

3214.4 LOCAL BOUNDARY COMMISSION: NORTH SLOPE BOROUGH

DISTRIBUTION LIST
CITY OF KETCHIKAN: GISSE-FURUSETH-SPEAR ADDITIONS
PAGE TWO

The Honorable Dave Hanson
Local Boundary Commission Member
XXXXX
Anchorage, Alaska XXXXX

James A. Van Altvorst
City Manager
City of Ketchikan
334 Front Street
Ketchikan, Alaska 99901

David Crow
Borough Manager
Ketchikan Gateway Borough
334 Front Street
Ketchikan, Alaska 99901

Edward G. King
Ziegler, Cloudy, King & Peterson
307 Bawden Street
Ketchikan, Alaska 99901

OTHERS? EXAMINE FILE

Feb. 28, 1986.

Page 1.

: chairperson Peter Goll,
House Community + Regional Affairs Comm.

First, of all let me address my name,
Johnie Kunag Brower, From Browerville,
Section of Barrow, Alaska. P.O. Bx 628.

I am currently working the North Slope
Borough/Planning Dept. at EXT. 365 (852-2611).

Second, I would very much like to express my
thoughts & feeling about what happening about
the Red Dog Mine issues and the Boundary lines
of NSB, as the Boundary lines of LCAS are
in the same as such.

it troubles me to know what is happening
in the name and love of profit, that people
who have common bond to the Native land
and its ways of living is being twisted
by the love of Business licenses in
commercial world of profit society.

I come from the Hopson/Brower family
tree within the North Slope country

my first Grand Mother "Maggie Itta Hopson
whom rest in peace in the Lord, lies at the
cemetery at Hatz See, Alaska. and my
first "Grandfather" Alfred Hopson Sr." (now late)
Rest in peace in the Lord here at Barrow, Alaska,
There are my Hopson side as my Mother is
a Hopson, oldest daughter of late Alfred & Maggie
Hopson.

write Sympatetic Thank
you letter.

and from my 1st Grandparents from the
Broweis (Mr + Mrs "late" Charlie D. & Mary T & Mary A.
Broweis") they both rest in peace in the
lod here in Browerville at the private
cems. of the Brower Family, and My Father
Arnold Brower Sr. still alive to this day.

third,

I hope in some way you people whom
thought to control the state or Municipal areas.
within your control state of abuse to the
Native Nation of the North Slope do find
time to understand, we the children from
our with 4th Grandparents rights hopefully
some day the state of Alaska and its ways
since 1959 have gone too far in employing
the common existing rights of the people
as a Nation which have lived longer
than what the United States stands for,
well one day soon come to their senses,
about the spirit of the Native Nation
of people within the North Slope areas.

Four,

it don't seem right to induce these kind
of activities into the mind of the Native
world we the people in the North Slope
country don't really need the divisions of
the chapters of John Mork and please
understand in some way what is being sent
to you from the Family world of the North's
country.

your truly,
Johnnie Kenag Brower.



Alaska State Legislature

House of Representatives

Committee on Community & Regional Affairs

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4833

JOINT HOUSE/SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEES

Local Boundary Commission Decision
North Slope Borough Detachment
February 11, 1986
3:30 p.m.

A G E N D A

Witnesses to Testify in Juneau:

Harold Curran, Chief Attorney
North Slope Borough

Dennis Roper, Special Assistant
Mayor's Office North Slope Borough

Willie Hensley
NANA Corporation

Witness to Testify from Kotzebue:

Marie Green
Maniluk Corporation

Handwritten notes:
① Curran
② W. Hensley
③ Jeff Smith
④ BC

Teleconference sites which may have testimony relating to the North Slope Borough detachment decision:

Anaktuvuk Pass, Atkasuk, Barrow, Nuiqsut, Point Hope, Wainwright and Kotzebue.

Teleconference facilities are not available past 5:30 p.m. this afternoon nor are they available Wednesday, February 12th. Testimony must be completed during the two hour hearing today in order to be timely.

The Local Boundary Commission has requested the last 10 minutes of the hearing in order to present any position summary or concluding testimony.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT BARROW

NORTH SLOPE BOROUGH,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF ALASKA, LOCAL BOUNDARY)
 COMMISSION; HAROLD M. BROWN,)
 Attorney General for the State)
 of Alaska; and JONATHAN B.)
 RUBINI, Assistant Attorney)
 General for the State of Alaska.)
)
 Defendants.)

Case No. 2BA-88-20001.

PRELIMINARY INJUNCTION ENJOINING DEFENDANTS ATTORNEY
GENERAL HAROLD M. BROWN AND ASSISTANT ATTORNEY
GENERAL JONATHAN B. RUBINI FROM CERTAIN ACTIONS

Plaintiff North Slope Borough has moved for temporary restraining orders and preliminary injunctions and based on the findings of fact and conclusions of law entered herein, including the finding that the decision on plaintiff's motions for temporary restraining orders are determinative of plaintiff's motions for preliminary injunctions as to defendants Attorney General Harold M. Brown and Assistant Attorney General Jonathan B. Rubini no factual issues remain to be determined.

IT IS ORDERED that defendant Assistant Attorney General Jonathan B. Rubini is enjoined, pending determination of this action, from further furnishing legal advice to or the representation of the Alaska Department of Community and Regional Affairs or the defendant Local Boundary Commission.

IT IS FURTHER ORDERED that defendant Attorney General Harold M. Brown and his agents, servants, employees and attorneys are enjoined, pending determination of this action, from directing defendant Assistant Attorney General Jonathan B. Rubini to further furnish legal advice to or represent the Alaska Department of Community and Regional Affairs or the defendant Local Boundary Commission.

DATED at Barrow, Alaska this 10th day of January, 1986.

Paul B. Jones
Paul B. Jones
Superior Court Judge



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT BARROW

NORTH SLOPE BOROUGH,

Plaintiff,

vs.

STATE OF ALASKA, LOCAL BOUNDARY
COMMISSION; HAROLD M. BROWN,
Attorney General for the State of
Alaska; and JONATHAN B. RUBINI,
Assistant Attorney General for the
State of Alaska.

Defendants.

Case No. BA-85-200CI.

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDERS AND PRELIMINARY INJUNCTIONS

Plaintiff's Motion For Temporary Restraining Orders and Preliminary Injunctions came on for hearing on the record in the Barrow Trial Courts on January 9, 1986, with plaintiff appearing by its attorneys, L. Merrill Lowden, Esq., in the Barrow Trial Courts, and David R. Heber, Esq., appearing by telephone from Anchorage, and defendants appearing by the Attorney General through James L. Baldwin, Esq., Assistant Attorney General, appearing by telephone from Juneau, and Jonathan B. Rubini, Esq., Assistant Attorney General, appearing by telephone from Anchorage, and Paul B. Jones, J. hearing the matter by telephone from Kotzebue.

Based on the Findings of Fact and Conclusions of law entered herein,

IT IS ORDERED that:

1. The plaintiff's motion for temporary restraining order to enjoin defendant Local Boundary Commission from any further consideration of the petition submitted by the Commissioner of Community and Regional Affairs to detach certain lands from the North Slope Borough for later inclusion in a NANA borough caused by the participation of Local Boundary



General Jonathan B. Rubini, pending further order of this court with regards to plaintiff's motion for a preliminary injunction, is denied.

2. The plaintiff's alternative motions for temporary restraining order and preliminary injunction enjoining defendant Local Boundary Commission from any further consideration of the petition of the Commissioner of Community and Regional Affairs for the detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough, unless and until said defendant retains the services of independent counsel outside the State of Alaska Department of Law for purposes of consideration of said petition are denied.

3. The plaintiff's motions for temporary restraining order and preliminary injunction to enjoin defendant Jonathan B. Rubini from providing further attorney services or representation to the Alaska Department of Community and Regional Affairs or to defendant Local Boundary Commission with relation to the petition by the Commissioner of Community and Regional Affairs for detachment of certain lands from plaintiff North Slope Borough, pending determination of this action, are granted.

4. The plaintiff's motions for temporary restraining order and preliminary injunctions to enjoin defendant Attorney General Harold M. Brown from directing defendant Jonathan B. Rubini to provide attorney services or representation to the Alaska Department of Community and Regional Affairs or to defendant Local Boundary Commission are granted.

5. The plaintiff's motions for temporary restraining order and preliminary injunction to enjoin defendant Attorney General Harold M. Brown from directing any subordinate within the State of Alaska Department of Law towards providing attorney services or representation to defendant Local Boundary Commission or himself providing such services or representation are denied.

IT IS FURTHER ORDERED that plaintiff's motion for preliminary injunction to enjoin defendant Local Boundary Commission from any further consideration of the petition submitted by the Commissioner of Community and Regional Affairs

to detach certain lands from the North Slope Borough for later inclusion in a NANA borough caused by the participation of Local Boundary Commissioner Bert Greist and defendant Assistant Attorney General Jonathan B. Rubini will be heard in the Barrow Trial Courts on January _____, 1986 at _____ a.

DATED at Barrow, Alaska this 10th day of January, 1986.



Paul B. Jones
Paul B. Jones
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

SECOND JUDICIAL DISTRICT AT BARROW

NORTH SLOPE BOROUGH,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF ALASKA, LOCAL BOUNDARY)
 COMMISSION; HAROLD M. BROWN,)
 Attorney General for the State)
 of Alaska; and Jonathan B.)
 Rubini, Assistant Attorney)
 General for the State of Alaska.)
)
 Defendants.)

Case No. 2BA-82-200CI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT
OF THE ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDERS AND PRELIMINARY INJUNCTIONS AND PRELIMINARY
INJUNCTION ENJOINING DEFENDANTS ATTORNEY GENERAL
HAROLD M. BROWN AND ASSISTANT ATTORNEY GENERAL
JONATHAN B. RUBINI FROM CERTAIN ACTIONS

Plaintiff's Motion For Temporary Restraining Orders and Preliminary Injunctions having been heard on January 9, 1986 as to the motion for temporary restraining orders, the court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The Commissioner of Community and Regional Affairs has submitted a petition for the detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough pursuant to AS 44.47.567(a)(3).
2. The Local Boundary Commission began holding public hearings on the Commissioner of Community and Regional Affairs' petition for the detachment of certain lands from the North Slope Borough for later inclusion in a NANA Borough on January 8, 1986 which will be concluded by a decisional meeting on January 11, 1986.
3. The regular session of the 14th Alaska Legislature begins January 13, 1986.
4. The local boundary changes proposed by the petition of the Commissioner of Community and Regional Affairs, if

approved by the Local Boundary Commission, must be filed during the first 10 days of the regular session of the Legislature pursuant to AS 44.47.583 if it is to be considered this session.

5. The Commissioner's petition for detachment of certain lands from the North Slope Borough, if approved by the Local Boundary Commission and proposed to the Legislature, is conditioned upon the incorporation of a NANA borough.

6. The case of Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92 (Alaska 1974) holds that a petition for incorporation of a borough from the unorganized borough, if approved by the Local Boundary Commission, does not have to be submitted to the Legislature under AS 44.47.583.

7. There is no dispute as to the fact that Assistant Attorney General Jonathan B. Rubini provided legal advice or represented the Commissioner of Community and Regional Affairs in presenting his petition for the detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough and provided legal advice to the Local Boundary Commission in its consideration of this petition.

8. Assistant Attorney General Jonathan B. Rubini in advising the Commissioner of Community and Regional Affairs in presentation of his petition to detach certain lands from the North Slope Borough before the Local Boundary Commission and in turn acting as legal adviser to the Local Boundary Commission in its consideration of the same petition may have impaired his independent professional judgment and gave the appearance of impropriety to the other participants in the hearings and to the people of the State of Alaska constituting a violation of the due process concept of a fair hearing before an impartial tribunal. This finding is not meant in any way to say that Assistant Attorney General Jonathan B. Rubini himself has failed to exercise independent judgment or follow the strictest of ethical standards, but the appearance of "cross-pollination" requires his immediately ceasing further representation of both the Department of Community and Regional Affairs and the Local Boundary Commission in this matter and Attorney General Brown should

assign separate assistant attorneys general to advise the two governmental entities, preferably from different branch offices in the State to avoid the sharing of filing facilities and support staff.

9. Immediate and irreparable injury will be suffered by the plaintiff North Slope Borough in the denial of due process if Assistant Attorney General Jonathan B. Rubini continues to provide legal advice to and represent the Alaska Department of Community and Regional Affairs and the Local Boundary Commission during the consideration of the petition of the Commissioner of Community and Regional Affairs which outweighs the inconvenience in the assignment of separate assistant attorneys general to represent the two governmental entities.

10. As Local Boundary Commissioner Bert Greist recused himself from further consideration of the Commissioner of Community and Regional Affairs' petition to detach certain lands from the North Slope Borough for later inclusion in a NANA Borough on January 3, 1986 during the preliminary stages when procedural and scheduling matters were being discussed and before the substantive hearings began, I find an insufficient showing that any conflict of interest Commissioner Greist may have had during the time he participated in the proceedings will improperly influence the Commission in making its decision.

11. There is an insufficient showing that the furnishing of legal advice to or the representation of the Department of Community and Regional Affairs and the Local Boundary Commission by Assistant Attorney General Jonathan B. Rubini during the preliminary stages of consideration of the Commissioner of Community and Regional Affairs petition for detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough before the substantive hearings begin will improperly influence the Local Boundary Commission in making its decision.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter.

2. Judicial review of administrative decisions is appropriate at this stage of the proceedings to determine whether due process has been afforded, i.e., to determine whether the applicable rules of law and procedure were observed.

3. The Attorney General is sui generis in his role of legal adviser of state officers with the duty as lawyer to protect the interest of his client, the people of the State of Alaska, and, as long as not an actual party to the petition under consideration, may represent or furnish legal advice to both the Department of Community and Regional Affairs and the Local Boundary Commission.

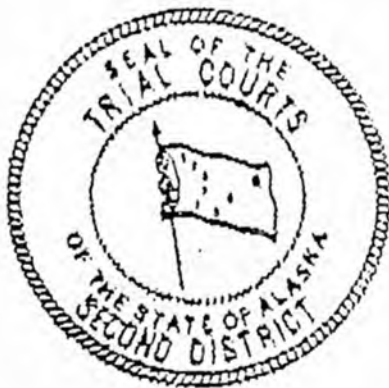
4. The Attorney General and assistant attorneys general are subject to the Alaska Code of Professional Responsibility and an individual assistant attorney general must exercise independent professional judgment in representation of a State agency and not be in the position of advising one State client either to the adverse interest of another State client nor give the appearance of impropriety to the ultimate client, the people of the State of Alaska, in appearing to have an unfair advantage in furthering the interests of one State agency before another State agency or tribunal.

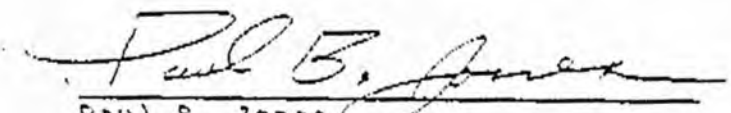
5. There being no dispute as to the fact that Assistant Attorney General Jonathan B. Rubini provided legal advice or represented the Commissioner of Community and Regional Affairs in presenting his petition for the detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough and provided legal advice to the Local Boundary Commission in its consideration of this petition, and the court having concluded as a matter of law that this constitutes a denial of due process, a preliminary injunction may be entered without further hearing to enjoin the further representation of both governmental entities by Assistant Attorney General Jonathan B. Rubini or his being directed to do so by Attorney General Harold M. Brown pending determination of this action.

Based on the foregoing findings of fact and conclusions of law a preliminary injunction shall issue enjoining defendant

Assistant Attorney General Jonathan B. Rubini from further furnishing legal advice to or representing the Department of Community and Regional Affairs or defendant Local Boundary Commission and defendant Attorney General Harold M. Brown from directing him to do so, pending determination of this action, setting a time for a hearing on preliminary injunction regarding the issue whether the participation of Local Boundary Commissioner Bert M. Greist and Assistant Attorney General Jonathan B. Rubini in the preliminary stages of the consideration of the Commissioner of Community and Regional Affairs' petition for detachment of certain lands from the North Slope Borough for later inclusion in a NANA borough will improperly influence the Local Boundary Commission in its consideration of the petition and issuance of an order denying plaintiff's remaining motions for temporary restraining order and preliminary injunctions.

DATED at Barrow, Alaska this 10th day of January, 1986.




Paul B. Jones
Superior Court Judge

RECEIVED

DEC 18 1985

R. K. Rutherford
DEPT. OF COM. & REG. AFFAIRS 4:30 PM
DIV. OF MUNICIPAL & REG. ASST.

BEFORE THE LOCAL BOUNDARY COMMISSION
OF THE STATE OF ALASKA

IN RE: THE DETACHMENT FROM THE NORTH
SLOPE BOROUGH OF TERRITORY
WITHIN AND ADJACENT TO THE
NANA REGION

BRIEF IN OPPOSITION TO PETITION FOR DETACHMENT

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INTRODUCTION

A. ROLE OF THE LOCAL BOUNDARY COMMISSION

The Constitution of the State of Alaska, Article X, Section 12, endows the Local Boundary Commission with broad authority to consider and present to the Legislature proposed local government boundary changes.

