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 MINE, INC. Appellees.	Case No. 3AN-10-12552CI

BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES

JOHN J. BURNS
ATTORNEY GENERAL

Rebecca D. Kruse
Assistant Attorney General
Alaska Bar No. 1005024

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

TABLE OF CONTENTS

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISION

CASES

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

STATUTES AND REGULATIONS

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

COURT RULES

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

STATUTORY, AND REGULATORY PROVISIONS

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) [See delayed amendment note]. 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,

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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 unless the project is subject to a consistency review under AS 46.40 and public notice and the opportunity to comment are provided under AS 46.40.096(c);

(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 38.05.180is 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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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.

6 AAC 80.130 (2005)

(a) Habitats in the coastal area which are subject to the Alaska coastal management program include

(1) offshore areas;

(2) estuaries;

(3) wetlands and tideflats;

(4) rocky islands and seacliffs;

(5) barrier islands and lagoons;

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(6) exposed high energy coasts;

(7) rivers, streams, and lakes; and

(8) important upland habitat.

(b) The habitats contained in (a) of this section must be managed so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources,

(c) In addition to the standard contained in (b) of this section, the following standards apply to the management of the following habitats:

(1) offshore areas must be managed as a fisheries conservation zone so as to maintain or enhance the state's sport, commercial, and subsistence fishery;

(2) estuaries must be managed so as to assure adequate water flow, natural circulation patterns, nutrients, and oxygen levels, and avoid the discharge of toxic wastes, silt, and destruction of productive habitat;

(3) wetlands and tideflats must be managed so as to assure adequate water flow, nutrients, and oxygen levels and avoid adverse effects on natural drainage patterns, the destruction of important habitat, and the discharge of toxic substances;

(4) rocky islands and seacliffs must be managed so as to avoid the harassment of wildlife, destruction of important habitat, and the introduction of competing or destructive species and predators;

(5) barrier islands and lagoons must be managed so as to maintain adequate flows of sediments, detritus, and water, avoid the alteration or redirection of wave energy which would lead to the filling in of lagoons or the erosion of barrier islands, and discourage activities which would decrease the use of barrier islands by coastal species, including polar bears and nesting birds;

(6) high energy coasts must be managed by assuring the adequate mix and transport of sediments and nutrients and avoiding redirection of transport processes and wave energy; and

(7) rivers, streams, and lakes must be managed to protect natural vegetation, water quality, important fish or wildlife habitat and natural water flow.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(d) Uses and activities in the coastal area which will not conform to the standards contained in (b) and (c) of this section may be allowed by the district or appropriate state agency if the following are established:

(1) there is a significant public need for the proposed use or activity;

(2) there is no feasible prudent alternative to meet the public need for the proposed use or activity which would conform to the standards contained in (b) and (c) of this section; and

(3) all feasible and prudent steps to maximize conformance with the standards contained in (b) and (c) of this section will be taken.

(e) In applying this section, districts and state agencies may use appropriate expertise, including regional programs referred to in 6 AAC 80.030(b).

6 AAC 8.900(a)(20) (2005)

(20) "feasible and prudent" means consistent with sound engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard which is modified by the term "feasible and prudent";

11 AAC 112.300(b)

(b) The following standards apply to the management of the habitats identified in (a) of this section:

(1) offshore areas must be managed to avoid, minimize, or mitigate significant adverse impacts to competing uses such as commercial, recreational, or subsistence fishing, to the extent that those uses are determined to be in competition with the proposed use;

(2) estuaries must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) adequate water flow and natural water circulation patterns; and

(B) competing uses such as commercial, recreational, or subsistence fishing, to the extent that those uses are determined to be in competition with the proposed use;

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(3) wetlands must be managed to avoid, minimize, or mitigate significant adverse impacts to water flow and natural drainage patterns;

(4) tideflats must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) water flow and natural drainage patterns; and

(B) competing uses such as commercial, recreational, or subsistence uses, to the extent that those uses are determined to be in competition with the proposed use;

(5) rocky islands and sea cliffs must be managed to

(A) avoid, minimize, or mitigate significant adverse impacts to habitat used by coastal species; and

(B) avoid the introduction of competing or destructive species and predators;

(6) barrier islands and lagoons must be managed to avoid, minimize, or mitigate significant adverse impacts

(A) to flows of sediments and water;

(B) from the alteration or redirection of wave energy or marine currents that would lead to the filling in of lagoons or the erosion of barrier islands; and

(C) from activities that would decrease the use of barrier islands by coastal species, including polar bears and nesting birds;

(7) exposed high-energy coasts must be managed to avoid, minimize, or mitigate significant adverse impacts

(A) to the mix and transport of sediments; and

(B) from redirection of transport processes and wave energy;

(8) rivers, streams, and lakes must be managed to avoid, minimize, or mitigate significant adverse impacts to

(A) natural water flow;

(B) active floodplains; and

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

(C) natural vegetation within riparian management areas; and

(9) important habitat

(A) designated under 11 AAC 114.250(h) must be managed for the special productivity of the habitat in accordance with district enforceable policies adopted under 11 AAC 114.270(g); or

(B) identified under (c)(1)(B) or (C) of this section must be managed to avoid, minimize, or mitigate significant adverse impacts to the special productivity of the habitat.

11 AAC 112.900(a)

(a) As used in this chapter and for purposes of district enforceable policies developed under 11 AAC 114, "avoid, minimize, or mitigate" means a sequencing process of

(1) avoiding adverse impacts to the maximum extent practicable;

(2) where avoidance is not practicable, minimizing adverse impacts to the maximum extent practicable; or

(3) if neither avoidance nor minimization is practicable, conducting mitigation to the extent appropriate and practicable; for purposes of this paragraph, "mitigation" means

(A) on-site rehabilitation of project impacts to affected coastal resources during or at the end of the life of the project; or

(B) to the extent on-site rehabilitation of project impacts is not practicable, substituting, if practicable, rehabilitation of or an improvement to affected coastal resources within the district, either on-site or off-site, for a coastal resource that is unavoidably impacted.

11 AAC 112.990(18)

(18) "practicable" means feasible in light of overall project purposes after considering cost, existing technology, and logistics of compliance with the standard;

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

STATEMENT OF ISSUES

This appeal arises from a final agency decision that a gas only exploration license in the Healy area, proposed by Usibelli Coal Mine, Inc. ("Usibelli"), would best serve the State's interest. After issuing a preliminary finding that the exploration license would best serve the State's interest, the Department of Natural Resources ("DNR") received comments from members of the public, including Denali Citizens Council ("DCC"). DNR considered, summarized, and responded to these comments, and in the regular course of progressing from a preliminary to final finding, DNR edited the language of the decision and in some case modified certain details. DCC appeals this Healy Final Written Finding. The appeal presents the following issues:

1. In response to the preliminary finding that granting the Healy Exploration License would best serve the interests of the State, DCC commented that DNR should modify the exploration license proposal to remove certain acreage from the license area. DCC objects to DNR's response to this comment. A response to a public comment is not an agency decision, subject to arbitrary and capricious review. Rather DNR's obligation with respect to comments is to consider, summarize, and respond to the comment. DNR did so. What DCC asked DNR to do in its comment — modify the exploration license proposal — is something that DNR can only do if the modification is necessary to conform the proposal to the best interests of the State — defined by statute as encouraging assessment of oil and gas resources while minimizing adverse impacts of exploration and development, and offering oil and gas leases. The record

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

demonstrates that eliminating the acreage in question is not necessary for oil and gas leasing, oil and gas assessment, or minimizing adverse impacts of exploration and development. Has DCC failed its burden to show that the Healy Final Written Finding is arbitrary because of DNR's response to DCC's comment, considering that (1) DNR's obligation was only to consider, summarize, and respond to DCC's comment; (2) that DNR did consider, summarize, and respond to the comment; and (3) that the record does not demonstrate that eliminating acreage is necessary to conform to the State's best interest such that DNR would have authority to modify the exploration license proposal as DCC requested in the comment?

2. DNR has authority to impose conditions — called mitigation measures — throughout the life of an oil and gas project. DNR has imposed general, overarching mitigation measures here that will apply for the life of the exploration license and any projects proposed under it, including if the license is eventually converted to a lease. DNR has authority to impose additional, more tailored mitigation measures when the licensee submits a proposed plan for approval — and these Plans of Operation are subject to public notice and comment and are appealable by those who supply comments. DNR relied on its authority to impose mitigation measures in reaching its final finding that the Healy Exploration License best serves the interest of the State, but did not rely on any particular mitigation measure because these measures will be added to and made more specific in the future as specific projects are submitted for approval. Because mitigation measures are conditions, not the decision itself, they are not subject

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

to arbitrary and capricious review. But even if they are, DCC would bear the burden of demonstrating that the mitigation measures are arbitrary. By merely arguing that it preferred variations on several mitigation measures as they appeared in the preliminary finding, but pointing to no evidence in the record that the final mitigation measures themselves are arbitrary, has DCC failed to satisfy its burden of showing that the Healy Final Written Finding is arbitrary because of the mitigation measures?

JURISDICTIONAL STATEMENT

DCC asserts jurisdiction under AS 44.62.560. This appeal, however, is from a DNR decision under AS 38.05.035. DNR decisions as a whole are exempt from the adjudication provisions of the Alaska Administrative Procedures Act, including AS 44.62.560, except as to the Alaska grain reserve program. AS 44.62.330(a)(34). Accordingly, this Court's jurisdiction does not arise under AS 44.62.560. Jurisdiction instead arises under AS 38.05.035(l).

