This service area was first established in 1969 by Ordinance 69-03 in order to provide hospital services. The current service area has a population of 35,656 and covers 9,126 square miles. There are two hospital service areas within the borough, and the CKPHSA encompasses essentially the northern half of the borough from Tyonek to Hope to Clam Gulch and has a mill rate of 0.1. The South Kenai Peninsula Hospital Service Area covers much of the southern half of the borough, excluding Seldovia and Seward, in particular, and has a mill rate of 2.3. The service area provides

46 Petition, Exhibit E, p. 2
47 North Peninsula Recreation Service Area website. Accessed April 20, 2017
48 KPB Assembly Ordinance, 93-05
49 Minutes from February 16, 1993 KPB Assembly Meeting.
50 Petition, Exhibit E, p. 6
51 KPB FY17 budget, p. 135

funds and a nonprofit, CPGH, Inc., manages the hospital operations. In 2016, the KPB Assembly abolished the service area board, and now manages the service area directly.[52]

Road Service Area

In the 1980s, the borough passed ordinances creating four service areas for road construction and maintenance. The borough also required road service areas conform to election precincts as established by the lieutenant governor. Therefore, three election precincts, as they were then drawn after redistricting following the 1980 Census, were included in the North Kenai Road Maintenance Service Area: Nikiski 1, Nikiski 2, and Tyonek.[53]

That service area made up of the three election precincts then called the North Kenai Peninsula Road Maintenance Service Area has similar boundaries to the current NFSA and the territory proposed for incorporation in this 2016 petition. It also did not include a mill levy because the ordinance stated that the State of Alaska provided the money for service area roads that were not state roads.[54]

That service area had an elected five-member board. The service area only had road maintenance powers. Throughout this time, no mill rate was levied because costs were entirely covered by the state. In 1985, the powers were expanded to acquire road improvement powers, and a half mill levy was established, but not levied.[55] Only in 1992, after the road service areas had been consolidated and state funds had declined, was a mill rate on property tax levied for maintenance and improvements.[56] A 1991 assembly ordinance consolidated the four service areas into a single service area with a stated purpose of efficiency; this ordinance passed the assembly, and survived a legal challenge that reached the supreme court of Alaska.[57]

In that case, the court stated that

> "A service area is a specific geographical area within which a municipal service is furnished by a borough. Its powers derive from statute, charter and ordinance. Service areas have no corporate status or right to sue under any Alaska statute. Neither the Kenai Borough charter nor Borough ordinances confer such status or right. Therefore, the North Service Area does not have standing to sue the Borough."[58]

In *North Kenai Peninsula Rd. Maintenance Serv. Area v. Kenai Peninsula Borough*, the court also determined that because the new ordinance consolidating the road service areas into one, and changing the elected boards to appointed was simply altering the service areas, doing so by ordinance and without

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52 KPB FY17 budget, p. 308-309
53 KPB Assembly Ordinance, 82-63 sub.
54 Kenai Peninsula Borough Assembly Ordinance 81-63S. 1981. Kenai Peninsula Borough website.
55 KPB Assembly Resolution, 98-062; KPB Assembly Ordinance 85-52.
56 KPB Assembly Resolutions 92-070, 85-104, 86-79, 87-50, 88-50, 89-62, 90-53
57 KPB Assembly Resolution 91-18
58 *North Kenai Peninsula Rd. Maintenance Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636 (Alaska 1993).

a public vote, as created the service areas, was valid. The court also stated the consolidated road service area did not change the powers and duties or the geographic boundaries of the larger service area which was still subject to assembly approval and appropriation, and that voter approval would only be required if the borough were seeking an additional power.[59]

Since 1991, there has been a single service area that covers much of the Kenai Peninsula Borough outside of most of the incorporated cities. The borough levies a 1.4 mill rate on that area to provide road services across the service area. The current road service area is divided into five regions for administration: Eastern, Western, Central, Northern, and Southern. The Northern section is described as Mile 15 of the Kenai Spur Highway or North Road to approximately Mile 35 in what the KPB calls the "North Kenai/Nikiski" area.[60] While the Road Service Area boundaries are nonareawide which means all areas within the borough, but outside organized cities with some exceptions, none of these administrative regions for road maintenance are located on the west side of Cook Inlet. The current service area has eight employees.[61] There is a seven member appointed board, with one representative from each region, and two at-large.

The next chapter will evaluate the information provided by the petitioners, respondents, and public comment and provide analysis by the department in determining whether the proposed boundary change meets the standards.

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59 *North Kenai Peninsula Rd. Maintenance Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636 (Alaska 1993).
60 KPB website, "Road Service Area," http://www.kpb.us/service-areas/rsa-service-area, accessed March 23, 2017.
61 KPB FY17 budget, p. 228

STANDARDS FOR INCORPORATION OF CITIES

This section will examine the standards required for incorporation by stating which will be followed by the views expressed in the petition, respondents' briefs, reply brief, comments, and a department analysis based on information presented and internal research. The department has done its best to characterize accurately the information provided in the petition, briefs, and comments. Finally, a conclusion on whether the proposal to incorporate meets that standard will be provided.

COMMUNITY (3 AAC 110.005)

In order to incorporate, the territory proposed to become a city must be recognized as a community. Community is defined by regulation 3 AAC 110.920.

> **a) In determining whether a settlement comprises a community, the commission may consider relevant factors, including whether the**
>
> **(1) settlement is inhabited by at least 25 permanent residents**

Views Expressed in the Petition

The petitioners list the population in the territory proposed for incorporation at approximately 5,985.[62]

Respondents' Views

Tyonek Group: The brief gives the approximate number of residents in the Native Village of Tyonek as 130, and notes that there are about 800 shareholders of the Tyonek Native Corporation.[63]

Views Expressed in the Reply Brief

None offered.

Departmental Analysis

As defined by the boundaries proposed by the petition, Nikiski meets the first requirement of 25 permanent residents.

> **(a)(2) whether the permanent residents live in a geographical proximity that allows frequent personal contacts and interaction**

62 Petition, p. 7
63 Tyonek Group Responsive Brief, p. 2

Views Expressed in the Petition

The petition describes Nikiski as a community with many churches, and civic organizations that shares a sense of local pride and lifestyle preferences demonstrated in local meeting spots, at annual community-wide events, and other events throughout the year.[64]

Respondents' Views

Kenai Peninsula Borough: The west side of Cook Inlet does not meet the standard of community because the distance prohibits frequent interaction and personal contacts found where permanent residents live in geographic proximity required by the standards, and should be excluded.[65]

Tyonek Group: Cultural differences, transportation patterns, as well as physical proximity preclude frequent personal interaction with residents on the east side of Cook Inlet.[66]

Views Expressed in the Reply Brief

The reply brief asserts that the inclusion of Tyonek and the west side in the KPB rather than the Anchorage Borough—both of which were created by the Mandatory Borough Act of 1963—is evidence that Tyonek is a part of the community, and this is bolstered by the fact that the west side has been included in service areas since.[67] Transportation routes between sides of the inlet demonstrate the connections. In addition, Nikiski is closer than Soldotna, and therefore, better able to provide services.[68]

Departmental Analysis

This section asks whether residents live in geographic proximity that allows for frequent interaction. At the closest point, Cook Inlet is nearly 10 miles across, and without a bridge, or any easy means across, Cook Inlet represents a geographic barrier. No part of the west side of Cook Inlet can meet this standard. Nor can any part of Cook Inlet. Certainly, some parts of Nikiski meet this standard, but the entire boundaries do not.

> **(a)(3) the permanent residents at a location are a discrete and identifiable social unit, as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial or industrial establishments, community services, and service centers**.

64 Petition, Exhibit G. p.4-6
65 KPB Responsive Brief, p. 2
66 Tyonek Group Responsive Brief, p. 7
67 Nikiski Reply Brief, part 1, p. 5
68 Nikiski Reply Brief, part 2, p. 17

Views Expressed in the Petition

The petition describes a community of Nikiski with approximately 300 businesses, community groups, meeting places, 13 churches, and civic organizations where many long-term residents meet and interact. The petition states that Nikiski has attracted many seniors, industry employees, and families who participate in community outreach to the needy, annual clean-up events, and other civic activities. The petition describes services provided within the territory including Meals on Wheels for seniors, and the Nikiski Community Council as examples of a discrete community.[69] The community is defined by its major industries related to natural resources and industry and by the services the community has voted to provide for itself for many years.[70]

Respondents' Views

Kenai Peninsula Borough: Tyonek is a discrete and identifiable social unit from Nikiski rather than a part of Nikiski. This is indicated in many ways. The brief notes that the west side is part of a separate state and house district than the east side communities of Nikiski and Salamatof, in addition to hosting its own school.[71]

Tyonek Group: The Tyonek Group asserts Tyonek "in no way fits within petitioner's 'discrete and identifiable social unit.'"[72] Tyonek residents attend different schools, subscribe to a lifestyle based on the seasons, and are more connected to Anchorage due to transportation patterns.[73]

Finally, the Tyonek Group states that inclusion in the proposed city boundaries means that it will be subject to a community which is "disturbing given the vast differences between the goals, needs and interests of Tyonek and those of Nikiski."[74]

In addition, the brief states that the information provided in the petition to describe the lifestyle of the community of Nikiski is "foreign" to Tyonek residents.[75] Rather, the brief contends Tyonek residents are attuned to the seasons as part of their subsistence lifestyle. The brief provides examples of the discrete community of Tyonek and points out that the services the community receives for the NSSA and NPRSA are provided through contracts; in the case of recreation, the contract is between the KPB and the Boys and Girls Club based in Anchorage rather than the eastside counterpart.[76]

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69 Petition, Exhibit G, p. 6
70 Petition, p. 8-9
71 KPB Responsive Brief, p. 4
72 Tyonek Group Responsive Brief, p. 7
73 Tyonek Group Responsive Brief, p. 7
74 Tyonek Group Responsive Brief, p. 13
75 Tyonek Group Responsive Brief, p. 6
76 Tyonek Group Responsive Brief, p. 7

Both entities (KPB and Tyonek Group) point out that the community action plan developed with the Nikiski Community Council (NCC) describes activities and goals of the much more limited scope of Nikiski and Salamatof. Indeed, the NCC limits membership to those two communities.[77]

Wenda Kennedy: Nikiski is a distinct community that embraces industry, fishing, and an independent lifestyle different from other communities across the Kenai Peninsula Borough. As an incorporated community, Nikiski could pursue innovative and distinct energy projects based on the plentiful resources available in the area.[78]

Louis Oliva: There are strong connections between the side of the inlet and the platforms because Nikiski is the home of many jobs that operate from their docks, heliports, airfields, and roads.[79]

Views Expressed in the Reply Brief

As an indication of shared interests, the petitioners in their brief and reply brief have asserted that the community of Nikiski is welcoming to industry. They refute the KPB's and Tyonek's response that the Native Village of Tyonek does not necessarily share this mindset. The petitioner replies that Tyonek Native Corporation's pursuit of development indicates that they are also welcoming to industry.

The boundaries of the Nikiski Community Council are not relevant to this petition. Census designated places, voting districts and other administrative boundaries should not be considered because they were chosen by entities without the consent of local residents.[80]

Indeed, the reply brief contends that there are many connections between the communities including many students from Tyonek that attend school on the east side and the presence of relatives who live in Nikiski and Tyonek; in addition, the Tyonek Native Corporation owns land on the east side, and Tyonek and Beluga families also fish on the east side of the inlet.[81]

Nikiski currently provides "direct" services to Tyonek and Beluga and it is the most appropriate place from which to provide services because of this and its geographic location in terms of efficiency.[82]

Departmental Analysis

While information provided by petitioners is considered in the determination of community, the department must also consider other objective sources such as those listed in the regulation. The department acknowledges that the boundaries of such administrative districts such as election, recording, CDPs, schools, and otherwise are outside the control of the petitioners so the borders do

77 KPB Responsive Brief, p. 3 and Tyonek Group Responsive Brief, p. 8
78 Kennedy Responsive Brief, p. 1-3
79 Oliva Responsive Brief, p. 5
80 Nikiski Reply Brief, part 2, p. 18-19
81 Nikiski Reply Brief, part 2, p. 19-20
82 Nikiski Reply Brief, part 2, p. 17

not necessarily reflect what petitioners consider to be their community. However, when examined as a whole, given the purposes of these administrative boundaries, the department is able better to identify what the appropriate boundaries are. The petitioner asks the LBC not to deny their petition simply because these administrative boundaries (schools, election districts, CDPs, and community council) do not fit the definition they have proposed for the city of Nikiski. The standard for community requires that residents live in close proximity that allows for frequent personal interactions.

The department examined election districts, school districts, recording districts as well as CDPs and find that none of them consider the west side of the inlet to be part of those communities on the east side. In addition, community-wide institutions described in the petition itself do not consider the west side part of the community. Cook Inlet represents a geographic barrier that is a clear impediment to personal interaction among residents on either side of the inlet. In addition, 95 percent of the residents in the entire territory proposed for incorporation live on the east side of the inlet.

Nikiski, itself, can be identified through its organizations, and institutions and their histories. The Nikiski Community Council, also called the North Peninsula Community Council, is one example of the community. The history of the northern Kenai Peninsula too indicates the presence of a community at times called North Roaders, which began with homesteaders in the 1950s—a history distinct from that of the west side.

In addition, Nikiski represents an assembly district with a seat on the borough assembly. Three election precincts for statewide elections are also found in the territory proposed for incorporation. Salamatof, while represented by a distinct CDP and election district, appears to be part of what constitutes Nikiski, and the department believes should also be included within the boundaries of the proposed city because Salamatof only seems to represent a village corporation not an actual community of Salamatof.

Furthermore, the Nikiski community is represented by its own eponymous schools that are part of the KPB school district: Nikiski North Star Elementary, Nikiski Middle School and High School all serve the population north of the City of Kenai.[83] Communities on the west side attend different schools within the borough district. The Nikiski Community Council also known as North Peninsula Community Council is limited to membership in the election districts of Nikiski and Salamatof.[84] The Nikiski Community Council receives community revenue sharing through the borough.[85]

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83 KPB School District. "Attendance Area Boundaries," http://www.kpbsd.k12.ak.us/departments.aspx?id=276, Accessed March 7, 2017.
84 Nikiski Community Council, "About," http://www.nikiskicc.com/about/, Accessed March 6, 2017.
85 Petition, p. 31

The Nikiski Community Action Plan describes Nikiski as the unincorporated area covered 28.1 square miles of water and 90 square miles of land.[86] The 2012 update to this plan described the area as the unincorporated areas of Salamatof and Nikiski north of the City of Kenai and comprising approximately 69.6 square miles of land.[87] It is unclear to the department the reasoning for this discrepancy and neither plan includes a map. Both plans identify law enforcement as a priority for the community, and the petition refers to the goals offered in these plans.

The balance of administrative boundaries indicate that only the east side represents a community as defined by regulation. Only service areas, whose boundaries have been drawn based on factors beyond whether the area represents a community, have included boundaries as large as presented by the petition. There is an area that does meet the requirement that the community can be identified as a discrete unit. While this section will not define it, broadly, it coincides with nearly all of the administrative boundaries the department examined and fits the population center on the east side, but is limited to a significantly smaller territory that is centered around the Kenai Spur Highway on the east side of Cook Inlet.

> **(b) absent a specific and persuasive showing to the contrary, the commission will presume that a population does not constitute a community if (1) public access to or the right to reside at the location of the population is restricted**

Views Expressed in the Petition

The petition briefly acknowledges that a potential city of Nikiski will "uphold [Tyonek's] wishes to remain a closed community,"[88] but does not specifically address this section or acknowledge that access is restricted in Tyonek.

Respondents' Views

Tyonek Group: The inclusion of Tyonek cannot be justified because as a closed community, Tyonek cannot meet the standard of a community of Nikiski.[89] The brief states clearly that "both geographically and culturally, public access to or the right to reside in Tyonek is restricted."[90]

Kenai Peninsula Borough: Tyonek is a closed community and therefore cannot be considered part of a city of Nikiski. In addition, the community of Tyonek sends its children to separate schools.[91]

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86 Nikiski Community Action Plan, May 2001, North Peninsula Community Council d.b.a. Nikiski Community Council, p. 3
87 Community Action Plan, Revised December 2012, North Peninsula Community Council, p. 3
88 Petition, p. 12
89 Tyonek Group Responsive Brief, p. 4
90 Tyonek Group Responsive Brief, p. 4
91 KPB Responsive Brief, p. 4

Views Expressed in the Reply Brief

Petitioners contend that KPB's responsive brief misrepresents the LBC regulations which state (as noted above) the community cannot be "restricted." The petitioners contend that "restricted" is not defined in LBC regulations, and that 3 AAC 110.920 applies to the entire territory proposed and so, cannot be apply to sections or portions of the territory proposed for incorporation.[92]

Departmental Analysis

While the regulation states a community cannot have access that is restricted, "closed" means the same thing here, in this case.[93] The regulation states that the petition must demonstrate that access is not limited. As the Tyonek Group's brief points out, the right to visit and reside in Tyonek is restricted which is demonstrated in evidence provided in Tyonek Group's brief, as well as known to the department. While the Nikiski petitioners may not view Tyonek as restricted, Tyonek and others do. Their argument also states that the LBC regulations only ask whether the entire territory proposed for incorporation is restricted, not a part.[94] The department agrees that Tyonek is a closed community and that alone disqualifies its inclusion.

(b)(3) the location of the population is provided by an employer and is occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

Views Expressed in the Petition

The petition describes many different employers of Nikiski residents, and indicates that Nikiski enjoys a stable, permanent and long-term population attracted by its many amenities.[95]

Respondents' Views

None offered

Views Expressed in the Reply Brief

None offered.

Departmental Analysis

The petitioners are not claiming that people working on the west side in facilities, or in Cook Inlet on oil platforms are residents. The department does not find any evidence that residents in any part of the territory are subject to employer-based residence.

92 Nikiski Responsive Brief, Supplement p. 2-3
93 Nikiski Reply Brief, part 1, p. 7
94 Nikiski Reply Brief, Supplement, p. 2
95 Petition, Exhibit G, p. 4

Findings on Standard of Community

Only an existing community is appropriate for a city boundary and there is no indication, and the petitioners case does not overcome the departments concerns that the community of Nikiski cannot logically be construed to include anything in Cook Inlet or any part of the west side.

