IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DENALI CITIZENS COUNCIL, Appellant, v. ALASKA DEPARTMENT OF NATURAL RESOURCES, USIBELLI COAL, INC Appellees. _____	)	Case No. 3AN-10-12552 CI

BRIEF OF APPELLANT DENALI CITIZENS COUNCIL

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Alaska Constitution

Article VIII, Section 1
It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Article VIII, Section 2
The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Article VIII, Section 8
The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

Article VIII, Section 10
No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

Alaska Statutes

AS 38.05.035(e)
(e) Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them. In approving a contract under this subsection, the director need only prepare a single written finding. In addition to the conditions and limitations imposed by law, the director may impose additional conditions or limitations in the contracts

as the director determines, with the consent of the commissioner, will best serve the interests of the state. The preparation and issuance of the written finding by the director are subject to the following:

(1) with the consent of the commissioner and subject to the director's discretion, for a specific proposed disposal of available land, resources, or property, or of an interest in them, the director, in the written finding,

(A) shall establish the scope of the administrative review on which the director's determination is based, and the scope of the written finding supporting that determination; the scope of the administrative review and finding may address only reasonably foreseeable, significant effects of the uses proposed to be authorized by the disposal;

(B) may limit the scope of an administrative review and finding for a proposed disposal to

(i) applicable statutes and regulations;

(ii) the facts pertaining to the land, resources, or property, or interest in them, that the director finds are material to the determination and that are known to the director or knowledge of which is made available to the director during the administrative review; and

(iii) issues that, based on the statutes and regulations referred to in (i) of this subparagraph, on the facts as described in (ii) of this subparagraph, and on the nature of the uses sought to be authorized by the disposal, the director finds are material to the determination of whether the proposed disposal will best serve the interests of the state; and

(C) may, if the project for which the proposed disposal is sought is a multiphased development, limit the scope of an administrative review and finding for the proposed disposal to the applicable statutes and regulations, facts, and issues identified in (B)(i) - (iii) of this paragraph that pertain solely to the disposal phase of the project when

(i) the only uses to be authorized by the proposed disposal are part of that phase;

(ii) the disposal is a disposal of oil and gas, or of gas only, and, before the next phase of the project may proceed, public notice and the opportunity to comment are provided under regulations adopted by the department;

(iii) the department's approval is required before the next phase of the project may proceed; and

(iv) the department describes its reasons for a decision to phase;

(2) the director shall discuss in the written finding prepared and issued under this subsection the reasons that each of the following was not material to the director's determination that the interests of the state will be best served:

(A) facts pertaining to the land, resources, or property, or an interest in them other than those that the director finds material under (1)(B)(ii) of this subsection; and

(B) issues based on the statutes and regulations referred to in (1)(B)(i) of this subsection and on the facts described in (1)(B)(ii) of this subsection;

(3) a written finding for an oil and gas lease sale or gas only lease sale under AS 38.05.180 is subject to (g) of this section;

(4) a contract for the sale, lease, or other disposal of available land or an interest in land is not legally binding on the state until the commissioner approves the contract, but if the appraised value is not greater than $50,000 in the case of the sale of land or an interest in land, or $5,000 in the case of the annual rental of land or interest in land, the director may execute the contract without the approval of the commissioner;

(5) public notice requirements relating to the sale, lease, or other disposal of available land or an interest in land for oil and gas, or for gas only, proposed to be scheduled in the five-year oil and gas leasing program under AS 38.05.180 (b), except for a sale under (6)(F) of this subsection, are as follows:

(A) before a public hearing, if held, or in any case not less than 180 days before the sale, lease, or other disposal of available land or an interest in land, the director shall make available to the public a preliminary written finding that states the scope of the review established under (1)(A) of this subsection and includes the applicable statutes and regulations, the material facts and issues in accordance with (1)(B) of this subsection, and information required by (g) of this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state will be based; the director shall provide opportunity for public comment on the preliminary written finding for a period of not less than 60 days;

(B) after the public comment period for the preliminary written finding and not less than 90 days before the sale, lease, or other disposal of available land or an interest in land for oil and gas or for gas only, the director shall make available to the public a final written finding that states the scope of the review established under (1)(A) of this subsection and includes the applicable statutes and regulations, the material facts and issues in accordance with (1) of this subsection, and information required by (g) of this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state is based;

(6) before a public hearing, if held, or in any case not less than 21 days before the sale, lease, or other disposal of available land, property, resources, or interests in them other than a sale, lease, or other disposal of available land or an interest in land for oil and gas or for gas only under (5) of this subsection, the director shall make available to the public a written finding that, in accordance with (1) of this subsection, sets out the material facts and applicable statutes and regulations and any other information required by statute or regulation to be considered upon which the determination that the sale, lease, or other disposal will best serve the interests of the state was based; however, a written finding is not required before the approval of

(A) a contract for a negotiated sale authorized under AS 38.05.115 ;

(B) a lease of land for a shore fishery site under AS 38.05.082 ;

(C) a permit or other authorization revocable by the commissioner;

(D) a mineral claim located under AS 38.05.195 ;

(E) a mineral lease issued under AS 38.05.205 ;

(F) an exempt oil and gas lease sale or gas only lease sale under AS 38.05.180(d) of acreage subject to a best interest finding issued within the previous 10 years or a reoffer oil and gas lease sale or gas only lease sale under AS 38.05.180 (w) of acreage subject to a best interest finding issued within the previous 10 years, unless the commissioner determines that substantial new information has become available that justifies a supplement to the most recent best interest finding for the exempt oil and gas lease sale or gas only lease sale acreage and for the reoffer oil and gas lease sale or gas only lease sale acreage; however, for each oil and gas lease sale or gas only lease sale described in this subparagraph, the director shall call for comments from the public; the director's call for public comments must provide opportunity for public comment for a period of not less than 30 days; if the director determines that a supplement to the

most recent best interest finding for the acreage is required under this subparagraph,

(i) the director shall issue the supplement to the best interest finding not later than 90 days before the sale;

(ii) not later than 45 days before the sale, the director shall issue a notice describing the interests to be offered, the location and time of the sale, and the terms and conditions of the sale; and

(iii) the supplement has the status of a final written best interest finding for purposes of (i) and (l) of this section;

(G) a surface use lease under AS 38.05.255 ;

(H) a permit, right-of-way, or easement under AS 38.05.850 ;

(7) the director shall include in

(A) a preliminary written finding, if required, a summary of agency and public comments, if any, obtained as a result of contacts with other agencies concerning a proposed disposal or as a result of informal efforts undertaken by the department to solicit public response to a proposed disposal, and the department's preliminary responses to those comments; and

(B) the final written finding a summary of agency and public comments received and the department's responses to those comments.

AS 38.05.035(g)
(g) Notwithstanding (e)(1)(A) and (B) of this section, when the director prepares a written finding required under (e) of this section for an oil and gas lease sale or a gas only lease sale scheduled under AS 38.05.180, the director shall consider and discuss

(1) in a preliminary or final written finding facts that are known to the director at the time of preparation of the finding and that are

(A) material to issues that were raised during the period allowed for receipt of public comment, whether or not material to a matter set out in (B) of this paragraph, and within the scope of the administrative review established by the director under (e)(1) of this section; or

(B) material to the following matters:

(i) property descriptions and locations;

(ii) the petroleum potential of the sale area, in general terms;

(iii) fish and wildlife species and their habitats in the area;

(iv) the current and projected uses in the area, including uses and value of fish and wildlife;

(v) the governmental powers to regulate the exploration, development, production, and transportation of oil and gas or of gas only;

(vi) the reasonably foreseeable cumulative effects of exploration, development, production, and transportation for oil and gas or for gas only on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;

(vii) lease stipulations and mitigation measures, including any measures to prevent and mitigate releases of oil and hazardous substances, to be included in the leases, and a discussion of the protections offered by these measures;

(viii) the method or methods most likely to be used to transport oil or gas from the lease sale area, and the advantages, disadvantages, and relative risks of each;

(ix) the reasonably foreseeable fiscal effects of the lease sale and the subsequent activity on the state and affected municipalities and communities, including the explicit and implicit subsidies associated with the lease sale, if any;

(x) the reasonably foreseeable effects of exploration, development, production, and transportation involving oil and gas or gas only on municipalities and communities within or adjacent to the lease sale area; and

(xi) the bidding method or methods adopted by the commissioner under AS 38.05.180 ; and

(2) the basis for the director's preliminary or final finding, as applicable, that, on balance, leasing the area would be in the state's best interest.