STATEMENT OF THE CASE

Usibelli proposed a gas only exploration license on April 23, 2004 for the Healy area. (Exc. 372.) Pursuant to AS 38.05.133(d), DNR gave public notice of its intent to evaluate Usibelli's proposal, and asked for public comments within 60 days. (Exc. 372-75.)

DNR issued a preliminary finding, on August 31, 2005, concluding that Usibelli's exploration license would best serve the interests of the State. (Exc. 268.) Pursuant to AS 38.05.133(f) and AS 38.05.945(b), DNR provided public notice and a

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

comment period for this preliminary finding. (Exc. 373.) DNR accepted written and oral comments, and attended multiple public meetings in 2005. (Exc. 372-73.)

The Denali Borough Assembly introduced two draft ordinances on December 14, 2005 that would have imposed restrictions on gas exploration, thus greatly affecting the proposed Healy Exploration License. (Exc. 373.) These ordinances went through many drafts and were the subject of multiple meetings attended by Usibelli, DNR, and others. (*Id.*) The Assembly amended the ordinances on May 14, 2008 to effectively remove the restrictions on gas exploration, thereby clearing the way for DNR to resume processing the Healy Exploration License proposal. (*Id.*)

DNR considered all public input, and weighed the known facts, issues, and laws and regulations, as well as the potential benefits and risks. DNR concluded, in the June 28, 2010 Healy Basin Gas Only Exploration License Final Finding of the Director ("Healy Final Written Finding"), that Usibelli's proposed license would best serve the State's interest. (Exc. 359, 364-65, 373.) The Healy Final Written Finding is a final agency decision signed by both the Director and Commissioner. (Exc. 365.)

DCC timely requested reconsideration of the Healy Final Written Finding, claiming that (1) the decision violates due process; (2) there is missing or inadequate information on deep gas drilling, the effects of exploration on Mental Health Trust Lands, and whether DNR incorporated development standards from the Matanuska-Susitna Borough; (3) the decision did not sufficiently respond to citizen comments about certain mitigation measures; and (4) the decision "seems to apply a different

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

standard than the 'best interest' of the citizens of the state" with respect to "sensitive lands west of Healy." (Exc. 585-95.)

DNR granted reconsideration , but affirmed the Healy Final Written Finding that the license would best serve the State's interest. (Exc. 596-606.)

DCC timely appealed to this Court, asserting that (1) the Healy Final Written Finding is arbitrary because DNR "found, without analysis, that a smaller license area may be uneconomic"; (2) the Healy Final Written Finding is arbitrary because "DNR refused to stringently apply important mitigation measures"; and (3) that phasing (i.e., following AS 38.05.035(e)(1)(C) and limiting the scope of review of a disposal best interest finding to the facts, issues, laws, and regulations pertinent to the "disposal phase") violates Article VIII of the Alaska Constitution. (Appellant's Brief at 1-2, 31-34.) By not raising it in its Appellant's Brief, DCC waived the due process argument that it raised in its reconsideration request. *See, e.g., Kellis v. Crites*, 20 P.3d 1112, 1114-15 (Alaska 2001) (argument not included in opening brief is waived).

DNR moved to strike DCC's argument that phasing is unconstitutional for failure to raise this issue before DNR, as required by AS 38.05.035(l). This Court granted the motion and struck Section VII.B.2 of DCC's brief. Accordingly, DNR does not respond to that section or its argument here.

STANDARD OF REVIEW

A finding that an oil and gas exploration license would best serve the State's interest is "almost entirely a policy decision, involving complex issues that are

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

beyond this court's ability to decide." *Hammond v. North Slope Borough*, 645 P.2d 750, 758-59 (Alaska 1982). Accordingly, "[t]his court reviews DNR's best interest determination 'only to the extent necessary to ascertain whether the decision has a 'reasonable' basis,' and to ensure that it 'was not arbitrary, capricious, or prompted by corruption.'" *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1217 (Alaska 1996). Unless DCC affirmatively demonstrates that DNR's decision lacked a reasonable basis or was arbitrary or capricious, this Court must defer to DNR's expertise. *Kachemak Bay Conservation Soc. v. State, Dep't. of Natural Res.*, 6 P.3d 270, 275 (Alaska 2000).

ARGUMENT

I. THE WRITTEN FINDING GRANTS ONLY THE RIGHT TO EXPLORE, NOT THE ABILITY TO EXERCISE THAT RIGHT OR TO PROGRESS TO DEVELOPMENT.

DCC's focuses largely on events that may or may not happen in the future if Usibelli converts this Exploration License to a lease and progresses to gas development, and constructs the infrastructure necessary to produce gas. But while DNR's assessment of whether this Exploration License best serves the State's interest looks forward at what may develop in the future, it is important to bear in mind that this decision itself does not authorize any such activity. This Healy Final Written Finding approves an exploration license and nothing more.

Exploration licenses were developed to encourage assessment of the State's hydrocarbons in areas that are unattractive for leasing because they are far from

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

existing infrastructure and have unknown or relatively low hydrocarbon potential. (Exc. 368.) An exploration license allows the licensee to explore without the upfront cost of a lease, and to later convert the license area — or a portion of the area — to a lease if certain conditions are met. AS 38.05.134. (Exc. 368.) The license also benefits the State by providing valuable subsurface geologic information, and revenue in the event of later development. (Exc. 368.) So whereas the traditional phases of oil and gas development are lease sale, then exploration, then development and production, the exploration license process begins with a license proposal, then approval and issuance of the exploration license, followed by exploration, then possible conversion to a lease, and only then development and production. Each of these phases involve their own adjudicatory process, including public notice and comment. AS 38.05.035(e)(1)(C).

This particular license gives Usibelli an exclusive right to explore for gas in the license area for ten years. (Exc. 568-69.) Exploration itself may take the form for seismic testing followed by the drilling of exploratory wells, of a foot or so in diameter, to collect well logs, core samples, cuttings, and other data. (Exc. 432-35.) These exploration activities are far different from the permanent drill pads and compressor stations that DCC focuses on. Those types of facilities are associated with the much later production phase — a phase that may never come to fruition.

Importantly, the right to explore that this Exploration License confers, and the ability to exercise that right, are two very different things. To conduct any exploration activities, Usibelli will need to submit additional applications, which have

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

their own public processes and result in their own appealable decisions. (*See* Exc. 451-68 for a general description of state and federal approvals Usibelli may need to seek.) And to move on from exploration to actual development, Usibelli will not only have to convert the exploration license to a lease, but obtain DNR approval after public notice and comment. AS 38.05.035(e)(1)(C)(ii)-(iii).

II. DCC FAILS TO MEET ITS BURDEN OF DEMONSTRATING THAT DNR'S RESPONSE TO DCC'S COMMENT ABOUT ACREAGE WEST OF THE NENANA RIVER RENDERED DNR'S APPROVAL OF THE EXPLORATION LICENSE INVALID.

DCC contends that DNR "found" that a smaller acreage area was not feasible, and that this finding is arbitrary. (App. Br. at 14.) This argument ignores the statutory exploration license procedures and turns the standard of review and written finding requirements on their heads, attempting to impose nonexistent obligations on DNR and reverse DCC's burden.

There is no "finding" about "a smaller acreage area," as DCC contends. Under the exploration license statutes, DNR considers all proposals for an exploration license. AS 38.05.133(f). Here, there was only one proposal — Usibelli's proposal for 208,630 acres.[1] (Exc. 359.) DNR had no proposal for a smaller license area before it, and thus DNR did issue a decision or enter any "findings" on a smaller license proposal.

[1] An exploration license area may be between 10,000 and 500,000 acres. AS 38.05.132(c)(2). The Healy exploration license falls squarely in the middle of this range.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

What DCC attempts to elevate to a finding or decision is merely DNR's response to a comment by DCC — that DNR should exclude acreage west of the Nenana River from the license area. There are several problems with this argument.

First, public comments responses are not decisions subject to an arbitrary and capricious standard. Rather, the only consideration for this Court is whether DNR considered, summarized, and responded to the comment. DNR did so. Second, to eliminate acreage would require DNR to change the license proposal itself, and DNR can do so only if it is necessary to meet the best interests of the State. It is DCC, not DNR, who has the burden here. AS 38.05.035(m). ("[T]he burden is upon the party seeking review to establish the invalidity of the finding."). And DCC pointed to nothing in the record that demonstrates eliminating acreage west of the Nenana River is necessary to conform to the State's best interests. Third, even looking at DNR's response to DCC's comment about the area west of the Nenana River, the phrase DCC focuses on — that removing this area "may make the project economically unfeasible" — was only one part of DNR's response, which focused primarily on DNR's authority to adopt mitigation measures in lieu of changing the exploration license proposal. Furthermore, the "economically unfeasible" language itself is supported by the record.

A. DNR Considered, Summarized, and Responded to DCC's Comment Regarding Area West of the Nenana River.

DCC attempts to apply the arbitrary and capricious standard for agency decisions to DNR's response to DCC's public comment. Public comments, however, are not subject to this standard. Rather, DNR's statutory obligation with respect to

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

public comments is only to consider, summarize, and respond to the comments. AS 38.05.035(e)(7)(B) ("[T]he director shall include in the final written finding a summary of agency and public comments received and the department's responses to those comments."); AS 38.05.133(f) ("After considering . . . public comment on those proposals [not rejected], the commissioner shall issue a written finding."). There is no requirement for DNR to enter a decision accepting or rejecting a suggestion in a public comment such that this Court could review that decision to determine if it was arbitrary.

