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of other violent criminals have been handed sentences as grave as the death penalty because researchers now can literally disassemble DNA, and examine it for microscopic variations that make human beings (except for identical twins) verifiably unique to a statistical certainty.

DNA testing's power to identify so specifically is a boon not only to the police but also to the wrongly accused, who now have an avenue of exoneration. This is a fact of compelling consequence in death-penalty cases where, if tissue samples survive from the crime in question, the chances of executing an innocent person may be dramatically reduced.

"We see it as probably the most significant thing for the century," says John W. Hicks, a deputy assistant director of the Federal Bureau of Investigation, which plans to open its own DNA identification laboratory this winter.

DNA TESTING REPresents the first major breakthrough in forensic detection since Sir Edward Richard Henry figured how to use human fingerprints to identify criminals, at the turn of the century.

DNA probe analysis grew out of basic genetic research, with far different aims. A kind of serendipitous gift to police science, it takes advantage of a peculiarity within the human genetic code. Along the three feet of the double helix in each complete DNA molecule there exists, in addition to the tens of thousands of protein-coding genes, a so-far indecipherable wilderness called the intron. The intron, although it seems mostly chaotic, nevertheless contains certain repetitive sequences of the genetic alphabet, which geneticists sometimes call "stutters" or "burps."

To exploit these stutters for identification purposes, scientists use a technique that forms this genetic material into a distinctive pattern, similar to the universal bar codes on retail merchandise.

The degree of certainty that can be attained depends on a number of factors, one of which is the number of probes applied. A single probe might produce a pattern unique to one person in a hundred. The application of a second probe with the same discriminating power then produces a combined pattern unique to one person in ten thousand. After several more probes, the final pattern might be unique to one person in a trillion, two hundred times as many people as exist on earth today. If this pattern matches the bar code for the suspect's DNA, the test has produced an identification every bit as reliable as a human fingerprint.

Almost any tissue sample is a potential candidate for testing. Bone, blood, semen, skin and hair (if it contains the root) all contain DNA, and are recovered from the scenes of violent crimes more often than are fingerprints. Noncellular body fluids such as saliva, urine and sweat can also carry testable quantities of DNA. This means that a discarded cigarette butt, shoes, a handkerchief, a wad of gum, or even the inner part of a hat or watchband could yield DNA evidence to solve a crime.

The potential for 100 percent certainty makes this a singular forensic tool. The best that other techniques, such as serology and hair-analysis, can hope to establish is a 90 to 95 percent level of certainty leaving room for reasonable doubt, and acquittal.

"DNA has really opened up some valuable avenues," says Mac McLeod, Assistant State Attorney in Daytona Beach, Fla. He first used DNA evidence this spring in a successful murder prosecution, in which Randall Scott Jones was sentenced to the electric chair. "Before, with evidence like hair, your people could only come back and say, 'It's the same kind of hair.'" McLeod is currently awaiting DNA test results on hair specimens in another capital case. "It's going to be crucial," he says. "If it comes back positive, we're going to convict the guy of first-degree murder. If it comes back negative, we've got a long way to go."

THE FIRST MURDER suspect to be identified and charged solely as a result of DNA analysis was a 27-year-old Briton named Colin Pitchfork, who, in September 1987, was charged with two murder-rapes near Leicester, England. His arrest culminated a four-year investigation. Pitchfork's DNA not only singled him out as a suspect but also cleared another young man who had confessed to the crimes.

The technique used to identify Colin Pitchfork was developed by a University of

Leicester ge[illegible]st, Alec J. Jeffreys, who gave it the trademark name DNA Fingerprinting. He has assigned the process in the United States to Cellmark Diagnostics, in Germantown, Md. Cellmark and Lifecodes (which uses a slightly different technology) operate the only two labs in the United States now conducting this kind of testing commercially.

Enthusiasm for the technique is building. Virginia, Florida and California are starting up their own DNA labs. California, anticipating the technology's advent, in 1985 passed a law mandating that all convicted sex offenders provide blood and saliva specimens at the time of their release from prison. According to Steve Helsley, chief of the California Attorney General's Bureau of Forensic Services, the more than 4,200 samples collected will be submitted for DNA testing, and will provide the basis for a computerized forensic DNA data bank to complement a computerized system the F.B.I. proposes to establish. The Colorado Legislature is considering a specimen-collection bill similar to the California statute. And in Seattle, where the Haynes case received wide publicity, such a county ordinance has already passed.

The first case in this country in which a conviction hinged almost exclusively on DNA testing occurred in early November of last year. An Orlando, Fla., judge sentenced the defendant, Tommie Lee Andrews, to 22 years in prison for rape. Last month, New York joined the number of states with a DNA conviction to its credit. In Queens, Victor Lopez, 46, the so-called "Forest Hills rapist," was convicted on an 18-count indictment. Although Queens Assistant District Attorney Robert Arena was able to put four of Lopez's alleged victims on the stand to identify him as their attacker, it was his presentation of the DNA evidence that ultimately swayed the jury. "That was the only thing that opened my eyes. That was the whole case, in my opinion," the jury forewoman Catherine Allen told a Newsday reporter.

DNA testing is not free of problems. The proprietary nature of the technique (the United States patent is pending) means that the F.B.I. and any regional forensic laboratory will have to pay fees to Lifecodes and Cell-

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mark. They now charge $300 for every sample submitted, but when others, like the F.B.I., get into business for themselves and rely on the two companies as suppliers for probes, the costs may escalate. "That's the thing we're worried about," says James J. Kearney, head of the Bureau's Forensic Science Research and Training Center, part of the F.B.I. Academy complex at Quantico, Va. "It could cost quite a bit."

DNA testing can also detect genetic abnormalities, wholly separate from its power to discriminate among individuals for forensic purposes. This raises concerns among civil libertarians. The first commercial uses of this technology were in paternity cases, and Lifecodes expects to profit much more handsomely from medical diagnostics than from forensic testing. Probes some day may be used to isolate defective genes, for instance, or in cancer diagnosis, raising the possibility of early gene therapy, in which a mutant or rogue gene's destructiveness might be mitigated or blocked. Some medical and legal experts foresee the possibility that an insurer or employer might run a DNA probe to check for information on susceptibility to genetic disease.

Prof. E. Donald Shapiro at New York Law School, co-author of "Law, Medicine, and Forensic Science," argues that its uses must be monitored. "It's like any sort of scientific technique," says Shapiro. "It should be limited to where the public has a vested interest, such as in crime." He would like to restrict medical applications of DNA analysis to diagnosis. He also suggests requiring that patients give their informed consent before the testing can be done. Since these records inevitably would be computerized, Shapiro favors making unauthorized access to them a felony.

DNA ANALYSIS CAN not be run on minute samples, a problem that is addressed by a complementary new technology called polymerase chain reaction (P.C.R). Owned by the Cetus Corporation of Emeryville, Calif., and licensed for police applications to Forensic Science Associates of nearby Richmond, P.C.R. solves the problem of what to do when there isn't enough tissue sample to run a DNA analysis. P.C.R. induces the material to replicate itself, much as it does naturally. It also offers the advantage of retrieving information from old or degraded tissue specimens. Archeologists have used P.C.R. to amplify trace amounts of DNA from a 40,000-year-old Siberian mammoth.

According to Dr. Ed Blake, a partner at Forensic Science Associates, his company has accepted at least 30 forensic P.C.R. cases. They include the hair analysis that McLeod, the Daytona Beach Assistant State Attorney, is waiting for. Of these examinations, the single one used in court, to date, was also part of Blake's most macabre case. Two Pennsylvania nursing-home owners, Helen and Walter Pestinikas, were indicted for negligent homicide in the alleged starvation death of one of their elderly patients, and with trying to cover up their crime by switching the victim's desiccated organs with those of another cadaver.

Blake and his team were able to determine that a part of one gene they isolated from the heavily damaged DNA of the exhumed organs occurred in only 10 percent of the population, enough to establish that the organs were those of the deceased. The P.C.R. results cleared the defendants of organ-switching, though the murder rap stuck. The results may only have succeeded in making the Pestinikases appear marginally less sinister, but their acceptance in court helped validate the technology as a new and useful forensic procedure.

DNA TESTING HAS proved to be particularly useful in conjunction with other forensic testimony. Last May, Randy D. Pioletti, a mortuary worker, was brought to trial in Wichita, Kans. Pioletti had been accused of the murder six months earlier of his estranged wife; the prosecutors, Ann Swegle and James Ward, charged that Pioletti then had partially incinerated his wife at the mortuary crematorium.

The day after the murder,

'We see it as probably the most significant thing for the century,' says an assistant director of the F.B.I, which soon will open its own DNA lab.

Pioletti left a five-gallon bucket at the house of a friend; he said it contained rags. The police later found it to be half-full of broken and charred bones. A forensic pathologist determined that the remains were human, and a forensic anthropologist then described the bones as those of a woman of the approximate height and posture of the vanished Mrs. Pioletti. The pelvis revealed evidence of childbirth within the past five years; Mrs. Pioletti had borne a child during that period. A necklace identical to one of hers also was discovered in the bucket.

Other evidence placed the defendant in Mrs. Pioletti's company the night of her disappearance, and at the mortuary the following day. The forensic evidence almost certainly identified the remains as the victim's. What remained was to place her at the crematorium. This was made possible by means of a DNA test, performed by Lifecodes, on a blood sample fortuitously found on the side of the oven. Randy Pioletti continued to deny his culpability, but the jury convicted him of first-degree homicide and aggravated kidnap.

Needless to say, DNA testing has proved a nightmare for defense attorneys with guilty clients. "If they print your guy with this stuff you're dead," says Mac McLeod. "You can't combat it. There is no defense to it."

So far, no appeal has successfully challenged the legality or constitutionality of DNA forensic testing, or the California law requiring sex offenders to submit tissue specimens as a condition of their release from prison. Most of the current legal excitement, on the contrary, is over how fast and how far DNA can be exploited to catch criminals.

An insurmountable problem for defense attorneys has been the unwillingness of credible experts to question the basic scientific premise for DNA analysis. "It's a major part of all that we accept as true in all medical science," points out Dr. Carole Jenny, director of the Harborview Sexual Assault Center in Seattle.

This is why no new case law is likely to emerge from the first courtroom use of the technology. Kenneth Witts, the Florida public defender, has based his appeal for Tommie Lee Andrews, who was convicted of rape, on "the test as Lifecodes runs it, as opposed to the general reliability of DNA testing." He has done so, Witt says, because in the original trial, the defense failed to produce any witness who would say that DNA testing in and of itself isn't reliable. "Had they done that, I would have had much more to work with," he adds.

Still, there are lingering fears in the legal community that a premature rush by prosecutors to use DNA evidence might expose it to innovative legal attack, and perhaps permanently damage its credibility. Such concerns have led California Attorney General John K. Van de Kamp to urge his state prosecutors to hold off on the technology until its reliability has been further validated.

One possible defense strategy, says Professor Shapiro, would be based on the legal requirement governing the admissibility of scientific evidence. This rule flows from the 1923 Frye decision restricting the use of lie-detector results in court. It reads, in part, that a new technology must "have gained general acceptance in the particular field in which it belongs."

Frye Test

"I would attack," says Shapiro, "on the issue that it has not been given the broad validity checking in the community" that Frye mandates. He attributes this to the fact that the "technology is not really typical and open to all. It's proprietary," he says. "It's a money-making technology."

Oliver C. Schroeder, professor emeritus at the Case Western Reserve -University of Cleveland School of Law, expects there ultimately will be a constitutional challenge to the new technology, although he doubts it has a chance to succeed. He ex-

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plains, and Shapiro concurs, that issues such as protection against self-incrimination, unreasonable search and seizure and due process in the taking of suspects' tissue samples have all been raised on behalf of drunk drivers and drug traffickers, and that they have failed to move the Supreme Court. "A constitutional differentiation for DNA testing might be made," he concedes, particularly if it involves a needle for extracting blood.

Knowledgeable observers such as Schroeder worry more that DNA testing may not turn out to be consistently reliable. They question the quality of the work that regional labs will do. "The more sensitive the test, the greater the possibility it has been done improperly," he says. "You'll have people in the crime labs who are not qualified to do this DNA test. The problem is already there with other scientific evidence..."

"Also," Schroeder goes on, "heads of [police] crime labs [sometimes] tell me that they have been told to find a certain result. Now that's not strange, because the loyalty of the scientist is not to science there; it's to his job. If he wants to be loyal to science, he better get a job somewhere else."

DNA testing may be further limited by the need for well-preserved specimens. Moisture, heat and even daylight accelerate the natural process of DNA degradation in tissue samples. "I can guarantee you," the F.B.I.'s Kearney says, "that if I draw your blood, put it on a piece of cloth and keep it under relatively humid conditions at body temperature, within three days I'm not going to be able to do the DNA analysis on it." Ideally, Kearney explains, semen, blood and other body tissue or fluids from a crime scene should be quickly air-dried and then frozen away from light — often a practical impossibility in the real world of crime detection and investigation.

Many forensic experts caution against unreal expectations that DNA testing will have a dramatic impact on overall criminal conviction rates. Its chief use, they say, will be in solving sex crimes. But other felonies where a suspect is likely to leave his or her DNA behind include, according to the F.B.I.'s John Hicks, extortion cases (where saliva might be left on a ransom note's envelope glue or behind its stamp) or in terrorist or armed robbery cases, if a suspect wears a ski mask.

For common felonies such as burglary, or for the majority of homicides — committed at a distance with firearms — the odds of recovering a suspect's DNA are low. There are also confounding circumstances in rape prosecutions. It is in only a minority of cases that semen-sample collections are made. And according to prosecutors, at least half of all rape defendants are unconcerned about being identified, because their defense is that the act was consensual.

Despite these caveats, the F.B.I. in particular is undeterred in its enthusiasm for DNA testing. "I am intently interested in it," Director William S. Sessions told a Florida gathering of agents in May. "I know that it must succeed and I am confident that it will."

Once the F.B.I. establishes itself in the testing business, it expects to move toward digitalizing DNA analysis results, in the same way that fingerprints are now being translated into computer codes. Assuming some sort of multicharacter, alphanumeric personal DNA identity tag is found feasible, it might be added to computerized missing persons' files, or used to help identify the thousands of anonymous deceased whose physical descriptions are logged into national law-enforcement computers.

The F.B.I. system could be of special importance in tracking down serial killers and repeat sex offenders, who are thought to account for the bulk of sex crimes. Beginning with the California sex-offender DNA profiles, the computer might eventually contain a comprehensive, standardized cross-referenced criminal file that could be scanned for possible matches between tissue specimens of unknown origin and the unique individuals who left them.

For now, DNA analysis has demonstrated its power to crack previously unsolvable cases. For that reason alone, it merits the excited attention it has received in law-enforcement circles. But as Dr. Ronald C. Dorazio, a vice president and co-founder of Lifecodes is quick to point out, "We're really only one step out of the laboratory with this."

If the legal and scientific issues DNA testing has raised are satisfactorily resolved, DNA's future applications to police work may be restricted only by the scientists' imaginations. "We've had an incredible explosion of knowledge," says Dr. Jenny of Seattle. "This technology is going to progress at a fantastic rate." ■

DNA FINGERPRINTING: POSSIBILITIES AND PITFALLS OF A NEW TECHNIQUE

Dan L. Burk*

ABSTRACT

A technique popularly called DNA fingerprinting holds the potential to significantly impact legal evidence of identity. This article outlines the technical steps involved in DNA fingerprinting, distinguishing the test from similar techniques. The article further describes the technical limits of DNA fingerprinting, and suggests the legal questions the test may raise.

I. INTRODUCTION

The headlines proclaim it will revolutionize legal evidence: "DNA fingerprinting," a new method of identification that has caught the attention of the popular press.[1] The scientific community developed and uses this technique to investigate human genetics,[2] but now the technique is touted as the solution to legal questions from murder to paternity. Promotional literature from commercial firms offering the technique predict that it will be helpful in solving not

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[1] "DNA minisatellite analysis" would be a more appropriate title, as this article describes. The technique's popular nickname may prove to be particularly unfortunate because it creates in the mind of most persons as association with conventional fingerprinting. *See infra* note 65 and accompanying text.

[2] *See* Jeffreys, Wilson & Thein, *DNA Fingerprints and Segregation of Multiple Markers in Human Pedigrees*, 39 AM. J. HUM. GEN. 11 (1986) for a recent example.

only cases of paternity and homicide, but rape, assault, missing persons, unidentified bodies, unsolved crimes, and even hit-and-run.[1]

Are these predictions likely to come true? British immigration officials have relied on DNA fingerprinting at least once,[4] and other law enforcement applications are likely to follow. The technique has also been used to exclude suspects in one widely publicized murder case,[5] causing the press to call the test "foolproof," not unlike "supermarket bar code."[6] Jurors in a recent Florida case similarly believed the test "foolproof,"[7] and found the defendant guilty when no rebuttal was offered to the DNA evidence.[8] Courts on both sides of the Atlantic remain cautious about the DNA fingerprints, although reports in the popular press have begun to attract the notice of concerned American courts.[9]

This article reviews the process by which DNA fingerprints are generated, the advantages and disadvantages of the technique, and the technique's relationship to similar forms of genetic identification. Although scientific jargon and journalistic enthusiasm have previously obscured many details of the technique, a plain explanation should be comprehensible to judges, attorneys, and jurors from all backgrounds. Finally, the article raises several legal questions that stem from the technique's strengths as well as from its limitations; courts in the United States must carefully evaluate such questions before embracing this test. We must begin our description of DNA fingerprinting, however, by outlining some essential background information about DNA and its manipulation.

II. BACKGROUND

Our bodies are composed of tiny functional units called *cells*, each of which contains information packaged as deoxyribonucleic acid, or DNA. This enormously long molecule carries information for a cell much the same way magnetic tape carries information for a stereo system. DNA interacts with cellular machinery just as the tape interacts with a tape deck. Rather than recordings of music or words, though, our DNA molecules carry instructions on how to construct and operate a human body.[10]

Information is often carried most efficiently in a code. Morse code carries words as dots and dashes; computer memories carry software as binary digit code. DNA also carries its information in coded form. DNA is composed of two parallel chains of *bases*. The four different bases, designated A, T, C, and G, encode information for the cell. The *sequence* of the bases in a DNA chain carries instructions for the cell in the same way dots and dashes carry words in Morse code.[11]

The physical shape of the DNA molecule is a "double helix" structure. This may be thought of as a sort of twisted ladder, with the rungs corresponding to base pairs. Some have compared the DNA structure to that of a zipper: two parallel strands, with teeth or bases pairing in the middle.[12] DNA base pairing is very specific, however: A will pair only with T, and C will pair only with G. A DNA strand can only be "zipped up," or *hybridized* with another strand that has a matching, complementary base sequence.

DNA in the cell is contained in packages called *chromosomes*. An individual inherits half of his or her chromosomes from each parent. The combined information encoded in the base sequences of the inherited chromosomes is called the *genome*; this information determines the individual's physical characteristics. Each body cell contains a complete set of chromosomes, a complete DNA "blueprint" for the entire person. No cell uses the entire "blueprint," however. Cells in different parts of the body read only the sections of DNA that they need to perform their functions.

In a laboratory, DNA may be examined by cutting the long chromosomal chains into short pieces. The DNA is cut using protein molecules called *restriction enzymes*. These enzymes will cut DNA only at very specific points. The enzyme acts as a "magic pair of scissors"; it recognizes a specific base sequence in the DNA and cleaves the DNA only at that place.[13] Different restriction enzymes recognize different sequences. The sequences that the enzyme will recognize may be from 4–8 bases long. Such sequences are scattered at random throughout the genome. Because the restriction enzymes cut only at

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[1] *Background Information: DNA-PRINT™ Identification Test*, Lifecodes Corporation (1986). Lifecodes is a firm offering a type of DNA test commercially in the United States; they have quite vigorously publicized and marketed their service.

[4] Jeffreys, Brookfield & Semeonoff, *Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints*, 317 NATURE 318 (1985).

[5] *See* Begley, *Leaving Holmes in the Dust*, NEWSWEEK, Oct. 26, 1987, at 81; L.A. Times, March 11, 1987, at 113, col. 1.

[6] *DNA Prints: A Foolproof Crime Test*, TIME, Jan. 26, 1987, at 66; Washington Post, Sept. 20, 1987, at A23.

[7] Arizona Republic, Feb. 7, 1988, at A3, col. 1, reporting on Florida v. Andrews, No. CR 871400 (Orlando 1987).