AS 38.05.133

(a) The procedures in this section apply to the issuance of an exploration license under AS 38.05.132 .

(b) The licensing process is initiated by the commissioner preparing, or a prospective licensee submitting to the commissioner, a proposal that identifies a

specific area to be subject to the exploration license, proposes specific minimum work commitments, and states the minimum qualifications for a licensee as established by regulations adopted by the commissioner. A prospective licensee may initiate a proposal only in response to a call for proposals by the commissioner or during a period specified in regulations adopted by the commissioner. The regulations must provide for at least one period for that purpose during each calendar year.

(c) If the commissioner initiates the licensing process under (b) of this section, the commissioner shall publish notice of the commissioner's proposal in order to solicit comments and competing proposals.

(d) Within 30 days after receipt of a proposal from a prospective licensee under (b) of this section, the commissioner shall either reject it in a written decision or give public notice of the intent to evaluate the acceptability of the proposal. The commissioner shall solicit comments on a proposal for which public notice is given under this subsection, and shall request competing proposals.

(e) The commissioner may make a written request to a prospective licensee for additional information on the prospective licensee's proposal. The commissioner shall keep confidential information described in AS 38.05.035 (a)(8) that is voluntarily provided if the prospective licensee has made a written request that the information remain confidential.

(f) After considering proposals not rejected under (d) of this section and public comment on those proposals, the commissioner shall issue a written finding addressing all matters set out in AS 38.05.035(e) and (g), except for AS 38.05.035 (g)(1)(B)(xi). If the finding concludes that the state's best interests would be served by issuing an exploration license, the finding must (1) describe the limitations, stipulations, conditions, or changes from the initiating proposal or competing proposals that are required to make the issuance of the exploration license conform to the best interests of the state, and (2) if only one proposal was submitted, identify the prospective licensee whom the commissioner finds should be issued the exploration license. The commissioner shall attach to the finding a copy of the exploration license to be issued and the form of lease that will be used for any portion of the exploration license area subsequently converted to a lease under AS 38.05.134 .

(g) If only one prospective licensee submits a proposal and the finding under (f) of this section concludes that an exploration license should be issued to that prospective licensee, the prospective licensee has 30 days after issuance of the finding within which to accept or reject the issuance of the exploration license, as limited or conditioned by the terms contained in the finding. The exploration

license to be issued and the form of lease that will be used must be attached to that finding. The prospective licensee must accept or reject the issuance of the exploration license in writing.

(h) If competing proposals are submitted, and the commissioner's finding under (f) of this section concludes that an exploration license should be issued, the commissioner shall issue a request for competitive sealed bids, under procedures adopted by the commissioner by regulation, to determine which prospective licensee should be issued the exploration license. The finding provided to the prospective licensees and the public under (f) of this section must contain notice that (1) the commissioner intends to request competitive sealed bids, (2) a prospective licensee who intends to participate in the bidding must notify the commissioner in writing by the date specified in the notice, and (3) a prospective licensee's notice of intent to participate in the bidding constitutes acceptance of issuance of the exploration license, as limited or conditioned by the terms contained in the finding and by the exploration license to be issued and the form of lease to be used that have been attached to that finding, if the prospective licensee is the successful bidder. The successful bidder is the prospective licensee who submits the highest bid in terms of the minimum work commitment dollar amount.

I. JURISDICTIONAL STATEMENT

On August 31, 2005, the Alaska Department of Natural Resources Division of Oil and Gas (DNR) issued a preliminary "best interest" finding (preliminary finding), concluding that issuance of the Healy Basin Gas Only Exploration License to Usibelli Coal Mine, Inc. (Usibelli) was in the best interest of the State of Alaska. Denali Citizens Council (Denali Citizens) actively participated in the administrative process for this DNR decision. In 2010, DNR issued its final "best interest" finding (final finding) for the Healy Basin Gas Only Exploration License. Denali Citizens timely requested reconsideration pursuant to 11 AAC 02.030, and then-DNR Commissioner Tom Irwin granted this request. On November 9, 2010, Commissioner Irwin issued the agency's final administrative order in this matter, affirming the final finding. Denali Citizens then timely filed its notice of appeal on December 8, 2010 pursuant to AS 44.62.560 (allowing judicial review by the superior court of a final administrative order) and Alaska Rule of Appellate Procedure 602 (requiring that an appeal to the superior court of a final administrative order be filed within 30 days of that order).

II. STATEMENT OF ISSUES PRESENTED

1) Is DNR's final finding arbitrary because DNR found, without analysis, that a smaller license area may be uneconomic for the licensee?

2) Is DNR's final finding arbitrary because DNR refused to stringently apply important mitigation measures at the land disposal phase?

3) Is DNR's decision to declare the Healy Basin land disposal in the "best interest" of Alaska without applying important mitigation measures a violation of Article VIII, §§ 1, 2, 8 and 10 of the Alaska Constitution?

III. STATEMENT OF THE CASE

Appellant Denali Citizens seeks review of DNR's decision to grant Usibelli the Healy Basin Gas Only Exploration License. In 2003, Usibelli submitted to DNR eight lease applications totaling 46,080 acres. The vast majority of these lands were on the east, less populated, side of the Nenana River. The next year, Usibelli submitted seven lease applications totaling 38,400 acres in roughly the same areas as the 2003 applications. Later in 2004, in anticipation of a change in Alaska's oil and gas management structure, Usibelli submitted a gas only exploration license application that covered 208,630 acres, which encompassed the land in the 2003 and 2004 lease applications, and also encompassed lands west of the Nenana River that include residential areas where most of the Denali Borough residents live and the wildlife and recreation-rich Wolf Townships.

DNR granted Usibelli the license after finding that it was in the "best interest" of the State to do so. In making this finding, DNR found that anything less might not be economically feasible for Usibelli and thus it would not consider granting a license for a smaller area. This finding was made without supporting analysis, is contradicted by evidence in the record, and is therefore arbitrary.

Additionally, while initially imposing stronger mitigation measures in the preliminary finding on Usibelli's operations, DNR backtracked in its final decision

and found that a stringent blanket exception to such measures, and core setback, subdivision and noise protection measures, "may be unnecessarily restrictive" on Usibelli. DNR thus significantly eased the blanket exception to mitigation measures so as to undercut all such measures, and will only consider applying many of them at later stages of the exploration process. DNR's finding is not supported in the record and is arbitrary.

Finally, DNR's deferred approach to core mitigation measures, coupled with the fact that DNR will not revisit whether the land disposal is in the public interest, violates Article VIII, §§ 1, 2, 8, and 10 of the Alaska Constitution.

IV. STANDARD OF REVIEW

The Alaska Supreme Court has identified four main standards of review of agency decisions:

> the 'substantial evidence test' for questions of fact; the 'reasonable basis test' for questions of law involving agency expertise; the 'substitution of judgment test' for questions of law where no expertise is involved; and the 'reasonable and not arbitrary test' for review of administrative regulations.