There should be no question here that DNR considered, summarized, and responded to DCC's comment that the area west of the Nenana River should be excluded from the license area. In its public comments, DCC opined that "DNR should declare it not in the best interests of the State or local citizens to explore for or develop gas in those parts of the license area west of the Nenana River" because (1) the area is "too important to be explored and developed" because it is near Denali National Park, local tourism depends on the park, and local governments depend on tourism; (2) "there is little statewide economic importance to this gas project" and "local residents are unlikely to benefit from the project"; and (3) majority of the license area is east of the river. (Exc. 328-29.) DNR summarized this comment in the Healy Final Written Finding as "[t]he council stated that ADNR should declare it not in the best interest of the state or local citizens to explore for or develop gas in those parts of the license area west of the Nenana River." (Exc. 525.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

DNR also considered and responded to the comment as follows:

> Removing the area west of the Nenana River from the license area may make the project economically unfeasible. The imposition of mitigation measures to avoid, minimize, or mitigate potential impacts is preferable to removing a large acreage from the license area. As specific projects are proposed, additional mitigation measures may be imposed. Given these measures, licensee advisories, and existing laws and regulations, removing the area west of the Nenana River from the license area is unnecessary. . . . Mitigation measures and licensee advisories are designed to protect diverse aspects of habitats, species, local uses, and other uses and values. Each of these measures, in turn, will help protect recreational values, fish and wildlife populations and habitats, scenic views, and adjacent landowners such as the [National Park Service]. The Wolf Townships [which are west of the Nenana River] are owned by the state . . . Mitigation Measure A(2)(g) allows the director, in consultation with ADF&G, to impose seasonal restrictions on activities located in, or requiring travel through or overflight of, important moose and caribou calving and wintering areas.

(Exc. 515-16, 525.) These statements respond to DCC's comment about excluding the area west of the Nenana River, and DNR had to consider the comment in order to formulate the response. Thus DNR considered and responded to the comment.

The Commissioner further responded when DCC sought reconsideration on this issue. The Commissioner expressly "reconsidered removing the area west of the Nenana River," but decided against it because (1) mitigation measures can provide protection for fish, wildlife, habitat, and other uses of this area; (2) the area is open to oil and gas leasing under the Tanana Basin Area Plan; (3) exploration and protection of fish, wildlife, habitats, and other uses are not mutually exclusive; (4) exploration and development projects on the Kenai Peninsula, Cook Inlet, and the North Slope

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

demonstrate how exploration and development can successfully coincide with protection of fish, wildlife, and habitats; (5) DCC had not "provided a compelling, documented justification for excluding that area or portions of it from the license area" or "explain why the mitigation measures of the Final Finding are inadequate" to protect the area. (Exc. 598-99, 605.)

By summarizing, considering, and responding to DCC's comment, DNR has satisfied its obligation with respect to the comment. In *Kachemak Bay Conservation Society v. State, Dep't of Natural Res.*, 6 P.3d 270 (Alaska 2000), appellants made an argument similar to DCC here, contending that DNR had not meaningfully responded to public comments and therefore the decision was arbitrary and capricious. The court observed that DNR had catalogued and responded to all public comments, and held that because DNR had done so, appellants had failed to demonstrate the decision was arbitrary or capricious. *Id.* at 286. This Court should reach the same conclusion here — DNR summarized and responded to DCC comments, and therefore the response cannot render the Healy Final Written Finding arbitrary or capricious. The arbitrary and capricious standard is reserved for DNR's determination that the Healy exploration license best serves the State's interests — not for examining the content of a response to a public comment asking DNR to change the scope of the license proposal. DNR responded to DCC's comment, and the fact that DNR responded is dispositive, regardless of DCC's low opinion of that response.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

B. Eliminating the Area West of the Nenana River is Not Necessary to Conform to the Best Interests of the State.

DCC's comment asked DNR to exclude all acreage west of the Nenana River from the exploration license. To eliminate acreage from the license, however, would require DNR to change Usibelli's license proposal. DNR may change a proposal, but only if the change is necessary "to make the issuance of the exploration license conform to the best interests of the state." AS 38.05.133(f) (authorizing DNR to change exploration license proposals, but only as necessary for the state's best interest). The "best interests of the state" are defined as (1) encouraging assessment of oil and gas resources and to allowing flexible means of leasing to recognize varied geography and minimize the adverse impacts of exploration, development, production, and transportation activities; and (2) offering acreage for oil and gas leases. AS 38.05.180(a)(2). Thus to eliminate acreage from the exploration license proposal, DNR would have to have found that doing so was necessary to facilitate the leasing of oil and gas resources, to encourage assessment of oil and gas, or to minimized adverse impacts of exploration and development. The record demonstrates no such need.

1. Eliminating Acreage is Not Necessary for Oil and Gas Leasing.

Eliminating acreage is not necessary to facilitate leasing of oil and gas resources. Exploration licenses in general are designed to incentivize exploration where leasing is less economically attractive, and to allow conversion of the some or all of the license area into a lease if certain conditions are met. AS 38.05.134. (Exc. 368.) Removing a large portion of the acreage from the Healy exploration license will do

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

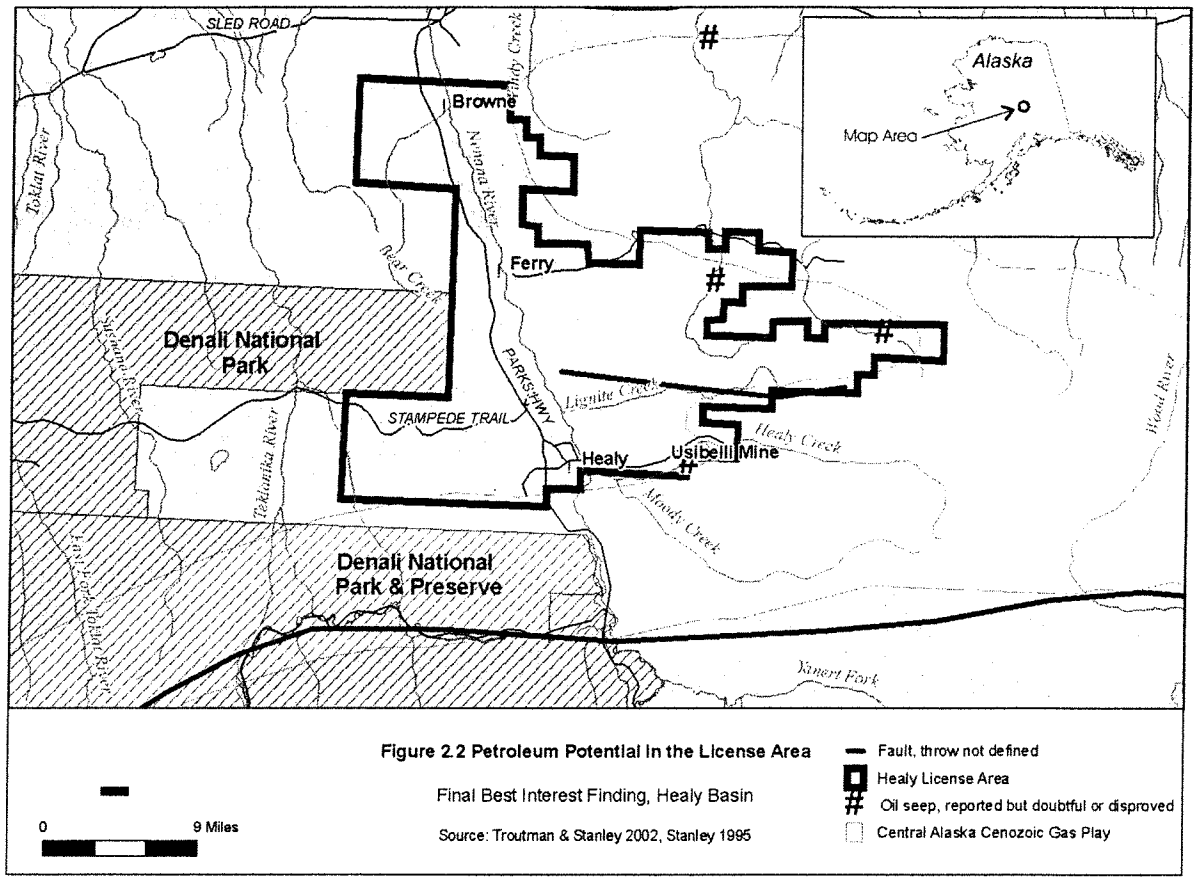
nothing to increase the chance that Usibelli will eventually convert the license to a lease. If anything it would decrease the chances since the less area there is to explore, the lesser the chance of finding gas to support converting to a lease. Nothing in the record suggests that eliminating the area west of the Nenana River was necessary to encourage or increase the likelihood of Usibelli converting this license to a lease.

2. Eliminating Acreage is Not Necessary to Encourage Oil and Gas Assessment.

Eliminating acreage is not necessary to encourage assessment of oil and gas resources either. There is nothing in the record that suggests that giving Usibelli less acreage to explore will increase the chances Usibelli will conduct exploration work to assess the hydrocarbon potential in this area. To the contrary, the record shows that there is a chance of gas in the area west of the Nenana River, so eliminating that area should only decrease, not increase, the chance of assessing that gas.

