

STATE OF ALASKA

BEFORE THE DEPARTMENT OF NATURAL RESOURCES

Before Commissioner: Tom Irwin

Appeal by Exxon Mobil Corporation )  
BP Exploration (Alaska) Inc., )  
Chevron USA, Inc., ConocoPhillips )  
Alaska, Inc. and Exxon Mobil Oil )  
Corporation, Working Interest Owners, )  
of the Notice of the Director, )  
Division of Oil and Gas, dated )  
August 4, 2008, entitled Lease )  
Expiration Due To Elimination From )  
Unit for Oil and Gas Leases )  
ADL 28380 et al. )

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VOLUME I  
PREHEARING CONFERENCE

October 10, 2008  
9:00 o'clock A.m.  
Anchorage, Alaska

BEFORE: G. NANETTE THOMPSON, HEARING OFFICER

APPEARANCES:

FOR BP EXPLORATION ALASKA,  
INC.:

MR. BRADFORD G. KEITHLEY  
Perkins Coie, LLP  
1029 West Third Avenue,  
Suite 300  
Anchorage, Alaska 99501

MS. SUSAN C. ORLANSKY  
Feldman, Orlansky & Sanders  
500 L Street, Suite 400  
Anchorage, Alaska 99501

FOR EXXON MOBIL CORP:

MR. WILLIAM B. ROZELL  
Attorney at Law  
P. O. Box 20730  
Juneau, Alaska 99802

APPEARANCES :

FOR EXXON MOBIL CORP:

MR. DOUGLAS J. SERDAHELY  
MR. KEVIN D. CALLAHAN  
Patton Boggs, LLP  
601 West Fifth Avenue,  
Suite 700  
Anchorage, Alaska 99501

MR. C. STEPHEN LUNA  
Law Department  
Exxon Mobil Corporation  
800 Bell Street, Suite 1707J  
Houston, Texas 77002

FOR CHEVRON USA:

MR. STEPHEN E. ELLIS  
Delaney Wiles, Inc.  
1007 West Third Avenue,  
Suite 400  
Anchorage, Alaska 99501

MR. P. JEFFERSON BALLEW  
Thompson & Knight, LLP  
One Arts Plaza  
1722 Routh Street,  
Suite 1500  
Dallas, Texas 75201

FOR CONOCOPHILLIPS:

MR. SPENCER C. SNEED  
Dorsey & Whitney, LLP  
1031 West Fourth Avenue,  
Suite 600  
Anchorage, Alaska 99501

1 P R O C E E D I N G S

2 (On record - 9:00 a.m.)

3 HEARING OFFICER THOMPSON: Good morning. We're on record  
4 in a Prehearing Conference for a series of lease appeals. I'm  
5 not going to read out the lease numbers, but there are 31  
6 leases which were terminated by decision of Kevin Banks,  
7 Director of the Division of Oil and Gas which have been  
8 appealed by the parties sitting here today. This appeal is  
9 pending before the Commissioner of Natural Resources, Tom  
10 Irwin, who is not here today.

11 Speaking for the record is -- my name is Nan Thompson. I  
12 was appointed by Commissioner Irwin as the Hearing Officer in  
13 this matter. My role is procedural. I will resolve this or  
14 work on this case much as I did in the Remand Remedy Proceeding  
15 that many of you, if not all of you, are quite familiar with  
16 that was conducted earlier this year. I don't make substantive  
17 decisions in that role. My role is to frame the issues for  
18 Commissioner Irwin. He is the -- he will decide them.

19 And the procedure today -- the purpose of the hearing  
20 today is to address the issues identified in the letter dated  
21 September 9th. I received this morning from Mr. Keithley an  
22 outline which was helpful. I appreciate -- and I will go  
23 through it in that order. I've amended it somewhat to reflect  
24 the notes I made before this morning, but that's a good start,  
25 I appreciate that.

1 With that a preliminary note had asked the parties to  
2 identify themselves. I know that a sign-in sheet has been  
3 passed around. I would intend to use the E-mail addresses on  
4 that as a notification list much as I did in the last procedure  
5 unless you tell me otherwise or if there's anybody else you  
6 want added as -- to receive E-mail notice of any communications  
7 from me regarding this proceeding you can add them to that list  
8 as you leave or when we take a break later on this morning.

9 So I'll start with Mr. Sneed.

10 MR. SNEED: Spencer Sneed of Dorsey & Whitney representing  
11 ConocoPhillips.

12 HEARING OFFICER THOMPSON: Okay.

13 MR. KEITHLEY: Bradford Keithley of Perkins Coie and Susan  
14 Orlansky of Feldman & Orlansky representing BP Exploration  
15 Alaska, Inc.

16 MR. ELLIS: Steve Ellis with Delaney Wiles representing  
17 Chevron.

18 MR. BALLEW: Jeff Ballew with Thompson & Knight, Dallas  
19 representing Chevron.

20 MR. CALLAHAN: Kevin Callahan, Patton Boggs for Exxon  
21 Mobil.

22 MR. LUNA: Stephen Luna with Exxon Mobil.

23 MR. SERDAHELY: Doug Serdahely with Patton Boggs for Exxon  
24 Mobil.

25 MR. ROZELL: And William Rozell for Exxon Mobil.

1 HEARING OFFICER THOMPSON: Is there anyone here today  
2 representing any of the Minority Interest Holders in these  
3 leases? Let the record reflect that there is no one.

4 Did any of you have communication with any  
5 representative -- legal representative for the Minority  
6 Interest Holders about appearing or not appearing  
7 at the Prehearing Conference today?

8 MR. ROZELL: I'm sorry, I didn't quite hear what you said?

9 HEARING OFFICER THOMPSON: Did any of you have a  
10 communication with any legal representative for the Minority  
11 Interest Holders about this Prehearing Conference today  
12 appearing or not appearing?

13 MR. KEITHLEY: Not for BP.

14 MR. ROZELL: Not that I'm aware of, no.

15 HEARING OFFICER THOMPSON: Okay, all right, then we'll --  
16 we will proceed. The agenda that was forwarded to me this  
17 morning listed as the first item threshold issues. There was a  
18 motion filed yesterday for Appointment of Independent Hearing  
19 Officer. That is pending before the Commissioner and he will  
20 issue a ruling on that next week.

21 A sub-bullet on your outline was scheduling further  
22 briefing and hearing if needed and I wanted to provide the  
23 parties with the opportunity to tell me if you think further  
24 briefing beyond the motion that was filed is necessary.

25 MR. ROZELL: I think we're satisfied with the filing

1 unless something else is put into the record, but if that's --  
2 that's the only thing going to the Commissioner we're happy  
3 with that.

4 HEARING OFFICER THOMPSON: Okay. Then the Commissioner  
5 will issue a ruling on that in writing and the timing depends  
6 on, you know, what else we do this morning when the -- when the  
7 post-hearing -- post-prehearing order comes out as well.

8 There was also listed on that a bullet that said pending  
9 Request for Stay of lease termination orders. And this  
10 question can probably be best addressed to Mr. Keithley. In  
11 looking for that this morning what's the filing date of that?

12 MR. KEITHLEY: It's in the appeals. It's a part of the  
13 appeals.

14 HEARING OFFICER THOMPSON: Which appeal?

15 MR. KEITHLEY: All of the appeals.

16 HEARING OFFICER THOMPSON: Okay, okay. So it's embedded  
17 in your filings, it's not a separate.....

18 MR. KEITHLEY: Correct.

19 HEARING OFFICER THOMPSON: Okay.

20 MR. ROZELL: Yeah, there are two places it's mentioned in  
21 the appeals.

22 HEARING OFFICER THOMPSON: Okay. I'm familiar with that.  
23 I just wanted to make sure that there wasn't a separate filing  
24 that I couldn't find this morning.

25 MR. KEITHLEY: No. No, there's not a separate filing.

1 It's in the appeals.

2 HEARING OFFICER THOMPSON: Okay. And you -- again,  
3 scheduling briefing and hearing on request, is there a need on  
4 your part for any further -- do you want to file another brief  
5 on that issue? Are you asking to?

6 MR. ROZELL: Yeah, I think we should file a brief on that  
7 issue, yes.

8 MR. KEITHLEY: And likely we'll file affidavits with that  
9 brief -- with that brief and if the Commissioner -- as a  
10 results of the affidavits, if he likes to have a hearing that  
11 would be acceptable to us.

12 HEARING OFFICER THOMPSON: Okay. So that -- for -- on  
13 that issue -- the stay issue, we need to set a filing date for  
14 the briefs, the first of many dates we'll be looking at this  
15 morning. Since it's been addressed before do you have a  
16 proposed due date for your additional briefing and affidavits  
17 on that issue?

18 MR. KEITHLEY: Two weeks.

19 MR. ROZELL: Two weeks is -- today (ph).....

20 HEARING OFFICER THOMPSON: Two weeks from today?

21 MR. KEITHLEY: Yes.

22 MR. ROZELL: Yeah.

23 HEARING OFFICER THOMPSON: So I don't have a.....

24 MR. ROZELL: I'm supposed to be gone that day thought. I  
25 don't know if it will happen, but e-mail and stuff -- all

1 right, so that will be the 24th then?

2 HEARING OFFICER THOMPSON: Okay. Okay. I'm going to do  
3 all of these tentatively now. Subject to how other dates are  
4 set later in the Prehearing Conference there will be a written  
5 order issued after this Prehearing Conference that summarizes  
6 the results, but for purposes of scheduling that now, two  
7 weeks. Although that one, the ruling on that may impact other  
8 things, but we'll see as we go forward.

9 Disputed factual issues and evidence that will be offered,  
10 this is the -- verbatim from the first item in the order  
11 setting Prehearing Conference Order. It would be most helpful  
12 to me to have -- to hear from the parties individually on this  
13 issue. And, again, the question is what factual issues you  
14 think the Commissioner needs to hear evidence on.

15 MR. KEITHLEY: May I approach.

16 HEARING OFFICER THOMPSON: Go ahead.

17 MR. KEITHLEY: Anticipating you might want something.

18 HEARING OFFICER THOMPSON: Is this -- Mr. Keithley, this  
19 is presented on behalf of all of the appellants or just BP?