The Alaska Legislature has specified how the Local Boundary Commission shall exercise its constitutional powers and functions (AS 44.47.565 - 583). Among other matters, the Alaska Legislature has mandated that "The Local Boundary Commission shall...develop proposed standards and procedures for changing local boundary lines." (AS 44.47.567(a)(2) formerly 44.19.260(a)).

The Alaska Supreme Court has ruled that the Local Boundary Commission must adopt appropriate standards and procedures before exercise of its authority to propose boundary changes is proper and that Local Boundary Commission proposals for boundary changes adopted in the absence of appropriate standards and procedures may be voidable. U.S. Mining and Smelting v. Local Boundary Commission 489 P.2d 140 (1971); Port Valdez Company, Inc. v. City of Valdez. 522 P.2d 1147 (1974).

The Local Boundary Commission has adopted regulations that incorporate standards and procedures for action on petitions for municipal incorporations and petitions for local governmental boundary changes. (19 AAC 10.010-10 AC 10.840). These regulations provide standards for (1) incorporation, dissolution, merger and consolidation of municipalities; (2) annexations to cities and organized boroughs; and (3) detachments from cities, unified municipalities and organized boroughs. The regulations also provide procedures (1) for incorporation, merger or consolidation of municipalities; and (2) for boundary changes requiring legislative review or by local action or by step annexation.

Commissioner Notti has submitted a petition for a local governmental boundary change by detachment of territory from an established borough. This detachment is a boundary change requiring legislative review. Therefore, the standards for detachment from organized boroughs (19 AAC 10.225 - 19 AAC 10.250) and the procedures for boundary changes requiring

legislative review (19 AAC 10.450 - 19 AAC 10.620) govern Local Boundary Commission review and action upon the petitioner's petition.

At its discretion, the Local Boundary Commission may impose additional appropriate regulatory standards and procedures (e.g., standards for municipal incorporation (19 AAC 10.240(b))). These additional standards and procedures cannot compromise, nullify or supercede its adopted regulatory standards and procedures for detachment of territory from organized boroughs.

In order to approve the present detachment petition, the Local Boundary Commission must find that the Commissioner's petition for detachment fulfills all the regulatory standards for detachment from an organized borough, regardless of any other standards the Local Boundary Commission may choose to apply. For example, the Local Boundary Commission cannot approve this petition for detachment merely because the altered boundaries would better satisfy standards for incorporation of boroughs as previously applied to the North Slope Borough or as prospectively applied to some future borough incorporation petition that may be submitted by NANA region residents.

The regulations governing petitions for detachments from organized boroughs set specific standards for review of such petitions. These standards do not provide for detachment in order to redistribute local government tax bases; to perfect boundaries of existing boroughs or proposed boroughs; to promote economic development; or to promote the feasibility of new governments. In view of the Court's ruling in U.S. Smelting and Mining v. Local Boundary Commission, supra, the Local Boundary Commission does not have blanket authority and discretion to consider and propose local governmental boundary changes to the legislature. As Justice Robinowitz stated at page 144.

"Absent known standards governing the changing of local boundary lines, the legislature's ability to make rational decisions as to whether to approve or disapprove proposed local boundary changes of the commission is seriously handicapped.

The Local Boundary Commission is mandated to adopt regulations and, having adopted regulations, is bound to operate within its adopted regulatory framework. The legislative mandate that the Local Boundary Commission adopt standards and procedures was meant to prevent, not promote,

Local Boundary Commission decisions based on standards not specified in regulation.

An analysis of this regulation in conjunction with a reading of 44.47.567(a) and the U.S. Smelting case reflects an inherent conflict. The court stated at p. 142 that "the language employed by the legislature made the exercise of the Commission's discretion under AS 44.19.260(b) conditioned upon the development of standards and procedures for changing local boundary lines under AS 44.19.260 (a)(2)." If in fact the Commission can consider other factors under 19 AAC 10.830 (b), the legislature has lost its ability to make a reasoned and rational decision regarding the Commission's actions.

Having reviewed the framework within which the Local Boundary Commission can act, and before proceeding with the response to the petitioner's brief, there are vital considerations which should be addressed. First the issue of due process to the North Slope Borough.

B. DUE PROCESS

As the Alaska Supreme Court stated at p. 413 in Mukluk Freight Lines, Inc. v. Nabors Alaska Drill, Inc (Alaska 516 P.2d 408, 1973) quoting K & L Distributors, Inc. v. Murkowski, 486 P.2d 351 (Alaska 1971) "The safeguard which due process assures is that....we will review to assure that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the hearing was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed..."

"The review of factual determinations becomes a review to find whether the decision has passed beyond the lowest limit of the permitted zone of reasonableness to become capricious, arbitrary or confiscatory."

Before the Commission has even held its hearings, there has been a failure to observe due process guarantees i.e.,

1. An impartial tribunal

The North Slope Borough has already raised the issue of Commission member Greist, a NANA shareholder, employee and member of the Board of Directors of the NANA Regional Corporation, continuing to sit on the Commission while it considers this detachment decision. Contrary to the

opinion given the Commission by Mr. Pubini that Mr. Greist has no conflict, the common law and the cases show that even the appearance of a possible impropriety gives rise to a conflict of interest. As was stated in Attorney General Opinion #15, (Attachment A) dated December 3, 1982, "unless and until the legislature puts a different body of enacted law in its place, the common law of conflict of interest...prescribes the standards of conduct which must be followed by all state officials..."

Under the common law, decisions in reference to conflicts of interest are to be founded on reason, natural justice, consideration of fitness and propriety and justice.

As stated in Attorney General's Opinion No. 15, supra, "Public service demands total fidelity to the public interest at all times"...the potential for abuse and the appearance to the public is the interest of the common law of conflicts."

Another element in this decision process, as was so aptly described by the Daily News Editorial of December 12, 1985 (see Attachment B), is common sense. It is the appearance of impropriety and the possibility of subconscious motives that will taint the process. The Alaska Supreme Court in Warwick v. State ex rel Chance, 548 P.2d 384 (1976), although faced with a different fact situation, affirmed that principle.

A member of the corporation and class of persons most likely to benefit from this proposed detachment must, in the public's perception, be subjected to "influences from personal considerations which might cause him to fail in coming up to his duty...the frailty of human nature might incline him to a leniency... Mayor of City of Ensley v. Hollinsworth & Company, 54 So. 95, 102 (Ala. 1910).

There can be no division of loyalty. Situations of temptation must be avoided and it makes no difference that Mr. Greist is of the highest integrity and can resist such temptation. See Attorney General's Opinion by Thomas Jahnke to Robert Sundberg, July 23, 1984 (Attachment C).

It is not just the act of voting by Mr. Greist that will taint the proceeding. His mere presence let alone his participation in discussion influences his fellow board members.

As the appearance of impropriety through direct or moderate conflicts must be avoided under the current status of the law in Alaska, "disclosure as (by Mr. Greist) is by no means an answer...Disclosure does

not cure the conflict, it only makes it a matter of record." See Attorney General's Opinion by Diane T. Calvin to Carol Derfner, dated September 23, 1983. (Attachment D).

Thus, Mr. Greist's continued participation in the detachment petition process deprives the North Slope Borough of its guarantee of an impartial tribunal. Mr. Greist's participation has already tainted the actions of the Commission in this matter, i.e., 1) acceptance of the petition; 2) acceptance of an accelerated briefing schedule; and 3) scheduling of hearings.

2. Notice and Opportunity to be Heard

The next pre-hearing guarantee is the guarantee of notice and opportunity to be heard. The petition was accepted on November 22, 1985. The North Slope Borough has been given only 17 working days to answer the petition. The petition and its exhibits fill a 35 pound box. While the issue of a possible detachment has been under consideration for some time, there is a considerable difference between what was being considered by representatives of the North Slope Borough and NANA during past negotiations and the petition submitted by the Commissioner. The Commissioner's petition, to which we must respond, became available only on November 22, 1985. The Commissioner has proposed a much larger area for detachment. There is no mention of equitable compensation for the North Slope Borough and the schedule is much accelerated. The following lists some of the major specific differences.

	<u>Criteria</u>	<u>Subject of Negotiations</u>	<u>State's Petition</u>
1.	Size of area to be detached	433,000 acres	over 2.1 million acres
2.	Compensation for North Slope Borough	Legislative authority to select lands or interests of similar economic value to the fullest extent possible	Nothing
3.	Jobs for North Slope Borough residents at the mine	Not less than 10 percent of all jobs held by NANA residents	None
4.	Relation to NANA Borough Incorporation	LBC would not submit boundary change to Legislature until <u>after voters approved NANA Borough</u>	Vague reference that detachment will be conditioned on formation of a borough (no time certain)

There has simply not been sufficient time for the North Slope Borough to adequately analyze and respond to the allegations in the petition. North Slope Borough Mayor Ahmaogak has previously expressed his concern for adequate notice and hearing time for this proceeding before the Local Boundary Commission (Attachments D1 and D2). The Alaska Municipal League and Alaska Chapter of the American Planning Association have adopted resolutions stating similar concerns. (Attachments D3 and D4).

In Mukluk cited supra, the court held (at p. 414) that the appellant had insufficient time to prepare a written submission and therefore its due process rights were infringed. Although the opinion does not state how much time had been given to appellant, considering the volume of material and the importance of the issues in this case, common sense would indicate that seventeen working days is insufficient time to prepare. The proposed revised regulations for the Local Boundary Commission would allow 45 days. (Attachment E). In addition, representatives of NANA had more notice of the petition and its contents and therefore more time to prepare any material which it will submit for the Local Boundary Commission's review. Reference is made to the Commissioner's petition and a document dated October 4, 1985 and titled "Example Detachment Petition prepared by NANA", transmitted to the North Slope Borough with a cover letter by Marty Rutherford on November 6, 1985 (Attachment F). A side by side comparison (Attachment G) shows that the critical section of the petitioner's brief addressing the "best interests of the State, the detached territory and the North Slope Borough", came mainly from the "Example Detachment Petition" prepared by NANA.

It cannot be forgotten that Commissioner Greist is also a shareholder and director of the private corporation which was improperly allowed to draft major parts of the conclusions of the petitioner's brief.

This fact, added to the burden of the seventeen days for preparation is another infringement of the North Slope Borough's due process guarantees. In addition, this tinges the impartiality of the tribunal. The Commission is deciding upon a petition allegedly prepared by the Commissioner of Community and Regional Affairs and his staff. The true origin of the petition is unknown. Significant material has come from the leading benefactor of this petition. The impartiality of the Commissioner's brief has to be questioned in light of the above information. The

Commission must consider this when deciding upon the merits of the arguments presented.

3. Expedited Briefing and Hearing Schedule.

Other due process considerations arise from the expedited briefing and hearing schedule. As North Slope Borough Mayor Ahmaogak stated to the Commission at its December 9, 1985 meeting, hearings should be held in all the villages of the North Slope Borough. The hearings that were held by North Slope Borough representatives prior to the October vote considered a very different detachment proposal than is presented here. The differences as outlined on page six are substantial. The residents of the villages who might have a part of their territory and tax base taken from them desire and deserve an opportunity to be heard. More than 1,000 residents of the North Slope Borough have already signed petitions opposing the detachment petition. (Attachment H).

The expedited hearing schedule was even further expedited beyond the Local Boundary Commission's own stated guidelines of January 9-14, 1986.

The North Slope Borough on December 11, attempted to ensure the best participation out of the only two hearings scheduled on the North Slope - Point Hope and Barrow. Borough representatives recommended that Point Hope be scheduled for the evening of January 13 and Barrow for the evening of January 14. (See letter from Arnold Brower, Jr. Acting Chief of Staff, to Local Boundary Commission Chairman, Robert Eder, December 12, 1985). (Attachment I).

In disregard of the Borough's positive recommendation, the Local Boundary Commission compressed the Point Hope and Barrow hearings into a single day, January 10, 1986. As Arnold Brower, Jr. North Slope Borough Acting Chief of Staff, noted to Chairman Eder, "Your schedule indicates that the public meetings may be more for the record than for the people."

See also the North Slope Borough's Motion for Reconsideration (12/2/85), previously submitted.

Having raised these objections, it is the North Slope Borough's position that the Commission should defer consideration of this petition until (1) more time has been allowed the North Slope Borough to prepare; 2) a more fair hearing procedure as to times and locations has been determined;

and (3) there has been a court decision on Mr. Greist's conflict of interest if he does not withdraw.

C. LACHES - UNDUE DELAY IN ASSERTING A LEGAL RIGHT OR PRIVILEGE.

Another issue which should be addressed by the Commission is laches. The integrity of boundaries is important to local governments. It impacts their ability to develop financial plans for the future and is an important consideration to bond purchasers and bond raters. The boundaries of the North Slope Borough were carefully considered by the Local Boundary Commission during the hearings in 1971 and 1972. The decision was subjected to court review and upheld. If there was a serious concern on the part of the Department or the Northwest Native Association officials and residents regarding the southern boundary, which concern is disavowed by the letter of its Executive Director, John Schaeffer (Attachment J), it should have been pursued earlier. NANA residents, e.g. Mr. Newlin (Attachment K) could have joined in the Mobil Oil litigation which challenged the Borough incorporation and the inclusion of certain territories. This was not done. To wait for thirteen years to challenge the boundary is unreasonable delay. And unreasonable delay with its potential for injury to the North Slope Borough constitutes laches. Alaska both in statute and court decision has recognized the defense of laches as it relates to municipal boundaries A.S. 29.18.150 provides that:

Challenge of Legality. No person may challenge the formation of a municipality except within six months of the date of the incorporation.

In addition, in Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough (527 P. 2d 447, Alaska 1974), the Supreme Court found unreasonable delay on the part of appellants and harm to the appellees. And in Pavlik v. State 634 P. 2nd 1045 (1981) involving the annexation of territory to the City of Yakutat, the court found a delay of two years and eight months after the effective date of a boundary change was unreasonable and led to the defense of laches.

In the case before you, the Borough's boundaries have been set for nearly fourteen years. The NANA representatives (the real party in interest here) acquiesced in the boundaries (Schaeffer's letter, Attachment J) and there was no contest to the Borough incorporation. The court in Pavlik at

p. 1048 accorded significant weight to appellant's acquiescence and the facts here confirm such acquiescence.

The court also stated at p. 1049 that where there is a long delay, a lesser degree of prejudice will be required. The North Slope Borough has brought forth and will present additional evidence of significant prejudice if this territory is detached and the integrity of its boundaries is impaired - far more evidence than would be required under Pavlik. See discussion at pages 46 through 51 of the brief.

With these due process and laches objections noted, the following is the North Slope Borough's response to Commissioner Notti's Brief for the Detachment of 2,110,720 million acres from the North Slope Borough.

I. HISTORY OF NSB BOUNDARIES AND ANCSA REGIONAL CORPORATION BOUNDARIES

Petitioner's account of the North Slope Borough's incorporation, of how the boundaries for the ANCSA regional corporations were settled and, especially, how ANCSA regional corporate boundaries were viewed in relation to borough boundaries is incomplete, inaccurate and misleading.

The following chronology of events in the incorporation of the North Slope Borough is a matter of record:

April 4, 1971	NSB incorporation petition submitted
May 7, 1971	Local Affairs Agency acceptance of petition
November 24, 1971	Newlin/Northwest Native Association letter protesting proposed boundary
December 2, 1971	LAA report to LBC
December 2, 1971	LBC hearing at Barrow
February 23-25, 1972	LBC decisional meeting to accept NSB incorporation petition
March 28, 1972	Mobil Oil suit to invalidate LBC decision
May 10, 1972	LBC Statement of Findings and Conclusions
July 1, 1972	NSB incorporation
January 16, 1974	State Supreme Court affirms LBC decision

The following chronology of events in the resolution of the ANCSA regional corporate boundaries between ASRC and NANA is a matter of record:

January 24, 1966	Arctic Slope Native Association land protest filed
June 13, 1966	Northwest Native Association land protest filed
November 24, 1971	Newlin letter protesting proposed NSB boundary
December 18, 1971	ANCSA signed
February 23-25, 1972	LBC decisional meeting to accept NSB incorporation petition
May 10, 1972	LBC Statement of Findings and Conclusions
May 26, 1972	Sackett letter re Tanana Chiefs Conference boundaries and NSB boundaries
June 2, 1972	Schaeffer letter re NANA Regional Corporation boundaries and NSB boundaries
July 28, 1972	ASRC/NANA agreement on boundaries
August 1, 1972	ASRC/NANA letter re boundary agreement
December 11, 1972	Secretary of Interior's letter approving ASRC/NANA boundary agreement

The Petitioner "contends that if the testimony provided to the Commission regarding the boundaries of the proposed Arctic Slope Regional Corporation had been correct, the Commission may have modified the boundaries of the proposed borough to exclude the territory which the state now seeks to detach."

Petitioner's imputation of jurisdictional import to ANCSA corporate boundaries is directly contradicted by statements issued at the time of North Slope Borough incorporation by Mr. John Schaeffer, then Executive Director of NANA Regional Corporation, and by Mr. John Sackett, then president of Tanana Chiefs Conference.

