

IN THE SUPREME COURT FOR THE STATE OF ALASKA

DENALI CITIZENS COUNCIL, )  
)  
Appellant, )  
)  
vs. )  
)  
STATE OF ALASKA, DEPARTMENT OF )  
NATURAL RESOURCES, and USIBELLI )  
COAL MINE, INC., )  
)  
Appellees. )

Supreme Court No. S-14896

Trial Court No. 3AN-10-12552CI



APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA,  
THIRD JUDICIAL DISTRICT AT ANCHORAGE,  
HONORABLE ANDREW GUIDI, PRESIDING

RESPONSE BRIEF OF APPELLEE USIBELLI COAL MINE, INC.

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State of Alaska this \_\_\_\_ day of April  
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Deputy Clerk

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## PRINCIPAL AUTHORITIES RELIED UPON

### Sec. 38.05.035. Powers and duties of the director.

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

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

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

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

(i) applicable statutes and regulations;

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

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

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

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

(ii) the disposal is a disposal of oil and gas, or of gas only, and, before the next phase of the project may proceed, public notice and the opportunity to comment are

provided under regulations adopted by the department 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 38.05.180 is subject to (g) of this section;

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

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

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

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

this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state is based;

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

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

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

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

(D) a mineral claim located under AS 38.05.195;

(E) a mineral lease issued under AS 38.05.205;

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

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

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

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

(G) a surface use lease under AS 38.05.255;

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

(7) the director shall include in

(A) a preliminary written finding, if required, a summary of agency and public comments, if any, obtained as a result of contacts with other agencies concerning a

proposed disposal or as a result of informal efforts undertaken by the department to solicit public response to a proposed disposal, and the department's preliminary responses to those comments; and

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

\* \* \*

(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.

\* \* \*

(m) For purposes of appeal under (l) of this section, the burden is upon the party seeking review to establish the invalidity of the finding.

**Sec. 38.05.132. Exploration license for oil and gas or gas only.**

(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.

## JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Denali Citizens Council (“DCC”) is satisfactory to Usibelli Coal Mine, Inc. (“Usibelli”).

### STATEMENT OF ISSUES PRESENTED

This is an administrative appeal by DCC from a decision by the State of Alaska, Department of Natural Resources (“DNR”) to grant Usibelli the Healy Basin Gas Only Exploration License (“Healy Exploration License”).<sup>1</sup> Specifically, DCC challenges DNR’s Healy Final Written Finding (“Final Finding”), in which DNR explained its determination that issuance of the Healy Exploration License is in the best interest of the state.<sup>2</sup> This appeal presents the following issues for decision:

1. Whether DNR’s Final Finding supporting issuance of the Healy Exploration License to Usibelli, covering 208,630 acres, is arbitrary or otherwise fails to comply with the law when (i) the law allows a license to cover between 10,000 and 500,000 acres, (ii) DNR determined, after a detailed and lengthy analysis, that the disposal was in the best interest of the state, and (iii) DCC fails to demonstrate that DNR failed to comply with applicable law or that its best interest finding lacks a reasonable basis.

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<sup>1</sup> In an administrative appeal, this Court “independently review[s] the merits of the administrative determination . . . [and does] not defer to the superior court’s decision.” *Kachemak Bay Conservation Soc. v. State*, 6 P.3d 270, 275 (Alaska 2000).

<sup>2</sup> See AS 38.05.035(e).

2. Whether DNR's Final Finding supporting issuance of the Healy Exploration License to Usibelli is arbitrary or otherwise fails to comply with the law when (i) DNR exercised its authority to impose mitigation measures on the license and retains the authority to tailor existing mitigation measures and require additional mitigation measures in the future to address environmental, aesthetic and other concerns, depending on the scope and character of future operations, (ii) it is premature for DCC to challenge the adequacy of DNR's mitigation measures at this time under Alaska case law, and (iii) DCC fails to demonstrate that DNR failed to comply with applicable law or that its best interest finding lacks a reasonable basis.