Staff has examined the boundaries presented in the petition and many administrative boundaries that have attempted to define the Nikiski area throughout its history. It is evident to the department that the west side, including Tyonek and Beluga, does not fit these standards. Each is a discrete community with its own name, CDP, culture, and history. Tyonek represents a discrete community—not one that is part of any other, larger city, with another name that is distant and unconnected.

The department agrees with the Tyonek Group's assessment that the inclusion of Tyonek is inappropriate and that the west side of Cook Inlet cannot legitimately be considered part of a community with frequent interactions with Nikiski. Therefore, the entire west side must be eliminated because the extreme disparity in population between the east and west sides of Cook Inlet are a clear indication that there is not a community encompassing the west side or a need for city government where there are no people.

Moreover, the Mandatory Borough Act's author, John Rader, wrote in his explanation accompanying the bill that the election districts chosen were only proposed to be the starting point, and that he and others expected the residents of the boroughs proposed would adjust the boundaries to suit those communities.[96] As the early Alaska legislators found in 1961, local government in the form of boroughs did not form organically, and had to be induced. In addition, Tyonek failed to participate in the formation of the Kenai Peninsula Borough as indicated by DCRA's own files.[97] That Tyonek was included in the Kenai Peninsula Borough does not mean that Tyonek, which in the department's view is a discrete community, must be included in a city of Nikiski 53 years later.

While the territory as a whole exceeds the 400 permanent residents required for incorporation, about 95 percent of the residents live on the east side of Cook Inlet while approximately 95 percent of the land and water sought has no population at all. The department finds that the standard for community in section (a)(1) is met, but must note the unbalanced nature of the proposed boundaries.

There is a community of Nikiski, and the department does not dispute this. It is not, however, and cannot be defined by its service areas. Rather, the school district boundaries, CDPs, voting precincts,

96 Morehouse, p. 44-45; Rader, John, "An Explanation of House Bill No. 90," Supplement to House Journal, February 25, 1963
97 DCRA LBC physical files on Tyonek

and the community council boundaries help close in on what the appropriate boundaries for the discrete and identifiable boundaries for the community called Nikiski.

The entire territory proposed for incorporation does not meet the standard for community. However, a smaller territory does meet the standard for community. These specific boundaries will be discussed more fully throughout this report. This report will attempt to determine what is appropriate given the information found in the petition, comments, briefs, and department research. The remainder of the standards will guide the discussion leading to the department's conclusion.

NEED (3 AAC 110.010)

This section of the regulations evaluates whether the territory proposed for incorporation demonstrates a reasonable need for city government.

(a) In accordance with AS 29.05.011(a)(5), a community must demonstrate a reasonable need for city government

(a)(1) Existing or reasonably anticipated social or economic conditions

Views Expressed in the Petition

Incorporation as a home rule city would give Nikiski residents the ability to provide services for themselves in the most efficient and cost-effective method. The petition states that in order for residents of Nikiski to participate in planning for potential development in the Nikiski area incorporation is necessary. More responsive government, and control over local infrastructure are critical because the needs of the community are not a priority of the borough currently.

The petition states that the inadequacy of existing services, inequitable distribution of funds by the borough, potential development such as the Alaska Liquefied Natural Gas (AKLNG) pipeline, and other factors demonstrate a reasonable need for city government, and that residents recognize the need to "take direct responsibility for [their own] local government."[98] The petition states that the KPB ignores the social and economic impact from the proposed AKLNG, and that elected local government is the antidote to this. Incorporation will promote and provide better representation and higher standards or services.[99]

In addition, the petition states that the reason for the petition is that Nikiski has a distinct culture and community in the KPB, and wishes to provide services locally to ensure that they are provided more efficiently.[100] In addition, the petition mentions incorporation will allow the territory to create a municipal structure to work with state and federal officials.[101]

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98 Petition, p. 9
99 Petition, Exhibit G, p. 11
100 Petition, p. 10
101 Petition, Exhibit G, p. 21

Respondents' Views

Kenai Peninsula Borough: The land purchased in Nikiski took place when the state was not the primary driver of the AKLNG project as it is now. The borough also asserts that the future of the project is uncertain, but does not address the petition's claims that the community of Nikiski was left out of the planning processes so far.[102]

The borough states that the primary reason the petitioners are seeking incorporation is that the petitioners believe that their local tax dollars are being redistributed elsewhere in the borough and the Nikiski area is receiving inadequate road maintenance. The KPB brief contends that rather than the petition's claim that Nikiski residents are subsidizing the rest of the borough's road improvements, the oil and gas industry is subsidizing the Nikiski area.[103] The borough concludes that the proposed city does not meet the standard of demonstrating a reasonable need for city government because it does not plan to provide any services beyond what the borough currently provides or demonstrate how a city can do so more efficiently or in a more cost-effective manner.[104]

Wenda Kennedy: Lack of municipal status contributes to administrative and identity challenges for local businesses.[105]

Louis Oliva: Centralization of administration has led to a loss of control by residents over their own community. There is a pattern moving toward appointed boards with less autonomy from elected boards with more control over finances and decision-making. Nikiski residents receive significantly less in services than they contribute in taxes, but each service area was voted on by Nikiski residents as a means to tax themselves to receive services.[106]

Nikiski needs to have control over its future, and incorporation is the surest way to ensure Nikiski residents have an equal seat at the table. Without incorporating, the borough may continue a pattern of consolidating service areas in order to subsidize other service areas without similar resources.[107]

Tyonek Group: The petition offers no expansion in terms of service provision to the Native Village of Tyonek.[108]

Views Expressed in the Reply Brief

The petitioners state that the borough has failed to represent their interests with regard to AKLNG, as well as with road maintenance needs, and that incorporation would allow the city to lobby on its own behalf.[109]

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102 KPB Responsive Brief, p. 14-15
103 KPB Responsive Brief, p. 9-10
104 KPB Responsive Brief, p. 9-18
105 Kennedy Responsive Brief, p. 6
106 Oliva Responsive Brief, p. 3-4
107 Oliva Responsive Brief, p. 2-4
108 Tyonek Group Responsive Brief, p. 12
109 Nikiski Reply Brief, part 2, p. 28-29

The petitioners contend that the second class borough of KPB is too large and distant to be able or willing to provide the services that the residents desire. The borough has continued to centralize services to the point where the Nikiski area feels shortchanged. Furthermore, the petition states that without incorporation the growth of Nikiski is limited.[110]

The brief also asserts that the borough is unable and unlikely to provide further municipal services to the west side if Nikiski does not continue providing services as it has through service areas and will through incorporation.[111] Petitioners contend that the KPB's assertion that the primary reason for incorporation is control over road maintenance is incorrect; rather self-determination is the issue. The petitioners also state that the KPB cannot defend the fact that more revenue is generated in the Nikiski area than is expended. The reply brief contends that the KPB has not adequately demonstrated how it is not distributing tax revenue unequally throughout other areas of the borough.[112]

Departmental Analysis

It is reasonable to desire adequate representation for a community through local government. A locally elected city council could be more responsive to the needs of residents of Nikiski, but the department is unsure that incorporation will address the social and economic conditions expressed in the petition. The petitioners express dissatisfaction with an unresponsive borough government whose agenda they view as contrary to that of the residents of Nikiski. The issues regarding perceived tax inequities will be addressed in a later part of this section.

(a)(2) Existing or reasonably anticipated health, safety, and general welfare conditions

Views Expressed in the Petition

The Nikiski petition lists the inadequate coverage from the Alaska State Troopers as one reason for incorporation. The petition also discusses the need to protect groundwater from industrial pollution as a reason for the need for home rule city status, and states the U.S. Environmental Protection Agency (EPA) and Alaska Department of Environmental Conservation (DEC) as well as the KPB have not adequately protected their water in the past. Specifically, incorporation will give residents the ability to regulate new industry safety standards when the city negotiates contracts, permits, and operating agreements.[113]

110 Nikiski Reply Brief, part 1, p. 8-9
111 Nikiski Reply Brief, Supplement, p. 2
112 Nikiski Reply Brief, part 2, p. 23-24
113 Petition, p. 13

Respondents' Views

Kenai Peninsula Borough: One reason the Nikiski area attracts industry is the current lack of regulation. KPB points out that the transition plan does not indicate a permitting process for a groundwater protection program or a revenue source for this new power that the petition mentions as a reason for incorporation.[114]

The Nikiski area has voted down the power to provide law enforcement and that law enforcement powers are not included in the incorporation petition or charter is evidence that a city of Nikiski does not consider law enforcement an essential municipal service, which contradicts their statement of the lack of law enforcement as a reason for incorporation.[115]

Views Expressed in the Reply Brief

The petitioners note that it is only speculation by the borough that a potential city of Nikiski would have to raise taxes in order to provide law enforcement, and point to a letter reproduced in the reply brief from Governor Bill Walker to Senator Pete Kelly discussing potential legislation that would allow communities to contract with the state troopers—a process that would align with their proposed public-private partnership (PPP) model.[116]

Regarding the additional powers including groundwater protection and disaster planning that are mentioned in the petition, the petitioners state that the home rule charter is not required to "'guarantee' that the city can or will provide services."[117] In addition, the reply brief asserts that the notion that because residents have twice rejected a law enforcement service area, they will again if Nikiski becomes a city is only conjecture on the borough's part.[118]

Departmental Analysis

The petition mentions protection of water as a reason for incorporation; however, while this task is indeed important, it is a task delegated to state and federal officials. There is no other mention of this task in a transition plan or in the charter. The petition also concludes that there is little a city or other entity can do about past pollution and indicates that only future development will be regulated.[119] In addition, there is little discussion about water and sewer or public utilities at all, but the petition notes that wells and a private water company serve the area.[120]

However, there are certainly mitigation measures that can be taken—perhaps not on the local level, but the petition does not draw the conclusion that this is a step to take upon incorporation: to deal with past pollution problems and prevent them in the future. There is no indication of how the city

114 KPB Responsive Brief, p. 13
115 KPB Responsive Brief, p. 24
116 Nikiski Reply Brief part 2, p. 25
117 Nikiski Reply Brief, part 2, p. 25
118 Nikiski Reply Brief, part 2, p. 26
119 Petition, Exhibit G, p. 12
120 Petition, Exhibit G, p. 20

would exercise this authority or how incorporation could offer solutions though it is mentioned as a reason for the need for city government.

In addition, the department finds a disconnect between the petition's stated need for increased public safety, and a petition for incorporation of a city with no plans to provide this service. The petitioners indicate that the Kenai Peninsula Borough does not provide law enforcement and relies on the state troopers for service. However, in 2015, the community voted down a proposal to form a Law Enforcement Service Area.[121] Though the petition indicates that the level of service provided by AST is slated to decrease and is currently inadequate, neither the petition nor charter indicate that provision of law enforcement by a potential home rule city within an organized borough is likely or necessary—only that it is possible in the future.[122]

However, neither the petition, nor the transition plan or charter indicate that a future city of Nikiski would be willing to take on additional taxes to support this vital service, and past history raises questions. In fact, in 2004, the first iteration of a law enforcement service area for the area within the boundaries of the Nikiski Fire Service Area was voted on by residents. It was defeated with 906 voters against and 490 in favor. The issue was again raised in 2015, again placed on the ballot, and again failed—this time by a closer margin: 576 against and 454 in favor.

Questions were raised in developing the ordinance to hold an election on the question about what a law enforcement service area would entail, and these questions never seemed to be fully answered. Typically, law enforcement powers are associated with municipalities. The Municipality of Anchorage has a police service area and has had conflicts in the recent past about the presence of state troopers in areas within the municipality but outside the service area such as Girdwood.

However, Anchorage, a unified home rule borough, has a large professional police force within that Anchorage police service area boundaries. Its powers are limited within and by a tax base that has roots in geography and the history of the municipality. The Kenai Peninsula Borough is a second class borough, in contrast. While it may exercise law enforcement powers, it has not elected to do so. Four of the six cities in the borough do exercise law enforcement powers; the two that do not have populations under 500. In fact, no home rule city in Alaska excepting Nenana fails to exercise law enforcement powers. Nenana only has a population of 381.[123]

During a 2015 Borough Assembly Meeting, Mayor Mike Navarre asked about the possibility of extending the law enforcement service area to other parts of the borough experiencing similar problems. He also indicated that this might be a way to provide services more fairly. In this discussion, he noted that the primary tax base is outside the Nikiski area. That is, the bulk of the services would be subsidized by the part of the service area boundaries with the least population and who would be least served.

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121 Petition, p. 12
122 Petition, Exhibit G, p. 11
123 Community Database Online, 2016 Department of Labor Estimate, accessed March 7, 2017.

The conditions regarding health and safety that are mentioned specifically in the petition as reasons demonstrating the need for city government are legitimate. However, those needs are not proposed to be alleviated by incorporation. The petition only offers that a home rule could in the future exercise these powers.

(a)(3) Existing or reasonably anticipated economic development

Views Expressed in the Petition

Nikiski is home to the proposed terminus of the AKLNG pipeline. While pipeline construction is a long-term prospect, planning for such an investment must begin early. The petition states that because the community of Nikiski is unincorporated, its interests are not adequately represented at the state level. Indeed, representatives from each of the incorporated municipalities along the proposed pipeline have been included at least somewhat in the planning process.[124] The petition also states that it will be able to promote a welcoming atmosphere that will attract more business.[125]

Respondents' Views

Kenai Peninsula Borough: Incorporation of a city will have no impact on industry's decision whether to locate in Nikiski or the future of AKLNG.[126] If AKLNG proceeds as a state project, that will exempt the property from property tax, although a payment in lieu of taxes agreement (PILT) could be possible, but is an unknown at this time.[127] The brief notes that the project has been delayed.[128]

Regarding the Kenai Spur Highway extension project, the borough notes that it is a federal grant project and that its presence within the boundaries of the proposed city is evidence that the borough is expending its resources on road maintenance projects on this long-term project.[129]

The brief argues that the petition paints a much stronger economic base than is accurate: several businesses mentioned in the petition have closed or will close soon, or are not operating at full capacity though it does note that Agrium may reopen in the future.[130]

Louis Oliva: Despite being directly affected by the potential AKLNG project, the lack of municipal status allows the borough and the state not to directly engage with the community on actions such as a planned reroute of the Kenai Spur Highway that will affect the area.[131]

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124 KPB Responsive Brief, p. 15
125 Petition, Exhibit G, p. 24
126 KPB Responsive Brief, p. 20
127 KPB Responsive Brief, p. 15
128 KPB Responsive Brief, p. 15
129 KPB Responsive Brief, p. 9
130 KPB Responsive Brief, p. 16
131 Oliva Responsive Brief, p. 4

Views Expressed in the Reply Brief

The petitioners state that the borough's assertion that incorporation will not encourage growth and development is speculation, and that the KPB brief's discussion of AKLNG is evidence that the borough does not keep its residents well informed about issues that will directly affect them. Regardless, the incorporation of Nikiski is not contingent on the development of AKLNG, but petitioners emphasize that the lack of involvement of residents on this and any future development could be improved by incorporation as a home rule city.[132]

Departmental Analysis

In April of 2017, the Alaska Gasline Development Corporation (AGDC) held two meetings in the Nikiski area to provide an update on the AKLNG project.[133] AGDC's website indicates that they have held similar meetings in communities, both incorporated and unincorporated, along the proposed pipeline route.

The department finds no indication that incorporation would have helped or hurt the proposed AKLNG pipeline whose success is at the behest of the world market, as well as negotiations far above the city level—especially a city with few employees. Certainly, having a seat at the table would and could be beneficial, but because the proposed city does not provide plans for land use, permitting with regard to implementing environmental controls or other restrictions, the department is unsure how incorporation as it relates to AKLNG is necessary.

(a)(4) Adequacy of existing services

Views Expressed in the Petition

The petition states that a primary reason for incorporation is control over the currently inadequate road services.[134] Without adequate representation at the borough assembly, and with the nonareawide road service area, the petitioners contend that poorly maintained roads are hazardous to residents and that concerns are dismissed by the appointed service area board.

In addition, the petition states that the inadequate distribution of funds contributes to the problems with road maintenance. The premise of the petition's argument is that approximately $2.2 million is collected through property taxes in the Nikiski area for roads, but only $625,000 was budgeted for the North roads section of the RSA, and in FY16, only $231,000 had been spent.[135] Lack of control over local roads has led to unacceptable road conditions and an unresponsive board and borough both of whom are unwilling to address the problems.[136]

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132 Nikiski Reply Brief, part 2, p. 28
133 Alaska Gasline Development Corporation, "News & Calendar," https://agdc.us/news-calendar/?event_id=1545.
134 Petition, Exhibit G, p. 8-9
135 Petition, Exhibit G, p. 10
136 Petition, Exhibit G, p. 7-9

Respondents' Views

Kenai Peninsula Borough: The petition does not identify which roads are pictured, and asserts that the petition does not provide sufficient evidence that Nikiski is being shortchanged in terms of road maintenance or other services. The borough also cites *Carmichael v. Southern Coal & Coke Co.* to demonstrate that tax burden is not required to be analogous to service provision.[137]

The borough notes that the Nikiski area is paying the same mill rate as other parts of the borough with regard to the road service area. It also notes that the differences pointed out in the petition in revenues generated locally are due in part to the disparity in the amount of revenue from oil and gas properties rather than from Nikiski residents themselves. The brief cites the oil and gas taxable value for the NFSA which has the same boundaries as the proposed city to have $1.1 billion and, outside AS 43.56, Tesoro, Agrium, and ConocoPhillips LNG production facilities contribute $282,866,900; as a point of comparison, the brief asserts that those living in the territory proposed incorporation contribute only $495,258,937 in assessed value.[138]

Louis Oliva: The brief argues that over time there has been an erosion of autonomy in service area administration as evidenced by moving to appointed board members, consolidated service areas, fees charged, and loss of local control. The three service areas that are substantially similar to the proposed city of Nikiski have fund balances that Mr. Oliva says are not spent as the board members wish, and are considered fund balances that belong to the borough.[139] In addition, he describes the merger of the road service areas in 1991 as a "disaster" for Nikiski because it diluted power and decision-making.[140]

Wenda Kennedy: There is currently a gap in services for the senior service area in Salamatof. Incorporation as a city would fix that gap and allow programs like Meals on Wheels to be administered in that area.[141]

Tyonek Group: The Tyonek Group brief concludes that their community has significant needs, but that they cannot be met efficiently, effectively, or equitably by inclusion in a potential city of Nikiski.[142]

Views Expressed in the Reply Brief

Inclusion of Tyonek and the west side in an incorporated city will bring government to an area not currently being served by some government services. The petitioners assert also that the borough is providing services to Tyonek "on behalf of the Nikiski service areas, as it must under its second-class status."[143] If the west side is excluded, the borough is unlikely to be able to provide the same

137 KPB Responsive Brief, p. 10
138 KPB Responsive Brief, p. 9
139 Oliva Responsive Brief, p. 2-3
140 Oliva Responsive Brief, p. 3
141 Kennedy Responsive Brief, p. 7
142 Tyonek Group Responsive Brief, p. 11-12
143 Nikiski Reply Brief, part 1, p. 5-6

level of services that Tyonek currently receives from the Nikiski service areas.[144] The brief reiterates that the statement provided in the Tyonek Group brief that they do indeed struggle to "secure local services" is evidence that they need the services proposed by a city of Nikiski since they are not able to receive them from the borough.[145]

Further, the reply brief adds that many of the powers described in the petition are "new or enhanced" and again mentions law enforcement and economic development as examples.[146]

Departmental Analysis

The petitioners contend that information about road service revenues and expenses is controlled by the borough so petitioners cannot provide specific examples of unequal treatment in terms of road services.[147] While the petition presents pictures of poorly maintained roads, and indicates that the money for the borough wide RSA is being misspent, this is not necessarily a demonstration of a reasonable need for city government. The $2.2 million figure that the petition argues is evidence that the Nikiski area is paying more than their fair share is worth an examination.

