Peter Van Tuyn (AK Bar #8911086)
BESSENYEY & VAN TUYN, L.L.C.
310 K St. #200
Anchorage, AK 99501
(907) 278-2000
(907) 278-2004 fax
peter@bvt-law.com
Bvt-law.com

Attorneys for Appellants

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| DENALI CITIZENS COUNCIL,<br><br>Appellant,<br><br>vs.<br><br>ALASKA, DEPARTMENT OF NATURAL RESOURCES, USIBELLI COAL MINE, INC.<br><br>Appellees. | Case No.: 3AN – 10-12552 CI |

**OPPOSITION TO MOTION TO STRIKE**

Denali Citizens Council (Denali Citizens) hereby opposes Appellee Alaska Department of Natural Resource's (DNR) Motion to Strike. DNR focuses its motion on Denali Citizens' argument that DNR's approach to mitigation measures is unconstitutional. Denali Citizens challenged DNR's approach to mitigation measures throughout the administrative process, and the record is thus fully developed on that point. For this, and other reasons as stated below, the Court should deny DNR's motion.

## I. Legal Background

Alaska Statutes 38.05.035(l) provides that

> points on appeal are limited to those presented to the commissioner in the person's administrative appeal or request for reconsideration.

This is a statutory application of the judicially-created doctrine of exhaustion of administrative remedies.

As noted by the United States Supreme Court, the doctrine of exhaustion "is well established in the jurisprudence of administrative law" and has as its "primary purpose ... the avoidance of premature interruption of the administrative process." *McKart v. United States*, 395 U.S. 185, 193 (1969); *see also Eidelson v. Archer*, 645 P.2d 171, 176 (Alaska 1982). Requiring exhaustion can benefit judicial review in that it allows the agency the chance to "make a factual record, or to exercise its discretion or apply its expertise." *Id.* (quotation deleted).

## II. Argument

### *A. Title 38 exhaustion is not a jurisdictional issue*

As an initial matter, DNR is wrong to craft the issue as one that implicates this Court's jurisdiction. DNR Motion to Strike at 1. The Alaska Administrative Procedure Act provides that

> Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

AS 44.62.560. The "applicable rule of court" in this instance is Alaska Rule of Appellate Procedure 602(a)(2), which also includes a 30 day statute of limitations within which appeals from the final decisions of administrative agencies must be filed.

Denali Citizens met these requirements. *See* Opening Brief at page 1 (Jurisdictional Statement). Thus, the Court has jurisdiction over this appeal.

DNR ignores AS 44.62.560 in its motion, referring the Court instead to AS 44.62.330 and AS 38.05.035(l) to support its argument. DNR Motion to Strike at 1. Alaska Statute 44.62.330, however, addresses only the *procedures* to be used in the administrative processes delineated in that section. It does not address jurisdictional issues for other administrative decisions.

Likewise, the exhaustion language that DNR points to in AS 38.05.035(l) is focused, by its plain meaning, on the points that can be raised in an appeal, not whether that appeal can be taken. This language simply codifies in statute the doctrine of exhaustion. *See e.g. Weinberger v. Salfi,* 422 U.S. 749, 765–66 (1975) (a statutory exhaustion requirement is only jurisdictional if it provides "more than simply a codification of the judicially developed doctrine of exhaustion"). That this statute does not address the jurisdiction of the Court to hear this appeal can also be understood through the language of other statutes. For example, on its face, 7 U.S.C. 6912(e), which addresses the issue of exhaustion in appeals of United States Forest Service National Forest Management Act decisions under the federal Administrative Appeals Act, presents much stricter exhaustion language than at issue here:

> **Exhaustion of administrative appeals** Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law *before the person may bring an action in a court of competent jurisdiction* against - (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department.

