IN THE SUPREME COURT FOR THE STATE OF ALASKA

DENALI CITIZENS COUNCIL, Appellant, v. ALASKA, DEPARTMENT OF NATURAL RESOURCES, and USIBELLI COAL MINE, INC., Appellees.	)	Supreme Court No. S-14896

Superior Court No. 3AN-10-12552 CI

BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES

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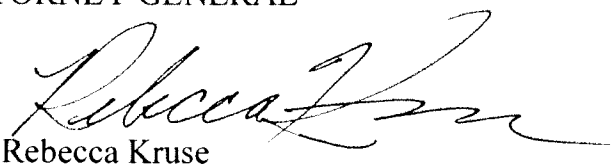
ATTORNEY GENERAL

By: 
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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,

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 review established under (1)(A) of this subsection and includes the applicable statutes

and regulations, the material facts and issues in accordance with (1)(B) of this subsection, and information required by (g) of this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state will be based; the director shall provide opportunity for public comment on the preliminary written finding for a period of not less than 60 days;

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

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

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

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

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

(D) a mineral claim located under AS 38.05.195;

(E) a mineral lease issued under AS 38.05.205;

(F) an exempt oil and gas lease sale or gas only lease sale under AS 38.05.180(d) of acreage subject to a best interest finding issued within the previous 10 years or a reoffer oil and gas lease sale or gas only lease sale under AS 38.05.180(w) of acreage subject to a best interest finding issued within the previous 10 years, unless the commissioner determines that substantial new information has become available that justifies a supplement to the most recent best interest finding for the exempt oil and gas lease sale or gas only lease sale acreage and for the reoffer oil and gas lease sale or gas only lease sale acreage; however, for each oil and gas lease sale or gas only lease sale described in this

subparagraph, the director shall call for comments from the public; the director's call for public comments must provide opportunity for public comment for a period of not less than 30 days; if the director determines that a supplement to the most recent best interest finding for the acreage is required under this subparagraph,

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

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

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

(G) a surface use lease under AS 38.05.255;

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

(7) the director shall include in

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

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

AS 38.05.035(g)

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

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

(A) material to issues that were raised during the period allowed for receipt of public comment, whether or not material to a matter set out in (B) of this paragraph, and within

the scope of the administrative review established by the director under (e)(1) of this section; or

(B) material to the following matters:

(i) property descriptions and locations;

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

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

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

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

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

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

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

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

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

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

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

AS 38.05.132

(a) To encourage exploration for oil and gas on state land, the commissioner may issue exploration licenses. The commissioner may limit the exploration licenses under AS 38.05.132--38.05.134 to exploration for and recovery of gas only. The commissioner may not issue an exploration license on land that is held under an existing coal lease entered into under AS 38.05.150 that has an active permit for exploration or mining unless the licensee under this subsection is also the lessee under AS 38.05.150 of that land.

(b) An exploration license issued under this section gives the licensee

(1) the exclusive right to explore, for a term not to exceed 10 years, on unleased state land described in the exploration license for deposits of oil and gas, or for deposits of gas only, as appropriate, unless the exploration license is terminated under (d)(1) of this section or the land is earlier relinquished, removed, or deleted under (d)(2) of this section; and

(2) unless the exploration license is terminated under (d)(1) of this section, the option to convert the exploration license for all or part of the state land, except the land that is deleted or removed from the land described in the exploration license under (d)(2) of this section, into an oil and gas lease, or a gas lease only, as appropriate, upon fulfillment of the work commitments contained in the exploration license.

(c) An exploration license awarded under this section

(1) is not subject to the acreage limitations imposed by AS 38.05.140(c) or 38.05.180(m);

(2) may cover, subject to the maximum acreage limitation on exploration licenses by one licensee under AS 38.05.131(e), an area of not less than 10,000 acres and not more than 500,000 acres, that must be reasonably compact and contiguous;

(3) must be conditioned upon an obligation to perform a specified work commitment, in total for the term of the license, expressed in dollars of direct exploration expenditures; the specified work commitment

(A) may include a provision that adjusts the total amount of work commitment, expressed in dollars of direct exploration expenditures, to account for inflation;

(B) must include a requirement that the licensee complete at least 25 percent of the licensee's total specified work commitment by the fourth anniversary of the effective date of the issuance of the exploration license;

(4) must be conditioned upon the posting of a bond or other security acceptable to the commissioner, in favor of the state and subject to the following requirements:

(A) the bond or other security must be renewed annually;

(B) the annual bond or other security shall be calculated as the entire work commitment expressed in dollars, less the cumulative direct exploration expenditures of the licensee as of the last day of the most recent project year, divided by the number of years remaining in the term of the exploration license;

(5) is subject to an annual review and revocation if the commissioner determines that the licensee has failed to provide or maintain in effect the bond or other security required by (4) of this subsection;

(6) must be conditioned upon the licensee's payment to the state of a nonrefundable exploration license fee of $1 for each acre of land or fraction of each acre that is subject to the exploration license; and

(7) must be conditioned upon an agreement that exploration expenditures are subject to audit by the commissioner.

(d) If, on the fourth anniversary of the effective date of the issuance of the exploration license awarded under this section,

(1) the licensee has not completed at least 25 percent of the licensee's total specified work commitment, as measured by the licensee's direct exploration expenditures, the exploration license terminates;

(2) the licensee has completed at least 25 percent but has not completed at least 50 percent of the licensee's total specified work commitment, as measured by the licensee's direct exploration expenditure, the commissioner shall remove or delete or shall require the licensee to relinquish a portion of the area within the exploration license; relinquishment, removal, or deletion of an area from the state land described in the exploration license terminates the licensee's rights under AS 38.05.131 - 38.05.134 in the area that is relinquished, removed, or deleted; a relinquishment, removal, or deletion of a portion of the area described in the exploration license must be in areas that are reasonably compact and contiguous; the areas relinquished from the state land described in the exploration license must be areas identified by the licensee but, if the licensee fails to identify sufficient area, the commissioner may identify any additional acreage required to be removed or deleted from the area under license to meet the requirements of this subsection; within the area described in the exploration license issued under (a) - (c) of this section,

(A) 25 percent must be relinquished, removed, or deleted not later than the fourth anniversary of the effective date of the issuance of the exploration license;

(B) an additional 10 percent of the acreage remaining after relinquishment, removal, or deletion of acreage required by (A) of this paragraph and by previous relinquishments, removals, or deletions under this paragraph must be removed or deleted on each of the succeeding anniversaries of the effective date of the issuance of the exploration license;

(C) the cumulative total of the acreage relinquished, removed, or deleted under (A) and (B) of this paragraph may not be required to exceed 50 percent of the area awarded within the original exploration license area.

(e) If, immediately before the beginning of the period for annual renewal of the bond or other security under (c)(4)(A) of this section, the licensee fails to provide or maintain in effect the bond or other security required by (c) of this section for the period covered by the annual renewal and the commissioner revokes the exploration license, the bond or other security then in effect for the licensee's obligations under the exploration license is forfeited to the state.

(f) In this section,

(1) "direct exploration expenditure" means cash expenses undertaken in performance of a specified work commitment under the provisions of AS 38.05.131--38.05.134 and necessarily incurred by the licensee in the permitting, mobilization, conducting, demobilization, and evaluation of geophysical and geological surveys, or the drilling, logging, coring, testing, and evaluation of oil and gas or gas only wells; the term

(A) includes direct labor costs, including the cost of benefits, for employees directly associated with the work commitment programs, the cost of renting or leasing equipment from parties not affiliated with the licensee, the reasonable costs of maintaining and operating equipment, payments to consultants and independent contractors not affiliated with the licensee, and costs of materials and supplies;

(B) does not include noncash expenses such as depreciation and reserves, interest or other costs of borrowed funds, return on investment, overhead, insurance or bond premiums, or any other expense that is unreasonable or that the licensee has not incurred to satisfy the licensee's work commitment;

(2) "work commitment" includes the drilling of one or more exploration wells or the gathering of data from activities described in (1) of this subsection, or both.

AS 38.05.133

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

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

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

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

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

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

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

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

AS 38.05.134

If the licensee requests and the commissioner determines that the work commitment obligation set out in an exploration license issued under AS 38.05.132 has been met, the commissioner shall convert to one or more leases all or part, as the licensee may indicate, of the area described in the exploration license that remains after the relinquishments, removals, or deletions required by AS 38.05.132(d)(2). A lease issued under this section

(1) is subject to the acreage limitations imposed by AS 38.05.140(c);

(2) is subject to AS 38.05.180(j)--(m), (o)--(u), and (x)--(z);

(3) must be conditioned upon a royalty in amount or value of not less than 12.5 percent of production, except that the lessee who, proceeding under AS 38.05.131--38.05.134, under a lease issued in the Cook Inlet sedimentary basin who is the first to file with the commissioner a nonconfidential sworn statement claiming to be the first to have drilled a well discovering oil or gas in a previously undiscovered oil or gas pool and who is certified by the commissioner within one year of completion of that discovery well to have drilled a well in that pool that is capable of producing in paying quantities shall pay

a royalty of five percent on all production of oil or gas from that pool attributable to that lease for a period of 10 years following the date of discovery of that pool, and thereafter the royalty payable on all production of oil or gas from the pool attributable to that lease shall be determined and payable as specified in the lease; the payment of the five percent royalty under this paragraph is authorized only to a holder of a lease who meets the requirements of AS 38.05.180(f)(4);

(4) must include an annual rent of $3 per acre or fraction of an acre initially paid to the state at inception of the lease and payable annually after that until the income to the state from royalty under that lease exceeds the rental income to the state under that lease for that year; and

(5) is subject to other conditions and obligations that are specified in the lease.