[8] *Id.*

[9] Several trial courts have admitted DNA tests into evidence, but no cases have reached an appellate level, nor are any reported. A court in Rockland, New York admitted the test as evidence, and other New York trial courts are considering the matter. *See* New York Law Journal, Feb. 24, 1988, at 1, col. 3. Cases in Oklahoma and Pennsylvania have used DNA evidence, although the tests were insufficient to obtain convictions. *See* Moss, *DNA—The New Fingerprints*, A.B.A. J. May 1, 1988 at 68. A Maryland appellate court has also made passing mention of the test in its discussion of another type of genetic identification. *See* The Washington Post, Sept. 20, 1987, at A23; *see also* Cobey v. Maryland, No. 237, slip op. at 2 (Md. Ct. Spec. App. filed Dec. 2, 1987) (LEXIS, States Library, Omni file).

[10] For a more detailed discussion of DNA structure and function, *see generally* B. LEWIN, GENES II 17-22 (1985).

[11] Similarly, a sequence of ones and zeroes carries information for computers. Biological information storage and retrieval, in fact, closely parallels a computer model. The DNA molecule interacts with cellular machinery much the same way a floppy disk interacts with computer hardware. Sequences in the DNA define an "operating system" for reading and processing its coded information. The DNA code is acutally a "machine language"; cellular hardware must translate the code into a different language before it can be expressed.

[12] Kelly, Rankin, and Wink, *Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist*, CRIM. L. REV. (London) Feb. 1987, at 106.

[13] *See generally* B. LEWIN, *supra* note 10, at 68–70.

their specific recognition sequences, digesting a person's DNA with a certain restriction enzyme will produce the same pieces every time.

As an example, consider a section of DNA as illustrated in figure 1. The section is 10,000 bases or 10 *kilobases* long. This DNA section happens to have three cleavage sites which would be recognized by a certain restriction enzyme. Cutting this section with the enzyme, as illustrated by the arrows, produces two fragments: one 4kb long and another 6kb long. We will call these fragments A and B respectively. Each time this person's DNA is cut with this restriction enzyme, these same fragments will be produced. The production of these fragments is a recognizable characteristic, like height or eye color. This characteristic is inheritable. Because every body cell contains a complete copy of a person's DNA, the same fragments should be produced by cutting DNA from any body cell.

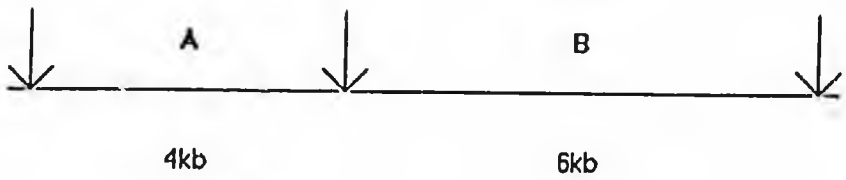

fig. 1

III. THE METHOD OF DNA FINGERPRINTING

Just as the characteristics of height or eye color may be useful for identification, the characteristic of producing certain restriction fragments may be useful for identification. Other biochemical identification tests, such as blood typing, compare some cellular expression of information in the DNA. Identification by comparing restriction fragments would examine the DNA itself. Since the same restriction fragments are produced from each body cell, this characteristic may be particularly useful for identification based upon forensic samples—they can be identified from cells in blood, semen, or hair roots.[14] Because they comprise an inheritable characteristic, the fragments may be useful in determining relatedness, such as paternity.[15]

First, though, laboratory techniques must be employed to visualize and compare the fragments from different samples. DNA molecules are far too small to be examined individually; instead, groups of identical molecules are examined. Determining the sequence of these DNA molecules would be a difficult and time-consuming task; the behavior and physical characteristics of the molecules are much easier to observe. DNA fingerprinting and similar techniques therefore test samples of DNA first for the presence of certain restriction enzyme sites, and second for the size and type of restriction enzyme fragments produced.

Comparison of restriction fragments begins in the laboratory by cutting the DNA from a sample with a restriction enzyme. Samples of the fragmented DNA are then loaded into small holes cut into one end of an *agarose gel*. The gel, which resembles a slab of Jell-O, is placed in a tray of an electrolyte solution. An electric current is applied through the solution. Because DNA fragments have a negative electrical charge, they will migrate toward the positive electrode at the far end of the gel as illustrated in figure 2. This technique, called *gel electrophoresis*, sorts the DNA fragments according to their length.[16]

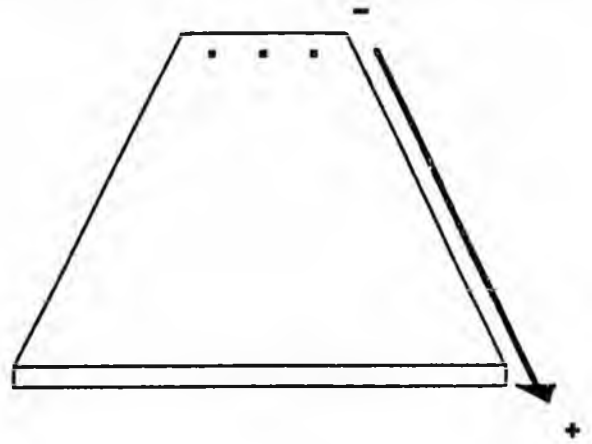

fig. 2

The movement of the fragments through a gel is similar to the movement of a person carrying a rod through a dense forest. If the rod is a short baton, she may move rapidly. If the rod is a long pole, however, her movement will be

[14]Although such samples seem tiny by everyday standards, in the worlds of biochemistry or forensics, these are fairly substantial amounts. *See infra* note 28 and accompanying text. The test is not quantitative, and compared to antibody techniques such as ELISA or RIA, quite insensitive. Recently publicized reports concerning DNA typing from single hairs concern techniques far less accurate than DNA fingerprinting. *See* Higuchi, von Beroldingen, Sensabaugh & Erlich, *DNA Typing from Single Hairs* 332 NATURE 543 (1988).

[15]For discussion of a recent application, *see* Baird, Balazs, Giusti, Miyazake, Nicholas, Wexler, Kanter, Glassberg, Allen, Rubinstein, & Sussman, *Allele Frequency Distribution of Two Highly Polymorphic DNA Sequences in Three Ethnic Groups and Its Application to the Determination of Paternity*, 39 AM. J. HUM. GEN. 489 (1986) [hereinafter Baird].

[16]*See generally* B. LEWIN, *supra* note 10.

impeded and she will move quite slowly. By the same principle, short DNA fragments move a greater distance through the gel matrix; large fragments move more slowly. When the current is turned off, fragments of different sizes have moved different distances. Long pieces of DNA remain near the top of the gel, and short pieces are found near the bottom. Gel electrophoresis is sensitive enough to accurately measure a fragment's size by its final position in the gel.[17]

While agarose gels are excellent for separating fragments, the gel is messy and inconvenient for later phases of DNA manipulation. The separated DNA is therefore fixed to a thin sheet of *nitrocellulose* filter. This procedure, called *Southern blotting* for its inventor, transfers the fragments in exactly the same positions they occupied in the gel. The fragments of interest are now visualized using a DNA *probe*.[18]

Probes are created using sophisticated recombinant DNA technology. Using this technology, a fragment such as the 6kb length we designated B may be isolated and placed in a microorganism. There, the fragment is reproduced thousands of times. The fragment is then reisolated and purified; one strand of the fragment is labeled with a radioactive marker. The labeled strand, which we shall call B', is used to probe the nitrocellulose filter. Because DNA hybridization is very specific, B' will pair only with strands on the filter which have a matching sequence—that is to say, with fragment B. Because of the probe's radioactive label, a piece of X-ray film left in contact with the filter will show a dark band at the position where the probe pairs with fragment B. The piece of exposed X-ray film, called an *autoradiograph*, allows us to see the positions of specific DNA fragments, as illustrated in figure 3.

Just as it is possible for individuals to have different eye or hair color, it is possible for individuals to display different band positions. Some individuals' autoradiographs may show a dark band closer to the top of the gel than the place we would expect for the 6kb B fragment. This change in band position is due to a difference in the person's DNA sequence. An inheritable change in DNA is called a *mutation*. A mutation in some ancestor may have changed a restriction enzyme recognition site, and no cut will occur at that point.

If such a sequence change occurs between sections A and B in figure 1, no 6kb fragment would be created. The 10 kilobase section would remain intact. The B' probe would still recognize the matching B sequence, however, so a dark band would show the position of the 10kb fragment. Because the 10kb fragment is larger than a 6kb fragment, it will appear closer to the top of the gel.

[17] *See generally* Elder & Southern, *Measurement of DNA Length by Gel Electrophoresis II: Comparison of Methods for Relating Mobility to Fragment Length*, 128 ANAL. BIOCHEM. 227 (1983).

[18] *See generally* B. LEWIN, *supra* note 10, at 287–89.

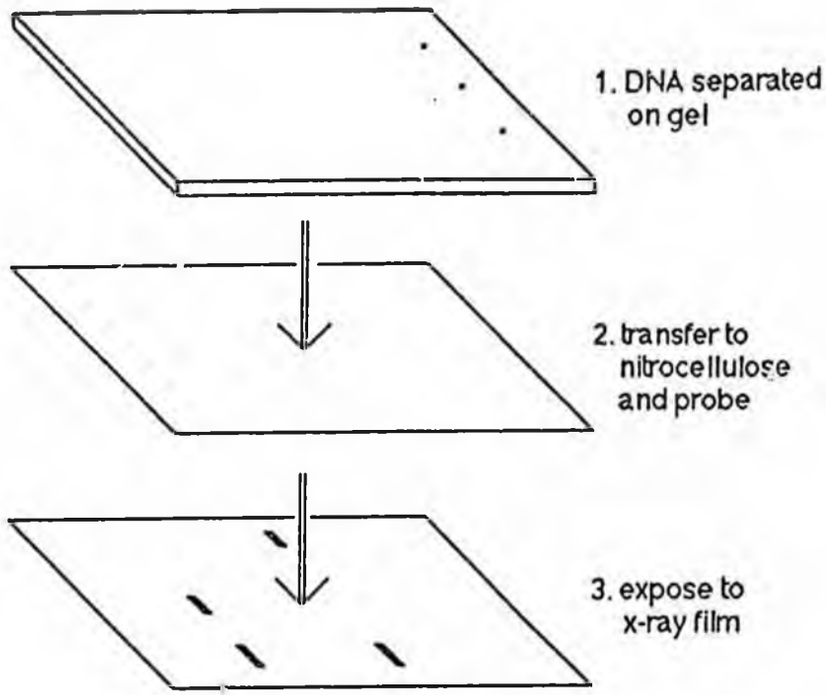

fig. 3

The presence of bands at different positions due to differences in a fragment's length is called *restriction fragment length polymorphism*, or RFLP.[19] The presence or absence of a certain enzyme cleavage site creates a possibility of two inheritable band positions. Such an inheritable characteristic is called an *allele*. If a person inherits the same allele from each parent, one band or the other will appear. Both bands may appear if a different allele is inherited from each parent. The three possibilities—one band, the other band, or both bands—are illustrated in lanes 1, 2, and 3 of figure 4.

RFLPs are generally discovered by accident; scientists find and characterize a few more each year.[20] Each is an identifiable, inherited characteristic which

[19] *See, e.g.*, Baird, *supra* note 15.

[20] A recent example with possible forensic applications is reported by Ali, *DNA Fingerprinting by Oligonucleotide Probes Specific for Simple Repeats*, 24 HUM. GEN. 239 (1986).

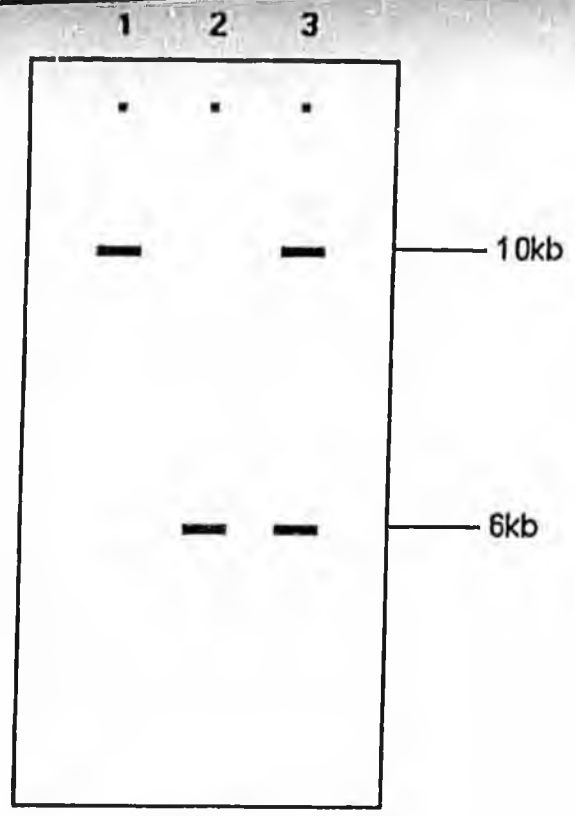

fig. 4

is somewhat useful for determining identity or relatedness. Testing for an RFLP is most useful in excluding the possibility of identity or relatedness; a person who doesn't display the allele found in a forensic sample must be the wrong person. A child who doesn't show one of a suspect's RFLP alleles cannot be that suspect's offspring. Many people in the population may by chance display the same allele, however, so that matching bands are not conclusive identification.

Some RFLPs have multiple alleles; people may display a band at more than two positions. RFLPs may show fifty or more different possible band positions. These "hypervariable" RFLPs occur when many different lengths are possible for a given restriction fragment.[21] A DNA fragment, such as section B in figure 5, may contain a short DNA sequence, or *minisatellite*, repeated over and over. Due to a type of chromosome rearrangement called *unequal crossing over*, these multiple adjacent repeats might occur twenty times in some people,

[21] *See, e.g.*, Baird, *supra* note 13.

thirty times in other people, and so on.[22] Variation in the number of minisatellite repeats creates variations in total fragment length. These fragments of different length move different distances in the gel, so the 6.0kb band might therefore appear at 5.7kb, 6.2kb, or some other position.

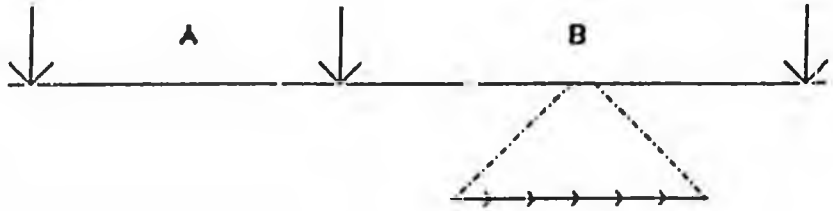

fig. 5

Naturally, an RFLP with multiple alleles is more useful in determining identification, since a smaller proportion of the population will show a given band. The chance of an accidental match is smaller. If several such RFLPs were examined, the possibility of all of them matching by chance would become quite small. The technique commonly called "DNA fingerprinting" does precisely that; it is equivalent to examining scores of hypervariable RFLPs at once.[23]

The minisatellite repeats which create multiple RFLP alleles occur in groups of related sequences; minisatellites with similar or identical sequences are scattered throughout a person's genome.[24] If the probe used to visualize fragments matches a minisatellite sequence, any fragment containing that minisatellite creates a band. Many bands appear, creating a characteristic pattern. This pattern may be very useful in determining a person's identity or relatedness by comparison with other such DNA fingerprint patterns.[25]

The end result of a DNA fingerprint, then, is a piece of X-ray film with dark bands showing the characteristic positions of certain fragments. The only information this test reveals about the DNA code sequence is the presence or absence of the restriction enzyme sites, and the presence or absence of the minisatellite sequences. This technique creates a pattern based on the DNA molecule's structure, and says practically nothing about the genetic information the molecule carries. In this regard, a DNA fingerprint really does resemble an ordinary fingerprint—they are simply highly individual patterns for comparison with other highly individual patterns. But how far will this analogy hold?

[22] *See* Jeffreys, Wilson, & Thein, *Hypervariable Minisatellite Regions in Human DNA*, 314 NATURE 67-69 (1985).
[23] *Id.*
[24] *Id.*
[25] *Id.* at 72.

IV. TECHNICAL LIMITS OF DNA FINGERPRINTING

In determining how useful a DNA fingerprint pattern may be for determining identification or relatedness, we must consider the limitations of the techniques used in the test. One set of possible limitations depends upon the nature of the sample examined. The "fingerprinting" test requires a relatively large sample of well-preserved DNA for analysis.[26] Stories of scientists extracting DNA from 2,400-year-old Egyptian mummies, while based upon actual research, have become almost apocryphal.[27] In reality, the DNA obtained from such sources is too degraded for fingerprint analysis.[28] Success has been reported in fingerprinting DNA from dried blood and semen samples up to four years-old.[29] However, forensic samples that weather more adverse conditions may be inappropriate for this test.

Contamination of samples may also prevent DNA fingerprinting. Bands from foreign DNA cannot be distinguished from bands of interest. For example, vaginal cells invariably become mixed into the semen samples obtained from rape victims; this has caused problems in other biochemical identification tests.[30] In DNA fingerprinting, this particular problem has been overcome by destroying the fragile vaginal cells in a mild detergent solution, leaving the hardier sperm cells intact.[31] DNA for analysis can then be isolated from only the sperm cells. A contaminated sample such as mixed blood, though, would pose a serious obstacle to accurate DNA fingerprinting identification. The test is similarly unable to distinguish between samples which may have been accidentally or deliberately substituted.[32]

If an appropriate forensic sample is available for analysis, we must next determine what limits on identification are inherent in the nature of the test. The greatest asset of DNA fingerprinting is also its greatest liability: the technique generates a monstrous amount of information. DNA fingerprinting attempts to analyze, all at once, dozens of RFLPs from all over the human genome.[33] This amount of information allows highly specific identification, but may also become obscurative.

[26]Gill, Jeffreys, & Warrett, *Forensic Application of DNA "Fingerprints,"* 318 NATURE 577 (1985). *See also* Siwolop, Hamilton, Clark, & Cooke, BUS. WEEK, Dec. 1, 1986, at 128E.

[27]Pääbo, *Molecular Cloning of Ancient Egyptian Mummy DNA*, 314 NATURE 644 (1985).

[28]Gill, Jeffreys, & Warrett, *supra* note 26.

[29]*Id.* at 578. For an editorial citing American researchers' success, see Dodd, *DNA Fingerprinting in Matters of Family and Crime*, 318 NATURE 506 (1985).

[30]Gill, Jeffreys, & Warrett, *supra* note 26.

[31]*Id.* at 578.

[32]Dr. Alec Jeffreys, the British scientist who developed the most sensitive version of the test, recently cautioned, "I would like, however, to point out that, contrary to statements in the popular press, this test is not foolproof. It cannot necessarily detect blood sample substitutions, whether accidental or deliberate." Dr. Jeffreys also cautioned against other difficulties discussed in this article, including mutations and closely related suspects. Jeffreys, *Highly Variable Minisatellites and DNA Fingerprints*, 15 BIOCHEM. SOC. TRANS. (London) 309, at 314 (1987).

[33]*See, e.g.*, Jeffreys, Wilson, & Thein, *supra* note 22, at 69.

Three obscurative limitations stem from digesting a large amount of DNA, then separating the fragments only by their length. First, two matching bands from different autoradiographs might consist of entirely different fragments which happen to be of the same length. Second, bands within the same autoradiographs may consist of different fragments having the same length; fragments from different sections of the DNA, as long as they are the same size, will migrate together. Third, fragments which are very close together in size may obscure each other's autoradiograph bands. This problem becomes particularly noticeable at the lower part of an autoradiograph, where the small fragments run. Restriction enzyme digests generate many small fragments, creating indistinguishable overlapping bands.[34]

Identification therefore depends upon bands near the top of an autoradiograph, where the larger and slower moving fragments run.[35] Here again, some bands may obscure others. Some bands may occur in all autoradiographs; these are useless for identification. Some bands may be very faint or correspond to a very heavy band when the patterns are compared; such bands must be disregarded. As a practical matter, approximately fifteen clearly distinguishable bands "of roughly similar autoradiographic intensity" are available for comparison with other DNA fingerprints.[36]

A high degree of technical expertise is therefore needed to perform the DNA fingerprinting technique in its present form.[37] Laboratory personnel are very familiar with the time and practice necessary to make gel electrophoresis yield consistent results. All conditions of the test must be uniform before results may be compared. In addition, a degree of human judgment enters the test when the autoradiographs are interpreted. The person who determines whether or not a certain band should be disregarded should have considerable experience in reading autoradiographs.