Alaska Ctr. for the Env't v. State, 80 P.3d 231, 236 (Alaska 2003). In general, the "reasonable basis" test applies to this Court's review of an agency's decision under the Alaska Lands Act. *Kelly v. Zamarello*, 486 P.2d 906, 916-18 (Alaska 1971) (addressing appropriate standard of review for administrative decisions, including need for "substantial basis in the record" for agency findings). In reviewing a DNR decision, a court should analyze whether DNR has given reasoned consideration to all materials facts and issues "with particular vigilance if

it 'becomes aware, especially from a combination of danger signals, that the agency has not really taken a hard look at the salient problems and has not genuinely engaged in reasoned decision making.'" *Trustees for Alaska v. State*, 795 P.2d 805, 809 (Alaska 1990) (citations omitted) (Trustees).

The Court reviews questions of constitutional law *de novo* applying its "independent judgment." *Brooks v. Wright,* 971 P.2d 1025, 1027 (Alaska 1999). In doing so, the Court will adopt "a reasonable and practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision and the intent of the framers." *Alaska Legislative Council v. Knowles,* 21 P.3d 367, 370 (Alaska 2001) (internal citations omitted). Moreover, constitutional questions generally are mixed questions of fact and law, and the Court "will consider precedent, reason, and policy." *Id.*

V. FACTUAL AND PROCEDURAL BACKGROUND

The Usibelli license is located in the Healy area of the Denali Borough. Exc.195. Denali National Park comprises roughly 70% of the Denali Borough, and the Healy area, adjacent to Denali National Park's northeast border, contains the majority of the population of the Denali Borough. Exc.195-97.

Many residents are drawn to the area for its natural beauty, recreation opportunities, and quality of life. As one commenter stated: "I came here to enjoy a simple, quiet life unencumbered as much as possible from the materialistic concerns of the modern world." R.2249; *see also* R.151, 539, 548, 636-37

(expressing similar sentiments). Subsistence, sport hunting and fishing are also important for residents of the Healy region. Exc.201-03.

A portion of the Stampede Trail management unit of the Tanana Basin Area Plan (Tanana Plan) known as the Wolf Townships, is located within the license area. The Wolf Townships area is known for its extremely high value as habitat for the Denali and Delta caribou herds, and is an area in which fish and wildlife habitat and recreation are designated as primary uses. Exc.1, 125-26.

The primary employment in the Healy area is tourism, Exc.204, and the "front country" area outside Denali National Park is seen as an important place to develop new tourism opportunities. Exc.205. Coal mining is also a long-standing part of the local economy. Exc.197.

In 2003, Usibelli submitted eight separate shallow-gas lease applications for 44,680 acres of state-owned land largely on the east side of the Nenana River in the vicinity of Healy, Alaska, at a cost of $5,000 per application. Exc.2-7, 8-47. Thereafter, DNR issued a call for public comments concerning Usibelli's lease applications, thereby beginning the legally-required "best interest" finding process. Exc.48-49.

Denali Citizens is a local non-profit citizens group established in 1974 with a mission of supporting sound planning and sustainable development in the Denali Borough. Exc.50. Denali Citizens does not oppose gas development in general, *see* Exc.585, and commented to DNR that the leases should only be issued if the impacts from activities under the leases would not degrade the quality of life of

area residents, the valuable wildlife resources of the area, and the long-term sustainable tourism-based economy. Exc.50. Denali Citizens also stated that any activity that did occur should be held to the highest environmental standards. *Id*. Denali Citizens then identified a number of concerns, including the impacts the proposed leases could have on local residents and the use and enjoyment of their property, land use, and the wildlife which is the backbone of the Denali Borough economy. Exc.51-53.

In 2004, Usibelli submitted seven shallow-gas lease applications that totaled 38,400 acres and included much of the area encompassed in the 2003 applications, also at a cost of $5,000 per application. Exc.56-90. DNR had not made a decision on the earlier Usibelli lease applications by that time. It is unclear from the record why Usibelli filed new lease applications that had duplicate lands to its previous applications.

In the meantime, the Alaska State Legislature was considering H.B. 531, 23rd Ak. State Leg. (Ak. 2004), which would replace the leasing program under which Usibelli filed these applications with a new gas-only exploration licensing program. H.B. 531. Its' intent was to encourage exploration in areas outside of known oil and gas provinces, and the primary way in which it did this was to eliminate the "initial expense" to an interested party of gaining authorization for exploration activities. Exc.138, R.684. [1]

[1] The lower entry cost and other differences between the between the licensing and leasing programs are explained in the record. *See* Exc.140.

In anticipation of this legislation becoming law, Usibelli submitted to DNR an exploration license proposal in which it expanded its target area to 208,630 acres, noting that its "most likely" product would be coalbed methane gas. R.216. This new proposal included the land on which it originally had filed its lease applications, as well as areas west of the Nenana River that included nearly all of the residential areas in the Healy area and the Wolf Townships. Exc.93.

Usibelli requested that consideration of the application be delayed until final resolution of H.B. 531. R.216. Subsequently H.B. 531 was signed into law, thereby creating the gas-only exploration licensing program. R.227. Usibelli then let lapse the original 15 lease applications. R.217.

Pursuant to this program, Usibelli would gain an exclusive right to explore the state subsurface land within the license area. Exc.122. Should it meet minimum work and other ministerial requirements, Usibelli can then convert all or a portion of the license to gas leases. *Id*.

Concurrent with Usibelli's interest in exploring for coalbed methane in the Healy-area, other parties were interested in exploring for coalbed methane in the Matanuska-Susitna (Mat-Su) Valley. DNR decided to develop enforceable standards for coalbed methane activities in the Mat-Su, which DNR also stated would be a model for the Healy area, Exc.589, and which all parties understood were to be applied to the Healy area. *See* Exc.95 (Usibelli comment on draft standards that Mat-Su standards would apply in Healy area); Exc.123-24 (Denali Citizens noting similar understanding). DNR also stated that the:

> adoption of enforceable standards will provide the public with confidence that future decisions regarding coalbed methane development are being made with an understanding of what is required to protect the interests of the residents of the state.

Exc.107.

In early 2005 DNR sought public input into what it should consider in the "best interest" finding for Usibelli's license proposal. Exc.122-22b. Along with many others, Denali Citizens submitted comments to DNR objecting to the massive expansion of the area that could be covered by gas activities. Exc.123-28.[2] Denali Citizens noted that the expansion of Usibelli's proposal into residential areas of Healy and the wildlife and recreation-rich Wolf Townships created significant potential conflicts between gas activities, residents and surface estate landowners, and the primary wildlife and recreation values for the Wolf Townships as called for in the Tanana Plan. *Id*.

For those areas where coalbed methane exploration and development was, in its opinion, appropriate, Denali Citizens stated its appreciation that DNR would apply the Mat-Su coalbed methane standards as a foundation for Healy-specific standards. Exc.123-24. As Denali Citizens noted, it was of particular importance that facility siting, spacing, and noise standards be imposed as part of the "best interest" finding process. Exc.127.

Later in 2005, DNR issued its preliminary "best interest" finding, which included DNR's initial determination that that the issuance of the license was in

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[2] *See also* R.489-93, 500-01, 518, 521, 534-35, 571-74, 578-79 (examples of objections to area expansion).

the State's "best interest." Exc.131-312. DNR did not consider shrinking the license area, and noted that in response to comments it had "incorporated [in the preliminary finding] enforceable standards for coalbed methane activities in the Healy Basin," including standards that dealt with noise, siting and spacing. Exc.146. DNR then stated that it was:

> conditioning this preliminary best interest finding with a number of proposed mitigation measures designed to reduce or eliminate adverse effects, and to ensure that future exploration, development, production, and transportation activities, if pursued, will serve the best interests of the state.