#### **STATEMENT OF THE CASE**

Usibelli incorporates by reference and relies upon the Statement of the Case by DNR for the arguments presented herein.<sup>3</sup> Additional background information is presented in the Argument, below.

#### **STANDARD OF REVIEW**

In an administrative appeal involving agency expertise as to either complex subject matter or fundamental policy formulations, this Court has long held that "an administrative agency's decision will be reviewed by the court only to the extent

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<sup>3</sup> App. R. 212(c)(5) ("In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another.")

necessary to ascertain whether the decision has a reasonable basis.” *Hammond v. North Slope Borough*, 645 P.2d 750, 758 (Alaska 1982) (internal quotation omitted; citing *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971)). This Court has similarly long held that a best interest finding regarding a disposition of state land, such as the Healy Exploration License, “is almost entirely a policy decision, involving complex issues that are beyond this [C]ourt’s ability to decide.” *Id.* at 758-59 (citing *Moore v. State*, 553 P.2d 8, 36 n.20 (Alaska 1976)). Accordingly, this Court has held that a DNR best interest finding is subject to a “deferential reasonable basis review.”<sup>4</sup> *Kachemak Bay Conservation Soc. v. State*, 6 P.3d 270, 275 (Alaska 2000). “This [C]ourt reviews DNR’s best interest determination only to the extent necessary to ascertain whether the decision has a reasonable basis, and to ensure that it was not arbitrary, capricious, or prompted by corruption. *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1217 (Alaska 1996) (internal quotations omitted). Moreover, the burden is squarely on DCC to demonstrate that DNR’s finding lacks a reasonable basis or is otherwise arbitrary and capricious.<sup>5</sup>

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<sup>4</sup> *See also* Ch. 38, § 1(2), SLA 1994 (“each determination under AS 38.05 that the interests of the state will be best served is a policy decision involving facts unique to each proposed disposal, and complex issues the analysis and resolution of which are most appropriately left to the expertise of the agency making the determination”).

<sup>5</sup> AS 38.05.035(m) (providing that “the burden is upon the party seeking review to establish the invalidity of the finding”). DCC does not allege that DNR’s finding is a result of corruption.

## ARGUMENT

### I. **DCC Fails Its Burden to Demonstrate DNR’s Final Finding is Arbitrary Based on the License Size.**

In terms of size, AS 38.05.132 provides that an exploration license

may cover, subject to the maximum acreage limitations 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 . . . .

AS 38.05.132(c)(2). As stated by the Superior Court, Usibelli’s Healy Exploration License “covers an area of 208,630 acres – less than half the maximum allowed – and is reasonably compact and contiguous.”<sup>6</sup> [Exc. 767] Other than (i) the individual acreage limitation in AS 38.05.131(e), which is inapplicable here; and (ii) the compact and contiguous requirement, which DCC does not raise, AS 38.05.132 imposes no other conditions or qualification on the size license area an applicant may apply for.

DCC argues DNR’s Final Finding is arbitrary because the agency did not “consider changing the size and location of the license area.” [DCC Br. 12] DCC argues that DNR did “not conduct any actual applicant- or project-specific analysis” of the economic feasibility of a smaller license area and “acceded to the interested party’s licensing proposal without question.” [DCC Br. 17]

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<sup>6</sup> DCC does not claim the license area is not “reasonably compact and contiguous.” AS 38.05.132(c)(2).

DCC's contentions are without merit. DCC's argument relies upon a handful of select statements taken out of context from DNR's responses to comments [Exc. 515; DCC Br. 16] and the Commissioner's decision on reconsideration [Exc. 604-05; DCC Br. 13] cobbled together to support a specious argument. Notably, DCC's arguments ignore DNR's actual Final Finding and the detailed and extensive analysis undertaken by the agency before issuing the Healy Exploration License. To begin with, DNR hardly issued the Healy Exploration License "without question." [DCC Br. 17] The Final Finding spans over 150 pages of dense, single-spaced analysis, excluding the appendices. [Exc. 350-510] The Final Finding contains entire chapters devoted to such topics as a description of the license area [Exc. 377-89], wildlife species in the area [Exc. 393-412], current and projected uses in the area [Exc. 417-425], the reasonably foreseeable cumulative effects of licensing [Exc. 472-493] and the mitigation measures attached to the license [Exc. 500-510].