*Id.* (bold emphasis in original, italics added). Yet even with this strict language, the Ninth Circuit Court of Appeals has held that this statute provides a jurisprudential consideration, but not a jurisdictional limitation. *See McBride Cotton and Cattle Corp. v. Veneman,* 290 F.3d 973, 980 (9th Cir.2002) (concluding that section 6912(e) is non-jurisdictional); *see also Ace Prop. and Cas. Ins. Corp. v. Fed. Crop Ins. Corp.,* 440 F.3d 992, 999-1000 (8th Cir.2006) (same for 8th Circuit).[1]

### *B. Denali Citizens Raised in the Administrative Process the Legality of DNR's Approach to Mitigation Measures*

Denali Citizens' questioned argument is that DNR's decision to put off whether and how to apply important mitigation measures until later phases violates the Alaska Constitutional principles that are intended to safeguard the public interest. *See* Denali Citizens Opening Brief at Section VII.B.2. This argument is based on DNR's increasingly weak treatment of mitigation measures through the administrative process, which Denali Citizens objected to at each and every opportunity.

As DNR notes, Title 38 limits this Court's review to issues that were "presented to the commissioner in the person's administrative appeal or request for reconsideration." DNR Motion to Strike at 1. At every stage of the administrative process Denali Citizens

---

[1] While the Fifth Circuit Court of Appeals has held this statute to be jurisdictional in nature it did so based on the much stricter – indeed what it found to be "explicit" -- language of that statute. *See Bastek v. Federal Crop Ins. Corp.,* 145 F.3d 90, 94-95 (2d Cir.1998).

expressed its concern with and opposition to lax or missing mitigation measures. *See* Exc. 50-53 (comments on Usibelli lease applications); Exc. 127 (comments on scoping for "best interest" finding); Exc. 320 (comments on preliminary "best interest" finding); Exc. 589-91 (comments and request for reconsideration on final "best interest" finding).

DNR was thus well aware of Denali Citizens' concerns about mitigation measures, and its view that DNR's treatment of mitigation measures was improper and illegal. Indeed, in its final decision DNR exhaustively defended its final finding. Exc. 596-606.

To be sure, the factual context of DNR's actions and justifications through the administrative process is critical to the argument. And as described above and in Denali Citizens Opening Brief, that factual context is amply provided in the record. To require more from Denali Citizens would be tantamount to requiring the full development of all legal arguments in the administrative process, something which is far beyond the capacity of most citizens. But for those members of the public who can and do hire attorneys to guide their every move, a requirement that such legal expertise be displayed throughout administrative decision-making processes would substantially impair the ability of the public to meaningfully participate in those processes, as well as further insulate agency decisions from the checks and balances accorded by judicial review.

As the Ninth Circuit has stated, parties fulfill the exhaustion requirement if their appeal "provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Native Ecosystems v. Dombeck,* 304 F.3d 886, 899 (9th Cir.2002). "Plaintiffs need not state their claims in precise legal terms, and need only raise an issue 'with sufficient clarity to allow the decision maker to understand and

rule on the issue raised, but there is no bright-line standard as to when this requirement has been met.'" *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1065 (9th Cir. 2010) (quoting *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 968 (9th Cir. 2006); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899-900 (9th Cir. 2002) (citations omitted) (""we hold that the plaintiffs exhausted their administrative remedies as to the issues they raise before us. This result comports with the purposes of the exhaustion requirement of avoiding premature claims and ensuring that the agency be given a chance to bring its expertise to bear to resolve a claim. ... Requiring more might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms rather than precise legal formulations").[2]

Consequently, the doctrine of exhaustion should not bar the Court's consideration of this issue.[3]

---

[2] Further, the situation in this case is far from the "sandbagging" that is threatened when an issue has not been raised before the agency. *See Forest Guardians v. United Stated Forest Service*, 641 F.3d 423, 431 (10th Cir. 2011) (In practice, "the requirement that plaintiffs exhaust their administrative remedies ... greatly minimizes the threat of sandbagging"—i.e., the concern that plaintiffs will "shirk their duty" to raise claims before the agency, "only to present new evidence at trial that undermines" the agency's decision.) This is far from the situation here – the record is fully developed and no new evidence is presented in support of the argument. *See* Denali Citizens Opening Brief at Section VII.B.2.