Exc.150; *see also* Exc.249 (same). DNR also noted in the preliminary finding that it had "tailored" the Mat-Su standards to the Healy area, Exc.214, and "developed [them] after considering terms imposed on earlier licenses and competitive lease sales." Exc.251.

DNR prohibited Usibelli from constructing drill pads within 500 feet and compressor stations within 1500 feet of any residential structure. Exc.255. DNR also precluded Usibelli from constructing drill pads or compressor stations in any residential subdivision in which more than half of the land is divided into lots sized five acres or less without consent of the surface property owners in that subdivision. *Id*. To mitigate the noise impacts of the proposal, DNR mandated maximum ambient noise limits for day and night that Usibelli could not exceed. Exc.253-54. DNR also provided that Usibelli submit a noise monitoring plan as part of its plan of operations that included short-term manned monitoring to ensure

compliance and corrective action if Usibelli were to become non-compliant. Exc.253.

Finally, DNR stated that while it could grant exceptions to these mitigation measures, it would "only" do so upon

> *a showing by the licensee that compliance with the mitigation measure is not feasible or prudent*, or that the licensee will undertake an equal or better alternative to satisfy the intent of the mitigation measure.

Exc.251 (emphasis added).

Denali Citizens submitted comments on the preliminary finding, requesting once again that DNR remove from the license area the residential areas west of the Nenana River as well as the Wolf Townships. Exc.318-20, 328-29. Denali Citizens noted that this proposal would "not preclude the project from going forward on the majority of land in the license proposal," Exc.329, a point which is evidenced by the much smaller original lease proposals pursued by Usibelli, Exc.8-47, 56-90, as well as DNR gas licensing decisions in other areas. Exc.591. Denali Citizens also offered productive comments to improve the exploration and development in subdivisions, setback, and noise mitigation measures. Exc.320.

Usibelli also commented on the preliminary finding. Exc.331-42. Usibelli stated that "the operational practicalities and economics would be significantly affected if DNR were to impose any more onerous mitigating measures" than the ones in the preliminary finding. Exc.337.

The administrative process then sat dormant for five years. DNR issued a final "best interest" finding in 2010, concluding that it was in the state's best interest to issue the full exploration license to Usibelli. Exc.348-584.

In the final finding, DNR refused to remove areas west of the Nenana River, reasoning without reference to any documentation or analysis that doing so "may make the project economically unfeasible." Exc.515, *see also* Exc.513, 515-16, 523-24 (similar comments). Notably, it also stated that the imposition of mitigation measures to avoid or minimize impacts "is preferable to removing large acreage from the license area." Exc.515. Despite this last statement, DNR also significantly backtracked from the mitigation measures imposed in the preliminary finding. DNR eased the terms of the blanket exception to mitigation measures, eliminating the "feasible and prudent" standard to justify exceptions, and replacing it with a "not practicable" standard:

> [DNR] may grant exceptions to these mitigation measures. Exceptions will only be granted upon *a showing by the licensee that compliance with the mitigation measure is not practicable* or that the licensee will undertake an equal or better alternative to satisfy the intent of the mitigation measure.

Exc. 500 (emphasis added). Further, in DNR's words it "replaced" the consent requirement for subdivisions with a minimum setback requirement, and failed to note that DNR itself had already imposed this setback requirement on Usibelli in the preliminary finding. Exc.513, 515, 524. DNR also eliminated the noise standards from the mitigation measures. Exc.515.

Denali Citizens requested reconsideration of DNR's decision to grant Usibelli the exploration license. Exc.585-93. DNR granted Denali Citizens' request for reconsideration and then affirmed the final finding. Exc.596-606. DNR claimed that AS 38.05.035(g) required that it consider whether the project was economically feasible to Usibelli given the size of the license area and upheld its previous conclusion that reducing the size of the license area was not an option as it might make the project economically unfeasible for Usibelli. Exc.605. With respect to the elimination of the consent and noise mitigation measures, DNR declared that the "intent of changes to the mitigation measures concerning noise and buffers around residential areas was not to weaken protections, but to ensure flexibility while not unnecessarily restricting the licensee's activities," and that stipulating specific noise thresholds and disallowing certain gas-related facilities in subdivisions "may be unnecessarily restrictive." Exc.602.

Denali Citizens then timely filed its notice of appeal of DNR's decision to this Court.

VI. GENERAL LEGAL BACKGROUND

The Alaska Land Act ("Act") is the statutory scheme that governs oil and gas licensing, leasing and development. Pursuant to that law, exploration licenses must go through a formal "best interest" finding process to ensure the license as approved is in the "best interest" of the State. AS 38.05.133; AS 38.05.035(e). As the Alaska Supreme Court has emphasized, DNR's function "is not to run an enterprise but to make decisions that "best serve the interests of the state." *State*

v. Arctic Slope Regional Corp., 834 P.2d 134, 143 (Alaska 1991). In this process, DNR has the explicit discretion to limit the size of the license area to align with the state's best interests. AS 38.05.133(f).

DNR's duty to determine whether the disposal of state land or an interest in state land is in the best interest of the state is founded in Article VIII of the Alaska Constitution. *Arctic Slope*, 834 P.2d at 143. Pursuant to Article VIII, it is the State's policy "to encourage the…development of [the State's] resources by making them available for maximum use *consistent with the public interest*." AK Const. Art. VIII, § 1 (emphasis added). Article VIII, § 2 requires the Legislature to provide for "the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the *maximum benefit of its people*." (emphasis added). In addition, "[t]he legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, *subject to reasonable concurrent uses*." *Id.* at § 8 (emphasis added). And, to ensure compliance with Article VIII's requirements, the Constitution provides legal safeguards that apply to disposals of state lands: "[n]o disposals or leases of state lands, or interests therein, shall be made without prior public notice *and other safeguards of the public interest* as may be prescribed by law." *Id.* at § 10 (emphasis added).

VII. ARGUMENT

DNR's refusal to consider a smaller license area because it could be economically infeasible to Usibelli is a finding that is not supported by the record

and arbitrary. DNR's approach to mitigation measures is similarly arbitrary, and if not, it makes DNR's land disposal unconstitutional.

A. DNR's Finding That A Smaller License Area Is Not Feasible Is Arbitrary

As noted above, DNR found that "[r]emoving the area west of the Nenana River from the license area may make the project economically unfeasible." Exc.515, 604-05.[3] This finding is arbitrary, and thus so is DNR's decision that the license area could not be reduced in size.

DNR must base its factual findings on "substantial evidence," *Alaska Ctr. for the Env't*, 80 P.3d at 236, and give reasoned discretion to all material facts and issues. *Trustees,* 795 P.2d at 811. This means that DNR must take a "hard look at the salient problems" and engage in "reasoned decisionmaking." *Id.* at 809. The potential implications to residents, the community, and the wildlife and recreation-rich Wolf Townships, all support the fact that the massive expansion in size of Usibelli's proposal is a salient issue. *Id.*

Looking to the facts, Usibelli first targeted roughly 40,000 acres in its lease applications to DNR. Exc.8-47, Exc.56-90. When the State enacted the new gas exploration license program, eliminating significant up front and annual rental expenses, Usibelli shifted to that program and expanded its target to roughly 208,000 acres in the Healy area. R.216. With this expansion, Usibelli's target for

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[3] The Alaska Lands Act requires that "best interest" findings address fiscal issues, AS 38.05.035(g)(1)(B)(ix), and DNR relied on this authority to base its decision on the economic feasibility of the license to Usibelli. Exc.604.

the first time included the residential areas west of the Nenana River as well as the wildlife and recreation-rich Wolf Townships. Exc.93.