Prior to 1991, no taxes were levied for these road improvements through the original North Kenai Road Service Area so the argument regarding consolidation of local representation is largely irrelevant because while residents may have had more power, they were not contributing to this service area. In 1991, each of the borough's four service areas were consolidated into the current, single nonareawide borough service area which has an appointed board and levies at 1.4 mills.

The NFSA, NSSA, and NPRSA each have elected boards. The petition does not indicate any perceived inadequacies with the other services areas that are proposed to be absorbed. The three service areas in Nikiski are able to function at such a low mill rate because they are subsidized by oil and gas taxes and property taxes. The view that Nikiski residents have been taxing themselves at a higher rate to provide better services is an incomplete analysis. This report need not examine the significant exemptions that the KPB has that eliminate a great deal of personal property taxes, but it is important to note briefly that anytime there are exemptions on property tax, the tax burden shifts from those with exemptions to those without those exemptions. In this case, the tax burden shifts to the oil and gas industry primarily located outside the core Nikiski area which is the primary population center on the east side of the inlet.

Each of the service areas are drawn purposely large in order to tax a much larger and unpopulated area than where those will be served live. The petition asserts that the lack of local control and boroughwide road service area has resulted in poorly maintained roads in the Nikiski area. The petition's solution is to detach the part of the road service area that matches the proposed

144 Nikiski Reply Brief, Supplement, p. 5
145 Nikiski Reply Brief, Supplement, p. 5
146 Nikiski Reply Brief, Supplement, p. 5
147 Nikiski Reply Brief, part 2, p. 24

boundaries, assess the same mill rate, and require that the taxes collected within those boundaries stay there.

It is reasonable to seek local control and greater autonomy as it relates to local services such as road maintenance. However, transferring the 1.4 mill rate associated with the RSA from the entire territory proposed for incorporation to a city of Nikiski is an overcorrection to the perceived problem and creates inequities for the service area left behind. In other words, while the petitioners find road maintenance service inadequate, the solution is not to divert a large portion of the borough's revenue for roads to a single city.

The petition, some respondents, and commenters note that because there was once a road service area that largely matched the boundaries proposed for incorporation, and because the current borough service area is not providing services that meet the needs of residents, it is evidence that Nikiski residents have been shortchanged by the borough's consolidation of road service areas. The $2.2 million figure is based on the notion that the Nikiski area is entitled to the full amount collected in what it considers its community to spend on road services. Anything that does not return the road service area into one that matches the NFSA will continue to deprive the local area of the money it is owed.

The argument that there was once a road service area that did just that is undermined by the lack of local taxes levied to pay for those roads. The argument that it is unfair that the taxes collected, primarily from oil and gas properties, are distributed throughout the borough, assumes, without basis, that the Nikiski area "owns" the oil and gas industry revenues, but this is not borne out by a few important facts. Oil and gas taxes are collected by the state under AS 43.56 because oil and gas activities in this state are perceived as a state resource, not just a local one. If the petition were proposing additional taxes to be assessed on residents as well as the oil and gas facilities, that would create more ownership. As it stands, the proposal takes from one entity and gives to another without a proposal to provide commensurate services.

Furthermore, there is no evidence to suggest that city services are needed for any oil or gas platforms in Cook Inlet. Therefore, there is no reason to include them inside a city. They will continue to function as long as the market allows and with or without a local government that does not plan to regulate them, or provide any additional services than the borough or existing services areas. There is no need for city government in Cook Inlet as presented by the petition.

While the Nikiski area certainly serves an important purpose in providing services to those employed in the oil and gas industry, the industry does not rely on the community in the same way that Nikiski relies on it. Furthermore, the industry does not belong to a certain community any more than another. There is no reason that Nikiski can claim any more ownership of those taxes especially given that those service areas are functions of and administered by the Kenai Peninsula Borough.

This is a fundamental question regarding these boundaries. A city is an entity whose purpose is to provide services. Having local control over services is reasonable. However, incorporation will not provide any additional seats on the borough assembly. While the department acknowledges that

transferring road service powers would increase local autonomy with local service provision, the petition has not provided much evidence that there is a need or that the perceived tax inequities are to blame.

Service areas, within the Kenai Peninsula Borough, as elsewhere, are a function of a borough. The petition does not indicate how the proposed will lead to higher standards, and higher levels of services that will alleviate the stated inadequacies of current services.

(c) Whether essential municipal services can be provided more efficiently or effectively

(1) by annexation to an existing city

Views Expressed in the Petition

There are two incorporated cities near or adjacent to the boundaries of the proposed city of Nikiski. There is no indication that either Soldotna or Kenai wish to annex the area north of them in order to increase tax revenue or provide services. The petition states those cities are distinct communities that do not share the values of Nikiski residents including limited government, and a welcoming attitude toward industry.[148]

Respondents' Views

Wenda Kennedy: Absorption into the City of Kenai will not solve the problem facing Nikiski: "North Roaders" have a separate identity than much of the borough and do not feel their voice is heard on the borough level.[149]

Views Expressed in the Reply Brief

The petition and reply brief emphasize that services can be provided more efficiently and effectively by a city of Nikiski. While the petition does not specifically explain this, it indicates broadly that the centralized model espoused by the borough with its seat in Soldotna, which the brief states is "many road miles away," cannot provide services to the local area.[150] Regarding the west side, the petition and reply brief note that Nikiski is closer to Tyonek and Beluga than Soldotna.[151]

Departmental Analysis

The petition states "annexation of Nikiski by the City of Kenai would […] triple the area size."[152] The department took note of this statement because the City of Kenai is currently 35.5 square miles of land and water. Tripling the size would amount to approximately 106 square miles—far less than

148 Petition, Exhibit G, p. 13-14
149 Kennedy Responsive Brief, p. 5
150 Nikiski Reply Brief, part 1, p. 7
151 Nikiski Reply Brief, part 1, p. 6
152 Petition, Exhibit G, p. 13

the square mileage Nikiski states in their petition is necessary for incorporation, whose proposed size is approximately akin to the state of Connecticut. This statement, while not very relevant to the question at hand, is an indication that Nikiski residents do indeed recognize that the "core" of Nikiski is much smaller than the proposed incorporation. For clarification, the department use of the term "core" which is undefined in regulation is warranted because approximately 95 percent of the population of the territory lives in about 1.5 percent of the territory on the east side, which the department finds "core" describes accurately.

In addition, Salamatof residents lobbied to be excluded from the senior service area. This gap in service delivery could be remedied by an expansion of the senior service area or an annexation by the City of Kenai in a more expeditious manner than the entire incorporation of the proposed boundaries for Nikiski. However, there is no indication that the City of Kenai wishes to annex the territory proposed for incorporation or Kenai or any other existing city would be able to provide services on a more efficient, or cost-effective basis. The department agrees with the petition that annexation to an existing city is not the most efficient or effective method of service provision. Certainly, the City of Kenai would have to be willing and there is no indication that that is the case at this time. In any case, the threat of annexation should not be a primary reason for incorporation because by law, there must be a majority voting for the annexation in both the city, and the territory proposed for annexation.

(2) by an existing organized borough on an areawide or nonareawide basis

Views Expressed in the Petition

The services Nikiski offers through its borough service areas cannot be provided by borough on an areawide or nonareawide basis equitably. Service areas which are voted on by residents can later be expanded or abolished by the Assembly by ordinance as happened with the road service area. In order to control the services provided and provide for local funding, incorporation, the petition contends, is the only option for residents of Nikiski.[153]

Respondents' Views

Kenai Peninsula Borough: Service areas are a function of the KPB. Therefore, because the services identified to be the primary functions of the proposed city are the same as those provided by service areas, the petitioners do not overcome the statutory burden required for incorporation within an organized borough.[154] The brief argues further that the petitioners' assertions that the success of the Nikiski Fire Service Area is because it has been managed by the borough resources. The borough maintains that its provision of services such as payroll, human resources, legal services, insurance, and other overhead and administrative costs are evidence that services can best and most efficiently and cost-effectively be provided by the borough. Their brief further states that the public-

153 Petition, Exhibit G, p. 14-16
154 KPB Responsive Brief, p. 18

private partnership (PPP) model touted by the petitioner ignores the cost of these services and comparisons to Sandy Springs, Georgia are irrelevant due to many differences in those communities.[155]

Tyonek Group: The services proposed in the petition are duplicative and, therefore, violate the constitutional mandate of minimum number of local government units.[156] Tyonek is already exempt from taxes for the road service area, and the petition merely offers a change in provider by swapping the borough for a city without any change or expansion in services provided to Tyonek.[157]

Louis Oliva: The borough is not providing services at a level of quality, quantity and with the local control desired by the residents of the proposed city of Nikiski. Therefore, the residents of Nikiski wish to provide those same services themselves.[158]

Views Expressed in the Reply Brief

The petitioners assert that the borough is not currently providing services on an areawide or nonareawide basis. Therefore, the prohibition in AS 29.05.021(b), that a city may not form within an organized borough if the services proposed by the city can be provided on an areawide or nonareawide basis by the borough or by annexation to an existing city, is overcome.[159]

Furthermore, without the services provided by Nikiski, the west side of Cook Inlet would be left without any essential services which the petitioners contend would be impossible for the borough to correct by forming new service areas given current Alaska law without a vote.[160]

The petitioners contend that Tyonek's acknowledgement that it is not fully satisfied with services provided by the borough is evidence that a city of Nikiski would improve these services.[161] The petitioners further quote Article X, Section 5 of the Alaska constitution, which describes service areas. The petitioners note that if Nikiski residents want to provide more services, they cannot, and so, they must incorporate.[162] The reply brief says that the borough cannot and will not provide services on an areawide or nonareawide basis. In addition, the brief contends that since the borough has only exercised the minimum required regarding areawide powers and only a few nonareawide powers in the half century since the borough was forced to incorporate, it is unlikely they will do so in the future.[163]

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155 KPB Responsive Brief, p. 25
156 Tyonek Group Responsive Brief, p. 10
157 Tyonek Group Responsive Brief, p. 11-13
158 Oliva Responsive Brief, p. 5
159 Nikiski Reply Brief, Supplement, p. 5
160 Nikiski Reply Brief, Supplement, p. 4
161 Nikiski Reply Brief, Supplement, p. 5
162 Nikiski Reply Brief, part 1, p. 4
163 Nikiski Reply Brief, Supplement, p. 4

They state that becoming a city will allow them to provide the services they seek. The petitioners cite LBC staff's recommendation and the commission's 2015 approval of a proposed city of Big Lake in the Matanuska-Susitna Borough as additional support.[164]

The petitioners, in their reply brief, state that the borough is not currently providing economic development to the Nikiski area—just funding to the Kenai Peninsula Economic Development District (KPEDD). The petitioners state this as evidence that the service provision is inadequate.[165] The petition states that as a city, Nikiski would have a seat on the board that serves KPEDD.[166]

Departmental Analysis

Particularly in the case of road maintenance services, the petition offers no assurance of higher quality service except that private contractors in their community will be better equipped, through the public-private partnership model to maintain Nikiski roads. The petition also does not specify which roads will be maintained or any details about regarding the quality of roads except anecdotal evidence.

The petition fails to demonstrate that it can provide road services more efficiently or effectively than the borough which has a large staff beyond the eight employees of the RSA not including a GIS department, for example. Additionally, there is no requirement for taxes collected to equate to services provided. If there were, those with higher property values could expect to receive more services from government based on the taxes they paid. The department finds the argument that revenue generated in the territory proposed for incorporation is unequally distributed throughout the borough misguided because this incorporation petition is proposing to claim the massive tax revenues of oil and gas of a much larger area than the area to which a potential city of Nikiski would administer services. The road service area collects taxes on a nonareawide basis in the regional interest. The petition proposes to collect taxes, which the petition contends belongs to Nikiski as a result of being included in its borough service areas, and keep them locally, and thereby, continue to subsidize low mill rates for residents. If Nikiski were to provide road services, logically, that revenue associated with the services Nikiski assumes, would be transferred by the borough. The argument that Nikiski deserves revenue from the larger road service area which would preclude the borough from using it throughout its service area does not make sense.

Regarding the KPEDD, even though the proposed city of Nikiski plans to contract out nearly all services and the petition nor the reply brief indicate how the city would provide for economic development, it is unclear to the department whether participation in this organization is how Nikiski plans to exercise the power of economic development. There is no indication that significant economic or social conditions will improve with the formation of a city.

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164 Nikiski Reply Brief, part 1, p. 4
165 Nikiski Reply Brief, part 1, p. 3
166 Nikiski Reply Brief, part 1, p. 3

Regarding the Nikiski area, the argument that the borough does not provide or is not able to provide services on an areawide or nonareawide basis is irrelevant because the proposed city does not plan to offer any additional services.

(3) through an existing borough service area

Views Expressed in the Petition

The petition argues that a proposed city can administer its services better than the existing service areas because it will do so locally, and use the public-private partnership model. The petition contends that the borough increasingly would like to consolidate and centralize administration of these successfully managed service areas. While the services are provided by borough service areas, there is always the threat of abolishment or consolidation which dilutes local funds and local control. In addition, it is unlikely that additional services or functions such as new fire station construction could occur under the current administration by the service area. The petition describes the possibility of adding law enforcement powers in the future—but notes that the law enforcement service area was voted down by Nikiski because residents were concerned it would be expanded borough-wide and, thereby, strip Nikiski of the control it wishes to retain locally.[167] Incorporation allows the possibility of expansion of services while keeping funds locally.[168]

Respondents' Views

Kenai Peninsula Borough: The success of the service areas cited in the petition is a function of successful management by the borough rather than the Nikiski area and without the administration provided by the borough, the cost of providing services will increase. The petition does not describe any new services that are not already provided by existing borough service areas and therefore, the petition does not meet the requirement for incorporation.[169]

Tyonek Group: The brief indicates that the petition fails to demonstrate how city governance will offer better services than the existing borough service areas offer Tyonek.[170]

Views Expressed in the Reply Brief

The petitioners emphasize that the incorporation model will allow the potential to provide services more efficiently and on a more cost-effective basis using the PPP model.[171]

167 Petition, Exhibit G, p. 14-16
168 Petition, p. 20
169 KPB Responsive Brief, p. 18
170 Tyonek Group Responsive Brief, p. 11-12
171 Nikiski Reply Brief, part 2, p. 20

Departmental Analysis

In order to incorporate under Alaska law, a community must demonstrate a reasonable need for city government. A petition must meet a higher threshold when a community within a borough seeks incorporation because that community must demonstrate that it demonstrates a reasonable need for government and services beyond what is currently provided by the existing borough and service areas in which the community is located.

Because the petition offers no new services beyond what the current borough service areas are providing, or evidence that the service provided is truly inadequate and can be improved upon significantly, this threshold is not overcome.

The petition actually only expresses dissatisfaction with the road service area—and does not describe any reason that the NSSA and NPRSA are not providing adequate services to the Nikiski area. The reply brief describes the process of providing services to the west side regarding senior services as an example of the borough contracting out service provision which it plans to do as well.[172]

Nikiski's argument on behalf of Tyonek is misguided at best. They allege that the only way for Tyonek to continue receiving funds for senior services, recreation services, and fire and emergency powers is to be included in a city of Nikiski. They further assert that the second class borough is unlikely or even unable to provide these services—without a vote if Nikiski incorporates. This statement is disingenuous. There is no indication why the communities on the west side demonstrate a need for city government—especially since Tyonek, the larger of the two communities, opposes inclusion.

Only through the fire service area is there any actual interaction with the west side—the other service areas provide money through the borough budget, with contracts through the borough and therefore cannot claim to have any advantage in service delivery. Providing these services from a city instead of through borough service area would amount to a change on paper only.

There is no reason that the services currently provided cannot continue to be provided through a service area or through specific allocations as the borough sees fit to continue service provision to the west side. The department concludes also that the petition fails to demonstrate that services can be provided more effectively or efficiently than those of the existing service areas because the petitions do not express any dissatisfaction with the NSSA, and NPRSA which both contract in order to provide services to the west side anyway.

172 Nikiski Reply Brief, part 2, p. 21

Findings on the Standard of Need

No city has formed within an organized borough since Pilot Point in Lake and Peninsula Borough in 1991. That decision was subject to a remand, but the case of Pilot Point varies significantly from the situation Nikiski and the KPB face. The LBC has approved other petitions for city incorporations in organized boroughs since, but in each case, residents voted the proposals down. The same fate met the 1984 Nikishka proposal.

Regarding Road Services

A common thread throughout the comments as well as from petitioners is the idea that the borough is not providing adequate road services and specifically, that the money collected in property tax by the KPB is not spent proportionally to where it was collected.

Many of the commenters do not acknowledge that at the 1981 origination of the road service area, it was funded entirely by state funds rather than local taxes on property; there was no mill rate actually levied on residents in the 10 years the road service area existed.

While the department is willing to acknowledge that residents are unhappy with the road maintenance currently provided by the borough as evidenced by comments and briefs as well as in the petition, this does not mean that the consolidation of the road service area in 1991 was fundamentally unjust.