On June 2, 1972, three weeks after the Local Boundary Commission's Statement of Findings and Conclusions on the North Slope Borough incorporation petition, Mr. Schaeffer wrote to Mr. Harrison Loesch, Assistant Secretary for Public Lands in the Department of the Interior:

We have always believed that the proposed [North Slope] borough boundary has no relation to regional boundaries set up under the Settlement Act and therefore have not opposed the proposed Arctic Slope Borough boundary although it encompasses land used exclusively by the natives of NANA. (Attachment J). Emphasis added.

Thus, this crucial distinction between local government jurisdiction and ANCSA corporate boundaries was precisely acknowledged and accepted by NANA Regional Corporation at the time the North Slope Borough was incorporated.

This crucial distinction was also recognized by the Tanana Chiefs Conference, precursor of Doyon, Ltd. which also shares a common boundary with the Arctic Slope Regional Corporation. On May 26, 1972, John Sackett, then president of Tanana Chiefs Conference, wrote to Assistant Secretary Loesch:

"It is the position of the Tanana Chiefs that boundaries between Regional Corporations set up under ANCSA are unrelated to political boundaries of subdivisions of the state. Regional Corporation boundaries under ANCSA are related to the question of land selections and ownership, while Borough boundaries related to political regulation and taxation.

We note that our region contains the entire Fairbanks-North Star Borough within its boundary, and also a substantial amount of the Matanuska-Susitna Borough. Other Native regions contain whole Boroughs. Additional Boroughs are likely to be formed in the future in all regions. It is not unlikely that taxes may be paid by our regional and village corporations to several Boroughs at some future time.

Accordingly, we believe that the formation of the North Slope Borough and the location of its boundaries is an issue which is entirely unrelated to the establishment of Regional Corporation boundaries under ANCSA. (Attachment L). Emphasis added.

These two letters accurately reflect the historic and legal relationship of the North Slope Borough's boundaries to the boundaries of its two neighboring ANCSA regional corporations.

The origin and the ASRC/NANA boundaries reflects the history of overlapping use of the territory by North Slope Borough and NANA residents. On January 24, 1966, the North Slope Native Association filed the first native claim of aboriginal use and occupancy over the North Slope, including the territory now proposed for detachment. (Attachment M). That original claim encompassed the entire territory later incorporated as the North Slope Borough. North Slope Natives consistently maintained this territorial claim. (Attachment N).

The overlapping territorial claims of the North Slope Native Association and Northwest Native Association date from June 13, 1966, when the Northwest Native Association filed a native claim which partly overlapped the earlier claim of the North Slope Native Association. The overlap area included the territory now proposed for detachment. Most of the overlap stemmed from Northwest Native Association's inclusion of Point Hope and land traditionally used by Point Hope residents. In fact, Point Hope residents chose to remain affiliated with the North Slope Native Association. Thus, the Northwest Native Association territorial claim was inaccurate insofar as it was based on traditional use and occupancy patterns of Point Hope residents.

Robert Newlin's letter to the Local Affairs Agency (Attachment K, undated, but receipted November 24, 1971), described Northwest Native Association's territorial claim at that time, absent Point Hope. As petitioner relies upon this letter to establish that there was a legitimate dispute about native regional boundaries before the Local Boundary Commission, the letter warrants comment. The letter predates passage of ANCSA. Its accompanying map illustrating Northwest Native Association's claim is crudely drawn and does not appear to claim the Red Dog area. The letter does not provide any legal description. As to the overall authority of the letter, comparison of Northwest Alaska Native Association's pre-ANCSA territorial claim with the boundaries that NANA Regional Corporation ultimately negotiated with its adjoining regional corporations (Arctic Slope Regional Corporation, Tanana Chiefs Conference, Bering Straits Native Corporation) shows that Northwest Native Association's original territorial

claims exceeded its final boundaries in every direction: north, east, south, and west. These adjustments were the practical result of an ANCSA-mandated process to impose mutually exclusive regional corporate boundaries, even over marginal territories where overlapping use by adjoining native groups was the rule rather than the exception.

Petitioner's brief generally seeks to bestow upon ANCSA regional corporate boundaries a legal, jurisdictional, proprietary and usufructuary significance that is inconsistent with history and law.

Section 7(a) of ANCSA states:

For purposes of this Act, the State of Alaska shall be divided by the Secretary within one year after the date of enactment at [sic] this Act into twelve geographic regions, with each region composed as far as practicable of Natives having common heritage and sharing common interests...

To implement this section of ANCSA, the Secretary of Interior first encouraged regional Native groups to negotiate mutually agreeable boundaries on their own. The ANCSA regional corporate boundary between Arctic Slope Regional Corporation and NANA Regional Corporation was settled by mutual agreement at a meeting in Kotzebue on July 28, 1972. (Attachment O). This agreement was formalized by a joint letter dated August 1, 1972. (Attachment P). The compromise divided the area of overlap between the original claim of the North Slope Native Association and the post-ANCSA claim of the Northwest Native Association in approximately equal parts. (Attachment Q). This agreement settled the common corporate boundary between the two ANCSA regional corporations. Thus, the Secretary of the Interior's letter of December 11, 1972 (Attachment R) merely formalized an agreement voluntarily reached by the two corporations.

Petitioner's statement that the Secretary of Interior set ANCSA regional corporate boundaries "on the basis of a standard essentially identical to that required for incorporation of a borough" is wrong. As just shown, the two ANCSA regional corporations, not the Secretary of the Interior, determined their mutual boundary.

Petitioner's claim that ANCSA standards for regional corporate boundaries were equivalent to State standards for borough incorporation is amply refuted by reference to the Department of Community and Regional Affairs' map of Alaskan municipalities (Attachment S). As the map shows, none of the eleven established boroughs incorporated under State law has boundaries that coincide with the boundaries of any regional native corporation formed according to the ANCSA standard. This universal incongruity totally belies petitioner's claim that the constitutional, legislative and regulatory standards by which the Local Boundary Commission sets borough boundaries are "essentially identical" in practice to the standard set out in Section 7(a) of ANCSA.

Petitioner's allegation that the Secretary of the Interior in some manner "detached" the territory now in question from the North Slope Borough is, of course, based on a mistaken history of how these ANCSA regional corporate boundaries were set. The Secretary of the Interior did not detach territory of NANA Regional Corporation from the North Slope Borough, any more than he detached territory of Chugach Natives, Inc. or Bristol Bay Native Corporation from the Kenai Peninsula Borough; or territory of AHTNA, Inc. and Doyon Ltd. from the Matanuska-Susitna Borough. Conversely, the Secretary's approval of ANCSA regional corporate boundaries did not consolidate the Bristol Bay Borough into some future unified borough for the Bristol Bay Native Corporation's region; or the Fairbanks North Star Borough into some future unified borough for the Doyon, Ltd.'s region; or the City and Borough of Juneau, the City and Borough of Sitka, the Ketchikan Gateway Borough and the Haines Borough into some future unified borough for the Sealaska Corporation's region; or Kodiak Island Borough into some future unified borough for Koniag, Inc.'s region.

It is commonplace for ANCSA regional corporations to fall under the jurisdiction of more than one borough. Sealaska Corporation falls within four separate boroughs (Ketchikan Gateway Borough, City and Borough of Sitka, City and Borough of Juneau, Haines Borough), plus the unorganized borough; Cook Inlet Region, Inc. falls within three separate boroughs (Matanuska-Susitna Borough, Anchorage, Kenai Peninsula Borough), plus the unorganized borough; Doyon, Ltd. falls within the Fairbanks North Star Borough, the Matanuska-Susitna Borough and the unorganized borough. (Attachment T).

It is clear that the standards governing the territorial configuration of boroughs and ANCSA regional corporations were fundamentally different in purpose and result.

Finally, Section 7(a) of ANCSA plainly did not confer, establish or imply specific proprietary or usufructuary rights for ANCSA regional corporations. Section 7(a) merely provided a practical procedure for dividing the State of Alaska into sectors from which ANCSA regional corporations might select eligible lands.

The petitioner's brief strives to impose a revisionist interpretation upon the Commission's decision when the record of the Commission's unanimous decision should be allowed to speak for itself. The record speaks contrary to the interpretation that the petitioner's brief attempts to put upon the Local Boundary Commission's decision to approve incorporation of the North Slope Borough.

In its Statement of Findings of Fact and Conclusions (Attachment U), regarding the North Slope Borough incorporation petition, the Local Boundary Commission applied the statutory standards to reach the following conclusions about the Borough's proposed boundaries:

"The Commission finds that the area encompassed by the proposed boundaries contains a population which, on the whole, share common ethnic origin and cultural heritage...

The Commission finds that the proposed borough meets this (geographic) standard in every respect...

The Commission finds that the proposed borough meets this (economic) standard in that commercial activity takes place among the various communities, with Barrow as the regional hub...The trading area described by the proposed borough boundaries is almost precisely that which is defined in Alaska Natives and the Land for the North Slope region. The Commission finds that this (transportation) standard has been met in all respects."

The transcripts for the Local Boundary Commission's December 2, 1971 Barrow public hearing (Petitioner's Attachment 6) and its February 23-25, 1972 decisional meeting (Petitioner's Attachments 7(a) and (b)),

together with the official record for its decision, further document the context within which the Local Boundary Commission made its incorporation decision. Among other matters, the transcripts and record show that:

- the Local Boundary Commission was fully aware of the unresolved territorial dispute between Arctic Slope Native Association and Northwest Native Association. Therefore, it was aware of the possibility that governmental and regional corporate boundaries might diverge.¹

- the Local Boundary Commission was informed of the mineral resources and development potential of the southwest sector of the proposed borough.²

- there was wide-ranging discussion of alternative boundaries for the North Slope Borough, including boundaries that might encompass territory as far south as Unalakleet.³

- the Local Boundary Commission was acutely concerned about the relation of its decision to the great public issue of incorporating the unorganized borough. A substantial share of the February 23-25 decisional meeting agenda was devoted to discussion of pending legislation to incorporate the unorganized borough.⁴

- the Local Boundary Commission was specifically mindful of the implications of its decision upon the boundaries and feasibility of future rural boroughs.⁵

- the Local Boundary Commission was concerned to document the basis for its decision in a Statement of Findings and Conclusions in order to dispel anticipated challenges to its decision, including the serious challenge embodied in this present petition of the State.⁶

II. DESCRIPTION OF TERRITORY PROPOSED FOR DETACHMENT

A. NATURAL GEOGRAPHY

The natural geography of the territory proposed for detachment has not changed since the time of the North Slope Borough's original incorporation petition and is not here in dispute. Whether the natural geography precludes or makes impractical provision of services to the

detachment area by the North Slope Borough is discussed in detail in Section III of this brief.

B. HISTORIC AND CONTEMPORARY SETTLEMENT AND LAND USE

The dominant human use of the territory proposed for detachment is non-use. The territory is huge, larger in area than five existing boroughs. Generally, the territory is at the margin of overlapping subsistence usage by residents of NANA region and the North Slope Borough, with subsistence resource values confined to a few areas of seasonal use. The main subsistence resources, anadromous fish and caribou, are themselves present only seasonally.

Historically and today, there is no uniform region-wide pattern of subsistence use throughout the area. It is well documented that residents of both regions make use of various sectors of the territory. Likewise, it is well documented that residents of the North Slope Borough make extensive use of lands and rivers within the NANA region for subsistence purposes. (Attachment V). This documentation is consistent with a traditional and contemporary practice of wide-ranging, opportunistic pursuit of subsistence resources in a region characterized by frequent population movements even into the current century. (Attachment W). As a result, the boundaries of subsistence use have not been exclusively defined or static.

There is no historic or contemporary evidence of permanent human settlement in the detachment area. The area is outside the selection area of any ANCSA village corporation. There are only six native allotment applications in the entire area. There are few improvements.

Overall, a balanced assessment of available evidence presented below indicates a prevailing pattern of transient, intermittent human use of selected areas and corridors consistent with seasonal subsistence harvest activity and travel enroute through the detachment area for purposes of trade and social interchange. These facts refute the picture implied in petitioner's brief that NANA residents make widespread, intensive and exclusive use of the territory.

Dr. Edwin Hall, an anthropologist with extensive knowledge of and research experience in the North Slope Borough and NANA region, (Attachment X), prepared an independent evaluation of the subsistence use map (Petitioner's Exhibit D-5) compiled under the direction of

Maniilaq Association. Dr. Hall concluded that this map substantially overstates the geographic extent and intensity of NANA residents' subsistence use in the detachment area. Dr. Hall's evaluation, reproduced in full in Attachment Y, can be summarized as follows:

The data presently available to the North Slope Borough suggests that the proposed detachment area has not been particularly important, in subsistence terms, to the residents of NANA, except perhaps in the very western portion.

...A general map is not sufficient evidence for the assertion that the people of Noatak and Kivalina "...have commonly used the land and rivers of the proposed detachment for harvesting subsistence resources" (Petitioner's Brief, page 22; emphasis Dr. Hall's).

...A thorough review of the available evidence and further field work quite likely will disclose that NANA's claim of extensive subsistence resource harvesting in much of the proposed detachment area is not an accurate reflection of reality.

Another recent study of subsistence harvest activities of Kivalina and Noatak residents does not show intensive use of the territory proposed for detachment. (Attachment Z).

The territory proposed for detachment is traversed by many traditional trails and trade routes long used for purposes of trade, communication and social exchange between Inupiat people dispersed throughout the Arctic Slope and NANA region. This is documented on many maps of traditional trails and in scholarly studies. (Attachment AA). Clearly, the natural geography does not pose impassable barriers to overland travel between the two regions.

Petitioner's Exhibit D-6 illustrates the occurrence of archaeological and historic sites within the territory proposed for detachment. This exhibit was evaluated by Dr. Hall who concluded his comments on the significance of Exhibit D-6 as follows:

"As part of his petition, the Commissioner of the Alaska Department of Community and Regional Affairs submitted a map (Exhibit D-6) which supposedly shows locations of archaeological and historic sites in the proposed detachment area. The map is hopelessly out of date. More to the point, it does not illustrate, as is implied, that NANA peoples or their ancestors

utilized the disputed area and (by implication) people from the North Slope Borough did not. The present state of the art rarely permits confident assignment of archaeological remains to specific societal groups (the lineal ancestors of the Point Hope Inupiat for example) and this reality is particularly apparent when dealing with archaeological sites--even early historic ones--within the territory in question. Unless oral history accounts or documentary evidence directly demonstrate that the ancestors of a living NANA individual occupied or utilized a specific site, it is impossible to deny the possibility that members of some other societal group were responsible for the archaeological site. In the case of sites within the proposed detachment area, I would estimate that more than 90 percent are not assignable to a specific societal group. (Attachment Y).

Dr. Hall conducted an extensive field survey in 1982 for Cominco of archaeological sites in the Red Dog vicinity, along the alternative transportation corridors and at the proposed port sites. Dr. Hall was not able to assign discovered sites to definite cultural groups or times. With reference to sites in and near the detachment area, Dr. Hall wrote "The few archaeological sites known from the middle Kivalina - Wulik region are not particularly informative about the history of human resource utilization in the area. While the nature of the known sites suggest subsistence activities and perhaps chert procurement were involved, there is little indication of when or by whom. (Attachment BB).

C. LAND STATUS

The territory proposed for detachment comprises about 2,110,720 acres, including about 2,105,920 acres of land and about 4,800 acres of marine waters.

Based on best information readily available from the Bureau of Land Management, the current land status is shown in Table A and Attachment CC.

TABLE A
LAND STATUS
PROPOSED DETACHMENT TERRITORY

<u>Acres</u>	<u>Percent of Total</u>
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<u>Federal</u>		
Noatak National Preserve	1,598,577	
National Maritime Preserve	16,757	
National Petroleum Reserve	7,091	
National Maritime Preserve	2,165	
Subtotal:	<u>1,624,590</u>	77.0
<u>State of Alaska</u>	504,466	23.9
<u>ANCSA/ANILCA</u>		
NANA regional selections	66,785	3.2
Red Dog minesite	1,336	less than 0.1
NANA historic places/ cemetery sites	19,440	0.8
<u>Native Allotments</u>	690	less than 0.1
TOTAL	2,110,720	100.0

Sources: Bureau of Land Management; Red Dog EIS

NOTE: Acreage and percentage figures are approximate. Due to overlapping state, federal and NANA selections and NANA overselections, land status is in flux. Acreage figures total more than actual acreage of territory proposed for detachment and percentage figures total more than 100%.

Overall, about three-quarters of the land in the proposed detachment is federally owned and managed, mainly as part of the national conservation system. About another quarter is State-selected land. About 4% of the territory has been selected by NANA Regional Corporation. These selections are comprised of two types: NANA regional selections and historic places/cemetery sites pursuant to ANCSA Section 14(h)(1). All of NANA's regional selections are in the general vicinity of Red Dog, apparently chosen for their mineral resource potential. The Red Dog minesite and related improvements comprise less than one-tenth of one percent of the proposed detachment. ANCSA Section 14(h)(1) selections are scattered throughout the territory. As noted earlier, these sites predate contemporary use and occupancy patterns and their origin cannot be linked to contemporary settlement residents.

Because the detachment area is remote from NANA villages, there are no village corporate selections in the detachment territory.