DCC's case challenges none of the actual substantive analysis in DNR's Final Finding.<sup>7</sup> Instead, DCC points to a one sentence from DNR's response to comments that the area west of the Nenana River should be excluded from the license area: "Removing the area west of the Nenana River from the license area may make the project

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<sup>7</sup> In this context, DCC attempts to turn the law on its head by asserting that "the burden does not rest on Denali Citizens" to demonstrate DNR's finding is arbitrary. [DCC Br. 16] The law provides otherwise. AS 38.05.035(m).



economically unfeasible.” [Exc. 515; DCC Br. 16] DCC, however, ignores the further explanation that followed this statement (as well as that incorporated by reference):

The imposition of mitigation measures to avoid, minimize, or mitigate potential impacts is preferable to removing a large acreage from the license area. As specific projects are proposed, additional mitigation measures may be imposed. Given these measures, license advisories, and existing laws and regulations, *removing the area west of the Nenana River from the license area is unnecessary*. See common Issue 8 for further discussion regarding the Wolf Townships. [Exc. 515 (emphasis added)]

In addition to the potential economic impact of reducing the license area, DNR equally found that “*removing the area west of the Nenana River from the license area is unnecessary*” because the objectives DCC seeks to advance will be adequately protected given the detailed mitigation measures and license advisories attached to the Final Finding, as well as the protections afforded by existing laws and regulations. [Exc. 515 (emphasis added)] Thus, considering the entirety of the comment response DCC attempts to build its case on, it is evident that DCC does not begin to show that even the comment response is arbitrary, let alone DNR’s actual Final Finding.

DCC’s reliance on the statements plucked from the Commissioner’s decision on reconsideration is equally unavailing. [Exc. 604; DCC Br. 15] DCC cites the Commissioner’s statement that:

the Director must consider whether or not the project will be economically feasible to the licensee, given the size of the license area, the mitigation measures, and other regulatory

requirements. If the project is not economically feasible, it will not occur at all. [Exc. 604]

This statement, however, is only part of a longer response to comments from DCC criticizing the Director for allegedly applying “a standard other than the best interest of the state” and asserting that the Director equated the “economic feasibility for a particular corporation . . . to the state’s best interest, considering all its citizens.” [Exc. 604] For context, Usibelli sets forth the comment summary and the Commissioner’s response to this comment in full:

**Comment Summary (a):** The DCC stated that the Director applied a standard other than best interest of the state to Healy exploration license, and asked how economic feasibility for a particular corporation equates to the state’s best interest, considering all its citizens.

**Response (a):** Before approving the disposal of interests in resources or property, AS 38.05.035(e) requires that the Director find that the interests of the state will be best served by the disposal. The Director also may impose conditions or limitations as s/he determines will best serve the interest of the state. In determining if an exploration license is in the best interest of the state, the Director is required to consider and discuss a wide range of matters, several of which address environmental concerns (AS 38.05.035(g)). But one of these factors is also “reasonably foreseeable fiscal effects” of the exploration license (AS 38.05.035(g)((1)(B)(ix))). To consider this factor, the Director must consider whether or not the project will be economically feasible to the licensee, given the size of the license area, the mitigation measures, and other regulatory requirements. 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. The intent of exploration licensing is to encourage exploration in areas far from existing infrastructure, with relatively low or unknown hydrocarbon potential, where this is a higher investment risk to the operator; the state also receives valuable subsurface geologic information from exploration of new areas. If an exploration project does not occur because it is not economically feasible for the licensee, the state will not realize these benefits.