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;

(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.

(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 83.158

(a) Except as provided in (b) of this section, a plan of operations for all or part of the leased area or area subject to an oil and gas exploration license must be approved by the commissioner before any operations may be undertaken on or in the leased or licensed area.

(b) A plan of operations is not required for

(1) activities that would not require a land use permit under this title; or

(2) operations undertaken under an approved unit plan of operations in accordance with this title.

(c) Before undertaking operations on or in the leased or licensed area, the lessee or licensee shall provide for full payment of all damages sustained by the owner of the surface estate as well as by the surface owner's lessees and permittees, by reason of entering the land.

(d) An application for approval of a plan of operations must contain sufficient information, based on data reasonably available at the time the plan is submitted for approval, for the commissioner to determine the surface use requirements and impacts directly associated with the proposed operations. An application must include statements and maps or drawings setting out the following:

(1) the sequence and schedule of the operations to be conducted on or in the leased or licensed area, including the date operations are proposed to begin and their proposed duration;

(2) projected use requirements directly associated with the proposed operations, including the location and design of well sites, material sites, water supplies, solid waste sites, buildings, roads, utilities, airstrips, and all other facilities and equipment necessary to conduct the proposed operations;

(3) plans for rehabilitation of the affected leased or licensed area after completion of operations or phases of those operations; and

(4) a description of operating procedures designed to prevent or minimize adverse effects on other natural resources and other uses of the leased or licensed area and adjacent areas, including fish and wildlife habitats, historic and archeological sites, and public use areas.

(e) In approving a lease or license plan of operations or an amendment of a plan, the commissioner will require amendments that the commissioner determines necessary to protect the state's interest. The commissioner will not require an amendment that would be inconsistent with the terms of sale under which the lease was obtained, or terms under which the oil and gas exploration license was obtained or with the terms of the lease or license itself, or which would deprive the lessee or licensee of reasonable use of the leasehold or licensed interest.

(f) The lessee or licensee may, with approval of the commissioner, amend an approved plan of operations.

(g) Upon completion of operations, the lessee or licensee shall inspect the area of operations and submit a report indicating the completion date of operations and stating any noncompliance of which the lessee or licensee knows, or should reasonably know, with requirements imposed as a condition of approval of the plan.

(h) In submitting a proposed plan of operations for approval, the lessee or licensee shall provide 10 copies of the plan if activities proposed are within the coastal zone, and five copies if activities proposed are not within the coastal zone.

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;

(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

(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;

STATEMENT OF ISSUES

This is an appeal from a Department of Natural Resources ("DNR") Commissioner decision on reconsideration that a gas-only exploration license, proposed by Usibelli Coal Mine, Inc. ("Usibelli"), would best serve the State's interest. The issues on appeal are:

1. Does one sentence, out of a 256-page decision, in a response to a public comment in which DNR noted that excluding certain acreage from the license could threaten the economic feasibility of the project render DNR's decision that the license would best serve the State's interest arbitrary and capricious?

2. Do revisions to mitigation measures between the Preliminary and Director's Final Finding approving the license render DNR's decision that the license would best serve the State's interest arbitrary and capricious?

Because DNR properly applied the law and reasonably determined — after weighing the potential benefits to the State and the public against the potential risks from gas exploration and development activity — that Usibelli's Healy exploration license best serves the State's interest, this court should defer to DNR's judgment, reject Denali Citizens Council's ("DCC's") arguments, and affirm the superior court's decision upholding the Commissioner's Reconsideration Decision.

STATEMENT OF THE CASE

DCC appeals the Commissioner's Reconsideration Decision approving Usibelli's Healy exploration license best serves the State's interest.

Oil and Gas Exploration Licenses

The State regularly leases its subsurface rights for oil and gas development. In areas that are unattractive for leasing because they are far from existing infrastructure and have unknown or relatively low hydrocarbon potential, however, the State can encourage assessment of its hydrocarbon resources by granting an exploration license. [Exc. 368.] An exploration license confers the exclusive right to explore in an area for a term of up to 10 years without the upfront and continuing costs associated with oil and gas leasing.[1] After fulfilling a work commitment to explore, the licensee can convert all or part of a license area to a lease.[2] [Exc. 368.] Only then can the licensee (now lessee) proceed with development. Each phase of the project involves its own adjudicatory process, including public notice and comment.[3]

DNR's Approval of Usibelli's Exploration License

Usibelli proposed a gas-only exploration license for the Healy area on April 23, 2004. [Exc. 372.] DNR gave public notice of its intent to evaluate the proposal, and invited public comment. [Exc. 372-75.]

DNR issued a Preliminary Finding, on August 31, 2005, that Usibelli's exploration license would best serve the interests of the State. [Exc. 268.]

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1 AS 38.05.132(b).

2 AS 38.05.134.

3 AS 38.05.035(e)(1)(C); AS 38.05.133(f) (incorporating AS 38.05.035(e) for exploration licenses); 11 AAC 83.158 (requiring an approved plan of operations before a licensee may begin work on an exploration license).

DNR provided public notice, accepted written and oral comments, and attended multiple public meetings in 2005. [Exc. 372-73.]

DCC submitted public comments that included a request to exclude "those parts of the license area west of the Nenana River." [Exc. 328.] DCC's reasons for excluding this area were (1) the area is important for tourism and the local community depends on tourism; (2) Usibelli's development of the gas would not provide much statewide economic benefit; and (3) Usibelli could still explore the rest of the license area. [Exc. 329.] DNR also received comments from Usibelli that raised concerns with certain mitigation measures, including provisions to setback facilities from residential property and control noise. [Exc. 336-41.]

On December 14, 2005, while DNR was reviewing public comments on the Preliminary Finding, the Denali Borough Assembly introduced two draft ordinances that would have restricted gas exploration in much of the license area, including the area DCC wanted to exclude. [Exc. 373; 732.] These ordinances went through many drafts and were the subject of multiple meetings attended by Usibelli, DNR, and others. [Exc. 373.] Usibelli advised the Assembly that these ordinances would likely preclude gas development in the Borough. [Exc. 732.] The Assembly amended the ordinances on May 14, 2008 to effectively remove the restrictions on gas exploration. [Exc. 373.]

After considering public input and weighing the known facts, issues, and laws and regulations, including the potential benefits and risks, DNR concluded in a June 28, 2010 Director's Final Finding that, on balance, the license would best serve the

State's interest.[4] [Exc. 359, 364-65, 373.] In response to comments from DCC and others about excluding the area west of the Nenana River, DNR stated that the mitigation measures would address concerns about this area and that removing the area entirely could affect the economic feasibility of the project. [Exc. 515-16, 525.] DNR also made a number of edits from the Preliminary to Final Findings, ranging from wordsmithing to modifying mitigation measures in response to comments. On the wordsmithing end of the spectrum, DNR rephrased the circumstances under which Usibelli could — when submitting a plan of operations in the future — seek an exception, from when a measure is "not feasible and prudent" to "not practicable." [Exc. 251, 500.] Changes to mitigation measures included modifications to drill pad and compressor setbacks and noise control requirements. [Exc. 253-55; 502-03.]

DCC requested reconsideration of the Director's Final Finding. [Exc. 585-95.] The Commissioner granted reconsideration and affirmed the Director's Final Finding that the license would best serve the State's interest. [Exc. 596-606.]

On the issue of including acreage west of the Nenana River in the license area, the Commissioner affirmed on the grounds that (1) the Director's Final Finding considered the statutory criteria; (2) mitigation measures would adequately address

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[4] This decision is titled the "Final Finding of the Director," but was also signed by the Commissioner in concurrence. [Exc. 365.] Thus when DCC asked the Commissioner to review the decision, it was as a request for reconsideration, not an appeal. 11 AAC 02.010(f). Since the initial co-signed decision is titled as a Director's decision and the Commissioner referred to it as a Director's decision on reconsideration, and to distinguish it from the Commissioner's Reconsideration Decision, DNR will refer to it as the "Director's Final Finding."

concerns about this acreage; (3) the license would not restrict public use; and (4) the license was consistent with the Tanana Basin Area Plan, which designates the area as available for oil and gas development. [Exc. 598-99.] The Commissioner went on to conclude that the Director had reasonably considered economic feasibility as a logical step in considering the reasonably foreseeable effects, but did not include economic feasibility as one of his reasons for affirming approval of the license. [Exc. 599; 604-05.]

Superior Court Appeal

DCC appealed to superior court, asserting two main arguments: that DNR "found, without analysis, that a smaller license area may be uneconomic" and that "DNR refused to stringently apply important mitigation measures."[5] [Exc. 627.] With respect to mitigation measures, DCC argued that by rephrasing the grounds to seek a mitigation measure exception from "not feasible and prudent" to "not practicable," DNR had somehow adopted a different standard. [Exc. 645-51.]