BLM records indicate that six native allotment applications, totalling about 690 acres, have been filed within the proposed detachment. This amounts to one half of one percent of all native allotment applications (1,060) filed within the NANA region.

Considering that the territory proposed for detachment is larger in area than five existing boroughs and extends over a distance that would stretch from Anchorage to Fairbanks, the pattern of NANA residents' use and

occupancy of the territory (no historic or contemporary settlements; no ANCSA village selections; six native allotment applications, seasonal subsistence use) does not substantiate a claim of intensive and extensive use and occupancy by NANA residents.

D. Red Dog Mine Project

1. Description of Red Dog Mine Project

The mineral deposit now popularly referred to as the Red Dog mine was first discovered in 1968 and reported in a U.S. Geological Survey publication in 1970. (Attachment DD). Thus, the occurrence of this mineral deposit was publicly known before incorporation of the North Slope Borough, before passage of ANCSA and before ANCSA regional selections. (Attachment EE).

Publicity about this mineralized area prompted a spate of State and NANA land selections and conflicting private mining claims throughout the general vicinity. By 1982, more than 250 mineral claims were staked in the Red Dog area. Dispute about land tenure over the Red Dog deposit was resolved by ANILCA, which approved NANA Regional Corporation's selection. In 1982, NANA entered an agreement with Cominco, Ltd. of Canada to develop the mine property.

The mineral deposit and proposed minesite facilities are located within the boundaries of the North Slope Borough.⁷ The Red Dog minesite and related improvements will be contained within 1,336 acres, less than one-tenth of 1% of the total territory proposed for detachment. The port and 47 of 54 miles of road improvements proposed to transport Red Dog mineral production are in the unorganized borough and within the boundaries of the NANA Regional Corporation.⁸ (See Attachment FF). The minesite, road and port have been designed as an enclave, totally separate from existing settlements.⁹

Further details about the development of the Red Dog project are contained in Petitioner's Attachment 23.

2. Environmental and Socioeconomic Impacts of Project

The petitioner's brief cites an alarming picture of imminent adverse environmental and socioeconomic impacts stemming from development

and operation of the Red Dog mine project. The brief offers only general assertions and does not document this picture with facts and analyses. This alarming picture is totally in conflict with other analyses published by the Department of Community and Regional Affairs and at odds with the conclusions of the Environmental Impact Statement.

The Department of Community and Regional Affairs' original assessment of the socioeconomic impacts of the Red Dog mine project was published in Red Dog Project Analysis: A Report to Governor Bill Sheffield, (Petitioner's Attachment 15) a 1984 report "commissioned by the Governor to provide his office with the information necessary to formulate the State's role in the development of Red Dog."

The Department of Community and Regional Affairs then assessed the service and facility impacts of the project as follows:

"Because of the stringent requirement that the Red Dog be a fully enclaved development, there are not expected to be substantial additional demands placed upon the regions [sic] service delivery.

...in brief summary, the additional 100 jobs which will occur in Kotzebue, and accompanying overall population increase of some 10%, should not stress existing facilities (i.e., schools, public safety, fire, electrical, etc.) in the near future, and do not represent a significant planning component in comparison to the increase in population which would occur with or without the project. Emphasis added.

The EIS presents a more detailed assessment of Red Dog mine impacts upon environmental resources, subsistence, social life, and community facilities and services. Briefly, the EIS concluded that impacts on the environment, subsistence, community facility and service needs, social life and population growth would be negligible. Pertinent excerpts from the EIS are reproduced as Attachment GG. Key conclusions are summarized below.

The EIS summarizes environmental impacts at the Red Dog minesite as follows:

The mine area facilities (mine, tailings, pond, mill site, worker housing, water supply, airstrip and all associated roads) would directly disturb a total of about 441 ha (1,336 ac) of vegetation in Red Dog Valley. Development and operation of these facilities might have an indirect impact upon caribou by displacing some animals from

marginal water range. This impact would not be significant on more than a local basis and no other wildlife species would be significantly impacted.

...There would be no significant impacts on fisheries resources from mine area facilities.

...The mine site vicinity possesses little value for subsistence or recreational fishing and hunting, and no significant impacts would be anticipated.

With regard to the environmental impacts of the road component, it may be noted that only seven miles and four of 187 stream crossings fall within the North Slope Borough. Due to minesite water treatment requirements, it is likely that water quality downstream of the mine will be improved. Thus, the mine and roadway within the North Slope Borough do not pose any threat to water quality. The port site does not, of course, pose any environmental problems within the North Slope Borough.

The EIS describes the impact of the mine on subsistence as follows:

The mine site vicinity possesses little value for subsistence or recreational fishing and hunting. The South Fork of Red Dog Creek is utilized by caribou to a lesser extent than areas outside the mine site, and the area is at the margin of use areas for Noatak and Kivalina residents. Based on the assessment of environmental effects of mine site operations on surface lands and water quality, the mine would not cause any material loss of habitat.

The EIS describes the overall impact of the Red Dog mine project as a whole on demand for community infrastructure as follows:

All elements of the proposed project (mine area facilities, overland transportation corridor and port facilities) would be remote from existing communities. Cominco would provide at the mine site all support infrastructure for its employees, including camp quarters, recreational facilities and emergency medical services. Thus, the mining project would not compete with existing communities for state or federal community development programs.

The EIS evaluates the impact on the social, political and cultural stability and autonomy of the region as follows:

The isolated, self-enclosed mine camp facilities would tend to buffer the existing communities from the most disruptive social impacts often associated with large resource development projects in undeveloped rural regions. An estimated 354 new residents or about a five percent increment to the base case regional forecast would accrue from the project over a period when the region would not be otherwise projected to undergo much economic or population growth. All these circumstances would tend to moderate any potential disruptions of the prevalent political, social and cultural equilibrium.

On the other hand, the project has substantial potential for positive long-term impacts on employment, income opportunities and the family stability of the region's residents. Increased family income should significantly reduce poverty-related stress, promote family stability, and decrease social problems such as alcoholism, suicide and mental illness.

Petitioner claims that the Red Dog mine project will cause "unprecedented growth" in the region. As noted above, this claim contradicts analyses previously published by the Department of Community and Regional Affairs. It is also contradicted by the growth assessment in the EIS.

The population growth rate projected in the EIS for the NANA region with the Red Dog project is identical with the rate the region experienced between 1970 and 1980 and much slower than the rate experienced from 1980 to the present.¹⁰

Petitioner's prognosis of dire impacts on subsistence, community infrastructure and local social, cultural and political life is unsubstantiated in the brief and contradicted by petitioner's prior analysis and the EIS.

3. Financing and Economic Impact of Project

Development of the Red Dog mine will require capital investment estimated at \$400,000,000. Present plans call for the project to be financed partly by private investment, partly by State tax-exempt industrial revenue bonds.

In 1985, the Alaska Legislature authorized State financial assistance for the Delong Mountain Transportation Project (CSSB 280). (Attachment HH). That legislation authorized the Alaska Industrial

Development Authority ("AIDA") to issue up to \$175,000,000 in state bonds and notes to finance road and port improvements for the Red Dog mine project. That legislation also required AIDA to prepare a finance plan, pursuant to AS 44.88.173, to include estimates of the capital and operating costs of the project and a description of the sources of funds to finance and operate the project. That finance plan for the Delong Mountain Transportation Project is titled "Economic Evaluation and Finance Plan for the Proposed Delong Mountain Transportation System", prepared for AIDA by SRI Institute. (Attachment II). Among the key findings of the finance plan are:

- NANA royalties over the first 30 years of mine operation will exceed two billion dollars. (Attachment JJ).
- Cominco after tax profits over the first 30 years will amount to \$850,000,000. (Attachment JJ).
- Cominco's return on investment ("ROI") is projected at 16.1%, assuming Cominco internally finances minesite improvements. Cominco's ROI would be substantially higher if borrowed capital were obtained.
- State mining, corporate and other taxes will total \$229,880,000 over 30 years. (Attachment JJ)
- Cominco's ROI is primarily sensitive to fluctuations in the price of zinc and, secondarily, to the original cost of project development. Operating costs, including debt service on AIDA revenue bonds and other tax payments, are relatively insignificant factors in Cominco's profit picture.

Since the road and port improvements to be built in the NANA region will be owned and operated by AIDA, they are exempt from local governmental property taxation.¹² However, AIDA is authorized (AS 44.88.140(b)) to "enter into agreements with a proposed project applicant or project applicant providing for payments, computed on a formula basis or otherwise, in lieu of taxes, which the authority may consider appropriate. The agreement may provide that the payments be made to the political subdivision of the state in which the project is or is to be located or to any other taxing unit of the state including, without limitation, a borough, city, municipality, school district or public utility district, the area of which is coterminous in whole or in part with that of the political subdivision."¹³

Thus, AIDA has the authority to require a project applicant (e.g., Cominco) to make payments in lieu of taxes to local governments, including a new NANA region borough, to defray the cost of providing local public services and improvements.¹⁴

AIDA and Cominco are now in process of finalizing a Memorandum of Agreement, required by the Delong Mountain Transportation Project enabling legislation. (Attachment KK). This agreement will provide a six and one half percent return to the State of Alaska, with supplemental payments if the price of zinc rises above a specified level. The proposed Memorandum of Agreement omits any provision for Cominco to make payments in lieu of taxes on the State-financed road and port improvements for the Red Dog mine project.

4. Red Dog Mine Planning Regime

The Red Dog mine is a major development requiring extensive public review and approvals. The EIS identified twenty-eight major federal, state and local approvals required for project development. (Attachment LL). Most of these approvals are mandated by federal (twelve approvals) or state (fifteen approvals) laws. Only one approval - the North Slope Borough's land use permit - is required by local government. Most of the federal and state approvals are to be issued by public agencies headquartered outside the NANA region. Thus, responsibility and authority for regulating and permitting the Red Dog mine project rests overwhelmingly with non-local federal and state agencies. The regulatory and permitting powers of local government, though important for local concerns, are not onerous. They are therefore a relatively minor part of the total scheme of planning and regulatory requirements for the Red Dog mine project. The Borough's primary concerns have been potential adverse effects of mine development on human health and subsistence resources. (Attachment LL1).

Over the past two and a half years, the North Slope Borough has routinely and efficiently processed Red Dog permit applications. The North Slope Borough has never denied, delayed or in any way negatively impacted development progress. NANA Regional Corporation's only planning request to the North Slope Borough has been NANA President John Schaeffer's letter dated April 23, 1985 to Mayor Ahmaogak requesting that "all planning and permitting processed exercised by the North Slope Borough be suspended for the Red Dog Project." (Attachment SS).

The North Slope Borough is currently reviewing Cominco's draft Master Plan (Attachment LL2) and its request to rezone the Red Dog area from the more restrictive Conservation District to the less restrictive Resource Development District which will promote resource development and NANA employment.

This type of planning control by local government over remote resource development control was foreseen and approved by the Alaska Supreme Court in Mobil Oil, supra, p. 102, wherein the Court stated that "an active planning and zoning authority in the form of a borough would assure that private agreements and intentions do not waiver and development diverge from the long-range interests of North Slope residents and the State."

5. Relation of Proposed Detachment to Mine Feasibility

Petitioner states that detachment is necessary to facilitate resource development in the region. Petitioner offers no specific evidence for this allegation. Numerous circumstances, recited below, indicate that petitioner's statement is erroneous.

Regardless of detachment, the minesite will be subject to local government regulation (if NANA region residents exercise comparable planning and regulatory authority) and subject to local taxation. AIDA's finance plan does not indicate that local government taxation, whether by North Slope Borough or NANA region borough, is a significant factor in mine profitability. Virtually all of the road and port improvements to be financed, owned and operated by AIDA are outside the North Slope Borough and will be unaffected by detachment. The North Slope Borough has supported mine development so long as it complies with appropriate development standards, and has reviewed permit applications and taken appropriate action in timely fashion. Cominco has not heretofore claimed that North Slope Borough jurisdiction would impede mine development. Any sudden eleventh-hour announcement that the project is contingent upon a boundary change wholly lacks credibility.

III. REGULATORY FACTORS TO BE CONSIDERED

A.S. § 44.47.567(a) states, in part: "The Local Boundary Commission shall...develop proposed standards and procedures for changing local boundary lines." Pursuant to this mandate, the Local Boundary Commission enacted 19 AAC 10.225 - 10.250, "Standards For Detachment From Organized Boroughs".

The Local Boundary Commission may detach land only if the detachment is in the best interest of the state, the land to be detached and the borough from which detachment is sought. This is not a balancing test. The detachment must be in the best interest of each of the enumerated entities.

In addition to determining the best interests of the state, borough and area, the Local Boundary Commission will consider:

(1) whether the social, cultural and economic characteristics of the population of the territory are substantially different or in conflict with those of the remainder of the population located in the borough;

(2) whether the geographic location or configuration of the territory precludes the provision of borough services provided other areas of the borough or make the provision of borough services impractical;

(3) whether the lack of transportation facilities precludes the communication and exchange necessary for responsive and integrated local government.

The burden rests with the petitioner to prove that the service requirements of the area proposed for detachment will be met after detachment. Because the area proposed for detachment is proposed to be included in a NANA regional borough, the Local Boundary Commission may condition the detachment on later incorporation in a NANA borough.

If the detachment is approved, the Local Boundary Commission must distribute the assets and liabilities of the territory to be detached between the North Slope Borough and the State or the successor government.¹⁰ These are the standards governing detachment of land from an organized borough.

Part IV of this brief will address the best interests of the State, North Slope Borough and the area proposed for detachment. This part will address the remaining factors.

A. SOCIAL, CULTURAL AND ECONOMIC FACTORS

In its Statement of Findings and Conclusions on the North Slope Borough incorporation petition in 1972, the Local Boundary Commission found, with respect to the social, cultural and economic standards that "The area encompassed by the proposed boundaries contains a population which, on the whole, share common ethnic origin and cultural heritage..." Emphasis added.

The Commission likewise found "that the proposed borough meets this (economic) standard in that commercial activity takes place among the various communities, with Barrow as the regional hub...The trading area described by the proposed borough boundaries is almost precisely that which is defined in Alaska Natives and the Land for the North Slope region."

Petitioner's brief offers no evidence of past conflict over the use of the detachment area since the North Slope Borough was incorporated in 1972. There is no present population in the area and therefore no present conflict. There is no proof of substantial differences or conflicts between the projected future transient workforce and the residents of the North Slope Borough.

As the petitioner's brief acknowledges, there are no permanent inhabitants in the territory now or within recent decades. Thus, the question of whether the characteristics of the population of the territory are substantially different from or in conflict with those of the remainder of the population located in the borough must be answered in the negative.

Present residents of the North Slope Borough have many social, cultural and economic characteristics in common with NANA region residents, who hope ultimately to comprise a substantial share of the Red Dog mine workforce. Residents of the North Slope Borough and the NANA region share a common language and ethnic history, are joined by family ties, enjoy similar lifestyles and economic endeavors, including reliance on subsistence activities, and have taken part in historic and present-day trade and exchange patterns. North Slope Borough and NANA Inupiat share similar games, traditions and beliefs, Point Hope and Kivalina Inupiat engage in trade for frozen char and ugruk hides. (Attachment MM). Thus, the two groups interact culturally, economically, and socially.

The North Slope Borough is already host to many commercial enterprises and commuting workers associated with the NANA region, e.g., NANA Development Corporation, Arctic Utilities, Purcell Services, NANA's Beaufort Sea oil and gas lease partnerships with Sohio, NANA-Mannings, NANA-Coates Drilling, NANA Construction Company, NANA Oil Field Services, NANA Hotel, Alaska United Drilling.

Petitioner asserts that the cultural, social and economic characteristics of NANA area residents should be considered because they

occasionally populate the land for subsistence purposes. This "standard" finds no support in the Alaska Statutes or the Alaska Administrative Code.

It is argued that NANA residents use the land more frequently than North Slope Borough residents. That does not, however, constitute "substantially different" social, cultural and economic characteristics between the NANA and North Slope Borough Inupiat. Nor does overlapping use evidence conflict.

The land use of the North Slope Borough and NANA Inupiat, both within and without the area in question points to a history of substantial similarity and lack of conflict. There is no conflict over resource usage: no North Slope Borough Inupiat or official has ever tried to halt or limit subsistence use of the area by others. The North Slope Borough has extensive land use regulations that give first priority to subsistence uses of the land. Any development occurring in the area will be subject to development permits and regulations which will protect all subsistence users' rights, regardless of their village ties.

While the characteristics of the future population in the territory proposed for detachment are a matter for speculation, the best information is that there will not be any permanent resident population in the foreseeable future.

The transient workforce quartered at the Red Dog mine camp will not be substantially different from or in conflict with the population of the North Slope Borough. The North Slope Borough is already host to a much larger transient, non-resident workforce employed at remote worksites. For example, in 1982, the Alaska Department of Labor prepared a comprehensive survey of 6,306 workers in North Slope oil field camps. (Attachment NN). Seventy-three percent of this workforce were Alaska residents commuting from hometowns outside the North Slope Borough. Another twenty-three percent (1,432 persons) of these transient workers commuted from place of residence outside Alaska, including Washington State (264), California (204) and Texas (185). About four percent (4%) of these oil field workers were residents of the North Slope Borough. At present and for the foreseeable future, the composition of the North Slope Borough's oil field workforce will remain largely transient and non-resident. Other remote economic and military activities across the North Slope Borough are also typically manned by transient, non-resident workforces.

