IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS (REDOIL), GWICH'IN STEERING COMMITTEE, ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, and NORTHERN ALASKA ENVIRONMENTAL CENTER,	)	RECEIVED FEB 24 2011
Appellant,	)	
v.	)	
THOMAS IRWIN, COMMISSIONER, STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,	)	
Appellee.	)	
	)	Case No.: 3AN-10-4217CI

MEMORANDUM DECISION AND ORDER

Appellants Resisting Environmental Destruction on Indigenous Lands (REDOIL), Gwich'in Steering Committee, Alaska Wilderness League, Center for Biological Diversity, and Northern Alaska Environmental Center (collectively "REDOIL") bring this appeal from a Department of Natural Resources, Oil and Gas Division ("DNR") decision regarding the Beaufort Sea Areawide Oil and Gas Lease Sale Final Finding of the Director[1] ("Final BIF"). For the following reasons, the Court REVERSES the Commissioner's ruling on REDOIL's request for reconsideration of the Final BIF.

[1] Appellant and Appellee refer throughout briefing to this document as the "best interest finding" and "disposal written finding," respectively and how to properly refer to this document has been an issue argued in briefing. Although the document is entitled "Final Finding of the Director," the State of Alaska website and the document itself refer to these findings generally as "best interest findings." For the sake of clarity, the Court will use BIF since that is what is on the bottom of every page of the director's finding,

BACKGROUND

This case concerns a final best interest finding by DNR regarding the Beaufort Sea Lease Area Sale ("Lease Sale"), a two million acre area of state owned tide and submerged land located between Point Barrow and Canada, within the three mile offshore boundary between state and federal waters.[2] The land is located within the Arctic Coastal Plain region within the North Slope Structural Province, forming the modern northern continental margin of Alaska.[3] The State of Alaska can offer areas of state owned land for lease to companies interested in the exploration and production of oil and gas wells. The State decided to offer the Beaufort Sea area in question for lease sales for oil and gas exploration, development and production.

Prior to any lease sale of the Beaufort Sea tracts, DNR issued a Preliminary Best Interest Finding ("Preliminary Finding") for the Lease Sale on April 2, 2009. The Preliminary Finding was that holding annual Beaufort Sea areawide oil and gas lease sales from 2009-2018 was in the best interest of the state. In making this best interest determination, the director of DNR "reviewed all facts and issues known or made known to him and limited the scope of the finding to the lease phase of oil and gas activities and the reasonably foreseeable effects of issuing leases."[4] The Department also noted that

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and the finding text repeatedly uses this term to describe the director's examination of the best interest. The court will also use BIF to refer to any best interest finding.

[2] Beaufort Sea Areawide Final Best Interest Finding at 3-1 [hereinafter "Final BIF"].

[3] *Id.* at 6-1.

[4] Preliminary Finding at 1-1. The director must consider the following factors:

> (g) Notwithstanding (e)(1)(A) and (B) of this section, when the director prepares a written finding required under (e) of this section for an oil and gas lease sale or a gas only lease sale scheduled under AS 38.05.180, the director shall consider and discuss
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> (1) in a preliminary or final written finding facts that are known to the director at the time of preparation of the finding and that are
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> (A) material to issues that were raised during the period allowed for receipt of public comment, whether or not material to a matter set out in (B) of this paragraph, and within

conditions for phasing of the lease sale process were met under AS 38.05.035(e)(1)(C).[5] The Preliminary Finding noted that further use of any lease sale land would be subject to (1) local, state and federal codes, statutes and regulations; (2) additional project-specific and site-specific mitigation measures; (3) further review and authorization from the appropriate permitting agency; and (4) Alaska Coastal Management Program (ACMP) review.[6]

After the Preliminary Finding was issued, pursuant to Alaska law[7], DNR put interested parties on notice that there was a thirty-day comment period to submit any concerns to DNR regarding the Preliminary Finding, either in writing or at public

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> the scope of the administrative review established by the director under (e)(1) of this section; or
> (B) material to the following matters:
> (i) property descriptions and locations;
> (ii) the petroleum potential of the sale area, in general terms;
> (iii) fish and wildlife species and their habitats in the area;
> (iv) the current and projected uses in the area, including uses and value of fish and wildlife;
> (v) the governmental powers to regulate the exploration, development, production, and transportation of oil and gas or of gas only;
> (vi) the reasonably foreseeable cumulative effects of exploration, development, production, and transportation for oil and gas or for gas only on the sale area, including effects on subsistence uses, fish and wildlife habitat and populations and their uses, and historic and cultural resources;
> (vii) lease stipulations and mitigation measures, including any measures to prevent and mitigate releases of oil and hazardous substances, to be included in the leases, and a discussion of the protections offered by these measures;
> (viii) the method or methods most likely to be used to transport oil or gas from the lease sale area, and the advantages, disadvantages, and relative risks of each;
> (ix) the reasonably foreseeable fiscal effects of the lease sale and the subsequent activity on the state and affected municipalities and communities, including the explicit and implicit subsidies associated with the lease sale, if any;
> (x) the reasonably foreseeable effects of exploration, development, production, and transportation involving oil and gas or gas only on municipalities and communities within or adjacent to the lease sale area; and
> (xi) the bidding method or methods adopted by the commissioner under AS 38.05.180; and
> (2) the basis for the director's preliminary or final finding, as applicable, that, on balance, leasing the area would be in the state's best interest.

AS 38.05.035(g).

[5] Preliminary Finding, *supra* note 4 , at 1-1.

[6] *Id.* at 1-7.