20 MR. KEITHLEY: It's presented on behalf of all the  
21 appellants, Your Honor.

22 HEARING OFFICER THOMPSON: Okay, good, that's helpful.  
23 Okay. It would help me in terms of framing this hearing going  
24 forward to better understand some of what you've identified  
25 here. And it also strikes me that some of these are legal

1 issues rather than factual, but I have a thought on that, but I  
2 wanted to offer for your consideration. And I'm not going to  
3 ask you to answer right now unless you're ready to, give you a  
4 break later on and you can answer it which is, some of these,  
5 for example, the standard for capable of producing is partly a  
6 legal and partly a factual issue and in order to resolve that  
7 or present evidence on that it might be helpful to the parties  
8 to know -- have a clear statement from the Commissioner about  
9 the legal standard he believes applies.

10 In order to facilitate that I -- again, I'm not sure this  
11 is going to work. This is my thought this morning that it  
12 would be -- might be helpful to the parties to have him issue a  
13 statement about what he thinks DNR's position is or the  
14 standard he will be applied (sic), give the parties the  
15 opportunity to brief that and convince him that a different  
16 standard should be applied and try and resolve that.

17 Again, I'm thinking of this case like you would a case in  
18 court where you frame the factual issues by first resolving the  
19 legal issues. And it strikes me that many of what you've  
20 identified here on this list are factual issues that could be  
21 better framed if they were presented within the context of a  
22 specific legal standard.

23 MR. KEITHLEY: Your Honor, if I might respond?

24 HEARING OFFICER THOMPSON: Um-hum. (Affirmative)

25 MR. KEITHLEY: We would never decline an opportunity for

1 the Commissioner to make clearer what's in his mind so if  
2 there's some opportunity to do that, that would be great.

3       However, in our view this case is really a contractual  
4 interpretation case and it's a case about what the parties  
5 intended at the time they entered into the contract as well as  
6 the custom and practice of the parties, the conduct of the  
7 parties and the custom and practice of the terms in the  
8 industry as they go forward. It's not -- this isn't a  
9 regulatory case.

10       The leases are clear that the only regulations that apply  
11 are those in effect at the time the lease was entered into.  
12 And the case law is clear, we believe, that the lease formed a  
13 contract between the State and the lessee that can only be  
14 modified by agreement of both parties going forward.

15       So it's -- what the Commissioner believes now is useful.  
16 I mean, we -- as I said, we would never decline an opportunity  
17 to understand what's in his mind, but it's really irrelevant to  
18 this case because this case is about what the contract meant at  
19 the time it was entered into and how it has been administered  
20 and understood by the parties during the course of the  
21 contract.

22       So that's why all of these, in fact, are -- we believe,  
23 are factual issues because it's a factual understanding of what  
24 these terms means -- or what these terms meant -- were meant by  
25 the parties at the time they entered into the contract and how

1 the parties have conducted themselves relevant to these terms  
2 as they've gone through the course of the contract.

3 HEARING OFFICER THOMPSON: Thank you, that's helpful.  
4 While it's clear from this filing this morning and your  
5 comments that the parties view this as fundamentally a  
6 contractual dispute, I don't know that the Commissioner shares  
7 that view. And if that -- and I just don't know. It sounds  
8 like it would be very helpful to have that clarified or framed.

9 Again, I think in the interests of having a hearing that  
10 builds a full record on issues that are relevant to what must  
11 finally be decided, I would suggest or I'm going to see what I  
12 can do, again, looking at these issues again and talking to the  
13 Commissioner to try to frame what is presented factually in a  
14 way that would be most helpful in developing a full record.

15 MR. SNEED: Are you suggesting that the Commissioner's  
16 position would preclude us from presenting evidence on what we  
17 believe to be a factual issue or merely providing some insight  
18 so as we prepare our factual presentation we have a sense what  
19 the other contention is? We would not want to be precluded  
20 from presenting evidence if you're talking about narrowing the  
21 issue.

22 HEARING OFFICER THOMPSON: The purpose is to narrow the  
23 issues. In terms of precluding, I'm not going to make any  
24 rulings today and I'm not going to make any rulings in the  
25 absence -- I wouldn't make them anyway, that's the

1 Commissioner's job.

2 I'm trying to understand what it is -- what facts you  
3 intend -- upon which you intend to present evidence and  
4 suggesting that your choice of what you present might be guided  
5 or best framed by an understanding of the legal framework  
6 within which those facts will be evaluated.

7 So to the extent that understanding the legal framework  
8 that the Commissioner will be applying would be helpful, I'm  
9 offering that that -- there may be a way to have that presented  
10 and give you an opportunity to argue differently before.

11 I think you're -- so that's a long way of saying I think  
12 what you're suggesting is premature at this point, Mr. Sneed,  
13 but you'll have plenty of opportunity to argue about this  
14 later.

15 MR. SNEED: Guidance is welcome, but preclusion is --  
16 would not be helpful we believe.

17 HEARING OFFICER THOMPSON: Your comments are noted for the  
18 record.

19 MR. SNEED: Okay.

20 MR. BALLEW: And if I might add, there is always the  
21 possibility we might agree and then that might make the  
22 presentation of some of the evidence unnecessary.

23 HEARING OFFICER THOMPSON: That's exactly where I'm  
24 heading. I'm trying to make this as cle- -- the record as  
25 clear as possible and to give the parties a good understanding

1 of what it is that would be helpful to hear in order to make  
2 the case go smoother.

3 MR. ROZELL: In the sense that I don't want to disrupt  
4 where we're going on this, but I want to move back to just  
5 state an objection in connection with the independent Hearing  
6 Officer issue.

7 Now you said you won't be making substantive rulings, but  
8 I think it's, kind of, a slippery slope. We're not clear how  
9 much you will be consulting with the Commissioner, whether  
10 you'll be preparing findings of fact and conclusions of law if  
11 there's a draft for him to consider. You'll be making rulings  
12 that will have an impact.

13 As we get more into the factual issues I become more  
14 concerned that we're -- we're dealing with issues where -- we  
15 certainly have no complaint about your role with DNR. You've  
16 been an important player for them in preparing their positions  
17 and working on the case, but as we said in the papers, it's not  
18 a personal issue. We just don't think that someone who has  
19 played as an important a role as you have should be sitting as  
20 the Hearing Officer.

21 So I want to make it clear that we're not waiving that  
22 objection and, you know, I think really we shouldn't be doing  
23 some of the discussion we're having this morning until there's  
24 a ruling, but that's for purposes of making the record on that  
25 point.

1 HEARING OFFICER THOMPSON: You've been very clear both in  
2 your written comments and your oral comments this morning and  
3 it's noted for the record.

4 MR. SNEED: If I might, can we have an understanding that  
5 there is throughout the rest of this morning there's no waiver  
6 of these objections to -- to you conducting the hearing?

7 HEARING OFFICER THOMPSON: Certainly, Mr. Sneed.

8 Some of these issues that you have identified I -- it  
9 would be helpful to me, again, to understand the scope of this  
10 hearing and the evidence that's likely to be presented to know  
11 what it is you're thinking of. I don't know whether this is  
12 just a list or you have specific witnesses and timing available  
13 -- or timing just identified with these witnesses.

14 MR. KEITHLEY: We're too early in the process, Your Honor,  
15 to have identified witnesses. Some of these are going to  
16 require expert witnesses about the meaning of the term in the  
17 industry, some of them to the extent they can be found will  
18 involve documents contemporaneous to the drafting of the lease.

19 Some of them will involve the custom and practice that  
20 have gone on between the Division and the Department and the  
21 lessees during the course of the leases so we really -- we have  
22 not developed a witness list yet or identified the documents  
23 that we would submit at a hearing.

24 HEARING OFFICER THOMPSON: So if I was -- for example,  
25 under number 3, the second bullet talks about testimony of

1 parties involved in the drafting and execution of the leases.  
2 Is this identified 'cause you think that that might be  
3 something that would be helpful or because you have a specific  
4 idea and a list of witnesses already?

5 MR. KEITHLEY: We have a specific idea of the category of  
6 witnesses we'll be looking for. We don't have a list of  
7 specific witnesses.

8 HEARING OFFICER THOMPSON: Okay. And the same with regard  
9 to what's the fourth bullet expert testimony, I think I  
10 understood your comments a moment ago to suggest that you think  
11 you will be hiring experts, but you haven't retained them so  
12 you don't -- can't tell me, for example, how many days I should  
13 be thinking about for expert testimony?

14 MR. KEITHLEY: Yes, ma'am. We have -- in -- when we get  
15 down to item six which is the time and location of the hearing,  
16 we have given some thought about as a block how long we think  
17 this may take, but we have not specifically identified -- this  
18 isn't -- we aren't close enough to trial to be able to have  
19 identified the specific witnesses. We aren't far enough down  
20 the road yet to have identified the specific witnesses and  
21 evidence.

22 HEARING OFFICER THOMPSON: Okay. And with regard to  
23 what's the third bullet under number 3, documents and testimony  
24 related to the meaning given relevant terms over the years  
25 during the -- through the course of dealing with parties to the

1 agreement. Are you suggesting that there are documents and  
2 tes- -- or documents that are not already in the record that  
3 you will be designating?

4 MR. KEITHLEY: We haven't gone through -- in the PTU  
5 records, you mean?

6 HEARING OFFICER THOMPSON: It depends on what you mean by  
7 the PTU record?

8 MR. KEITHLEY: Well, as far as I know there's no record  
9 for the lease terminations yet other than the Director's  
10 Decision. There is a record that sits out there for the  
11 termination of the unit, but I've not understood that that  
12 record is automatically being incorporated into this  
13 proceeding.

14 HEARING OFFICER THOMPSON: Well, that's a question we need  
15 to address this morning that I was getting at with my question  
16 which is do the parties -- would it be helpful or are you  
17 suggesting that we take one of the factual records that has  
18 been developed in one of the parallel proceedings and use it in  
19 this -- is that -- you don't have -- again, you don't have to  
20 tell me today, but it strikes that the -- many of the same, if  
21 not all the same documents might be the record. If there's one  
22 -- if it's already been numbered, if it's a system folks are  
23 familiar working with that might save us some time here.