At present, then, if the DNA fingerprinting test is properly performed under optimal conditions, about fifteen clear autoradiographic bands will appear for identification. We must consider how accurate identification will be based upon comparisons of those bands. What is the likelihood that two individuals might demonstrate identical patterns of bands? Might two people by chance generate restriction fragments of the same size and electrophoretic mobility? The answers to these questions define limits upon our interpretation of the test.

The popular press, in addressing these questions, has often quoted a probability of one in thirty billion for two individuals to display by chance the same pattern of identifiable bands.[38] This figure is taken from the work of British

[34]Jeffreys, Wilson, & Thein, *Individual-Specific "Fingerprints" of Human DNA*, 316 NATURE 76 (1985).

[35]*Id.* at 76 (Table 1 caption).

[36]*Id.*

[37]*See* Dodd, *supra* note 29.

[38]Among others, *see* L.A. Times *supra* note 5; Dec. 20, 1985, at 134, col. 2; Miller, *DNA Fingerprints to Aid Sleuths*, 128 SCI. NEWS 390 (1985).

researchers who developed the DNA fingerprinting technique.[39] Based upon their initial studies of twenty British Caucasians, these researchers calculated the probability that a given band would be seen when comparing two patterns. From these calculations, they estimated the probability of two individual patterns showing fifteen identical bands.[40]

Forensic experts have expressed some concern that the figure of one in thirty billion, so often quoted, was based upon a small, very homogeneous population sample.[41] The total probability of two patterns matching by chance is dependent upon the frequency with which each individual band occurs in the population. The extensive data necessary to accurately assess the frequency of a given band in the general population—or in an ethnic subpopulation—is not yet available.[42] Research teams in Britain and the United States are continuing their studies and remain confident that their accumulated data will show the probability of chance matches to be very low.[43] Until such data is available, however, sweeping generalizations about the technique's accuracy seem premature.

The British scientists who initially gave the one in thirty billion estimate also observed that the possibility of a chance pattern match increases if the subjects are closely related. The chance of any band appearing in two siblings' autoradiographs is approximately fifty percent.[44] The chance of two siblings showing identical patterns therefore becomes about one in 33,000.[45] Identical twins—the most extreme case of relatedness—naturally display identical patterns.[46]

This trend becomes even more pronounced where the technique is used in paternity determination. Since half of an individual's DNA is inherited from each parent, six or seven of the fifteen bands from a pattern should be identifiable in each parental pattern.[47] In paternity testing, then, the possibility of a chance match increases again—only half as many bands are used to establish identity. If the suspected father were wholly unrelated to the actual father, the

[39]Jeffreys, Wilson, & Thein, *supra* note 32, at 77.

[40]*Id.*

[41]N.Y. Times, Feb. 4, 1986, at C10, col. 5; American Association of Blood Banks Committee on Parentage Testing, *Standards for Parentage Testing Laboratories*, Dec. 5, 1986; International Society for Forensic Haemogenetics, *Statement of the Society for Forensic Haemogenetics Concerning DNA-Polymorphisms* Vienna 1987.

[42]Surprisingly little data has actually been published in this regard. The British researchers who performed the initial studies on Northern Europeans have also accumulated data on individuals from Jamaica, but this remains unpublished. *See* Jeffreys, *supra* note 32, at 314. In the United States, researchers from Lifecodes have published copiously, but almost entirely on RFLP frequency, rather than on minisatellite probes. For an example, *see* Baird, *supra* note 15. Unfortunately, lawyers with little science background tend to confuse these RFLP papers with minisatellite research. The legal community must realize that the accuracy and reliability of these tests are very different. *See infra* note 67.

[43]N.Y. Times, *supra* note 41.

[44]Jeffreys, Wilson, & Thein, *supra* note 34, at 77.

[45]*Id.*

[46]*Id.*

[47]*E.g.*, Jeffreys, Wilson, & Thein, *supra* note 34, at 78.

probability of matching patterns is about one in 20,000.[48] If, however, the suspected and actual fathers are closely related, a chance match may be as likely as one in sixty-three.[49] The possibility of a chance match may be greatly reduced by running parallel tests. Different probes or different restriction enzymes would yield different patterns for comparison.[50] This, of course, is only possible if enough undergraded DNA can be extracted from a forensic sample to run multiple tests.

Finally, there is some possibility that mutation or unequal crossing over may occur within the space of a generation, altering one or two bands of a pattern. At least one such occurrence has already been observed by British scientists.[51] They estimate the chances of such an event happening as high as one in 240.[52] Such a genetic change might create one or two bands that would not match either parental pattern. A difference of one or two bands may therefore be insufficient to exclude relatedness.[53]

V. LEGAL LIMITS OF DNA FINGERPRINTING

We have examined how DNA fingerprinting produces an inheritable pattern of autoradiographic bands, approximately fifteen of which may be useful in determining identity or relatedness. While more extensive studies of this technique have been called for, studies performed so far indicate that, within its proper limits, the test has an estimated chance of false positives comparable to established biochemical tests for excluding suspects. More importantly, the DNA fingerprinting technique holds the potential for individual identification of suspects. These attributes of the test raise a host of technical and legal questions which will make its use as evidence far more complex than its proponents have yet suggested.[54]

To begin with, what criteria will American courts consider in admitting this test as evidence? Acceptance or rejection of scientific tests by our courts tends to be a quirky and complicated process, particularly in criminal cases. One or two standards will clearly be addressed. In evaluating controversial techniques, many jurisdictions have adopted the test articulated in *Frye v. United States.*[55] The *Frye* court, evaluating polygraph tests, stated that an

[48]*Id.*

[49]*Id.*

[50]Jeffreys, Wilson, & Thein, *supra* note 22 at 71.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]Dr. David Housman, a biologist at M.I.T., has suggested that lawyers who question the accuracy of the test "don't know basic biology." Arizona Republic, March 13, 1988, at AA2, col. 1. However correct this assesment may be, the accuracy of the test rests primarily upon principles of physics, chemistry, and even psychology. Its admission into court rests wholly upon principles of law.

[55]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

emerging scientific test should be generally accepted in its own field before it can be admitted by the court.[56] DNA fingerprinting may not yet be ready for such scrutiny: clearly, many experts and professional associations are hesitant to accept the test without further study of its reliability and accuracy.[57] While the methods employed in this technique are commonly used and well accepted in the scientific community, the interpretation of results obtained by those methods may not be so well accepted.

Imbedded within the *Frye* standard is a particularly sticky question concerning what portion of the scientific community a court should look to for acceptance of a new test. In the case of DNA fingerprinting, should the court look for acceptance by biochemists in general, by specialists in molecular biology, or by forensic experts?[58] This question becomes more troublesome when one realizes that many of the experts willing to testify concerning DNA fingerprinting are employed by firms offering the test commercially.[59] Because of the high degree of technical skill necessary to analyze DNA, most prosecutors wishing to employ the test will be forced to rely on these commercial firms. Experts from the firms naturally paint a rosy picture of the test and its accuracy.[60]

Because of such problems, several jurisdictions have never adopted the *Frye* court standard, and others are moving away from it.[61] These courts evaluate the admissibility of new scientific tests on the same basis as they evaluate other evidence.[62] The Second Circuit Court of Appeals, considering the admissibility of sound voice spectrometry, or "voiceprints," stated that the trial judge must weigh the evidence's probativeness, materiality, and reliability against its tendency to mislead, prejudice, or confuse the jury.[63] DNA fingerprinting may face serious challenges under this standard. As previously noted, the test's reliability is still open to question. More importantly, media portrayal of the technique as magically foolproof may make the admission of the test seriously misleading or prejudicial.[64] Even the name "fingerprinting"

[56] *Id.*

[57] *See* examples *supra* note 41.

[58] Biochemistry is a broad field concerning the chemistry of living creatures, and so includes investigation of the DNA molecule. Molecular biology primarily concerns the study of nucleic acid structure and function; it is sometimes considered a subspecialty of biochemistry. Biochemists in general, and molecular biologists in particular, often use the techniques employed in DNA fingerprinting.

[59] Experts from Lifecodes have testified concerning the test's reliability in the Florida *Andrews* case and in the New York cases. *See* Arizona Republic, *supra* note 51; N.Y.L.J., *supra* note 9.

[60] Testimony from scientists performing a particular analysis is obviously important to establish that the test was done properly, the results are the best obtainable, and so on. Testimony on the overall reliability of the technique, when offered by executives from firms with a commercial interest in seeing the test widely accepted, is an altogether different matter which courts may wish to weigh accordingly.

[61] *See* Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254 (Spring 1984).

[62] *See id.*

[63] United States v. Williams, 583 F.2d 1194 (2d Cir. 1978).

[64] *Id.*

may create unsubstantiated beliefs and expectations in the minds of judges and jurors.[65]

If DNA fingerprinting is admitted into evidence, courts must then decide how much weight as evidence the test should be allowed. The test's ability to exclude a suspect will doubtless be treated in much the same way as that of established biochemical tests. DNA fingerprinting, however, has a unique potential to individually identify suspects. What degree of reliance should be placed on this attribute of the test? Courts may regard the test differently in criminal cases, requiring proof beyond a reasonable doubt, than in civil suits where a preponderance of evidence is sufficient.

Several factors should be considered in deciding how the test should be regarded in a particular case. As previously discussed, data concerning the rate of mutations or occurrence of given bands in the population is at best tentative.[66] Because the test's performance record is so sparse, juries should perhaps be cautioned against relying primarily upon the results of a DNA fingerprint analysis—especially if the accused's life or liberty may be at stake. This issue is further complicated by different versions of the test which have different estimated accuracies. One commercial version of the test has been estimated to yield false positives once in 200,000 times; a different firm's test has an estimated accuracy of thirty billion to one.[67] Courts may therefore wish to inquire into which laboratory performed the test, the laboratory personnel's level of expertise, the difficulty of their version of the test, and similar matters. Certainly prosecutors and defense attorneys should consider the weight of such factors in presenting their cases.

Similar questions revolve around the application of the technique. For example, the comparison of DNA fingerprints from different types of samples may not yet satisfy applicable legal standards. In theory, DNA analyzed from any body tissue should yield a pattern identical to the pattern from any other body tissue. Some question, though, may arise in criminal cases where semen samples are analyzed to identify rapists. Because each person receives half of his or her genetic material from each parent, sperm and ova cells contain only half as much DNA as other body cells. Each sperm cell in a semen sample will contain only half of a man's chromosomal complement, drawn at random from his entire genome. Presumably, enough sperm cells containing different portions of a rapist's total DNA complement will be present in a forensic sample to

[65] A similar problem occurred with the nickname "voiceprint" for sound spectrometry. *See* Williams, 583 F.2d 1194.

[66] Jeffreys, *supra* note 32; *see also* Jeffreys, Wilson & Thein, *supra* note 22.

[67] The Lifecodes version of the test examines a single RFLP; this is faster but less accurate than analysis offered by Lifecodes' competitor Cellmark. *See* Siwolop, Hamilton, Clark, & Cooke, *supra* note 26; *see also* Moss, *supra* note 9 at 69. Cellmark, founded by Dr. Alec Jeffreys, presumably uses more than one probe to achieve a far greater degree of accuracy. Cetus Corporation has also announced success with a different version of the test using recombinant DNA technology to amplify the number of DNA fragments; the Cetus test also examines a single RFLP. *See* Moss, *supra* note 9, at 69.

represent his entire genome. As yet, though, no published research appears to have examined whether some bands may become fainter or disappear when semen samples are analyzed against samples from other tissues. All data so far indicates that the theory holds true, but the question illustrates one area where little is known about the test's performance. Such questions are salient to determining whether the test's meager record is yet convincing beyond a reasonable doubt.[68]

In criminal cases, some questions about DNA fingerprinting may arise in conjunction with rights protected under the Federal Constitution. The United States Supreme Court has, for example, ruled that fundamental fairness often requires the State to provide indigent defendants with the necessary tools for an effective defense and appeal.[69] The cost of DNA fingerprinting by commercial firms is high; if the test becomes widely accepted, situations may arise where doctrines of equality compel states to pay for DNA fingerprinting or expert testimony.[70]

Previously established doctrines concerning consent and warrants for obtaining blood samples will presumably apply in obtaining samples for DNA fingerprinting. The United States Supreme Court has held that police may determine intoxication through blood samples obtained without a warrant from an unconscious person.[71] The Court stated that such tests are common and minimally intrusive.[72] Samples for DNA fingerprinting may also be obtained from sources such as hair roots or skin scrapings; these might be viewed as even less intrusive than blood sampling.[73]

The Supreme Court has also decided that blood samples to determine intoxication may be taken over an injured person's objection without violating the Fifth Amendment right against self-incrimination.[74] Even without a warrant, such sampling does not constitute an unreasonable search and seizure if the situation involves exigency and probable cause.[75] Unlike blood alcohol levels, though, DNA restriction fragment patterns do not diminish over time. Without such "destruction of the evidence," the exigency needed for warrantless blood sampling may not be present in obtaining "DNA fingerprint" samples.

[68]Unforeseen exceptions to the test's reliability are already beginning to surface. For example, recent evidence indicates that chemotherapy alters DNA characteristics in a manner that would lead to false exclusions in RFLP or DNA fingerprint analysis. *See* Vink, DeHoog, Reekers, DeWitte, *Changes in RFLP-Patterns after Bone Marrow Transplantation* (Abstract on file with this author).

[69]*See* Britt. v. North Carolina, 404 U.S. 226 (1972); Griffin v. Illinois, 351 U.S. 12 (1956).

[70]The Court, for example, has ruled that states may have to pay for psychiatric evaluation and testimony where essential to an accused indigent's defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[71]Breithaupt v. Abram, 352 U.S. 128 (1954).

[72]*Id.*

[73]*See* Cupp v. Murphy, 412 U.S. 291 (1973) (warrantless taking of scrapings from fingernails permitted).

[74]Schmerber v. California, 384 U.S. 757 (1966).

[75]*Id.*

Some concern may arise that DNA fingerprinting constitutes a greater degree of privacy invasion than other sorts of biochemical tests. In a society concerned with blood tests exposing the stigma of AIDS, some might fear the ultimate invasion of privacy: examination and exposure of a person's genetic makeup. This type of concern would seem to be unwarranted, and probably deserves minimal court attention. As previously discussed, this technique says virtually nothing about the genetic information the DNA molecule carries. Autoradiographic patterns created by DNA fingerprinting show nothing concerning a person's intelligence, sex, or outward physical appearance.[76] A highly trained scientist might glean from the patterns some information concerning genetic disease, but this is true of many commonly considered biochemical tests.[77]

These are only a handful of preliminary concerns which courts may be required to address in evaluating DNA fingerprinting; other questions will arise. This test, with advancing technical expertise and public understanding, shows every indication of playing a significant role in our justice system. In defining that role, courts should be aware of the technical limits of this test, as well as its unique advantages. A test currently suitable for scientific research may not yet be suitable to alter people's lives and legal positions. The legal community should therefore continue to evaluate with caution the place of DNA fingerprinting in court.[78]

[76]Dr. Alec Jeffreys has observed that a DNA fingerprint autoradiograph does not even indicate the subject's species. *See* L.A. Times, *supra* note 5.

[77]*See* Jeffreys, Wilson & Thein, *supra* note 2. Some sort of argument might be made that exposing information on inheritable diseases is a substantial intrusion on privacy, but this is surely outweighed by compelling state interests.

[78]As this article went to press, both Cellmark and Lifecodes announced improved versions of their DNA analysis techniques; the Cellmark technique was admitted to evidence in a Florida murder trial. *See* Marx, *DNA Fingerprinting Takes the Witness Stand*, 240 SCIENCE 1616 (1988).

S B 281

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

SB 281

Senate Judiciary 2/21/89

Alaska State Legislature

Al Adams
District L

WHILE IN SESSION
P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3707

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3245

3111 C Street
Anchorage, Alaska 99503
(907) 561-7622

Official Business

RECEIVED
MAY 1 1989
JAN FAIKS
SENATE OFFICE

TO: SENATOR JAN FAIKS
SENATE JUDICIARY COMMITTEE

FROM: SENATOR AL ADAMS AFA

RE: SENATE BILL 281, RELATING TO THE LOCAL BOUNDARY COMMISSION AND PROVIDING FOR AN EFFECTIVE DATE

DATE: MAY 1, 1989

SENATE BILL 281 IS INTENDED TO BRING GREATER PARTICIPATION AND CONFORMITY TO THE AFFAIRS OF THE LOCAL BOUNDARY COMMISSION.

THE BILL PASSED OUT OF THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE LAST WEEK AND IS NEXT REFERRED TO YOUR COMMITTEE.

THIS BILL AMENDS EXISTING STATUTES IN THE FOLLOWING WAYS:

° IT INCREASES THE NUMBER OF PUBLIC HEARINGS IN AN AREA PROPOSED FOR INCORPORATION FROM ONE TO TWO.
THE SECOND MEETING WOULD NEED TO BE HELD AT LEAST 30 DAYS AFTER THE FIRST HEARING.
ONE OF THESE TWO MEETINGS COULD BE CONDUCTED BY TELECONFERENCE.

° AN UNPOPULATED AREA COULD NOT BE ANNEXED TO AN EXISTING MUNICIPALITY EXCEPT UNDER CERTAIN CIRCUMSTANCES

° REQUIRES THAT THE COMMISSION ADOPT REGULATIONS FOR THE CONDUCT OF ITS MEETINGS

° REQUIRES THAT NOTICE OF HEARINGS WOULD BE GIVEN 30 DAYS RATHER THAN 15 DAYS IN ADVANCE.
ADDS THAT PUBLIC SERVICE ANNOUNCEMENTS ON RADIO AND TELEVISION STATIONS WILL BE GIVEN AND THAT PRINT AND POSTING OF NOTICES WOULD OCCUR RATHER THAN ONE OR THE OTHER OF THE LATTER REQUIREMENT.

° A MAJORITY OF THE FULL MEMBERSHIP OF THE LBC MUST VOTE IN FAVOR OF PROPOSED BOUNDARY CHANGES

- AT LEAST TWO HEARINGS WOULD HAVE TO BE HELD IN COMMUNITIES IN AN AREA AFFECTED BY A BOUNDARY CHANGE BEFORE THE LBC PROPOSED THAT CHANGE TO THE LEGISLATURE. IF THERE IS NO COMMUNITY IN THE AREA AFFECTED, THEN THE LBC WOULD NEED TO HOLD HEARINGS IN A "PROXIMATELY" LOCATED COMMUNITY.

I WOULD APPRECIATE YOUR CONSIDERATION OF THIS MATTER.

Alaska State Legislature

Al Adams
District L

WHILE IN SESSION
P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3707

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3245

3111 C Street
Anchorage, Alaska 99503
(907) 561-7622

Official Business

TO: JAN FAIKS, CHAIR
SENATE JUDICIARY COMMITTEE

FROM: SENATOR AL ADAMS APA

RE: AMENDMENT TO SENATE BILL 281, "AN ACT RELATING TO THE LOCAL BOUNDARY COMMISSION AND PROVIDING FOR AN EFFECTIVE DATE."

DATE: MAY 1, 1989

ATTACHED IS AN AMENDMENT TO SB 281 THAT WOULD ACCOMMODATE THE REQUIREMENTS OF SB 281 TO THE CIRCUMSTANCES OF CERTAIN AREAS IN REGARDS TO PRINT AND VISUAL MEDIA. THIS AMENDMENT WAS INADVERTENTLY NOT CONSIDERED BY THE C&RA COMMITTEE. AN EXPLANATION FOLLOWS:

SOME AREAS OF THE STATE ONLY HAVE RATNET TELEVISION SERVICES. IT WOULD BE INAPPROPRIATE TO BROADCAST ISSUES OF NOTICE REGARDING BOUNDARY CHANGES RELEVANT TO A CERTAIN PORTION OF THE STATE ON STATE WIDE NEWS.

ALSO SOME AREAS DO NOT HAVE A NEWSPAPER OF LOCAL CIRCULATION. THIS AMENDMENT WOULD MAKE "PRINT MEDIA" NOTICE REQUIRED IF THERE WERE "PRINT MEDIA" AVAILABLE.