As DNR pointed out in the Healy Final Written Finding, there is "no documentation available quantifying the occurrence of hydrocarbons, either gas or oil, within the license area." (Exc. 430.) But the presence of subbituminous C rank coal suggests a high probability of biogenic gas, leading experts to predict a Cenozoic gas play in the area. (*Id.*) As the map from the Healy Final Written Finding shows, the gas play exists to the west of the exploration license area and extends through most of the area, roughly to the eastern border of the area:

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100



(Exc. 430 (Map 6.1, Petroleum potential in the license area).) Since the gas play is to the west of the license area, the western portion of the area — the area west of the Nenana River — could prove to be significant to potential development.

But while clues like subbituminous C rank coal might be sufficient to evaluate the general hydrocarbon potential of the larger area and justify exploration, they are not sufficient to pinpoint exact locations in order to say that one part of the license area will be more critical to the project than others. To attain that kind of information, Usibelli needs to explore. Encouraging exploration is the very purpose of exploration licenses — not to mention a primary component of the State's best interest. AS 38.05.132(a) ("To encourage exploration for oil and gas on state land, the

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

commissioner may issue exploration licenses."); AS 38.05.180(a)(2)(A) ("[I]t is in the best interests of the state to encourage an assessment of its oil and gas resources."). (*See also* Exc. 1232 ("The intent of exploration licensing is to encourage exploration in areas with relatively low or unknown hydrocarbon potential where there is a higher investment risk to the operator").) Decreasing the size of the exploration license area would only decrease the area for which the State will receive information about hydrocarbon potential. Nothing in the record would support a finding by DNR that decreasing the area would *increase* the assessment of gas potential such that DNR could change the license proposal.

3. Eliminating Acreage is Not Necessary to Minimize Adverse Impacts of Exploration and Development.

Eliminating the area west of the Nenana River is not necessary to minimize the adverse impacts of exploration and development either. There are statutes and regulations, both state and federal, that address adverse social and environmental effects of oil and gas activity. (*See* Exc. 451-68 (general description various state and federal approvals required); Exc. 508-10 (licensee advisories of various state and federal requirements for addressing adverse impacts).)

In addition, DNR has authority to address potential adverse impacts through mitigation measures. (Exc. 515-16, 599, 605.) DNR has statutory authority to "impose additional conditions or limitations . . . [to] best serve the interests of the state." AS 38.05.035(e). Here, DNR imposed multiple conditions and limitations through mitigation measures that will apply through the life of the exploration license and any

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

conversion to a lease. The mitigation measures thus address not only exploration activities — the seismic testing and test wells that Usibelli may apply to conduct under this license — but also any development, production, and transportation activities, such as facilities and pipelines, that could arise if Usibelli ever converts the license to a lease. DNR developed these measures after considering public comments — which would include DCC's comment. (Exc. 500.) Mitigation measures include:

- "[P]lans to minimize impacts on residential, commercial, and recreational areas." (Exc. 501.)
- "[M]easures for minimizing damage and promoting safety." (Exc. 501.)
- "Route plans for heavy equipment and trucks to avoid rural residences and other sensitive areas to the greatest extent possible." (Exc. 501.)
- "[N]on-toxic dust control measures." (Exc. 501.)
- "Measures to minimize damage to the surface for approved off-road access." (Exc. 501.)
- "Measures to minimize the need for new road development, and to ensure that construction of new roads minimizes surface impacts." (Exc. 501.)
- "Measures to control soil erosion and sedimentation."
- "An emergency preparedness and response plans which addresses explosions, fires, gas, or water pipeline leaks or ruptures, earthquake or flood events, or hazardous material spills." (Exc. 501.)
- "A monitoring plan . . . tailored to the specific situation and potential impacts of proposed activities . . . [including] [p]otential impacts to water quality and quantity; [p]otential noise or visual impacts; [m]agnitude of proposed ground disturbance; [p]roximity to sensitive habitats or use areas; and [p]otential impact to fish or wildlife populations." (Exc. 501.)
- A prohibition on "diesel-based fracturing materials" (Exc. 502.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

- "[A] water management plan providing detailed information on . . . potential impacts associated with the disposal." (Exc. 502.)

- A requirement that "[f]acilities must be designed and operated to minimize sight and sound impacts in areas of residential, commercial, recreational, and subsistence uses; Native allotments; and important wildlife habitat." (Exc. 502.)

- A 500 foot setback for drill pads and 1500 foot setback for compressor stations "from any occupied residential structure, community or institutional building," and any exception requiring consent of the homeowner or demonstration that the drill pad or compressor station will be substantially hidden from view and that noise will not exceed ambient noise levels. (Exc. 502.)

- "Measures to be used to mitigate visual impacts associated with facilities . . . [including] [m]inimizing the size of structures; [m]inimizing damage to vegetation and the use of vegetation to buffer visual impacts; [m]inimizing work pad size to the area necessary to provide a safe work area; [l]ocating facilities aware from prominent features, hilltops and ridges; [l]ocating facilities at the base of slopes; [p]ainting permanent facilities in uniform, non-contrasting, non-reflective color tones slightly darker than the adjacent landscape; [d]irecting exterior lighting, when required, away from residential areas, or effectively shielding the light from such areas; [and] [a]pplying . . . landscape practices for permanent facilities" including practices for vegetation, rock, and fence placement and removal." (Exc. 502.)

- "Measures to be used to mitigate potential noise impacts associated with facilities and compressor stations . . . [including] [v]enting exhaust in a direction away from the closest existing residences of a platted subdivision; [u]sing quiet design mufflers on non-electric motions; [l]imiting the hours of noise-generating operations to daytime hours; [u]sing sound insulating enclosures [near populated and sensitive areas] . . . ; and [s]iting facilities and compressor stations in locations that use geographic features to buffer noise." (Exc. 502-03.)

- A prohibition on permanent facilities during exploration. Only "air service, an existing road system, ice roads . . . off-rad vehicles that do not cause significant damage to the ground surface or vegetation . . . [and] temporary drill pads, airstrips, and roads may be allowed." (Exc. 503.)

- A half mile setback from the Nenana and Savage Rivers, 500 foot setback from other fish bearing water, and 1500 foot setback from drinking water sources for facilities. (Exc. 503.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

- A requirement that the operator "minimize disturbance of vegetation within rights-of-way during construction, maintenance, and operational activities." (Exc. 503.)

- A requirement that pipelines be designed "to allow for the free movement of wildlife . . . facilitate the containment and cleanup of spilled fluids. . . . [and] assure integrity against climatic conditions and geophysical hazards." (Exc. 503-04.)

- A prohibition on "[g]ravel mining within an active floodplain." (Exc. 504.)

- Prohibitions on detonating explosives in or near water. (Exc. 504.)

- A prohibition on "[c]ompaction or removal of snow cover overlying fish bearing water bodies." (Exc. 504.)

- Measures to protect fish during removal from water bodies. (Exc. 504.)

- A requirement for passing pipelines under fish bearing streams. (Exc. 504.)

- "[A] human-bear interaction plan" and limitations on activities near bear dens. (Exc. 504-05.)

- Seasonal restrictions on activities in moose and caribous calving and wintering areas and waterfowl habitat. (Exc. 505.)

- Use restrictions "when the Commissioner determines it is necessary to prevent unreasonable conflicts with local subsistence, commercial and sport harvest activities" that will be determined when DNR reviews specific plans of operation or development. (Exc. 505.)

- A requirement for "[s]econdary containment . . . for the storage of fuel or hazardous substances." (Exc. 505.)

- A setback of 100 feet from water bodies and 1500 feet from drinking water sources for certain storage containers. (Exc. 505.)

- Protective measures for protecting against fuel and hazardous substance leaks during equipment storage and maintenance and fuel and hazardous substance transfers, and for labeling and maintaining safety data on hazardous substances. (Exc. 505.)

- A prohibition on "[v]ehicle refueling . . . within the annual floodplain." (Exc. 506.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

- Provisions for reducing, reusing, recycling, and temporarily storing waste. (Exc. 506.)
- A prohibition on solid waste disposal sites during exploration. (Exc. 506.)
- Requirements for underground injection disposal of muds and cuttings. (Exc. 506.)
- Restrictions on limiting public access to the license area. (Exc. 506.)
- Requirements for "conduct[ing] an inventory of prehistoric, historic, and archeological sites within the area affected by an activity," based on which DNR will impose restrictions to "avoid or minimize adverse effects." (Exc. 506.)
- Requirements that the licensee report discovery of a prehistoric, historic, or archaeological site or object, and preserve and protect it. (Exc. 506-07.)
- Requirements for communicating with local community groups. (Exc. 507.)
- A requirement to train "each person working on the project of the environmental, social, and cultural concerns . . . . [and] techniques necessary to preserve geological, archeological, and biological resources." (Exc. 507.)

DCC's reason for excluding the area west of the Nenana River — that the area is important for tourism — is addressed by these mitigation measures which protect against adverse impacts to fish and wildlife, water and soil quality, noise levels, views, cultural sites, subsistence, and commercial and sport harvests. DNR imposed the mitigation measures that it determined were necessary to minimize adverse impacts.

DNR's authority to impose these conditions on the exploration license is limited only by what will serve the State's best interest. AS 38.05.035(e). And one of the enumerated best interest of the State is the need to minimize adverse impacts of exploration and development. AS 38.05.180(a)(2). Because DNR can adopt any mitigation measure to serve the State's best interest, and minimizing adverse impacts is

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

in the State's best interest, DNR necessarily can address any need to minimize adverse impacts with a mitigation measure. Nothing in the record suggests a need to minimize adverse impacts that necessitates removing a large percentage of the entire license area. Since DNR can address minimizing adverse impacts through mitigation measures, eliminating acreage west of the Nenana River is not necessary to meet that goal.