Economic feasibility is thus one of many factors that the Director must consider. Therefore, because the Director considered and discussed the topics and issues required by AS 38.05.035(g), and appropriately considered feasibility of the exploration license, I have decided that the Director appropriately determined that issuing the Healy exploration license as described in the Final Finding is in the best interest of the state. [Exc. 604-05]

Considered in its entirety and fairly construed, it is evident that the main thrust of the Commissioner's response to DCC's claim on reconsideration was the "reasonably foreseeable fiscal effects' of the exploration license (AS 38.05.035(g)((1)(B(ix)) [sic]" on the state and ensuring that the state realized the benefits of exploration licensing. [Exc. 605] Realization of those benefits includes obtaining "valuable subsurface geologic information from exploration of new areas." [Exc. 605] The economic viability of the license for the applicant (Usibelli) was only one factor the Director considered in the context of the fiscal effects of the license on the state, as well as a means of ensuring the

state ultimately reaped the benefits sought.<sup>8</sup>

Further, there is sound basis in the record for the Director's belief that exclusion of all the acreage from the west side of the Nenana River "may" render the license economically infeasible to the applicant. [Exc. 515] To begin with, DCC's contention that DNR "interprets the law to require a licensee-specific economic feasibility analysis" is contradicted by the record and a flimsy straw man at best.<sup>9</sup> [DCC Br. 18] DNR's actual Final Finding – which DCC does not acknowledge – explained that the economic viability of the project can only be determined *after* exploration; thus, it would be impossible to make a definitive finding of economic viability *before* exploration has even started, as DCC now argues. [Exc. 435 (explaining that development and production phases will occur "only after exploration has been completed and tests show that a discovery is economically viable")]

During the administrative process, Usibelli explained in its comments that it had a number of economically-based concerns about the restrictions and limitations advocated by license opponents, including DCC, and being considered by DNR:

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<sup>8</sup> In addition, the Commissioner noted the "Director considered many factors affecting economic feasibility," [Exc. 605] and likewise explained the Director's refusal to exclude the Wolf Townships, as favored by DCC. [Exc. 605; *see also* Exc. 515-16] DCC, of course, does not challenge the fiscal effects analysis of the actual Final Finding. [*See, e.g.*, Exc. 488-93 (fiscal effects on state, municipalities and communities)]

<sup>9</sup> DCC's argument clearly elevates isolated statements in the agency's comment responses and decision on reconsideration far beyond their reasonable import.

- As early as 2004, in the context of the coal-bed methane (“CBM”) enforceable standards adopted by DNR for the Matanuska-Susitna Valley, Usibelli noted that “there are many who would prefer that CBM development happen somewhere else and in total.” [Exc. 95] Usibelli commented that “these Standards go a long ways towards accomplishing that goal.” [Id.] Usibelli also pointed out that “[s]ince there are very limited markets in remote areas [for selling gas], the Standards will likely have a major chilling effect on the industry’s interest in Alaska CBM development.” [Id.] In other words, undue restrictions on exploration and development could render natural gas projects economically infeasible.
- In comments on the Preliminary Finding, Usibelli noted that the Preliminary Finding did not adequately explain that the license area included important uses for “natural resource & industrial development and as a commercial transportation corridor.”<sup>10</sup> [Exc. 333]
- Usibelli’s comments on the Preliminary Finding also noted the potential economic impacts of prohibiting summer exploration activities. [Exc. 335 (noting summer construction of “roads may be much safer, more cost effective and provide summer employment opportunities for local residents and students”)] One can reasonable

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<sup>10</sup> Ironically, Usibelli noted that “most of the residential settlement and recreational use of the area has occurred, as a direct result of the historic establishment and use of the area for these purposes.” [Id.]

infer that the removal of an entire area, as opposed to a mere seasonal work restriction, could make operations even less cost effective.