A M E N D M E N T

OFFERED IN THE SENATE BY ADAMS

TO: SB 281

Page 2, line 15, after "area":

Insert ", if available"

Page 2, line 16, after "media":

Insert ", if available locally,"

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 4-21-89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUD
FIN

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 4-28-89

4/17/89

Mr. President:

C&RA Committee considered SB 281

Local Boundary Commission; efd

and recommended:

[ ] replace with CS _____ [] same title
[] new title

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[✓] no recommendation

[ ] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) attached [ ] zero [ ] fiscal impact
[ ] appropriation no FN attached [ ] Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Mike Lazenby - DO Rec.
Pat Patrick no rec

Al Adams - DO PASS
Chair signature and recommendation

[ ] Committee backup attached

Anchorage Daily News

Winner, 1976 Pulitzer Prize Gold Medal for Public Service

Gerald E. Grilly
Publisher

Howard Weaver
Managing Editor

Michael Carey
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown

The right vote was 'No' vote

Lawmakers made the right decision last week when they rejected the Fairbanks North Star Borough's attempt to annex a portion of the trans-Alaska pipeline.

The proposed addition, crafted to annex 10 miles of the pipeline sitting on a 216-square-mile parcel of land northwest of Fairbanks, would have set a very bad precedent.

Fairbanks wanted the pipeline for one reason: to tax it. The annexation would have been worth about $2 million in property-tax revenue in 1990. That $2 million would have gone a long way to ease the Golden Heart City's current budget crisis.

The Local Boundary Commission apparently thought Fairbanks' financial need was adequate justification for the annexation. It wasn't — nor should financial need ever be the basis of flawed policies. Such an approach is nothing more than arbitrary no matter what kind of covering it wears. Boundary changes are supposed to be in the public interest — and Fairbanks clearly had only a financial interest in the matter.

Annexations typically have revenue implications, but they never should be strictly revenue-generating actions. Lawmakers had it right when they told Fairbanks it was out of line to go after the pipeline. Now they ought to tell the Local Boundary Commission to establish tougher standards for annexations.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM March 1, 1989

SUBJECT: Local Boundary Commission: HB 131

TO: Representative Dick Shultz

FROM: Richard A. Bradley
Legislative Counsel

It is clear to me that familiarity with the matters that are pending before the commission is not a ground for disqualification by a member of the commission. The law establishing the commission, AS 44.47.565, requires that a member be from each of the four regions of the state.

While there are many valid policy reasons for requiring that members of a state commission be widely representative of the state, one result is that the law requires that one member of the commission be, to some extent, familiar with the issues that are coming before the commission.

While many laws in recent years have addressed the question of ethics (as, for example, AS 39.51) or conflict of interest (as, for example, AS 39.50), I am aware of no law that disqualifies a member of a state board or commission because the member is familiar with the issues. That person is an asset to a state commission, not a liability.

Both AS 39.50 and AS 39.51 are concerned, in part, with the financial interests of the state officer. Nothing described to me suggested that the member of the local boundary commission had the kind of interest that should have disqualified him.

Finally, it seems that the members of a state commission with a relatively small membership should be especially careful about their failure to attend the meetings. Since three votes remain necessary to take action (see AS 44.47.-577), the absence of a member increases the difficulty for the commission in taking action.

If I may be of further assistance, please advise.

RAB:gc
WKG7/077

A CITIZEN'S GUIDE TO THE CONSTITUTION OF THE STATE OF ALASKA

A Citizen's Guide to

The Constitution of the State of Alaska

PREAMBLE

We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty

Gordon S. Harrison

does Section 2), but it requires that they be "part of" a surrounding borough if one exists. The section gives broad power to the legislature to build a statutory framework for the creation and operation of cities. The constitution suggests by reference to "classification" of cities and boroughs in this and other sections that flexibility may be provided by authorizing the creation of local governments with different sets of duties and responsibilities. At the present time, two classes of cities and three classes of boroughs are recognized by statute—each with different powers.

Section 8. Council

The governing body of a city shall be the council.

Section 9. Charters

The qualified voters of any borough of the first class or city of the first class may adopt, amend, or repeal a home rule charter in a manner provided by law. In the absence of such legislation, the governing body of a borough or city of the first class shall provide the procedure for the preparation and adoption or rejection of the charter. All charters, or parts or amendments of charters, shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority of those who vote on the specific question.

This language gives effect to the declaration in Section 1 that the constitution provide "maximum local self government." Home rule charters—that is, locally drafted "constitutions" for local government—are the means for municipalities to exercise the largest measure of self government. "First class" municipalities (these are defined in law, not in the constitution) may adopt home rule charters. Cities and boroughs that do not have home rule charters—first class or otherwise—must operate within the limits of the powers delegated to them by the state. These are known as general law municipalities. Home rule municipalities, in contrast, may exercise all powers not explicitly deni[illegible] them by state law or by their own charter (see Section 11).

Section 10. Extended Home Rule

The legislature may extend home rule to other boroughs and cities.

By the previous section the constitution extends home rule to "first class" cities and boroughs, which the legislature is to define. In this section, the convention delegates made it clear that the legislature can extend home rule to other categories of municipalities as well if it wants to do so.

Section 11. Home Rule Powers

A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

This broad grant of home rule power is unique among state constitutions. It means that the governing body of a home rule city or borough can exercise any constitutional power of the state legislature if it is not explicitly denied by law or by the charter itself. Typically, other state constitutions narrowly enumerate the powers of home rule municipalities. With the simple and concise language of this section, the authors of Alaska's local government article sought to make the home rule power as expansive as possible. Article II, Section 19 protects home rule and other municipalities from selective intervention in their affairs by the legislature and thereby further strengthens local autonomy.

Section 12. Boundaries

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

Few if any oth[illegible] state constitutions provide for a body of this type. The independent authority of this agency to establish the borders of local government units, subject only to legislative veto, recognizes that the most "rational" boundaries may not always result from the local tug and tussle of politics. In the words of the convention committee on local government, this scheme allows boundary decisions to be made "at a level where area-wide or statewide needs can be taken into account. By placing authority in this third party, arguments for and against boundary change can be analyzed objectively." In its deliberations, the local boundary commission must refer to the standards for borough and city formation established by the legislature .

The veto power (exercised here by a simple majority of both houses acting separately) has been exercised freely by the legislature over decisions of the commission.

Section 13. Agreements; Transfer of Powers

Agreements, including those for cooperative or joint administration

and Peninsula REAA had filed a brief in court opposing the LBC's decision based on these factors.

Number 137

DAVE WILDER, VICE-PRESIDENT, LAKE AND PENINSULA SCHOOL BOARD testified on behalf of HJR 23.

Mr. Wilder reiterated that the Aleutians East Borough had been granted by the LBC a large portion of land previously held by the Lake and Peninsula REAA. He pointed out that there was a court case pending on that action and that the manager of the Aleutians East Borough now sat on the commission. He maintained that if the commission decided against the Kodiak Island Borough annexation that it would badly reflect on the Aleutians East Borough's claims.

Mr. Wilder further maintained that the conflict stated by the commission's chairman, C.B. Bettisworth, was a result of a newspaper article which appeared in the Kodiak Island Fisherman Newspaper on February 23, 1989. The article quoted the Kodiak Island Borough Mayor, Jerome Selby, as saying that as far as annexation goes that the commission had assured him "if you want it you've got it." This article came eight months before the petition was filed. He added that the annexation process had been compromised and the legislature needed to stop the process and define the goals and procedures of the commission.

Number 158

Rep. Cato asked who would pay for the court costs of the REAA.

Number 168

Mr. Wilder replied that he thought the Lake and Peninsula School District would cover the costs.

Number 178

Rep. Cato asked if that was not the state fighting the state.

Number 180

Mr. Wilder replied that there was no other entity to represent the area.

Mr. Wilder stated that the process of borough formation by the Lake and Peninsula School District had been rushed due to the Kodiak Island Borough annexation and that because of

#4A

COMMENTS ON LOCAL BOUNDARY COMMISSION PROCESS FOR CONSIDERING BOROUGH PROPOSALS

January 31, 1989

The following comments are based on the three borough proposals within the the Bristol Bay region in the last two years: the Aleutians East incorporation in 1987; the Lake and Peninsula incorporation which will go to public vote this spring, and the Kodiak annexation currently before the legislature.

The proposals have generated much controversy within the region and have highlighted serious flaws in the Local Boundary Commission (LBC) process. Indeed the process is so flawed as to almost guarantee arbitrary and short-sighted results. If large areas of the unorganized borough continue to be carved into jurisdictional units under existing LBC practice, a statewide planning disaster of monumental proportions is in the making.

Most of the problems fall into three broad categories: 1) lack of meaningful standards, 2) procedural, particularly relating to public notice and the ability to contest particular proposals, and 3) problems in substantive decision-making, which involve institutional or structural problems with the LBC and its inability to follow statutory and regulatory mandates.

Each of these areas of concern will be discussed below. However, these comments are not intended to be a thorough analysis of the LBC or its procedures but rather concern particular problems identified from its actions in Bristol Bay. And although examples will be used to illustrate the problems, the comments are not intended to address the merits of any pending proposal.

I. Standards

A. Incorporation

1. Statutory standards

The four statutory standards for incorporation of AS 29.05.031 would be adequate if they were evenly applied and properly construed. However, in practice they have given inadequate guidance for drawing territorial boundaries between widely separated population centers.

The first standard requires that "the population of the area [be] interrelated and integrated as to social, cultural and economic activities" and be large and stable enough for borough government.

The second requires that the borough boundaries "conform generally to natural geography and include all areas necessary for full development of municipal services." The third requires the economy of the area to include the human and financial resources necessary for municipal services, and lists a number of factors to be considered. The fourth speaks to transportation facilities.

Except for the requirement for following natural geography, all deal more with population characteristics and with developed areas rather than with the vast uninhabited areas in the unorganized borough.

The standards would be improved by clearly specifying that traditional use patterns and existing land planning units be followed in unpopulated areas.

2. Regulatory standards.

The regulatory standards of 19 AAC 10.160 also need improvement. 19 AAC 10.160(5) requires a new borough to include at least one entire REAA, and as interpreted it seems to create a bias in favor of following REAA lines. Yet as pointed out in the 1988 DCRA Regional Government study, following REAA boundaries for borough formation results in conflicts with other standards. Some REAAs have only one community or less than 1,000 people; some form enclaves within others, which may violate constitutional and statutory standards.

Worse, the external boundaries of REAAs often cut across natural geography and socio-economic use patterns, thereby violating the mandatory statutory standards for borough formation. REAAs should not be used to determine the external territorial boundaries of boroughs. The intent of 19 AAC 10.160(5) can be met by using REAAs merely as a guideline for deciding which community should go with which borough.

There is also a problem with the "transportation" standard of 19 AAC 10.160(2). This standard requires that communities within a new borough be connected by road or have transportation services "available at least once a week ... on a regularly scheduled or chartered basis." Chartered services are almost universally available and it is difficult to see how any two Alaskan communities could fail to meet this standard. Although the intent of the provision may be sound, standards that are always met are no standards at all, and this provision should either be rewritten or deleted.

B. Annexation.

There are no statutory standards for annexation. The LBC by regulation (19 AAC 10.190) has set up separate standards for the annexation of contiguous territory and of non-contiguous territory. The latter, for obvious reasons, is much more stringent.

1. Definition of "Contiguous."

The LBC recently approved the annexation of a large area on the Alaska Peninsula to the Kodiak Island Borough under its standards for annexation of contiguous territory. The annexed area is separated from the Kodiak Island Borough by Shelikoff Strait, the center of which for its entire course is federal water beyond the territorial limit of Alaska. The LBC rejected Lake and Pen's competing claim for the same territory.

Neither the LBC decision nor its staff report discuss the crucial preliminary issue of whether the annexed territory is contiguous to the original Kodiak Island Borough. Under a dictionary or common sense definition, it surely is not contiguous. However, contiguous is defined at 19 AAC 10.840(4) "as territory which is immediately adjacent to or which is separated only by natural or artificial barriers which do not disrupt or impede the supplying or receiving of municipal services."

The problem with that definition, as apparently construed by the LBC in the Kodiak decision, is that the exception swallows the rule. Boroughs provide very few municipal services in roadless, unpopulated areas, and those services they do provide (i.e., planning) are not hampered by geographic barriers. If the Alaska Peninsula is "contiguous" to Kodiak Island despite the jurisdictional barrier of federal waters, it is difficult to conceive of any roadless, sparsely populated area of the state that is not contiguous to any other area. An ocean, another borough, a mountain range, or 500 miles of land are just barriers which do not "disrupt or impede" borough services when those services are almost non-existent to begin with.

The definition of contiguous in 19 AAC 10.840(4) could be salvaged if the LBC were to construe it more closely to the dictionary definition. But following the Kodiak decision, there is no longer a distinction between contiguous and non-contiguous lands for purposes of borough annexations, and the whole framework of 19 AAC 10.190 is undermined.

2. Standards for contiguous annexations.

Eight standards are set forth in 19 AAC 10.190(a) for annexation of contiguous territory. Only one of these standards must be met for the annexation to be approved. In addition, the annexation must meet the four statutory standards for borough incorporation of AS 29.05.031.

Some of the eight standards of 10.190(a) are relatively straight-forward and easy to apply, i.e. whether the land is totally surrounded by the borough or wholly owned by the borough. Others, however, have been so watered down by the LBC that virtually any proposal will meet them. Such standards are meaningless.

The problem can best be illustrated by reference to an LBC decision. In the Kodiak decision the LBC found that three of the regulatory standards for annexation were met, those of 19 AAC 10.190(a)(3),(4) and (8).

(a) Application of 10.190(a)(3)

The LBC found that the Kodiak annexation met the third regulatory standard: "the territory is in need of municipal services which the organized borough can provide more efficiently than another municipality or the state." Specifically, the LBC found that the area was in need of "planning, economic development and solid waste collection and disposal which can best be provided by the Kodiak Island Borough."

This ruling is particularly suprising since earlier in the decision the LBC said: "The contested area is uninhabited. Therefore, the need for services in that area is greatly limited."

In regard to "planning," the area consists almost entirely of state and federal land (with some subsurface rights owned by a Native regional corporation). Coastal management and state and federal land use plans are already in place and could not easily be changed by a borough, nor did Kodiak indicate it would try to do so. The decision offered no explanation at all of how planning services would be improved; arguably planning services could suffer due to the dismemberment of the CRSA.

The "economic development" consisted of "salmon enhancement projects" which were never identified in the decision, the DCRA report, or testimony. Worse, there was no finding or evidence that salmon enhancement is actually needed, which would be necessary to meet the standard. Moreover, given exclusive federal jurisdiction on federal lands and ADF&G's authority over fish stocks, it is doubtful that any such borough-sponsered project is feasible. (The LBC decision did not discuss the legal obstacles to it.)

As for "solid waste collection and disposal," the opinion discussed fisheries-related waste disposal in the City of Kodiak and at the Borough's landfill on Kodiak Island. It did not find that such services were needed within the annexed area. Indeed, there was no discussion of such services within the annexed area and the Kodiak Borough did not indicate it would extend such services into the area.

Since there is no population to be served and since planning services are already in place, it is apparent that the LBC bent over backwards to find this standard met. It is quite difficult to conceive of any area in the state which would not meet it as applied.

(b) Application of 10.190(a)(4)

The LBC also found the fourth standard met, that "there is a reasonable likelihood that future growth and development will occur within the territory considered for annexation and that annexation of tnat territory will enable the borough to plan for and control that development."

The LBC cited testimony from Kodiak officials that "there is potential for development of mineral, oil and gas and fishing activities in the area considered for annexation." The specific examples cited were the federal oil and gas lease sale scheduled for 1990, "likely" growth in the number of offshore processors, and Kodiak's complaint it hadn't been consulted on federal land use plans.

One problem with this analysis is that both the federal lease sale and the growth of offshore processors apply only to the waters and not to the annexed territory on the Alaska Peninsula. Indeed, the federal lease sale will occur by definition outside of state and borough jurisdiction. Likewise, there was no discussion of how the borough could plan for and control the growth of offshore processors, a process that (if true) will likely occur outside the boundary of the state. The reference to federal land use plans is a non sequiter, irrelevent to the issue of whether there is a reasonable likelihood of growth and development.

There was no finding of fact and no evidence of any projected shoreside development in that part of the Alaska Peninsula. No land disposals, no mineral discoveries, no development of canneries or other fishery-related infrastructure were indicated. The LBC did not even look behind the federal lease sale to find if oil is actually expected to be discovered. (In fact, the Shelikoff Strait is not considered a good oil prospect and the lease sale has generated little interested by the oil industry.)

A better interpretation of this standard would apply it to areas experiencing specific, identifiable development that distinquishes them from the unorganized borough in general, or in which such development is planned. Examples would include rapid population growth or industrial or mineral development such as the Red Dog Mine. To extend the standard to areas such as the south side of the Alaska Peninsula, which at most is experiencing slow incremental development no different in scope from that in any other unpopulated area, is to render the standard meaningless.

(c) Application of 10.190(a)(8)

The LBC also concluded that the eighth standard was met, that "the annexation is otherwise necessary to accomplish a valid public purpose." The decision refers to the growth of offshore fish processors which are replacing shore-based processors, thereby diminishing local employment and depriving municipal governments of raw fish taxes. It concludes: "Annexation of the area in question would mitigate these negative effects."

This again is completely irrelevant as applied to the annexed land on the Alaska Peninsula. Even in regard to the waters it is difficult to see how annexation to the borough could curtail the growth of offshore processors, or confine them to the three-mile limit. Although the annexation may give Kodiak more raw fish tax revenues simply by increasing the area in which it collects them, if that is all the standard means then raising revenue alone becomes a "valid public purpose" sufficient to justify annexation.

I. Procedural Problems

A. Timeframe.

The timeframe used by the LBC to reach borough decisions precludes rational decision-making and may in itself violate constitutional standards of due process. The Aleutian's East process took just two months from the filing of the petition to the decisional meeting (May 7 - July 8, 1987). The Kodiak process took just over seven weeks (Oct. 14 - Dec. 4, 1988), and the Lake and Pen process lasted just three and one-half weeks (Nov. 10 - Dec. 4, 1988). It is inconceivable that all factors relevant in applying all the standards to all the boundaries can be adequately weighed in those time frames.

DCRA is under statutory duty to investigate borough proposals. AS 29.05.080. Some indication of the depth of investigation which should be required may be found in the

legislation which authorizes DCRA to contract for borough studies and allows up to three years for completion of the studies. AS 44.47.730. Nowhere near that depth of analysis was given to any of the Bristol Bay proposals.

It is equally impossible for an opponent of a borough proposal to adequately respond in the time allowed. The borough petitioners have months or years to prepare the proposal, and an adequate response would require considerable marshalling of facts, evidence and legal arguments. The LBC's own regulations call for "answering briefs" to be filed (19 AAC 10.390), but no time is provided to prepare them, especially considering that the governing bodies of cities and most other organizations are not in continuous session and need time to react.

Ironically, the LBC has no legal deadline for considering borough petitions. It rushes decisions only as a matter of policy. (Deadlines come into play only after the LBC's public hearing. And, in practice, the LBC doesn't take as long as those deadlines allow.)

B. Notice.

1. Outside the boundary.

One major flaw with the regulations governing notice and public hearings is that as interpreted they don't recognize the rights of those outside of proposed boundaries.

AAC 10.370(a) requires that the petition be served directly on "every municipality in or adjoining the territory." In the unorganized borough, of course, municipal boundaries rarely meet. The only interpretation of this regulation that makes sense in the unorganized borough is to apply it to communities in the adjoining geographical area. The regulation should also be expanded to include unincorporated communities.

The LBC, however, and its staff interpret it to require direct notice only to municipalities with a common legal boundary with the new borough. As a result, in the Lake and Pen process villages in the Nushagak drainage did not receive direct notice of the Lake and Pen proposal, and at the time the decision was made DCRA's mailing list did not include one village or village corporation on the western side of boundary. Nor did it include BBNA or the Southwest Region School District - even though the latter would lose one of its villages to the proposal.

Likewise, in the Aleutians East incorporation the villages of Ivanof Bay and Port Heiden were not "entitled" to direct notice even though the proposed boundary included an airstrip, a proposed new village site and Native corporation lands of Ivanof Bay and the traditional village site (Ilnik) and much of the subsistence territory of Port Heiden. (DCRA did put these villages on its mailing list, however.)