If the North Kenai Road Service Area were still to exist in the boundaries suggested by the petitioners (similar to the fire service area), then as with the other service areas, industry taxes (under AS 43.56) would be subsidizing the cost of road maintenance and improvements while no services—because there are no roads in Cook Inlet or even borough-maintained roads on the west side of the inlet—were provided.

Regardless of past activity regarding the RSA, there is no reason to include the west side in a service area or city that does not plan to provide any services to the west side or to Cook Inlet even if there is an exemption for the NVT. It is only reasonable to assume that a newly incorporated city would assume the assets and revenue associated with that part that is relieving the borough of the need to provide services—and not a much larger area as is proposed.

The petition does not indicate that the proposed city plans to provide any additional services beyond those currently provided by the borough. Each service area is a function of the borough. The petition states that though, for example, law enforcement could be provided by a home rule city, it is not part of the current plans for city government. Therefore, the argument that incorporation is the only option is irrelevant because they are not proposing anything beyond what is currently provided by the borough.

When Nikiski had an opportunity (twice) to enact a Law Enforcement Service Area, the proposal was voted down.[173] The petition reasons that the opposition was due to a perception that the service area might be consolidated to a borough-wide service area or because residents did not want to add another borough-layer of government. Regardless of the outcome of this petition, Nikiski as a home rule city or an incorporated community is still within an organized borough.

The department disagrees with the contention that neither Tyonek nor the west side is receiving the services of any government; both communities and the entire rest of the unpopulated west side are within an organized borough. In addition, the petition claims that the borough's service provision is minimal because it only does so within the realm of service areas, and by contract in the case of Tyonek.

Regarding the fire service area, only the moveable assets are the property of the NFSA; neither fire station on the west side is owned by the borough service area. Moreover, while Nikiski Fire Department paid members assist, both Beluga and Tyonek are volunteer fire departments. This is not the same level of service that is provided on the east side of the inlet.

The services that the petition indicates are inadequate including water pollution and law enforcement are not planned services of a new city of Nikiski. The inadequate distribution of funds within the road service area funds point to a misguided argument. The original road service area formed in 1981 included territory that neither paid for nor received any services—the west side including Tyonek. It also did not levy any mill rate, and therefore, existed only to control the money provided by the state. The reasoning provided by petitioners that their money is redistributed throughout the borough is not adequately documented, and does not represent an accurate picture.

As the borough points out, the majority of the revenue raised within the proposed city is beyond the population centers. If the service provision will be no different than that provided by the borough which is admittedly not direct, then the department questions whether there is a need for a city of Nikiski to be that intermediary instead. Moving services from the existing service areas in the case of senior services, fire services, and recreational services without an increase or change does not demonstrate a need for city governance. It is merely duplicating those services within an additional layer of government. The department disagrees because the administration provided by the borough in administering not only service areas, but areawide and nonareawide powers represent efficiencies provided by economies of scale. It is unclear how the services provided will be higher quality than those of the borough.

The department first recommends elimination of the portion of the Nikiski Fire Service Area on the west side of Cook Inlet from the borough's western boundary to strictly include only the east side of Cook Inlet because only that portion of the territory demonstrates any reasonable need for city government.

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173 Nikiski Reply Brief, Supplement, p. 2

However, the department does not find that the petitioners have demonstrated a reasonable need for city government in the model they have proposed even with the aforementioned reduced boundaries. If there are no services planned that represent an increase over what is currently provided by the borough and existing service areas, there is no need for a city government. If this threshold is not overcome, then the petition must fail.

RESOURCES (3 AAC 110.020)

Whether the economy of the proposed city includes the financial resources necessary to provide essential municipal services on an efficient, cost-effective level.

(A) Reasonably anticipated functions

Views Expressed in the Petition

The petition indicates the proposed city of Nikiski intends to provide the following services:

- City administration
- Fire and emergency services
- Parks and recreation
- Senior services
- City road development and maintenance
- Law enforcement services[174]
- Planning and zoning
- Local economic development
- Taxation
- Local community development
- Capital improvement projects
- Disaster planning and cooperative response with the Kenai Peninsula Borough[175]

The petition states that because it seeks incorporation of the entire service areas' boundaries (senior, recreation and fire), it intends to dissolve and absorb those functions into the proposed city of Nikiski.

Respondents' Views

Kenai Peninsula Borough: The petition mentions new services, but does not provide evidence that the proposed city will take on any new services beyond what is currently provided through

174 This is directly contradicted both by the petition and the reply brief which state law enforcement is only a possible power to be decided by voters in the future if they so choose.
175 Petition, p. 19

existing service areas. The borough states that the petition lists many services without any explanation or description such as "disaster planning and cooperative response."[176]

In addition, the borough brief contends that employees hired as contractors will still likely be subject to the costs of municipal employees despite the petition's claim that the city will be able to avoid the long-term liabilities of public employee retirement system (PERS), as well as medical benefits, workers compensation, etc.[177] The borough's brief notes that the PPP model described in the petition plans to hire outside companies to provide government services, but that there is no evidence that the Nikiski area has the resources to follow this model.[178] The borough asserts that its centralized administration is a more efficient method of providing the same essential services that the city is proposing.[179]

The borough contends, too, that the petition fails to mention the CKPHSA or whether it plans to stay within that service area; remaining within, the borough states, would require an ordinance from the future city of Nikiski which the borough worries could fail and therefore preclude collection of revenue, but by law the hospital would still be required to provide services. The borough suggests the LBC could condition approval of incorporation on this issue.[180]

Tyonek Group: The brief indicates Tyonek does not believe the petition demonstrates that a city of Nikiski will provide expanded services beyond what is currently provided, and the services they may exercise in the future, such as planning, platting, and zoning, may, in fact, be detrimental to Tyonek.[181]

Views Expressed in the Reply Brief

Arguments regarding costs of contract employees as well as the costs of additional services such as law enforcement are speculation on the borough's part.[182] In addition, the brief notes that the charter and petition are not required initially to provide for all future services.[183] Regarding the CKPHSA and 911 services, the reply brief notes AS 29.35.450(a) is not applicable and there will be no need to pass an ordinance or hold a vote on whether to stay in the CKPHSA.[184]

Departmental Analysis

Both the petitioners and borough assert that each entity is solely the reason that the service areas are well managed. This incorporation proposal hinges upon a fundamental disagreement between the

176 KPB Responsive Brief, p. 11
177 KPB Responsive Brief, p. 25
178 KPB Responsive Brief, p. 25
179 KPB Responsive Brief, p. 25
180 KPB Responsive Brief, p. 13-14
181 Tyonek Group Responsive Brief, p. 11, 13
182 Nikiski Reply Brief, part 2, p. 26
183 Nikiski Reply Brief, part 2, p. 25, 33
184 Nikiski Reply Brief, part 1, p. 11

petitioners and the Kenai Peninsula Borough. Service areas are functions of the borough in which they are located. The borough can create, change, and abolish them as necessary. Service area employees are borough employees. Title 29 has no requirements regarding municipal employees or contracted employees and so the discussion regarding whether contracted employees would be subject to similar costs is largely irrelevant to this discussion. However, the issue of transferring employees from borough employment to the city is an issue to be resolved in the transition.

There is no doubt that there are abundant resources in the territory proposed for incorporation. An estimate of the taxable property finds more than one billion dollars. This section considers whether there are sufficient resources for the anticipated functions. This incorporation, however, does not propose any new taxes; it only proposes moving existing taxable property from place to another. Moreover, the functions listed are virtually the same as those currently provided. The additional ones listed are ill defined, and are not described or detailed in the transition plan, reply brief, or draft charter, which is not helpful in analyzing whether the city is planning on taking on additional functions. It is unclear what capital improvement projects, and disaster planning and response are because neither the petition including the draft charter, or the reply brief offer any clues as to what these services are and how they will be administered, or funded. The department concludes that no new services or functions are planned upon incorporation beyond those exercised by the four service areas.

(B) Reasonably anticipated expenses

Views Expressed in the Petition

The petition has determined that the budgets of existing service areas are a good general guide to the reasonably anticipated expenses going forward.[185] The petition anticipates the addition of two new employees beyond current service area employees who will mostly become city employees. More details on this are provided in the section on transition in this report.[186]

The petition contends that a potential city of Nikiski using the public-private partnership model will allow it to realize greater savings than if the borough continued to administer services.[187] In addition, as a city, Nikiski would not be subject to the current administrative fees charged by the borough, which will offer additional savings.[188] The petition describes the PPP model: city employees perform the central administrative tasks, but contractors are hired to perform specific tasks and the results are that a city avoids the political problems of governmental employees, pensions, long-term liabilities, and saves money in the process.[189]

185 Petition, Exhibit G, p. 18
186 Petition, Exhibit G, p. 18
187 Petition, p. 19-20
188 Petition, p. 17
189 Petition, p. 21

Respondents' Views

Kenai Peninsula Borough: The borough argues that the costs of administering services that are currently provided by service areas will be more costly without the economies of scale provided by centralized administration.[190] Any new services would likely require additional tax revenue, which is not planned.

The comparison of the PPP model used in Sandy Springs, Ga. is irrelevant due to the many differences in the communities. The petition does not demonstrate how the PPP model will lead to more efficient and less costly services than what the borough provides.[191]

Views Expressed in the Reply Brief

Petitioners assert that the PPP model allows for more cost-effective service provision and will allow the potential city of Nikiski to do more with less, and all arguments made by the borough about other cities' tax structures and the need to raise taxes in a potential city in the future are speculation.[192]

Departmental Analysis

The description of the PPP model does not indicate exactly what city employees will do versus what will be contracted out. In addition, the petition does not indicate whether there are sufficient contractors available locally or whether the future city might hire non-local contractors as the city of Sandy Springs, Ga., which the petition has noted as a model, has.[193]

The petition indicates that they have used the same budgeted expenditures from the borough, but does not include the cost of administering those services. Simply stating the PPP model will allow for savings is not an indication that it will come to fruition. The department agrees with the KPB that there are significant economies of scale provided by the centralized administration, and that using the same budgets as the current service areas likely does not sufficiently account for these issues.

(C) Ability of the proposed city to generate and collect revenue at the local level

Views Expressed in the Petition

The borough will continue to assess and administer property tax on behalf of the proposed city. There is no planned local sales tax.

190 KPB Responsive Brief, p. 17-18
191 KPB Responsive Brief, p. 24
192 Nikiski Reply Brief, part 2, p. 33-34
193 KPB Responsive Brief, Exhibit W

Respondents' Views

Kenai Peninsula Borough: Since the proposed city is within an organized borough, the burden for assessment and collection of taxes is a function of the borough.[194]

Views Expressed in the Reply Brief

The brief contends that through successful municipal management using the PPP model, the city could eventually offer additional services without raising taxes beyond current levels.[195]

Departmental Analysis

Because the proposed city is within an organized borough, the burden of assessing and collecting revenue will remain with the borough under AS 29.35.170. However, the petition indicates that there are no new taxes proposed to be collected beyond the total mill rate of the four service areas the city plans to absorb.

(D) The reasonably anticipated income of the proposed city

Views Expressed in the Petition

A city of Nikiski expects to generate and collect property taxes at the same rate as its current service areas. By the petitioners' estimate, property tax will raise $9,540,549 each year.[196] The petition states that incorporation will encourage development, and, therefore, spur economic growth. The petition also lists the organizational grant for new cities from the state in other sources of revenue.[197] The petition also discusses a large fishing industry, but no plans to levy any taxes on fishing.

The petitioners indicate they would like the LBC to condition an incorporation question on the ballot with the taxes from the four service areas in addition to what is listed without explanation as a "flat tax" and a motor vehicle tax.[198] The proposed city plans to levy the same mill rates, totaling 5.5 mills, currently assessed by the various service areas. The petitioners estimate savings to come from efficiencies in local management of money, contracting of government services, and a reduction in mandatory borough-imposed fees for administration. The proposed city anticipates an estimated $2 million balance to begin.[199]

By the petition's estimate, with the same service area mill rates, a city of Nikiski can expect the service area fund balances total $7,777,621 which will be transferred to the city of Nikiski.[200] The

194 KPB Responsive Brief, p. 18
195 Nikiski Reply Brief, part 2, p. 33
196 Petition, p. 15
197 Petition, p. 17
198 Petition, p. 14
199 Petition, p. 17
200 Petition, p. 15-16

fund balance for the road service area was calculated by applying the 1.4 mills assessed nonareawide for the road service area to only the territory proposed for incorporation.[201]

Respondents' Views

Kenai Peninsula Borough: The borough's brief states that it is not clear that the revenue associated with the service areas to be dissolved would immediately and easily transfer to the proposed city's budget. The KPB adds that every city within the borough has its own mill rate for city services.[202] Further, the petition overlooks the fact that the majority of taxable property and revenue in the Nikiski area comes from oil and gas related property.[203]

The borough's brief contends that the presence of large fund balances does not indicate that local tax revenue collected in Nikiski is spent outside Nikiski. Rather, the borough states it indicates that the service areas are successfully managed.[204] In addition, administration by the borough of service areas is facilitated by the centralized administration of the KPB, the loss of which has not been adequately accounted for in the petition's cost estimates of the transition to its own city.[205]

Tyonek Group: The seven businesses listed in the petition as located in Tyonek, the brief states, have relationships based on land management, and access primarily which is indicative of the control Tyonek has regarding its own land.[206]

Views Expressed in the Reply Brief

The petitioners reiterate that welcoming industry will result in rising property values.[207] It states that home rule status provides flexibility for diversification of revenue beyond property tax in the future.[208]

Departmental Analysis

The petitioners indicate that they anticipate the transfer of the fund balances of each service area to a city of Nikiski, and the organizational grant from the state as a firm foundation from which to begin the municipality. It is unclear whether a city of Nikiski would be entitled to a percentage of the fund balance of the RSA upon incorporation based upon the boundaries of their city as a part of the service area as the petitioners anticipate.

(E) The feasibility and plausibility of the anticipated operating and capital budgets of the proposed city through the period extending one full fiscal year beyond the reasonably anticipated date (i) for receipt of the final organizational grant under AS

201 Petition, p. 15
202 KPB Responsive Brief, p. 22
203 KPB Responsive Brief, p. 9
204 KPB Responsive Brief, p. 18
205 KPB Responsive Brief, p. 17
206 Tyonek Group Responsive Brief, p. 7
207 Petition, Exhibit G, p. 20
208 Nikiski Reply Brief, part 2, p. 35

29.05.180; (ii) for completion of the transition set out in AS 29.05.130-29.05.140 and 3 AAC 110.900

Views Expressed in the Petition

The proposed city plans to levy the same mill rate currently assessed by the various service areas, and has used the service areas' budgets as a guide to anticipated revenues and expenditures. The petitioners estimate savings to come from efficiencies in local management of money, contracting of government services, and a reduction in mandatory borough-imposed fees for administration. The proposed city anticipates a $2 million-plus balance in its first year from its service area funds.[209] The budget accounts for inflation for revenues and expenses, and includes the organizational grant provided by the state as required.[210]

The petition budget projects until the year 2025 and provides for the costs of the transition from the borough to municipal governance within the two-year requirement. The petition contends that using the PPP model and with the existing tax base in the territory proposed for incorporation, the future city of Nikiski will not need to increase taxes unless residents vote to increase services and choose to raise taxes.[211]

Respondents' Views

Kenai Peninsula Borough: The petition's budget does not account for the borough's emergency 911 services communications system, which required cities to transfer the power to the borough because it is a nonareawide power. A city of Nikiski would have to do so by ordinance as well.[212]

Views Expressed in the Reply Brief

The petitioners state that the borough is required to prove that a city of Nikiski cannot provide services more effectively or efficiently than it does. The petitioners contend that the borough has not overcome this requirement.[213]

Regarding emergency calls, the fire service area already contributes to the 911 service and the petitioners contend that as part of the transition, a city of Nikiski will be part of the 911 service as other cities within the borough are.[214]

Departmental Analysis

The petition does not provide a capital budget. The department finds the petition's budget plausible in terms of revenues including the receipt of the organizational grant, but believes that anticipating

209 Petition, p. 17
210 Petition, Exhibit G, p. 18
211 Petition, p. 15-20
212 KPB Responsive Brief, p. 26
213 Nikiski Reply Brief, part 1, p. 14
214 Nikiski Reply Brief, part 2, p. 26

the same expenditures for road maintenance for example discounts the economies of scale provided by the larger borough administration. The borough has eight employees for the road service area, but is able to rely on other departments for cost savings and for in-house expertise.

With regard to the road service area, in particular, the proposed city plans to replace the road service department of the borough using only the city manager, and city clerk. It is unclear what assets the road service area would succeed to a newly formed city, and it is also unclear from the petition what roads would be under the purview of the new city. The department finds that the budget provided by the petitioners does not adequately demonstrate an ability with regard to roads that they can provide better services with the same budget as the borough.

Regarding the 911 issue, the department finds this is an issue to be worked out in the transition between the borough and the proposed city.

(F) The economic base within the proposed city

Views Expressed in the Petition

The petition indicates that the territory has a strong economic base because the territory hosts over 300 businesses in a variety of industries.[215] According to the petition, 306 are located in 15 categories in the Nikiski/Salamatof area, seven in six categories in Tyonek, and two businesses in two categories in Beluga for a total count of businesses of 315.[216]

Respondents' Views

Tyonek Group: Because Tyonek owns most of its land, as with the borough the petition intends to exempt Tyonek from taxes related to road services because it will not be providing services to Tyonek.[217]

Kenai Peninsula Borough: The borough's brief points out the fact that if the AKLNG project does go forward, it will likely be a state project, which means that it will likely be exempt from property taxes.[218] It also contends that the economic base of the proposed city with regard to the road service area is for nonareawide road services, and so, under current Alaska law, Nikiski cannot secede and collect the revenue from this borough-wide service area tax base.[219]

215 Petition, Attachment G
216 Petition, Exhibit G, p. 7
217 Tyonek Group Responsive Brief, p. 12
218 KPB Responsive Brief, p. 15
219 KPB Responsive Brief, p. 11

Wenda Kennedy: Nikiski has abundant resources, undeveloped land, and infrastructure from which to continue to grow and develop and residents of Nikiski, unlike many other communities, are willing to encourage industrial and commercial growth.[220]

Views Expressed in the Reply Brief

According to petitioners, many more businesses are connected with the west side of Cook Inlet and Tyonek than are actually reflected in the seven that are incorporated there.[221] As stated earlier, the borough acknowledges in its brief that Nikiski is the industrial base of the borough.[222] The brief notes that the KPB Responsive Brief acknowledges that the Nikiski area is the industrial base for the borough, and asserts that history suggests the proposed city will be able to provide services as the service areas have within the same boundaries effectively using the PPP model without raising revenue.[223]

Departmental Analysis

The location of the majority of the tax base is inversely related to the location of the majority of the population and, in addition, to the provision of services. It has been adequately demonstrated by both the borough and the petitioners that there are large and valuable assets within the territory proposed for incorporation. However, the department questions the justification when so few people on the west side pay taxes and will largely be tax exempt of including those people within a city whose purpose is to provide services to that population.