- Usibelli also commented on the mitigation measures proposed in the Preliminary Finding. Usibelli commented that it “does not agree that each of the mitigation measures identified in the PBIF is necessary.” [Exc. 337] Significantly, Usibelli expressly noted that the “operational practicalities *and economics* [of a project] would be significantly affected if DNR were to impose any more onerous mitigation measures.” [Exc. 337 (emphasis added)] Again, one can reasonably infer that a wholesale removal of a large portion of the license area could similarly impact the economic viability of the license.
- Usibelli also commented that a proposed setback from the Nenana River would exclude access to “Usibelli’s own permanent facilities, that have been the stated initial potential market for any gas discovered” in the license area. [Exc. 338] Once again, one can reasonably infer that the even greater burden of the wholesale removal of all lands west of the river could impact the project economics by excluding access to an even greater number of potential gas customers.
- Lastly, Usibelli commented that the proposed quarter mile setback made less “economic sense for any development in the license area” and, together with topographical features in the area “further inhibit[ed] operational, *economic* and

environmental practicality and prudence” for the project. [Exc. 339 (emphasis added)]

Finally, DCC challenges the decision of the Superior Court for dismissing DCC’s comparison of Usibelli’s exploration license proposal to Usibelli’s earlier shallow gas-only *lease* applications. [DCC Br. 17-18] DCC criticism of the Superior Court’s Decision is without merit. The Superior Court rightly noted that DNR explained there are significant economic differences between the state’s former shallow gas-only *leasing* program and the gas exploration *licensing* program. [Exc. 766-68] DNR explained these differences in both the Preliminary Finding and Final Finding. [Exc. 140, 369-70] DCC does not challenge the distinctions pointed out by first DNR and then the Superior Court. DCC argues that the distinctions in costs and timing between these two distinct programs “prove[s] Denali Citizens’ point: licenses are less expensive than leases, and thus a license is economically cheaper to pursue than a lease.” [DCC Br. 18] DCC’s argument, however, is like a dog chasing its tail – it go’s in a circle and accomplishes nothing.<sup>11</sup>

## **II. DCC Fails Its Burden to Demonstrate DNR’s Final Finding is Arbitrary Based on the Mitigation Measures Imposed by DNR on the License.**

With respect to DCC’s challenge based on the mitigation measures adopted by DNR in the Final Finding, Usibelli incorporates by reference and relies upon the

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<sup>11</sup> Usibelli incorporates by reference and relies upon the arguments of DNR for further support on this issue. App. R. 212(c)(5).



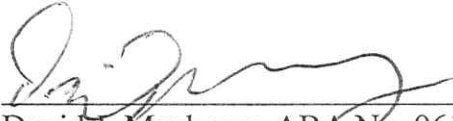
arguments of DNR.<sup>12</sup> DNR's thorough and robust treatment of these issues amply demonstrates that DCC's contentions are without merit and fail to demonstrate any error in the Final Finding, or the Superior Court's decision.

### CONCLUSION AND RELIEF REQUESTED

Below, after full briefing and argument and based upon the extensive record before it, the Superior Court concluded that, "[g]iven DNR's detailed and comprehensive findings, the Court must reject DCC's contention that DNR's decision to grant Usibelli the exploration license was arbitrary." [Exc. 771] Similarly here, DCC has not met its burden to demonstrate that DNR's decision to issue the Healy Exploration License lacked a reasonable basis or was otherwise arbitrary and capricious.<sup>13</sup> Accordingly, Usibelli respectfully requests that the Court reject the appeal of DCC and affirm the Final Finding of DNR to issue Usibelli the Healy Exploration License.

DATED at Anchorage, Alaska this 30th day of April 2013.

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<sup>12</sup> App. R. 212(c)(5).

<sup>13</sup> *Kachemak Bay*, 6 P.3d at 275.

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I certify that on this 30th day of April 2013 a true and correct copy of the foregoing was served via U.S. Mail, with a courtesy copy delivered via email to the address indicated, upon the following:

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