The economic characteristics of the prospective Red Dog workforce will be far more compatible with the composition of the present residents and workforce of the North Slope Borough than with the traditional society in the NANA region.

As a matter of policy and economics, NANA Regional Corporation and Cominco plan to develop and operate the Red Dog mine as a remote workcamp enclave with a transient workforce. This is consistent with North Slope Borough's own development policy to discourage new permanent settlements in connection with remote resource development activities. Thus, the mine will not promote a permanent resident population in the territory. Furthermore, it is likely that any future mineral development in the territory will be developed according to the enclave concept. There are no other reasons to speculate that this traditionally uninhabited territory will attract permanent settlers. There is no evidence that there will be a future resident population that might be different or in conflict with residents of the North Slope Borough.

It is a strength of Alaska's borough system in general, and a particularly necessary strength of rural boroughs, that established boroughs embrace substantial geographic, social, and economic diversity.

Morehouse, et.al., catalog the great social diversity, economic rivalries and separatist tendencies that the borough system now accommodates. (Attachment CO). To cite some instances of intense separatist conflict that the Local Boundary Commission has had to address in the past: between the City of Anchorage and the former Greater Anchorage Area Borough; between the Eagle River-Chugiak area and the Municipality of Anchorage; between the City of Kodiak and other native villages within Kodiak Island Borough; between the Cities of Juneau and Douglas; between the Cities of Ketchikan and Saxman and Ketchikan Gateway Borough; between the Kenai Peninsula Borough and various cities and rural areas of the Kenai Peninsula Borough (Seward, Tyonek, Nikiski-North Kenai); between the City of Fairbanks, Fairbanks North Star Borough and its rural settlements; between Matanuska-Susitna Borough, Lake Louise and other rural areas.

The longstanding and uniform policy of the Local Boundary Commission has been to promote accommodation within the flexible framework of the established borough system. The long-term result of this policy has been to strengthen the stability, security and effectiveness of the borough

system of local government. The borough system demonstrably possesses the flexibility to accommodate successfully these differences and conflicts, where they exist.

The Local Boundary Commission and the Alaska Supreme Court have directly faced this issue in Mobil Oil Corporation v. Local Boundary Commission, Alaska, 518 P. 2d 92 (1974) wherein the court concluded that the inclusion of the Prudhoe Bay oilfields within the boundaries of the North Slope Borough was consistent with the standards for borough incorporation, even though the workforce at the oilfields was culturally and socially different from the rest of the traditional North Slope Borough population. As the court stated at page 98 "The standards...were intended to be flexibly applied to a wide range of regional conditions." At page 101 "They are meant to provide local government for regions as well as localities and encompass lands with no present municipal use."

Under the analysis of Mobil the Red Dog mine is compatible with the North Slope Borough.

The social, cultural and economic differences and conflicts that might arise between transient workers at the Red Dog minesite and the rest of North Slope Borough's population is trivial compared to the social diversity commonly embraced by Alaska's established boroughs.

There is no good reason for the Local Boundary Commission to ascribe significance to the relatively minor differences that distinguish the prospective transient workforce for the Red Dog mine and NANA region residents in general from the existing population and workforce of the North Slope Borough, when such vast, enduring and divisive differences and conflicts are tolerated by the Local Boundary Commission in other borough jurisdictions despite petitions for realignment of jurisdictional boundaries.

This overall pattern of facts presented by petitioner and respondent, together with policies implicit in earlier Local Boundary Commission decisions, does not provide a reasonable basis for finding that the social, cultural and economic characteristics of the population of the territory proposed for detachment have been, are, or will be substantially different from, or in conflict with, those of the remainder of the population of the North Slope Borough. Conflict fabricated by advocates of detachment is not a just basis for detachment.

B. GEOGRAPHIC FACTORS

In its Statement of Findings and Conclusions on the North Slope Borough incorporation petition in 1972, the Local Boundary Commission found with respect to the geographic standard that "the proposed borough meets this standard in every respect." Emphasis added.

In *Mobil Oil v. Local Boundary Commission*, supra, the Alaska Supreme Court affirmed that the Local Boundary Commission had correctly applied the geographic standard to the incorporation of the North Slope Borough.

From the outset it must be made clear that the standard of 19 AAC § 10.230(a)(2) is not whether services might be supplied more easily from another area. The standard is whether the location of the land in question precludes or makes impractical the provision of borough services.

The North Slope Borough has issued and is currently processing several permits for activities in the area proposed for detachment. Thus far there is absolutely no basis for any argument that the North Slope Borough cannot provide borough services to the area.

The North Slope Borough has demonstrated its ability to develop facilities and provide services as needed at all settlement within its jurisdiction. The North Slope Borough's jurisdiction extends across the arctic frontier from beyond Point Hope, past Anaktuvuk Pass to beyond Kaktovik.

The quality of community improvements and public services provided is superior to the improvements and services generally available to rural Alaskan communities. (Attachment PP). Additionally, the Borough provides area-wide planning, environmental regulation and public safety services and maintains stand-by medic transport services throughout the Borough.

Three of the Borough's seven permanent settlements outside Barrow and nearly half of its resident population outside Barrow are as distant from Barrow as the Red Dog minesite. (Attachment QQ). While the Borough government is headquartered in Barrow, supplies and materials are typically delivered directly to village destinations by air freight or marine shipping. (Attachment RR). All of the Borough's settlements are accessible by Hercules cargo aircraft, as is the Red Dog minesite. Five settlements are also seasonally accessible by marine transport. The physical development of Anaktuvuk Pass, Nuiqsut and Atkasuk, inland communities which

are inaccessible by sea routes or developed overland routes, demonstrates the Borough's capability to serve remote areas.

The present lack of overland and marine transportation links between Barrow and other communities does not prevent the effective conduct of borough business. Borough officials on public business customarily travel by air among the borough's communities, not by ship or highway. Despite distances between communities, frequent official and personal air travel between Barrow and the Borough's other settlements is available by private flight services and by regularly scheduled borough charter service.

The North Slope Borough has installed modern public telecommunications facilities in all its communities to provide communication linkages among its communities and to facilitate the conduct of public business. It is feasible to install similar facilities at Red Dog when needed.

Furthermore, as has been noted previously, the Red Dog mine project sponsors, the State and the EIS consistently maintain that development of the Red Dog mine will not generate any exceptional demand for local public improvements or services within the territory proposed for detachment. The North Slope Borough is now performing all required local government planning and regulatory functions.

There are no other developments pending in the territory proposed for detachment that might generate demand for local public services.

Finally, the petitioner's brief makes clear that the purpose of the detachment is not to finance and facilitate services to the detachment area but to utilize the tax base being developed at the Red Dog minesite to finance and facilitate services throughout the rest of the NANA region.

Thus, there is no reasonable basis to conclude that the geography or configuration of the territory proposed for detachment precludes or makes impractical the provision of services by the North Slope Borough.

C. TRANSPORTATION AND COMMUNICATIONS FACTORS

In its Statement of Findings and Conclusions on the North Slope Borough incorporation petition in 1972, the Local Boundary Commission found with respect to the transportation standard that "this standard has been met in all respects."

In Mobil Oil v. Local Boundary Commission, supra, the Alaska Supreme Court affirmed that the Local Boundary Commission correctly applied the transportation standard to the incorporation of the North Slope Borough.

The transportation facilities and communications services serving the communities of the North Slope Borough are now greatly superior to the facilities and services available in 1972. As stated before, every community, as well as Red Dog, is serviceable by Hercules cargo aircraft. Marine transportation serves the Borough's coastal communities.

The present low level of transportation improvements in the detachment area as a whole reflects the historic lack of intensive human use and occupancy. However, contrary to petitioner's assertion, the natural geography of the detachment has not barred travel within and across the detachment area for subsistence and inter-regional trade.

Development of the public port and road to the Red Dog minesite will render that sector of the North Slope Borough as accessible by marine and air transportation as Point Hope already is. The detachment area and the Red Dog mine will not be accessible by road or water from any settlement in the NANA region, including Kotzebue. When developed, the port for the Red Dog mine will be among the busiest ports in Alaska and open to public use.

Successful development and operation of the mine will entail substantial import and export of goods and commodities and extensive communications between the minesite and distant locations. Since the mine project will require fewer public improvements or services than the North Slope Borough routinely provides to its other communities, provision of local governmental services should offer no difficulty. The Red Dog minesite will be no less accessible to Barrow by air transport than are Point Hope, Anaktuvuk Pass or Kaktovik.

These circumstances, supplemented by the facts presented in the preceding section, belie any conclusion that "the lack of transportation facilities precludes the communication and exchange necessary for responsive and integrated local government." Few local government services will be required. It will certainly be easier for the North Slope Borough to provide any needed local services than for Cominco to manage the great volume of international commercial activity necessary to develop and operate this remote mine, the largest of its kind in the world.

D. PROVISION OF SERVICES.

The requirements of 19 AAC § 10.240(a) and (b) are cumulative. Even if the Local Boundary Commission approves detachment conditioned on the formation of a NANA regional borough, the Local Boundary Commission must still find that the new borough will be able to provide services to the detached area.

The Local Boundary Commission does not have the benefit of any proposal for a NANA borough as yet. The Local Boundary Commission cannot now tell what services a NANA borough can or will provide to the area. Nor can the Local Boundary Commission guarantee that services promised by borough petitioners will be delivered.

In talks with North Slope Borough representatives, NANA incorporation advocates (then seeking voluntary detachment), asked the North Slope Borough to suspend enforcement of planning regulations governing the Red Dog area for three years (Attachment SS). Planning is the most critical local government function applicable to the proposed detachment. As such suspension would be unlawful, the North Slope Borough declined. Will these advocates suddenly become eager to regulate and protect this land and its resources after incorporation of a NANA borough? Is it reasonable to assume that the advocate of this boundary change, which owns mine properties in the area, will support the lawful regulation of its property by the new borough government when it has sought unlawful waiver of regulation by the North Slope Borough?

E. DISTRIBUTION OF ASSETS AND LIABILITIES

Petitioner states: "There are no assets of the North Slope Borough within the territory proposed for detachment". From this, Petitioner extrapolates that the Local Boundary Commission can dismiss the need to distribute the North Slope Borough's liabilities. This application of 19 AAC 10.250 is in error.

Because there are no permanent residents, and, as yet, no substantial developments warranting local improvements, the North Slope Borough has not invested - nor been asked to invest - in local public improvements within the detachment area. Moreover, as noted earlier, the Red Dog EIS indicates that there will be no significant demand for public improvements at the minesite.

Nevertheless, there are existing and pending improvements to which a portion of the North Slope Borough liabilities attaches. All of the North Slope Borough's bonded indebtedness is in the form of general obligation bonds, backed by the full faith and credit of the North Slope Borough. All real property valuation that is or, in the absence of detachment, will be within the North Slope Borough is liable for a pro rata share of North Slope Borough debt service obligations. In other words, even now, a measurable share of liability attaches to all real property valuation that is or will be developed in the detached area.

The Petitioner's argument that the lack of improvements excuse the state or a successor government from assuming liability for a portion of the NSB's bonded debt conflicts with the court's ruling in Mobil, supra, p. 102. Also, if property taxes from the Red Dog mine and other properties in the detached area are to be available to service bonded debt for the proposed NANA borough (Petitioner's Attachment 36), they will be no less useable for the same purposes by the North Slope Borough, in the absence of detachment.

The Red Dog Mine is only one manifestation of extensive mineralization occurring within the area. (Attachment TT). Petitioner has not attempted to prepare a comprehensive assessment of the fiscal impact of the detachment petition on the North Slope Borough. Petitioner's brief addresses the Red Dog minesite, to the exclusion of all other potential revenue sources. While it may be technically demanding to develop a full accounting of the future revenue potential encompassed by the detachment territory, failure to do so discredits Petitioner's assessment of potential fiscal impacts. It also prevents a full and fair reckoning of the distribution of assets and liabilities at this time.

To conclude, the Petitioner's brief fails to address the equitable distribution of assets and liabilities, as required by 19 AAC 10.250 in the event of detachment. The Local Boundary Commission must address the distribution of assets and liabilities before it decides upon detachment petition.

IV. APPLICATION OF THE BEST INTEREST STANDARD

In order to approve the detachment of the land in question, the Local Boundary Commission must find the detachment to be in the best interests of

the State of Alaska, the territory proposed for detachment and the North Slope Borough. This standard is cumulative. Detachment must be in the best interest of all three or it is not in compliance with standards and cannot be approved.

A. BEST INTERESTS OF THE STATE OF ALASKA.

1. Local Self Government

The North Slope Borough shares the state's interest in promoting local self government. The State, however, cannot be provincial in this regard. The State's best interest is to promote local self government throughout Alaska, not just "maximizing local self-government in the NANA region". For the State to promote local self government in one area by harming it in another area is self-defeating. Formation of one local government at the expense of another jurisdiction is detrimental to the principle of jurisdictional and fiscal integrity for all local governments in the State.

It is not in the State's best interest to harm the long term viability of any government. As will be shown more fully in the section addressing North Slope Borough's best interests, the future viability of the North Slope Borough depends on diversification of its economy and tax base in the face of declining oil reserves and revenues. The State of Alaska should be especially sensitive to this concern. Mineral development in the area proposed for detachment will help provide that diversified economy and tax base for North Slope Borough's future.

Involuntarily removing a potential revenue source from North Slope Borough can only hurt the North Slope Borough's creditworthiness. Indeed, the State's apparent readiness to tamper with its local governments' economy and tax base can only harm investor confidence in all Alaskan local governmental bonds. It is not in the State's best interests to harm the North Slope Borough's creditworthiness or to create a precedent whereby the bond ratings of all Alaska local governments may suffer.

The State's interest in promoting local government is valid. The method the State has chosen in this petition however harms all local

governments, especially the North Slope Borough. The State's interest can be effected in other, less harmful ways. There are fiscal alternatives for support of a NANA region borough. (Attachment UU).

Petitioner's brief has not provided evidence that detachment will advance the State's interest in the development of the territory.

2. Precedents for Future Detachment

Detachment of this area would set a precedent for similar detachments of unpopulated or lightly populated areas and/or for detachments of areas containing natural resources which are near the borders of an ongoing-unorganized borough which might form the basis of a new borough. (Attachment VV).

Beginning with the southern part of Alaska.

a. Ketchikan Gateway Borough. The only populated area in Ketchikan is the area immediately northwest of Ketchikan towards Ward Cove and the area immediately south of Ketchikan along the road going to Saxman and south. The other 95% of the Ketchikan Borough does not receive any greater level of governmental services from the Ketchikan Borough than does the area here proposed for detachment.

The Ketchikan Borough also includes all of Revillagigedo and Gravina Islands. Almost all of the area comprised by these two islands would also be eligible for detachment.

The pertinent natural resource area is the U.S. Borax molybdenum mine which is just outside the Ketchikan Gateway Borough in the unorganized borough. The precedent of tax relief for a private developer might be used there to defeat an annexation proposal by the Ketchikan Borough.

b. Sitka Borough. The Sitka Borough is similar to the Ketchikan Borough in that at least 95% of the borough could be detached, including all of that part of Chichagof Island included in the Sitka Borough, all of Kruzof Island and the great majority of Baranof Island, and in particular, all of the eastern and southern portions of the island, if lack of population or lack of provision of municipal services were considered. There do not appear to be any natural resource areas equivalent to the Red Dog area in this Borough.

c. Juneau Borough. The Juneau Borough is similar to the Ketchikan and Sitka Boroughs. Areas which would easily qualify for detachment include all the land north of Berners Bay and all of the land south of Taku Inlet and on both sides of Taku Inlet to the Canadian Border.

In the Juneau Borough area there are natural resource areas which could be considered i.e the Green's Creek lead, zinc and silver mine which is just outside the Juneau Borough in the unorganized borough and Admiralty Island with its timber resource. If there were to be an Admiralty Island Borough proposed or a Sealaska Borough, this Green's Creek area could be included. It could also be included even without the formation of a borough if the City of Angoon continues its expansion. This would place Juneau in the position of servicing the population of the Green's Creek mine, as most workers commute from Juneau, without the benefit of the tax base to offset these costs. Annexation of this area to the Juneau Borough would be more logical but under the basis of the petitioner's brief, this could be defeated.

d. Haines Borough. All of the area of the Haines Borough could be detached, including Klukwan. There are valuable mineral and timber resource deposits in this area. With the long standing conflict between Klukwan and the Haines Borough, a detachment petition might be presented by Klukwan if the Local Boundary Commission began looking with favor upon realigning existing borough/government boundaries.

e. Kodiak Island Borough. Kodiak Island has small Native villages on the shores and inlets of Kodiak Island. All of Afognak, considering the lack of population or municipal services could be detached. Koniag could propose a new borough coterminus with its boundaries which would swallow the existing Kodiak Island Borough.

f. Bristol Bay Borough. Almost all of the Bristol Bay Borough could be detached. This includes the approximate third of Bristol Bay Borough within Kvichak Bay and all of the area north of Naknek and east of King Salmon, including a portion of Naknek Lake. The areas within the Bristol Bay Borough now receiving government services are Naknek, South Naknek, which is across the Naknek River from Naknek, King Salmon, and the

area on both sides of the road between Naknek and King Salmon. Tax revenues for this borough come almost entirely from their one percent sales tax on fish, a substantial portion of which is collected from floating processors within Kvichak Bay which never touch shore. The Bristol Bay Regional Corporation could propose a new borough coterminus with its boundaries which would extinguish the existing Bristol Bay Borough.

g. Kenai Peninsula Borough. The one-half of the Kenai Peninsula Borough area comprised of Cook Inlet and the area west of Cook Inlet could be detached. They include all the drilling platforms within Cook Inlet and the Beluga coal fields. There is an elementary school at the very northwest tip of that portion of the Kenai Peninsula Borough west of Cook Inlet at the Native Village of Tyonek. Other than at Tyonek, the area west of Cook Inlet is unpopulated and is not served by schools, roads or fire service. Development of the Beluga and Placer Amex coal fields could form the economic nucleus of a new borough with Tyonek as its seat. The road access to this area would be from the Matanuska-Susitna Borough although Tyonek, the power station and the port site are presently within the Kenai Peninsula Borough.