(G) Valuations of taxable property within the proposed city

Views Expressed in the Petition

The petition provides the following data for taxable property in 2016:

- Real Property: $678,459,000
- Personal Property: $43,078,000
- Oil and Gas Property Tax (AS 43.56): $878,259,000[224]

The petition indicates that the assessed property value in the territory proposed for incorporation is approximately $1,599,796,000.[225] By the petition's estimate, with the service area mill rates, a city of Nikiski can expect $9,540,549 in tax revenue in its first fiscal year; in addition, the petition indicates that the service area fund balances total $7,777,621, which will be transferred to the city of Nikiski

220 Kennedy Responsive Brief, p. 4-5
221 Nikiski Reply Brief, Supplement, p. 3
222 Nikiski Reply Brief, part 2, p. 32
223 Nikiski Reply Brief, part 2, p. 26, 30, 32
224 Petition, Exhibit G, p. 17
225 Petition, p. 15

upon transition.[226] The petition indicates that a city of Nikiski will have the financial resources to provide services in a manner that is both efficient and cost-effective.

Respondents' Views

Tyonek Group: Most of the land in Tyonek is tax exempt.[227]

Kenai Peninsula Borough: The borough notes that oil and gas related property taxes (collected under AS 43.56) account for the majority of revenue collected in the territory proposed for incorporation.[228] Regarding the west side, the majority of Tyonek, 216 of 254 parcels, is tax-exempt. By 2028, 19 of the remaining 38 taxable parcels will become tax-exempt.[229]

Views Expressed in the Reply Brief

The petitioners state that they plan to exempt Tyonek from the cost of road services.[230]

Departmental Analysis

As stated earlier, the borough points out that oil and gas related industry (under AS 43.56 and regular property tax) provides significantly more taxable value in property than do Nikiski residents. The charts in Table 5 below were produced in a borough mayor's report as part of the Kenai Peninsula Borough Assembly packet alongside an ordinance for a Nikiski Law Enforcement Service Area in 2015. The chart was provided for comparison in case the assembly was interested in reducing the boundaries to just the east side of Cook Inlet. The exact boundaries for the "east side" as opposed to the entire boundaries are not precisely defined, but are illustrative for two reasons: first, that the report was calculated in case the assembly decided to create service area boundaries that actually matched the area it could potentially actually serve, and two, because the difference for a mill rate of 1.5 is more than one million dollars in revenue between the two boundaries.

Table 5. Nikiski Fire Service Area Boundaries Identical			
Type	**Taxable Value**	**Mills**	**Tax Revenue**
Real Property	678,459,300	1.5	1,017,688.95
Oil & Gas	878,259,310	1.5	1,317,388.97
Personal Property	43,077,996	1.5	64,616.99
		Total	2,399,694.91

Nikiski Fire Service Area- East Side Only			
Type	**Taxable Value**	**Mills**	**Tax Revenue**
Real Property	651,249,300	1.5	976,873.95
Oil & Gas	5,553,055	1.5	8,329.58

226 Petition, p. 15-16
227 Tyonek Group Responsive Brief, p. 12
228 KPB Responsive Brief, p. 9-10
229 KPB Responsive Brief, p. 5
230 Nikiski Reply Brief, part 2, p. 21

Personal Property	43,077,996	1.5	64,616.99
		Total	1,049,820.53
Source: Mayor's Report on Nikiski Law Enforcement Service Area, June 16, 2015. Kenai Peninsula Borough Assembly packet, p. 3			

The difference in oil and gas taxable value (collected primarily under AS 43.56) between the two charts is $872,706,255.00. The offshore and west side of the proposed boundaries have a taxable property value for AS 43.56 revenue of nearly 900 million dollars which illustrates the reason the proposed territory for incorporation is so large.

The current service areas are able to have such low millage rates because they are subsidized by oil and gas property taxes. Whereas, the petition proclaims that Nikiski residents have a history of taxing themselves, taxes on real property are supplemented with substantial revenue from corporations rather than residents. Shifting this revenue from a borough service area fund into a city fund without planning to provide new services and precluding that revenue from the borough nonareawide road service is unfair and inequitable.

If the bulk of revenue comes from taxes outside the "core" of Nikiski, and Tyonek contributes very little due to tax exemptions, this incorporation is indeed banking on collecting revenue from the large portions of the territory that are unpopulated as the service areas do. However, as mentioned throughout this report, cities, unlike service areas, and their functions exist for people, and are not allowed to be inordinately large in order to collect revenue from areas that will not demonstrably benefit from inclusion because there are no services to be provided.

(H) Existing and reasonably anticipated industrial, commercial, and resource development within the proposed city

Views Expressed in the Petition

The petition indicates that there is a great deal of industrial and resource development currently and some potential development including the AKLNG project. The petition explains that successful municipal management, a wealth of natural resources, and continued welcoming atmosphere for industrial projects will contribute to increasing the tax base through rising property values.[231]

Respondents' Views

Kenai Peninsula Borough: The borough contends that the petition's discussion of anticipated development is overstated: there is less evidence of current and planned industrial, commercial or resource development within the proposed boundaries, and there is no indication that any development would be accelerated by incorporation of a city.[232]

231 Petition, Exhibit G, p. 20
232 KPB Responsive Brief, p. 16-19

Wenda Kennedy: The brief indicates a number of possible uses and industries that could be developed in the Nikiski area including wind power, plasma burner for solid waste, volcanic steam-generated power, and other ideas for potential development of existing resources.[233]

Views Expressed in the Reply Brief

Petitioners note that the area boasts low land prices, and is still attractive to industry and residential development and provides evidence of future drilling with a news article included in the reply brief.[234]

Departmental Analysis

The petition does not mention any impending development except for the AKLNG, which the department considers unlikely to be developed within the 10-year scope identified in regulations. The reply brief does offer an example of additional drilling that is planned within Cook Inlet, but the decisions whether to drill or invest in large projects is made based on world prices and many other factors outside a municipality's control. There is no evidence that this is a consistent trend. The petition's claim that incorporation will encourage investment is unfounded.

(I) Personal income of residents

Views Expressed in the Petition

The petition reports that the median household income for Nikiski is $71,683, which the petition notes, is higher by nearly $10,000 than that of the Kenai Peninsula Borough.[235]

Respondents' Views

Tyonek Group: There are few jobs available in Tyonek, which is compounded by the inability to travel easily for work because of geographic isolation.[236]

Views Expressed in the Reply Brief

None offered.

Departmental Analysis

The department reviewed information available, but finds it is not very relevant. There is no planned income tax, or any income tax levied in the KPB at this time.

(2) Other Relevant Factors

(2)(A) land use within the proposed city

233 Kennedy Responsive Brief, p. 3-5
234 Nikiski Reply Brief, part 2, p. 29
235 Petition, Exhibit G, p. 17
236 Tyonek Group Responsive Brief, p. 7

Land use is discussed in the Boundaries section later in this report.

(2)(B) the need for and availability of employable skilled and unskilled persons to serve the proposed city government

Views Expressed in the Petition

The petition states that Nikiski has many skilled residents including teachers, oil and gas industry-related employees, commercial fishermen, and other skilled and professional positions. The petition notes that educational attainment in Nikiski is high with 92 percent high school graduation. The petition contends that the education levels and presence of a skilled workforce indicates that Nikiski is not only willing but also able to provide services through incorporation.[237]

Respondents' Views

Kenai Peninsula Borough: The borough contends that it is unclear whether the type of companies and employees the PPP will require for contracts are available in the Nikiski area.[238]

Views Expressed in the Reply Brief

The borough uses contractors for services, including companies such as CH2M Hill, in a similar manner to what a city of Nikiski plans.[239]

Departmental Analysis

The petition indicates that service area employees from the NFSA and NPRSA will become employees of the newly formed municipality. The department finds the lack of employees for roads problematic since the borough has access to many resources the city will not immediately have access to such as the in-house expertise of departments such as GIS, and engineering. However, the petition indicates that the concept planned for a city of Nikiski is to contract out services, and so, within the large population, the department feels comfortable assuming there are sufficient persons willing and able to serve the proposed city government.

(2)(C) the reasonably predictable level of commitment and interest of the residents in sustaining a city government

Views Expressed in the Petition

The petition presents the history of the community, and asserts that successful management of its service areas for many decades prove that Nikiski is ready, willing, and capable of incorporating a city of Nikiski that better serves the needs of its residents.[240]

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237 Petition, Exhibit G, p. 17
238 KPB Responsive Brief, p. 25
239 Nikiski Reply Brief, part 2, p. 35
240 Petition, p. 10

Respondents' Views

Tyonek Group: Tyonek states, "While additional laws and regulations may be a benefit when offered to a cohesive community with common goals, the imposition of such laws and regulations to an outside community is dangerous and destabilizing."[241]

Views Expressed in the Reply Brief

The intent of incorporation for Nikiski is self-determination, not simply better roads, and a more equitable distribution of road service funding, as the borough claims.[242]

Departmental Analysis

There has been demonstrated intent regarding incorporation over the years. From an examination of the creation of service areas, public hearings regarding these activities, as well as current, and past petitions, comments and briefs, the department concludes that the primary intention over the years, while sincere, still has the primary goal of taxing a large base in order to subsidize services within a small area. The department concludes the residents have demonstrated a sustained commitment to city government in the Nikiski area through the petition process and organization promoting their efforts.

Findings on the Standard of Resources

There are vast resources in the borough and in the territory proposed for incorporation. However, a city cannot simply claim them all without adequate justification. That justification must be whether new services are provided.

Through the history of these service areas, they have been created and expanded in order to include vast, unpopulated territories without providing any services to those areas. The original road service area, expanded the 1982 fire service area, recreation service area and perhaps the senior service area were created as large entities to subsidize the cost of services implicitly with little or any benefit to the few residents on the west side. The Kenai Peninsula Borough may allow service areas to function in this manner, but cities provide services to populated areas who decide that they want to fund those services and operate in a manner that is prescribed by law.

Just as the proposed Nikiski borough was rejected by the LBC in 1973, even though it contained far less territory than what is proposed today, it created a new, richer entity while depriving the remaining borough of resources. While Nikiski is proposing a home rule city, the borough stands to lose a great deal of money. The territory proposed for incorporation includes very substantial taxable property. The proposed incorporation seeks to claim some of that revenue and divert it to a city coffer without planning to provide a higher level of services.

241 Tyonek Group Responsive Brief, p. 14
242 Nikiski Reply Brief, part 1, p. 9

Incorporation of a city with these boundaries would simply be moving tax revenue from one place to another, and that is not justified by the information provided. However, the standard asks whether there are sufficient resources within a community to support a government. The petition is not proposing to raise any taxes so if the borders were significantly reduced, there would likely be some changes in the tax rate in order to pay for the same rate of services. With more than 5,000 residents, several hundred businesses, and many potential sources of revenue beyond the planned property tax, this standard is met. A potential city of Nikiski could draw upon many sources to create a diverse revenue stream; however, none are proposed at this time.

POPULATION (3 AAC 110.030)

(a) Whether the population within the proposed city is sufficiently large and stable to support the proposed city government

(b) To become a first class or home rule city, the territory proposed for incorporation must have a population of least 400 permanent residents

Views Expressed in the Petition

The petition indicates that the estimated population within the boundaries proposed for incorporation is approximately 5,985, which would be one of the largest cities in Alaska if incorporated by population. The petition states that a growing population is one reason for seeking incorporation.[243]

Respondents' Views

Kenai Peninsula Borough: The borough contends that **t**he population numbers given in the petition are presented in a manner that is not consistent. The responsive brief states the petition presents numbers from varying sources, and boundaries, and, therefore, their conclusions are inaccurately portrayed.[244] For example, the brief asserts that their use of only the Nikiski CDP for population and educational attainment versus their use of the entire proposed area for assessed taxable property underscores the "disconnect between Nikiski proper and the remaining area" proposed for incorporation.[245]

Views Expressed in the Reply Brief

The petitioners contend that the population has grown and the rate of growth is not relevant because the standard only asks whether the population is large and stable.[246]

243 Petition, Exhibit G, p. 11
244 KPB Responsive Brief, p. 7
245 KPB Responsive Brief, p. 7
246 Nikiski Reply Brief, part 2, p. 22

Departmental Analysis

As discussed in the first chapter, there are five CDPs within the territory proposed for incorporation. It is important to use the aggregate of these numbers rather than simply the one called "Nikiski" for comparison. The department uses the official DOLWD estimates, which are calculated, depending on the year, with the help of the census, PFD applications, as well as other information.

As an unorganized community, population is not clearly defined as with incorporated communities with municipal boundaries. The approximate population within the proposed boundaries is 5,985.[247] The large majority of the population is on the east side of Cook Inlet. Table 6 demonstrates the growth of each CDPs from 1980 or the year it was first counted to the most current estimate. CDPs were counted in this form starting in 1980. Estimates before then are excluded though there has been population in the area for much of the twentieth century. As described in the first section of this report, homesteading, then onshore and later offshore oil development contributed greatly to the population growth since the 1950s. This table provides the decennial count which is regarded as the most accurate, as well as the most current estimate by the DOLWD. Because the Nikiski area is unincorporated, data before 1980 is unhelpful without the parameters of CDPs in place now.

Table 6. Populations by Census Designated Place

CDP	1980	1990	2000	2010	2016 DOLWD Estimate
Nikiski	1,109	2,743	4,327	4,493	4,616
Salamatof	334	999	954	980	1,097
Beluga	-	-	32	20	16
Tyonek	239	154	193	171	182
Point Possession	-	-	-	3	3

Source: DCRA Community Database Online, accessed March 13, 2017

Beluga was not counted, or did not have any population before 1990. Both the Salamatof and Nikiski CDPs have grown steadily since the 1980s, and represent the "core" of what most consider the Nikiski area.

Findings on the Standard of Population

Home rule cities in Alaska may incorporate only if they must have 400 permanent residents. The population in the territory proposed for incorporation exceeds this threshold. The census data indicates that the population has steadily increased and is stable enough to support the creation of a city government.

247 Petition, p. 7

The department finds it important to note that the populations trends found on the east side for Nikiski and Salamatof are dissimilar to those on the west side and even Beluga and Tyonek are dissimilar. About 95 percent of the population lives within the Nikiski and Salamatof CDPs or on the east side of Cook Inlet within the boundaries proposed for incorporation which accounts for approximately 1.5 percent of the territory. However, the population is stable and large enough to sustain a municipal government. The department finds the standard found in 3 AAC 110.030 and AS 29.05.011(4) is met.

BOUNDARIES (3 AAC 110.040)

This section looks at whether the proposed boundaries are appropriate for the boundary change sought in a petition.

> **(a) in accordance with AS 29.05.011(a)(2), the boundaries of a proposed city include all land and water necessary to provide the development of essential municipal services on an efficient, cost-effective level**

Views Expressed in the Petition

The petition indicates the reasoning for inclusion of 5,480 square miles of land and water is that the Nikiski Fire Service Area was formed in 1969, and serves those boundaries. In order to continue that service, the petition states the proposed boundaries must include the entire service area.[248] Reducing the boundaries would leave some area without essential services which would become the responsibility of the KPB.[249]

Respondents' Views

Tyonek Group: Drawing the boundaries of territory within the fire service area "far exceeds the appropriate or justified boundaries of the proposed City" of Nikiski and what is considered the "community" of Nikiski.[250] The addition of municipal government structures imposed on unincorporated Tyonek would be detrimental to the village with respect to zoning, land use restrictions, permitting, and generally maintaining control over their own land.[251] The Tyonek Group brief asserts the fundamental difference between emergency service management and city government is that the priorities are dissimilar.[252]

Kenai Peninsula Borough: The petition presents proposed boundaries that do not adequately justify why the west side of the inlet is included, or necessary for the provision of essential municipal services to a city of Nikiski. In addition, the borough contends that incorporation as a city is not necessary for the oil and gas related industry located including in the water and on the west side of

248 Petition, Exhibit G, p. 21
249 Petition, Exhibit G, p. 22
250 Tyonek Group Responsive Brief, p. 8-10
251 Tyonek Group Responsive Brief, p. 13
252 Tyonek Group Responsive Brief, p. 9

Cook Inlet. In addition, the borough concludes the incorporation does not propose to provide any additional services to those residents of the west side.[253]

Views Expressed in the Reply Brief

The proximity of the west side to Nikiski as opposed to the borough seat in Soldotna as well as the historical inclusion in borough-created service areas is an indication that the west side is appropriate for inclusion in the proposed city of Nikiski.

The reply brief states that the LBC should not only take into account current and past administrative boundaries such as election districts and the other factors listed in 3 AAC 100.920(a)(3) which are decided politically and outside the petitioners' control. The petitioners assert that the service areas of Nikiski currently provide "direct" services to the west side, that the west side is "intimately" connected to Nikiski, and Nikiski's proximity relative to the borough seat will allow them to provide services most efficiently and best.[254]

Departmental Analysis

The primary reasoning by the petitioners in justification of inclusion of the large proposed boundaries is the history of the Nikiski Fire Service Area and their stated intention of providing services after incorporation as a city. However, the original fire service area covered fewer than 30 square miles. In 1982, the boundaries expanded to the current boundaries without an expansion of services to match.[255]

(a)(1) land use, subdivision platting, and ownership patterns

Views Expressed in the Petition

Land within the territory proposed for incorporation is owned both publicly and privately and the petition notes that major landowners include: the State of Alaska, KPB, native corporations, the Alaska Mental Health Trust Authority, and oil and gas companies. The petition also indicates private ownership includes a variety of uses from gravel sources to recreational summer cabins.[256]

The petition notes that the territory is connected by the presence of industry. The petition suggests there are a variety of owners and land uses within the proposed territory and reiterates that a city of Nikiski will continue to promote future industrial growth.[257]

253 KPB Responsive Brief, p. 17
254 Nikiski Reply Brief, part 2, p. 17
255 See history of the NFSA in the Profile of the KPB and Territory Proposed for Incorporation earlier in this report.
256 Petition, Exhibit G, p. 20
257 Petition, Exhibit G, p. 20

Respondents' Views

Tyonek Group: Tyonek wishes to retain control and jurisdiction over its own land and losing "control is especially disturbing given the vast differences between the goals, needs, and interests of Tyonek and those of Nikiski."[258] The brief also states that being included within a municipality would jeopardize this control by subjecting their lands to zoning, permitting, land use or conditional use restrictions that would largely be created without consent from Tyonek since it cannot have a direct member on the proposed city council. Tyonek wishes to retain the borough's minimally intrusive approach regarding land use and zoning, and to retain the ability to continue subsistence activities.[259]

Views Expressed in the Reply Brief

The petitioners state that the borough does not provide ownership information for property in the Kenai Peninsula Borough so no response was provided.[260]

Departmental Analysis

The borough provides land ownership information on its website by parcel, by owner, and other methods. This is all publicly available information that is not easy to search, but certainly not hidden as the petitioners suggest.