While not opposed in general to oil and gas activity, this expansion alarmed Denali Citizens, which repeatedly raised its concerns with the inclusion in the license application of the residential areas west of the Nenana and the Wolf Townships. Exc.123-28, 318-20, 328-29.[4] Denali Citizens specifically noted that such a reduction should not impact the overall ability of Usibelli to explore for gas in the Healy area. Exc.329. Not only did Usibelli's original lease applications targeting a much smaller area support this conclusion, so did the fact that DNR had approved a gas exploration proposal in the Holitna Basin which was less than 27,000 acres in size. *See* Exc.591.

While DNR concluded that limiting the license area "may make the project economically unfeasible," Exc.515, and thus declined to make the area smaller, nowhere did DNR analyze whether limiting the area actually would make the project infeasible. It did not, for example, ask or answer the question why, given that Usibelli had made two applications under the previous statutory scheme despite the higher monetary hurdles associated with that scheme, limiting the area when there are far lower entry expenses to Usibelli somehow would not be economic to Usibelli.

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[4] As noted above Denali Citizens were not the only commenters opposed to this expansion. *See supra* note 2.

In making this decision, DNR indicated that factors to consider include "the size of the area, what is known about the prospectivity of the area, and the individual situation of the licensee." Exc.605. Yet DNR failed to apply these factors to the Healy license. The first part of this explanation is of no import: the bland statement that a proposal may be unique says little about its' economic feasibility. While facts about the "prospectivity of the area" and the "individual situation of the licensee" may indeed make a difference on the economic feasibility of relative exploration license proposals, nowhere did DNR specifically analyze the "prospectivity" of the Healy region or Usibelli's "individual situation."

Rather than perform such analysis, DNR concluded that

> [Denali Citizens] did not provide a compelling reason for why the exploration license is incompatible with protection of fish, wildlife, and habitats; because the DCC did not explain why the mitigation measures of the Final Finding are inadequate; and because the [Tanana Basin Area Plan] clearly states that the area west of the Nenana River and the Wolf Townships area are open for development of subsurface resources, I have decided not to exclude the west side of the Nenana River nor the Wolf Townships from the license area, and am affirming the license area as defined in the Final Finding.

Id. Yet, the burden does not rest on Denali Citizens. If DNR refuses to limit the size of the license area, which the law provides it ample discretion to do, AS 38.05.133(f), and refuses to do so based on a finding of economic infeasibility, DNR must base this finding on "evidence in the record." *Noey v. Dep't of Envtl. Conservation*, 737 P.2d 796, 806 (Alaska 1987) (failure of agency to ensure that record supports findings and conclusions is arbitrary and contrary to law); *Kelly*, 486 P.2d at 918 (agency finding needs "substantial basis in the record").

In essence, what DNR is saying is that the fiscal analysis requirement of the "best interest" finding permits it to accede to an interested party's licensing proposal without question. Were DNR's baseless reasoning here to stand, the "best interest" analysis and DNR's authority to "limit" the size of a license would be rendered meaningless. This is not, however, the case under the law. DNR is "not to run an enterprise" but rather to make decisions that "best serve the interests of the state." *Arctic Slope*, 834 P.2d at 143. This requires "reasoned decisionmaking," *Trustees*, 795 P.2d at 811, with support in the record, *Noey*, 737 P.2d at 806; *Kelly*, 486 P.2d at 918.. This DNR did not do, and its decision should be reversed. *Id*.

B. DNR's Approach To Mitigation Measures Is Not Supported In The Law

In its final decision, DNR significantly lowered the standard for a blanket exception for all mitigation measures and did not impose fundamental protections for other values and uses of the Healy area, saying instead that it would only consider doing so at later stages. DNR's reasoning for doing so – that imposing measures at the license stage would somehow be unnecessarily restrictive – is arbitrary. Furthermore, the deferral of important mitigation measures, coupled with the fact that DNR does not revisit the "best interest" of the state prior to approving later phases of activity under the license, violates Article VIII, § 1, 2, 8, and 10 of the Alaska Constitution.

1. DNR's Findings Not To Impose Strict Mitigation Measures Are Arbitrary

DNR stated that enforceable standards are critical to ensuring that coalbed methane activities occur in a manner that "protect(s) the interests of the residents of the state of Alaska." Exc.107. DNR also publicly committed that the "best interest" finding [w]ill include mitigation measures to protect against unreasonable conflicts with other users and environmental impacts." R.2184.

In line with this commitment, DNR initially imposed in the preliminary finding mitigation measures on the license to deal with potential impacts from subsequent licensee activity such as exploration and development drilling, operation of compressors, construction of temporary and permanent drill pads, roads, pipelines and other facilities. In its final finding, however, DNR significantly lowered the standard pursuant to which Usibelli could gain an exception to any mitigation measure. It also eliminated core protections for surface property owners, residents, wildlife, and recreators. Its justifications for doing so – that it did not intend to weaken protections but rather to retain flexibility, and that such measures might be unnecessarily restrictive – are not borne out in the finding or the larger administrative record. Paradoxically, it also stated that:

> the Healy exploration license mitigation measures are among the strongest and most detailed of mitigation measures for State of Alaska oil and gas lease sales and exploration licenses.

Exc.599.[5] In order for its decision to stand, DNR must have given reasoned discretion to all material facts and issues. *Trustees*, 795 P.2d at 811. DNR did not do so.

a. DNR's Approach To The Blanket Exception To Mitigation Measures Is Arbitrary

In the preliminary finding, DNR provided Usibelli with the opportunity to avoid the application of any mitigation measure if it could demonstrate that "compliance with the mitigation measure is not feasible or prudent." Exc.251. DNR defines "feasible and prudent" to mean:

> consistent with sound engineering practice and not causing environmental, social, or economic costs that outweigh the public benefit to be derived from compliance with the standard.

Exc.259. As noted by the Alaska Supreme Court, the "feasible and prudent" standard is "stringent" and "strongly protective." *Alaska Ctr. for the Env't,* 80 P.3d at 244 *quoting Trustees for Alaska v. State, Dep't of Natural Res.,* 851 P.2d 1340, 1344 (Alaska 1993)(*Trustees II)*.[6] This standard is crafted to be used in only very limited circumstances:

> where forcing compliance with the standard would be impossible or cause a worse result than non-compliance [and that] feasible and prudent deviations from the normal standards should be narrow in interpretation and result only where the *public* good outweighs the *public* costs.

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[5] *See also* R.1682 ("many of the mitigation measures of Chapter Nine of the Final Finding are among the most detailed and restrictive mitigation measures imposed in Alaska for state oil and gas licenses and leases").

[6] While these cases were addressing the feasible and prudent standard in the context of the Alaska Coastal Management Program and not Title 38 "best interest" findings, the standard is exactly the same. *See Id.* at text accompanying note 57.

Id. at 246-47 (quotations omitted, emphasis in original).

The "feasible and prudent" standard was also the subject of U.S. Supreme Court review in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971)(*Overton*). In *Overton*, federal statutes provided that highways were not to be built through public parks where a "feasible and prudent" alternative route existed. *Id.* at 411-12. The government in that case argued that this standard in essence required a cost-benefit analysis – if an alternative that went around the park was more costly, it would not be feasible and prudent and the agency could choose a route through the park. *Id*. at 411-12. The Court rejected this interpretation of the standard, reasoning that it would relegate the park to unprotected status because the value of parks are, by their nature, hard to quantify in economic terms, and thus non-parkland routes are nearly always more expensive and more disruptive than parkland routes and thus would never meet the standard. *Id*. at 413. The Court held that alternative routes should be chosen unless

> there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.

Id. Consequently, agencies could only approve routes through parkland in "unusual" or "extraordinary" situations. *Id*.