In any case, Usibelli already excluded large areas west of the Nenana River from its proposal. As DNR explained in the Healy Final Written Finding, Usibelli considered the need to include the area west of the river, and decided to exclude much of the state land to the west, "[r]ecognizing the area's importance as caribou calving and wintering habitat."[2] (Exc. 485.)

Furthermore, the entire license area — including the area west of the Nenana River — is mixed use and has long been approved for natural resource development. DCC's justification for excluding the area — tourism — is only one of the many current uses. This area is also used for mining, highway and railroad transportation, subsistence, sport hunting and trapping, and sport fishing. (Exc. 419-24; *see also* Exc. 333-34, 338) DNR must — and did — consider all of these uses, not just the tourism use DCC values most. AS 38.05.035(g)(1)(B)(iv). (Exc. 419-24.) In addition, the entire license area — including the area west of the Nenana River — is within the boundaries of the Tanana Basin Area Plan, a region that DNR long ago

[2] DCC makes much of the fact that Usibelli had previously submitted lease applications for different acreage. But the existence of a prior *lease application* unrelated to the proposal before DNR here demonstrates nothing about whether DNR's consideration and approval of *this exploration license* had a reasonable basis.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

approved for oil and gas leasing. (Exc. 418.) The portion of the river corridor that runs through the license area is also open to subsurface use for locatable minerals. (*See* Exc. 339 for comments by Usibelli discussing the R-1 Nenana River Corridor area.[3])

Considering that the area west of the Nenana River is mixed use, has long been approved for natural resource development, is governed by state and federal laws that protect against adverse social and environmental effects, and is subject to mitigation measures designed to protect adverse effects on the environment, subsistence, and enjoyment of the land, the record supports DNR's determination that eliminating the area is not necessary to minimize adverse impacts.

Because the record demonstrates that eliminating the area west of the Nenana River was not necessary to facilitate leasing, encourage assessment, or minimize adverse impacts, there was no need to conform to the State's best interest that would have supported DNR changing Usibelli's proposal to exclude this acreage. AS 38.05.133(f).

C. Economic Feasibility Was Only One Part of DNR's Response to DCC's Comment, and it is Supported by the Record.

As discussed above, DNR's obligation with respect to public comments is only to summarize, consider, and respond, and the response itself is not subject to an

---

[3] The Tanana Basin Area Plan is also publicly available at http://dnr.alaska.gov/mlw/planning/areaplans/tanana/pdf/sub4r.pdf, with specific content about the R-1 region at http://dnr.alaska.gov/mlw/planning/areaplans/tanana/pdf/sub4r.pdf. This agency document is located on DNR's official government website, and thus is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Alaska R. Evid. 201(b). Thus this Court may take judicial notice of this document.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

arbitrary and capricious standard. But even looking at the content of the response, the phrase DCC focuses on here — economic feasibility — was only one part of DNR's response to DCC's comment about the area west of the Nenana River.

Yes, DNR raised the question that eliminating this area "may make the project economically unfeasible." (Exc. 515.) But DNR further stated that "imposition of mitigation measures to avoid, minimize, or mitigate potential impacts is preferable to removing a large acreage," and that mitigation measures will be added as specific projects are proposed. (*Id.*) DNR also stated that considering mitigation measures, licensee advisories, and laws and regulations — which include statutory provisions for decreasing the size of an exploration license area over time — removing acreage west of the Nenana River "is unnecessary." (*Id.*) *See* AS 38.05.132(d) (provisions for relinquishment and removal of acreage).

On reconsideration, DNR only mentioned economic feasibility to say that considering it is required under the AS 38.05.035(g)(1)(B)(ix) factor of considering reasonably foreseeable fiscal effects. (Exc. 604.) Otherwise, the reasons DNR provided for not changing Usibelli's proposal to exclude acreage west of the Nenana River were DNR's authority to impose mitigation measures, the fact that the area is open to oil and gas leasing under the Tanana Basin Area Plan, the fact that exploration and environmental protection can successfully coexist as demonstrated by several projects through the state, and the fact that DCC had not "provided a compelling, documented justification for excluding that area or portions of it from the license area" or "explain

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

why the mitigation measures of the Final Finding are inadequate" to protect the area.[4] (Exc. 598-99, 605.) To the extent DNR needs any justification for a response to a public comment, that justification should be found in the entire response and consideration of the comment, not one isolated phrase.

But even considering DNR's statement that removing the area west of the Nenana River could make the project "economically unfeasible," there is ample support in the record for DNR's conclusion that economic unfeasibility is possible. Importantly, DNR's statement is only that economic unfeasibility is a possibility. As DNR pointed out in the Healy Final Written Finding, the economic viability of a project can be determined only after completing exploration. (Exc. 435 (development and production "phases can begin only after exploration has been completed and tests show that a discovery is economically viable").) Thus it is the possibility of creating economic unfeasibility that is important when reviewing an exploration license proposal.

There were several facts before DNR that indicated that eliminating the area west of the Nenana River could result in economic unfeasibility at the development stage. Before DNR for consideration was a letter from Usibelli to the Denali Borough mayor stating that a draft ordinance that sought to limit development in large areas of the license area was "exceedingly restrictive and likely would preclude Coal Bed

[4] DCC's argument that this statement improperly placed the burden on DCC is baseless. As an appeal of a final written finding disposing of an interest in state land, "the burden is upon the party seeking review to establish the invalidity of the finding." AS 38.05.035(m). The burden is absolutely on DCC. And DCC failed to meet its burden of demonstrating that DNR's decision is invalid.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Methane (CBM) development in the Denali Borough."[5] (Appellee's Excerpt of Record 611.) Also before DNR were Usibelli's comments on the Preliminary Finding, which stated that a quarter mile setback along the Nenana River, and the resulting inability to tie into existing commercial developments would "inhibit[] operational, economic and environmental practicality." (Exc. 339.) If a mere setback along the east and west shores of the river threatens the economic viability of the project, then it stands to reason that excluding the entire area west of the river would as well. DNR pointed out in the Healy Final Written Finding that "[t]he mode of transportation from a discovery will be an important factor in determining whether future discoveries can be economically produced" and that "[p]roximity to existing transportation, storage, and processing facilities is a major consideration in petroleum development planning, especially as a discovered field is considered marginally economic." (Exc. 440, 492.) Usibelli's comments about the need to tie into facilities along the river is thus important to economic feasibility. And eliminating that access by removing the area west of the Nenana River would indeed create the possibility that the project could prove economically unfeasible. Thus even focusing on the DNR's singular comment about economic feasibility, the comment is more than supported by the record.

[5] The entire license area is within the Denali Borough. (Exc. 380.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

III. DCC HAS FAILED TO DEMONSTRATE THAT THE HEALY FINAL WRITTEN FINDING IS INVALID BECAUSE OF ANY MITIGATION MEASURE.

A. Mitigation Measures Themselves Are Not Subject to Arbitrary and Capricious Review.

DCC contends that "DNR's approach to mitigation measures" is arbitrary. (App. Br. at 17-31.) A fatal flaw to this argument is that mitigation measures are not a decision subject here to arbitrary and capricious review. It is DNR's finding that the exploration license best serves the State's interest that is subject to review, and the burden is on DCC to demonstrate that this finding is invalid. AS 38.05.035(l), (m). Mitigation measures are not findings that a disposal is in the best interest of the State. Mitigation measures are additional conditions that DNR can impose on a disposal. AS 38.05.035(e); *see also Kachemak Bay Conservation Soc. v. State, Dep't of Natural Res.*, 6 P.3d 270, 280 (Alaska 2000) (referring to mitigation measures as conditions on approval).

The Supreme Court has held that mitigation measures are merely general guidelines, the adequacy of which are not at issue until a company submits a specific plan for work that would invoke application of those measures as well as adoption of additional ones. In *Trustees for Alaska v. State, Dep't of Natural Res.*, 851 P.2d 1340 (Alaska 1993), the appellant argued that a Alaska Coastal Management Program ("ACMP") consistency determination that accompanied a lease sale approval was arbitrary because DNR relied on the mitigation measures to find consistency with ACMP standards without evaluating the adequacy of the mitigation measures. *Id.* at

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1346-47. Although in the context of an ACMP decision, this is essentially the same argument that DCC raises here — that the Court should review mitigation measures for arbitrariness. The Supreme Court soundly rejected the argument, holding that mitigation measures with a disposal are "guidelines," and that the time to assess their adequacy, and determine whether to impose additional mitigation measures to adequately minimize harmful effects of oil and gas development, is when DNR reviews a Plan of Operation. *Id.* at 1347. The Supreme Court agreed with DNR that until an operator submits a detailed Plan of Operation, it is unknown what operations will occur and thus DNR cannot, as a practical matter, assess whether existing mitigation measures will be adequate to address the particular proposed work. *Id.* ("[W]e reject Trustees' argument to the extent that it would tie the reasonableness of DNR's consistency determination to its developing and assessing detailed mitigation measures even before knowing which activities it needs to mitigate.").