24 MR. KEITHLEY: Might save us a lot of time. I'm not  
25 suggesting that there's one record that contains all the

1 documents. I think there are going to be documents that will  
2 be relevant to these issues that are not in the -- in any of  
3 the existing PTU records, but one or more of the records  
4 depending upon how we're counting them might be helpful as  
5 providing a base for this proceeding and then adding on  
6 additional documents as we go.

7 MR. ROZELL: Yeah, I concur that I think we may want to  
8 draw extensively on the existing records and (ph) other  
9 proceedings because that has a lot of background, but we  
10 haven't dealt before with the lease, its drafting and  
11 interpretation in those proceedings and I think that's the  
12 primary area where we think there will be new information.

13 HEARING OFFICER THOMPSON: Okay.

14 MR. KEITHLEY: There certainly are terms in the lease that  
15 are not included in the Unit Agreement and -- and as a  
16 result.....

17 HEARING OFFICER THOMPSON: Right.

18 MR. KEITHLEY: .....there's going to be testimony or  
19 documents relevant to those terms that won't be in the Unit  
20 Agreement proceeding.

21 HEARING OFFICER THOMPSON: Well, it's a question in my  
22 mind whether we -- you want to start with one of the existing  
23 records and develop or are you going to develop something  
24 wholly new and, again.....

25 MR. KEITHLEY: When you said numbering Suzie smiled and I

1 agree, you know, if we can -- if we can cut short numbering  
2 we're going to ahead of the game.

3 HEARING OFFICER THOMPSON: And the last bullet under  
4 number 3 I just don't understand what you're suggesting. I  
5 don't know who the author of this document is, but documents  
6 and testimony related to the activities relevant to the  
7 contractual provisions which have been conducted. I need to --  
8 I don't understand what you're suggesting.

9 MR. KEITHLEY: I think that's -- I'm the author so any  
10 confusion is mine -- mine created and it relates to the course  
11 of conduct between the parties. For example, it's no great  
12 secret we believe there's a course of conduct with respect to  
13 what's a well capable of producing oil or gas in paying  
14 quantities and we believe that course of conduct has continued  
15 over a substantial period of time and we believe that forms the  
16 understanding of the meaning of that term in the lease.

17 MR. ROZELL: I think we have evidence about the course of  
18 conduct and evidence about what's actually been the activity on  
19 the leases -- the different leases and so. Obviously we have  
20 factual differences because we have 31 leases, but I think  
21 we're talking about both the course of conduct and also factual  
22 information about (ph).....

23 MR. KEITHLEY: Thanks.

24 MR. ROZELL: .....activities that have been conducted.

25 MR. KEITHLEY: That's fair.

1 HEARING OFFICER THOMPSON: Okay. The third bullet on your  
2 response filed this morning, Mr. Keithley, was hearing and  
3 decisional procedures. Again, I reiterate the guidance  
4 provided at the beginning of this proceeding which is my role  
5 is similar to what it was in the Remand Remedy proceeding. I'm  
6 not here to make substantive decisions.

7 I'm here to try and frame the case and make sure that the  
8 record is fully developed and I don't -- I'm not going to offer  
9 guidance or answer any other questions below although we will  
10 take those as questions that the Commissioner may address in  
11 his -- the order that will follow this Prehearing Conference.

12 MR. ROZELL: You have mentioned the Remand proceeding and  
13 that's one thing we wondered, obviously there are other issues  
14 that are raised on the other bullets, but as far as general  
15 structure and what you envision as -- assuming you're  
16 continuing as Hearing Officer, you would preside as you did at  
17 the Remand proceeding and the Commissioner will or will not  
18 attend, do you know?

19 HEARING OFFICER THOMPSON: He will.

20 MR. ROZELL: He will attend.

21 HEARING OFFICER THOMPSON: That -- he -- yes.

22 MR. ROZELL: And we conduct testimony.....

23 HEARING OFFICER THOMPSON: Depending again -- I say that  
24 subject to scheduling and how things work out, but.....

25 MR. ROZELL: I understand.

1 HEARING OFFICER THOMPSON: .....it is his plan to attend  
2 as he did at the Remand Remedy proceedings.

3 MR. ROZELL: And we would conduct testimony similar to the  
4 way in which we did in the Remand is we're not locked into this  
5 at this point, but that's the general understanding what we did  
6 last time?

7 HEARING OFFICER THOMPSON: I thin- -- that is the  
8 model.....

9 MR. ROZELL: Okay.

10 HEARING OFFICER THOMPSON: .....subject to discussions --  
11 further discussions about why some other model would be  
12 appropriate. It's not cast in stone at this point, but it's  
13 what internally we're thinking of as the model to start with.

14 MR. SNEED: On framing the issues.....

15 HEARING OFFICER THOMPSON: Um-hum.

16 MR. SNEED: .....would that include drafting proposed  
17 findings of fact, conclusions of law?

18 HEARING OFFICER THOMPSON: At what juncture are you  
19 proposing to do that, Mr. Sneed?

20 MR. SNEED: No, I'm asking when you might do that, whether  
21 you would ever do that in this procedure -- in this process?

22 HEARING OFFICER THOMPSON: We didn't do, you know,  
23 drafting proposed findings. I'm -- I'm not understanding your  
24 question. Are you asking me if -- for clarification of the  
25 role in drafting the final order?

1 MR. SNEED: Yes, would you participate in that?

2 HEARING OFFICER THOMPSON: Again, that -- that's the  
3 Commissioner's decision and the model of the last time which  
4 I'm uncomfortable asking (ph) a question about 'cause that  
5 decision is also under appeal and I don't know if that  
6 particular issue is before Judge Gleason, but, you know, your  
7 question is noted for the record. You want to know whether I'm  
8 going to draft the order, is that it?

9 MR. SNEED: Whether you would -- whether you assist the  
10 Commissioner in drafting the --.....

11 HEARING OFFICER THOMPSON: Okay.

12 MR. SNEED: .....the decision, the findings that you would  
13 made and the conclusions of law or would you communicate orally  
14 with him in assisting in that regard?

15 HEARING OFFICER THOMPSON: Okay.

16 MR. BALLEW: If I may, Your Honor, I think that what Mr.  
17 Sneed just described is a subset of the questions that appear  
18 in the last four bullet points under.....

19 HEARING OFFICER THOMPSON: It is.

20 MR. BALLEW: .....number 3.

21 HEARING OFFICER THOMPSON: And I'm not going to address it  
22 here today. It'll be addressed in the Commissioner's order.

23 MR. BALLEW: That's what I wanted to.....

24 HEARING OFFICER THOMPSON: Yeah.

25 MR. BALLEW: .....make sure that I heard correctly. Thank

1 you.

2 HEARING OFFICER THOMPSON: Yeah. Discovery and scope of  
3 procedures, the question was asked in the Prehearing Conference  
4 Order because we need to understand whether there's a necessity  
5 to set aside some time for discovery in the schedule. What  
6 were you thinking? Are you intending to do any discovery?

7 MR. KEITHLEY: Well, it -- the reason that, that refers to  
8 the prior section is because it really is dependent on what's  
9 going to come into the record. If the record is solely what is  
10 submitted by appellants than we don't need to -- we don't need  
11 discovery on that.

12 If, on the other hand, there are going to be things coming  
13 into the record or things taken into consideration by the  
14 decision maker in the course of making the decision then we  
15 would want discovery with respect to those things.

16 An example -- not to be offensive,.....

17 HEARING OFFICER THOMPSON: Um-hum.

18 MR. KEITHLEY: .....but an example is in the last Order  
19 there was a history provided in the -- in the Order on --.....

20 HEARING OFFICER THOMPSON: Um-hum.

21 MR. KEITHLEY: .....on the Remand -- in the Remand of the  
22 PTU case, there was a history provided of the Unit.

23 HEARING OFFICER THOMPSON: Um-hum.

24 MR. KEITHLEY: The first time the appellants really ever  
25 saw that was in the Order itself and then the way -- the way it

1 was -- we had to deal with it was in the Re hearing to put in  
2 additional facts to deal with that history of the Unit as  
3 described in the Order in the Re hearing.

4 If those types of things are going to come into this  
5 proceeding, if there's going to be a piece of the Order where  
6 the Commissioner or the decision maker recounts the history of  
7 the lease or the history of the conduct, if it's outside the  
8 record that's been provided by the appellants than the  
9 appellants are going to want the opportunity to have notice of  
10 those additional facts, that additional evidence the  
11 Commissioner may be taking into account so that we can provide  
12 -- so that we have an opportunity to respond to it.

13 HEARING OFFICER THOMPSON: It's my understanding that the  
14 history, if I am thinking of the same thing you're referring to  
15 here, is one that was developed based on looking at the large  
16 volume of documents that were designated as part of the record  
17 in that proceeding.

18 CHAIR KETCHUM: It won-.....

19 HEARING OFFICER THOMPSON: So certainly the Order and the  
20 Commissioner's summary of the history was not previously in the  
21 record, that was in his Order, but that was developed looking  
22 at the documents that were part of the record that everybody  
23 had access to and numbered during the proceeding.

24 MR. KEITHLEY: Well, there were some characterizations and  
25 I -- we don't need to go too far down this road, but there were

1 some characterizations of what the Unit owners had or had not  
2 done, whether they had fulfilled obligations or hadn't  
3 fulfilled obligations that were contained in that Order that on  
4 prehearing the owner submitted affidavits that took issues with  
5 that. So I -- you know, the facts on such and such a date  
6 something happened certainly were drawn from the record, but  
7 inferences that said, and they didn't fulfill the obligation  
8 were not drawn from the record. They were inferences that were  
9 drawn by the Commissioner.

10 HEARING OFFICER THOMPSON: Well, that was part of the  
11 Commissioner's decision. Perhaps the discussion could be more  
12 productive if we framed it in the context of what seems like to  
13 me an obvious other source of reference of documents that I'm  
14 not familiar with are all in the record or not and that's the  
15 AOGCC well files. Those are public records that are available  
16 on line, I believe, but you have identified as an issue here  
17 several that relate to status of these wells.