The analogy of this situation to the present petition is clear, i.e., road from a MANA port to a resource in the North Slope Borough.

The Kenai Peninsula Borough is subject to attack from the other side as well. The concept of a Prince William Sound Borough surfaces periodically. This Borough, as discussed, would include Valdez, Cordova, Whittier and Seward which if approved would significantly alter the Kenai Peninsula Borough boundaries and remove a substantial amount of tax base.

In addition, there are mineral deposits in the Port Graham-English Bay area which could form the basis of a detachment petition.

Even if some of these examples above would not be the basis for a new government entity, there would at least be a precedent for the detachment of territory to grant tax relief to a corporation under the guise of creation of jobs.

h. City of Valdez. The City of Valdez if encompassed within a Prince William Sound Borough as discussed above would see its tax base seriously diluted.

i. Municipality of Anchorage. All of the Chugach State Park could be detached from Anchorage plus Portage and Portage Glacier, where there are no schools or municipally maintained roads.

j. Fairbanks North Star Borough. Most of the area in this borough could be detached, including all of the area south of the Tanana River, which is unpopulated, and all of the area away from the Alaska Highway and west of the homesteaded area along the Chena Hot Springs Road. This is well over half of the Fairbanks North Star Borough. And, certainly, major portions of the Alyeska Pipeline, which passes through the Fairbanks North Star Borough, could be taken away from the Borough's tax base if criteria presented here applied or Doyon, Ltd. would wish to propose a regional government along its boundaries.

k. Matanuska Susitna Borough. The Matanuska Susitna Borough has already experienced efforts on the part of some of its residents (as distinguished from this case) to detach. These petitions have been rejected. In addition to the Lake Louise area, there is also the Dunkle Mine area near the northwestern boundary of the borough. With the growth in the Healy area because of the Usibelli Mine development, it is conceivable that the formation of a regional government around Healy would seek to detach the Dunkle mine area.

Also as discussed in the section on the Kenai Peninsula Borough, the possibility of a new government centered around Tyonek also raises the possibility of territory being detached from the Matanuska-Susitna southwestern boundary.

l. North Slope Borough. The North Slope Borough could be subjected to other detachments.

As the above discussion indicates, there are many areas of the State ripe for detachment petitions if the Commission approves this petition. Disturbing effects of detachment are discussed on pages 48 through 51 of this brief.

3. Economic Development and Employment

The North Slope Borough shares the State's interest in promoting resource development and local employment. Petitioner, however, makes unfounded statements that detachment will further these interests.

The State's interest in resource development at Red Dog can be fully satisfied under North Slope Borough jurisdiction. Preliminary development of the mine is going on now. No evidence has been submitted that detachment is essential to the economic feasibility of the mine project. The world market for the mine's products is the crucial factor in the feasibility and profitability of the Red Dog Mine, according to AIDA's official finance plan. There is no evidence the proposed boundary change will enhance the financing of the DeLong Mountain Transportation Project.

Petitioner alleges the detachment will achieve unified regulation and control of the DeLong Mountain Transportation system and the Red Dog Mine. As shown earlier (Attachment LL), local governmental regulation is a relatively minor factor in the overall regulatory scheme for the mine, compared to federal and state regulation. Detachment will not materially unify regulatory processes or remove non-existent barriers to development

Part of NANA Regional Corporation's private agreement with COMINCO involves an employment preference for NANA shareholders at the Red Dog Mine. As the mine is developed and operates, NANA shareholders will absorb a major share of the jobs. This will help alleviate unemployment and underemployment in the NANA region. This economic benefit will accrue to NANA residents regardless of detachment.

The North Slope Borough has no power or interest to impede employment of NANA residents at Red Dog. The proliferation of NANA-related businesses in the North Slope Borough has already been noted. The North Slope Borough has not sought to mandate employment of North Slope Borough residents on private projects. The North Slope Borough cannot, as a matter of law, condition the granting of a permit or enforcement of a regulation on the employment of North Slope Borough residents. Such an action would be unconstitutional both under the Alaska and United States Constitutions.

B. THE PROPOSED DETACHMENT IS NOT IN THE BEST INTERESTS OF THE TERRITORY TO BE DETACHED.

Petitioner's brief makes no claims and offers no evidence that the North Slope Borough has been remiss in its governance of the territory

proposed for detachment or has heretofore interfered with any person's use and enjoyment thereof. Since its founding, the North Slope Borough has protected and encouraged traditional subsistence uses in the territory, including uses by NANA residents. The North Slope Borough has not interfered with the efforts of allotment applicants, NANA Regional Corporation, and other landed interests to obtain, use and enjoy their lands. The North Slope Borough has protected the territory's environmental integrity through appropriate planning regulations and has provided public services appropriate to the character of the territory.

The best interest of the territory proposed for detachment is to be found in a balance between the exploitation and conservation of resources. The vast majority of the area is a "conservation area" under North Slope Borough land use regulations. (Attachment WW and Petitioner's Attachment 29). Development of mineral sites in the area will be allowed to the extent such development does not harm subsistence resources. The North Slope Borough has demonstrated the ability to successfully address and balance these concerns. NANA Regional Corporation representatives however have shown an antipathy for legitimate regulation. They have sought a three-year waiver of environmental regulation over their Red Dog mine property. (Attachment SS). NANA's president has said, "Cominco feels that if the people who benefit from the mine regulate it, they will have a more stable government to work with." (Attachment XX).

Even assuming officials of a NANA borough would seek to regulate development and protect the environment of the territory, the fact remains that any future government's laws, rules, regulations and enforcement procedures are unknown. For the Local Boundary Commission to find that a future government and its unknown regulatory scheme will better serve the territory proposed for detachment than will North Slope Borough's regulations would be pure speculation.

Petitioner argues that the territory will be managed and regulated to promote environmentally sound economic development. Thus, as nothing would change, it would not be in the territory's best interest to be detached. Petitioner's arguments, however, also ignore the necessary time lag between a decision to detach and the enactment and enforcement of a regulatory scheme by a new borough. In the interim, uncontrolled

development may occur, as was sought by NANA Regional Corporation from the North Slope Borough.

As noted earlier, the proximity of the area proposed for detachment to Kotzebue is immaterial when considering the North Slope Borough's ability to provide services to the area. The North Slope Borough can effectively service the area from Barrow or Point Hope.

The North Slope Borough has demonstrated a willingness to provide services to the Red Dog area. It has issued and is processing land use permits for the area. The North Slope Borough has offered to create a Service Area governed by a board with representatives from NANA and Cominco to allay development concerns of the Red Dog mine sponsors. Evidently, the service area concept holds no appeal to project sponsors.

C. BEST INTERESTS OF THE NORTH SLOPE BOROUGH.

Detachment will have no positive effects and many detrimental effects on the best interests of the North Slope Borough.

First, the North Slope Borough respectfully submits that the uniform judgment of its electorate and elected Assembly and Mayor are, in the absence of overwhelming evidence to the contrary, the best measure of the best interest of the North Slope Borough. The electorate, the Assembly and the Mayor have judged that the proposed detachment is not in the best interest of the North Slope Borough. Since submittal of this petition for a forced detachment, North Slope Borough residents have become more convinced that detachment is not in their best interests. (Attachment H).

Second, the proposed detachment will deny the North Slope Borough an important source of potential revenues to fund public improvements and services for its residents. A preliminary and limited analysis, of the fiscal impact of detachment of Red Dog mine alone, prepared by E.F. Hutton, projected a short-term revenue loss to the North Slope Borough of \$33,260,000 by 1996. (Attachment Y7). While this is only a conservative, short-term and partial analysis, it establishes that there will be a significant revenue loss to the North Slope Borough. A more comprehensive analysis would undoubtedly find a more substantial revenue loss.

This revenue loss will have three fiscal impacts adverse to the North Slope Borough's best interests. It will reduce the amount of revenues available for debt service and will thereby devalue outstanding North Slope Borough bonds and diminish the marketability of future North Slope Borough

bond offerings. It will reduce revenues available to fund the ongoing operations of local government. It will shift to other North Slope Borough taxpayers a substantial burden of higher mill rates and higher taxes to offset the revenues lost by detachment. These impacts are not in the best interest of the North Slope Borough.

Data submitted as part of the petitioner's brief indicate that the taxable value of Red Dog mine improvements will be about \$250 million and that the new borough will levy a 3 mill property tax. (Petitioner's Attachment 16 and 36) Based on this data, it is calculated that the proposed detachment of Red Dog alone will yield \$750,000 in annual revenue to the NANA region borough and \$3,842,500 annually in tax reduction to NANA/Cominco. The annual net fiscal effect of the Red Dog minesite development can be summarized as follows:

Revenues to NANA Region Borough	3.0 mills X \$250 Million =	\$750,000
Tax Reduction for NANA/Cominco	15.37 mills X \$250 Million =	<u>\$3,842,500</u>
Tax Burden Shift to NSB Taxpayers	18.37 mills X \$250 Million =	\$4,592,500

Thus, detachment of the Red Dog minesite alone will result in a shift of tax burden to North Slope Borough taxpayers of about \$4.6 million annually. This is not in the best interest of the North Slope Borough.

Notwithstanding petitioner's allegation that the main purpose of the detachment is to provide a tax base for the proposed NANA borough, figures submitted by the petitioner (Petitioner's Attachments 16 and 36) lead to the conclusion that better than eighty percent (80%) of the financial benefits of the proposed boundary change will accrue to NANA/Cominco as developers of a private mining venture. Less than twenty percent (20%) of the public revenues taken from the North Slope Borough will actually go to support the proposed NANA borough and the public needs of its citizens.

There is no statutory or regulatory authority or just reason to implement boundary changes for the purpose of redistributing local government tax assets to benefit private interests.

Third, this first inroad upon the territorial and fiscal integrity of the North Slope Borough will naturally raise general concern in the financial community about the commitment of the State of Alaska to maintain the long-term stability of the North Slope Borough's boundaries. This

result will magnify the financial market's concern about the North Slope Borough's long-term creditworthiness, beyond any short-term concern for immediate revenue losses.

Bond buyers are used to settled local government boundaries and have developed expectations as to the size of the tax base for individual governments. Since 1963, there have not been significant detachments of areas from any local government tax base. As a result, there are almost 24 years of expectation and reliance upon the settled nature of Alaskan local government boundaries. There have been almost 14 years of reliance upon the North Slope Borough's boundaries. Any action which will suggest that this commission would as a matter of policy favorably consider petitions for detachment of land in unpopulated areas of the North Slope Borough will become a relevant factor of the bond rating for not only the North Slope Borough but for every local government where this is a possibility.

Fourth, the proposed detachment encompasses other important prospective mineral deposits besides the Red Dog minesite. (Attachment 7i and ZZ). While it is technically difficult to determine the fiscal value of these resources to the North Slope Borough, detachment of this economic potential is clearly not in the best interest of the North Slope Borough.

Fifth, the North Slope Borough well recognizes the vulnerability of its petroleum-dominated economic and fiscal base. For the North Slope Borough, as for the State, petroleum revenues are forecast to decline steeply beyond 1995. The North Slope Borough, like the State, is committed to a prudent program to diversify its long-term economic base. Development of the North Slope Borough's mineral resources at Red Dog and other sites in the detachment area represents the first significant opportunity to diversify the borough's economic base. This is doubly important, since the mineral reserves in the Red Dog vicinity have a productive life that will far outlast the proven petroleum reserves elsewhere in the borough. Detachment of the territory holding the first opportunity for economic diversification is not in the best interest of the North Slope Borough.

Petitioner alleges that the proposed detachment will not impair the future creditworthiness of the North Slope Borough. In support of this allegation, petitioner offers the opinion of the State Bond Bank's financial advisor (Government Finance Associates, Inc.) and of the Commissioner of Revenue. (Petitioner's Attachment 19 and 20). Petitioner and the

Commissioner of Revenue aver that detachment will augment the tax base of the proposed NANA borough but will not diminish the North Slope Borough's tax base. Obviously, any aggrandizement of the proposed NANA borough's property tax base resulting from the detachment is offset by diminution of North Slope Borough's property tax base.

The Commissioner of Revenue's letter of November 18, 1985, purports to refute the E.F. Hutton letter of November 6, 1985 assessing the impact of the proposed detachment on the North Slope Borough's fiscal condition. The Commissioner's letter, however, does not challenge the two key points in the E.F. Hutton letter: (1) detachment will set a damaging precedent and (2) detachment will result in measurable loss of revenue to the North Slope Borough. Both of these points are affirmed by information that petitioner has submitted for the record on this petition (Petitioner's Attachment 19) and information submitted regarding a previous detachment petition, (Attachment AAA, BBB, CCC) as well as by new information submitted as part of this brief. Nor does the Commissioner's letter address the obvious loss of the North Slope Borough's ability to pledge that future tax revenue to secure bond funds.

Standard and Poor's Corporation is widely recognized as the nation's foremost independent credit rating agency. As such, its professional opinion carries unmatched credibility and acceptance in the financial community. Mr. Vladimar Stadnyk, Senior Vice President of Standard and Poor's Municipal Finance Department, assessed the impact of the proposed detachment of the North Slope Borough territory as follows:

"Although the magnitude of the loss in valuation, and its impact on the Borough rating cannot be defined specifically at this time, I would offer that continued loss of assessed valuation because of economic reasons, deannexation proceedings, or detachment by other agencies or authorities would generally be considered detrimental to the ability of the borough to meet its commitments on general obligation debt. (Attachment DDD).

Standard and Poor's independent opinion is wholly consistent with the conclusion of the North Slope Borough's own financial advisors. (Attachments YY and EEE). It is also consistent with the Matanuska-Susitna Borough's financial advisor's evaluation of the impact of the proposed Lake

Louise detachment upon the creditworthiness of the Matanuska-Susitna Borough. (Attachment AAA).

This concern for precedent cited by Standard and Poor's, and concurred in by the North Slope Borough's own financial advisors was heartily endorsed in the Department of Community and Regional Affairs' own recommendation to the Local Boundary Commission and the Local Boundary Commission's decisional statement on the proposed Lake Louise detachment. The Department's report recommended that the Lake Louise detachment be rejected, in part because:

"The Matanuska-Susitna Borough would be adversely affected by the detachment of the Lake Louise area. It would reduce the assessed value by \$6,941,700 (0.67%), which would negatively affect the bonding capacity of the borough. As the bonding ability of the Borough is based upon the level of taxable property, the uncertain future of current boundaries could have a debilitating effect upon the Borough's bond rating and capacity to issue bonds. In addition, there are other regions within the Matanuska-Susitna Borough that are in a similar situation to the Lake Louise area and this detachment could, again, set a precedent for future detachment proceedings from the Matanuska-Susitna Borough. Therefore, it would not be possible for the Borough to assure the bonding market of a consistent future valuation." (Attachment BBB).

This concern for precedent was reflected in the Local Boundary Commission's official Statement of Decision, in which it said:

"The Matanuska-Susitna Borough would be adversely affected by the detachment of the Lake Louise area. It would reduce the assessed value by \$6,941,700 which could negatively affect the bonding capacity of the Borough. (Attachment CCC).

Petitioner seeks to minimize the redistribution of local property tax base from the North Slope Borough to the proposed NANA region borough by characterizing it as a relatively modest part of the North Slope Borough's overall fiscal base. Objectively, if detachment of less than \$7 million (or

0.67%) from its property tax base adversely affects the Matanuska-Susitna Borough, then it would be inconsistent and illogical to maintain that this proposed detachment of \$250,000,000 (or 1.6%) in property tax base, counting only the initial Red Dog minesite valuation, will not affect the North Slope Borough.

In any case, relative significance is not the issue. For example, the State was not careless of its own resources during its negotiations with Cominco to finance the Red Dog road and port improvements, even though it was committing only a minute share of its total financial assets to the project. In practice, the State of Alaska and the North Slope Borough are similarly obliged to be mindful of the public resources entrusted to their stewardship.

The fact that the area proposed for detachment only comprises 3.7 percent of the total land area of North Slope Borough is irrelevant. The fiscal significance of an economic resource is not proportionate to its area. For example, Prudhoe Bay represents a very small portion of the North Slope Borough and of the State of Alaska but is the primary source of revenue for both governments.