DCC further disagreed with the policy of mitigation measures for drill pad setbacks, noise control, and caribou protection. [Exc. 651-57.]

The superior court correctly rejected each of DCC's arguments. The court held that the size of the license area was reasonable because it fell within statutory

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[5] DCC also included a constitutional argument that DNR moved to strike because DCC had failed to raise it before the Commissioner, as required by AS 38.05.035(l). [R. 3171-74.] The superior court granted that motion. [R. 3133.] Although DCC mentioned the motion to strike in its points on appeal, it did not address the issue in its Appellant's Brief. Accordingly, DCC has waived the issue. *See, e.g., Kellis v. Crites*, 20 P.3d 1112, 1114-15 (Alaska 2001) (argument not included in opening brief is waived).

parameters, the area was consistent with the intent of exploration licensing, and because DNR had concluded that the license was consistent with the best interest of the state. [Exc. 767-68.] The superior court also agreed with DNR that there was essentially no difference between the "not feasible and prudent" and "not practicable" in the mitigation measures and that changes to the mitigation measures between the Preliminary and Director's Final Finding were within DNR's discretion and responsive to other comments DNR had received. [Exc. 768-71.]

STANDARD OF REVIEW

DCC misconstrues what is really under review and how the standard of review applies. DCC's entire appeal is based on a few discrete passages out of the 256-page Director's Final Finding: (1) one sentence from a response to a public comment; (2) a two-word change in the showing that the licensee will have to make in the future if it requests an exception to a mitigation measure; and (3) the mitigation measures for facility setbacks and noise. DCC urges this Court to look at these passages in isolation and determine whether each is arbitrary or capricious.[6]

But what is on appeal here is the Commissioner's affirmance on reconsideration of the Director's Final Finding that granting the exploration license best serves the State's interest. It is this best interest determination, and the Commissioner's

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[6] The very headings in DCC's opening brief demonstrate this: "DNR's Finding That A Smaller License Areas Is Not Feasible Is Arbitrary"; "DNR's Finding Not To Impose Strict Mitigation Measures Is Arbitrary"; "DNR's Approach To The Blanket Exception To Mitigation Measures Is Arbitrary"; "DNR's Approach To Specific Mitigation Measures Is Arbitrary." [At. Br. at 13, 18, 20, 25.]

reasons for affirming it, that are at issue. DNR's consideration of public comments and adoption of mitigation measures are a part of that best interest determination. But public comment responses and mitigation measures are not independent decisions reviewable separately from the best interest determination. DCC's burden is to show that these isolated sentences and phrases that it focuses on *make the best interest determination* arbitrary and capricious.[7] DCC has not done so.

DCC's burden is also to show that the Commissioner's reasons for affirming the Director's Final Finding are arbitrary and capricious, not the Director's Final Finding itself. Of course, DCC did not seek reconsideration on every aspect of the Director's Final Finding, and for the portions that the Commissioner did not reconsider, it is entirely appropriate for this Court to review the Director's Final Finding. But for the issues that the Commissioner did reconsider, this Court should review the Commissioner's Reconsideration Decision and his reasons for affirming — particularly where the Commissioner stated different reasons than the Director's Final Finding.[8]

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[7] *See, e.g., Kachemak Bay Conservation Society v. State, Dep't of Natural Res.*, 6 P.3d 270, 285-86 (Alaska 2000) (in appeal concerning in part responses to public comment, looking at whether the responses rendered the overall decision arbitrary and capricious); *Trustees for Alaska v. State, Dep't of Natural Res.*, 851 P.2d 1340, 1346-47 (Alaska 1993) (in appeal concerning in part adequacy of mitigation measures, looking at whether the lack of adequacy evaluation made the overall decision arbitrary and capricious).

[8] *See* AS 44.37.011(c) ("The commissioner's decision made upon reconsideration . . . is a final administrative order for purposes of filing an appeal of the administrative decision to the court.").

This Court independently reviews DNR's decision without giving deference to the superior court's decision.[9] But this Court *does* give deference to DNR's decision. DCC has not raised a question of fact, a question of law outside DNR's expertise, or challenged a regulation, nor does it claim to have done so. DCC's discrete arguments about public comment responses and mitigation measures all come down to DNR's conclusion that the license best serves the State's interest. The question of whether disposal of a license best serves the State's interest is "almost entirely a policy decision, involving complex issues that are beyond this court's ability to decide."[10] This Court has long held that it "has neither the authority nor competence to decide whether the public interest is 'best served' by a proposed disposition of land" and that only "a limited review of the Director's decision would be available simply to ensure that it was not arbitrary, capricious, or prompted by corruption."[11] This "deferential reasonable basis review" looks only at whether DNR has considered "important factor[s]" and "genuinely engaged in reasoned decision making."[12]

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[9] *Rollins v. State, Dep't of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 206 (Alaska 1999).

[10] *Hammond v. N. Slope Borough*, 645 P.2d 750, 758-59 (Alaska 1982).

[11] *Moore v. State*, 553 P.2d 8, 36 n.20 (Alaska 1976); *see also Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1217 (Alaska 1996) ("[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."').

[12] *Kachemak Bay Conservation Society v. State, Dep't of Natural Res.*, 6 P.3d at 275-76.

Unless DCC affirmatively demonstrates that DNR's decision lacked reason or failed to consider an important factor, this Court should defer to DNR's expertise.[13] As discussed below, DCC failed to meet its burden.

ARGUMENT

DCC's arguments are little more than a series of straw men. DCC argues that it was arbitrary for DNR to "find" that a smaller license area was not economically feasible. But what DCC attempts to cast as a discrete, independent finding is really a response to public comments — or rather, one sentence out of a response that is but one tiny part of the 256-page Director's Final Finding, and that the Commissioner superseded by affirming on different grounds. There was no proposal for a smaller license area before DNR for it to grant or deny, nor has DCC shown that DNR lacked a rational basis for granting Usibelli's proposed area.

Next DCC argues that it was arbitrary for DNR to adopt a "lower standard" for mitigation measure exceptions by rephrasing the grounds for an exception from "not feasible and prudent" to "not practicable." But there is no difference between these two phrases. DNR, the entity that will apply the standard, says there is no difference. [Exc. 507, 714-17.] The superior court found no difference. [Exc. 771.] And DCC fails to point to any authority that articulates a difference.

DCC further argues that DNR acted arbitrarily by modifying some mitigation measures between the preliminary and final decisions. But it is DNR's final

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[13] *Id.* at 275.

approval of an exploration license that is subject to an arbitrary and capricious review, not modifications between a preliminary and final finding. When it comes to the content of the Director's Final Finding, DCC utterly fails to demonstrate anything arbitrary or capricious about DNR's license approval. To the extent mitigation measures are even ripe for review, DCC demonstrates nothing unreasonable about the setback, noise control, and caribou-related mitigation measures DNR imposed.

I. DCC FAILS TO MEET ITS BURDEN OF DEMONSTRATING THAT APPROVING THE PROPOSED LICENSE AREA WAS ARBITRARY AND CAPRICIOUS.

A. DNR's Approval of the License is Reasonable and Supported By the Record.

To meet its burden, DCC must affirmatively demonstrate that DNR lacked reason or failed to consider important factors when it concluded that the license best serves the State's interest.[14] For an exploration license, the legislature has set forth the list of important factors in statute, and instructed DNR to consider public comments. [15] DCC has failed to show that DNR did not consider these factors or public comment.

1. DNR Considered the Statutory Factors and Public Comments.

Broadly, DNR must address the statutes, regulations, facts, and issues that DNR deems material to whether the proposal best serves the State's interests.[16]

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[14] *Id.* at 275.

[15] AS 38.05.133(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).").

[16] AS 38.05.035(e)(1)(B); AS 38.05.133(f) (cross-referencing AS 38.05.035(e)).

More specifically, DNR must consider and discuss known facts material to: the property description and location; the petroleum potential of the area; fish and wildlife species and their habitat; current and projected uses of the land; governmental regulation of exploration, development, production, and transportation; reasonably foreseeable cumulative effects of exploration, development, production, and transportation in the license area; stipulations and mitigation measures; likely methods to transport oil or gas from the area; reasonably foreseeable fiscal effects on the State, municipalities, and local communities; and the reasonably foreseeable effects of exploration, development, production, and transportation on municipalities and local communities.[17] The Director's Final Finding considered and discussed each of these factors.[18] Critically, DCC does not contend that DNR failed to or inadequately considered and discussed any of the statutory factors, or that DNR lacked a reasonable basis for its discussion of these factors. DCC's failure to show that DNR did not adequately address the statutory factors should be fatal to its appeal.[19]

DNR also considered public comments. DNR provided public notice, accepted written and oral comments, and attended multiple public meetings in 2005.

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[17] AS 38.05.035(g); AS 38.05.133(f) (cross-referencing AS 38.05.035(g)).