To the extent that DNR desired to have a blanket exception to mitigation measures for the Healy Basin license without losing the strength of those

measures,[7] the "feasible and prudent" standard would seem an appropriate standard. Yet, in the final finding, DNR used the much weaker "not practicable" standard for the blanket exception:

> Exceptions will only be granted upon *a showing by the licensee that compliance with the mitigation measure is not practicable.*

Exc.500 (emphasis added). DNR interprets the term "practicable" to mean:

> feasible in light of overall project purposes after considering cost, existing technology, and logistics of compliance with the mitigation measures.

Exc.507.

This definition is close to the one used by the Corps of Engineers in its Clean Water Act section dredge and fill permitting program, where the Corps must deny a § 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. 230.10(a). *See* 40 C.F.R. 230.3(q)(the term *practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes). As applied in the Clean Water Act context, therefore, it is intended to be an easy standard to meet, as doing so would help avoid harm to waters of the United States (which after all is the purpose of the Clean Water Act). DNR's application of this standard in the Healy

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[7] Again, DNR stated that Healy mitigation measures are "among the strongest and most detailed of mitigation measures for State of Alaska oil and gas lease sales and exploration licenses." Exc.599; *see also* R.1682 (Healy measures "are among the most detailed and restrictive" in Alaska).

Basin context turns this intent on its head by using a low standard to allow a potentially more damaging alternative.

Missing from this standard is the concept of "prudence," such as whether "the *public* good outweighs the *public* costs." *Trustees II,* 851 P.2d at 1344 (emphasis in original). This allows for consideration of intangible benefits, which are hard to weigh against economic cost. *Overton*, 401 U.S. at 411-13.

In essence, DNR changed the blanket exception from one that was "stringent" and "strongly protective,"[8] and which would then only apply in "unusual" or "extraordinary" circumstances,[9] to one that could be used when the costs of compliance with the underlying mitigation measure may be higher than the costs of the more protective alternative. *See e.g*. R.1341-42 (DNR responding to Usibelli concern about cost by noting that the "not practicable" standard in blanket exception allows for greater consideration of economics). This is hardly the "strong" and "restrictive" standard DNR claims it imposed. Exc.599, R.1682.

DNR states that the mitigation measures were developed "after considering terms imposed on earlier licenses and competitive lease sales." Exc.500. A review of the mitigation measures in these other contexts, however, reveals that the Healy blanket exception is the weakest among all the oil and gas licenses

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8 *Alaska Ctr .for the Env't*, 80 P.3d at 244.

9 *Overton*, 401 U.S. at 413.

granted in Alaska. *See* Exhibit 1.[10] Of the four licenses (including Healy Basin) granted by DNR, two contain blanket exceptions for mitigation measures using the "not feasible and prudent" standard (Holitna and Susitna), and the fourth has no blanket exception at all (Nenana). Exh. 1.[11] Further, the Mat-Su coalbed methane standards contain no blanket exception. *See Id.*[12]

Other than the response to Usibelli's cost comment, Exc.539-40, DNR does not explain why it so significantly lowered the standard for blanket exceptions to the mitigation measures. DNR justified undercutting specific mitigation measures by stating that its intent "was not to weaken protections, but to ensure flexibility while not unnecessarily restricting the licensee's activities." Exc.602, *see also* Exc.609. As an initial matter, DNR could not properly rely on this rationale to support its decision as it did not so state in the administrative process. *See Ellis v. State, Dep't of Nat. Res*., 944 P.2d 491, 493 (Alaska 1997) (Court "determine(s) from the administrative record whether there was a reasonable basis" for agency decision); *Kelly*, 486 P.2d at 918 (agency finding needs "substantial basis in the record"). Yet for the sake of argument, as the above discussion details, there is a

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[10] Exhibit 1 is a comparison chart of DNR licenses. Appellants present this exhibit for the convenience of the Court in place of presenting the information in a series of lengthy string cites.

[11] The definition of "feasible and prudent" in the Holitna and Susitna findings are the same as that which DNR used in the preliminary finding for Healy. *See* Exh. 1.

[12] A few specific measures in the Holitna, Susitna, Nenana and Mat-Su coalbed methane documents also contain the "not feasible and prudent" exception language, and none contain the "not practicable" language. *See id.* (river buffer and other examples of "not feasible and prudent" exception language).

huge disconnect between not intending to weaken the standards and what DNR actually did, which was to undercut every single measure with the "not practicable" blanket exception standard.[13]

Importantly, DNR's approach to the blanket exception undercuts the values prioritized by the Tanana Plan. That Plan provides that fish, wildlife and recreation are the "primary use[s]" in the Wolf Townships. Exc.1. Pursuant to the Tanana Plan, the unit will be managed to encourage [] use, conservation or development" of primary uses and a "secondary use is permitted when its occurrence will not adversely affect achieving the objectives for the primary uses." Tanana Plan at 1-5.[14] Consequently, just as allowing the road through Overton Park under the feasible and prudent standard would have relegated that park to unprotected status because non-parkland routes are nearly always more expensive

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[13] In addition to being obvious on its face, a review of specific standards also serves to demonstrate this point. For example, mitigation measure 5a provides that "[w]aste from operations must be reduced, reused, or recycled to the *maximum extent practicable*." Exc.506 (emphasis added). Yet Usibelli could be excused from this measure that includes a "maximum extent practicable" specific exception if it demonstrates that complying with it is "not practicable." This makes no sense. None of the other licenses nor the Mat-Su standards have this non-sensical conflict. *See* Exh. 1. This is another "danger signal[], that the agency has not really taken a hard look at the salient problems and has not genuinely engaged in reasoned decision making." *Trustees*, 795 P.2d at 809 (citations omitted).

[14] The Tanana Plan is available at http://dnr.alaska.gov/mlw/planning/areaplans/tanana/pdf/sub4e.pdf (visited August 19, 2011). To imply, as does DNR, that because this land is open to mineral entry there is a presumption that access to it is consistent with all other uses is incorrect. *See* Exc.601. All state lands classified after 1983, such as the 1985 Tanana Plan, is by regulation open to mineral entry. 11 AAC 55.040. As the Tanana Plan states, regulation is to be placed on this secondary use during the land disposal process. Exc.1.

and more disruptive than parkland routes,[15] allowing a "not practicable" exception to what should otherwise be "primary use" protections for caribou or other Area Plan resources and values would erase the import of the Area Plan.

b. DNR's Approach To Specific Mitigation Measures Is Arbitrary

In its final finding, DNR also did not apply or define key mitigation measures until later phases. In addition to problems with the blanket exception, this approach is arbitrary.

In its preliminary "best interest" finding, DNR included a mitigation measure that precluded the siting of drill pads and compressor stations in subdivisions in which more than half of the land was divided into 5 acre lots or less without the consent of the surface property owners. Exc.255. The preliminary finding also included standards requiring the analysis of noise impacts on residential and other users of the proposed project area, establishing day and night time noise levels, and requiring manned monitoring to ensure compliance with the standards. Exc.253-54. Usibelli was also required to submit a corrective action plan within 10 days if the standards were not met. *Id*. These noise standards were similar to those imposed by DNR on coalbed methane activities in the Mat-Su Valley. *See* Exc.116-17.

In its final finding, DNR eliminated the subdivision consent measure in its entirety, declaring that the changes were not intended to weaken protections but to afford Usibelli flexibility, and that specifically disallowing drill pads and

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[15] *See Overton*, 401 U.S. at 412.

compressor stations from subdivisions "may be unnecessarily restrictive" for Usibelli. Exc.609; *compare* Exc.255 *with* Exc.502. DNR stated that the "small lot subdivision exclusion [was] replaced by" a setback requirement from occupied strictures of 500 feet for drill pads and 1,500 feet for compressor stations. Exc.524. It also eliminated the noise measure using similar reasoning. Exc.502.