The fact that the 1984 tax valuation of property in the area proposed for detachment was a small percentage of North Slope Borough's overall tax base is irrelevant and misleading. The 1985 valuation is much higher. Mineral exploration and development activity in the territory is on the upswing. The 1986 valuation and future valuations will continue to rise.

The detriments to the North Slope Borough that flow from detachment show that it is not in the best interest of the North Slope Borough.

CONCLUSION

The North Slope Borough has shown through its brief that Commissioner Notti's petition to detach the 2,110,720 million acres from the North Slope Borough should fail not only on its merits but on procedural grounds as well. These failures are on many grounds:

1. NANA Regional Corporation representatives and its predecessor acquiesced in the boundaries of the North Slope Borough at the time of the original incorporation. NANA

representatives in fact supported the original boundaries and disavowed any commonality between regional corporation and borough boundaries.

2. There is no correlation between the success of the Red Dog mine and detachment of the area from the North Slope Borough. The Red Dog mine can benefit the people of NANA while remaining in the boundaries of the North Slope Borough.

Red Dog development promises no significant adverse environmental or social impacts and many positive impacts for NANA residents. Red Dog development alone is not an urgent cause for borough incorporation. There is time and need to explore fiscal alternatives to detachment.

3. The petition fails to satisfy the standards for detachment and bases its arguments on erroneous assumptions and interpretations of the Local Boundary Commission North Slope Borough incorporation decision.

4. Detachment is not in the best interest of the State. Instead of promoting local self government, the petition undermines the integrity and stability of a local government's boundary, with harmful implications for the State's entire system of borough government.

5. The petition is clearly not in the best interests of the North Slope Borough. It harms the financial stability and future of the North Slope Borough and takes territory from the Borough against the express wishes of its voters.

6. The petition is based upon the erroneous assumption that there are no assets and/or liabilities to be distributed if detachment is approved. Approval will impose an arbitrary and inequitable shift of tax base from an existing government to a yet-to-be formed government.

7. The petition is not in the best interests of the area proposed to be detached. The North Slope Borough is exercising land management regulations over the area while NANA representatives have indicated a desire to abate such regulation.

8. Approval would set a dangerous precedent, giving rise to the possibility of many similar petitions. The subsequent local boundary and fiscal instability would reverberate through the financial markets, and would be very detrimental to local governments and to the State.

9. Due process guarantees have been abrogated which would subject any approval of the petition to judicial attack. These issues should be resolved before the Commission takes action.

For all of the above reasons and additional reasons presented in the body of the North Slope Borough brief, the North Slope Borough urges the Local Boundary Commission to deny Commissioner Notti's Petition for Detachment.

Signature Page is Attached.

LIST OF ATTACHMENTS TO NORTH SLOPE BOROUGH BRIEF

- Attachment A - December 3, 1982, Attorney General Opinion #15, memorandum from Attorney General Wilson Condon to Governor Jay Hammond.
- Attachment B - December 12, 1985, Anchorage Daily News editorial on conflict of interest.
- Attachment C - July 23, 1984, memorandum from Assistant Attorney General Thomas Jahnke to Commissioner Robert Sundberg.
- Attachment D - September 23, 1983, memorandum from Assistant Attorney General Diane Colvin to Carol Derfner.
- Attachment D1 - November 7, 1985, letter from North Slope Borough Mayor George Ahmaogak to Commissioner Notti.
- Attachment D2 - November 14, 1985, letter of North Slope Borough Mayor Ahmaogak to Local Boundary Commission Chairman, Robert Eder.
- Attachment D3 - November 16, 1985, Resolution No. 86-20 of the Alaska Municipal League, "A Resolution Endorsing Careful Planning of Municipal Boundary Changes."
- Attachment D4 - December 17, 1985, Resolution 1-85 of the Alaska Chapter, American Planning Association, "A Resolution Endorsing Careful Planning of Municipal Boundary Changes."
- Attachment E - Timetable from draft revised Local Boundary Commission regulations.
- Attachment F - October 4, 1985, draft memorandum, hand-titled "Example Detachment Petition - Prepared by NANA"; November 6, 1985, letter from Marty Rutherford to Earl Finkler; excerpt from Commissioner Notti's Brief in Support of Petition for Detachment.
- Attachment G - Two-page chart comparing NANA draft memorandum and Commissioner Notti's Brief.
- Attachment H - Petitions of the residents of the North Slope Borough reference detachment petition.
- Attachment I - December 12, 1985, letter from Arnold Brower Jr., North Slope Borough, to Local Boundary Commission Chairman Robert Eder.
- Attachment J - June 2, 1972, letter from John Schaeffer, Executive Director of Northwest Alaska Native Association to Assistant Secretary Harrison Loesch.
- Attachment K - Letter from Robert Newlin, Northwest Native Association to Byron Mallott, Local Affairs Agency, with attached map.
- Attachment L - May 26, 1972, letter from John Sackett, president of Tanana Chiefs Conference to Assistant Secretary Harrison Loesch.
- Attachment M - Two maps of Arctic Slope and Bering Strait native protests, from Alaska Natives and the Land.
- Attachment N - April 24, 1972, letter from James Wickwire to BLM Director Curtis McVee, with six attachments.
- Attachment O - August 17, 1972, letter from Jacob Adams, ASRC, to U.S. Department of the Interior, with attachment of NANA/ASRC boundary agreement.
- Attachment P - August 1, 1972 letter from Joseph Upicksoun, ASRC, to John Schaeffer, NANA Regional Corporation.
- Attachment Q - Map and title box, dated February 22, 1972, showing NANA's proposed regional boundaries.

Attachment R - December 11, 1972, letter to Joseph Upicksoun, ASPC, from Assistant Secretary Harrison Loesch.

Attachment S - DCRA map of Alaska municipalities.

Attachment T - Map illustrating borough and ANCSA regional corporate boundaries.

Attachment U - "Statement of Findings and Conclusions on the Petition Proposing Incorporation of a First Class North Slope Borough", adopted by the Local Boundary Commission on May 10, 1972.

Attachment V - Edwin Hall, Jr., In the National Interest: A Geographically Based Study of Anaktuvuk Pass Inupiat Subsistence Through Time, Volume I, with Attachment Va, map of "Total lifetime subsistence territories" from Volume II.

Attachment W - 1800 Ernest Burch, Jr., The Traditional Eskimo Hunters of Point Hope, Alaska: 180-1875.

Attachment X - September 1985 VITA, Edwin S. Hall, Jr.

Attachment Y - December 13, 1985, memorandum from Edwin Hall to Kevin Waring.

Attachment Z - Stephen Braun and David Burnham, Chapter 7, Kivalina and Noatak Subsistence Use Patterns, from Cominco Alaska, Inc., Environmental Baseline Studies, Red Dog Project, prepared by Dames & Moore.

Attachment AA - Three maps of traditional trails, arctic and northwest Alaska.

Attachment BB - Edwin Hall, Jr., Chapter 8, Archaeology, from Cominco Alaska Inc., Environmental Baseline Studies, Red Dog Project, prepared by Dames & Moore.

Attachment CC - Map of Land Status, Territory Proposed for Detachment.

Attachment DD - Irvin Tailleux, U.S. Geological Survey Open-file Report, "Lead-Zinc-, and Barite-Bearing Samples from the Western Brooks Range, Alaska."

Attachment EE - U.S. Geological Survey Open-file Report, "The Status of Mineral Resource Information on the Major Land Withdrawals of the Alaskan Native Claims Settlement Act of 1971.

Attachment FF - Cominco map of Red Dog minesite and road corridor.

Attachment GG - Excerpts of Red Dog project environmental and socioeconomic impacts from Red Dog EIS.

Attachment HH - CS for Senate Bill No. 280 (Finance) am in the Legislature of the State of Alaska, Fourteenth Legislature - First Session.

Attachment II - SRI International, Economic Evaluation and Finance Plan for the Proposed Delong Mountain Transportation System.

Attachment JJ - Table IV-5 from Economic Evaluation and Finance Plan for the Proposed Delong Mountain Transportation System.

Attachment KK - Memorandum of Understanding between the Alaska Industrial Development Authority and Cominco, Ltd. for the Delong Mountains Transportation System.

Attachment LL - Excerpt on Red Dog permit approvals from Red Dog EIS.

Attachment LL1 - April 13, 1983 letter of North Slope Borough Mayor Eugene Brower to William Riley, Environmental Protection Agency; May 10, 1984, letter from North Slope Borough Mayor George Ahmaogak to William Riley, Environmental Protection Agency.

Attachment LL2 - November 1985, Red Dog Master Plan and Rezoning Request, Cominco Alaska. Attachment MM - December 13, 1985, letter from Stephen Brand to John Carnahan.

Attachment NN - "Special Census Results for Oil Related Worksites in the North Slope Borough" from Alaska Department of Labor Alaska Population Overview, 1982.

Attachment OO - Thomas Morehouse, et al., Alaska's Urban and Rural Governments.

Attachment PP - North Slope Borough Capital Improvements Program, FY 1986 - FY 1991.

Attachment QQ - Map of air mileage from Barrow to North Slope Borough communities.

Attachment RR - Map of inbound Marine and Air Cargo Routes, North Slope Borough.

Attachment SS - April 23, 1985, letter from John Schaeffer, MANA Regional Corporation to North Slope Borough Mayor George Ahmaogak.

Attachment TT - Alaska's Mineral Industry, 1984.

Attachment UU - November 19, 1985, letter from North Slope Borough Mayor George Ahmaogak to Local Boundary Commission Chairman Robert Eder.

Attachment VV - Map of natural resources and Alaska boroughs.

Attachment WW - North Slope Borough Land Management Regulations.

Attachment XX - Article from Anchorage Daily News, November 2, 1985, "Native groups vie for right to tax mine".

Attachment YY - November 6, 1985, letter from Peter Gaide, E.F. Hutton, to Mr. James Sharpe, North Slope Borough.

Attachment ZZ - August 2, 1985, memorandum from Kevin Waring to Earl Finkler, North Slope Borough.

Attachment AAA - August 11, 1982, letter from Eric Wohlforth, Wohlforth and Flint, to Gary Thurlow, Matanuska-Susitna Borough.

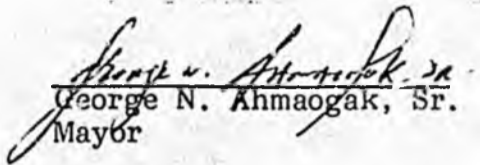
Attachment BBB - "Report to the Local Boundary Commission of the State of Alaska on the Petition to Detach the Lake Louise area from the Matanuska-Susitna Borough", September 9, 1982.

Attachment CCC - "Statement of Decision", State of Alaska Local Boundary Commission, January 8, 1983.

Attachment DDD - November 18, 1985, letter from Vladimir Stadnyk, Standard and Poor's Corporation to Mr. James Sharpe, North Slope Borough.

Attachment EEE - November 20, 1985, letter from Wood Dawson Smith and Hellman to Mr. James Sharpe, North Slope Borough.

Respectfully submitted this 18th day of December, 1935.


George N. Ahmaogak, Sr.
Mayor

FOOTNOTES

1. Petitioner's Attachment 6, pp. 45-46; Petitioner's Attachment 7(a) and 7(b), pp.34 ff.; pp.201 ff.; p. 215; p. 248 ff.
2. Petitioner's Attachment 7(a), p. 123.
3. Petitioner's Attachment 6, p. 22.
4. Petitioner's Attachment 7(a) and 7(b), pp. 44 ff.; pp. 56 ff.; pp. 66 ff.; pp. 98 ff.; pp. 154 ff.; pp. 180 ff.
5. Petitioner's Attachment 4, p. 10; Petitioner's Attachment 7(a), pp. 56 ff.; pp. 166 ff.
6. Petitioner's Attachment 7(b), pp. 241 ff.; pp. 252 ff.; p. 255.
7. Please see, Petitioner's Attachment 23, Environmental Impact Statement Red Dog Mine Project Northwest Alaska at p. 1-4, figure 1-2.
8. Id., at p. 111-4 and 111-5, figure 111-1 and 111-2.
9. Id., _____

10. Table #
NANA Region Population

Year/Source	Population
1970 (U.S. Census)	4,048
1980 (U.S. Census)	4,831
1982 (State of Alaska)	5,343
2000 (EIS Base Case Forecast)	6,985
2000 (EIS Red Dog Impact Case)	7,339

Source: Red Dog Mine Project EIS

Table #
Average Annual Population Growth Rate

Period of Time	Average Annual Growth Rate
1970 - 1980 (actual)	1.8%
Base Case Forecast	1.5%
Red Dog Impact Forecast	1.8%

11. Please see, Attachment II, Alaska Industrial Development Authority and SRI, Economic Evaluation and Finance Plan for the Proposed DeLong Mountain Transportation System.
12. Please see, A.S. 44.88.140 (1984).
13. Please see, A.S. 44.88.140(b) (1984).
14. The Alaska State Housing Authority customarily makes payments-in-lieu of taxes to local governments to help offset local governmental expenditures for improvements, services and facilities furnished to ASHA's tax-exempt housing or public housing projects (AS 18.55.250). The Alaska Power Authority is also authorized (AS 44.83.150) to "make payments in place of taxes in amounts equal to the real and personal property taxes which would be assessed on its real and personal property by each political subdivision in which its property is located to the same extent as if that property were private property and the authority were a non-public corporation."

15. Please see, Attachment LLI, Letter of April 13, 1984 from North Slope Borough Mayor Eugene Brower to Mr. William Riley Environmental Protection Agency; and Attachment LLI, Letter of May 10, 1984 from North Slope Borough Mayor Eugene Brower to Mr. William Riley, Environmental Protection Agency.

16. Please see, 19 A.A.C. 10.240 (b).

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IN RE:)
THE DETACHMENT FROM THE)
NORTH SLOPE BOROUGH OF)
TERRITORY WITHIN AND)
ADJACENT TO THE NANA REGION)

Dept. of Comm. & Reg. Affairs
Div. of Municipal & Reg. Asst.

COMMENTS OF NANA REGIONAL CORPORATION IN REPLY TO BRIEF IN
OPPOSITION TO PETITION FOR DETACHMENT

I. Introduction.

NANA Regional Corporation ("NANA") submits the following reply to the North Slope Borough's Brief in Opposition to Petition for Detachment ("Brief in Opposition to Petition"). The Brief in Opposition seriously distorts the standards under which the Commission must review the petition - advocating a rigid interpretation of those standards that cannot be reconciled with the Commission's constitutional mandate. The Brief in Opposition to Petition also misrepresents important facts concerning the history of the North Slope Borough's southwest boundary, and the subsistence use of the Detachment Area. Finally, the Brief in Opposition to Petition fails to present any persuasive reason why the Commission should delay in approving the petition.

II. The Commission Should Apply the Detachment Standards Flexibly and in Accordance With its Constitutional Mandate.

A. The Commission Must Apply its Standards Flexibly to Meet a Wide Range of Regional Conditions.

Under United States Smelting, Refining and Mining Co. v. Local Boundary Commission, 489 P.2d (Ak. 1971), and Port of Valdez Company, Inc. v. City of Valdez, 522 P.2d 1147 (Ak. 1974), the Local Boundary Commission must adopt standards for boundary changes before it has the power to recommend boundary changes to the legislature. The Commission has complied with this requirement here by adopting the standards for detachment from organized boroughs appearing at 19 AAC 10.225 through 19 AAC 10.250.

While the Commission must adopt standards for local boundary changes, United States Smelting and Port Valdez Co. do not state what those standards must consist of or how they should be applied. On the contrary, the court in United States Smelting carefully excluded itself from reviewing standards adopted by the Commission, or decisions to approve boundary changes under those standards:

Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published stan-

dards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as "political questions," beyond the compass of judicial review. But other annexation issues, such as whether statutory notice requirements were followed, are readily decided by traditional judicial techniques.

489 P.2d 140, 143 (emphasis added). United States Smelting and Port Valdez Co. do not constrain the Commission to apply the standards in 19 AAC 10.225 through 19 AAC 10.250 in the rigid and mechanical fashion advocated by the North Slope Borough.

The correct approach to applying the Commission's standards is indicated in Mobil Oil Corp. v. Local Boundary Commission, 518 P.2d 92 (Ak. 1974). In contrast to the present detachment proceeding, the Commission's acceptance of the North Slope Borough incorporation petition in Mobil Oil was not subject to review by the legislature, but was explicitly subject to judicial review under former AS 7.10.110, which provided in relevant part:

Any person aggrieved by any determination of the commission may appeal to the Superior Court in the manner and within the scope of review prescribed by Sections 24 and 25, Ch. 2 of the Administrative Procedure Act (AS 44.62).

518 P.2d 92, n.5 at 96. Thus, the Commission's action in Mobil Oil was subject to a more stringent standard of review than that which would apply to the Commission's action on this detachment.