[18] Exc. 377-391 (property description and location); 428-30 (petroleum potential); 392-416 (fish and wildlife); 417-26 (current and projected uses); 449-70 (government regulation); 421-88, 431-39, 443-46 (reasonably foreseeable cumulative effects); 499-510 (mitigation measures); 439-43(transportation methods); 488-91 (reasonably foreseeable fiscal effects); 491-93 (reasonably foreseeable local effects).

[19] *Kachemak Bay Conservation Soc'y v. State, Dep't of Natural Res.*, 6 P.3d at 275 (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).

[Exc. 372-73.] DNR then considered all of these public comments, as demonstrated by its response to each comment.[20] [Exc. 511-56.]

Both the Director's Final Finding and Commissioner's Reconsideration Decision demonstrate that DNR weighed the statutory factors and State's best interest against concerns from the public and Usibelli. At its core, what DCC is appealing is DNR's policy determination that the license best serves the State's interest. DNR considered the statutory factors and public input and discussed at great length the potential costs and benefits and the reasons why this particular exploration license, on balance, best serves the State's interest. This Court should defer to that policy decision.

2. The License Area Size and Location is Supported by the Record.

As the superior court held, DNR's approval was also reasonable in light of the record and exploration license statutes. The area falls squarely within size limits: a license may be between 10,000 and 500,000 acres; Usibelli's exploration license includes 208,630 acres. [Exc. 359.] The license is also consistent with the purpose of exploration licensing, which is to "encourage exploration in areas with relatively low or unknown hydrocarbon potential where there is a higher investment risk to the operator."[21] [Exc. 1232.] As DNR explained in the Director's Final Finding, there is "no documentation available quantifying the occurrence of hydrocarbons, either gas or oil, within the license area." [Exc. 430.] There is, however, subbituminous C rank coal that

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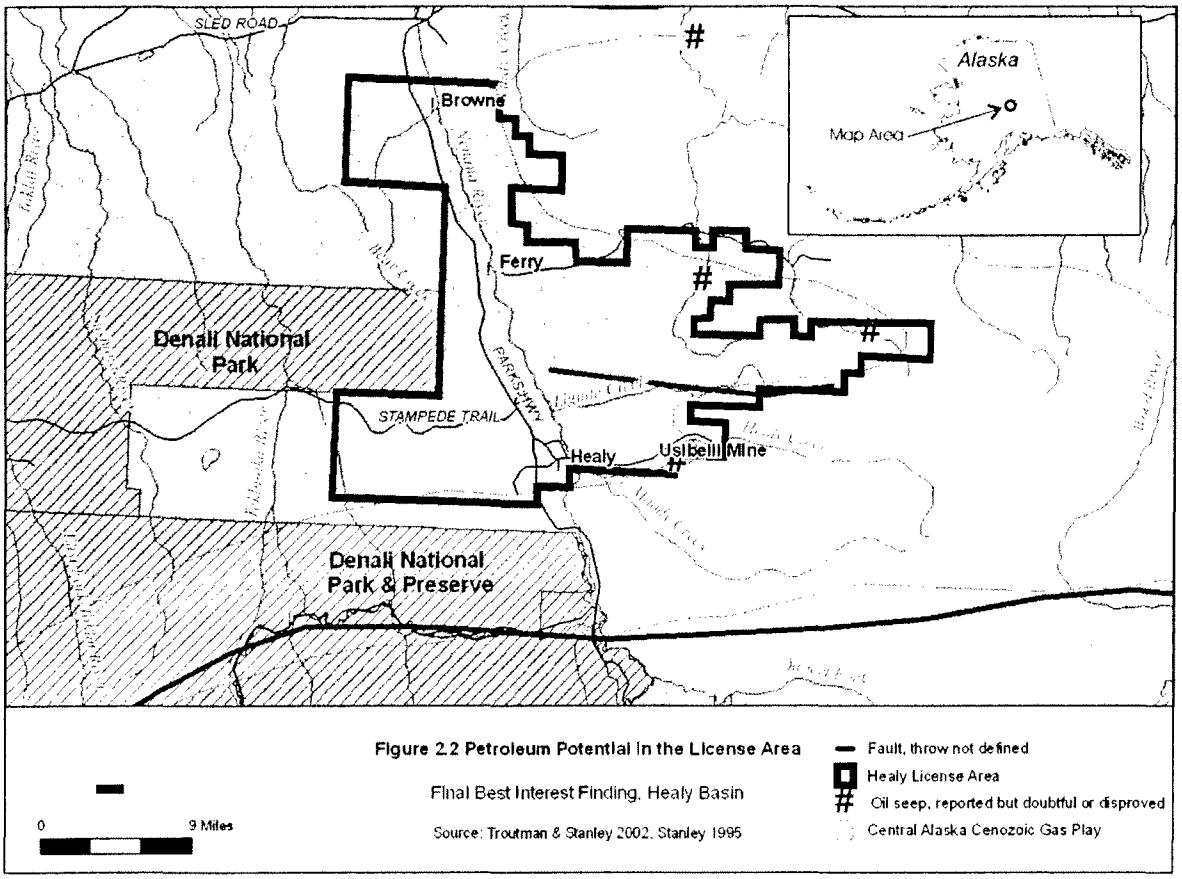
[20] DCC may not like it that DNR approved the license after reviewing DCC's comment, but that does not mean DNR did not consider the comment.

[21] AS 38.05.132(a) ("To encourage exploration for oil and gas on state land, the commissioner may issue exploration licenses.")

suggests a gas play in the area. [*Id.*] The following map from the Director's Final Finding demonstrates this potential gas play underlying most of the license area, including all of the license area west of the Nenana River: [Exc. 430.]



DCC makes much of the fact that Usibelli had previously applied to lease a portion of the license area, and proposed this license instead when the leasing program was eliminated. [At. Br. at 9, 14-15.] This argument is a classic *post hoc ergo propter hoc* fallacy: Usibelli applied for a smaller area as a lease, so the smaller area must be the most Usibelli needs for a *license*. But one does not follow from the other because of fundamental differences between leases and licenses:

- A lease involves a upfront bidding costs.[22] There is no bidding for an exploration license when, as here, there is a single proposal.[23]

- A lease requires ongoing rental costs.[24] There is a one-time fee for a license, but no rent.[25]

- Once operations begin, a lessee must maintain a bond — either $10,000 for each lease, or $500,000 for all of its leases in the State.[26] An exploration licensee must also pay an annual bond, but it is discounted in the earlier years of the license, and decreases over time as the licensee spends money to explore.[27]

- A lease expires after a maximum term of 10 years unless the lessee is actively drilling or producing, has a well capable of producing and begins production within a reasonable time, or has identified a reservoir or potential hydrocarbon accumulation across multiple leases in order to combine the leases into a unit.[28] And if a lease is extended, such as by active production or unitization, DNR can increase the rental rate by up to 150 percent.[29] An exploration license, by contrast, gives the licensee

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22 AS 38.05.180(f).

23 AS 38.05.133 (describing proposal process for obtaining a license).

24 AS 38.05.180(n).

25 AS 38.05.132(c)(6).

26 11 AAC 83.160.

27 The bond is calculated as: (work commitment in dollars - direct exploration expenditures)/years remaining in license term. AS 38.05.132(c)(3), (c)(4)(B), (f). Thus the bond is lower in earlier years when the divisor is greater, and can go down in later years if the licensee increases its direct exploration expenditures to subtract from the work commitment, eventually disappearing as the licensee meets the full work commitment.

28 AS 38.05.180(m), (p); 11 AAC 83.303(b)(2).

29 AS 38.05.180(m).

an exclusive right to explore for a maximum term of 10 years, at which time the licensee can convert to a lease, with its maximum term of 10 years — potentially doubling the time to attain production or unitization or risk losing the lease.[30]

- There is a limit on the number of acres a company can lease in the State — 500,000 acres of tide and submerged land or 750,000 acres of other land.[31] A company may hold exploration licenses for far more land — up to 2,000,000 acres.[32] And a company's exploration license acres do not count against its acreage limit for leases.[33]

- Leases have a maximum size of 5760 acres, whereas exploration licenses may be up to 500,000 acres.[34] Thus any area greater than 5760 acres would require multiple leases — and multiple per-lease costs — but could be held by one license, with only one set of license costs.

Any one of these distinctions could explain why a company would consider a larger area for a license than for leases: because the license acreage limitations are higher; because the company has other leases and will reach its lease acreage limit, but has license acreage capacity to spare; because leases have upfront bidding costs and ongoing rental, and royalty costs; because the smaller size of leases multiplies the cost of leasing, compared to one set of costs for a single, larger license; because lease operations

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30 AS 38.05.132(b).
31 AS 38.05.140(c).
32 AS 38.05.131(e).
33 AS 38.05.132(c)(1).
34 AS 38.05.132(c)(2); AS 38.05.180(m).

require a constant bond, rather than the disappearing bond for licenses; or because leases allow less time to attain production or unitization to extend the lease beyond its term. And these are just reasons based on the difference between leases and licenses. There are any number of business reasons why a company might pursue one area by lease in a given year and later seek a different area by license. Nothing in the record tells us why Usibelli decided to seek a certain area by lease and later proposed a somewhat different area by license.