Much of the land on the west side is unplatted and undeveloped in addition to being mostly unpopulated. The west side includes national park land in Lake Clark National Park and Reserve, Kenai National Wildlife Refuge as well as land owned by Cook Inlet Region, Inc. (CIRI), TNC, KPB, the State of Alaska, and the federal government. Much of it is undeveloped and inaccessible and includes mountains and volcanoes. Land use on either side of the inlet varies greatly. For example, the two fire stations on the west side are owned by entities other than the service area. Many of the facilities on the west side are owned by the companies that operate them.

The east side is much more developed and clustered along the North Road where industry and residential both located. This road extends from the City of Kenai up to Mile 36 beyond which the road is unpaved, but an extension is planned, and has been in development for decades. The east side has a large mix of ownership patterns.

There is little land use regulation in the territory proposed for incorporation currently. The petition does not indicate how land use powers might be developed in a potential city except that it plans to seek delegation of platting, planning, and zoning from the borough. The department cannot evaluate this without additional information.

(a)(2) population density

258 Tyonek Group Responsive Brief, p. 13
259 Tyonek Group Responsive Brief, p. 12-13, 6-7
260 Nikiski Reply Brief, part 2, p. 30

Views Expressed in the Petition

The petition states that the NFSA provides services "uniformly" across the territory proposed for incorporation, and the history and proposed continuation of service provision is the reason for the inclusion of a large area.[261]

Respondents' Views

Kenai Peninsula Borough: The brief states that the lack of population density and largely unpopulated west side only contributes to the necessity that the west side should be excluded from future boundaries for a city.[262]

Views Expressed in the Reply Brief

The petitioners, throughout their reply brief, contend that the borough's assertions that the west side is unpopulated are untrue, and that the borough is too large to provide services as efficiently as a more local government can.[263]

Departmental Analysis

Across the territory proposed for incorporation, there are stark differences in population density. Ninety-five percent of the population of the territory proposed to be incorporated as the city of Nikiski lives in about 1.5 percent of the territory. The CDP boundaries of the unincorporated communities of Tyonek and Beluga account for only three percent of the land on the west side of Cook Inlet. The land mass on the east side of Cook Inlet is about eight percent of the entire territory proposed for incorporation.

While the west of Cook Inlet is not completely unpopulated, its population, less than 200 persons, lives within just three percent or 170 square miles of the 4,349 total square miles of land. In addition, the water included within the territory proposed for incorporation which has no permanent population is approximately 19 percent of the territory proposed. Just eight percent of the land mass is on the east side of Cook Inlet.

Looking specifically at the CDPs of Nikiski and Salamatof, together they total 84 square miles of land and represent only 17 percent of the land mass included within the territory proposed for incorporation on the east side of the inlet. Those two CDPs are a mere 1.5 percent of the total area included within the proposed boundaries.

The point of these calculations is to illustrate that the population density is uniformly low outside the "core" area of Nikiski which is significantly smaller than the proposed boundaries. These figures demonstrate clearly that the boundaries are not appropriate for efficient service delivery.

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261 Petition, Exhibit G, p. 22
262 KPB Responsive Brief, p. 17
263 Nikiski Reply Brief, part 2, p. 31-32; part 1, p. 7

(a)(3) existing and reasonably anticipated transportation patterns and facilities

Views Expressed in the Petition

The petition offers that Nikiski firefighters fly to the west side of Cook Inlet for weekly training, and many residents work in the oil fields and platforms within the territory proposed for incorporation.[264]

Respondents' Views

Tyonek Group: The Native Village of Tyonek is off the road system and has limited accessibility. The brief notes that air travel is the only way to reach Tyonek year-round and that more flights connect Tyonek to Anchorage (as many as eight daily) than to Kenai's airport (up to six weekly).[265]

Kenai Peninsula Borough: The brief states that the absence of existing and anticipated transportation patterns and facilities connecting the west side add to its argument that the west side must be excluded.[266]

Views Expressed in the Reply Brief

The borough's brief describes the "core area of Nikiski," which the petitioners contend is undefined, and that the KPB unfairly dismisses that Nikiski currently provides "local government services" to the west side. In Exhibit L, the reply brief provides information on the transportation patterns across the inlet, which it contends demonstrate strong connections between the communities on either side of Cook Inlet.[267]

Departmental Analysis

Transportation on the east side of Cook Inlet is primarily along the North Road, also called the Kenai Spur Highway. There are no bridges across Cook Inlet, and the nearest public airport is in the City of Kenai. There are no public airports on the west side.

The map the reply brief provides (Exhibit L), describes flights of a private transportation company, and it is unclear to the department how this demonstrates true connections with the Native Village of Tyonek; rather it demonstrates connections between private company operations on either side. According to data from DOLWD, Tyonek residents are not working in these industries.[268] The links between each side of Cook Inlet provided by the reply brief are hardly indicative of a community. Moreover, Cook Inlet is a geographic barrier that divides the west and east sides of this proposed incorporation. There is no discernible reason to include the unpopulated areas on the west side of the inlet. The approximate distance from the core Nikiski area to Tyonek is roughly 20 miles.

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264 Petition, p. 25 and Exhibit G, p. 17, 21
265 Tyonek Group Responsive Brief, p. 4
266 KPB Responsive Brief, p. 17
267 Nikiski Reply Brief, part 1, p. 6
268 Alaska DOLWD, Alaska Local and Regional Information (ALARI) for Tyonek CDP, accessed April 3, 2017

(a)(4) natural geographic features and environmental factors

Views Expressed in the Petition

Residents are connected through industry including fishing and oil and gas related activities. In addition, the petition describes that Nikiski firefighters have specific training including responding to emergencies on oil platforms, and emergencies in the waters of Cook Inlet with trained dive teams.[269]

Respondents' Views

Kenai Peninsula Borough: The geographic distance created by Cook Inlet between the east side and west side is an argument for excluding the west side.[270]

Tyonek Group: Tyonek is separated by Cook Inlet and access to the community other than by air is limited by the season.[271]

Views Expressed in the Reply Brief

Nikiski is better positioned to continue providing local government services to the west side than more distant Soldotna because of its transportation connections and current service provision.[272]

Departmental Analysis

As stated previously, Cook Inlet is a major body of water. Cook Inlet represents a physical and geographic barrier to community connections that are not bridged by any transportation patterns examined by the department.

(a)(5) extraterritorial powers of cities None offered views regarding this section.

(a)(6) salability of land for residential, commercial, or industrial purposes

Views Expressed in the Petition

The petition describes availability of resources such as gravel, as well as a great deal of variety in land uses for varying needs of a community.[273]

269 Petition, Exhibit G, p. 22
270 KPB Responsive Brief, p. 17
271 Tyonek Group Responsive Brief, p. 7
272 Nikiski Reply Brief, part 1, p. 6
273 Petition, Exhibit G, p. 20

Respondents' Views

Wenda Kennedy: Nikiski is home to much industry and can welcome more because of the infrastructure and attitudes of the area residents.[274]

Views Expressed in the Reply Brief

The Nikiski area has land available for industrial residential development and is more attractive and affordable than nearby Kenai and Soldotna.[275]

Departmental Analysis

Nothing mentioned in the petition regarding the salability of land for residential, commercial, or industrial purposes adds to the justification of the large boundaries in the department's view.

(a)(7) suitability of the territory for reasonably anticipated community purposes

Views Expressed in the Petition

A municipal building will be provided for using the organizational grant from the state.[276] In addition, a private company provides water to the downtown Nikiski area.[277]

Respondents' Views

Tyonek Group: Because Tyonek is primarily tax exempt, and owns its own facilities including roads, the Native Village of Tyonek, and its lands are unsuitable for inclusion within another city, as services currently provided by the borough will simply be transferred to Nikiski without any expansion of services.[278]

Views Expressed in the Reply Brief

None offered.

Departmental Analysis

It is unclear to the department what the anticipated community purposes regarding land are so it cannot address whether the land is suitable for those purposes.

(b) To promote the limitation of community, the boundaries of the proposed city (1) must be on a scale suitable for city government and may only include that territory comprising a present local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the anticipated date of incorporation

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274 Kennedy Responsive Brief, p. 1
275 Nikiski Reply Brief, part 2, p. 29
276 Petition, p. 33
277 Petition, Exhibit G, p. 20
278 Tyonek Group Responsive Brief, p. 12

Views Expressed in the Petition

The boundaries proposed correspond to the current NFSA boundaries and the high quality of service provided over the years within those bounds demonstrates that the proposed city can continue to provide the same level of services effectively. The petition states that the services are provided "uniformly" and the more than 46-year history of the Nikiski Fire Department demonstrates that the scale is appropriate for a city of Nikiski in order to continue these services.[279] The petition indicates that a city of Nikiski does not intend to adjust the boundaries for any reason after incorporation.[280]

Respondents' Views

Kenai Peninsula Borough: The success of service provision through service areas is a result of effective management by the borough.[281]

Tyonek Group: Service areas have no restrictions on size and are not akin to municipal governance in part because their priorities are based on needs and resources and are "by their nature, apolitical." The brief goes on to note that future Nikiski city officials would likely not seek to cater to Tyonek because the constituency on the east side of the inlet far exceeds that of the west side.[282] In addition, the brief also notes that the proposed boundaries are drawn "with an eye towards economic interests and commercial gain rather than common culture and community."[283]

Views Expressed in the Reply Brief

The boundaries are based on the territory currently provided services through Nikiski's service areas and are therefore entirely included in order to continue those services successfully.[284]

Departmental Analysis

There is no definition in square miles for the scale that is suitable for a city government in Alaska. However, the proposed city would be larger than the largest city in Alaska by a factor of 20. Cities and boroughs have different roles under Alaska law. The proposed city would fit comfortably within the range of boroughs in Alaska, which range from 464 square miles in the Municipality of Skagway to North Slope Borough, which stretches 94,770 square miles. The Kenai Peninsula Borough is 21,330 square miles. The boundaries as drawn encompass far more than what can be considered the community of Nikiski as is indicated throughout the petition, as by facts presented throughout this report. Whether the service area boundaries are drawn on such a large scale is not relevant because

279 Petition, Exhibit G, p. 22-23
280 Petition, Exhibit G, p. 23
281 KPB Responsive Brief, p. 17
282 Tyonek Group Responsive Brief, p. 9
283 Tyonek Group Responsive Brief, p. 9
284 Nikiski Reply Brief, part 2, p. 30

those service areas are part of the borough. City government exists to provide services to populated areas. The proposed boundaries are not on a scale suitable for city government.

(b)(2) may not include entire geographical regions or large unpopulated areas, except if those boundaries are otherwise justified by the application of the standards in 3 AAC 110.005-3 AAC 110.042 and are otherwise suitable for city government

Views Expressed in the Petition

The petition acknowledges that the boundaries do include large unpopulated areas, but that successful service area management justifies their inclusion in their entirety in order to continue high levels of service for fire and emergency services in a proposed city of Nikiski.[285]

Respondents' Views

Kenai Peninsula Borough: The brief states that the petition does not adequately address the fact that the boundaries include entire geographical regions and large unpopulated areas, which violates this standard, and does not provide adequate justification as required.[286]

Views Expressed in the Reply Brief

Petitioners note that the west side of Cook Inlet is not entirely unpopulated, and that the inclusion is justified by the history of service provision and demonstrated transportation patterns across the inlet.[287]

Departmental Analysis

The territory as presented in the petition for incorporation includes both entire geographical regions and large unpopulated areas. The majority of the land on the west side of the inlet has no population. It also includes land that is part of Lake Clark National Park and Preserve. The communities that are located on the west side of the inlet, Tyonek and Beluga, are small and concentrated and together represent about three percent of the total population of the territory and approximately and about four percent of the land mass on the west side alone. The land on the west side of the inlet represents about 72 percent of the total territory proposed for incorporation. A fuller picture of these numbers was addressed earlier in the section regarding the population density factor. That section concluded that the territory does indeed include entire geographic regions, and large, unpopulated regions.

By contrast, the territory better meets the definition in 3 AAC 110.990 of region: "a relatively large area of geographical lands and submerged lands that may include multiple communities, all or most of which share similar attributes with respect to population, natural geography, social, cultural, and

285 Petition, Exhibit G, p. 22-24
286 KPB Responsive Brief, p. 19
287 Nikiski Reply Brief, part 2, p. 31; and part 1, p. 11-12

economic activities, communications, transportation and other factors."[288] Regions are more appropriate for boroughs rather than cities. The department does not find the petition overcomes this requirement seeking adequate justification if territory includes entire geographical areas or large unpopulated areas.

> **(c) Absent a specific and persuasive showing to the contrary, the commission will presume that territory proposed for incorporation that is noncontiguous or that contains enclaves does not include all land and water necessary to allow for the development of essential municipal services on an efficient, cost-effective level**

Views Expressed in the Petition

The petition does not directly discuss this section.

Respondents' Views

Tyonek Group: The incorporation of Nikiski will create an enclave whereby Tyonek will be subject to another layer of government and its regulations without an increase in the services provided or representation in that government. This, says respondent Tyonek Group, condemns the petition whose boundaries encompass Tyonek.[289]

Views Expressed in the Reply Brief

The reply brief does not directly discuss this section.

Departmental Analysis

As proposed, the boundaries are contiguous and do not create enclaves.

> **(d) if a petition for incorporation of a proposed city describes boundaries overlapping the boundaries of an existing organized borough or city, the petition for incorporation must also address and comply with all standards and procedures to alter the boundaries or the existing borough or city to remove the overlapping territory. The commission will consider that petition for incorporation as also being a petition to alter the boundaries of the existing borough or city.**

Views Expressed in the Petition

The petition acknowledges that the boundaries include unincorporated, but federally recognized Native Village of Tyonek who the petition states will "gain a more visible and respected position of representation within the localized government."[290] In addition, the proposed city will:

- Be more engaged with the west side and Tyonek

288 3 AAC 110.990(28)(A) "Region"
289 Tyonek Group Responsive Brief, p. 13
290 Petition, Exhibit G, p. 24

- Respect their sovereign status
- Honor its wish to remain a closed community
- Appoint a council member as a liaison representative to the west side and Cook Inlet.[291]

Respondents' Views

Tyonek Group: The Native Village of Tyonek is the recognized tribal government in the community and Tyonek Native Corporation is the ANCSA-created village corporation.[292] As stated in its brief, the Tyonek Group finds the potential inclusion of their community within another community's jurisdiction "disturbing."[293]

Views Expressed in the Reply Brief

The current service area boundaries include Tyonek and Beluga, and were created by the borough. The petitioners reiterate that the petition "assumes that continuity of services to the west side is preferable."[294] The petitioners also note that no comments were submitted to LBC staff from Tyonek residents indicating their opposition.[295]

The petition and reply brief assert that without inclusion in a potential city of Nikiski, the communities on the west side of Cook Inlet would be left without essential municipal services and the borough would not legally be able to provide them without a vote as a second class borough.[296]

The petitioners reiterate their contention that there are very close connections between the west side and the northeast side, and that these connections are much stronger than those with the borough.[297]

Departmental Analysis

The territory proposed for incorporation does not include any incorporated cities. However, the village of Tyonek, while not incorporated under state law, is a recognized and distinct community in addition to being a federally recognized tribe. It is not appropriate to include Tyonek within the boundaries of another distinct community.

Tyonek residents did not respond with public comments individually; however, the Tyonek Group brief was filed on behalf of the two organizations that represent both shareholders and village residents, which indicates clear and unequivocal opposition to inclusion within the boundaries.

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291 Petition, Exhibit G, p. 24
292 Tyonek Group Responsive Brief, p. 2-3
293 Tyonek Group Responsive Brief, p. 13
294 Nikiski Reply Brief, part 2, p. 30
295 Nikiski Reply Brief, Supplement, p. 6
296 Nikiski Reply Brief, part 2, p. 18
297 Nikiski Reply Brief, part 2, p. 17

The petitioners' claim that no resident of Tyonek submitted comments is simply untrue because one of the jointly submitted brief's representative is the president of the Native Village of Tyonek.

Findings on the Standard of Boundaries

Within the territory proposed for incorporation, there are major geographic and cultural barriers. The land on either side of the inlet has limited connections, varying land use, and extreme disparities in population.

The boundaries of the proposed city must include only that territory comprising a present local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the effective date of incorporation. The territory as presented by the petition does not include only that territory comprising a present local community.

The petitioners contend that without inclusion in a city of Nikiski those excluded parts would be left without services. The petitioners claim that there are no other service areas for recreation or senior service. There is a Seldovia recreation service area, but, to this end, there is no prohibition on the borough continuing to provide either direct services to Tyonek or Beluga (it is unclear whether it receives any direct or indirect services), or creating new service areas at the request of those areas.

Service areas are not analogous to cities. When a city proposes to become larger than any other city in terms of area by a factor of 20, and approximately 364 times larger than the average city in the KPB, the city proposed is not on a scale suitable for city government. The department acknowledges there is no firm number that is appropriate for the size, but the petition does not demonstrate that it can better provide services across that territory. Service areas may take in large boundaries, as they did in this case, to take advantage of the tax base. Cities must only take in land to serve municipal purposes. Moreover, services are not provided uniformly within this vast territory, nor could anyone expect them to be—as the majority of the territory is unpopulated. Service area boundaries are not analogous to municipal boundaries. The presence of them does not mean that the boundaries are therefore appropriate for municipal government or their inclusion into a single city would be fair or appropriate.