[3] DNR may also be arguing that Denali Citizens is prevented from raising a constitutional issue with DNR's treatment of mitigation measures because of alleged deficiencies in the notice of appeal. *See* DNR Motion to Strike at 2-3. To the extent it makes this argument, DNR is wrong. Notices of appeal should be interpreted in light of the underlying record, *see Anderson v. State, Commercial Fisheries Entry Comm'n*, 654

### C. Principles of Judicial Economy Support Review

Full briefing and decision on the question whether DNR's approach to mitigation measures is constitutional is also supported by principles of judicial economy. Should the Court grant DNR's motion, and rule against Denali Citizens on its other arguments against DNR's final decision, Denali Citizens would have an appeal as of right to the Alaska Supreme Court, which would then be faced with the question whether it was appropriate for this Court to strike the argument. If it found in favor of Denali Citizens, it would then have to remand the matter back to the superior court for consideration of the argument on its merits, thus extending the costs to both the court and the parties.

In contrast, there is little prejudice to requiring DNR to respond to the argument in its principle brief. With full briefing, the superior, and potentially Supreme, courts would have a full record on which to resolve all pending matters in this lawsuit.

For this reason as well as those presented above, the Court should deny DNR's motion. *See e.g.*, Alaska Rule of Appellate Procedure 521 ("These rules are designed to facilitate business and advance justice"); Alaska Rule of Civil Procedure 1 ("These rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding."); *compare Gates v. City of Tenakee Springs*, 822 P.2d 455, 463 (Alaska1991) (court providing guidance on briefed issues for purposes of judicial economy); *King v State, Department of Natural Resources*, 742 P.2d 253, 256 (Alaska 1987) (prejudice to state relevant factor in exhaustion inquiry).

---

P.2d 1320, 1322 (Alaska 1982), and as discussed above, that record is as complete as can reasonably be expected on this point.

**Conclusion**

Denali Citizens consistently raised before DNR the practical and legal problems associated with DNR's increasingly weak approach to applying mitigation measures to the Healy Basin Gas Only Exploration License and the record is fully developed on this issue. For this reason, and for reasons of judicial economy, the Court should deny DNR's motion and thus elicit full briefing on the argument.

Dated: September 20, 2011

Respectfully submitted,

PETER VAN TUYN
Alaska Bar #8911086
Bessenyey & Van Tuyn, L.L.C.
310 K St., #200
Anchorage, AK 99501
(907) 278-2000
Attorney for Denali Citizens Council

Peter Van Tuyn (AK Bar #8911086)
BESSENYEY & VAN TUYN, L.L.C.
310 K St. #200
Anchorage, AK 99501
(907) 278-2000
(907) 278-2004 fax
peter@bvt-law.com

Attorneys for Appellants

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | |
|---|---|
| DENALI CITIZENS COUNCIL,<br><br>Appellant,<br><br>vs.<br><br>ALASKA, DEPARTMENT OF NATURAL RESOURCES, USIBELLI COAL MINE, INC.<br><br>Appellees. | Case No.: 3AN – 10-12552 CI |

**CERTIFICATE OF SERVICE**

I hereby certify that Appellant's OPPOSITION TO DNR'S MOTION TO STRIKE was served by electronic and first class mail on the following parties:

Rebecca Kruse
Assistant Attorney General
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501-1994

direct: 907-269-3036
fax: 907-269-8644
becky.kruse@alaska.gov

Attorney for Appellee Alaska Department of Natural Resources

Kyle Parker
David Mayberry
Crowell & Moring LLP
1029 W. Third Ave., Suite 402
Anchorage, AK 99501
telephone: (907) 865-2600
fax: (907) 865-2680
kparker@crowell.com
dmayberry@crowell.com

Attorneys for Appellee Usibelli Coal Mine, Inc.

Date: September 20, 2011