Most importantly, Usibelli's reason for proposing a different area is completely irrelevant to DNR's review of whether the area it did propose best serves the State's interest. Whether Usibelli previously sought a certain area by lease does nothing to inform DNR's consideration of whether that area is appropriate for a license.

B. DCC Fails to Demonstrate that DNR's Response to DCC's Comment About Acreage West of the Nenana River Makes the License Approval Arbitrary or Capricious.

Unable to dispute that DNR addressed the reasonably foreseeable cumulative effects and other statutory factors for finding that this license best serves the State's interest, DCC asserts that a single sentence in a response to public comments is arbitrary. As discussed above in the standard of review section, DCC's burden is really to show that this one sentence renders the entire decision arbitrary and capricious. DCC fails to meet this burden for several reasons. First, DCC's argument focuses solely on this one sentence, without taking into account the totality of the Director's Final Finding, the record that was before DNR, or the fact that the Commissioner did not rely on this statement about economic feasibility when affirming the overall decision that the license

best serves the State's Interest. Second, DCC mischaracterizes its public comment as a competing license proposal and DNR's response to that comment as a rejection of such a proposal. A public comment is just that — a comment. DNR considered it, in light of all of the record and issues, and provided a written response explaining how DNR was addressing DCC's concerns. Third, DCC fails to address the findings DNR would have had to make in order to change the proposed license to exclude acreage — findings that are not supported by the record. Finally, DCC completely misconstrues the Commissioner's discussion of why it was reasonable for the Director to have considered economic feasibility.

1. DCC Fails to Take Into Account the Totality of the Director's Response to Public Comments About Acreage West of the Nenana River, the Commissioner's Reasons for Affirming, or the Record that Was Before DNR.

DCC focuses myopically on one sentence in the 256-page Director's Final Finding that eliminating acreage "may make the project economically unfeasible." [Exc. 515.] But its arguments fail to take into account the Director's entire response to the public comments about acreage west of the Nenana River, the Commissioner's reasons for affirming on this issue, or the record that was before DNR.

a. DCC's Ignores the Fact that Economic Feasibility Was Only One Small Aspect of the Director's Response Regarding Acreage West of the Nenana River.

In public comments, DCC and others raised concerns with the area west of the Nenana River, both stating that this area should be excluded, and raising concerns with the Wolf Townships located in this area. [Exc. 515.] The Director did, as DCC points out, respond with concern that denying a license for this large portion of the

proposed license area that lies west of the Nenana River could affect the economic feasibility of the exploration project. [*Id.*] To read DCC's brief alone, one would think that the Director stopped there. He did not. The Director went on to discuss how DNR is looking to its mitigation measures to address the commenters' concerns, and points out that DNR will continue to assess potential impacts and impose additional mitigation measures as Usibelli proposes specific exploration activity. [Exc. 515-16.] DCC ignores the discussion of mitigation measures and continued review.

b. DCC Ignores the Discussion of Economic Issues Throughout the Director's Final Finding and Support in the Record that Excluding Area West of the Nenana River Could Affect the Viability of the Project.

DCC focuses on its public comment and one sentence in response. But the Director did not consider public comments about area West of the Nenana River in a vacuum; these public comments were considered in light of the overall consideration of whether the license would best serve the State's Interest, the statutory factors DNR considered, the particular license proposal and its prospectivity, and comments and documents from Usibelli raising its own concerns.

The Director's Final Finding discusses the economic viability of the license throughout. In assessing the hydrocarbon potential, DNR looked not to the mere presence of hydrocarbons, but the potential for hydrocarbons in "economic quantities," *i.e.*, hydrocarbons that are plentiful enough and easy enough to access that it is worth the cost to produce them. [Exc. 473; *see also* Exc. 428-30 (evaluating recoverable hydrocarbons, as opposed to mere presence of hydrocarbons); Exc. 527 (noting in response to a public comment that "exploration is required to determine if economically

recoverable gas is present").] DNR also discussed that this project will only progress to development or production if Usibelli's exploration uncovers an "economically viable" source of gas. [Exc. 435.]

DNR noted that economic viability depends in part on the potential mode of transportation and proximity to existing infrastructure — specifically, the more expensive a means of transportation, the larger the gas resource will need to be for the project to be economically feasible. [Exc. 440.] Obviously, the smaller the license area, the smaller the area Usibelli can convert to leases from which to develop gas.

DNR discussed that proximity to communities with existing roads and facilities is an important factor in making production viable, especially if a hydrocarbon accumulation is only "marginally economic." [Exc. 492.] Notably, much of the infrastructure here is near or to the west of the Nenana River, including the Parks Highway. (See map on page 12)

DNR's assessment of reasonably foreseeable fiscal effects on the state and local communities also assumed that the project would proceed to production, which would then provide economic benefit to the State through lease rentals, taxes, and royalties. [Exc. 488-90.] DNR noted that "[g]iven the estimated high potential for shallow coalbed gas in the Healy area, it is possible that this project will contribute to these [royalty and tax] state revenues." [Exc. 488.]

The record also includes Usibelli's economic concerns. Usibelli had earlier written a letter to the Denali Borough stating that a proposed ordinance to prohibit coal bed methane in the license area was "exceedingly restrictive and likely would preclude

Coal Bed Methane (CBM) development in the Denali Borough." [Exc. 732.] Usibelli also submitted comments on the Preliminary Finding that a proposed quarter mile set back from the Nenana River would preclude tie in to existing commercial developments thereby "inhibit[ing] operational, economic and environmental practicality." [Exc. 339.] DCC wanted much more than a quarter mile set back, it wanted to exclude the entire area west of the Nenana River. 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.

c. DCC Ignores the Fact that the Commissioner Did Not Base His Affirmance on Economic Feasibility.

DCC bases its whole acreage argument the reference to economic feasibility in the Director's Final Finding. DCC fails to address the fact that — while stating that it was reasonable for the Director to have considered economic feasibility — the Commissioner did not give economic feasibility as one of his reasons for affirming approval of the entire license area.

When the Commissioner grants reconsideration, it is the reconsideration decision, not the decision being reconsidered, that an appellant may appeal to court.[35] Here, where the Commissioner reconsidered discrete issues, this Court should look at the Director's Final Finding as it was modified by the Commissioner's Reconsideration

[35] AS 44.37.011(c) ("The commissioner's decision made upon reconsideration . . . is a final administrative order for purposes of filing an appeal of the administrative decision to the court.").

Decision. As a matter of procedure, any grounds abandoned by the Commissioner on reconsideration have been superseded and should not be subject to review.[36]

DCC's request for reconsideration argued that the Commissioner should exclude area west of the Nenana River because economic feasibility was not an appropriate consideration. [Exc. 591.] In the Reconsideration Decision, the Commissioner split this argument in two and discussed separately his reasons for affirming approval of the entire license area and his reasons why the Director was reasonable in mentioning economic feasibility. [Exc. 598-99, 604-05.] The Commissioner affirmed the decision that the entire proposed license area best served the State's interest for the following reasons: (1) the Director's Final Finding had satisfied the requirement to consider the criteria set forth in AS 38.05.035(g), (2) mitigation measures would adequately address concerns about the acreage west of the Nenana River; (3) the license would not restrict public use; and (4) the license was consistent with the Tanana Basin Area Plan. [Exc. 598-99.] Notably, the Commissioner did not include economic feasibility as one of the grounds for affirming the Director's Final Finding. Since the Commissioner did not include economic feasibility as one of his reasons for affirming the license area, and it is the Commissioner's Reconsideration

[36] *Cf. Walt v. State*, 751 P.2d 1345, 1347-49 (Alaska 1988) (reviewing reasons for granting summary judgment stated in a reconsideration decision by superior court where superior court previously granted summary judgment for different reasons).

Decision that is on review here, the Director's prior reference to economic feasibility should not even be in issue.[37]

2. DCC Mischaracterizes a Public Comment Response as a Rejection of a Proposal for a Smaller License Area.

DCC's acreage argument ignores the fact that public comments are not proposals, nor was there a proposal for a smaller license area before DNR for it to reject. Under the exploration license statutes, prospective licensees may submit competing license proposals.[38] DNR solicits public comments on proposals, but nowhere in the license statutes does it suggest that DNR can consider such comments as proposals themselves.[39] Here, the only proposal was Usibelli's proposal for 208,630 acres. [Exc. 359.] DCC offers no legal authority for considering public comments as competing proposals.

Public comments and DNR's responses are part of the decision process. But public input is only one of many factors that DNR weighs in deciding whether, on balance, a license would best serve the State's interest. DNR's obligation with respect to public comments is to summarize, consider, and respond to them.[40] There should be no

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[37] As discussed below, the Commissioner did address DCC's objections to consideration of economic feasibility in the Reconsideration Decision, but he did so by concluding that is was reasonable for the "Director" to have considered economic feasibility. [Exc. 605.] The Commissioner did not state economic feasibility as one of his grounds for affirming the decision. [Exc. 598-99.]

[38] AS 38.05.133(b), (c).

[39] AS 38.05.133(c), (d).

[40] 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

question that DNR did so. The Director's Final Finding summarizes DCC's comment specifically, and responds to all of the comments about the area west of the Nenana River by explaining that removing the area is not necessary because of mitigation measures imposed by this decision and mitigation measures that can be imposed in the future, and because removing the acreage "may make the project economically unfeasible." [Exc. 515-16, 525.]