18 What is your position going to be on discovery if there is  
19 -- if you know that the Commissioner will, you know, look at  
20 the publicly available AOGCC files?

21 MR. ROZELL: Well, because of the tremendous volume at the  
22 AOGCC I don't think it's sufficient notice to say we may use  
23 what's at the AOGCC. I think some more specific notice about  
24 what the Commissioner thinks should be part of the record for  
25 consideration is something about which we should be given

1 notice and an opportunity to address those things.

2 HEARING OFFICER THOMPSON: Well, it's somewhat of a  
3 chicken and egg problem because I don't -- without an  
4 understanding of the issues you're disputing, but I think, you  
5 know, I'll provide you with notice here and, again, attempt to  
6 address the issue more specifically in the Commissioner's Order  
7 that follows that certainly since the status of wells is at  
8 issue for some of these leases anyway, they don't all have  
9 wells on them, it strikes me that the AOGCC records on those  
10 wells will be -- the public records, they're at -- I believe  
11 they're all available on line, maybe -- maybe something that  
12 the Commissioner looks at. I don't know so be thinking about  
13 what discovery you may or may not need to conduct as a result  
14 of that.....

15 MR. ROZELL: Let me raise a question because the  
16 proceedings here become unclear. When we had the Prehearing  
17 Conference with respect to the 2007 lease termination  
18 Orders.....

19 HEARING OFFICER THOMPSON: Um-hum.

20 MR. ROZELL: .....one of the questions that came up was  
21 what's the role of the Division, is the Division  
22 (indiscernible), is someone going to prevent -- present a case  
23 because ordinarily what we would expect to be able to have is  
24 if someone was advocating that well data proved something  
25 relevant to our case there would be some submission of that

1 evidence and some testimony about it, some opportunity to cross  
2 exam and some opportunity to rebut.

3 And our concern is that without having that kind of a  
4 procedure, as I think Mr. Keithley mentioned -- what someone  
5 mentioned earlier, the first time we see some of these things  
6 is in the decision as opposed to during the process of leading  
7 to that decision where we'd have a change to address it so, I  
8 guess, I'm looking for clarification again is the Division --  
9 what's the Division's role in this proceeding now?

10 HEARING OFFICER THOMPSON: Mr. Rozell, you articulated  
11 what is the second bullet under number 3 on Mr. Keithley's list  
12 and my answer on that is the same as before which is it's not  
13 my role here to make decisions, provide.....

14 MR. ROZELL: Okay.

15 HEARING OFFICER THOMPSON: .....clarification. I'm here  
16 to gather information. Your concern is noted. It was well and  
17 adeptly noted by Mr. Keithley as well and it will be addressed  
18 in the Commissioner's Order following.....

19 MR. ROZELL: All right.

20 HEARING OFFICER THOMPSON: .....this proceeding.

21 MR. ROZELL: Well, I guess the reason I raise it now is  
22 not asking you to make a ruling necessarily, but to say it has  
23 a bearing on the discovery question and that's why I raise it  
24 at this point.

25 HEARING OFFICER THOMPSON: It does.

1 MR. KEITHLEY: You know, actually if there's going to be a  
2 Prehearing Order -- or an Order subsequent to the Prehearing  
3 that addresses the issues in 3 it may make sense to schedule  
4 another Prehearing after that's issued to address 4 because  
5 without really knowing what the scope of what the  
6 Commissioner's going to consider it's difficult on our part to  
7 identify what discovery we need. I mean, I.....

8 HEARING OFFICER THOMPSON: Yeah, I can appreciate that and  
9 I -- that actually was a bullet I added to your list was  
10 subsequent Prehearing Conferences and we can talk a little bit  
11 further later on this morning whether you want to do that now  
12 or whether you want to wait and have the Order and then have a  
13 -- set up a procedure for scheduling a subsequent hearing.

14 MR. KEITHLEY: I -- in order to give the Commissioner  
15 whatever time he desires to get that Order out why don't we --  
16 why don't we set it up after that Order comes out as opposed to  
17 having it come out on the eve or.....

18 HEARING OFFICER THOMPSON: Right. I would suggest -- I  
19 was going to suggest that we use the e-mail list. After this  
20 morning you can let me know and provide -- you copy everybody  
21 else when you want to set another -- when you're ready to have  
22 another one and we can -- we can set it then because I don't  
23 know -- again, none of us have seen his Order, what's in it.  
24 You're going to want time to frame the issues, but I think we  
25 are going to need at least one more Prehearing Conference.

1 MR. SNEED: If the -- if the Order would in- -- would the  
2 Order include the proposed rules for the proceedings? Am I  
3 understanding this correctly that would be the next step, that  
4 the Commissioner would issue an Order that would lay out the  
5 rules that would govern this proceeding?

6 HEARING OFFICER THOMPSON: Well, I'm not sure I have the  
7 same understanding of rules for proceeding as you do, Mr.  
8 Sneed,.....

9 MR. SNEED: I've got.....

10 HEARING OFFICER THOMPSON: ....but I have -- I've said and  
11 I'll repeat that the issues identified under number 3 on Mr.  
12 Keithley's outline this morning will be addressed. We'll also  
13 address the dates that we've agreed to here this morning. So  
14 far the one I have is the 24th for subsequent briefing on a  
15 request for Stay which the parties have requested.

16 MR. SNEED: Here's my question is, what will be the rules  
17 and how will we know? I see 11 AAC 02.050 (ph) which says the  
18 Department will adopt rules case by case and my question is  
19 what will those -- how will we know what those rules are and  
20 will we have an opportunity to comment on them before they're  
21 adopted?

22 HEARING OFFICER THOMPSON: That's an issue that will be  
23 addressed in the Order.

24 MR. SNEED: Whether we have an opportunity to comment on  
25 the rules?

1 HEARING OFFICER THOMPSON: As well as the rules  
2 themselves.

3 MR. SNEED: Very well, thank you.

4 MR. ROZELL: If I understand what you said though is  
5 the --.....

6 HEARING OFFICER THOMPSON: Mr. Rozell.

7 MR. ROZELL: .....the sequence is we will get a copy of  
8 the Commissioner's decision following this conference here and  
9 then we will be in a position if we think another conference is  
10 appropriate to contact DNR again about scheduling that, is  
11 that.....

12 HEARING OFFICER THOMPSON: Yes. And my suggestion was  
13 that you use -- let me know when you -- when you want another  
14 one when you're ready -- when you're going to be ready. It  
15 would be most helpful if soon after you get the Order you can  
16 get together and say we need a week and then let me know and  
17 I'll work with Commissioner --.....

18 MR. ROZELL: Right.

19 HEARING OFFICER THOMPSON: .....my schedule, Commissioner  
20 Irwin's schedule and set something up.

21 MR. ROZELL: On thing that occurs to me is we may feel a  
22 motion's appropriate to address something in the Commissioner's  
23 ruling. We can't tell now (simultaneous speech).....

24 HEARING OFFICER THOMPSON: Right, I understand.

25 MR. ROZELL: Okay.

1 HEARING OFFICER THOMPSON: You -- there will probably be  
2 more that one motion filed before we're done with this case.

3 Consolidation of appeals, your outline submitted this  
4 morning suggests that you support consolidation of appeals.  
5 And my question is whether that support -- and I'll address --  
6 since you've identify yourself as the author, Mr. Keithley on  
7 this, and invite others to comment as well, all appeals?

8 There are 31 leases at issue here, the issues -- factual  
9 issues certainly with regard to some of these leases may be  
10 different. Are you suggesting that we have one hearing and  
11 that some how in the context of that hearing we figure out how  
12 to distinguish which issues apply to which leases?

13 MR. KEITHLEY: Yes, Your Honor. And I have -- and we are  
14 suggesting that. And I actually have in mind, sort of, a  
15 matrix that will do that. Some of the issues are going to  
16 apply to all the leases. Some of the issues will apply to only  
17 certain of the issues (sic) and I think that in the course of  
18 preparing for the hearing the appellants will be able to  
19 identify which issues apply to which leases, but there is a  
20 commonality of a number of the issues across a number of the  
21 leases --.....

22 HEARING OFFICER THOMPSON: Um-hum.

23 MR. KEITHLEY: .....or across all the leases actually.

24 HEARING OFFICER THOMPSON: And I take it by your comments  
25 you've starting working on your matrix, but that's not

1 something that you're prepared to discuss today or present  
2 today?

3 MR. KEITHLEY: Yeah, it's right here, it's not even on  
4 paper and it certainly hasn't been discussed with -- among the  
5 appellants so that's right, we're not prepared today.

6 HEARING OFFICER THOMPSON: It's just, I -- going forward  
7 it's something we're going to need to resolve in order to keep  
8 the record clear in the proceeding and it would be helpful -- I  
9 haven't -- I don't know, but we need to figure out a process at  
10 the hearing to make the record clear about which issues apply  
11 to which leases.

12 For example, again, wells. There's wells on some leases,  
13 there's not, there's wells in different status on some leases  
14 and not and if we can figure out a process that won't be  
15 cumbersome that will allow us to have a clear record about  
16 which -- which facts -- which leases the factual evidence is  
17 presented on.

18 For example, it strikes me that there's going to be some  
19 evidence that may apply to only one lease.

20 MR. KEITHLEY: I appreciate that, Your Honor, and I think  
21 as we approach the hearing we can have a Prehearing Conference  
22 if the -- the parties can submit something in an effort to try  
23 to clarify that and if it's not clear we can have a Prehearing  
24 Conference to clarify it.

25 HEARING OFFICER THOMPSON: All right. You've proposed

1 January 15th. And there are -- under the first bullet there  
2 are a couple of subs. Are you suggesting -- and this gets back  
3 to our subsequent Prehearing Conferences, you probably --  
4 significant time required to identify, prepare evidence,  
5 identify, coordinate, schedule other witnesses, blah, blah,  
6 blah, is this.....