The same is true here. The Exploration License gives Usibelli the right to submit Plans of Operation, but does not itself authorize any work or assess any particular work proposal. The mitigation measures thus provide only the minimum conditions DNR is imposing for the life of the license and any eventual lease. DNR has discretion to impose additional mitigation measures later when Usibelli submits a Plan of Operation and DNR assesses whether additional mitigation measures are necessary for that proposed Plan. 11 AAC 83.158(e) ("In approving a lease or license plan of operations or an amendment of a plain, the commissioner will require amendments that

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

the commissioner determines necessary to protect the state's interest.");

11 AAC 83.346(e) (same for a unit[6] plan of operations). Until Usibelli submits a Plan of Operation, DNR cannot assess whether the existing mitigation measures are sufficient, or whether it will need to impose additional ones. Accordingly, the sufficiency of mitigation measures is not part of DNR's determination that an exploration license best serves the State's interest.

Like the ACMP determination in the *Trustees* case, DNR here properly relied on the existence of mitigation measures and its authority to adopt additional measures in concluding that the exploration license best serves the State's interest. (Exc. 359.) But as the Supreme Court held in *Trustees*, the sufficiency of such measures is a question for DNR to consider at the time it reviews a Plan of Operations.[7] 851 P.2d at 1347.

Furthermore, DCC has asserted no statutory or regulatory violation by the mitigation measures. DCC asserts only that it liked mitigation measures in the preliminary finding better than ones in the Healy Final Written Finding. Preferring one policy choice over another — particularly a policy choice that can and will be modified over time as DNR reviews specific proposals — is no indication that DNR's conclusion about the State's best interest in this Exploration License is invalid.

---

[6] A unit is a group of leases that are part of the same oil and gas pool or field that are united, with DNR approval, to conserve natural resources. AS 38.05.180(p).

[7] Because this is a phased project, Usibelli's Plan of Operation will be subject to public notice and comment and an appealable DNR decision before Usibelli can proceed with any exploration activities. AS 38.05.035(e)(1)(C). (Exc. 374-76 (determining that this is a phased project).)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

B. DCC Has Shown Nothing Invalid or Arbitrary About Allowing an Exception When Mitigation Measures are Not Practicable.

Even if the generalized mitigation measures are subject to review at this stage, when no Plan of Operation has been submitted for DNR to tailor Plan-specific mitigation measures, DCC has failed to show anything invalid about the mitigation measures in the Healy Final Written Finding.

DCC's failure to demonstrate infirmities in the mitigation measures is no more apparent that in the faux controversy DCC erects around the exception DNR provided to the mitigation measures. The Healy Final Written Finding states that the DNR Division of Oil and Gas Director may grant an exception to a mitigation measure "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.) The Finding further specifies that exceptions are not considered now at the Exploration License stage; rather "[r]equests and justifications for exceptions must be included in the plan of operations. Decisions of whether to grant exceptions are made during the public review of the plan of operations." (*Id.*) Considering that DNR has discretion whether to even impose mitigation measures, there is nothing invalid, or arbitrary, about allowing a party to seek an exception to these measures. AS 38.05.035(e).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1. The Fact that DNR Changed Some Wording Between its Preliminary and Final Findings Does Not Demonstrate Anything About the Validity of the Healy Final Written Finding.

What DCC objects to is not a mitigation measure exception, but that DNR changed the grounds for seeking an exception between the preliminary written finding and Healy Final Written Finding. (App. Br. at 19-24.) Specifically, that the preliminary finding proposed requiring "a showing by the licensee that compliance with the mitigation measure is not *feasible or prudent*" and the Healy Final Written Finding requires "a showing by the licensee that compliance with the mitigation measure is not *practicable*." (See Exc. 251, 500 (emphasis added).)

There are several problems with DCC's arguments. First and foremost, a change in language between a preliminary and final written finding is not subject to arbitrary and capricious review. The Court's role is to assess whether DNR's final finding was arbitrary or capricious — not whether it was arbitrary to make changes between a preliminary and final finding. *Cf. Trustees for Alaska v. State, Dep't. of Natural Res.*, 795 P.2d 805, 809-10 (Alaska 1990) (in case challenging alleged changes between preliminary and final best interest findings, court looked at only whether the final finding was arbitrary or capricious). The fact that DNR changed some wording — not a change of decision, mind you, but a slight wording change in how the licensee may seek an exception to optional contract conditions that DNR is electing to, but need not, impose — has no bearing on whether the actual final decision was arbitrary and capricious. DNR is under no obligation to explain every wording change between a

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

preliminary and final finding. Its obligation to support a decision with a record applies solely to its actual decisions, not to its editing between drafts.

Furthermore, there is nothing particularly mysterious or monumental about this slight wording change. Feasible, prudent, and practicable are not magic words. They are synonyms. The Healy Final Written Finding in fact defines "practicable" to mean "feasible." And the change from "feasible and prudent" to "practicable" reflects nothing more than a similar wording change in ACMP regulations during the same time period.[8] Before 2006, the applicable ACMP regulations were found in 6 AAC 80 *et seq.* Similar to the mitigation measure exception set forth in the 2005 Healy preliminary finding, these ACMP regulations provided that uses and activities that would not conform to certain habitat management standards could be allowed under the ACMP if there was no "feasible" alternative, and "all feasible and prudent steps" were taken to maximize conformance with the habitat management standards. 6 AAC 80.130(d). The ACMP regulations at that time defined "feasible and prudent" the same way as DNR did in the Healy preliminary finding. *See* 6 AAC 80.900(a)(20) ("'feasible and prudent' means consistent with sound

[8] Prior to July 1, 2011, an Alaska Coastal Management Program ("ACMP") consistency review was also required before the next phase of an oil and gas multiphase project in a coastal zone. AS 38.05.035(e)(1)(C)(ii) (2010). Even though the Healy Exploration License is not in a coastal zone and thus was never subject to ACMP review, other land interest disposals are, so it makes sense that DNR would consider ACMP regulation language in its mitigation measures for land disposal best interest findings. With the scheduled termination of the ACMP — in place since 2005 — responsibility for coastal management reverted to other agencies, and the ACMP's coordination role ceased. *See* AS 44.66.020(a)(5), AS 44.66.030.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard"). (Exc. 259.) Alaska's revised ACMP was approved by the federal government in 2006, and consistency reviews after that time were then governed by 11 AAC 110 *et seq.* rather than 6 AAC 80 *et seq.*[9] Under the new ACMP regulations, habitats had to be "managed to avoid, minimize, or mitigate significant adverse impacts" and "avoid, minimize, or mitigate" was defined as avoiding or minimizing impacts "to the maximum extent practicable." 11 AAC 112.300(b); 11 AAC 112.900(a). The new regulations defined "practicable" the same as DNR did in the 2010 Healy Final Written Finding. *See* 11 AAC 112.990(18) ("'practicable' means feasible in light of overall project purposes after considering cost, existing technology, and logistics of compliance with the standard").

Thus where the old ACMP regulation articulated habitat management as requiring all feasible and prudent steps to comply with habitat standards, the new ACMP regulations articulated habitat management as requiring avoidance of adverse impacts to the maximum extent practicable. Neither is necessarily stronger or weaker, just a different way of articulating how to manage coastal habitat. The same is true for the mitigation measure exception in the Healy Preliminary and Final Written Findings. "Feasible and prudent" and "practicable" are two different ways of articulating the exception. But neither is stricter or stronger of a standard than the other.

---

[9] A copy of the approval is available at http://alaskacoast.state.ak.us/Clawhome/handbook/pdf/OCRM_Approval.pdf.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

DCC attached a table to its brief, showing that DNR had used "feasible and prudent" as the grounds for mitigation measure exceptions in other decisions, apparently attempting to paint the Healy Final Written Finding as a sea change. (App. Br. at 37-38.) But if one looks at *all* best interest findings in recent years, not just the ones DCC has selected to highlight, it quickly becomes clear that the best interest findings issued when the ACMP regulation used "feasible and prudent" also used "feasible and prudent,"[10] and the best interest findings issued after the ACMP regulation used "practicable" used "practicable."[11]

---

[10] These best interest findings are all available at DNR's website. Since these are final agency decisions, akin to court records and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of these decisions. Alaska R. Evid. 201(b); *cf.*, *F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993) ("[C]ourts freely take notice of court records."). DNR's pre-2006 best interest findings, all using "feasible and prudent," the same as the ACMP regulation consist of:

- Nenana Exploration License (issued 2002), http://dog.dnr.alaska.gov/Programs/Documents/Nenana/Final_Finding_of_Director_Nenana.zip at 7-2, 7-3, 7-5, 7-6, 7-7;
- Susitna Basin Exploration License (issued 2003), http://dog.dnr.alaska.gov/Programs/Documents/Susitna/Exploration_License_Final_Finding_of_Director_Susitna_Basin.zip, at 7-1;
- Alaska Peninsula Lease Sale (issued 2005),
- http://dog.dnr.alaska.gov/Leasing/Documents/BIF/Alaska_Peninsula/AlaskaPeninsula_BIF2005_7.pdf, at 7-1;
- Holitna Exploration License (issued 2006, revised on remand in 2009), http://dog.dnr.alaska.gov/Programs/Documents/Holitna/Final_Finding_of_Director_onRemand_Holitna_Basin_2009.pdf, at 7-1.

[11] DNR's post-2006 best interest findings, all using "practicable," the same as the 2006 ACMP regulation, consist of:

- North Slope Lease Sale (issued 2008),
- http://dog.dnr.alaska.gov/Leasing/Documents/BIF/North_Slope/NorthSlope_BIF2008_7.pdf at 7-1;

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

There is absolutely no basis for DCC's contention that "practicable" is a weaker standard than "feasible and prudent." More importantly, DCC's false dichotomy between "practicable" and "feasible and prudent," misses the critical — and only — question this Court could ask: Is allowing an exception to mitigation measures upon a showing that compliance is not practicable invalid under the statute? DCC bears the burden of showing that the Healy Final Written Finding is invalid. DCC has made no such showing.