In *Kachemak Bay Conservation Society v. State, Department of Natural Resources*, appellants argued that DNR had not meaningfully responded to public comments and therefore the decision was arbitrary.[41] This Court looked at the fact that DNR had catalogued and responded to all public comments, and concluded that appellants had failed to demonstrate that the decision was arbitrary or capricious because of the comments.[42] The same should be true here.

3. DCC Fails to Demonstrate that Changing the License Proposal to Eliminate Acreage Was Required to Conform to the State's Best Interest.

In mischaracterizing DNR's public comment response, DCC assumes that DNR may simply exclude acreage from an exploration license because a commenter suggests the land be excluded. It is not that simple. For DNR to have changed Usibelli's license proposal to a smaller license area, DNR would have had to conclude that changing the proposal was "required to make the issuance of the exploration license

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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.").

[41] 6 P.3d at 284.

[42] *Id.* at 286.

conform to the best interests of the state."[43] In other words, to show that DNR lacked a reasonable basis for not changing the proposal, DCC would have to demonstrate that it is impossible for the license to be in the State's best interest without excluding the acreage. DCC has made no such showing.

The "best interests of the state" consist of (1) encouraging assessment of oil and gas resources and allowing flexibility in leasing to both recognize varied geography and minimize the adverse impacts of exploration, development, production, and transportation activities; and (2) offering acreage for oil and gas leases.[44] Eliminating acreage is not necessary to any of these aspects of the State's best interest.

a. Eliminating Acreage is Not Required for Oil and Gas Leasing.

Eliminating acreage is not required to facilitate leasing. Exploration licenses in general are designed to incentivize exploration where leasing is less economically attractive, and to allow conversion of some or all of the license area into a lease if certain conditions are met.[45] [Exc. 368.] Removing a large portion of the license area would do nothing to increase the chance that Usibelli will eventually convert the license to a lease. To the contrary, Usibelli is not going to convert the license to a lease if it does not find gas. The less area there is to explore for gas, the less chance there is for Usibelli to find gas and convert to a lease.

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43 AS 38.05.133(f) (emphasis added).

44 AS 38.05.180(a), (b)(2).

45 AS 38.05.132(a); AS 38.05.134.

Excluding acreage does not increase the State's chances of leasing it to someone else either. The purpose of exploration licensing is to encourage exploration in areas unattractive to leasing. Not licensing land that is already unattractive to leasing does not encourage leasing.

b. Eliminating Acreage is Not Required to Encourage Oil and Gas Assessment.

Eliminating acreage is not required to encourage assessment of oil and gas resources either. Nothing in the record suggests that giving Usibelli less acreage to explore will increase the likelihood that Usibelli will explore to assess the hydrocarbon potential in this area. To the contrary, the entire area that DCC wants to exclude may contain gas. As the map on page 12 of this brief shows, the potential gas play (shaded in grey) exists west of the license area, spreads throughout the entire area west of the Nenana River, and continues east, roughly to the eastern boundary of the license area. [Exc. 430.] Excluding the western portion of the license area — which falls in the middle of this gas play — will only inhibit assessment of this potential gas resource.

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

Eliminating the area west of the Nenana River is not the only way to minimize adverse impacts of exploration and development. As DNR pointed out in its response to public comments asking to excluding acreage, DNR can address the commenters' concerns and minimize adverse impacts through current mitigation measures and future review of specific exploration activity and whether that activity

requires additional mitigation measures. Other agencies will also have a hand in minimizing adverse impact through their own review and enforcement.

State and federal statutes and regulations address adverse social and environmental effects of oil and gas activity. [*See* Exc. 451-68 (general description state and federal approvals required); Exc. 508-10 (licensee advisories of state and federal requirements for addressing adverse impacts).] DNR also has authority to address potential adverse impacts through mitigation measures, both now and in the future.[46] [Exc. 515-16, 599, 605.]

Here, DNR imposed multiple mitigation measures that address not only exploration activities — such as seismic testing and test wells — but also development, production, and transportation activities that Usibelli could apply to conduct if it converts the license to leases. These mitigation measures include conditions to minimize impacts on residential, commercial, and recreational areas [Exc. 501]; minimize traffic, roads, and damage from vehicles [Exc. 501, 503.]; provide for emergencies, including gas leaks and hazardous spills [*Id.*]; minimize visual impacts [Exc. 502] ; minimize noise [Exc. 502-04]; minimize impacts to fish and wildlife and their habitats [Exc. 502-05]; monitor impacts to water, noise, habitat, wildlife, and scenic views [*Id.*]; impose minimum setbacks from residential, commercial, recreational, drinking water, and subsistence

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[46] AS 38.05.133(f) (requiring DNR to describe the "limitations, stipulations, [or] conditions" it is placing on the license); AS 38.05.134(5) (noting that a license converted to a lease is subject to any additional conditions and obligations that DNR puts in the lease); 11 AAC 83.158(e) (stating that DNR will require any amendments to a plan of operations that are "necessary to protect the state's interest").

locations [Exc. 501-03, 505]; preserve public access and subsistence use of the area and require the licensee to communicate with local community groups [Exc. 505-07]; and minimize impacts from hazardous substances and waste [Exc. 505-06]. DNR can address minimizing adverse impacts through mitigation measures so eliminating acreage west of the Nenana River is not required to meet that goal.[47]

Furthermore, the Tanana Basin Area Plan designates the entire license area, including the area west of the Nenana River, as mixed-use land approved for natural resource development.[48] [Exc. 418.] This area has long had a variety of uses, including tourism, mining, highway and railroad transportation, subsistence, sport hunting and trapping, and sport fishing. [Exc. 419-24; *see also* Exc. 333-34, 338.] DNR considered all of these uses when it approved the license.[49] [Exc. 419-24.] The portion of the river corridor that runs through the license area is also open to subsurface use for locatable

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[47] Incidentally, Usibelli already excluded large areas west of the Nenana River from its proposal. As DNR explained in the Director's Final Finding, Usibelli considered its 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." [Exc. 485.]

[48] An area plan is a general planning document, but it is not a regulation and does not itself authorize any particular use or disposal of land. *State, Dep't of Natural Res. v. Nondalton Tribal Council*, 268 P.3d 293, 304-05 (Alaska 2012). The entire Tanana Basin Area Plan is publicly available at http://dnr.alaska.gov/mlw/planning/areaplans/tanana/pdf/sub4r.pdf. This agency document is located on DNR's official government website, and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" for purposes of judicial notice. Alaska R. Evid. 201(b).

[49] *See* AS 38.05.035(g)(1)(B)(iv) (requiring consideration and discussion of "the current and projected uses in the area, including uses and value of fish and wildlife").

minerals. [*See* Exc. 339 for comments by Usibelli discussing the R-1 Nenana River Corridor area.]

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 license mitigation measures that protect against adverse effects on the environment, subsistence, and enjoyment of the land, the record fails to show that it was necessary for DNR to eliminate acreage in order to minimize adverse impacts.

Since eliminating acreage is not required to facilitate leasing, encourage hydrocarbon assessment, or minimize the adverse impacts of exploration or development, DCC cannot show that DNR had to eliminate this acreage to conform the license to the State's best interest.

4. The Commissioner Did Not Deem Economic Feasibility to be a Statutory Requirement, as DCC Contends.

DCC both protests that the Director's Final Finding references economic feasibility and attempts to elevate consideration of economic feasibility to a statutory obligation. [At. Br. at 13-17.] These opposing arguments are equally misplaced.

As discussed above, the Commissioner addressed separately the issues of excluding acreage west of the Nenana River and the Director's reference to economic feasibility in the public comment response. [*See* Exc. 598-600 (address acreage west of the river); Exc. 604-05 (addressing Director's reference to economic feasibility).] On appeal to the Commissioner, DCC argued that by referencing economic feasibility, the

Director had applied a standard other than the best interests of the State, and that the Director lacked support for his economic feasibility statement. [Exc. 604.] The Commissioner responded by explaining how economic feasibility fit into the Director's consideration of the State's best interest. [Exc. 604-05.]

The Commissioner stated that the Director had reached a decision on the license area after properly considering the statutory criteria for a best interest finding set forth in AS 38.05.035(e) and (g). [Exc. 604.] The Commissioner further observed that "reasonably foreseeable fiscal effects . . . on the state and affected municipalities and communities" is one of the statutory factors DNR is required to consider, and that one cannot consider potential fiscal effects without taking into account whether the project is likely to go forward. [Exc. 604.] DCC takes this discussion out of context to contend that the Commissioner was interpreting "reasonably foreseeable fiscal effects . . . on the state and affected municipalities and communities" as requiring an analysis of economic feasibility. But if you read this entire section of the decision, what the Commissioner explains is that viability of a project is a necessary logical assumption when considering its potential effects. The Commissioner did not state that economic feasibility is its own statutory obligation or that DNR interprets "reasonably foreseeable fiscal effects" to mean economic feasibility, as DCC contends. As the Commissioner explained,

> If the project is not economically feasible, it likely will not occur at all. Thus in this case of deciding if the Healy exploration license is in the best interest of the state, the Director had to consider the possibility that the project would not occur at all if it became economically infeasible for the licensee.