7 MR. KEITHLEY: Blah, blah, blah.....

8 HEARING OFFICER THOMPSON: I was expecting something else,  
9 too. I was filling in with the third bullet that you didn't  
10 have. Was the notation of the significant time required in  
11 which you're going to be doing offered to suggest that these  
12 are deadlines that are -- there's certainly matters that need  
13 to be dealt with prehearing. I'm just trying to figure out  
14 what deadlines we need to set in the order. Identify and  
15 prepare evidence concerning past matters, you know,.....

16 MR. KEITHLEY: Well, it -- I -- what we've envisioned,  
17 what appellants have envisioned is a proceeding much like the  
18 last one which would be a live hearing at which we would submit  
19 evidence through witnesses and through the submission of  
20 documents and we'd be prepared to go on January 15th with that.  
21 I don't think that we have anticipated any prior deadlines by  
22 which we would do certain things.

23 HEARING OFFICER THOMPSON: Well, the only prior deadlines  
24 I at this point think you might have are briefing deadlines.  
25 We've talked about one.....

1 MR. KEITHLEY: Right.

2 HEARING OFFICER THOMPSON: .....already. I would be  
3 surprised if there's not a few others before we're -- we're at  
4 hearing. I think they might be helpful.

5 MR. KEITHLEY: Well, 1 and 2 were simply to explain  
6 January 15th. They weren't intended --.....

7 HEARING OFFICER THOMPSON: Okay.

8 MR. KEITHLEY: .....they weren't intended to identify any  
9 sub- -- sub-deadlines.

10 HEARING OFFICER THOMPSON: Okay. And I don't know about  
11 the Commissioner's availability, but I appreciate the  
12 suggestion of a date and we'll see if we can work with that.

13 With regard to the hearing time, it would help me to  
14 understand what the basis for your estimate of two weeks was?

15 MR. KEITHLEY: It's the -- and, again, this is at a  
16 preliminary stage, but looking at the number of issues, looking  
17 at the potential number of witnesses that may speak to those  
18 issues, looking at -- and let me correct one thing that I said  
19 earlier, the fifth bullet under 3 on the disputed factual  
20 issues, Mr. Rozell understood better than I did if -- if --  
21 that bullet is to speak to the activities that have been  
22 conducted on the leases during the -- during the history of the  
23 leases. It is to -- to identify the witnesses that are going  
24 to speak to that and to prepare testimony and present testimony  
25 and exhibits that -- and documents that speak to that, so it's

1 not a -- I can't say that we've got 10 witnesses that we've  
2 identified and we would assume each one is going to take a day.  
3 It's looking at the totality of the number of issues and the  
4 number of witnesses that may need to speak to those issues.

5 HEARING OFFICER THOMPSON: So would it be fair to say that  
6 this is your reasonable guess at this juncture depending  
7 on.....

8 MR. KEITHLEY: Absolutely.....

9 HEARING OFFICER THOMPSON: Okay.

10 MR. KEITHLEY: .....fair to say.

11 HEARING OFFICER THOMPSON: Okay. All right. Well, I'll  
12 try and see what we can do. That's a large block of time for  
13 the Commissioner's schedule and the second half of January is  
14 -- that's right after the Legislature starts so it may be more  
15 difficult to get -- it may be difficult if not impossible to  
16 get two weeks of Commissioner's time then, but again, I'll work  
17 on that and see what I can do and let you know.

18 MR. KEITHLEY: Thank you.

19 HEARING OFFICER THOMPSON: RCA or similarly equipped  
20 hearing room. I assuming what you mean -- the reference to  
21 that hearing room is to both size and the recording equipment  
22 that's there?

23 MR. KEITHLEY: And the layout, the layout of the room with  
24 the witness box and the Commissioner.....

25 HEARING OFFICER THOMPSON: Okay.

1 MR. ROZELL: I would request you remove the pillars.

2 HEARING OFFICER THOMPSON: I tried. I tried before we  
3 even moved in there and there's a good story that relates to  
4 those pillars.

5 MR. KEITHLEY: And they're better than they were in the  
6 last building.

7 HEARING OFFICER THOMPSON: That's a topic for another day.

8 MR. ROZELL: And we're not locked into the RCA. We've  
9 asked ourselves and, perhaps, we'll have another suggestion,  
10 but it's an example of something that's worked before and  
11 so.....

12 HEARING OFFICER THOMPSON: Yeah.

13 MR. ROZELL: .....it may work again.

14 HEARING OFFICER THOMPSON: Well, it's convenient for  
15 Conoco anyway and for many of the others of you, perhaps, but  
16 yeah, I don't know. I don't know if we're going to be able to  
17 get that -- probably not for two weeks, but I don't know what  
18 their schedule is at this juncture. And I have -- we have  
19 inquired in the past about using one of the courtrooms that is  
20 vacant, that may be an option we'll look into. I don't know if  
21 you have a facility available at one of your buildings. We may  
22 be desperate enough to ask for help.

23 MR. ROZELL: Yeah, we'll be exploring this further 'cause  
24 actually we've thought of the same suggestions that you did  
25 without tracking down what might actually be available, so.....

1 HEARING OFFICER THOMPSON: Okay.

2 MR. ROZELL: .....I think those are good things to look  
3 at.

4 HEARING OFFICER THOMPSON: Okay.

5 MR. KEITHLEY: Well, and the other criteria is wherever  
6 Suzie is comfortable.

7 HEARING OFFICER THOMPSON: That's the most important.

8 MR. KEITHLEY: It is actually.

9 HEARING OFFICER THOMPSON: She hasn't committed to me to  
10 do it yet, but.....

11 MR. KEITHLEY: I'll talk to her.

12 HEARING OFFICER THOMPSON: Okay, good. The last thing on  
13 my list before allowing your to break -- a break to figure out  
14 what else you want to raise was another Prehearing Conference.  
15 We've talked about already the procedure for setting one. I  
16 think we're going to need at least one more. I was intending  
17 to take a break and let you talk amongst yourselves and see if  
18 there's anything else you want to raise and give me a chance to  
19 go over my notes and see if there's anything else this morning.

20 MR. ROZELL: Let me just ask one question.....

21 HEARING OFFICER THOMPSON: Um-hum.

22 MR. ROZELL: .....so I don't forget next time. Last time  
23 your direction was that we should communicate in this -- in the  
24 lease proceeding with the Commissioner's office in writing as  
25 opposed to with counsel who have been involved in other

1 proceedings, is that where we are for this case, these appeals?

2 HEARING OFFICER THOMPSON: I'm confused by your question.  
3 Commission.....

4 MR. ROZELL: Maybe I should restate it. Last -- last time  
5 the question.....

6 HEARING OFFICER THOMPSON: Okay. What are you -- what are  
7 the....

8 MR. ROZELL: .....came up whether the -- there was a  
9 representation by the Attorney General or Ashburn & Mason and  
10 your answer was they were not representing anyone in the prior  
11 round of lease appeals and that we should communicate directly  
12 with the Commissioner's office in writing was what you said we  
13 should do as far as communication. I'm asking the same  
14 question. If we follow-up from here is that how we do it, we  
15 communicate with the Commissioner's office?

16 HEARING OFFICER THOMPSON: So you're asking me whether you  
17 should provide a courtesy copy to the AGs of anything you.....

18 MR. ROZELL: No, we've done.....

19 HEARING OFFICER THOMPSON: .....file in the case?

20 MR. ROZELL: .....that as a courtesy, but as far as actual  
21 service.....

22 HEARING OFFICER THOMPSON: Yes. Actual.....

23 MR. ROZELL: .....communication directly with -- with  
24 Commissioner's office is the way we should go?

25 HEARING OFFICER THOMPSON: Yes, actual service is with the

1 Commissioner's office. I can ask them -- I think a courtesy  
2 copy would be appreciated and a courtesy copy to.....

3 MR. ROZELL: Well, we'd be glad to.....

4 HEARING OFFICER THOMPSON: .....myself as well would be  
5 appreciated.

6 MR. ROZELL: And I hope we did that on this one. I think  
7 we intended to, did we.....

8 HEARING OFFICER THOMPSON: Yeah.

9 MR. ROZELL: .....do that? But I -- one of the concerns,  
10 just the ethical consideration of communicating directly with  
11 the client, but the understanding is you said last time that we  
12 should communicate directly with the Commissioner. We'll be  
13 happy to provide the courtesy copies. I think that's helpful  
14 to all of us to.....

15 HEARING OFFICER THOMPSON: Okay.

16 MR. ROZELL: .....keep the communication open.

17 HEARING OFFICER THOMPSON: Okay. I will clarify with them  
18 and make sure that the list of E-mail addresses that I'm going  
19 to circulate after the conference includes whoever requests a  
20 courtesy copy as well. It doesn't seem like much of a burden  
21 on E-mails to add another if there's anybody else. And you may  
22 want to add paralegals or somebody else in your firm as well.

23 MR. ROZELL: Now, one of the questions that's also going  
24 to come up as far as the ex parte communications and so is,  
25 again, the role of various attorneys representing the State.

1 You know, ordinarily in a hearing counsel on the two sides  
2 would not be communicating with the decision maker. We think  
3 it's inappropriate for that to happen, but it's one of the  
4 issues that we think needs to be address.

5 HEARING OFFICER THOMPSON: No, it's been -- I understand.  
6 I remember that was an issue before. I understand that to be  
7 -- I'm looking at your bullets here to see whether it's raised  
8 again, but if it isn't clearly.....

9 MR. BALLEW: It is in the second bullet point.

10 HEARING OFFICER THOMPSON: Okay, all right. Okay, I see.  
11 We can address that as well. All right. Let's go off record  
12 and give me 15 minutes to look through my notes and give you a  
13 chance to confer and see if there's anything else that it would  
14 be helpful to have you have addressed this morning. Thanks.

15 MR. ROZELL: Thank you.

16 (Off record - 9:59 a.m.)

17 (On record - 10:10 a.m.)

18 HEARING OFFICER THOMPSON: Okay. We're back on record.  
19 During the break I noted a few things. I'll give you an  
20 opportunity in a minute to follow-up. I believe an appeal  
21 record -- a record was designated for these lease appeals. If  
22 you go back and look at your files and the question will be  
23 whether or not you're going to feel the necessity to supplement  
24 it which obviously if you weren't aware that you filed it, you  
25 can't answer today, but we've given the opportunity so you

1 might want to start thinking about that question.