Upon reconsideration, DNR explained that

> [t]he intent of changes to the mitigation measures concerning noise and buffers around residential areas was not to weaken protections, but to ensure flexibility while not unnecessarily restricting the licensee's activities. Specifically disallowing drill pads and compressor stations in subdivisions and stipulating specific noise thresholds may be unnecessarily restrictive, especially when lots are unoccupied or undeveloped, perhaps for long periods of time. Requiring the consent of all property owners in a subdivision could result in drill pads and compressor stations not being allowed in subdivisions at all.

Exc.602; *see also* Exc.609. DNR also alleged that it had seen examples of successful coalbed methane exploration and development in residential neighborhoods where both residents and the operator were happy. *Id.* DNR provided no other explanation or support for such claims.

As an initial matter, Usibelli itself stated that its project would only be "significantly affected" if DNR imposed "more onerous mitigating measures" than those in the preliminary finding. Exc.337 ("The operational practicalities and economics would be significantly affected if DNR were to impose any more onerous mitigating measures"). The mitigation measures in the preliminary finding were not, therefore, "unnecessarily restrictive" on Usibelli.

Moreover, DNR's elimination of these protections, by definition, makes weaker the protections accorded to other uses and values, thus rendering arbitrary its statement that it did not intend for this result. Exc.602. For example, the setback requirement, which only applies to occupied structures, does nothing to protect small vacant or uninhabited parcels. Usibelli can locate a compressor or wells right next to or near property lines if the adjoining landowner does not at that time have an occupied residential structure on it. Although DNR claims that vacant lots favor elimination of the subdivision exclusion, Exc.602, elimination of the exclusion could significantly restrict or eliminate the vacant lot owner's ability to develop or sell his or her property. For DNR to claim otherwise is irrational, and thus arbitrary. *See Ellis*, 944 P.2d at 493 (Court "determine(s) from the administrative record whether there was a reasonable basis" for agency decision); *Trustees*, 795 P.2d at 809 (citations omitted) (agency must take a hard look at the salient problems and genuinely engage in reasoned decision making.)

. DNR also justifies the elimination of these measures by saying that they "may be unnecessarily restrictive." Exc.602. This claim is unsupported by any analysis, and the facts and circumstances show otherwise. The Denali Borough has a small population, the resulting number of subdivisions is limited, and the vast majority of Denali Borough's residents and subdivisions are west of the Nenana River while the vast majority of the proposed license area is east of the Nenana River. R.234, 236, 156, Exc.329. Usibelli even prioritized unpopulated

areas in its initial gas exploration approval efforts. Exc.2-7, R.12-21, Exc.8-47, 56-90. Consequently, DNR's unsubstantiated claim that the subdivision and noise measures might be unnecessarily restrictive is not supported by the record and is therefore arbitrary. *See Ellis*, 944 P.2d at 493; *Kelly*, 486 P.2d at 918.

As noted, DNR eliminated the noise-related mitigation measures. Exc.502. Instead, DNR provided that measures to mitigate noise impacts from facilities and compressor stations would be considered on a site-specific basis. *Id*. DNR thus did not limit in its land disposal decision the noise from Usibelli's proposed project in any manner. There are no standards that Usibelli must meet, numerical or otherwise. There is no limit on drilling or compressor station noise. There is no limit on cumulative noise or the number of noise sources that can be on one's property. There are no noise-related mitigation measures that are mandatory. There are no baseline studies required, even though the Healy area generally is very quiet.

DNR removed the noise limits because it claimed that "stipulating specific noise thresholds may be unnecessarily restrictive." Exc.602. Yet, DNR provides no basis for this conclusion. As noted above, Usibelli itself stated that its project would only be "significantly affected" if DNR imposed "more onerous mitigating measures" than those in the preliminary finding. Exc.337. Therefore, the only documentation or information in the administrative record supports the opposite of DNR's conclusion. *See Ellis*, 944 P.2d at 493; *Kelly*, 486 P.2d at 917.

In fact, DNR's own actions discredit such a claim. DNR asserts stipulating noise standards may be unnecessarily restrictive yet it established threshold noise standards for coalbed operations in the Mat-Su Borough in advance of exploration. Exc.602, 116-17. As such, there is no reasonable explanation why threshold limits may be unnecessarily restrictive in the Denali Borough but fine for the Mat-Su Borough. The change in DNR's position also goes back on its public commitment to include in the final "best interest" finding "mitigation measures to protect against unreasonable conflicts." R.2184.[16]

Turning to the Wolf Townships, if there is to be oil and gas activity in the Wolf Townships, the Tanana Plan requires that DNR impose restrictions in the leasing process so that "[i]mpacts on caribou from exploration and development will be avoided or mitigated, especially during the calving season (May 1 - June 10)." Exc.1.[17] Specific measures are to be determined in the leasing process, such as "the siting and consolidation of facilities, avoiding or minimizing activities during calving season, and allowing unrestricted movement of caribou through the lease area." Exc.1.

As an initial matter, the Tanana Plan reference to the "leasing process" cannot be interpreted to mean anything but the land disposal phase. At the time

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[16] That surface impacts such as noise and setbacks are important issues that, left unaddressed could lead to unreasonable conflicts, is supported by the public comments received on these issues, *see e.g.* R.151, 193, 502-12, 2249-50, 2252-53, as well as DNR's own public statements. *See, e.g.* R.2193 (identifying noise and setbacks as "areas of concern.")

[17] The Wolf Townships are in Tanana Plan Management Unit 4E, Stampede Trail Section. Exc.601.

the Tanana Plan was last updated there was no gas licensing program in the State of Alaska,[18] and as the administrative process associated with this case makes clear, the leasing process is when the "best interest" finding is prepared. See Exc.48 (call for comments to prepare a "best interest" finding.)[19] Consequently, no claim can stand that these Tanana Plan requirements do not apply at the "best interest" finding phase for gas only licenses.

Yet, the mitigation measures imposed by DNR in the final "best interest" finding do not adequately protect the extremely high habitat and recreation values these particular lands possess. Again, the Tanana Plan includes a mandate that impacts on caribou from exploration be avoided or mitigated especially during calving season and that specific measures be determined during the leasing process. Tanana Plan at 3-132; Exc.599. For compliance with this requirement DNR points to mitigation measure 2(g), which provides in full that DNR,

> in consultation with ADF&G, may impose seasonal restrictions on activities located in, or requiring travel through or overflight of, important moose and caribou calving and wintering areas.

Exc.505. Thus, DNR deferred the imposition of these protections until a later phase, and no "specific stipulation," Exc.599, exists to protect caribou in the Wolf

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[18] *Compare* Exc.598 (Tanana Plan last updated 1991) *with* H.B. 531, 23rd Ak. State Leg. (Ak. 2004).

[19] *See also* Exc.598-99 (Tanana Plan defers decisions on to leasing process, and "[s]pecific stipulations for oil and gas exploration, development, and production activities will be developed and applied using the oil and gas lease sale process.")

Townships during the calving season or in its wintering grounds. Indeed, DNR did not even identify what it meant by "important" areas for moose and caribou. It is arbitrary for DNR to approve the exploration licenses on grounds that the high wildlife and recreation values of these lands are protected by seasonal restrictions when such restrictions are not imposed in the final "best interest" finding process. *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990 (Alaska 2011) (only uphold agency decision on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

2. DNR's Approach To Mitigation Measures Renders Unconstitutional Its "Best Interest" Finding

DNR's duty to determine whether the alienation of state land or an interest in state land is in the best interest of the State is derived from Article VIII of the Alaska Constitution ("Constitution"). *Arctic Slope,* 834 P.2d at 143. Article VIII is the natural resources article of the Alaska Constitution, and was the first of its kind when enacted. Pursuant to Article VIII, it is the policy of the State "to encourage the…development of [the State's] resources by making them available for *maximum use consistent with the public interest.*" AK Const. Art. VIII, § 1 (emphasis added).