2. The Authorities DCC Cites Do Not Demonstrate Any Qualitative Difference Between "Feasible and Prudent" and "Practicable," Let Alone that "Practicable" is an Invalid Consideration.

The Alaska Supreme Court has never deemed "feasible and prudent" to be a "stringent" or "strongly protective" standard, as DCC misrepresents. In the cases DCC relies on, the Supreme Court discussed the pre-2006 ACMP regulation that used "feasible and prudent." *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 244 (Alaska 2003) (discussing 6 AAC 80.130); *Trustees for Alaska v. State, Dep't of Natural Res.*, 851 P.2d 1340, 1344 (Alaska 1993) (same). While it makes sense that DNR might have *looked to* an ACMP regulation for ideas on language to adopt, that ACMP regulation

---

- Beaufort Lease Sale (issued 2009), http://dog.dnr.alaska.gov/Leasing/Documents/BIF/Beaufort_Sea/BeaufortSea_FinalBIF_Chap09_Mitigation.pdf at 9-1;
- Cook Inlet Lease Sale (issued 2009),
- http://dog.dnr.alaska.gov/Leasing/Documents/BIF/Cook_Inlet/CookInlet_BIF2009_9_MitMeasures.pdf at 9-1;
- North Slope Foothills Lease Sale (issued 2011), http://dog.dnr.alaska.gov/Leasing/Documents/BIF/North_Slope_Foothills/Chapter9_MitigationMeasures.pdf, at 9-1.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

does not actually govern, and never would have governed, DNR's enforcement of mitigation measures in any land disposal best interest finding, let alone this Healy Final Written Finding, which is not in a coastal zone and thus was never subject to ACMP review. (Exc. 451.) The ACMP cases DCC relies on are thus inapposite.

But even considering DCC's ACMP cases, what the Alaska Supreme Court said in those cases about the pre-2006 ACMP regulation was not that "feasible and prudent" is a strong or stringent standard, as DCC claims. What the court stated was that the ACMP regulations had three elements for an exception — (1) that there was a significant public need; (2) that there was no "feasible prudent alternative"; and (3) that all "feasible and prudent steps" were made to "maximize conformance with the [habitat management] standards — and that these three standards *combined* were strong. *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 244 (Alaska 2003) (discussing 6 AAC 80.130); *Trustees for Alaska v. State, Dep't of Natural Res.*, 851 P.2d 1340, 1344 (Alaska 1993) (same). Stating that a combination of three factors creates a strong standard is a far cry from declaring a few words from one of those factors to be a strong standard in and of itself.

The United States Supreme Court case that DCC cites is equally irrelevant. The court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), interpreted statutes that prohibit the use of federal funds for constructing highways through a public park if there is a "feasible and prudent" alternative route. But the court merely looked at the legislative intent of these particular federal statutes,

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

and did not offer any opinion as to the strength or weakness of "feasible and prudent." *Id.* at 411-13.

More importantly, none of DCC's cases compared "feasible and prudent" to "practicable," such that any conclusion could be inferred as to whether one standard is stronger or weaker than the other. DNR's research has not revealed any Alaska or federal cases comparing "feasible and prudent" to "practicable," or even finding them to be different standards. To the contrary, at least one federal court has referred to "feasible and prudent" and "practicable" as being "similar[]." *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1467 (1st Cir. 1994) (calling a Clean Water Act requirement not to issue certain permits if there is a "practicable" alternative, and a Department of Transportation Act requirement not to approve certain projects if there is a "prudent and feasible" alternative, "similar[]" standards).[12]

The Clean Water Act regulation that DCC cites tells this Court nothing about the validity of the Healy Final Written Finding use of the word "practicable" either. The Clean Water Act regulation calls for a vastly different inquiry into whether there is any practicable alternative to a proposed activity. 40 C.F.R. § 230.10(a). The Healy Final Written Finding, on the other hand, sets up an inquiry into whether a

[12] In addition, there are two cases where courts compared (1) statutes that prohibited approval absent a finding of no feasible and prudent alternative with (2) an executive order stating that approval should be avoided absent a finding of no practicable alternative. Both courts found a difference, but not in "feasible and prudent" versus "practicable"; the difference was in the statutes' language of prohibition versus the executive order's instruction to avoid. *Nat'l Wildlife Fed'n v. Adams*, 629 F.2d 587, 591 (9th Cir. 1980); *Ashwood Manor Civic Ass'n v. Dole*, 619 F. Supp. 52, 84 (E.D. Penn. 1985).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

licensee has demonstrated that compliance with an existing requirement is not practicable. (Exc. 500.) Aside from the word "practicable" — which appears in countless state and federal statutes and regulations — there is no similarity between the two. Furthermore, DCC fails to cite any authority for its speculation that the Clean Water Act regulation is "intended to be an easy standard to meet." (App. Br. at 22.)

3. The Mitigation Measures and DNR's Ongoing Duty to Consider the State's Interest in Protecting the Environment Protect Against the Harm to Fish and Wildlife and DCC Fears.

DCC's speculation that allowing the licensee to seek an exception will somehow threaten fish and wildlife is not only baseless, but contrary to the mitigation measures themselves. As discussed above, DNR imposed extensive mitigation measures in the Healy Final Written Finding that specifically address protecting fish and wildlife. (*See*, *supra*, Section II.B.3.) No licensee can avoid complying with those measures without DNR first deciding to allow an exception. And DNR will not grant an exception unless the licensee makes an affirmative showing that compliance is not practicable, or that the licensee will provide an equal or better alternative. (Exc. 500.) But even then, DNR is under no obligation to grant an exception. (*Id.* ("The director may grant exceptions to these mitigation measures").)

Furthermore, DNR has an ongoing obligation to consider the State's best interests throughout its approval of Plans of Operation — the stage at which a licensee can seek a mitigation measure exception. Those State interests include "minimiz[ing] the adverse impact of [oil and gas] exploration, development, production, and transportation activity and considering environmental costs and benefits.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

AS 38.05.180(a)(2) (listing minimizing adverse impacts as one of the best interests of the state); 11 AAC 83.303 (a)(1), (a)(3), (b)(1), (c) (requiring a written finding addressing conservation, environmental costs and benefits, and protection of state interests when approving a Plan of Operations). Thus DNR's consideration of any mitigation measure exception request will necessary including DNR considering potential environmental effects. That ongoing concern for the environment protects against the harms that DCC claims will result from the merely changing the grounds for seeking an exception from "feasible and prudent" to the similar, if not identical, "practicable."

C. DCC Has Shown Nothing Invalid or Arbitrary About Imposing a Setback Requirement for Drill Pads and Compressor Stations.

DCC objects to a mitigation measures that requires a setback for drill pads and compressor stations:

> The operator will construct drill pads at least 500 feet, and compressor stations at least 1,500 feet, from any occupied residential structure, community or institutional building.

(Exc. 502.) Again, mitigation measures — as preliminary conditions, subject to additional requirements when DNR reviews an actual work proposal — are not themselves a decision and under Supreme Court precedent are not subject to arbitrary and capricious review at this time. But even if individual mitigation measures are reviewable, DCC has offered no basis for this Court to find this setback mitigation measure to be arbitrary.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

A decision is arbitrary and capricious or lacks reasonable basis if the agency failed to consider an important factor or engage in reasoned decision making. *Kachemak Bay Conservation Soc.*, 6 P.3d at 275. For an exploration license decision, the legislature has set forth the factors for DNR to "consider and discuss." AS 38.05.133(f) (requiring 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)," plus two additional factors). DCC does not suggest that DNR failed to consider any of these factors.

Rather, DCC's only complaint is that the mitigation measure does not prohibit siting drill pads and compressor stations near vacant lots in residential subdivisions, and that DNR should revert to a draft mitigation measure from its preliminary finding that required a setback from certain residential subdivisions without the consent of all property owners in the entire subdivision. (App. Br. at 27; Exc. 255.) DCC raised this same issue on reconsideration. (Exc. 589.) In response, the DNR Commissioner reviewed oil and gas projects in residential neighborhoods on the Kenai Peninsula, and found that in the permitting process, DNR can impose restrictions necessary to successfully balance the need for infrastructure with the needs of landowners, to the mutual satisfaction of both operators and residents. (Exc. 602.) The Commissioner thus concluded that the setback requirements from buildings, coupled with DNR's ability to add additional mitigation measures when reviewing a proposal to build a drill pad or compressor station, provide the best balance of flexibility for future DNR decisions with protections for local property owners. (*Id.*)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

In addition, there are several mitigation measures that protect owners of vacant lots in residential subdivisions within a half mile of hypothetical facilities — the land owners DCC claims are not protected by the current mitigation measures. In particular:

- These landowners will receive a copy of any proposed Plans of Operation (which otherwise are merely public noticed), and will have the opportunity to provide comments during the public comment period, and then to appeal any DNR decision. (Exc. 501.) AS 38.05.035(e)(1)(C)(ii); 11 AAC 02 *et seq.*
- Facilities must be designed and operated to minimize sight and sound impact to residential areas, which would include undeveloped residential subdivisions. (Exc. 502.)
- Measures must be taken to mitigate visual impacts of facilities regardless of their location, including minimizing the size of facilities, using vegetation to block the view of facilities, and siting facilities within existing geography to minimize their visibility. (*Id.*)
- Construction of permanent facilities is prohibited during the exploration phase. (Exc. 503.) Thus if a landowner has plans to construct a residence on his or her property in the next several years, that the property will be developed and subject to the residential building setback mitigation measure

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

well before any compressor station or permanent drill pad could be proposed.