[Exc. 605.] Nowhere did the Commissioner state that he interpreted the statutory term "reasonably foreseeable fiscal effects of the [exploration license] and the subsequent activity *on the state and affected municipalities and communities*" to mean whether or not the project is economically feasible *for the licensee*, as DCC contends.[50] [At. Br. at 13-14.] Nor would such an interpretation be reasonable.

Accordingly, DCC is incorrect that the Commissioner elevated "economic feasibility" to a statutory requirement and incorrect that DNR did not discuss economic feasibility in its decision. As the Commissioner explained in the Reconsideration Decision, the Director considered the economic viability of the project as a logical step in considering reasonably foreseeable effects.

The Commissioner also stated that the Director had considered "many factors affecting economic feasibility." [Exc. 605.] As discussed above, the record supports the Director's concern that excluding acreage west of the Nenana River could threaten the economic feasibility of the project. Usibelli raised concerns with setbacks and a proposed ordinance affecting this acreage. [Exc. 339, 732.] The Commissioner also pointed out that purpose of exploration licensing is to encourage high risk investments to explore remote areas with unknown hydrocarbon potential. [Exc. 604-05.] Significantly reducing the size of the exploration area would not only decrease the area in which Usibelli might find hydrocarbons, but potentially dissuade Usibelli from accepting the license and making invests to explore — thereby depriving the State from important

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[50] AS 38.05.035(g)(1)(B)(ix) (emphasis added).

knowledge about its hydrocarbon resources and the potential development that could result if Usibelli is successful.

More importantly, the Commissioner's Reconsideration Decision shows that the Commissioner considered DCC's objections to the area west of the Nenana River and DNR's tools for addressing those concerns. Excluding acreage is one tool DNR could have used, and the Commissioner stated that he considered this option. [Exc. 605.] But mitigation measures are another tool for protecting fish, wildlife, the environment, and human enjoyment of land. [Exc. 598.] This the tool DNR chose. [*Id.*]

II. DCC HAS FAILED TO DEMONSTRATE THAT DNR'S DECISION IS ARBITRARY OR CAPRICIOUS BECAUSE OF ANY MITIGATION MEASURE.

DCC similarly fails to demonstrate that the exploration license approval is arbitrary or capricious because of a particular mitigation measure. DNR has broad authority to impose mitigation measures when it approves a lease or exploration license.[51] DNR exercised that authority here by imposing measures to minimize (1) impact from facilities and operations on residential, commercial, and recreational areas; (2) impact to fish and wildlife; (3) impact to subsistence, commercial, and sport harvest activities; (4) risk from fuel and hazardous substances; (5) impact from waste; (6) impact to the public's use of the area by ensuring public access; and (7) impact to prehistoric, historic, and archeological sites. [Exc. 501-07.] DNR included proposed mitigation measures in

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[51] AS 38.05.035(g)(1)(B)(vii) (instructing the director to consider and discuss "lease stipulations and mitigation measures, including any measures to prevent and mitigate releases of oil and hazardous substances").

its Preliminary Finding, and finalized the measures in the Director's Final Finding after receiving comments from other agencies and from the public — including comments from Usibelli about the impact the proposed measures would have had on the viability of its license. [Exc. 336-41.]

At their core, all of DCC's mitigation measures arguments are about the adequacy of these measures. But this Court has held that the adequacy of a mitigation measure is not ripe at the point of a property disposal. Even if it is ripe, DCC has presented nothing to show that any measure is insufficient. DCC only states that it likes mitigation measures in the Preliminary Finding better. The fact that a measure changed fails to demonstrate that the measures DNR *did* adopt make its decision arbitrary or capricious.

A. The Adequacy of Mitigation Measures is Not Ripe.

In *Trustees for Alaska v. State, Department of Natural Resources*, this Court held that the adequacy of mitigation measures is not ripe until later stages when DNR is applying the measures.[52] The *Trustees* appellant argued that an Alaska Coastal Management Program ("ACMP") decision for a lease sale was arbitrary because DNR relied on mitigation measures without evaluating the adequacy of each measure.[53] This is essentially what DCC does here, asking this Court to review individual measures for arbitrariness. This Court rejected the argument because mitigation measures are "guidelines," and the time to assess their adequacy is when DNR reviews a plan of

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[52] 851 P.2d at 1346-47.

[53] *Id.*

operations.[54] This Court observed that until a company submits a detailed plan of operations, it is unknown what operations will occur and thus DNR cannot, as a practical matter, assess whether existing mitigation measures will be adequate.[55]

The same is true here. Usibelli cannot begin work under the license without submitting a plan of operations for DNR's approval, at which time DNR will assess the adequacy of the mitigation measures and determine whether additional measures are necessary.[56] And because this is a phased project, a plan of operations will be subject to public notice and comment and an appealable DNR decision before Usibelli can proceed with exploration activities.[57] [Exc. 374-76 (determining that this is a phased project).]

B. DCC Has Shown Nothing Arbitrary or Capricious About Approving the License With a Provision Allowing Usibelli to Seek an Exception in the Future Upon a Showing that Compliance With a Mitigation Measure is Not Practicable.

Even assuming *arguendo* that the adequacy of mitigation measures is ripe for review, DCC fails to show that any of the measures renders DNR's best interest determination arbitrary and capricious. DCC first argues that a "blanket exception" to mitigation measures in the Director's Final Finding is arbitrary. [At. Br. at 20-25.] There are several fatal flaws to this argument.

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[54] *Id.* at 1347.

[55] *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.").

[56] 11 AAC 83.158(e) ("In approving a lease or license plan of operations or an amendment to a plan, the commissioner will require amendments that the commissioner determines necessary to protect the state's interest.").

[57] AS 38.05.035(e)(1)(C).

First, there is no "blanket exception." A blanket exception would be one that covers all or most measures. DNR included no such provision, nor does the term "blanket exception" appear anywhere in the agency record. What DNR states is that when approving plans of operations in the future, the 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.]

Second, DCC's objection is not that DNR provided a process for Usibelli to request a mitigation measure exception in the future; its objection is that that DNR changed its description of this process between the Preliminary and Final Finding. [At. Br. at 20-25.] But DNR is under no obligation to explain every edit it makes between drafts. It is the Commissioner's affirmance of the Director's Final Finding that is on appeal here.[58] Differences between a Preliminary and Final Finding have no bearing on this Court's review of whether the Director's Final Finding, as modified by the Commissioner's Reconsideration Decision, is arbitrary and capricious.

Third, even considering the edit between the Preliminary and Final Finding, DCC completely fails to show any difference in the meaning of the words. The Preliminary Finding stated that Usibelli would have to show that complying with a mitigation measure was "not feasible or prudent," where the Director's Final Finding

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[58] *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).

uses the words "not practicable." [See Exc. 251, 500.] This is not the monumental change DCC makes it out to be. "Feasible," "prudent," and "practicable" are synonyms. The Director's Final Finding in fact defines "practicable" to mean "feasible." [Exc. 507.] As the superior court pointed out, the dictionary definition of "practicable" is "'capable of being put into practice or of being done or accomplished,'" and the definition of "feasible" is "'capable of being done or carried out.'" [Exc. 771.] The court aptly concluded that there is no discernible difference between these two words.

As for DCC's argument that "practicable" lacks a concept of prudence, that argument cuts against DCC's position. Accepting DCC's argument that "practicable" and "feasible and prudent" are not the same, under the Preliminary Finding, a licensee could seek an exception by showing either that complying was not feasible (*i.e.*, it could not be done) or prudent (*i.e.*, it was not wise). Under the Director's Final Finding, a licensee can only seek an exception by showing that compliance is not practicable (*i.e.*, that it could not be done). Thus to the extent there is any difference between the two phrases, the Final Finding narrows the circumstances under which Usibelli may seek an exception.

And of course when it comes time to applying the exception, it will be DNR that interprets its own words. DNR has been stating throughout this appeal process that it does not interpret the terms differently. If DNR does not interpret them to be different, and courts give deference to an agency's interpretation of its own words, then how would a different standard ever end up applying? DCC offers no explanation.

Nor do any of the authorities DCC cites demonstrate a difference between feasible, prudent, or practicable, let alone the dichotomy DCC imagines where "not practicable" is somehow weaker. This Court has never deemed "feasible and prudent" to be a "stringent" or "strongly protective" standard, as DCC misrepresents. [At. Br. at 21.]

What DCC's cases state is that an old ACMP regulation 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 combined they were strong.[59] 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 inapposite. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court 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.[60] But the court merely looked at the legislative intent of these particular federal statutes, and did not offer any opinion as to the strength or weakness of "feasible and prudent."[61]

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[59] *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 at 1344 (same).

[60] 401 U.S. 402, 411-13 (1971).