The LBC believes that publishing notice in the newspapers is sufficient protection for those outside proposed boundaries. But 19 AAC 10.380(a) only requires the petitioner to publish notice of the petition "in a newspaper of general circulation in the territory." Lake and Pen published this notice in the Borough Post, which is distributed only within the Lake and Pen school district and the Bristol Bay Borough, not in the Nushagak villages. This particular notice was the only one ever published containing critical information such as the place for inspecting the petition and brief and the right to file an answering brief.

In any event, few people even in urban areas read legal notices in the newspapers. And the Bristol Bay newspapers are mailed fourth class and are not reliably delivered or read in the villages. Anchorage newspapers rarely make it to most villages at all. Direct notice would be much more effective, and cheaper.

2. Noncompliance with regulations.

The LBC does not strictly follow its own regulations on notice and scheduling. For example, it is required to publish notice of its public hearing "at least 15 days before the date of the hearing, at least three times in a newspaper of general circulation in the territory ...." That was not followed for Lake and Pen, at least as publication rules are normally construed by the courts. The third publication was on November 25, a week before its public hearings began.

Regardless of technical procedural arguments, it is crystal clear from an overview of the regulations regarding incorporation petitions, 19 AAC 10.325-10.440, that the process is designed to take several months at a minimum and that the LBC bends over backwards to rush decisions. For example, the LBC decisional meeting on Lake and Pen was one day after its public hearings concluded, although 90 days is allowed. Another example is the speed with which the LBC scheduled the public hearings. The regulations provide that a petition isn't considered pending until proof of publication of the notice required by 19 AAC 10.380(a) is received. That publication did not occur until November 18. Yet the first notice of the LBC hearing was published November 11, and because of ad deadlines had to be placed several days before that. The petition wasn't even filed with DCRA until November 10, and it is clear the LBC scheduled action on the petition before it had it!

C. Hearings.

Current law requires very little in the way of public information and decisional hearings. By statute, DCRA is required to have one public informational meeting in the area and the LBC to have one public hearing. AS 29.05.080 and 090. (More may be held at the discretion of the LBC.) A decisional meeting must be held within 90 days of the LBC's public hearing. In recent practice, most of the LBC hearings have been teleconferenced rather than held in the area.

Again, there is no built-in practical mechanism for involvement of villages immediately outside the boundaries. Port Heiden or Ivanof Bay residents would have had to go to Cold Bay or False Pass in the middle of fishing season to participate in the Aleutians East hearings. Nushagak village residents would have had to go to Anchorage or the Iliamna Lake area to attend Lake and Pen's hearings. (The LBC later scheduled teleconference hearings in the Nushagak, but that was to consider a reconsideration request after the decision had already been made.)

The existing requirements for informational meetings and formal public hearings are clearly inadequate given the importance of the decision, the lack of general public knowledge about boroughs, and the vast territory involved.

Moreover, villages a few miles outside borough boundaries have as much at stake in determining where the line is drawn as communities within the boundary - which may be much farther away. The Aleutians East line was drawn far closer to Port Heiden and Ivanof Bay than to any populated area within the borough; Ekwok is only 12 miles from the new Lake and Pen boundary. To give such villages substantially less procedural protection than communities within the borough likely violates the constitutional standards of due process and equal protection.

III. Substantive Decision-Making

A. The Problems

The LBC Board is charged with a statutory and constitutional duty to consider proposed changes in the boundaries of local governments. Its duties have been elaborated by the legislature, which has also established specific standards for the LBC to apply in AS 29.05.031. Through its regulatory power the LBC has established further standards and established basic procedures.

Although the commissioners are not judges, they are

nonetheless charged with making quasi-judicial decisions, applying law to facts. Part of their duty is to serve a "watchdog" function, ensuring that boundary changes which do not meet the legal standards fail. Each of the statutory incorporation standards, for example, is mandatory as written and must by law be applied. While under normal rules of statutory construction the statutory standards can be balanced against each other, they must be evenly applied. The regulations must conform to them.

Although some of the statutory standards, such as the one dealing with socio-economic interrelationships, are difficult to apply, it is possible to do so if enough research is done. A great wealth of information on land and resource use patterns is available from agencies such as ADF&G, USF&W, CRSAs, and so forth. In Bristol Bay, massive resource inventories with much relevant data were compiled in the context of various management plans.

Particularly given DCRA's statutory duty to investigate borough proposals, one would think that this wealth of information and expertise on land use would be used to make rational boundary decisions. The process should be time-consuming but rather straight-forward.

The actual practice is far different. Some of its worse characteristics follow:

1. The statutory standards are not applied. The requirement regarding natural geography, for example, was completely ignored for the northwestern boundary of Lake and Pen, and was brushed over in the decision on the eastern boundary of Aleutians East.

LBC decisions focus too much on borough finances. While this is important, the standards only require that a borough be able to support itself. In practice, the LBC has allowed expanded boundaries which violate the other standards in order to put the borough in an better financial posture. For example, the Aleutians East boundary was allowed to extend into the Bristol Bay region primarily so that the borough would not have to rely on a property tax, despite a finding that this was not necessary to ensure the borough's financial viability.

Subsistence and traditional land use patterns patterns are rarely considered despite their importance in determining the socio-economic unity of a region.

2. Similarly, the LBC treats the unorganized borough as a blank slate, ignoring and jeopardizing years of planning already in place. For example, the Bristol Bay CRSA - widely viewed a model program - has been dismembered into a minimum —

of four parts, assuming the current borough proposals go through. This makes no sense from a planning perspective.

3. The LBC renders conflicting decisions and applies "standards" not found in the law. For example, the LBC would not even consider Nushagak village arguments based on a borough's potential impact on natural resource management. Yet the identical argument was found a valid basis for the Kodiak annexation. The LBC's focus on commercial fishing districts to the exclusion of other economic activities is a "standard" not found in the law, as is the "maximizing fish tax revenues" rationale applied for Kodiak and Aleutians East.

4. LBC decisions are based primarily on the bare assertions of fact in the petition and unsworn "testimony" at public hearings. There is rarely any checking of facts or reliance on experts such as ADF&G or the CRSA. This factor, coupled with the failure to seriously follow the standards, results in the decisional process being little more than a shuffling of words on paper, divorced from reality.

5. The DC&A and the LBC will not consider any factor not raised by a party, despite DCRA's duty to investigate. While to a certain extent this is understandable, there is no excuse for not analyzing glaring problems such as the "contiguous" issue in Kodiak's annexation or the failure of a boundary to generally conform to natural geography.

B. Causes and Possible Remedies

Some of the these problems are due to the following "institutional" flaws:

1. The existing standards and regulations were promulgated before the political and economic climate changed dramatically in favor of boroughization. There is now an institutional bias in favor of boroughs which creates a tendency on the part of the LBC and its staff to neglect its "watch-dog" duty and ignore rules which "get in the way" of borough formation. This results in a standardless system, creating a land-grab mentality where anything goes, first-come first-served.

If circumstances are now so changed that it is desireable for all or most of the unorganized borough to incorporate, the rules should also be changed and meaningful standards established for drawing lines in unpopulated areas. It is imperative that regions be looked at as a whole.

2. The LBC and its staff seem to lack understanding of the basic rules of statutory construction and administrative analysis. Although they are laymen, they are nonetheless charged with a quasi-judicial duty. This flaw was exemplified by comments by commissioners at a recent reconsideration hearing on the Lake and Pen proposal.

One commissioner said that the Nushagak villages arguments relating to subsistence use had no merit because state and federal government have exclusive jurisdiction over their respective lands and the borough could have no impact them. Two things are wrong with that statement: 1) it ignores the fact that subsistence and other resource use is the primarily indicia of the socio-economic ties of the region, which by law is something the LBC has to consider; 2) it is an incorrect statement of law and actual practice in regard to state lands.

Other commissioners indicated that their decision to favor Kodiak's annexation at the expense of Lake and Pen made them unwilling to adjust Lake and Pen's western boundary. That shows remarkable willingless to disregard the LBC's statutory duty to impartially apply law to facts.

3. There seems to be an institutional confusion about the nature of the proceedings. Case law has made clear that they are legislative rather than adversarial in nature. In practice, they are treated as adversarial in many respects but without the procedural safeguards that normally exist in adversarial proceedings.

4. The same DCRA staff who investigate proposals and prepare recommendations for the LBC provide technical assistence to those putting together proposals. This creates a built-in bias in favor of the petition. These two functions should be separated, with the DCRA investigation and report and recommendations done by neutral parties after the petition is filed.

5. Neutral hearing officers, with legal training and preferably a land-use background, should conduct public hearings and make recommended decisions whenever contested issues arise. This would alleviate some of the problems discussed above.

Conclusion

Borough decisions are quite important and have long-range implications not fully understood even by the LBC and DCRA. This is particularly true in regard to land and —

resource management, local influence on which is one of the major incentives for forming boroughs. Judging from our region's experiences, the LBC process results in short-sighted and arbitrary decisions. It is absolutely astounding that any agency would think that it can rationally make decisions redrawing the map of southwestern Alaska in a process taking less than two months.

Moreover, the process and the implications of borough formation are poorly understood by the public in Bristol Bay. This factor, combined with procedural impediments imposed by the LBC, greatly diminishes the ability of the local populace to have a meaningful voice in the decisions. A great deal of unnecessary divisiveness has resulted.

This situation can only serve to harm the state in the long run.

#48

February 7, 1989
Box 762
Dillingham, Ak 99576

Sen. Al Adams, Chairman
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Rep. Eileen Maclean, Chairman
House Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: Local Boundary Commission - HB-131, Kodiak Island Borough annexation, Lake and Peninsula incorporation

Dear Sen. Adams and Rep. Maclean:

I write to urge your committees to consider a major overhaul of the Local Boundary Commission process for considering borough incorporations and annexations. I also urge you to put borough decisions on hold in the meantime, and more particularly to veto the Kodiak Island Borough annexation and, if possible, to remand the Lake and Peninsula decision to the LBC for further consideration.

As a Dillingham city councilman, an attorney employed by a Native association, and a former newspaper writer in Bristol Bay I have closely scrutinized the above-referenced actions and also the 1987 Aleutians East incorporation. In terms of substantive analysis these three LBC decisions are probably the worst administrative decisions I have seen in ten years of legal practice.

While Rep. Shultz's bill is a good starting point, it does not go far enough. A major problem is that the statutory and regulatory standards, probably inadequate to begin with, have been so loosened in application that they no longer mean anything. The LBC simply substitutes its own judgement for the legally-promulgated standards whenever a contested issue arises, with the result that its decisions are arbitrary and inconsistent.

The process encourages land-grabs and results in further concentration of the tax base in the more politically sophisticated, urbanized communities at the expense of villages. It also results in boundaries that are irrational from a geographic and demographic perspective. You simply cannot carve up large regions of the state on a first-come

first-served basis, requiring only minimal compliance with weak standards, and hope to have a fair and rational result.

The Kodiak Island Borough annexation. This annexation should be vetoed because it is bad public policy and because the LBC threw its standards to the winds to allow it.

The Kodiak borough was allowed to annex a large uninhabited portion of the Alaska Peninsula and adjacent waters of the Shelikoff Strait that Lake and Pen also sought to incorporate. It should be borne in mind that Lake and Pen had only to meet the standards for incorporation, while Kodiak had to meet those standards and the regulatory standards for annexation.

The LBC's rationale for giving the area to Kodiak instead of Lake and Pen seems to have been that the Shelikoff Strait is fished primarily by Kodiak-based fishermen and that taxes from that fishery should, in fairness, go to Kodiak. While that may seem reasonable, no such standard is found in the statute or the regulations. This is a prime example of the LBC substituting its own judgement of what "ought" to happen for the legally-established rules.

The Kodiak annexation was granted under the LBC's regulations governing "contiguous" annexations, under which it had to meet one of eight regulatory standards. However, a preliminary issue not even discussed in the decision was whether the annexed territory is contiguous to the original borough. By any common sense definition it is not contiguous because it is separated from the original Kodiak Island Borough by federal waters beyond the territorial limit of Alaska and will be a separate enclave.

Likewise, the eight regulatory standards were not meaningfully applied. The LBC found that three of them were met, but not one of these findings withstands scrutiny. The LBC merely accepted the bare representations of the petitioners without independent analysis or research - despite DCRA's statutory duty to "investigate" proposals.

There was no evidence of likely development in the area which Kodiak could realistically plan for or control, no evidence that municipal services were needed and no evidence that the borough would provide any additional services in the area, which after all is uninhabited. In short, the only real reason for the annexation was to provide the Kodiak borough an additional revenue source, and that alone does not meet the legal standards. It should also be noted that most of the reasons the LBC cited for approving the annexation applied only to the waters of Shelikoff Strait and not to the Alaska Peninsula.

From a public policy perspective one has to question the wisdom of giving this revenue source to a borough with a relatively vibrant economy and healthy tax base at the expense of nearby chronically depressed villages with no tax base. Kodiak has numerous fisheries and is one of the communities directly benefitting from the "Americanization" of the North Pacific bottom fishery. It has year-round harbors and processing plants. The Lake Iliamna villages in contrast are almost solely dependent on the Bristol Bay salmon fishery, for which non-residents hold most permits. There are no processing plants. The typical village has only a few salmon permits and a handful of salaried jobs in the schools and local government. Unemployment is astronomical in the winter months.

One would think it in the state's interest that such villages have access to nearby fisheries, if only through taxation. And perhaps the new borough could develop programs enabling its people to more directly benefit from the Shelikoff Strait fisheries.

The LBC's decision itself found that the revenues from this territory would be much more important to Lake and Pen than to Kodiak, although not critical to either. Kodiak's benefit would be negligible.

Lake and Peninsula incorporation. This decision should be held open by whatever legal mechanism is available to do so. For one thing, a veto of the Kodiak annexation will not alone give Lake and Pen the additional territory it sought, and deserves.

For another, the borough's northwestern boundary was approved without adequate notice to neighboring communities in the Nushagak drainage. In my view, the procedures used effectively precluded any meaningful opportunity to be heard by residents of the adjacent area and thereby violated their constitutional rights of due process and equal protection.

Substantively, the northwestern boundary clearly violates the statutory standards by following longitudanal lines rather than natural geography and socio-economic use patterns. By slashing arbitrarily across the drainages, it divides historic (and logical) planning units and puts valuable spawning grounds for the Nushagak salmon fishery in the new borough. It also places subsistence hunting and fishing areas that Nushagak village residents say are traditionally "theirs" in the Lake and Pen Borough.

Depending on Lake and Pen's evidence, of course, the boundary might be moved in either direction if the legal standards were applied. But the northwestern boundary was not even addressed in the LBC decision, and the LBC refused to grant reconsideration of the decision so that it could be.

Another reason for overturning this decision is the speed with which it was made (24 days). This did not allow sufficient investigation and evaluation of the proposal by DCRA and the LBC, much less by the public. Many residents of the region believe one borough encompassing all of Bristol Bay would be a better choice. DCRA has been asked to study this possibility but has not done so.

In conclusion, the LBC process and the statutory standards for incorporation should be modified to ensure that boundaries are made on sound planning principles. Natural geography, traditional use patterns, and existing land-planning units should be emphasized in unpopulated areas. At the very least, if decisions are going to be made on the basis of "who should get the revenues," the legislature and not the LBC should establish the policies for making that choice. I would think the state would want to spread out the tax base as much as possible.

The standards and procedures should also be modified to give the interests of communities outside proposed boundaries equal consideration and to ensure that regions are looked at as whole.

The LBC's analysis would be improved if neutral hearing officers conducted the hearings and made recommended decisions, and if DCRA's investigative and technical assistance roles were clearly separated and performed by different people. DCRA's investigative duty should be more clearly spelled out so that decisions are based on facts and expertise rather than the superficial representations of those pushing a proposal. Right now, the whole petitioning process is little more than a word game.

Sincerely,

Bruce Baltar

Bruce B. Baltar

cc Sen. Zharoff
Sen. Binkley
Rep. Jacko
Rep. Hoffman
Rep. M. Davis
Rep. Schultz

REPORT ON LOCAL BOUNDARY COMMISSION WORK SESSIONS
REGARDING PROCEDURES (January 30 - 31, 1989)

The following is a summary of the work sessions held by the Local Boundary Commission on January 30 and 31, 1989 to discuss procedures and rules to be used by the Commission. The Commission plans additional work sessions concerning this matter and intends to amend its existing regulations (19 AAC 10) to implement changes to its procedures.

Commission Members present:
C.B. Bettisworth, Chair
Shelley Dugan, Vice-Chair
Jo Anderson, Member
Ben Nageak, Member
Lamar Cotten, Member

DCRA Staff present
Jake Lestenkof (partial attendance)
Patrick Poland, Deputy Director, MRAD-Anchorage
Dan Bockhorst, Local Government Specialist

Others Present (partial attendance)
Phil Kelly, Aide to Senator Zharoff
Martha Stuart, Aide to Senate C&RA Committee
Louanne Christian, Aide to House C&RA Committee
Vern Roberts, Chignik City Administrator
Peter Froehlich, Assistant Attorney General
Marjorie Odland, Assistant Attorney General

I. PUBLIC NOTICE OF THE FILING OF A PETITION

A. FOR REGIONAL ACTIONS HAVING POTENTIAL FOR SUBSTANTIAL PUBLIC INTEREST (defined to include incorporations, dissolutions, legislative review annexations, step annexations, legislative review detachments and local action detachments which involve boroughs or unified municipalities).

1. All of the following parties located within the territory proposed for the change, and within each regional educational attendance area (REAA) and municipality adjoining the borough or unified municipality shall receive individual public notice of the filing of a petition:

   A. All municipalities (cities, boroughs, unified municipalities);
   B. The tribal council or recognized spokesperson of every unincorporated community having 25 or more residents;
   C. All ANCSA village corporations with core townships within the region or the adjoining regions;
   D. All ANCSA regional corporations organized for profit;
   E. All ANCSA regional non-profit corporations;
   F. Regional Educational Attendance Areas;
   G. Coastal Resource Service Areas;
   H. Regional Health providers;
   I. "Major property owners" (to the extent they are readily known).

2. All of the following additional parties shall receive individual notice of the petition:

   A. Legislators (at a minimum, all legislators serving the region and the adjoining regions should be notified; for issues of statewide importance all legislators should be notified);
   B. Media (newspapers, radio stations and television stations serving the areas in question);
   C. The petitioners' representative;
   D. The Local Boundary Commission;
   E. Appropriate State and federal agencies;
   F. Other parties which the Department believes would be interested in this matter (e.g. financial institutions in the event of a proposed dissolution).

3. Notice described in 1 and 2 above shall be mailed via first class mail (except for that processed through the State mail distribution system). Certified mailings will not be used. Staff will prepare an affidavit of mailing identifying the date of the mailing and the mailing address for each party.

4. Notice shall be published as display advertisements in newspapers of circulation in the regions specified. [Note: standards for publication (e.g. number of times, minimum size) to be developed at subsequent worksessions of LBC].

B. FOR COMMUNITY ACTIONS HAVING POTENTIAL FOR SUBSTANTIAL PUBLIC INTEREST (defined to include incorporations, dissolutions, legislative review annexations, step annexations, legislative review detachments and local action detachments which involve cities).

1. All of the following parties located within 10 miles from the perimeter boundary of the proposed change and/or existing boundary of the city, whichever is further, shall be provided with individual notice.

   A. All municipalities (cities, boroughs, unified municipalities);
   B. The tribal council or recognized spokesperson of every unincorporated community having 25 or more residents;
   C. All ANCSA village corporations with core townships within the defined area;
   D. All ANCSA regional corporations organized for profit;
   E. All ANCSA regional non-profit corporations;
   F. Regional Educational Attendance Areas;
   G. Coastal Resource Service Areas;
   H. Regional Health providers;
   I. "Major property owners" (to the extent they are readily known).

2. All of the following additional parties shall receive individual notice of the petition:

   A. Legislators (at a minimum, all legislators serving the territory defined should be notified; for issues of statewide importance all legislators should be notified);
   B. Media (newspapers, radio stations and television stations serving the areas in question);
   C. The petitioners' representative;
   D. The Local Boundary Commission;
   E. Appropriate State and federal agencies;
   F. Other parties which the Department believes would be interested in this matter (e.g. financial institutions in the event of a proposed dissolution).

3. Notice in 1 and 2 above shall be mailed via first class mail (except for that processed through the State mail distribution system). Certified mailings will not be used. Staff will prepare an affidavit of mailing identifying the date of the mailing and the mailing address for each party.

4. Notice shall be published as display advertisements in newspapers of circulation in the territory specified. [Note: standards for publication (e.g. number of times, minimum size) to be developed at subsequent worksessions of LBC].