The court described the standard of review that it applied in Mobil Oil as follows:

Recent cases have established that where administrative action involves formulation of fundamental policy, the appropriate standard on review is whether the agency action has a reasonable basis. [citations]. A determination whether an area is cohesive and prosperous enough for local self government involves broad judgments of political and social policy. The standards for incorporation set out in AS 07.10.030 were intended to be flexibly applied to a wide range of regional conditions. This is evident from such terms as "large enough", "stable enough", "conform generally", "all areas

necessary and proper", "necessary and desirable", "adequate level" and the like. The borough concept was incorporated into our constitution in the belief that one unit of local government could be successfully adapted to both urban and sparsely populated areas of Alaska, and the Local Boundary Commission has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate. Necessarily, this is an exercise of delegated legislative authority to reach basic policy decisions. Accordingly, acceptance of the incorporation petition should be affirmed if we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence.

518 P.2d 92, 97-99 (footnotes omitted).

As with the standards for borough formation in Mobil Oil, the detachment standards here are appropriately general so that they may be applied to a wide range of regional conditions. As in the case of incorporation, the Commission here has been given a broad power, subject to its adopted standards, to decide in the unique circumstances presented by each petition whether a detachment is appropriate. It is the Commission's duty to exercise this power, applying the detachment standards flexibly to produce a recommendation to the legislature that is appropriate under all the circumstances presented in this case.

B. The Commission Should Consider Additional Factors in Applying the Detachment Standards.

To apply the detachment standards with appropriate flexibility, the Commission must decide what factors, if any, in addition to those listed in 19 AAC 10.230(a)(1)-(3) to consider in evaluating a detachment under the best interest standard in 19 AAC 10.230(a). In applying the best interest standard the Commission must consider the factors stated in 19 AAC 10.230 (a)(1)-(3), and may consider such additional factors as the Commission deems relevant to applying the best interest standard to the facts in this case. At pp. 38-51 of its brief the North Slope Borough also urges the Commission to consider a wide variety of factors other than those listed in 19 AAC 10.230(a)-(1)-(3). NANA suggests that the Commission's decision in this case should indicate what factors the Commission decided to consider in addition to those stated in 19 AAC 10.230(a)(1)-(3).

C. The Commission Should Consider Additional Factors Related to Maximizing Local Self-government.

Although not expressed in the regulations, a major factor supporting detachment is the mandate for maximum local self-government in Article X, Section 1 of the Alaska Constitution:

The purpose of this article is to provide for the maximum local self-government with a minimum of local government units, and to prevent duplication of tax levying jurisdictions.

"Self-Government" implies more than the mere presence of a local government serving the area proposed for detachment. "Self-Government" indicates that the area proposed for detachment should be served by a local government directly accountable to the people immediately affected by local government decisions concerning the Detachment Area. Those people are the residents of the NANA Region. Approving this detachment and the resulting transfer of the Detachment Area to a borough serving the NANA Region clearly would best serve the constitutional mandate for maximum local self-government in the present case.

The North Slope Borough contends that because it is capable of providing government services to, and communicating with, the Detachment Area, 19 AAC 10.230(a)(2) and (3) require that the detachment be disapproved. That is not the case. There are other factors related to maximizing local self-government that the Commission should consider here that are far more important to the merits of the present petition.

The factors stated in 19 AAC 10.230(a)(2) and (3) are most relevant to a pure detachment, one where territory is being detached from an organized borough and returned to the Unorganized Borough. Under those circumstances the heavy presumption in favor of maintaining current local government boundaries that is indicated by the use of words such as "precludes" and "impractical" in 19 AAC 10.230(a)(2), and "precludes" in 19 AAC 19.10.230(a)(3), may be appropriate. Here, however, the proposed detachment is to be conditioned on inclusion of the Detachment Area with the boundaries of another organized borough.

The practical consequences of the detachment proposed here are similar to the consequences of an annexation to one borough of territory in another, rather than the pure form of detachment apparently contemplated by 19 AAC 10.230. Hence in looking for additional factors to use in evaluating this petition, it is appropriate to refer to the standards for annexation of contiguous territory to an organized borough in 19 AAC 10.190(a). Several of the standards listed in that regulation are particularly appropriate to the present case:

- whether the territory is in need of municipal services which the organized borough can provide more efficiently than another municipality or the state (19 AAC 10.190(a)(3))

- there is a reasonable likelihood that future growth and development will occur within the territory and annexation of the territory will enable the organized borough to plan for and control that development (19 AAC 10.190(a)(4))

- residents or property owners receive or may be reasonably expected to receive, directly or indirectly, the benefit of organized borough services without commensurate property tax contributions, whether such services are rendered or received inside or outside the territory (19 AAC 10.190(a)(7))

- whether the annexation is otherwise necessary to accomplish a valid public purpose (19 AAC 10.190(a)(8)).

The Petitioner's arguments for this detachment demonstrate that all of these highly relevant additional factors support approval of the detachment.

D. In applying the Standards for Detachment the Commission Must Balance Local and Statewide interests.

In its previous comments on this detachment, NANA alluded to the Commission's constitutional mandate to assure that local boundary changes conform to statewide, as opposed to merely local, interests. Those comments bear reemphasis. Article X, Section 12 of the Alaska Constitution provided for a Local Boundary Commission so that local government boundaries would be established to serve statewide needs without obstruction by local interests:

Article X [of the Alaska Constitution] was drafted and submitted by the Committee on Local Government, which held a series of 31 meetings between November 15 and December 19, 1955. An examination of the relevant minutes of those meetings shows clearly the concept that was in mind when the local boundary commission section was being considered: that 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 areawide or statewide needs can be taken into account. By placing authority in this third-party, arguments for an against boundary change can be analyzed objectively.

Fairview Public Utility District No. 1 v. City of Anchorage, 368 P.2d 540, 543 (Ak. 1962) (footnotes omitted). In responding to an argument that the Commission's mandate to adjust boundaries in accordance with statewide interests became effective only after boroughs were formed, the Fairview court narrated the history that informed the constitutional convention in the drafting of Article X, Section 12:

This expressed need for state adjustment of local boundaries was of immediate concern, and not something that the delegates considered would arise only after a borough government had been formed. Following World War II the City of Anchorage, the largest municipality in Alaska, experienced such a rapid growth that it soon outgrew its boundaries, and the population of adjacent and contiguous areas became greater than that of the city. This resulted in efforts by the city to annex a number of these heavily populated and unincorporated areas. Those efforts were met by the most determined opposition. In a 1954 case involving the attempted annexation of adjacent territory, Judge Folta remarked:

"Every impediment and dilatory tactic has been employed by the opponents of annexation, except the homesteaders, to obstruct and harass the city in every move in connection with its efforts to extend its boundaries in the traditional manner to include the adjacent areas. Such opposition does not appear to be in the public interest or in good faith."

In 1955 there were petitions for the annexation of three additional areas adjacent to the city. Again there were protests and

concerted opposition, which required determination by the Territorial District Court.

* .. *

We cannot assume that when the delegates to the constitutional convention assembled later in 1955, they were unaware of these obstacles faced by Alaska's cities. We cannot assume that they were insensitive to the inadequacies inherent in a system where needed municipal expansion could be frustrated if the electors in a single urban area outside of municipal boundaries did not agree to annexation. In the light of these contemporary realities, we cannot assume that the adjustment of local boundaries at a state level was intended to be delayed pending the formation of boroughs.

368 P.2d 540, 543-546 (footnotes omitted). This history of Article X, Section 12 demonstrates that the fundamental purpose of the Local Boundary Commission is to assure that boundary changes to meet statewide needs are not obstructed by local interests. It totally refutes the North Slope Borough's repeated assertion that local government boundaries are somehow sacrosanct from "forced" detachment. The framers of the Alaska Constitution wisely provided otherwise.

The interpretation of the best interest standard in 19 AAC 10.230(a) advocated by the North Slope Borough cannot be reconciled with the purpose of the Commission mandated by Alaska Constitution Article X, Section 12. 19 AAC 10.230(a) states the best interest standard as follows:

Territory which is part of a borough may be detached from that borough if, in the determination of the Commission, the detachment would be in the best interests of the state, the territory to be detached, and the borough affected by the detachment.

The North Slope Borough contends that this standard requires the consideration of the best interest of each named entity separately. Under this interpretation, if the Commission determines that the detachment is not in the best interest of the North Slope Borough alone, the detachment must be disapproved. Brief in Opposition to Petition, pp. 29, 38-39. In fact, the North Slope Borough goes so far as to argue that opposition to the detachment by its elected officials and rejection of the

proposed detachment by its voters are enough to defeat the proposed detachment under the best interest standard. Brief in Opposition to Petition, p. 46.

The interpretation of the best interest standard advocated by the North Slope Borough would return local boundary changes to the state of affairs described in the Fairview case as prevailing in territorial days, where concerted local opposition could block a needed boundary change. This interpretation would nullify the fundamental purpose of the Local Boundary Commission under the Alaska Constitution. If the best interest standard were so interpreted it undoubtedly would be held unconstitutional and void.

However, there is another, no less reasonable, interpretation of the best interest standard which avoids the constitutional infirmity of the North Slope Borough's interpretation. That is that the Commission must determine the best interests of the three named entities as a whole, by balancing the best interest of each. Under this interpretation, the Commission may determine that the positive effects of the proposed detachment on one entity outweigh the negative effects of the proposed detachment on another entity. The latter interpretation conforms to the function of the Commission described in Fairview - to consider statewide as well as local interests in reviewing a proposed boundary change. Moreover, this interpretation conforms to the rule of statutory construction that an interpretation under which a provision is constitutional is preferred to an interpretation which renders the provision constitutionally infirm. Hammond v. Hoffbeck. 627 P.25, 1052, 1059 (Ak. 1981).

III. The Proposed Detachment Conforms to the Best Interest Standard.

While NANA submits that the proposed detachment is actually in the best interest of the North Slope Borough, the Commission should find that any harm to the North Slope Borough resulting from the detachment is outweighed by the substantial state interest in maximizing local self-government and promoting economic development. In addition to the arguments under the best interest standard in the Brief of Petitioner and the previous NANA comments, NANA submits the following comments in response to the Brief in Opposition to Petition.

The North Slope Borough exaggerates the financial effects of the proposed detachment. The financial community will not perceive the proposed detachment as a precedent for the wholesale dismemberment of the North Slope Borough, much less of other Alaskan municipalities. The capacity of the Local Boundary Commission independently to review each detachment proposal on its individual merits assures that detachments will not be

approved indiscriminately. The present detachment is supported by a unique set of circumstances that do not have a parallel elsewhere in the state. It is no precedent for the boundary changes upon which the North Slope Borough speculates at pp. 41-43 of the Brief in Opposition to Petition. The North Slope Borough has not produced any disclosure document, used in the sale of its bonds, to demonstrate that investors have been led to rely on tax revenues from the Red Dog Mine project in evaluating the North Slope Borough's credit. If this detachment may be defeated by the hypothetical concerns about creditworthiness raised by the North Slope Borough, then so may any detachment. The \$33 million in tax revenues that the North Slope Borough claims it will lose over the next 10 years (Brief in Opposition to Petition, p. 46) amounts, on an annual basis, to only 1% of the borough's current annual operating budget of \$329 million.

The North Slope Borough also seriously understates the cost of providing services to the Detachment Area as the Red Dog deposit is developed. In describing the available air communications among its villages at p. 35 of the Brief in Opposition to Petition, the borough neglects to mention the annual cost to the borough of this service, or the additional cost of extending that service to the Detachment Area. The suggestion that such a service might be provided does not address the issue of the inefficiency of that service as compared to air service from Kotzebue, which already is commercially available. Moreover, the North Slope Borough's assertion that the Red Dog Mine project will not generate any exceptional demand for government services within the Detachment Area (Brief in Opposition to Petition, p. 35) is contradicted by the borough's position concerning the provision of local services to the Prudhoe Bay oilfield area. In opposing reductions in its tax limit under AS 29.53.045 and in its revenue sharing entitlement, the borough has asserted that it provides substantial and costly services to the Prudhoe Bay - Deadhorse area (Attachment 1, pp. 1-2).

The interests that the Commission is to weigh in reviewing this petition are public interests. Private interests are not relevant to the Commission's decision. Nonetheless, the North Slope Borough repeatedly refers to benefits to NANA and Cominco resulting from the detachment. These references distort the facts and warrant a brief response. Whether the detachment is approved or not the Detachment Area will be part of an organized borough. If the detachment is approved the regulatory and tax policies of the borough for the NANA Region may or may not be more favorable to NANA and Cominco than those of the North Slope Borough. The issue will not be determined by NANA and Cominco, but by the residents of the NANA Region and the officials whom they elect. For example, while for planning purposes the new borough's property tax revenues are projected on the assumption of a 3 mil tax rate, nothing would prevent the new borough

assembly from selecting a higher rate. Whatever the outcome, the fact that residents of the NANA Region may make different choices about local regulatory policy and taxation than residents of the North Slope Borough is the very essence of the local self-government that is to be maximized under Article X, Section 1 of the Alaska Constitution.

IV. The Southwest Boundary of the North Slope Borough Established in 1972 Must be Corrected in Accordance with Present Circumstances.

The location of the southwest boundary of the North Slope Borough was not given significant consideration when the Commission reviewed the North Slope Borough incorporation petition in 1971 and 1972. The citations to the Local Boundary Commission record at p. 17 of the Brief in Opposition to Petition only show that on two occasions when the NANA protest of the North Slope Borough's southwest boundary was discussed, the issue was dismissed with the observation that the area was uninhabited.

MR. HEDLAND: Now, if we excluded the area that they're objected to, would you still be including Point Hope?

MR. STRANDBERG: Yes, you would, I'd like to point out something on the map here that they submitted. They note that the exclusion will be areas within the proposed borough South of 68 degrees North latitude and between 154 and a 164 degrees West longitude.

MR. HEDLAND: It's this area here that they're objecting to.

MR. STRANDBERG: If we go to the map and plot it on the the map, its this area right here. Let's see, where is the 69 degree line? It would be about half way. Now, where is 164 degrees? Right here. So the intersection is right about here and the area that they want to exclude comes over here to 154 degrees.

MR. HEDLAND: Does that go right along the Colville River here?

MR. STRANDBERG: No. they're swinging over here on the 69 degree latitude line.

MR. HEDLAND: Is any of that land populated?

MR. STRANDBERG: Let me see. Where is Noatak? No, there is no population there.

MR. HEDLAND: You're talking about land that nobody lives on. The boundaries of the Arctic Slope Land Claims Corporation are what?

MR. STRANDBERG: They're as is proposed for the borough here.

MR. HEDLAND: Well, this contested area here by the Northwest Native Association, is that part of the Arctic Slope or the Northwest Native Land Claims Corporation?

Mr. There is a little conflict overlapping those two claims, Northwest has claimed on up and the Arctic Slope has claimed on down so this area is in conflict.

MR. HEDLAND: Weren't the boundaries set out in the Land Claims Act?

MR. Well, by reference yes. The Secretary of the Interior is directed by statute to conform the regional incorporations to be the same as the existing regional associations unless good cause exists to the contrary.

MR. HEDLAND: Okay, but there's nobody living in this area, I take it, that is contested between the--

MR. If I can add or volunteer a statement, there's a misapprehension as to the boundary of the borough, Northwest has the idea that it's a fence. We had trouble on the Slope.

Attachment 7 to Brief in Support of Petition, pp. 35-37.

MR. HEDLAND: As far as geography is concerned, ethnic relations there isn't any question at all.

MR. North Slope, this was more to form their corporation boundaries with the Lands Claim. There's one little area that they're going to iron out.

MR. On the boundaries on the execution of the Alaska Native Land Claims, the Northwest Native Association and the Tanana chiefs have resolved their boundary problem.

MR. The dispute was over uninhabited land anyway. There wasn't--it wouldn't effect--it doesn't effect--substantially--it's basically bounded by the ocean and the Brooks Range which are certainly natural boundaries.

Id. at p.215.

At p. 17 of the Brief in Opposition to Petition, it is asserted that "the Local Boundary Commission was informed of the mineral resources and development potential of the southwest sector of the proposed borough." The record cited in support of this assertion does not support any inference that the Commission was aware of any mineral potential within the Detachment Area, much less aware of the Red Dog and neighboring zinc deposits. The cited testimony is only a highly generalized discussion of the presence of coal and petroleum resources in the southwestern part of the North Slope Borough. It offers no basis for asserting that the Commission was aware of, or considered, the presence of, zinc or other metal ore deposits in the Detachment Area in establishing the southwest boundary of the North Slope Borough.

Most importantly, no matter how well-considered was the Commission's decision concerning the North Slope Borough's boundaries in 1972, the present petition requires the Commission to consider anew the location of the North Slope Borough's southwest boundary in the light of present circumstances. The Commission is not bound now by its 1972 decision. If the Commission could not reassess previous boundary decisions in response to boundary change petitions, its power to approve boundary changes would be rendered meaningless.

Before the Local Boundary Commission in 1971, NANA vigorously protested the location of the southwest boundary of the North Slope Borough. In early 1972, the Local Boundary Commission nonetheless established that boundary contrary to NANA's position. Thus when NANA was presenting its position on the boundaries of its region, the boundaries of the North Slope Borough were an accomplished fact. Faced with this fact, NANA did not acquiesce in it, but merely argued that the North Slope Borough boundary did not preclude the establishment of a more appropriate region boundary. Similarly, it is turning history on