Article VIII, section 2 requires the Legislature to provide for "the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the *maximum benefit of its people*." (emphasis added). In addition, "[t]he legislature may provide for the leasing of,

and the issuance of permits for exploration of, any part of the public domain or interest therein, *subject to reasonable concurrent uses*." *Id.* at § 8 (emphasis added). Additionally, to ensure compliance with Article VIII's requirements, the Constitution provides legal safeguards that apply to disposals of state lands: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice *and other safeguards of the public interest* as may be prescribed by law." *Id.* at § 10 (emphasis added). Thus, while the Legislature has domain over the State's natural resources, that control is not without boundaries. *Arctic Slope,* 834 P.2d at 143.

Under the Act, DNR may phase its review if certain criteria are met. AS 38.05.035(e)(1)(C). This phasing approach permits DNR to limit the scope of its review at the disposal phase because DNR has the discretion under the statute to perform subsequent site-specific "best interest" findings at post-disposal phases. AS 38.05.035(e).

In the case at hand, DNR made the decision to phase its review of the Healy Basin license. Exc.374-76. At the same time, DNR did not commit to preparing another "best interest" finding at later phases. *See Id*. (outlining subsequent approvals, which do not include a new "best interest" finding). Meanwhile, DNR also put off the decision whether and how to apply important mitigation measures until later phases. *See, e.g.* Exc.362, 364, 472.

This approach violates the Constitution because it does not ensure that proper safeguards are in place at the disposal phase to protect the public interest.

The Alaska Supreme Court has acknowledged that there is a "broad constitutional mandate to protect the public interest in the dispositions of state land." *Northern Alaska Environmental Center v. State, Dep't of Natural Resources*, 2 P.3d 629, 635, n.27 (Alaska 2000) (*citing* Alaska Const. art. VIII, §§ 1, 10; Preamble of the Act, ch. 169, SLA 1959; and *Alyeska Ski Corp. v. Holdsworth,* 426 P.2d 1006, 1011 (Alaska 1967)); *Moore v. State,* 553 P.2d 8, 25 (Alaska 1976).

Since DNR is delegated the responsibility to implement Article VIII, § 2 when disposing of State land, it must conduct its "best interest" findings and make its decisions in a way that support "*reasonable concurrent uses,"* and in line with the corresponding directive to "encourage…the development of…[the State's] resources by making them available for maximum use *consistent with the public interest*." AK Const. art. VIII, §§ 1 and 8 (emphasis added); *Kachemak Bay Conservation Society v. State Department of Natural Resources,* 6 P.3d 270, 276 (Alaska 2000). In doing so, DNR must also ensure that no disposal of state land is made without proper safeguards in place to protect the public interest. *See* AK Const. Art. VIII, § 10.

Here, DNR put off until later phases making important decisions about what protections will apply to other values and uses of the license area. *See supra* Section II.B.1 and 2. DNR also admits that enforceable standards are critical to ensuring that coalbed methane activities occur in a manner that "protect(s) the interests of the residents of the state of Alaska." Exc.107.

Consequently, DNR did not know at the time it made its licensing decision what impacts might flow from its licensing decision. Therefore, because DNR did not commit to preparing a new "best interest" finding at a later phase to ensure it has met its constitutional obligations, DNR's "best interest" finding cannot stand as written. As the Alaska Supreme Court stated in *Kachemak Bay:*

> [w]ithin the strictures specified by the legislature, phasing is now expressly allowed. It is not for us to overturn that policy choice.
>
> We note, however, that the legislature's policy choice does not, by any means, relieve DNR of its duty to take a continuing "hard look" at future development on the lease sale lands. To the contrary, DNR is obliged, at *each phase* of development, to issue a best interests finding and a conclusive consistency determination relating to *that* phase before the proposed development may proceed.

6 P.3d at 293-94 (footnote 82 omitted; emphasis in original).

The Court should therefore vacate the finding to the extent it purports to cover subsequent phases of exploration or development, and compel preparation of new "best interest" findings at later phases.

VII. CONCLUSION

For the reasons stated above, DNR's "best interest" finding for the Healy Basin Gas Only Exploration license is arbitrary and contrary to law. The Court should set aside the finding and require a new analysis and "best interest" finding approach should Usibelli choose to proceed with the project.

Dated: August 26, 2010 Respectfully submitted,

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This Brief is proportionately spaced and has a typeface of 13 points.

Dated: August 26, 2011

Respectfully submitted,

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Exhibit 1 to Appellant's Opening Brief

Alaska Department of Natural Resources, Division of Oil and Gas, Best Interest Findings.
http://www.dog.dnr.alaska.gov/programs/leasing/best_interest_findings/best_interest_findings.html (visited August 22, 2010)

Area	**Type**	**Blanket Exception**	**Qualifying Language in Specific Measures**	**Definitions**
Healy Basin	Exploratory License	Exceptions will only be granted upon a showing by the licensee that compliance with the mitigation measure is **not practicable** or that the licensee will undertake an equal or better alternative to satisfy the intent of the mitigation measure. R.1302	Waste from operations must be reduced, reused, or recycled **to the maximum extent practicable**. R.1308.	**Practicable** means feasible in light of overall project purposes after considering cost, existing technology, and logistics of compliance with the mitigation measures. R.1309
Holitna	Exploratory License	Exceptions will only be granted upon a showing by the licensee that compliance with the mitigation measure is **not feasible and prudent**, or that the licensee will undertake an equal or better alternative to satisfy the intent of the mitigation measure. Page 7-1	Facilities may be sited within [river] buffers if the licensee demonstrates to the satisfaction of the Director, in consultation with ADF&G, that site locations outside these buffers are **not feasible or prudent** or that a location inside the buffer is environmentally preferred. Page 7-2	**"Feasible and prudent"** means consistent with sound engineering practice and not causing environmental, social, or economic costs that outweigh the public benefit to be derived from compliance with the standard. Page 7-5

Susitna	Exploratory License	Exceptions will only be granted upon a showing by the licensee that compliance with the mitigation measure is **not feasible or prudent**, or that the licensee will undertake an equal or better alternative to satisfy the intent of the mitigation measure. Page 7-1	Facilities may be sited within [river] buffers if the licensee demonstrates to the satisfaction of the Director, after consultation with OHMP, that site locations outside these buffers are **not feasible or prudent** or that a location inside the buffer is environmentally preferred. **Page 7-2**	**"Feasible and prudent"** means consistent with sound engineering practice and not causing environmental, social, or economic costs that outweigh the public benefit to be derived from compliance with the standard. Page 7-6
Nenana	Exploratory License	[no blanket exception]	**"feasible and prudent"** standard used for exceptions in following mitigation measures: 3b (exploration activities), 8b (oil pipelines), 10a (gravel mine sites), 17b (mud and cutting disposal), 18c (produced water disposal), 22 (fish-bearing waterbody buffer). Pages 7-2 through 7-7.	[no definition]
Mat-Su	Coalbed Methane Enforceable Standards	[no blanket exception]	Facilities may be sited within [river] buffers if the operator demonstrates to the satisfaction of the Director, after consultation with OHMP, that site locations outside these buffers are **not feasible or prudent** or that a location inside the buffer is environmentally preferred. R.1850	**"Feasible and prudent"** means consistent with sound engineering practice and not causing environmental, social, or economic costs that outweigh the public benefit to be derived from compliance with the standard. R.1846