2 The only date that we set was the 24th of September (sic)  
3 for further briefs so I'm going to -- just to let you know  
4 because the -- it will probably take some days to get the Order  
5 out. That date will be in that Order so if you want to start  
6 working on those briefs I'm -- it's going -- they're going to  
7 be due the 25th of September (sic). The order.....

8 MR. SNEED: October.

9 HEARING OFFICER THOMPSON: .....will certainly be out  
10 before then, but.....

11 MR. SNEED: Sorry, you mean October?

12 HEARING OFFICER THOMPSON: October. Gosh, what happened  
13 to September. Okay. And also with.....

14 UNIDENTIFIED VOICE: (Simultaneous speech) 25th.....

15 UNIDENTIFIED VOICE: She misspoke, the 24th.

16 UNIDENTIFIED VOICE: What did she say on that?

17 UNIDENTIFIED VOICE: It's the Stay briefing.

18 HEARING OFFICER THOMPSON: .....regard -- yeah, briefing  
19 on the issue you identified, the further brief was requested  
20 for the Stay issue and that's the one that when we talked about  
21 that at the beginning of the Prehearing Conference you  
22 suggested that October 24th would have been -- would be the  
23 filing date which is two weeks from today.

24 The other issue I thought about was with regard to the  
25 AOGCC files. I think that two of them are confidential because

1 of their proximity to the Canning (ph) River, but one of the  
2 parties to this proceeding has access to them and you may want  
3 to talk amongst yourselves about whether or not it's going to  
4 be relevant or important.

5 I don't know whether those are ones that will be at issue  
6 necessarily in this case, but certainly the AOGCC files are --  
7 there may be some -- it strikes me that those -- the public  
8 records, part of those and possibly the information that's in  
9 those two confidential wells files may be relevant to some of  
10 the issues that you identified on the list you filed today so  
11 to the extent that you haven't already started digging through  
12 those files sooner rather than latter is probably a good time  
13 to start doing that.

14 What additional issues did you come up with, if any?

15 MR. ROZELL: I think just one point of clarification if we  
16 didn't address and it may be implicit. We talked about two  
17 weeks beginning January 15th.....

18 HEARING OFFICER THOMPSON: Um-hum.

19 MR. ROZELL: .....if the Commissioner's schedule doesn't  
20 permit a block of two weeks and we had to break that into two  
21 pieces or whatever that's certainly something we're willing to  
22 do. That's not a problem.

23 HEARING OFFICER THOMPSON: Okay, that's helpful. And I  
24 also wondered whether that your suggestion of January 15th is  
25 no sooner than January 15th? It's my -- I don't know -- I'm

1 not sure I remember exactly, but I think it's the 19th that the  
2 Legislature comes back this year so part of that week may work  
3 and, in fact, a first week then may work, but even if we start  
4 a week earlier than January 15th you may be able to get a two  
5 week block in.....

6 MR. ROZELL: Okay.

7 HEARING OFFICER THOMPSON: .....if that -- I don't know if  
8 anybody has an immediate reaction to that suggestion or not?

9 MR. KEITHLEY: That's probably something that we ought to  
10 think about.

11 HEARING OFFICER THOMPSON: Yeah.

12 MR. ROZELL: One thing that occurs to me is the 15th is a  
13 Thursday.....

14 HEARING OFFICER THOMPSON: Oh, okay.

15 MR. ROZELL: Yeah, I mean, so if we started on the 12th,  
16 for.....

17 HEARING OFFICER THOMPSON: Started on the.....

18 MR. ROZELL: .....example. I'm not speaking for anybody  
19 else,.....

20 HEARING OFFICER THOMPSON: Right, started on the  
21 Monday.....

22 MR. ROZELL: .....I'm looking at the calendar.....

23 HEARING OFFICER THOMPSON: .....of that week, yeah.

24 MR. ROZELL: You know, that's one possibility to moving it  
25 ahead.

1 HEARING OFFICER THOMPSON: Okay, okay.

2 MR. KEITHLEY: Yeah, I think the -- the 15th was driven by  
3 just trying to get clear of the holidays obviously and time  
4 after the holidays to get the witnesses ready to go,.....

5 HEARING OFFICER THOMPSON: All right. So.....

6 MR. KEITHLEY: .....finalize their preparation, so.....

7 HEARING OFFICER THOMPSON: Yeah, the 12th makes sense if  
8 the -- and the Legislature probably is the 19th through 20th,  
9 but that -- if you're willing to break it into two, that's a  
10 good suggestion that will probably help us figure out.

11 Yeah, and it's going to be difficult just because we as an  
12 agency never know often until the day before or a couple days  
13 before what the hearing schedule is going to be and you get  
14 called down to testify. You don't have -- we don't have  
15 control over that, neither does the Commissioner as much as you  
16 might try so to the extent that we can resolve this either in  
17 the very early weeks of the Legislative session before things  
18 get more intense or before you're more likely to not have the  
19 schedule disrupted in the middle hearing by a Legislative  
20 request to have Commissioner Irwin present or we'd have to -- I  
21 guess there's always the option of continuing for a day without  
22 him, but that would not be my preference if we have a choice.

23 Is there anything further this morning?

24 MR. KEITHLEY: In talking about -- just to be clear, we  
25 were talking about the next Prehearing Conference, there's

1 really three things that are going to be useful to have done in  
2 front of that conference. One is the Order from this.....

3 HEARING OFFICER THOMPSON: Um-hum.

4 MR. KEITHLEY: .....Prehearing that you mentioned. The  
5 second is the ruling on the Motion for Appointment of an  
6 Independent Hearing Officer.

7 HEARING OFFICER THOMPSON: Um-hum.

8 MR. KEITHLEY: And the third is the ruling after we have  
9 the opportunity to brief on the Request for Stay.

10 HEARING OFFICER THOMPSON: Oh, okay. Okay.

11 MR. KEITHLEY: So once we have those three in probably  
12 make sense at that point to schedule the Prehearing following  
13 those three.

14 HEARING OFFICER THOMPSON: Okay. Unless it would be --  
15 unless we end up having an earlier Prehearing Conference just  
16 on discovery issues. I'm not sure we will, but that may come  
17 sooner than the ruling. We'll see. We'll work with it, but if  
18 -- you're welcome to communicate with me on any procedural  
19 issues by E-mail. I request that you copy everybody. I'll  
20 circulate a list later on today of all the addresses and if you  
21 want to add somebody else in your firm for notice purposes,  
22 courtesy purposes we can do that, too. It's easy enough just  
23 to make a group.

24 If there's nothing further we'll adjourn. Off record.

25 (Recessed - 10:18 a.m.)



Exhibit 4, removed at the direction  
of the Deputy Clerk.

IN THE SUPREME COURT OF THE STATE OF ALASKA

DANIEL S. SULLIVAN, COMMISSIONER, )  
STATE OF ALASKA, DEPARTMENT OF )  
NATURAL RESOURCES )

Petitioner, )

v. )

RESISTING ENVIRONMENTAL DESTRUCTION )  
ON INDIGENOUS LANDS (REDOIL), GWICH'IN )  
STEERING COMMITTEE, ALASKA )  
WILDERNESS LEAGUE, CENTER FOR )  
BIOLOGICAL DIVERSITY, and NORTHERN )  
ALASKA ENVIRONMENTAL CENTER, )

Respondents. )

2011 MAR 18 PM 4: 30  
CLERK, APPELLATE COURTS

BY: \_\_\_\_\_  
DEPUTY CLERK

Supreme Court S14216

Superior Court No.  
3AN-10-4217 CI

**PETITION FOR REVIEW**

Daniel S. Sullivan, Commissioner of the Alaska Department of Natural Resources (“DNR”), petitions for review of the superior court decision reversing his decision to deny reconsideration of DNR’s approval of the Beaufort Sea Areawide Oil and Gas Lease Sale Final Finding.<sup>1</sup> The superior court found an unwritten mandate in Article VIII of the Alaska Constitution that it held requires DNR to issue written best interest findings — statutorily required only for a “disposal” of state land — at every stage of a multi-phased oil and gas development project. This apparently means that in addition to issuing written best interest findings for the “disposal”—a lease—DNR must also make best interest findings before authorizing activities occurring long after the lease is issued, even though DNR already has regulations in place under which it reviews those

<sup>1</sup> The superior court decision is attached as Appendix A.

activities for consistency with the public interest before authorizing them. Although the existing review process and the resulting decisions likely satisfy a duty to prepare a best interest finding at every phase of development, DNR should not be subject to the uncertainty of trying to comply with — and the burden of defending its decisions' adherence to — a duty that does not exist in either statute or constitution. Thus, the superior court's decision is contrary to the public interest and may hinder the state's ability to fulfill its constitutional duty to encourage development of Alaska's natural resources. For these reasons, this Court should grant the petition and review the superior court decision.

#### **I. STATEMENT OF FACTS AND PROCEEDINGS**

This case involves a challenge to DNR's decision to lease state lands in the Beaufort Sea area for oil and gas exploration and development activity.<sup>2</sup> When DNR seeks to dispose of an interest in state land — as it sought to do in leasing the Beaufort Sea lands — AS 38.05.035(e) requires it to prepare a “written finding that the interests of the state will be best served.” If the project for which the proposed disposal is sought is a “multiphased development,” DNR may limit the scope of this finding to the applicable laws, facts and issues that pertain to the disposal phase of the development.<sup>3</sup> The legislature has provided that “[i]n approving a contract<sup>[4]</sup> under this subsection [(e)], the

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<sup>2</sup> Exhibit A at 2.

<sup>3</sup> AS 38.05.035(e)(1)(C).