C. FOR REGIONAL AND COMMUNITY ACTIONS HAVING LIMITED POTENTIAL PUBLIC INTEREST (defined to include mergers and consolidations involving boroughs, unified municipalities and cities, as well as local action annexations to boroughs, unified municipalities and cities).

Public notice of such types of actions will be much less than that described in I A and B. [Note: to be more clearly defined at subsequent worksessions of LBC]. Since mergers and consolidations involve a restructuring of existing governments, as opposed to a change in the boundaries of any government, notice will likely be limited to interested parties within the existing governments to be merged or consolidated.

With respect to local action annexations, there are three types of annexations. These are: annexations involving strictly municipally-owned property, those which have been requested by all of the property owners and resident voters in the territory proposed for annexation and those for which the annexation will be ultimately determined by an election of the voters within the territory. The overwhelming majority of these types of annexations are small in scale and are of little or no interest to the general public. In the event a local action proposal is

filed which has the potential for substantial public interest, appropriate notice will be given.

II. ADDITIONAL INFORMATION

Discussions were held by the LBC concerning the extent to which parties potentially interested in a particular proposal should be made responsible to ask for any information beyond that provided by the notice of the filing of the petition. These additional materials would include a copy of the petition, responsive briefs and written comments in favor or opposition to the petition, replies to the responsive materials from the petitioners' representative, correspondence from DCRA, DCRA draft reports, DCRA final reports, notice of meetings, hearings, et cetera. The Commission's discussion centered around the need to keep potentially interested parties informed, yet not incur undue costs of copying and mailing substantial materials to what would typically amount to 200 or more parties. The Commission was inclined limit the such information, UNLESS INDIVIDUALS SPECIFICALLY REQUESTED ADDITIONAL MATERIALS IN WRITING.

III. ADMINISTRATIVE PROCEDURES

Peter Froehlich, Assistant Attorney General, expressed the opinion that State Statutes [AS 29.05.100(b), 29.06.040(a), 29.06.130(b) and 29.06.500(b)] subject the Commission only to limited provisions of the Administrative Procedure Act. Specifically, these consist of AS 44.62.560 - 570 concerning a judicial appeal of a decision of the Commission.

Mr. Froehlich specifically indicated his belief that the provisions of AS 44.62.540 concerning reconsideration did not apply to the Commission. Mr. Froehlich suggested that the Commission adopt a regulation setting up a procedure for reconsideration based upon the process set out in the State court rules.

Mr. Froehlich recommended that the Commission adopt a regulation clearly establishing an effective date for its decisions.

The Commission discussed the need to formally adopt parliamentary rules. Assistant Attorneys General Marjorie Odland and Peter Froehlich recommended that the Commission adopt bylaws rather than a set of pre-established parliamentary rules. Ms. Odland indicated that she would provide the Commission with sample bylaws for consideration.

IV. SCHEDULE OF PROCEEDINGS

The Commission expressed the belief that a more moderate pace in future proceedings would likely accommodate nearly all of the concerns recently expressed regarding the procedures used by DCRA and the LBC.

It was agreed that the Commission should adopt a regulation allowing the Commission (or Chairman) to set a formal schedule for each proceeding. A typical schedule concerning DCRA and LBC activities leading to a decision concerning a legislative review boundary change, incorporation or dissolution was outlined as follows:

STEP 1. Form and content of petition reviewed for compliance with law by DCRA. If form and content is accepted, individual public notice of the filing of petition is given. Arrangements are also made for publication in appropriate newspaper at least once each week for four weeks. (see sample notice - petition for dissolution of City of Akiachak). These tasks would typically be accomplished within 2 weeks.

STEP 2. Chairman of the LBC sets the formal schedule for the proceedings. This would occur sometime around the 2nd or 3rd week of publication of the notice of the filing of the petition.

STEP 3. Deadline for receipt of responsive briefs and written comments in support of or in opposition to the petition. This would be determined in Step 2, but would typically be set for at least 7 weeks following the distribution and initial publication of the notice of the filing of the petition.

STEP 4. Deadline for receipt of answering brief from the petitioners' representative in reply to responsive briefs and written comments. This would be determined in Step 2, but would typically be set for 2 weeks following the deadline for responsive briefs.

STEP 5. Distribution of draft report and recommendation on the petition by DCRA. This would typically occur 4 weeks following the deadline for the answering brief.

STEP 6. Deadline for comment on DCRA draft report and recommendation. Possible public meeting(s) conducted on the petition by DCRA. These activities would typically occur 4 weeks following the distribution of the draft report.

STEP 7. Distribution of final report and recommendation on the petition by DCRA. This would typically occur 2 weeks following the deadline for comment on the draft report.

STEP 8. LBC conducts hearing(s) on petition. This would typically occur 3 weeks following the release of the final DCRA report. Note: additional public notice of the hearing would be given prior the hearing.

STEP 9. LBC makes decision on petition. This must occur within 90 days of the hearing(s), however, the Commission may make a decision immediately following the hearing.

QUESTIONS AND COMMENTS CONCERNING THE MATTERS OUTLINED IN THIS REPORT MAY BE DIRECTED TO:

Dan Bockhorst
Department of Community and Regional Affairs
949 East 36th Avenue, Room 405
Anchorage, Alaska 99508

telephone 561-8586

DRAFT #6 DRAFT

IMPORTANT NOTICE
FILING FOR DISSOLUTION OF THE CITY OF AKIACHAK

Voters of the community of Akiachak (located approximately 20 miles northeast of Bethel) have petitioned the State of Alaska to dissolve their city government. A copy of the petition and supporting materials is available for review at the Akiachak Native Community Office in Akiachak and at the Department of Community and Regional Affairs (DCRA) in Bethel and Anchorage.

BOUNDARIES. The boundaries of the city proposed for dissolution encompass approximately 12 square miles in and around the community of Akiachak.

WRITTEN COMMENT PERIOD. Individuals may file briefs or written comments in support of or opposition to this petition. To ensure consideration, such materials must be submitted in accordance with the schedule set by the Chairman of the Local Boundary Commission (LBC) as outlined below.

SCHEDULE. The Chairman of the LBC will formally set the schedule for action by the LBC concerning this matter on February 27, 1989. The following is the *tentative* schedule of the proceedings.

03/13/89 - Deadline for filing briefs and/or written comments in support of or opposition to the proposed dissolution.
03/27/89 - Deadline for submission of answering briefs by petitioners' representative.
04/24/89 - DCRA releases (for public review) draft report and recommendation to the LBC concerning the proposed dissolution.
05/22/89 - Deadline for receipt of comments on draft report and recommendation from DCRA.
06/05/89 - DCRA releases final report and recommendation.
06/26/89 - LBC conducts hearing in Akiachak.
11/07/89 - State conducts election on dissolution (assuming LBC approves petition - actual election date will be set by Director of Division of Elections).

SPECIAL NOTICE TO CREDITORS AND OTHERS WITH A FINANCIAL INTEREST. Any party to whom a debt is owed by the City of Akiachak or who holds assets of the City of Akiachak is asked to notify (INSERT NAME, ADDRESS AND TELEPHONE NUMBER OF AUDITOR).

FURTHER INFORMATION. Questions and requests for a copy of the petition for dissolution, DCRA's reports, briefs, correspondence and/or other materials concerning this matter should be directed to Dan Bockhorst, Department of Community and Regional Affairs, 949 East 36th Avenue, Suite 405, Anchorage, AK 99508 (telephone 561-8586).

STANDARDS ESTABLISHED BY THE LOCAL BOUNDARY COMMISSION CONCERNING THE ETHICAL CONDUCT OF COMMISSION MEMBERS PROHIBIT INDIVIDUAL MEMBERS OF THE COMMISSION FROM DISCUSSING ANY ASPECT OF THIS MATTER, OTHER THAN PROCEDURES TO BE USED.

(5) "rural" means

(A) a community with a population of 4,500 or less in the first or second judicial district of the state;

(B) a community with a population of 4,500 or less in the third judicial district of the state that is more than 100 nautical miles from the conforming boundary of jurisdiction of the Municipality of Anchorage; or

(C) a community with a population of 4,500 or less in the fourth judicial district of the state that is more than 35 nautical miles from the conforming boundary of jurisdiction of the City of Fairbanks;

(6) "rural housing" means housing, whether or not it is nonconforming housing, that is located in a rural area of the state. (§ 73 ch 106 SLA 1980; am § 50 ch 113 SLA 1982; am § 7 ch 128 SLA 1984)

Effect of amendments. — The 1982 amendment added paragraphs (5) and (6). The 1984 amendment rewrote paragraph (5).

Article 9. Local Boundary Commission.

Sec. 44.47.565. Local boundary commission. There is in the department a local boundary commission. The local boundary commission consists of five members appointed by the governor for overlapping five-year terms. One member shall be appointed from each of the four judicial districts described in AS 22.10.010 and one member shall be appointed from the state at large. The member appointed from the state at large is the chairman of the commission. (§ 7 ch 64 SLA 1959; am § 5 ch 200 SLA 1972; am § 100 ch 59 SLA 1982)

Revisor's notes. — Formerly AS 44.19.250. Renumbered in 1980.

Cross references. — For further provisions relating to the local boundary commission and to annexation by local action, see AS 29.68.010. As to appointment, qualifications, and terms of office of members of departmental boards, councils, or commissions, see AS 39.05.060.

Effect of amendments. — The 1982 amendment substituted "judicial districts described in AS 22.10.010" for "major senatorial election districts" and inserted "member shall be appointed" in the third sentence.

NOTES TO DECISIONS

When constitutional provision effective. — The method for making boundary changes, contemplated by art. X, § 12, of the Alaska Constitution, was operative upon the enactment of AS 44.19.260 [now AS 44.47.567] and this section. Fairview Pub. Util. Dist. No. 1 v. Anchorage, Sup. Ct. Op. No. 61 (File Nos. 69, 71), 368 P.2d 540, appeal dismissed and cert. denied, 371 U.S. 5, 83 S. Ct. 39, 9 L. Ed. 2d 49 (1962).

Cited in Mobil Oil Corp. v. Local Boundary Comm'n, Sup. Ct. Op. No. 989 (File No. 1947), 518 P.2d 92 (1974).

Sec. 44.47.567. Powers and duties. (a) The local boundary commission shall

(1) make studies of local government boundary problems;

(2) develop proposed standards and procedures for changing local boundary lines;

(3) consider a local government boundary change requested of it by the legislature, the commissioner of community and regional affairs, or a political subdivision of the state; and

(4) develop standards and procedures for the extension of services and ordinances of incorporated cities into contiguous areas for limited purposes upon majority approval of the voters of the contiguous area to be annexed and prepare transition schedules and prorated tax mill levies as well as standards for participation by voters of these contiguous areas in the affairs of the incorporated cities furnishing services.

(b) The local boundary commission may

(1) conduct meetings and hearings to consider local government boundary changes and other matters related to local government boundary changes, including extensions of services by incorporated cities into contiguous areas and matters related to extension of services; and

(2) present to the legislature during the first 10 days of a regular session proposed local government boundary changes, including gradual extension of services of incorporated cities into contiguous areas upon a majority approval of the voters of the contiguous area to be annexed and transition schedules providing for total assimilation of the contiguous area and its full participation in the affairs of the incorporated city within a period not to exceed five years. (§ 7 ch 64 SLA 1959; § 2 ch 45 SLA 1960; am §§ 1, 2 ch 55 SLA 1964; am §§ 1, 2 ch 161 SLA 1966; am § 6 ch 200 SLA 1972)

Revisor's notes. — Formerly AS 44.19.260. Renumbered in 1980.

Cross references. — For further statement of powers of local boundary commission, see Alaska Constitution, art. X, § 12.

Opinions of attorney general. — When grouped together, the powers and duties of the local boundary commission are as follows: (1) To consider any local government boundary change (§ 12, art. X, Alaska Constitution); (2) to present proposed changes to the legislature (§ 12, art. X, Alaska Constitution; § 7, ch. 64, SLA 1959); (3) (subject to law) to establish procedures whereby boundaries may be adjusted by local action (§ 12, art. X, Alaska Constitution); (4) to make studies

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The post-annexation creation of differently served and treated areas does not impugn the reasonableness of the annexation. Port Valdez Co. v. City of Valdez, Sup. Ct. Op. No. 1044 (File No. 1996), 522 P.2d 1147 (1974).

Standing to contest annexation. — An aggrieved property owner in an area to be annexed has standing to contest the annexation. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

Annexations effected through local boundary commission procedures receive a full administrative hearing, followed by legislative review, before they are subjected to judicial scrutiny. Port Valdez Co. v. City of Valdez, Sup. Ct. Op. No. 1044 (File No. 1996), 522 P.2d 1147 (1974).

Common challenge is to attack procedures. — The more common challenge to local boundary commission action attacks the procedures by which the substantive decisions were made. Port Valdez Co. v. City of Valdez, Sup. Ct. Op. No. 1044 (File No. 1996), 522 P.2d 1147 (1974).

The selection of annexation method made by the commission and approved by the legislature is controlling. Port Valdez Co. v. City of Valdez, Sup. Ct. Op. No. 1044 (File No. 1996), 522 P.2d 1147 (1974).

Judicial review. — 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 standards. 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. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

The policy decision as to the mode of annexation is an exercise of lawfully vested administrative discretion which the supreme court will review only to determine if administrative, legislative or constitutional mandates were disobeyed or if the action constituted an abuse of discretion. Port Valdez Co. v. City of Valdez, Sup. Ct. Op. No. 1044 (File No. 1996), 522 P.2d 1147 (1974).

Wood River made part of city of Dillingham. — When the legislature failed to disapprove of the commission's proposal, the commission's local boundary change, which consisted of the abolition of the boundary of Wood River and the confirmation of the boundary of the city of Dillingham, had the effect of making Wood River a part of the city of Dillingham. When the boundary commission's proposal for boundary change became effective, the city of Wood River was dissolved, even though the statutory procedures for dissolution of cities were not followed. Oesau v. City of Dillingham, Sup. Ct. Op. No. 467 (File No. 856), 439 P.2d 180 (1968).

Sec. 44.47.569. Meetings and hearings. The chairman of the commission or the commissioner of community and regional affairs with the consent of the chairman may call a meeting or hearing of the local boundary commission. All meetings and hearings shall be public. (§ 3 ch 45 SLA 1960; am § 7 ch 200 SLA 1972)

Revisor's notes. — Formerly AS 44.19.270. Renumbered in 1980.

Sec. 44.47.571. Minutes and records. The local boundary commission shall keep minutes of all meetings and hearings. If the proceedings are transcribed, minutes shall be made from the transcription. The minutes are a public record. All votes taken by the commission shall be entered in the minutes. (§ 3 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.280. Renumbered in 1980.

Sec. 44.47.573. Notice of public hearings. Public notice of a hearing of the local boundary commission shall be given in the area in which the hearing is to be held at least 15 days before the date of the hearing. The notice of the hearing shall include the time, date, place, and subject of the hearing. The director of local affairs shall give notice of the hearing at least three times in the press, through other news media, or by posting in a public place, whichever is most feasible. (§ 3 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.290. Renumbered in 1980.

Sec. 44.47.575. Quorum. Three members of the commission constitute a quorum for the conduct of business at a meeting. Two members constitute a quorum for the conduct of business at a hearing. (§ 3 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.300. Renumbered in 1980.

Sec. 44.47.577. Boundary change. A majority of the membership of the local boundary commission must vote in favor of a proposed boundary change before it may be presented to the legislature. (§ 3 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.310. Renumbered in 1980.

Sec. 44.47.579. Expenses. Members of the local boundary commission receive no pay but are entitled to the travel expenses and per diem authorized for members of boards and commissions. (§ 4 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.320. Renumbered in 1980.

Sec. 44.47.581. Hearings on boundary changes. A local government boundary change may not be proposed to the legislature unless a hearing on the change has been held in or in the near vicinity of the area affected by the change. (§ 2 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.330. Renumbered in 1980.

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Article 10.

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Sec. 44.47.583. When boundary change takes effect. When a local government boundary change is proposed to the legislature during the first 10 days of any regular session, the change becomes effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. (§ 2 ch 45 SLA 1960)

Revisor's notes. — Formerly AS 44.19.340. Renumbered in 1980.

Cross references. — For other provisions relating to procedures of the local boundary commission, see AS 29.68.010.

NOTES TO DECISIONS

By this section and AS 44.47.567 it is provided that the commission must make studies of local government boundary problems, develop proposed standards and procedures for changing boundaries, and consider boundary changes requested of it by political subdivisions. The commission may conduct hearings on boundary changes and present proposed changes to the legislature. The change becomes effective unless the legislature disapproves; legislative silence permits the change. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

Alaska Const., art. X, § 12, empowers the legislature to veto commission actions. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

But such section does nothing to compel the legislature to review for compliance with its own requirements. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

This section and Alaska Const., art. X, § 12, do not make the decision as to whether the commission has complied with the law exclusively legislative. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

Legislature handicapped in absence of known standard governing change of boundary lines. — Under Alaska's Constitution the supreme court has the duty of insuring that administrative action complies with the laws of Alaska. 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. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, Sup. Ct. Op. No. 727 (File No. 1461), 489 P.2d 140 (1971).

Existing cities with local bound commission created bounda remain unaffected by the holding, u the de facto municipality doctrine United States Smelting, Ref. & Minin v. Local Boundary Comm'n, Sup. Ct. No. 727 (File No. 1461), 489 P.2d (1971).

Standing to contest annexatio An aggrieved property owner in an a be annexed has standing to contes annexation. United States Smelting & Mining Co. v. Local Boundary Co Sup. Ct. Op. No. 727 (File No. 1461 P.2d 140 (1971).

Stated in State, Dep't of Nat'l Resources v. City of Haines, Sup. Ct. Op. No. 2342 (File No. 5067), 627 P.2d 1047 (1981).

Article 10. Senior Citizens Housing Development Fund.

Section

610. Declaration of purpose
620. Senior citizens housing development

#8

TITLE 19. COMMUNITY AND REGIONAL AFFAIRS

Part

Publisher's note. — Emergency regulations, if any, are placed in an appendix following the permanent regulations in each pamphlet of the Alaska Administrative Code.

PART 1. LOCAL BOUNDARY COMMISSION

Chapter

CHAPTER 05. STANDARDS FOR BOUNDARY CHANGES

Editor's notes. — As of 2/21/82, 19 AAC 05, 19 AAC 10, 19 AAC 15 and 19 AAC 20 have been reorganized under 19 AAC 10. The history notes for sections within the old chapters have not been carried forward in the reorganization.

CHAPTER 10. MUNICIPAL CORPORATIONS AND BOUNDARY CHANGES

Article

Article 1. Standards for Incorporation of Cities

19 AAC 10.010. CONSIDERATIONS RELATING TO INCORPORATION STANDARDS. (a) In determining whether the boundaries include all areas necessary to provide municipal services on an efficient scale for the purposes of AS 29.18.011(a)(2), the commission will, in its discretion and without limitation, consider land ownership patterns, land use patterns, population densities, the location of existing and anticipated transportation facilities, existing and anticipated roads and trails, existing or potential watersheds, and other areas necessary for the provision of municipal services.

(b) In determining whether the economy of a community has the human and financial resources necessary to provide local services for the purposes of AS 29.18.011(a)(3), the commission will, in its discretion and without limitation, consider existing and anticipated industrial, commercial, or resource development and education levels of the residents of the community, in addition to the factors listed in AS 29.18.011(a)(3).

(c) In determining whether the population of a community is stable enough to support local government for the purposes of AS 29.18.011(a)(4), the commission will, in its discretion and without limitation, consider community growth patterns, age distribution patterns, seasonal population changes, and other factors which indicate the stability of the population of the community.

(d) In determining whether there is a demonstrated need for local government in a community for the purposes of AS 29.18.011(a)(5), the commission will, in its discretion and without limitation, consider existing and anticipated social and economic problems, whether major economic development is anticipated, adequacy of existing services, and other factors which reflect the need for local government. (Eff. 2/21/82, Register 81)

Authority: AS 29.1
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Authority: AS 29.18.011
AS 44.47.980

19 AAC 10.020. APPLICATION OF STANDARDS. (a) The commission will not allow the incorporation of a community located within an organized borough unless the petitioners demonstrate to the satisfaction of the commission that the services to be exercised by the proposed city cannot be reasonably or practicably exercised by the borough on an areawide or non-areawide basis. The commission will consider the requirement of this subsection satisfied if

(1) the commission determines that the municipal services proposed to be exercised by the new city could more economically and efficiently be provided by the city form of government than by the exercise of areawide or non-areawide borough powers; or

(2) the commission determines that the proposed city is remote from the borough seat and is not connected to the borough seat by the state highway system.