The department finds no reason to include any part of the west side in a city of Nikiski. Including the entirety of Cook Inlet also has not been adequately justified. While it is true that the NFSA assists the oil platforms, that does not justify including 1134 square miles of water in Cook Inlet. The department does not preclude the inclusion of any water at all within a potential boundary for a city of Nikiski since the community could make the case for providing some services to the water such as search and rescue, and claim up to three miles as the City of Kenai does. This is an arbitrary number, however, proposed by the department as a suggestion based on precedent only, but one that is more reasonable.

The boundaries as presented cannot be justified by the standards applied. A significantly reduced boundary would be more appropriate—one that encompasses what is the "core" of the community of Nikiski. This undefined term the department continues to use is that are where the majority of

the population exists. As demonstrated within this larger discussion, there is a very small part of the boundaries where the majority of the population lives, and this is a good start from which to base a discussion on what the appropriate boundaries are. Service areas bear no historical precedence on municipal boundaries, and appear to have been drawn explicitly to take advantage of the rich resources and subsequent revenues. City boundaries cannot use this loose justification as reasoning. Rather they have much more stringent requirements. Therefore, the standard regarding whether the boundaries of the territory proposed for incorporation is not met.

BEST INTERESTS OF THE STATE (3 AAC 110.042; AS 29.05.100(A))

This factor provides three criteria for the LBC to consider in determining whether the boundary change is in the best interests of the state. This section will address each factor and the statutes and regulations within these factors. Each factor is listed with the subsections that relate to incorporation of a home rule city within an organized borough.

In determining whether incorporation of a city is in the best interests of the state under AS 29.05.100(a), the commission may consider relevant factors, including whether incorporation

(1) promotes maximum local self-government, as determined under 3 AAC 110.981

3 AAC 110.981 Determination of maximum local self-government

In determining whether a proposed boundary change promotes local self-government under art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

(8) Whether the proposed city would extend local government to territory or population of the organized borough where local government needs cannot be met by the borough on an areawide or nonareawide basis, by annexation to an existing city, or through an existing borough service area

(14) whether the petition proposed incorporation of a home rule municipality

Views Expressed in the Petition

The petition indicates this standard is met because it creates a local government where there is none now and that residents of Nikiski will be able to represent their own interests better as a municipality and as a home rule municipality be empowered to provide better services that are more responsive to its citizens.[298] City status will give Nikiski residents more recognition and respect in negotiations with other government entities and industry. The petition emphasizes that residents' interests are not currently understood or met at the borough level, and so incorporation as a home rule city is maximizing local self-government. Currently, Nikiski has only one seat on the borough assembly, which the petition states is not sufficient to meet the needs of the community.[299]

298 Petition, Exhibit G, p. 25-26
299 Petition, p. 10, 18

Respondents' Views

Tyonek Group: The incorporation petition of Nikiski promises no new services and merely substitutes one provider of services with another, with no planned change or additional benefit to Tyonek.[300] The Tyonek Group brief concludes that the petition as presented does not demonstrate a need for city government and violates the constitutional requirement that limits the number of local government units and fails to meet the requirement for maximizing local self-government. Tyonek states explicitly that the community feels essential municipal services can best be provided by the Kenai Peninsula Borough and its apolitical service areas.[301]

Louis Oliva: Moving from several service area boards, some of which have been changed from elected to appointed, to local city government promotes the requirement of maximizing local self-government found in the Alaska constitution.[302]

Kenai Peninsula Borough: This standard is not met because the services proposed can be provided by an existing organized borough, the Kenai Peninsula Borough, and existing service areas, which are functions of that same organized borough.[303]

Views Expressed in the Reply Brief

Incorporation is the only way to provide the services Nikiski residents want that are not being provided by a second class borough. In addition, the borough does not plan to exercise additional powers, which leaves incorporation as the best choice for Nikiski in order to maximize local self-government.[304]

Departmental Analysis

In order to meet this standard, the petitioners must demonstrate that the proposed city would provide more than what is currently provided by the borough and existing borough service areas. Maximizing local self-government is not simply transferring a power exercised by one entity to another. Simply stating that Nikiski can provide services better because it is closer to its citizens is not sufficient to do so. The department finds the proposed city will not maximize local self-government because it will not be extending local government to a territory of an organized borough where the local government needs cannot be met through existing borough service areas and on an areawide or nonareawide basis.

(2) promotes a minimum number of local government units as determined under 3 AAC 110.982 and in accordance with art. X, sec. 1, Constitution of the State of Alaska

3 AAC 110.982 Minimum number of local government units

300 Tyonek Group Responsive Brief, p. 11
301 Tyonek Group Responsive Brief, p. 10
302 Oliva Responsive Brief, p. 1
303 KPB Responsive Brief, p. 22
304 Nikiski Reply Brief, part 1, p. 3-4

Among the factors to be considered in determining whether a proposed boundary change promotes a minimum number of local government units in accordance with art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

(6) for city incorporation, whether incorporation as a new city is the only means by which residents can receive essential municipal services

Views Expressed in the Petition

Dissolution of the several service areas and formation of a city whereby these services will be departments of a municipal government meets the constitutional mandate of a minimum number of local government units, and will allow for more efficient and cost-effective service delivery. The petition contends that these services cannot be provided as efficiently by the current services areas through the second class borough as they could be through a municipal government.[305] The petition states that only through incorporation can residents exercise powers without the threat of the borough dissolving service areas the area voted to create and expanding them area or nonareawide, and thereby, diluting their local property taxes.

Respondents' Views

Kenai Peninsula Borough: The proposed city is not planning to provide any services not already provided by the borough, and the petition for incorporation, therefore violates minimum number of local government units called for in the constitution.[306]

Tyonek Group: The brief concludes that the standard cannot be met because the incorporation is not the only means that Tyonek can receive essential services, no new services are offered, and the formation of a city of Nikiski is merely a duplication of governing jurisdictions, which violates the constitution. Therefore, the petition must be denied.[307]

Views Expressed in the Reply Brief

Creation of any additional service areas would violate the constitution, and in order to provide additional services, incorporation meets the standards required in this section. The petitioners contend that the borough "is avoiding providing [services through areawide or nonareawide powers] by stacking service area on top of service area."[308] In addition, the petitioners note that the charter need not have all services the city may provide in the future.[309]

Forming a single city instead of the current "stacking" of five service areas with five different administrations in the same general area meets the standard in the constitution of minimizing local

305 Petition, Exhibit G, p. 26
306 KPB Responsive Brief, p. 27
307 Tyonek Responsive Brief, p. 12-13
308 Nikiski Reply Brief, part 1, p. 13
309 Nikiski Reply Brief, part 1, p. 5-6

government units.[310] Forming a city government is the only way a home rule city of Nikiski can expand its service provision because a second class borough such as the KPB is limited, spread out, and has been unwilling over its 53-year existence.[311]

Departmental Analysis

Incorporation as proposed by Nikiski does not meet the standard of promoting a minimum number of units because incorporation is not the only means by which residents can receive essential municipal services. If Nikiski residents were proposing additional services, this standard would be of greater relevance. Incorporation of a city and dissolution of the borough service areas would minimize local government units; however, because no new services are proposed there can be no argument that incorporation is the only means by which residents can receive the same set of services.

(3) will relieve the state government of the responsibility of providing local services

Views Expressed in the Petition

The petition does not directly address this section.

Respondents' Views

Kenai Peninsula Borough: Incorporation without proposing law enforcement will not offer any relief to the state government.[312]

Tyonek Group: Nothing in the petition indicates that there will be any relief to the state government and offers the example of future reliance on state troopers as an example.[313]

Views Expressed in the Reply Brief

The petitioners note that it is only speculation that a potential city of Nikiski would have to raise taxes in order to provide law enforcement services. They point to a letter reproduced in the reply brief from Governor Bill Walker to Senator Pete Kelly that discusses potential legislation that would allow communities to contract with the state troopers as a possible process that would align with the planned PPP model.[314] Further, the petitioners respond that the petition did not claim that it would relieve the state of providing any services so the point made by the borough is irrelevant.[315]

310 Nikiski Reply Brief, part 1, p. 13
311 Nikiski Reply Brief, part 1, p. 13-15
312 KPB Responsive Brief, p. 22
313 Tyonek Group Responsive Brief, p. 12-13
314 Nikiski Reply Brief part 2, p. 25
315 Nikiski Reply Brief, part 2, p. 33

Departmental Analysis

The state currently provides law enforcement within the Kenai Peninsula Borough and across the state. If Nikiski incorporates, it plans to continue to rely on this statewide service. The bill mentioned that would allow contracts between the AST and communities is pending legislation. However, this proposed bill would require an expenditure by a potential city and likely a tax increase. The department finds that the proposed incorporation does not offer any relief to the state in terms of services.

(4) is reasonably likely to expose the state government to unusual and substantial risks as the prospective successor to the city in the event of the city's dissolution

Views Expressed in the Petition

The petition does not directly address this section.

Respondents' Views

Kenai Peninsula Borough: The borough's brief states that this incorporation as proposed is not in the best interests of the borough because they find that under dissolution statutes and regulations, if the city dissolves, the borough may assume that former city's liabilities and duties.[316]

Views Expressed in the Reply Brief

The borough's assertion about a petition risk to the borough or state government is speculation.[317]

Departmental Analysis

The proposed city of Nikiski does not plan to provide services that are not already being provided by existing service areas, which are functions of the borough. The department does not find that there is any risk to state government in the incorporation of Nikiski since there will be no changes.

316 KPB Responsive Brief, p. 23
317 Nikiski Reply Brief, part 1, p. 13

Findings on the Standard of Best Interests of the State

This standard is the crux of the Local Boundary Commission's task in serving a statewide role in boundary changes. This standard asks about the role of government in the proposed boundary change—specifically whether the boundary change will maximize local self-government and whether that change minimizes the number of local government units. The framers sought to avoid the overlapping jurisdictions of the Lower 48 states.

The Alaska Supreme Court characterized the framers' purpose in creating the LBC as follows:

> An examination of the relevant minutes of [the Local Government Committee of the Constitutional Convention] shows clearly the concept that was in mind when the local boundary commission section was being considered: those local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The advantage of the method proposed, in the words of the committee:
>
> > . . . lies in placing the process at a level where area-wide or state-wide needs can be taken into account. By placing authority in this third party, arguments for and against boundary change can be analyzed objectively.[318]

The Local Boundary Commission is tasked with making boundary decisions that are in the best interests of the state, and not just that of the local community.[319] The incorporation will primarily affect the Kenai Peninsula Borough.

The incorporation, the department has determined, does not plan to expand the services provided and therefore is not maximizing local self-government. In dissolving borough service areas, it could be determined that it is minimizing local government units. However, the incorporation of a new local government unit is intended to provide an expansion of services, and statutes limit the incorporation of a new city if those services can be provided by an existing borough service area or on an areawide or nonareawide basis.

State or federal agencies will still provide assistance with large fires, and with police protection through the Alaska State Troopers. It does not appear that this incorporation would relieve the state of the provision of any local services because they are primarily already provided by the Kenai Peninsula Borough. This standard cannot be met unless the proposed city provides additional services that are not duplicative of the services currently being provided by the borough and its service areas. The department concludes that because the petition does not make a credible case that local government needs are unmet by the borough, this incorporation is not in the best interests of the state.

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318 "Background on the Local Boundary Commission." LBC staff, no date; *Fairview Public Utility District No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962).
319 *Fairview Pub. Util. Dist. No. One v. City of Anchorage*, 368 P.2d 540, 546 (Alaska 1962).

TRANSITION (3 AAC 110.900)

This standard requires that a petition for incorporation include a practical plan:

(a) that demonstrates the capacity to extend essential municipal services into the boundaries proposed for change in the shortest practicable time after the effective date of incorporation

(b) for the assumption of all relevant and appropriate powers, duties, rights, and functions presently exercised by an existing borough, city, unorganized borough service area, or other appropriate entity located within the boundaries proposed for change. The plan:

- **must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area and must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the effective date of the proposed change.**

(c) for the transfer and integration of all relevant and appropriate assets and liabilities of an existing borough, city, borough service area, and other entity located within the boundaries proposed for change. The plan:

- **must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area wholly or partially included within the boundaries proposed for change and**
- **must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the date of the incorporation and**
- **must specifically address procedures that ensure that the transfer and integration occur without loss of value in assets, loss of credit reputation, or a reduced bond rating for liabilities.**

Views Expressed in the Petition

The petition includes a transition plan which is described below. The petition asks the LBC to include on the ballot for incorporation the election of the eight-member city council as well as the property taxes now associated with the four service areas that will be absorbed into the new city. The petition describes the process planned for accession of powers, duties, and functions for the three service areas that follow similar boundaries to the proposed city in a timely manner. The petition indicates that current employees of NPRSA and NFSA will become city employees.

Nikiski Fire Service Area (NFSA)

- All NFSA assets will be transferred to the city.
- Property and Engineering studies completed for a new fire station will be transferred.

- All employees will become city employees.
- Legal counsel will work to determine new salary and benefit packages when employees transfer from union contract positions.
- Fire Stations in Beluga and Tyonek are owned by NVT and ARCO/ConocoPhillips and will remain so, but equipment owned by NFSA will be transferred.
- Seven elected member board will continue for up to one year and then the board of director's responsibilities will transfer to the city manager.
- Current mill rate of 2.9 will transfer to the city's mill rate

North Peninsula Recreation Service Area (NPRSA)

- Five-member board will continue for up to one year during the transition at which time then the board of director's responsibilities will transfer to the city manager.
- All assets of the NPRSA will be transferred to the city
- The city will continue the contract with the Boys and Girls Club of Southcentral for recreation services in Tyonek.
- All employees will become city employees.
- Legal counsel will work to determine new salary and benefit packages when employees transfer from union contract positions.
- Discrepancies of approximately 50 square miles from the proposed city boundaries do not include populated areas and are not a significant issue.
- Mill rate (1.0) will transfer to the city's mill rate total.

Nikiski Senior Service Area (NSSA)

- Five-member board will continue in their current capacity for no more than a year during the transition at which time then the board of director's responsibilities will transfer to the city manager.
- NSSA is actually the taxing mechanism for the NSSA whose assets are managed by the Nikiski Senior Citizens, Inc. a non-profit organization which will remain in place.
- Employees will be hired on an individual contract basis.
- Salamatof, which is not included in the NSSA at this time, will begin to receive services as a result of inclusion in the proposed city boundaries.
- The mill rate will remain the same. Salamatof residents will see an increase of 0.2 mills as part of the city's overall mill rate.

Road Service Area (RSA)

- The city manager will manage all roads and contracts on non-state maintained roads.
- City manager will recommend contracts and the city council and mayor will approve them.

- The mill rate associated with the current road service area of 1.4 mills will be added to the city's overall mill rate within the boundaries of the new city.

The petition indicates that the city manager and city clerk will be hired by the city council within one month of incorporation. The petition describes the steps the city council and city staff will take in working with the transition of powers, rights, assets of the service areas and borough. The plan lists officials from these entities that the petitioners have consulted. The plan indicates that the requirements of 3 AAC 110.900 are met, and the petition demonstrates a capacity to extend municipal services after incorporation within the shortest practicable time.[320]

Respondents' Views

Kenai Peninsula Borough: The borough contends that the petition has failed to consider the cost of administering services, 911 services, or a process to stay within the Central Kenai Peninsula Hospital Service Area.[321] In addition, the borough takes issue with the exclusion of specified powers in the proposed charter that the borough asserts demonstrate that the potential city will not be providing services beyond what is currently provided.

The borough contends that the petition does not adequately explain a legal and fair way to detach from the nonareawide road maintenance service area. The borough also concludes that the petitioners have not demonstrated how they will be able to provide better quality services other than just stating that the PPP model will allow for efficiencies. The borough concludes that the incorporation does meet the standards.[322]

If the incorporation were approved with the proposed boundaries, the city would take a large portion of the road service area without having to provide road maintenance to the majority of that area (i.e., Tyonek, Cook Inlet, Beluga, or the unpopulated areas on the west side of Cook Inlet) while keeping that money from the borough's use.

The borough states that AS 29.05.130 assumes a service area will have the same or smaller boundaries as the new city, and the statute provides for that type of transition. However, the RSA is much larger than the proposed boundaries of the city, and under AS 29.35.450(a), a city must pass an ordinance or hold a vote in order to stay within a service area. They conclude that, "under the present statutory scheme it is not an option to allow an incorporating city to secede from a much larger service area and simply start providing the service itself."[323] In addition, the borough contends that, while the assets for the northern region of the RSA may seem evident as those that would be transferred, the tax revenue is collected on a nonareawide basis. Transferal in its entirety

320 Petition, p. 21-36
321 KPB Responsive Brief, p. 14
322 KPB Responsive Brief, p. 24-27
323 KPB Responsive Brief, p. 10-11

"undermines the rule of law that the taxes in the service area are for the common good throughout the service area and not for the specific benefit of particular persons."[324]

Views Expressed in the Reply Brief

The petitioners state that they intend to work with the borough in order to come to agreement on the transition of powers and assets. As have other cities, the proposed city of Nikiski wants to stay in the CKPHSA, which is the reason it not discussed in the petition.[325] They also contend that it is not required to have an ordinance or vote to stay in so the borough's apprehension that a potential city would vote not to contribute but residents may still use the services is unwarranted.[326]

Regarding detachment from the road service area, the petitioners contend that the borough misinterprets the relevant statutes and that the statutes require the borough to work with a newly formed city and cooperatively transfer assets and powers which is the intention of the petitioners. The petitioners note that in the event that the borough is unwilling to proceed with a newly formed Nikiski they will seek the help of the LBC.[327]

Regarding the 911 system, the petitioners state that a city of Nikiski wishes, like other cities, to remain in the service that the petitioners claim is jointly funded by state, service areas and cities.[328]

The borough's interpretation of AS 29.05.130 that in order for a service area to be transferred or integrated, the boundaries must be the same, the petitioners contend, is inaccurate.[329]

Findings on the Transition

The petitioners claim that AS 29.35.450 does not apply because it does not relate to incorporating cities. They also state that the limits on incorporation in AS 29.05.021(b) are overcome because the borough does not exercise road service powers for example on an areawide or nonareawide basis, but rather through a service area.

Service areas that are within the boundaries of a newly incorporated municipality do not present the same challenge as the Road Service Area. The RSA boundaries are virtually nonareawide, though the power is exercised through a service area and was formed by ordinance.