[61] *Id.*

More importantly, none of DCC's cases compare "feasible and prudent" to "practicable." DNR's own 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[]."[62]

Furthermore, there is nothing mysterious or monumental about DNR's rephrasing of the grounds of a mitigation measure exception. The change simply reflects a similar rephrasing of ACMP regulations during the same time period.[63] Before 2006, the applicable ACMP regulations provided for exceptions if there was no "feasible" alternative and "all feasible and prudent steps" were taken to maximize conformance with the habitat management standards.[64] Starting in 2006, the ACMP regulations required

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[62] *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1467 (1st Cir. 1994) (calling (1) a Clean Water Act requirement not to issue certain permits if there is a "practicable" alternative; and (2) a Department of Transportation Act requirement not to approve certain projects if there is a "prudent and feasible" alternative "similar[]" standards). 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).

[63] Even though this 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 incorporate ACMP terminology in its mitigation measures for all land disposal best interest findings.

[64] 6 AAC 80.130(d).

habitat to be managed to minimize impacts "to the maximum extent practicable"[65] and defined "practicable" — the same as DNR did in the Director's Final Finding.[66] DCC attached a table to its brief, showing that DNR had used "feasible and prudent" in other decisions, apparently attempting to paint the Director's Final Finding as a sea change. [At. Br. at 36-37.] But if one looks at all best interest findings in recent years, not just the ones DCC cherry picked, one can see that the best interest findings that DNR issued when the ACMP regulation used "feasible and prudent" also use the words "feasible and prudent,"[67] and the best interest findings issued after the ACMP regulation used

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[65] 11 AAC 112.300(b); 11 AAC 112.900(a).

[66] *Compare* 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") *with* Exc. 507 (same definition in Final Finding).

[67] These best interest findings are all available at DNR's website. Since these are final agency decisions, akin to court records, and are "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.

"practicable" also use the word "practicable."[68] Thus there is nothing remarkable about DNR's edits between its 2005 Preliminary Finding and its 2010 Director's Final Finding.

Finally, there is no basis for DCC's contention that using "practicable" instead of "feasible and prudent" contradicts the Tanana Basin Area Plan. [At. Br. at 24-25.] DCC misrepresents the Plan as providing for wildlife and recreation in the Wolf Township as the "primary" use and oil and gas exploration as a "secondary use." The Plan's management guidelines for this Subregion (referred to in the Plan as Unit 4E, Stampede Trail) say that the primary surface use is public recreation and wildlife habitat. [Exc. 1.] Oil and gas is subsurface. For the subsurface, the guidelines expressly state that "[t]his unit is available for oil, gas, and coal leasing." [*Id.*] DCC's attempt to label this as a secondary use completely misrepresents the Plan.

Furthermore, there is no basis for DCC's conclusion that using the word "practicable" threatens fish and wildlife. DNR imposed numerous mitigation measures that specifically address fish, wildlife, and habitat protection. [Exc. 504-505.] No licensee can avoid complying with those measures without DNR first deciding to

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[68] 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;
- 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.

allow an exception. The fact that DNR may in its discretion allow an exception if compliance is not practicable does not change DNR's ongoing obligation and commitment to minimizing adverse impacts to the environment, nor its authority to impose an alternative mitigation measure when allowing an exception.[69]

C. DCC Has Shown Nothing Arbitrary or Capricious About a Decision that Includes a Setback Requirement for Drill Pads and Compressor Stations.

DCC objects to a mitigation measure that requires a setback for drill pads and compressor stations as follows:

> 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.] DCC has offered no basis for this Court to find that including this mitigation measure rendered the exploration license approval arbitrary or capricious. It merely opines that the measure is inadequate and states that it preferred the setback measure from the Preliminary Finding. [At. Br. at 26-28.] As discussed above, differences between the Preliminary and Final Finding have no bearing on this Court's review of whether the Director's Final Finding, as modified by the Commissioner's Reconsideration Decision, is arbitrary and capricious.[70] Also discussed above is this

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[69] AS 38.05.180(a)(2)(A)(ii) (State's best interest includes minimizing adverse impacts of exploration); 11 AAC 83.158(e) (providing for DNR to impose mitigation measures on a plan of operations in order to protect the State's interest).

[70] *Cf. Trustees for Alaska v. State, Dep't. of Natural Res.*, 795 P.2d at 809-10 (in case challenging alleged changes between preliminary and final best interest findings, court looked at only whether the final finding was arbitrary or capricious).

Court's holding that the adequacy of mitigation measures is not reviewable until later when a licensee submits a specific plan of operations.[71]

Even looking at the mitigation measure itself, DCC has offered no basis for finding the license approval was arbitrary or capricious because of this measure. DCC's complaint is that the setback does not protect vacant lots. [At. Br. at 26.] DCC raised this same issue on reconsideration. [Exc. 589.] In response, the Commissioner reviewed oil and gas projects in residential neighborhoods on the Kenai Peninsula, and found that in later approvals, 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.*]

In addition, there are several mitigation measures that protect owners of vacant residential lots 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 operations, and will have the opportunity to provide comments during the public comment period and appeal any DNR decision.[72] [Exc. 501.]

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[71] *Trustees for Alaska v. State, Dep't of Natural Res.*, 851 P.2d at 1346-47.

- Facilities must be designed and operated to minimize sight and sound impact to residential areas, which would include undeveloped subdivisions. [Exc. 502.]

- Measures must be taken to mitigate visual impacts of facilities regardless of location, including limiting the size of facilities, using vegetation to block the view of facilities, and siting facilities within existing geography to minimize 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 property will be developed and subject to the residential building setback mitigation measure well before any compressor station or permanent drill pad could be proposed.

Considering these mitigation measures and DNR's authority to fashion additional, activity-specific mitigation measures when reviewing a specific plan of operations, 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 otherwise.

D. DNR Did, in Fact, Impose Mitigation Measures to Address Noise, and DCC Has Failed to Show That These Measures Render the License Approval Arbitrary or Capricious.

DCC similarly fails to demonstrate that the license approval is arbitrary or capricious because of its noise control measures. DCC claims that there are no mitigation

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[72] AS 38.05.035(e)(1)(C)(ii); 11 AAC 02 *et seq.*

measures for noise, but that is untrue. [At. Br. at 26.] DNR set general guidelines for noise that will be tailored to a specific project in the future:

> 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;
> - 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.] These are generalized guidelines, but as this Court stated in *Trustees*, mitigation measures at the disposal stage are only guidelines.[73] When Usibelli submits a plan of operations, which will describe the actual exploration activities and their locations, DNR has broad discretion to impose noise restrictions.[74] And when it reviews the plan of operations, DNR will be taking a continuing look at the land and resources Usibelli proposes using, its plans to rehabilitate the license area, operating procedures to

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[73] 851 P.2d at 1347.

[74] 11 AAC 83.158(e). DNR may impose any mitigation measure on the plan of operations that protects the State's interest, is not inconsistent with the license, and does not deprive the licensee of reasonable use of the license. *Id.*

prevent or minimize adverse effects on natural resources and other uses of the area and adjacent areas, including fish and wildlife and public use, and determining whether DNR needs to impose additional mitigation measures to keep this project consistent with the State's interest.[75] DCC will be free to appeal the plan of operations approval.[76]

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 operations in the future, the Commissioner concluded that the noise mitigation measures are appropriate at this license approval stage. [*Id.*]

DCC has simply failed to demonstrate how this mitigation measure renders the license approval arbitrary or capricious. These measures are policy determinations within DNR's area of expertise.

E. DNR Did, In Fact, Impose Mitigation Measures to Address Caribou, and DCC Has Failed to Show That Including These Measures Renders the License Approval Arbitrary, Capricious, or Contrary to the Tanana Plan.

DCC suggests that DNR violated the Tanana Basin Area Plan by not adopting mitigation measures to "adequately protect" caribou. [At. Br. at 30-31.] This argument fails for two reasons.

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[75] 11 AAC 83.158(d)-(e).

[76] 11 AAC 02 *et seq.*

First, the Plan states only that DNR will set mitigation measures, and gives some examples of what those mitigation measures might include:

> 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.] This language does not "require[] that DNR impose restrictions" concerning caribou at the disposal phase, as DCC claims. [At. Br. at 30.] It merely requires mitigation measures in general and offers some examples. DNR certainly imposed mitigation measures on the license. [Exc. 499-510.] And DNR may continue to impose additional, more specific measures when it approves a plan of operations.[77]

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

> The director, in consultation with [Department of Fish and Game], 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, with more specific restrictions to follow when DNR can tailor measures to specific proposed activity.

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

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[77] 11 AAC 83.158(e).

- Usibelli must submit a specifically tailored monitoring plan with its plan of operations, and DNR will consider "[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.]

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

DCC fails to show how these measures render the license approval arbitrary.

CONCLUSION

With its series of straw man arguments, DCC fails to meet its burden of showing that the Commissioner's Reconsideration Decision affirming the Director's Final Finding is arbitrary or capricious. Accordingly, DNR's decision is entitled to deference, and this Court should affirm superior court's decision upholding the Commissioner's Reconsideration Decision.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DENALI CITIZENS COUNCIL, Appellant, v. ALASKA, DEPARTMENT OF NATURAL RESOURCES, and USIBELLI COAL MINE, INC., Appellees. Superior Court No. 3AN-10-12552 CI	Supreme Court No. S-14896

CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that I am a Law Office Assistant with 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 **BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES** in this proceeding on the following:

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