(b) The commission will not consider a petition for incorporation of a community located or partially located within an existing city until the petitioners have submitted, and the commission has approved, a petition for detachment from the existing city of the area proposed for incorporation in accordance with this chapter.

(c) The commission will not consider a petition for incorporation of a community located partially within and partially outside an organized borough until the petitioners have submitted, and the commission has approved

(1) a petition for annexation to the borough of the area located outside the borough in accordance with this chapter; or

(2) a petition for detachment of the area proposed for incorporation from the borough in accordance with this chapter.

(d) The commission will deny a petition for incorporation of a community as a city of the first class unless the petitioners demonstrate to the satisfaction of the commission that the community has the ability to generate sufficient local revenues to pay for the local share of the costs of mandatory first-class city services, which include, but are not limited to, the cost of the local contribution for education, the cost of an annual audit of the city accounts, and, for cities in the unorganized borough, the cost of exercising planning, platting, and zoning powers as authorized by AS 29. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.030. INCORPORATION OF TERRITORY LOCATED WITHIN A MUNICIPALITY. (a) For the incorporation of a community located within a municipality which is providing services to the community which the proposed city will provide upon incorpora-

tion, the commission will determine the method by which assets and liabilities are to be distributed between the newly incorporated city and the muncipality formerly providing services. In determining the method of transfer of service responsibility and the distribution of assets and liabilities, the commission will, in its discretion, approve an equitable agreement between the municipalities affected but will independently review the proposed agreement.

(b) If, within two years of the date of incorporation, the municipalities involved have failed to reach an agreement under (a) of this section as to the distribution of assets and liabilities, then the commission shall determine the method of transfer of service responsibility and the distribution or transfer of assets and liabilities which shall be binding on the municipalities.

(c) If, in exercising its responsibilities under (b) of this section, the commission determines it necessary, the commission will, in its discretion, employ the services of professional accountants or consultants, and charge the municipalities for the costs incurred. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

Article 2. Standards for Incorporation of Development Cities

Section
40 — 60. (Reserved)

19 AAC 10.040 — 19 AAC 10.060. Reserved.

Article 3. Standards for Annexation to Cities

Section
65. Applicability
70. Annexable territory
80. Application of standards
90. Annexation of incorporated territory

19 AAC 10.065. APPLICABILITY. The provisions of 19 AAC 10.070 — 19 AAC 10.090 apply to a proposal for annexation by local action (19 AAC 10.630 — 19 AAC 10.730), by legislative review (19 AAC 10.450 — 19 AAC 10.620) or by the step process (19 AAC 10.735 — 19 AAC 10.790). (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.070. ANNEXABLE TERRITORY. (a) Territory which is contiguous to a city may be annexed to that city if one or more of the following standards are met:

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(1) the contiguous territory is totally surrounded by the city's boundaries;

(2) the land in the territory is wholly owned by the city;

(3) the territory is urban in character;

(4) the territory is in need of municipal services which the city can provide more efficiently than another municipality;

(5) there is a reasonable likelihood that future growth and development will occur within the territory and that annexation of the territory will enable the city to plan for and control that development;

(6) the health, welfare, or safety of city residents is endangered by conditions existing or developing in the territory and annexation will enable the city to remove or relieve those conditions;

(7) the extension into the territory of city services or facilities is necessary to enable the city to provide adequate service to city residents, and it is impossible or impractical for the city to extend the facilities or services unless the territory is within the city's boundaries;

(8) residents or property owners within the territory receive or may be reasonably expected to receive, directly or indirectly, the benefit of city government without commensurate property tax contributions, whether city services are rendered or received inside or outside the territory;

(9) the annexation is otherwise necessary to accomplish a valid public purpose.

(b) Territory which is not contiguous to a city may be annexed to the city if

(1) the land in the territory is wholly owned or leased by the city or used primarily for the performance of city functions; and

(2) annexation is necessary to enable the city to achieve adequate control, protection, or management of the property.

(c) Territory which does not meet the standards of (a) of this section may be annexed to a city if the territory lies between the city boundary and other noncontiguous territory which meets the requirements of (a) of this section.

(d) In determining whether territory is urban in character for the purposes of (a)(3) of this section, the commission will, in its discretion and without limitation, consider whether the property is platted or held for sale for residential or commercial purposes, whether the population density of the territory approximates that of the annexing city, whether the population of the territory stems primarily from actual growth of the city beyond its legal boundaries, and whether the property is valuable primarily by reason of its suitability for prospective urban purposes.

(e) In determining whether the standard established in (a)(8) of this section is met, the commission will consider alternative methods

available to the city for offsetting the cost of providing services to individuals or property beyond its property taxation powers. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.070 is based on a former version of 19 AAC 05.010.

19 AAC 10.080. APPLICATION OF STANDARDS. (a) The commission will not approve an annexation unless the annexing city demonstrates to the satisfaction of the commission that it is capable of extending, and is willing to extend, services to the annexed area as follows:

(1) full municipal services shall be extended to the annexed area immediately unless

(A) the annexation is pursuant to 19 AAC 10.735 — 19 AAC 10.790; or

(B) the immediate extension of full municipal services to the annexed area is impossible because of a lack of necessary facilities, in which case the annexing city shall satisfy the commission that it will provide the services within a reasonable time;

(2) if the annexation is under 19 AAC 10.735 — 19 AAC 10.790, the commission must be satisfied that the city's plan for gradual extension of services reasonably compares with a plan for gradual extension of taxation and provides for extension of full municipal services to the annexed area within the time period established under 19 AAC 10.740.

(b) The commission will, in its discretion, conduct public hearings or investigations after a detachment to determine if the service requirements of residents are being met. If the commission determines that the service requirements of the residents of the territory are not being met, it will, in its discretion, begin annexation proceedings under this chapter.

(c) Notwithstanding the provisions of (a) of this section, the commission will, in its discretion, approve an annexation by a city which has authority to establish and operate differential taxation zones if the commission is satisfied that the city is willing and able to use that authority to

(1) provide the territory with such services as may be desired by residents of the territory; and

(2) insure that the annexed area is not subjected to unfair taxation for services not available in the annexed area. (Eff. 2/21/82, Register 81)

Authority: Art. X.
AS 44.4

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Authority: Art. X, S
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Authority: Art. X, S
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Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.080 is based on a former version of 19 AAC 05.020.

19 AAC 10.090. ANNEXATION OF INCORPORATED TERRITORY. (a) For the annexation by a city of territory of another municipality, the commission will determine the method by which assets and liabilities are to be distributed between the city and the municipality formerly providing services. In determining the distribution of liabilities and assets, the commission will, in its discretion, approve an equitable agreement between the municipalities affected but will independently review the proposed agreement.

(b) Territory which is part of a city may not be annexed to another city unless the commission determines the annexation to be in the best interests of the annexing city, the city from which the annexed territory is taken, and the annexed area.

(c) Separate or additional proceedings are not required for detachment from a city or borough of territory which becomes annexed to another city; the detachment is effected by and at the same time as the annexation. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.090 is based on former versions of 19 AAC 05.030 and 19 AAC 15.040.

Article 4. Standards for Detachment from Cities and Unified Municipalities

19 AAC 10.095. APPLICABILITY. The provisions of 19 AAC 10.100 — 19 AAC 10.120 apply to a proposal for detachment by local action (19 AAC 10.630 — 19 AAC 10.730) or by legislative review (19 AAC 10.450 — 19 AAC 10.620). (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.100. DETACHABLE TERRITORY. (a) Territory which is part of a city or unified municipality may be detached from that city or unified municipality if, in the view of the commission, the detachment would be in the best interests of the state, the area to be

detached and the municipality affected by the detachment. In determining whether to approve detachment, the commission will consider, but is not limited to, the following factors:

(1) whether the territory is so situated as to render it impractical or unfeasible to extend to the territory municipal sewer, street, water, or other facilities or municipal police, fire, health, or other services;

(2) whether within the territory conditions exist, or there is reasonable prospect for future conditions to exist, which, if not subject to municipal control, would endanger the health or safety of residents;

(3) whether it is likely that future growth and development of the city or unified municipality will occur within the territory; and

(4) whether the territory is needed by the city or unified municipality for a legitimate public purpose.

(b) Territory may be detached from a city or unified municipality if the commission determines that the city or unified municipality has substantially failed or refused to provide needed services to the territory, and there is a substantial likelihood that it will continue to fail or refuse to provide the services, when such services are provided to other areas within the municipality and are supported by taxes levied in the area considered for detachment.

(c) The commission will, in its discretion, conduct public hearings or investigations after the effective date of an annexation to determine whether the extension of services or taxation or use of differential taxation zones is proceeding in a reasonable manner. If the commission determines that the extension of services or taxation or use of differential taxation zones is not progressing in a manner consistent with that set forth in the annexation petition, it will, in its discretion, begin detachment proceedings. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.100 is based on a former version of 19 AAC 05.050.

19 AAC 10.110. APPLICATION OF STANDARDS. (a) The commission will not approve a detachment unless the petitioners demonstrate to the satisfaction of the commission that the requirements of the territory for services will be met following the detachment.

(b) If, in fulfillment of the requirement of (a) of this section, petitioners have proposed incorporation of a new municipality, the commission may condition the approval of the detachment upon voter approval of the incorporation proposal. (Eff. 2/21/82, Register 81)

Authority: Art. X, S
AS 44.47

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Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.120. DISTRIBUTION OF ASSETS AND LIABILITIES. (a) If territory sought to be detached is part of a city within an organized borough, the commission will determine the manner in which the assets and liabilities of the territory shall be distributed between the city from which it is being detached and the organized borough. In making this determination, the commission will, in its discretion, approve an equitable agreement between the detaching city and the organized borough but will independently review the proposed agreement.

(b) If the territory sought to be detached is part of a city within the unorganized borough, the commission will determine the manner in which the assets and liabilities of the territory being detached shall be distributed between the city from which the territory is being detached and the state. The commission, after an independent review, will, in its discretion, approve an equitable agreement between the city and the state.

(c) If petitioners have proposed that, following detachment, a new municipality be formed, the provisions of (a) of this section apply to the newly formed municipality and the municipality from which the territory was detached.

(d) If, within two years of the effective date of the detachment, an agreement specifying the manner by which assets and liabilities will be distributed has not been agreed to by the affected parties, the commission will enter an order providing for transfer of service responsibility and distribution of assets and liabilities which shall be binding on the parties affected.

(e) If in exercising its responsibilities under (d) of this section, the commission determines it necessary, the commission will, in its discretion, employ the services of professional accountants or consultants and charge the parties affected for the costs incurred. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.120 is based on former versions of 19 AAC 05.060 and 19 AAC 15.200.

Article 5. Standards for Dissolution of Cities

19 AAC 10.130. DISSOLUTION. (a) A city may be dissolved if the city has no indebtedness, bonded or otherwise, or has proposed a method of repayment which will protect the interests of its creditors, and if the following standards are met:

(1) the city has ceased, for two or more consecutive years, to exercise any of the municipal powers set forth in AS 29.48.030 — 29.48.035;

(2) the city has failed to conduct two or more consecutive regular elections in the manner provided by law; and

(3) the city no longer meets the standards for incorporation as provided by law and regulation.

(b) The commission will, in its discretion, conduct a public hearing or an investigation after the effective date of an incorporation of a city to determine whether municipal services are being provided in a manner consistent with the timetable included in the petition for incorporation. If the commission determines that services are not being provided according to the timetable, the commission will, in its discretion, bring dissolution proceedings under 19 AAC 10.130 — 19 AAC 10.150. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

Editor's notes. — 19 AAC 10.130 is based on a former version of 19 AAC 05.090.

19 AAC 10.140. APPLICATION OF STANDARDS. (a) If the commission determines that it will recommend to the legislature that a city be dissolved, the city may not make an expenditure without first receiving the written approval of the commissioner.

(b) In the dissolution of a city within an organized borough, the assets of the city being dissolved become the assets of the borough in which it is located if the borough possesses and exercises the powers to which the assets of the city relate. If the borough does not possess and exercise the relevant powers, the assets of the city being dissolved become the assets of the state.

(c) In the dissolution of a city within the unorganized borough, the assets of the city being dissolved become the assets of the state.

(d) If the liabilities of a city being dissolved exceed the assets of the city, the taxable property within the city remains subject to taxation until the liabilities are paid. (Eff. 2/21/82, Register 81)

Authority: Art. X, S
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Authority: Art. X, S
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Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.150. DISSOLUTION EFFECTED BY ANNEXATION. Separate or additional proceedings are not required for dissolution of a city in an area which has been annexed to another city; the dissolution is effected by and at the same time as the annexation. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

Editor's notes. — 19 AAC 10.150 is based on a former version of 19 AAC 05.100.

Article 6. Standards for Incorporation of Organized Boroughs

19 AAC 10.160. INCORPORATION. An area may incorporate as an organized borough if it meets the statutory standards set forth in AS 29.18.030 and meets the following specific requirements:

(1) the area includes at least two separate communities;

(2) transportation services are available at least once a week between communities located within the area on a regularly scheduled or charter basis, or communities located within the area which do not have regularly scheduled transportation services are connected by a highway system;

(3) there are sufficient anticipated revenues to maintain and operate, at a minimum, the mandatory powers of the proposed borough government;

(4) there are at least 1,000 people located within the area; and

(5) the area includes, at a minimum, one entire regional education attendance area unless the commission determines that a smaller area can otherwise meet borough government standards for incorporation. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.170. APPLICATION OF STANDARDS. (a) The commission will not approve an incorporation unless the petitioners demonstrate to the satisfaction of the commission that the proposed borough is capable of providing and willing to provide the mandatory powers of an organized borough within three months of incorporation.

(b) The commission will not consider a petition for incorporation as a borough of an area whose boundaries include only a portion of a city.

(c) The commission will not consider a petition for incorporation of an area located partially or wholly within an organized borough or unified municipality until the petitioners have submitted, and the commission has approved, a petition for detachment of the area from the borough or unified municipality pursuant to 19 AAC 10.100 — 19 AAC 10.120 or 19 AAC 10.230 — 19 AAC 10.250. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.180. DISTRIBUTION OF ASSETS AND LIABILITIES. (a) For the incorporation of an area located within an existing organized borough or city which provides services to the area, the commission will determine the method by which assets and liabilities are to be distributed between the newly incorporated borough, the former borough, and each city formerly providing services.

(b) Notwithstanding the provisions of (a) of this section, for the incorporation of an area which includes an organized city which provides mandatory borough powers, the newly incorporated borough succeeds to the assets and liabilities of the organized city as they relate to the mandatory powers being assumed by the borough.

(c) In determining the method of transfer of service responsibility and the distribution or transfer of assets and liabilities, the commission will, in its discretion, approve an equitable agreement between the municipalities affected but will independently review the proposed agreement.

(d) If, within two years of the date of incorporation, the newly incorporated borough and another municipality affected by the incorporation have failed to reach an agreement as to the method of transfer of service responsibility or the distribution or transfer of assets and liabilities, the commission will enter an order providing for the transfer of service responsibility and the distribution or transfer of assets and liabilities which shall be binding on the municipalities affected.

(e) If, in exercising its responsibilities under (c) of this section, the commission determines it necessary, the commission will, in its discretion, employ the services of professional accountants or consultants and charge the municipalities affected for the costs incurred. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

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Article 7. Standards for Annexation to Organized Boroughs

19 AAC 10.185. APPLICABILITY. The provisions of 19 AAC 10.190 — 19 AAC 10.220 apply to a proposal for annexation by local action (19 AAC 10.630 — 19 AAC 10.730) or by legislative review (19 AAC 10.450 — 19 AAC 10.620). (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.190. ANNEXABLE TERRITORY. (a) Territory which is contiguous to an organized borough may be annexed to that borough if one or more of the following standards are met:

(1) the contiguous territory is totally surrounded by the organized borough's boundaries;

(2) the land in the territory is wholly owned by the organized borough;

(3) the territory is in need of municipal services which the organized borough can provide more efficiently than another municipality or the state;

(4) 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;

(5) the health, welfare, or safety of the residents of the organized borough is endangered by conditions existing or developing in the territory and annexation will enable the organized borough to remove or relieve those conditions;

(6) the extension into the territory of borough services or facilities is necessary to enable the organized borough to provide adequate service to residents of the organized borough, and it is impossible or impractical for the organized borough to extend the facilities or services unless the territory is within the organized borough's boundaries;

(7) residents or property owners within the territory 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; or

(8) the annexation is otherwise necessary to accomplish a valid public purpose.

(b) Territory which is not contiguous to the borough may be annexed to the borough if

(1) the land in the territory is wholly owned or leased by the borough or used primarily for the performance of borough functions; and

(2) annexation is necessary to enable the borough to achieve adequate control, protection or management of the property.

(c) Contiguous territory which does not meet the requirements of (a) of this section may nevertheless be annexed to a borough if the territory lies between the borough boundary and noncontiguous territory which does meet the requirements of (a) of this section.

(d) In determining whether the standard established in (a)(7) of this section is met, the commission will consider alternate methods available to the borough for offsetting the cost of providing services to individuals or property beyond its property taxation powers.

(e) The commission will, in its discretion, conduct public hearings or investigations after a detachment to determine if the service requirements of the territory are being met. If the commission determines that the service requirements of the territory are not being met, it will, in its discretion, begin annexation proceedings under this chapter. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.190 is based on a former version of 19 AAC 05.110.

19 AAC 10.200. APPLICATION OF STANDARDS. The commission will not approve an annexation unless the annexing organized borough demonstrates to the satisfaction of the commission that it is capable of extending and willing to extend services to the annexed area in accordance with this subsection. If possible, areawide and nonareawide borough services shall be extended to the annexed area immediately. If the immediate extension of services is not possible, the commission must be satisfied that the services not immediately extended will be extended as soon as possible and that reasonable plans have been formulated for the capital expansion necessary for the extension of services. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.200 is based on a former version of 19 AAC 05.120.

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19 AAC 10.210. ANNEXATION OF INCORPORATED TERRITORY. (a) If the territory sought to be annexed includes part of another organized borough which is providing services to the territory that the annexing borough will provide upon annexation, the commission will determine the method by which assets and liabilities are to be distributed between the annexing borough and the borough formerly providing the services.

(b) In determining the method of transfer of service responsibility and the distribution of assets and liabilities, the commission will, in its discretion, approve an equitable agreement between the municipalities affected but will independently review the proposed agreement.

(c) Territory which is part of an organized borough may not be annexed to another borough unless the commission determines the annexation to be in the best interests of the annexing borough, the borough from which the annexed territory is taken, and the annexed territory.

(d) Separate or additional proceedings are not required for detachment of territory from an incorporated city or borough which becomes annexed to another borough. The detachment is affected by, and at the same time as, the annexation itself. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.210 is based on former versions of 19 AAC 05.130 and 19 AAC 15.040.

19 AAC 10.220. STATUTORY STANDARDS. (a) In addition to the requirements of 19 AAC 10.190 — 19 AAC 10.220, the commission will approve and recommend to the legislature the annexation of territory to an organized borough only if it finds that the resulting boundaries of the expanded borough conform substantially to the standards set forth in AS 29.18.030.

(b) In approving organized borough boundary changes, the commission, with the assistance of the department, will, if necessary, determine proposed assembly reapportionment plans applicable to the organized boroughs whose boundaries are to be affected by the change. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.220 is based on a former version of 19 AAC 05.140.

Article 8. Standards for Detachment from Organized Boroughs

19 AAC 10.225. APPLICABILITY. The provisions of 19 AAC 10.230 — 19 AAC 10.250 apply to a proposal for detachment by local action (19 AAC 10.630 — 19 AAC 10.730) or by legislative review (19 AAC 10.455 — 19 AAC 10.620). (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.230. DETACHABLE TERRITORY. (a) Territory which is a 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. In determining whether to approve a detachment, the commission will consider, but is not limited to, the following factors:

(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.

(b) The commission will, in its discretion, conduct public hearings or investigations after the effective date of an annexation to determine whether the extension of services is progressing in a reasonable manner. If the commission determines that the extension of services is not progressing in a reasonable manner, it will, in its discretion, begin detachment proceedings. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.240. APPLICATION OF STANDARDS. (a) The commission will not approve a detachment unless the petitioners demonstrate to the satisfaction of the commission that the service requirements of the territory will be met following the detachment.