Considering these mitigation measures that protect owners of vacant lot owners and DNR's authority to fashion additional, tailor-made mitigation measures to protect vacant lot owners when reviewing a specific proposal, it was reasonable for DNR not to impose a setback from vacant residential subdivision lots. DCC has offered no evidence in the record to suggest that DNR's decision was unreasoned or failed to consider the enumerated factors for an exploration license.

D. DNR Did, in Fact, Impose Mitigation Measures to Address Noise, and DCC Has Failed to Show That These Measures are Invalid or Arbitrary.

DCC also fails to demonstrate anything invalid or arbitrary about the mitigation measures for noise. DCC claims that there are no mitigation measures for noise, but that is untrue. DNR set general guidelines for noise that will be tailored to a specific project when and if one is proposed:

> Measures to be used to mitigate potential noise impacts associated with facilities and compressor stations will be considered on a site-specific basis. The operator will provide an analysis of the noise impacts on residential and commercial users of the proposed project area, and sensitive public facilities including community or institutional buildings. Measures to mitigate noise impacts may include but are not limited to:
>
> - Venting exhaust in a direction away from the closest existing residences of a platted
> - subdivision;
> - Using quiet design mufflers on non-electric motors;
> - Limiting the hours of noise-generating operation to daytime hours;

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

- Using sound insulating enclosures where facilities would otherwise create noise impacts because of proximity, population density, and other adjacent land uses sensitive to adverse impacts from noise; and,
- Siting facilities and compressor stations in locations that use geographic features to buffer noise.

(Exc. 502-03.) DCC's argument that there are no limits on noise is thus unfounded. True, these are general restrictions. But the generality provides DNR with flexibility to tailor additional restrictions for specific project proposals in the future. If DNR set forth the specific measures now, as DCC apparently wants, those measure could hinder DNR's ability to target the noise created by specific projects and the needs of specific areas, to the potential detriment of landowners or to the viability of development.

As with the setback mitigation measures, the Commissioner considered DCC's concerns on reconsideration. (Exc. 602.) The Commissioner also considered DNR's ability to impose more specific measures in the future, as well as its track record of imposing measures that successfully balance companies' and landowners' needs. (*Id.*) Considering both DCC's concerns and DNR's ability to address those concerns when assessing Plans of Operation in the future, the Commissioner concluded that the noise mitigation measures are appropriate for this Exploration License approval stage. (*Id.*) Again, landowners will have the ability to comment on any Plan of Operation, including on noise issues, and to appeal DNR's decision at that time.

DCC has simply failed to demonstrate anything invalid or arbitrary about imposing these limits on noise. The fact that DCC would prefer different limitations

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

does not demonstrate anything infirm about the existing measures. DNR is entitled to deference on these mitigation measures.

E. DNR Did, In Fact, Impose Mitigation Measures to Address Caribou, and DCC Has Failed to Show That These Measures are Invalid, Arbitrary, or Contrary to the Tanana Plan.

DCC suggests that DNR violated the Tanana Basin Area Plan — a guideline for a portion of the Exploration License Area — by not adopting mitigation measures to "adequately protect" caribou. (App. Br. at 29-31.) This argument fails for several reasons.

First, DNR is under no obligation to adopt all mitigation measures for all time in its approval of an Exploration License. DNR retains authority to impose additional mitigation measures as it reviews a Plan of Operation, when DNR will have the specific information necessary to fashion specific, targeted mitigation measures. 11 AAC 83.158(e) ("In approving a lease or license plan of operations or an amendment of a plain, the commissioner will require amendments that the commissioner determines necessary to protect the state's interest."); 11 AAC 83.346(e) (same). The Tanana Basin Area Plan does not impose any requirement that DNR adopt all mitigation measures for all time at the Exploration License phase either. The Plan states only that:

> Specific measures will be determined in the leasing process. Examples of mitigating measures are siting and consolidation of facilities, avoiding or minimizing activities during calving season, and allowing unrestricted movement of caribou through the lease area.

(Exc. 1.) In other words, the Plan states that DNR will set mitigation measures, and gives some examples of what those mitigation measures might include. (*Id.*) The

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

language does not "require[] that DNR impose restrictions" concerning caribou at the disposal phase, as DCC claims. (App. Br. at 29.)

Second, DNR *did* impose mitigation measures to avoid or mitigate impacts on caribou. In particular:

> The director, 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.) DCC suggests that this measure is a deferral to later phases, but it is not. This is a general condition on Usibelli's license that DNR is imposing at the Exploration License phase, with more specific restrictions to follow DNR has a specific Plan of Operations proposal before it to fashion mitigation measures to address the specific proposed activity.

In addition, DNR imposed multiple mitigation measures that address impacts on all wildlife, which necessarily includes caribou:

- Usibelli must submit a specifically tailored monitoring plan with its Plan of Operation, and requiring DNR to considering "[p]otential impact to fish or wildlife populations" when deciding whether to approve the monitoring plan. (Exc. 501.)
- Usibelli must design and operate facilities "to minimize sight and sound impacts in areas of . . . important wildlife habitat." (Exc. 502.)
- Usibelli must construct above ground pipelines "to allow for the free movement of wildlife." (Exc. 503.)

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

- Usibelli may not mine gravel in an active floodplain unless it would "enhance fish and wildlife habitat upon site closure and reclamation." (Exc. 504.)

Because there is no specific Plan of Operation or proposed activity for DNR to assess at this point, these mitigation measures must be generalized to apply to a broad spectrum of activities that could be proposed throughout the life of the Exploration License and potential lease. To be more specific would be to risk covering less ground and providing less, not more, protection. Since the Exploration License does not grant Usibelli the right to conduct any operations on the land, and specific enforcement of the mitigation measure to protect caribou will be spelled out when DNR approves any Plan of Operation, it is not arbitrary to adopt a general mitigation measure at this license approval phase.

CONCLUSION

DCC has failed to meet its burden of showing any part of the Healy Final Written Finding is arbitrary or capricious, largely by focusing on aspects of the written finding that are not themselves subject to arbitrary and capricious review. DCC focuses first on a response to a public comment, but DNR's obligation in response to comments is only to consider, summarize, and respond. DCC also focuses on mitigation measures, but here too the Supreme Court has held that that these guidelines for future decisions are not reviewable at this stage. But even looking at the content of DNR's comment response and mitigation measures, the record provides support for all of them. DCC has failed to show that DNR's decision process was unreasoned or that it failed to consider

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

any of the enumerated factors for approving an exploration license. Accordingly, DNR's decision is entitled to deference, and this Court should affirm DNR's approval of the Healy Final Written Finding.

DATED this 30th day of December, 2011.

JOHN J. BURNS
ATTORNEY GENERAL

By: _____
Rebecca Kruse
Assistant Attorney General
Alaska Bar No. 1005024

Attorneys for Appellee
DEPARTMENT OF NATURAL RESOURCES

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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 MINE, INC. Appellees.	Case No. 3AN-10-12552CI

APPELLEE
DEPARTMENT OF NATURAL RESOURCES

EXCERPT OF RECORD

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

TABLE OF CONTENTS

PAGE NUMBER

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

USIBELLI COAL MINE, INC.

PO Box 1000 • Healy, Alaska 99743
Telephone (907) 683-2226 • Facsimile (907) 683-2253

January 19, 2006

Mayor David Talerico
Denali Borough
PO Box 480
Healy, Alaska 99743

Re: Draft Coal Bed Methane Ordinances 05-20 and 05-21

Dear Mr. Mayor,

Subsequent to the Assembly meeting on January 11, 2006, we have reviewed Version B of draft Ordinance 05-20, which was reduced in size considerably from the original version. However, we still find the proposed ordinance exceedingly restrictive and likely would preclude Coal Bed Methane (CBM) development in the Denali Borough. We look forward to working with you, the Borough Assembly and the residents of Healy on January 30 towards developing resolution to the issues surrounding CBM development that will facilitate development in a manner acceptable to the community and our company.

Prior to that meeting, we request review of the draft ordinance by the Borough's legal council. Given the broad scope of the ordinance and the fact that no zoning action of such a magnitude has previously been undertaken, I believe a legal review would be a valuable component in the discussions on the 30th. It would also be informative to have a fiscal note prepared for the proposed ordinance, since 9.25.180(E) requires that the operator be assessed permit fees to offset the cost for Borough permitting and enforcement of the program.

Thank you in advance for investigating these issues. The information generated will be very helpful in gaining a better understanding of the impacts of the proposed ordinance.

Sincerely,

Steve W. Denton
VP Business Development

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 MINE, INC. Appellees.	)	Case No. 3AN-10-12552CI

CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this date I served, by first class mail, a true and correct copy of the BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES and APPELLEE DEPARTMENT OF NATURAL RESOURCES EXCERPT OF RECORD in this proceeding on the following:

Kyle W. Parker
David J. Mayberry
Crowell & Moring LLP
1029 W. Third Avenue, Suite 402
Anchorage, Alaska 99501

Peter H. Van Tuyn
Bessenyey &Van Tuyn, LLC
310 K Street, Suite 200
Anchorage, Alaska 99501

I further certify that the above named documents are in Times New Roman 13 point typeface.

12-30-11

Julienne Kim — Date

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100