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2 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**  
3 **THIRD JUDICIAL DISTRICT AT ANCHORAGE**  
4

5 DENALI CITIZENS COUNCIL, )

6 Appellant, )

7 v. )

8 ALASKA, DEPARTMENT OF NATURAL )  
9 RESOURCES, USIBELLI COAL MINE, INC. )

Case No. 3AN-10-12552CI

10 Appellees. )  
11 \_\_\_\_\_ )

12 **DNR'S MOTION TO STRIKE**  
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2 The Department of Natural Resources ("DNR") moves to strike a portion  
3 of Denali Citizen Counsel's ("DCC's") brief that improperly raises a point that it did not  
4 include in its reconsideration request to DNR: whether "phased review" violates Article  
5 VIII.

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7 DCC is appealing a final finding issued under AS 38.05.035. DNR is  
8 exempt from the adjudication provisions of the Alaska Administrative Procedures act,  
9 except as to the Alaska grain reserve program. AS 44.62.330(a)(34). Accordingly, this  
10 Court's jurisdiction derives solely from AS 38.05.035 itself. The statute specifically  
11 limits jurisdiction to the points that were "presented to the commissioner in the person's  
12 administrative appeal or request for reconsideration." AS 38.05.035(l). This Court  
13 lacks jurisdiction to consider issues that were not presented to DNR below, and an  
14 appellant lacks standing to raise them. This statutory requirement ensures that DNR has  
15 the opportunity to review, decide, and in some cases correct, issues in the first instance.  
16 The statutory requirement also ensures an agency record on all issues before this Court.  
17 Even for issues where this Court will apply its independent judgment, it is important for  
18 all parties to have the opportunity to develop a record on each issue.

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20 In its request for reconsideration, DCC raised four issues: (1) whether  
21 DNR had provided due process; (2) whether there was missing or inadequate  
22 information; (3) whether DNR sufficiently responded to public comments on mitigation  
23 measures; and (4) whether DNR improperly included, or applied the incorrect standard  
24 to including, sensitive lands. (Request for Judicial Notice in Support of Motion to  
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2 Strike ("RJN"), Ex. A.) By statute, these are the only issues that DCC may raise on  
3 appeal to superior court.

4 Many of the arguments DCC raises in its Appellant's Brief align with  
5 arguments it raised in its reconsideration request, and thus are proper grounds for appeal  
6 under AS 38.05.035(1).<sup>1</sup> DCC's argument that "DNR's finding that a smaller license  
7 area is not feasible is arbitrary" raises roughly the same issues as DCC's "sensitive  
8 lands" argument in its reconsideration request. (Compare Appellant's Brief at 14-17  
9 with RJN Ex. A at 7-8.)  
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11 DCC's argument that "DNR's finding not to impose strict mitigation  
12 measures are arbitrary" takes issue with changes in mitigation measures between the  
13 preliminary and final findings. (Appellant's Brief at 19-31.) Not all of the mitigation  
14 measures discussed in the Appellant's Brief were raised in the reconsideration request.  
15 DCC did, however, state that it was "dismayed that some key mitigation requirements in  
16 the Preliminary Best Interest Finding were eliminated in the Final BIF." (RJN Ex. A at  
17 5.) Reading this language broadly, it arguably could include changes to any mitigation  
18 measure, not just those specifically mentioned in the reconsideration request. Thus  
19 these arguments are properly before this Court.  
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21 But DCC's argument that "DNR's approach to mitigation measures  
22 renders unconstitutional its 'best interest' finding" is a completely new point that does  
23 not correspond to any issue DCC raised before the agency in its reconsideration request.  
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25 <sup>1</sup> DNR, of course, does not concede that there is any merit to DCC's arguments, only  
26 that some were included in its reconsideration request and therefore may be included in  
this appeal.

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2 Specifically, DCC now argues that DNR's decision to "phase its review" under  
3 AS 38.05.035(e)(1)(C) "violates [Article VIII of] the Constitution." (Appellant's Brief  
4 at 32.) DCC's reconsideration request does not mention phasing at all, let alone raise a  
5 constitutional argument about phases.<sup>2</sup> To the contrary, the only constitutional issue  
6 that DCC raised in its reconsideration request was due process with respect to the time  
7 period between public comment and the final finding. (RJN Ex. A at 2-4.) DCC  
8 waived that due process issue by not including it in its Appellant's Brief, leaving no  
9 constitutional issue from the reconsideration request to raise. *See, e.g., Kellis v. Crites*,  
10 20 P.3d 1112, 1114-15 (Alaska 2001) (argument not included in opening brief is  
11 waived).

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14 Because DCC did not raise the constitutionality of phased review in its  
15 reconsideration request, DCC is prohibited by statute from including this point in its  
16 appeal to this Court. AS 38.05.035(l). Accordingly, DNR asks that the Court strike  
17 section VII.B.2 from Appellant's Brief.

18 DATED this 7th day of September, 2011.

19  
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DEPARTMENT OF NATURAL  
RESOURCES

<sup>2</sup> DCC did not raise this issue in its Points on Appeal either, or DNR would have moved to strike the issue at that time.