The service area is administered through regions which are broken down into road maintenance units. Those within the boundaries of the Nikiski proposed city boundaries are shown in Figure 11.

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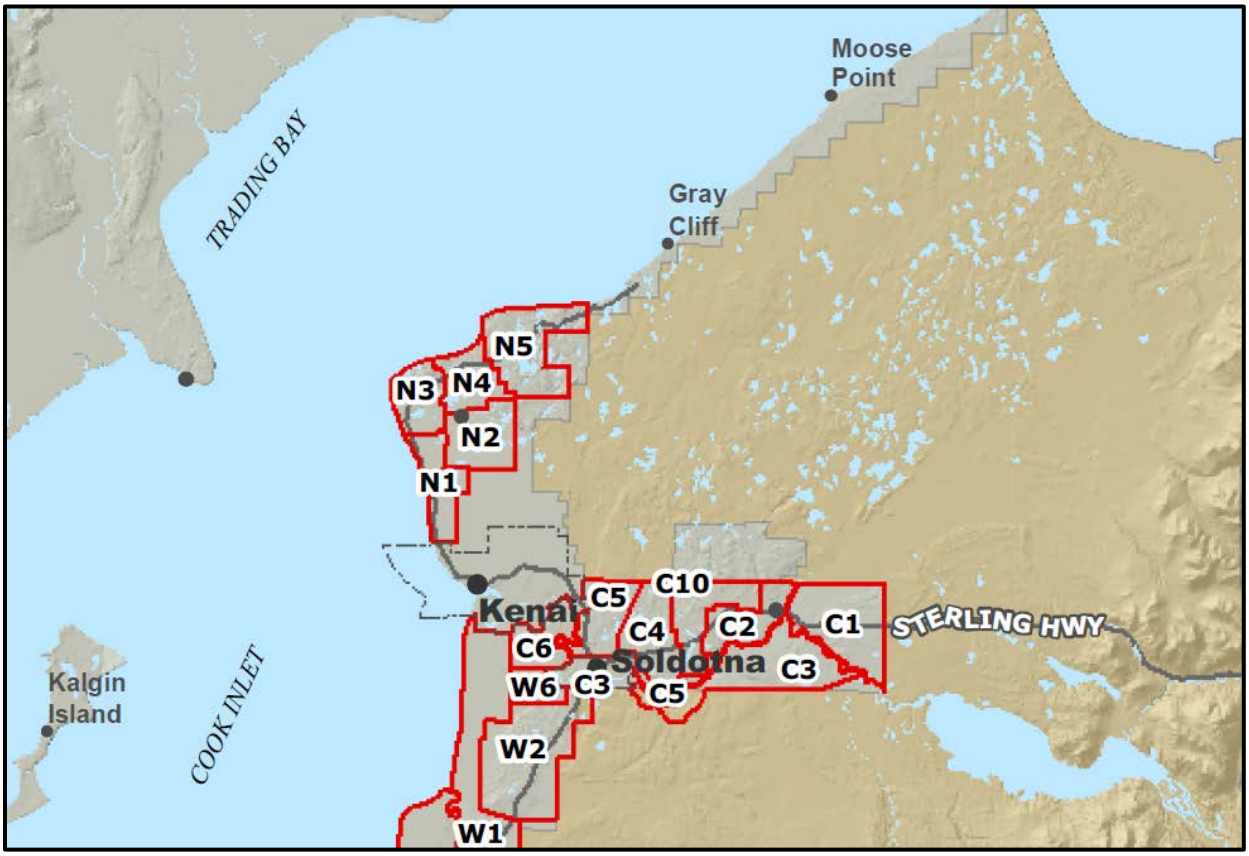
324 KPB Responsive Brief, p. 11
325 Nikiski Reply Brief, part 1, p. 11
326 Nikiski Reply Brief, part 2, p. 27-28
327 Nikiski Reply Brief, part 2, p. 25-26, 28 and part 1, p. 11
328 Nikiski Reply Brief, part 2, p. 36
329 Nikiski Reply Brief, part 1, p. 10

Figure 10. Road Maintenance Units in Road Service Area within Proposed Boundaries[330]



As demonstrated in Figure 11, there are no maintenance units on the west side of Cook Inlet. Therefore, the department finds it grossly inequitable for the entire boundary's tax revenue for road services to be transferred to a city of Nikiski for provision of roads that will only benefit a small territory in a concentrated area.

Regarding the CKPHSA, the department finds that since the boundaries are much larger than those of the proposed city, and the proposed city does not plan to offer hospital services, there is no need to apply AS 29.35.450, and the borough can continue to assess the tax rate associated with that service area.

Discussion on the effect of incorporation on the service areas

If the city of Nikiski were formed with boundaries that varied significantly from those of the current service areas, then the department would assuredly consider the effect on those service areas' ability to function. However, this report does not anticipate recommending incorporation for the many reasons given throughout this report, and so will not address the potential effects. If the LBC chooses to approve incorporation, the LBC will need to suggest a transition plan that addresses with

330 KPB Road Service Area, "About roads," http://www.kpb.us/rds-service-area/about-rds, accessed April 20, 2017

the cooperation of the petitioners and borough the future of service provisions in any areas inside service area boundaries, but outside the approved city limits.

The department finds the petition has a transition plan with all required elements. However, the road service area functions appear to be without the required staff necessary. There is much work to do to alleviate the disputes between borough and the residents of Nikiski, and if this incorporation is approved and voters choose to incorporate, there will need to be much coordination in order to ensure a smooth transition beyond what is minimally required and found here in this transition plan.

STATEMENT OF NONDISCRIMINATION (3 AAC 110.910)

A petition will not be approved by the commission if the effect of the proposed change denies any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin.

Views Expressed in the Petition

The incorporation will not deny any person any civil or political right protected under the U.S. Constitution or Alaska constitution.[331] The petition indicates that incorporation of Nikiski will not deny anyone any civil or political right.[332]

Respondents' Views

Kenai Peninsula Borough: A provision in the charter regarding a three-year residency requirement for those running for public office in the proposed city is unconstitutional under Alaska law.[333]

Tyonek Group: The Tyonek Group responsive brief voices its formal opposition to the petition in part, because it "directly encroaches on the needs and rights of the tribal members and shareholders of Tyonek, as well as its community and cultural independence."[334] Further, the brief asserts that an at-large representative on the proposed Nikiski proves that Tyonek's interests will not be adequately represented in a potential city of Nikiski that encompasses the small population in the NVT.[335]

Views Expressed in the Reply Brief

Because of the one person, one vote requirement in the U.S. Constitution, Tyonek cannot be represented by a dedicated council member. The petition indicates that it will have a council member serve as a liaison.[336] Petitioners state that the charter will be revised before incorporation in

331 Petition, Exhibit G, p. 27
332 Petition, Exhibit G, p. 27
333 KPB Responsive Brief, p. 23.
334 Tyonek Group Responsive Brief, p. 1
335 Tyonek Group Responsive Brief, p. 14
336 Tyonek Group Responsive Brief, p. 14

order to correct the residency requirement that the borough indicated is unconstitutional, and the charter is only a draft at this point.[337]

Findings on the Standard of Nondiscrimination

The provision in the charter regarding the residency requirement is likely unconstitutional in Alaska, but the department recognizes that the charter is a draft and the petitioners indicate that they recognize this flaw.

The incorporation, as proposed, would largely disenfranchise those residents on the west side of Cook Inlet by nature of the population disparity, but that does not amount to the standard of nondiscrimination considered here. The department concludes that if the flaws in the charter are resolved, the effect of the petition will not deny anyone the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. This standard is satisfied.

ESSENTIAL MUNICIPAL SERVICES (3 AAC 110.970)

This section discusses the parts of 3 AAC 110.970 that apply to a city incorporation within an organized borough.

(c) If a provision of this chapter calls for the identification of essential municipal services for a city, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that

(1) are reasonably necessary to the community;

(2) promote maximum, local self-government; and

(3) cannot be provided more efficiently and more effectively by the creation or modification of some other political subdivision of the state.

(d) The commission may determine essential municipal services for a city to include

(1) levying taxes;

(3) levying and collecting taxes

(5) public safety protection;

(6) planning, platting, and land use regulation; and

(7) other services that the commission considers reasonably necessary to meet the local governmental needs of the residents of the community.

Views Expressed in the Petition

The petition asserts that the services provided by the NFSA, as well as parks and recreation through NPRSA, and senior services through NSSA are the essential municipal services for a potential city of Nikiski. The petition indicates that the city plans to levy taxes, petition the borough for planning,

337 Nikiski Reply Brief, part 1, p. 13

platting, and zoning powers, as well as local provide for economic and community development. The petition also states the potential city plans to offer city administration, city road development and maintenance, capital improvement projects and disaster planning and cooperative response with the KPB.[338]

Regarding public safety, the petition indicates that the city will be able to choose whether to provide law enforcement if citizens vote to do so; the city does not plan to provide that service initially.[339]

The petition contends that the additional services beyond what is currently provided will be provided because of the efficiencies they anticipate from the public-private partnership model the proposed city has chosen to emulate. The city will not need to raise taxes using this model.[340]

The petition lists the services now provided by borough service areas as essential municipal services. These include fire and emergency services, parks and recreation, senior services, as well as road service, and local city administration. The petition indicates that the reason the Law Enforcement Service Area was voted down was that residents saw the KPB wanted to extend the service area to a nonareawide borough power.[341]

Respondents' Views

Kenai Peninsula Borough: The lack of law enforcement services in the proposed charter demonstrates the petitioners do not view it as an essential municipal service. Without law enforcement, which is only mentioned as a possible future city function, the borough contends that the proposed city does not plan to offer any services beyond what is currently provided by the borough and its service areas.[342]

The borough does not believe that the petitioner has made a satisfactory case how the proposed city will be able to provide essential municipal services more efficiently or in a more cost-effective manner.[343] Its brief assets that without the assistance of overhead and administrative services, the services necessarily will cost more. The borough specifies that 911 emergency communication center costs have been left out of the petition budget, and would be discontinued if the proposed city formed. Each city in the borough has transferred this power to the borough.[344]

338 Petition, p. 18-19
339 Petition, Exhibit G. p. 15
340 Petition p. 19-20
341 Petition, p. 30
342 KPB Responsive Brief, p. 25-27
343 KPB Responsive Brief, p. 24
344 KPB Responsive Brief, Exhibit X

Tyonek Group: The essential municipal services proposed by the petition are no different than what is currently offered to Tyonek by borough service areas, and the petition fails to demonstrate a new city will do a better job at serviced delivery than the borough.[345]

Views Expressed in the Reply Brief

The petitioners assert that the borough is not providing the services the petitioners consider essential, but rather the service areas are, and this is evidence of the borough's unwillingness. The petitioners contend that the borough has the burden of proof in efficiency of service delivery and the minimal services provided currently can be more efficiently provided using the PPP model instead of stacked service areas through the second class borough.[346] Home rule status will allow the city to vote on law enforcement powers if and when it chooses, but that it must incorporate because the borough does not provide this service.[347]

Findings on the Standard of Essential Municipal Services

This section allows the commission to determine what essential municipal services are for the boundary change before them. The department offers the following recommendations.

The petition addresses inadequacies in service provision which are stated reasons for the petition including public safety and water protection. However, neither of these are proposed as city services, and the department concludes that the petition does not consider them to be essential. The petition indicates that a city must form in order to provide these services, if residents choose, at a later date.

Each city, excluding two in the borough with very small populations, have police departments. All home rule cities in Alaska, excluding Nenana with a population of 381, have police departments. The department believes that public safety is an essential municipal service for a city of Nikiski, and that the commission should consider conditioning approval of a city of Nikiski on resolution of whether to provide for the public safety of the municipality—whether this means through a contract with the AST or establishment of a police department. This should also consider how to pay for the service.

In addition to public safety, the department finds that the standard of essential municipal services is not met by the petition because, as discussed elsewhere in this report, the city does not plan to offer services beyond what is provided by the borough currently.

345 Tyonek Group Responsive Brief, p. 11-12
346 Nikiski Reply Brief, part 1, p. 14-15
347 Nikiski Reply Brief, part 1, p. 4,14

CONCLUSION

The department has carefully reviewed the incorporation proposal and has concluded that the requisite standards found in law for incorporation have not been met. The findings are summarized below.

Standard	Findings
Community	There is a community of Nikiski, but the boundaries presented by the petition are far larger than what can reasonably be construed as that community.
Need	Because there are no new services proposed beyond those that are currently provided, the petition does not demonstrate a reasonable need for city government.
Resources	The territory proposed for incorporation has more than adequate resources to sustain a city government.
Population	There is a stable and large population available to support a city government.
Boundaries	The boundaries include unpopulated areas and areas that meet the definition of a region, without adequate justification. In addition, the boundaries are not on a scale suitable for city government, and do not comprise only a present local community plus reasonably anticipated growth in the next 10 years.
Best Interests of the State	Because the petition proposes no new services, the incorporation does not maximize local self-government. In addition, incorporation offers no relief to the state provision of local services, and therefore, the incorporation is not in the best interests of the state.
Transition	The petition provides an adequate transition plan, but the department notes many additional details must be coordinated with the Kenai Peninsula Borough in order for a successful transition to occur should both the LBC and voters favor incorporation.
Statement of Nondiscrimination	If the residency issue found in the draft charter is revised to meet constitutional requirements, the department finds that the petition will not infringe on any person's civil rights.
Essential Municipal Services	The department has determined that the provision of public safety is an essential municipal service for a home rule city of Nikiski with a population of nearly 6,000. The petition does not propose to provide law enforcement services upon incorporation, and so the department concludes this standard is not met.

The law in AS 29.05.021 does not allow for the creation of a new city within an organized borough if essential municipal services can be provided more efficiently or more effectively by an existing organized borough on an areawide basis, nonareawide basis, or through an existing borough service area. The department cannot recommend this petition for incorporation as a city of Nikiski be approved by the LBC because the proposal does not seek to address what is fundamentally required of cities in Alaska—that they seek to provide services for their residents. There is merit to seeking to enhance a community's representation at the borough level, as well as with state and federal officials through incorporation. However, formation of a city government is encouraged by the constitutional mandate to maximize local self-government. The proposal by Nikiski residents fails to meet many of the standards even with reduced boundaries, and most of the standards with the original boundaries. Essential municipal services will still be provided by the borough and the state.

Moreover, the scale is beyond what can be reasonably construed to be the community of Nikiski and the petition offers no credible evidence that a city could provide services across this territory better than is currently done. There are many reasons the department cannot justify recommending to the LBC approval of the incorporation petition. However, the department wishes to acknowledge that it recognizes that there is indeed a discrete and identifiable community of Nikiski, but that the boundaries of that community, while not specifically identified in this report, do not bear any resemblance to the boundaries proposed for incorporation which stretch far beyond. If that community had proposed a city with much smaller boundaries limited to the general area where the population is centered, and that community had proposed to offer services beyond what the borough currently provided such as law enforcement, much of the discussion in this report would not be necessary. The recommendation contained in this report is consistent with past denials of similar petitions in this area. The department finds it must recommend denial of the petition as presented because no new services are planned and the incorporation is not in the best interests of the state.

APPENDICES

A. Schedule
B. Public Notice

Appendix A

Nikiski Incorporation Petition Schedule

December 30, 2016

(Dates are subject to change)

December 30, 2016
LBC accepts petition for filing.

January 4, 2017
Petition public comment period starts on this first date of publication of notice. Notice published again January 11th and 18th.

Winter/Spring 2017
Staff conducts information session in Nikiski. This session, which will be conducted in person by LBC staff, will occur before the preliminary report is issued. Staff may also schedule additional meetings in other communities.

March 8, 2017
Deadline to file comments or responsive briefs concerning the petition.

March 29, 2017
Petitioner's reply brief due.

May 10, 2017
Staff issues a preliminary report. Public comment period on the preliminary report begins.

June 12, 2017
Public comment period ends. Staff then considers the comments and writes a final report.

July 26, 2017
Staff mails the final report. Staff issues a notice of public hearing.

August 23, 2017
LBC holds a public hearing.

September 6, 2017
Staff drafts a written decision and sends it to the commissioners.

September 13, 2017
LBC meets to approve or amend a written decision.

September 20, 2017
Staff issues the written decision. An 18-day period for the public to request reconsideration of decision begins. LBC has 30 days, on its own motion, to reconsider. If reconsideration is granted, then petitioner or respondent has 10 days to file a brief.

Appendix B

Notice of Preliminary Report Concerning the Petition to Incorporate Nikiski as a Home Rule City

The Department of Commerce, Community, and Economic Development (Department) has issued a preliminary report on May 10, 2017, regarding the petition to incorporate Nikiski as a home rule city. The preliminary report contains the department's findings and a recommendation to the LBC. The department recommends the LBC deny the petition. The report, petition, and all related materials are available on the LBC website: https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/.aspx

The publication of this report opens a public comment period. Interested persons or entities may submit written comments with the department regarding this preliminary report. Comments should also be sent to the petitioner's representative at the address below. Comments sent to the department should be accompanied by a statement that the comment was also submitted to the petitioner, or the commenter should notify the department of an inability to send a comment to the petitioner in accordance with 3 AAC 110.480. The LBC has waived the requirement that commenters send a paper original of a comment submitted electronically. Comments must be received in the office below by 4:30 p.m., Monday, June 12, 2017**:**

LBC staff, 550 W. 7th Ave., Ste.1640, Anchorage, AK 99501; Fax: 907-269-4563; Email: LBC@alaska.gov

Please also submit the comments to the petitioner's representative: Stacy Oliva, P.O. Box 7925, Nikiski, AK 99635; info@nikiskiinc.org; Fax: 907-776-8838

Following receipt and consideration of comments on this preliminary report, the department will issue a final report. The regulation found in 3 AAC 110.530 sets out the procedures governing departmental reports. The LBC will then hold at least one public hearing on the petition. If the LBC approves the petition, incorporation will be subject to a vote by registered voters within the proposed city.

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https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/2016PetitionforIncorporationofNikiski.aspx

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Questions may be directed to the department at the above mailing address, email address, or fax number, or by calling 907-269-4559.
It is recommended that persons interested in receiving future LBC notices, updates, and materials by email subscribe to the LBC notice list server by visiting http://list.state.ak.us/mailman/listinfo/dced-localboundarycommission and following the instructions.

PUb: 5/10/2017 8050496/730455

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