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(b) If, in fulfilling the requirement of (a) of this section, the petitioners have proposed the incorporation of a new municipality, the commission will, in its discretion, condition approval of the detachment upon voter approval of the incorporation proposal. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.250. DISTRIBUTION OF ASSETS AND LIABILITIES. (a) If territory sought to be detached consists entirely of a city having authority and responsibility for the powers formerly provided by the borough from which detachment is sought, the commission shall determine the manner in which the assets and liabilities of the borough shall be distributed between it and the detaching city.

(b) If territory sought to be detached consists entirely of territory not within a city or consists of a city not having authority to provide services currently provided by the borough from which detachment is sought, the commission shall determine the manner in which the assets and liabilities of the municipality from which detachment is sought shall be distributed between it and the state. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Article 9. Standards for Dissolution of Organized Boroughs

19 AAC 10.260. DISSOLUTION. (a) A borough may dissolve if it has no indebtedness, bonded or otherwise, or has proposed a method of repayment which will protect the interest of its creditors and if the following standards are met:

(1) the borough has ceased to exercise all of the mandatory powers of a borough;

(2) the borough has failed to conduct two or more consecutive regular elections in the manner provided by law; and

(3) the borough no longer meets the standards for incorporation as provided by law and regulation.

(b) The commission will, in its discretion, conduct public hearings or investigations after the effective date of an incorporation to determine whether the provision of the municipal services is proceeding in a manner consistent with that outlined in the petition for incorporation. If the commission determines that the provision of services is not proceeding in a manner consistent with that outlined in the petition,

the commission will, in its discretion, begin dissolution proceedings. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.270. APPLICATION OF STANDARDS. (a) If the commission determines that it will recommend to the legislature that a borough be dissolved, the borough may not make an expenditure without first receiving the written approval of the commissioner.

(b) The assets of the borough being dissolved become the assets of the state.

(c) If the liabilities of a borough being dissolved exceed the assets of the borough, the taxable property within the borough remains subject to taxation until the liabilities are paid. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.280. DISSOLUTION EFFECTED BY ANNEXATION. Separate or additional proceedings are not required for dissolution of a borough which has been annexed in its entirety by another borough. The dissolution is effected by and at the same time as the annexation itself. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Article 10. Standards for Merger of Municipalities

Section
290. Merger
300. Dissolution effected by merger

19 AAC 10.290. MERGER. Two or more municipalities may merge if, upon completion of the merger, the remaining municipality meets the applicable standards for incorporation set forth by law and regulation. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.300. DISSOLUTION EFFECTED BY MERGER. Separate or additional proceedings are not required for dissolution of a municipality which merges with another municipality. The dissolution is effected by and at the same time as the merger itself. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Article 11. St

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Authority: Art. X,
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Article 11. Standards for Consolidation of Municipalities

Section
310. Consolidation
320. Dissolution effected by consolidation

19 AAC 10.310. CONSOLIDATION. Two or more municipalities may consolidate if the newly created municipality meets the applicable standards for incorporation set forth by law and regulation. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.320. DISSOLUTION EFFECTED BY CONSOLIDATION. Separate or additional proceedings are not required for dissolution of municipalities which consolidate, but the dissolution is effected by and at the same time as the consolidation itself. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Article 12. Procedures for Incorporation of Municipalities

Section
325. Applicability
330. Petition
340. Form and contents
350. Exhibits
360. Briefs
370. Service
380. Notice of petition
390. Answering brief
400. Call for hearing
410. Reply brief
420. Hearing
430. Decisional meeting
440. Public meetings

19 AAC 10.325. APPLICABILITY. The provisions of 19 AAC 10.330 — 19 AAC 10.450 apply to a proposal for incorporation of a city or a borough. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.330. PETITION. A request for incorporation of territory is initiated by filing a petition and supporting brief with the commissioner. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.340. FORM AND CONTENTS. (a) The petition shall be addressed to the commission and shall bear a caption which states the name and class of the proposed municipality and the authority under which the action is initiated.

(b) In addition to the information required by AS 29.18.050, the petition shall contain the following:

(1) the number of residents within the territory;

(2) the assessed or estimated value of all taxable property within the territory, giving separate totals for real and personal property;

(3) the rate, if any, at which real and personal property are taxed in the territory;

(4) the rate, if any, of the sales tax levied and collected in the territory;

(5) the amount and a full explanation of the outstanding bonded indebtedness for which the territory is wholly or partially responsible; and

(6) the quantity of land contained in the territory.

(Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.350. EXHIBITS. (a) The petitioners shall append the following exhibits to the petition:

(1) a map or maps showing

(A) the boundaries of the proposed municipality; and

(B) sufficient detail to define the streets and roadways;

(2) an affidavit of the petitioner, or his representative, indicating the source from which the information contained in the petition was acquired and stating that a census or other reliable enumeration of the territory was conducted by him, or under his direct supervision, specifying the dates when the census or enumeration was begun and completed and verifying that it was taken accurately; and

(3) a schedule setting forth the approximate dates upon which the municipality will begin providing municipal services, whether mandatory or anticipated, together with a description of the services to be provided during the first full fiscal year of operation and the level of service to be provided.

(b) If a proposed municipality is within an organized borough, the petitioner shall append the following exhibits to the petition:

(1) a copy of the agreements, if any, entered into with an existing municipality regarding the transitional provision of services and the distribution of assets and liabilities;

(2) a map and legal description of any borough service area located wholly or partially within the proposed municipality; and

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(3) the affidavit of the petitioner or his representative that service of the petition has been made in compliance with 19 AAC 10.370.

(c) Maps submitted as exhibits to copies of the petition shall conform in color and other distinguishing markings to the original exhibit.

(d) If an official census has been made of the territory by the federal, state, or municipal government within three years of the date of the petition, a copy of that census may be attached to the petition in lieu of the census affidavit required by (a)(2) of this section. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.360. BRIEFS. The petition must be accompanied by a written brief. The brief shall fully set forth the reasons supporting the proposed incorporation and shall demonstrate that the area meets the standards for incorporation set forth in AS 29.18 and 19 AAC 10.010 — 19 AAC 10.030, or in the case of a development city 19 AAC 10.040 — 19 AAC 10.060. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.370. SERVICE. (a) The petitioner shall, by certified mail, serve a copy of the petition and brief, together with accompanying exhibits, to every municipality in or adjoining the territory. The service shall be made at the same time that the petition is filed with the commissioner.

(b) The petitioner shall arrange for the petition, exhibits, and brief to be available for inspection by the general public at a designated place in or near the territory. The affidavit required under 19 AAC 10.350 shall specify the exact location where and when the petition is available for inspection. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.380. NOTICE OF PETITION. (a) Upon receipt of notice from the department that the petition and brief have been accepted, the petitioner shall cause notice of the filing of the petition to be published in a newspaper of general circulation in the territory, or if a newspaper of general circulation is not available, post notice in at least three public and prominent locations. The notice shall be in the form specified by the commissioner; shall include a brief explanation of the proposed incorporation, the name and class of the proposed

municipality, and a general description of its boundaries; and shall indicate the place where the petition and brief may be inspected by the public as provided by 19 AAC 10.370. In addition, the notice shall advise persons that they may file an answering brief pursuant to 19 AAC 10.390 and that they may submit written comments on the proposal to the department.

(b) The petitioner shall furnish the commissioner with proof of compliance with (a) of this section. Upon receipt of the proof, the commissioner shall submit the petition and brief to the commission.

(c) A petition filed with the commissioner may not be considered to be pending before the commission until the petition and brief have been submitted to the commissioner pursuant to this section. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.390. ANSWERING BRIEF. (a) A person or entity residing or owning property in the territory proposed for incorporation or the governing body of a municipality may file a brief in opposition to the proposed incorporation. The original of the brief shall be filed with the commissioner together with proof that one copy was served upon the petitioner or his designated representative.

(b) A person, entity, or municipality filing an answering brief shall be designated a respondent.

(c) The answering brief shall indicate any factual information thought to be incorrectly or incompletely presented in the petition or petitioner's brief and shall demonstrate the manner in which the proposed municipality fails to satisfy the standards required by this chapter. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.400. CALL FOR HEARING. The commission will establish a time and place for a hearing regarding the proposed incorporation which shall be held in or near the territory proposed for incorporation. The commission will publish notice of the hearing at least 15 days before the date of the hearing, at least three times in a newspaper of general circulation in the territory, through other news media, or by posting in a public place, whichever is most feasible. At least 15 days before the date of the hearing, the commission shall cause notice of the hearing to be served by certified mail upon:

(1) the municipalities specified in 19 AAC 10.370;

(2) the petitioner or his representative; and

(3) any person, entity, or municipality who has filed an answering brief pursuant to 19 AAC 10.390. (Eff. 2/21/82, Register 81)

Authority: Art. X,
AS 44.4

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19 AAC 10.410. REPLY BRIEF. Before the hearing described in 19 AAC 10.400 is held, the petitioner may file a brief in reply to any new matter raised in an answering brief. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.420. HEARING. (a) At a hearing held pursuant to 19 AAC 10.400, the petitioner shall first proceed to support the petition through exhibits, testimony, and other means which bear upon the issues raised by the petition. The presentation shall proceed in substantially the following manner:

(1) the presentation shall be conducted by the petitioner or his designated representative;

(2) the presentation shall be opened with a brief discussion of the reason for and the nature of the proposed incorporation;

(3) at the conclusion of the opening statement, the petitioner shall submit a list of the persons who will give statements in support of the petition; and

(4) the petitioner shall proceed to conduct his presentation in the manner indicated in his outline; however, the chairman of the commission may allow the petitioner to deviate from his outlined presentation.

(b) Upon completion of the petitioner's presentation, each respondent shall proceed, in the manner established by the chairman and in the same manner as prescribed for the petitioner, to present his views. The respondent's presentation shall include the information and arguments which the respondent wishes to advance in rebuttal of the petitioner's presentation.

(c) The petitioner may rebut the respondent's presentation. Upon completion of the petitioner's rebuttal, the commission will hear views of interested persons who are not petitioners or respondents. To obtain the floor, a person must be recognized by the chairman and must state his name, address, and the nature of his interest. A person purporting to speak on behalf of a municipality shall demonstrate his authority to do so. The chairman may impose a reasonable limitation of the time allotted to each speaker and may curtail repetitive and irrelevant statements.

(d) Members of the commission may at any time pose questions or comment on matters raised during the hearing. Representatives of the department, with consent of the chairman, may pose questions or comment on matters raised during the hearing.

(e) The chairman may temporarily suspend the order of proceedings set forth in this section to allow rebuttal, counterrebuttal, or general

public comment on a particular issue or issues. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.430. DECISIONAL MEETING. (a) Within 90 days after a public hearing held pursuant to 19 AAC 10.400, the commission shall convene a decisional meeting to examine all aspects of the written and oral testimony before it, to consider other relvant and reliable information available to it, and to enter a decision. A majority of the total membership of the commission voting in favor of accepting a proposed incorporation is needed to decide the issue. The votes for and against the proposed incorporation shall be recorded. A petition is rejected if not accepted. If unable to meet as one body, the commission will, in its discretion, provide for a conference telephone or radio phone decisional meeting open to the public at a time and place to be determined by the commission.

(b) The commission will keep written minutes summarizing its decisional meetings. The minutes approved by the commission are a public record. The votes taken by the commission shall be entered into the minutes.

(c) Within 30 days after the date of reaching its decision, the commission will prepare a written statement of its decision, including an explanation of the major considerations upon which it relied in reaching its decision.

(d) The commission will immediately mail its written decision to the petitioner and to other interested parties who give written notice that they desire a copy of the decision. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.980

19 AAC 10.440. PUBLIC MEETINGS. The commission will, in its discretion and before consideration of a petition requesting incorporation of a municipality, require a petitioner to conduct informational meetings or hearings in the area proposed for incorporation to acquaint the residents of the area with the purposes sought to be accomplished and the benefits which are expected to be derived by the residents should the incorporation be made and to solicit public opinions on the proposed incorporation. The commission will, in its discretion, require that transcripts or minutes be taken of the meetings or hearings for the commission's use and require that the petitioner's representative certify to the commission that the meetings or hearings were conducted as directed by the commission. (Eff. 2/21/82, Register 81)

Authority: Art. X
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Article

Section
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460. Petition
470. Petitioner
480. Form and con
490. Exhibits
500. Briefs
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AS 44.47.980

Article 13. Procedures for Boundary Changes Requiring Legislative Review

19 AAC 10.450. APPLICABILITY. The provisions of 19 AAC 10.460 — 19 AAC 10.620 apply to an annexation or detachment proceeding initiated pursuant to AS 44.47.567(b)(2) and AS 29.68.010(a). (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

19 AAC 10.460. PETITION. A request for a local government boundary change under 19 AAC 10.450 — 19 AAC 10.620 is initiated by filing an original and six copies of a petition and supporting brief with the commissioner. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.460 is based on a former version of 19 AAC 10.010.

19 AAC 10.470. PETITIONER. (a) A petition may be initiated by

(1) the governing body of a municipality whose boundaries are to be changed;

(2) the governing body of an organized borough in which the territory is located;

(3) at least 10 percent of the registered voters residing in the territory to be annexed or detached, in the municipality to be dissolved, or in each municipality to be merged or consolidated;

(4) the commissioner.

(b) The person or entity initiating the petition shall be designated the petitioner. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.470 is based on a former version of 19 AAC 10.020.

19 AAC 10.480. FORM AND CONTENTS. (a) The petition shall be addressed to the commission and shall bear a caption which clearly identifies the nature of the boundary change and the municipality or municipalities whose boundaries are to be changed.

(b) The petition shall contain the following information about the territory:

(1) the name and residence address or mailing address of each petitioner;

(2) the name, telephone number, and mailing address of the representative designated by the petitioner to receive service, notice, and other correspondence relating to the proceedings on behalf of the petitioner;

(3) a legal boundary description;

(4) a legal description of the boundaries of the municipality should the boundary change be effected;

(5) the assessed or estimated value of taxable property, giving separate totals for real and personal property;

(6) the number of residents in the territory;

(7) the rate or rates at which real and personal property are taxed;

(8) the rate or rates of sales and use taxes levied and collected;

(9) the amount and a full explanation of the outstanding bonded indebtedness for which the territory is wholly or partially responsible;

(10) the population and area of the municipality affected by the proposed boundary change. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.480 is based on a former version of 19 AAC 10.030.

19 AAC 10.490. EXHIBITS. (a) The petitioner shall append to the petition the following exhibits:

(1) a map or maps showing

(A) the present boundaries of the municipality whose boundaries are to be changed and the boundaries of the municipality if the proposed boundary change becomes effective; and

(B) sufficient detail to define the streets and roadways of the municipality;

(2) an affidavit of the petitioner, or his representative who prepared the petition, indicating the source from which the information

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contained in the petition was acquired and stating that a census or other reliable enumeration of the territory was conducted by him or under his direct supervision, specifying the dates when the census or enumeration was begun and completed and verifying that it was taken accurately;

(3) a copy of the agreements, if any, entered into with another municipality regarding the transitional provision of services and distribution of assets and liabilities;

(4) a certified copy of the resolution or ordinance authorizing the municipality to file the petition if the petitioner is a municipality;

(5) the affidavit of the petitioner or his representative that service of the petition has been made in compliance with 19 AAC 10.510.

(b) Maps submitted as exhibits to copies of the petition shall conform in color and other distinguishing markings to the original exhibit.

(c) If an official census has been made of the territory by the federal, state, or municipal government within three years of the date of the petition, a copy of that census may be appended to the petition in lieu of the census affidavit required under (a)(2) of this section. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.490 is based on a former version of 19 AAC 10.040.

19 AAC 10.500. BRIEFS. The petition must be accompanied by a written brief. The brief shall fully set forth the reasons supporting the boundary change and shall demonstrate that the boundary change meets the applicable standards established in this chapter for annexation or detachment. The commission will, in its discretion, require additional information which it determines will be useful for evaluation of the petition. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.500 is based on a former version of 19 AAC 10.050.

19 AAC 10.510. SERVICE. (a) The petitioner shall, by certified mail, serve a copy of the petition and brief, together with accompanying exhibits, upon every municipality in or adjoining the territory.

The service shall be made at the same time that the petition is filed with the commissioner.

(b) The petitioner shall arrange that the petition, exhibits, and brief will be available for inspection by the general public at a designated place in or near the territory. The affidavit required under 19 AAC 10.490 shall specify the exact location where and when the petition is available for inspection. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.510 is based on a former version of 19 AAC 10.060.

19 AAC 10.520. REVIEW OF PETITION. (a) The department will review the petition and brief and determine whether they

(1) are in substantially the proper form; and

(2) contain the factual information required by this chapter.

(b) If the department determines that the petition or brief is deficient as to form or content, it will return the defective petition or brief for correction or completion. If the department determines that the petition and brief are in substantial compliance with these regulations, it will notify the petitioner that the petition and brief have been accepted. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.520 is based on a former version of 19 AAC 10.070.

19 AAC 10.530. NOTICE OF PETITION. (a) Upon receipt of notice from the department that the petition and brief have been accepted, the petitioner shall cause notice of the filing of the petition to be published in a newspaper of general circulation in the territory. The notice shall be in the form specified by the commissioner; shall include a brief explanation of the proposed boundary change, the name of the petitioner, and the name of each municipality whose boundaries are to be changed; and shall indicate the place where the petition and brief may be inspected by the public as provided in 19 AAC 10.510. Additionally, the notice shall advise persons that they may file an answering brief pursuant to 19 AAC 10.550 in response to the proposal or that they may submit written comments to the department.

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(b) The petitioner shall furnish the commissioner with proof of compliance with (a) of this section. Upon receipt of the proof, the commissioner shall submit the petition and brief to the commission.

(c) A petition filed with the commissioner may not be considered to be pending before the commission until the petition and brief have been submitted to the commissioner pursuant to this section. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.530 is based on a former version of 19 AAC 10.080.

19 AAC 10.540. CALL FOR HEARING. The commission will establish a time and place for a hearing concerning a proposed boundary change which shall be held in or near the territory. The commission will publish notice of the hearing at least 15 days before the date of the hearing at least three times in a newspaper of general circulation in the territory, through other news media, or by posting in a public place, whichever is most feasible. At least 15 days before the date of the hearing, the commission will give public notice of the hearing and cause notice of the hearing to be served by certified mail upon

(1) the municipalities specified in 19 AAC 10.510;

(2) the petitioner or his representative; and

(3) any person or municipality who has filed an answering brief pursuant to 19 AAC 10.550. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.540 is based on a former version of 19 AAC 10.090.

19 AAC 10.550. ANSWERING BRIEF. (a) A person or entity residing or owning property in the territory, or the governing body of a municipality affected by a proposed boundary change may file a brief in opposition to the proposed boundary change. The original of the brief shall be filed with the commissioner together with proof that one copy was served upon the petitioner or his designated representative.

(b) A person, entity, or municipality filing an answering brief shall be designated a respondent.

(c) The answering brief shall indicate the factual information thought to be incorrectly or incompletely presented in the petition or the petitioner's brief and shall demonstrate the manner in which the proposed boundary change fails to satisfy the appropriate standards

prescribed in this chapter. The brief shall include a discussion of the considerations set forth in 19 AAC 10.500. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.550 is based on a former version of 19 AAC 10.100.

19 AAC 10.560. REPLY BRIEF. Before a hearing is held pursuant to 19 AAC 10.540, the petitioner may file a brief in reply to any new matter raised in an answering brief. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.560 is based on a former version of 19 AAC 10.110.

19 AAC 10.570. DEPARTMENT REPORT. The department will prepare a report on the proposed boundary change. The report will summarize the issues raised in the petition and briefs and may comment upon those issues or any other issue which the department considers relevant to the proposal. The report will contain recommendations to the commission. The report will be filed with the commission before the date of the hearing established under 19 AAC 10.540. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.570 is based on a former version of 19 AAC 10.120.

19 AAC 10.580. HEARING AND DECISIONAL MEETING. The commission's public hearing and decisional meeting concerning a proposed boundary change will be conducted in the manner set forth in 19 AAC 10.420 — 19 AAC 10.430. (Eff. 2/21/82, Register 81)

Authority: Art. X, Sec. 12, Ak. Const.
AS 44.47.567

Editor's notes. — 19 AAC 10.580 is based on former versions of 19 AAC 10.130 and 19 AAC 10.140.

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