<sup>4</sup> The contract at issue here is the lease sale contract.

director need only prepare a single written finding.”<sup>5</sup> At subsequent phases of oil and gas development, lessees must submit for DNR’s approval proposed plans of operation,<sup>6</sup> which DNR reviews to ensure that they are consistent with the state’s interest.<sup>7</sup>

DNR issued the Beaufort Sea Areawide Oil and Gas Lease Sale Final Finding of the Director on November 9, 2009, finding that the interests of the state would be best served by issuing certain leases in the Beaufort Sea.<sup>8</sup> Because these leases will require multi-phased development, DNR limited its finding to the laws and facts pertinent to the lease sale itself, as permitted by AS 38.05.035(e)(1)(C).

After seeking reconsideration, the respondents (collectively “REDOIL”) appealed to the superior court, arguing that DNR cannot limit its best interest findings to the lease sale itself, because Article VIII requires DNR to issue a written best interest finding (“BIF”) at every phase of a multi-phased project.<sup>9</sup> REDOIL asserted that “where a BIF is promulgated at the disposal phase without any further BIFs at subsequent

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<sup>5</sup> AS 38.05.035(e).

<sup>6</sup> 11 AAC 83.158(a). Before a plan of operations may be approved, the applicant must submit sufficient information for the commissioner to determine the surface use requirements and impacts directly associated with the proposed operations, including “a description of operation 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 archaeological sites, and public use areas.” 11 AAC 83.158(d).

<sup>7</sup> See 11 AAC 83.158(e) (DNR commissioner must require amendments that are believed necessary “to protect the state’s interest”); 11 AAC 83.346(e) (same).

<sup>8</sup> DNR’s Final Finding is attached hereto as Appendix B. The commissioner approved the DNR Final Finding concurrently with the Director.

<sup>9</sup> Appendix A at 10-11; REDOIL Appellant’s Brief at 2, *REDOIL v. Sullivan*, 3AN-10-4217 CI.

development phases . . . . [AS 38.05.035] is unconstitutional as applied.”<sup>10</sup> REDOIL defined the term “BIF” as the type of document DNR issued for the Beaufort Sea oil and gas lease proposal,<sup>11</sup> which, since it deals with an oil and gas lease sale, is a lengthy AS 38.05.035(e) finding that addresses the criteria listed in AS 38.05.035(g).

DNR took issue with the vagueness of REDOIL’s “BIF” acronym, since AS 38.05.035 does not use the term “Best Interest Finding” and since DNR makes findings of the state’s best interest in a variety of contexts.<sup>12</sup> DNR also argued that a document in the form of the Final Finding — what REDOIL called a “BIF” — is a creation of statute (AS 38.05.035(e), (g)), not a requirement of Article VIII. Article VIII establishes the policy for disposals of state land, but gives the legislature authority to determine the procedure for doing so, as it did in enacting AS 38.05.035.<sup>13</sup>

The superior court ruled in favor of REDOIL. It held that "each phase of a project is a distinct disposal of an interest in state land,"<sup>14</sup> triggering a duty to prepare a written best interest finding at each phase of oil and gas development on state lands.

The court also held that Article VIII requires DNR to prepare a written best interest finding at each phase of oil and gas development on state lands. In light of this duty, the court ruled that "application of statutory permission to issue only a single BIF at

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<sup>10</sup> REDOIL Appellant’s Brief at 7.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> State’s Appellee Brief, *REDOIL v. Sullivan*, 3AN-10-4217 CI, at 1-2, n.1, 15 (citing statutes pursuant to which DNR makes best interest findings, but is not required to issue a written findings in the form required by AS 38.05.035(g)).

<sup>13</sup> *Id.* at 7-17.

<sup>14</sup> Appendix A at 21.

the initial phase of a development where it is impossible to assess the cumulative effects of the development as they relate to DNR's continuing obligation to consider the public's best interest violates Article VIII ...."<sup>15</sup> In other words, when DNR limits the scope of its review to the lease sale phase of a multi-phase oil and gas development, it may not issue just a single written best interest finding, but must also issue a best interest finding for each subsequent phase. Although AS 38.05.035(e) permits DNR to produce a single best interest finding, the superior court concluded that "the legislature is not empowered to enact a statute which would relieve DNR of its ongoing duty to consider best interests of the state at every phase of any project."<sup>16</sup> Accordingly, the court ruled that DNR's decision not to issue subsequent best interest findings violated Article VIII, and it remanded the case and instructed DNR to "revise the decision to conform to this court's ruling to require a written best interest finding at each phase of the subject project."<sup>17</sup>

## II. QUESTIONS PRESENTED FOR REVIEW

1. Does Article VIII require DNR to prepare a written best interest finding at every phase of oil and gas development, even though the legislature provided that DNR is required to prepare only a single best interest finding for a disposal of state lands?
2. Is each phase of oil and gas development a disposal of an interest in state lands

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<sup>15</sup> Appendix A at 23.

<sup>16</sup> Appendix A at 23.

<sup>17</sup> Appendix A at 24.

triggering DNR's duty under AS 38.05.035(e) to prepare a written best interests finding?<sup>18</sup>

### III. REASONS WHY REVIEW SHOULD NOT BE POSTPONED

- A. **Because DNR cannot appeal its own decision, the issue of whether it has a constitutional obligation to produce a written best interest finding at each phase of oil and gas projects might evade review unless the Court grants this petition.**

In remanding the case to DNR, the superior court directed the commissioner "to revise the decision to conform to this court's ruling to require a written best interest finding at each phase of the subject project."<sup>19</sup> Once DNR follows the superior court's instruction, it cannot elevate the legal issues presented in this petition to this Court unless another "eligible person" decides to appeal it.<sup>20</sup> Because the commissioner cannot appeal his own revised decision, the legal issues underlying it — whether each phase of oil and gas development project is "a disposal of interest in land" and whether Article VIII imposes a duty on DNR to prepare a best interest finding at each phase of a multi-phase project — will evade review.<sup>21</sup> Because the state, lessees, and the public must understand the legal requirements for each phase, an immediate decision by this Court is needed for the guidance of the lower courts and is in the public interest.<sup>22</sup>

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<sup>18</sup> Because the superior court heard this case on appeal from an agency decision, no trial date is scheduled.

<sup>19</sup> Appendix A at 24.

<sup>20</sup> AS 38.05.035(l); 11 AAC 02.010.

<sup>21</sup> Alaska R. App. P. 402(b)(4).

<sup>22</sup> *Id.*

**B. Whether the constitution imposes unstated duties on DNR is an important question on which there is substantial ground for difference of opinion, and the superior court's decision creates confusion that compromises the public interest.**

The superior court's holding that Article VIII requires DNR to prepare a written BIF at each phase of a multi-phased project burdens DNR in several ways. First, as DNR argued to the superior court, the state and other government entities make various types of public interest findings at each phase of a project. The superior court held that a BIF is required at each phase nevertheless. But the court did not explain what kind of best interest finding would satisfy Article VIII. Although DNR believes its existing post-lease sale procedures satisfy the superior court's standard, because it is a constitutional standard, DNR cannot be certain. Litigants will argue that the scope of a particular finding is not as broad — or does not consider the proper factors — as required by the constitution. The exact scope of the constitutional duty that is required would have to be delineated by a series of judicial decisions, and it could evolve over time.

Second, because the requirement of a best interest finding does not appear in the constitution, the decision implies that Article VIII might contain other unwritten, currently undefined obligations unknown to DNR staff. Because the existence of other obligations can be revealed only through future litigation, the superior court decision implicitly invites such lawsuits to flesh out what other hidden requirements the constitution might contain. This breeds uncertainty, creates potentially burdensome requirements for multi-phased projects, and may significantly hinder DNR's ability to permit oil and gas development, which is an express policy of the Alaska Constitution

and is important to the vitality of the state. The decision therefore involves an important legal issue on which there is substantial ground for difference of opinion, and the Court's review of the superior court decision will advance an important public interest that otherwise might be compromised.<sup>23</sup>

**IV. THE SUPERIOR COURT ERRED IN RULING THAT DNR MUST PRODUCE A WRITTEN BEST INTEREST FINDING AT EACH PHASE OF OIL AND GAS PROJECTS ON LEASED STATE LANDS.**

The superior court erred in two related ways. First, it erred in concluding that DNR has a constitutional obligation to prepare a written best interest finding at each phase of oil and gas development on state lands.<sup>24</sup> Second, it erred in concluding that each phase of a multi-phase oil and gas development project on state lands "is a distinct disposal of an interest in state land."<sup>25</sup> Because these conclusions are erroneous, the court's ultimate ruling that DNR must prepare a written best interest finding for every phase of oil and gas development on the leased state lands is also erroneous.

**A. Article VIII Does Not Require DNR To Prepare a Best Interest Finding at Every Phase of Oil and Gas Development on State Lands.**

Neither the actual provisions of Article VIII nor this Court's decision in *Katchemak Bay Conservation Society v. State, Department of Natural Resources*,<sup>26</sup> on which the superior court relied, establishes a constitutional duty to consider best interests at every phase of oil and gas development on state lands. DNR actually does review the

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<sup>23</sup> Alaska R. App. P. 402(b)(2).

<sup>24</sup> Appendix A at 21, 23.

<sup>25</sup> Order at 21.

<sup>26</sup> 6 P.3d 270 (Alaska 2000).

activities proposed at these subsequent phases for consistency with the public interest,<sup>27</sup> and these procedures likely satisfy a constitutional duty to consider the state's best interests at each phase of a project, assuming the duty exists. However, the constitution does not impose that duty, and DNR should not be required to bear the burdens of uncertainty and litigation that come with trying to comply with an amorphous constitutional duty when the duty does not exist.

Article VIII itself does not oblige DNR to prepare a best interest finding for each phase of activity on state lands. The article's provisions articulate a policy of administering lands in a way that makes them “available for maximum use consistent with the public interest”<sup>28</sup> and “for the maximum benefit of [Alaska’s] people.”<sup>29</sup> They also give authority to the legislature to enact laws for administering the lands and

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<sup>27</sup> For example, before any operations may be undertaken on leased state lands, a plan of operations must be approved by DNR. 11 AAC 83.158(a). Before a plan of operations may be approved, the applicant must submit sufficient information for the commissioner to determine the surface use requirements and impacts directly associated with the proposed operations, including “a description of operation 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 archaeological sites, and public use areas.” 11 AAC 83.158(d). Before approving a proposed plan of operations, DNR must require amendments that are believed necessary “to protect the state’s interest.” 11 AAC 83.148(e). Typically, leases are consolidated in a unit agreement among the producers, and this agreement must be approved by DNR. 11 AAC 83.303, .306. A proposed unit agreement must be accompanied by a proposed plan of exploration or plan of development, 11 AAC 83.306, .341, .343, and DNR must evaluate numerous factors in deciding whether to approve the proposal, including environmental costs, prevention of economic and physical waste, and other factors “necessary or advisable to protect the public interest.” 11 AAC 83.303.

<sup>28</sup> Alaska Const. Art. VIII, § 1.

<sup>29</sup> Alaska Const. Art. VIII, § 2.

interests in them.<sup>30</sup> Finally, the provisions impose certain specific duties for disposing of interests in state land — permitting “reasonable concurrent uses” on leased state lands,<sup>31</sup> reserving to the state access to resources,<sup>32</sup> requiring public notice “and other safeguards of the public interest as shall be prescribed by law” before disposal,<sup>33</sup> and, for mineral leases, permitting reasonable concurrent exploration for other types of minerals.<sup>34</sup>

Nowhere in Article VIII does the term “best interest finding” appear.

Rather, those terms are a creation of statute. They are elements of a comprehensive statutory scheme the legislature has adopted for disposing of state lands and interests in them, in order to carry out the constitutional policy of making lands available for “maximum use consistent with the public interest.” It is the legislature that has imposed on DNR the duty of preparing a “written finding that the interests of the state will be best served” before DNR may dispose of an interest in state land.<sup>35</sup> The legislature determined the scope of information that must be considered, including, when an oil and gas lease sale is proposed, “the reasonably foreseeable cumulative effects of

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<sup>30</sup> Alaska Const. Art. VIII, § 2 (“The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”); Alaska Const. Art. VIII, § 8 (“The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses.”); Alaska Const. Art. VIII, § 9 (“Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures.”); Alaska Const. Art. VIII, § 12 (“The legislature shall provide for the issuance, types, and terms of leases for coal, oil, gas, oil shale . . . and other minerals as may be prescribed by law.”).

<sup>31</sup> Alaska Const. Art. VIII, § 8.

<sup>32</sup> Alaska Const. Art. VIII, § 9.

<sup>33</sup> Alaska Const. Art. VIII, § 10.

<sup>34</sup> Alaska Const. Art. VIII, § 12.

<sup>35</sup> AS 38.05.035(e).

exploration, development, production, and transportation for oil and gas . . . on the lease sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources.”<sup>36</sup> The legislature decided what kinds of interests, when alienated, require such a finding and what kind do not.<sup>37</sup> Although Article VIII authorizes the legislature to “provide for the leasing of” state land and to prescribe “safeguards of the public interest” for leases of state lands, it is the legislature that created those specific safeguards, including the requirement of preparing a “best interest finding.” It is erroneous for the superior court to conclude that the legislature cannot limit the points at which a best interest finding must be prepared when the legislature created the duty to prepare a best interest finding in the first place.

Despite the fact that DNR's duty to prepare a written "best interest finding" originates in statute, the superior court reasoned that in *Kachemak Bay* this Court imposed a constitutional duty on DNR to prepare a written best interest finding at every phase of a development project on state lands.<sup>38</sup> The superior court interpreted the statement in *Kachemak Bay* that "DNR is obliged, at *each phase* of development, to issue a best interests finding and a conclusive consistency determination relating to *that* phase before the proposed development may proceed"<sup>39</sup> to recognize a constitutional duty. However, the superior court misconstrues the nature of the decision in *Kachemak Bay*.

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<sup>36</sup> AS 38.35.035(e)(3), (g).

<sup>37</sup> AS 38.35.035(e)(6).

<sup>38</sup> Order at 20-21, 23.

<sup>39</sup> 6 P.3d at 294.

In *Kachemak Bay*, this Court was presented with the question of whether “DNR may phase its best interests finding, an issue addressed in AS 38.05.035(e).”<sup>40</sup> Although the Court had in a previous decision articulated three rules limiting the use of phasing,<sup>41</sup> the legislature had subsequently amended AS 38.05.035(e) to expressly permit phasing.<sup>42</sup> The Court concluded that the amendments had overruled two of its three rules, but had not overruled the other.<sup>43</sup> Because the Court examined the degree to which these amendments overruled its earlier phasing rules, it is evident that these rules stemmed entirely from the statute — not from the constitution. Thus, when the Court in *Kachemak Bay* articulated a duty to issue a best interest finding at each phase of a project,<sup>44</sup> that duty, like the rest of the Court's phasing rules, stemmed from statute. In fact, in articulating that rule, the Court cited to AS 38.05.035(e)(1)(C), not to Article VIII.

In concluding that *Kachemak Bay* recognized a constitutional duty for DNR to issue a best interest finding at every phase of a project, the superior court appears to have relied on the Court's mention that this duty “can be traced” to Article VIII.<sup>45</sup> But the superior court misconstrued this statement. It is true that DNR's duty can be traced to Article VIII because Article VIII authorizes the legislature to establish the procedures for disposing of state lands, and the legislature chose to require a best interest finding as one

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<sup>40</sup> *Id.* at 276. The Court described DNR as “phasing” its best interest finding; in other words, DNR limited its best interest finding to the lease-sale phase of the project.

<sup>41</sup> *Thane Neighborhood Ass'n v. City and Borough of Juneau*, 922 P.2d 901 (Alaska 1996).

<sup>42</sup> Ch. 38, SLA 1994.

<sup>43</sup> 6 P.3d at 278-29.

<sup>44</sup> *Id.* at 294.

<sup>45</sup> Appendix A at 21.

of those procedures. However, the fact the duty can be *traced* to Article VIII does not mean that Article VIII requires it. Numerous provisions of the Alaska Statutes may be traced to Article VIII's delegation of authority to the legislature to administer the state's lands and resources, but not all of these provisions are *required* by Article VIII.

Because the *Kachemak Bay* decision mentions Article VIII only in passing and actually analyzes the statute and related legislative amendments on phasing, the superior court erred in concluding that the decision imposes a constitutional duty on DNR to prepare a best interest finding at every phase. The decision did not describe what Article VIII requires — it described what AS 38.05.035 required. The legislature therefore was free to amend AS 38.05.035(e) to allow DNR to prepare a single best interest finding, and to permit DNR to review activities at subsequent phases of development under regulations governing plans of operation rather than under AS 38.05.035(e).

DNR's procedures likely satisfy the duty to produce a "best interest finding" that the superior court articulated. However, subjecting DNR to a constitutional duty which is distinct from what the legislature has prescribed has the potential to raise long-term uncertainty about the validity of DNR's procedures and to delay exploration activities. Given the importance of oil and gas production to state coffers, the uncertainty and resulting delay would be harmful to the public interest. Thus, while DNR's procedures for reviewing proposed plans of operation likely satisfy the duty the superior court imposed, DNR should not be required to bear the potential burdens of trying to comply with an amorphous constitutional duty when no such duty exists.

**B. Oil and Gas Exploration and Development Activities that Occur on Leased State Lands after the Leases Are Sold Are Not Disposals of an Interest in State Land.**

The superior court based its holding on an assumption “that each phase of a project is a distinct disposal of an interest in that land.”<sup>46</sup> The court appeared to reason that because each phase is a distinct disposal, each phase requires a “disposal” finding under AS 38.05.035(e). But since each phase is not a “disposal of an interest” in state land, the court’s ultimate conclusion that a best interest finding is required for each is incorrect.

Oil and gas leases grant the lessee an exclusive interest in state land to “drill for, extract, remove, clean, process, and dispose of oil, gas, and associated substances in or under the . . . tract of land.”<sup>47</sup> This conveyance encompasses all of interest in the land that a lessee will ever enjoy. Later phases of a project — typically consisting of exploration, development, and production — provide no additional land interest.<sup>48</sup> At these phases, a lessee gains approval to exercise its existing rights in a particular manner — *e.g.*, approval of a plan of operation to drill an exploratory well, pursuant the leasehold right to “drill for . . . oil [and] gas.”<sup>49</sup> No additional interest is conveyed, no additional contracts are entered,<sup>50</sup> and no consideration is exchanged.<sup>51</sup>

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<sup>46</sup> Appendix A at 21.

<sup>47</sup> Appendix B at D-1.

<sup>48</sup> 11 AAC 83.158, 83.341, 83.343, 83.346.

<sup>49</sup> Appendix B at D-1.

<sup>50</sup> Indeed the only contracts that are entered after the lease are unit agreements — contracts entered between the lessees, and subject to DNR approval, pursuant to which

Because the leasehold is the sole interest in state land that is alienated or disposed of, and because DNR's duty to prepare a best interest finding is triggered when it disposes of an interest in state land, DNR need not issue a best interest finding for every post-lease activity on state lands,<sup>52</sup> Of course, DNR still reviews all activities proposed after the lease sale for consistency with the public interest when it decides whether to approve lessees' plans of operation.<sup>53</sup> However, additional "best interest findings" are not required, either by statute or by Article VIII.

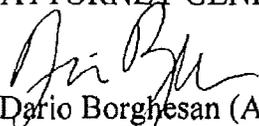
#### V. STATEMENT OF RELIEF SOUGHT

The Court should grant this petition, reverse the decision of the superior court, and uphold the decision of DNR.

RESPECTFULLY SUBMITTED March 18, 2011.

JOHN J. BURNS  
ATTORNEY GENERAL

By:

  
Darío Borghesan (Alaska Bar. No. 1005015)  
Joanne Grace (Alaska Bar No. 8606035)  
Assistant Attorneys General

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lessees join tracts with a common reservoir or accumulation into a "unit." Unitization is not a "phase" of development in and of itself since it does nothing but group leases.

<sup>51</sup> Additional entities that gain interest in the land after the lease sale — such as overriding royalty interests or working interests — do so by agreement with the lessee, not the state.

<sup>52</sup> AS 38.05.035(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.").

<sup>53</sup> See 11 AAC 83.303, .341, .343, .346.