[7] *See* 11 AAC 02; Final BIF, *supra* note 2, at 2-9 to 2-10.

hearings held by DNR.[8] DNR stated it would review comments and then would make a final determination of best interest; DNR noted it expected this final finding and determination to be issued in July 2009.[9] REDOIL submitted its comments on June 1, 2009 to DNR. DNR then extended the time for comments to August 31, 2009 after realizing that it had not given proper notice by publication as required by Alaska law.[10]

Concurrent with the Preliminary Finding, DNR also released an Alaska Coastal Management Program (ACMP) consistency analysis regarding the Beaufort Sea Lease Sale on April 2, 2009.[11] DNR noted that because of the phasing of the activity, the agency could limit the consistency review to the disposal phase so long as another agency carries out a subsequent review and consistency determination and the later consistency determinations are consistent with ACMP.[12] DNR found that lessees would be required to submit proposed plans of operations during the permit process and to DNR for review and approval, and that any activities during development and production would be subject to a plan of operations permit application and ACMP review.[13]

DNR then released a proposed consistency determination for the Lease Sale on October 30, 2009.[14] This proposed consistency determination was required by 11 AAC 110.255 and the Alaska Coastal Management Program (ACMP).[15] The proposed

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[8] Preliminary Finding, *supra* note 4, at 1-8.
[9] *Id.*
[10] Memorandum from Saree Timmons re: Beaufort Sea PBIF Public Comment Extension (June 30, 2009).
[11] Proposed Beaufort Sea Areawide Oil and Gas Lease Sale ACMP Consistency Analysis [hereinafter "ACMP Analysis"].
[12] *Id.* at 1. This phasing under the ACMP is authorized by AS 46.40.094(b).
[13] ACMP Analysis, *supra* note 11, at 2.
[14] Proposed Consistency Determination – Beaufort Sea Areawide Oil and Gas Lease Sales, 2009-2018, at 1 [hereinafter "PDC"].
[15] *Id.*

consistency determination was also written solely for the disposal phase, and likewise considered only the reasonably foreseeable, significant effects of the disposal[16]:

> At the disposal phase, it is unknown whether any leases will be sold; if they are sold, which tracts will be sold; whether any exploration, development, production or transportation will be proposed; and if it is, the specific location, type, size, extent and duration. In addition, methods to explore for, develop, produce, and transport petroleum resources will vary depending on the area, lessee, operator, and discovery. Speculation about possible future effects subject to possible future permitting that cannot reasonably be determined until the project or proposed use is more specifically defined is not required.[17]

DNR found the proposed Lease Sale was consistent with the standards of the ACMP.[18] DNR also cautioned that future "plans of operations must comply with the ACMP consistency review process, including public notice requirements, and must be found consistent with the ACMP before lessees may begin any projects or activities."[19] Finally, the consistency review stated that additional opportunities for public comment and review were available. Specifically, the consistency review noted (1) a required Call for New Information by DNR and subsequent public comment (nine years post-disposal)[20]; (2) approval of a plan of operations subject to public notice, comment and ACMP consistency review; and (3) numerous federal and state laws and regulations, many of which include public notice and comment requirements.[21]

DNR issued the Final Finding of the Director for the Lease Sale on November 9, 2009 ("Final BIF"). DNR found that offering the Beaufort Sea tracts for oil and gas lease was in the best interest of the State of Alaska. DNR limited the Final BIF to only present

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[16] *Id.*
[17] *Id.* at 4 (citation omitted). The Department relied upon legislative history for SB 308 to state that such a finding was not necessary. *See id.*
[18] *Id.* at 6.
[19] *Id.*, Attachment A, at 2 (emphasis omitted).
[20] *See* AS 38.05.035(e)(6)(F).
[21] PDC, *supra* note 14, at 2.

considerations of the law and facts, and did not address many of the future implications of the lease sale beyond noting generally the environmental and cultural effects the Lease Sale could be expected to cause.[22] Under AS 38.05.035(e)(1)(C), the director may limit the scope of administrative review in a multiphased development. DNR noted:

> The effects of future exploration, development and production will be considered at each subsequent phase, when various government agencies and the public review applications for specific proposed activities at specific locations.[23]

In response to concerns about the phased approach of the best interest review, DNR reiterated that phased review was statutorily authorized,[24] and found:

> . . . the statutory criteria for phasing have been met for the Beaufort Sea oil and gas lease sales. The constitutionality of phasing is beyond the scope of a best interest finding. A best interest process for post-lease phases is not required by statute. The commentary to the statute states that "no other best interest finding is required after the disposal phase."[25]

DNR also received comments stating that the Preliminary Finding failed to adequately consider reasonably foreseeable cumulative effects of oil and gas activities on fish and wildlife habitats, population and subsistence.[26] DNR stated that pursuant to A.S. 38.05.035(g)(vi), it only had to consider the reasonably foreseeable cumulative effects of exploration, development, production, and transportation for oil and gas or for gas only on the sale area, including effects on subsistence uses, fish and wildlife habitat, and

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[22] *See* Final BIF, *supra* note 2 at 2-10. Under AS 38.05.035(g), the best interest finding must consider reasonably foreseeable cumulative effects of 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; reasonably foreseeable fiscal effects of the lease sale on the state and affected municipalities and communities; and reasonably foreseeable effects of exploration, development, production and transportation for oil and gas on municipalities and communities within or adjacent to the lease sale area. *See id.* at 8-1. Chapter eight of the best interest finding discusses these reasonably foreseeable effects of leasing and subsequent activity in detail. *See id.*

[23] *Id.* at 2-10.

[24] *Id.* at A-3.

[25] *Id.*

[26] *Id.* at A-12.

populations and their uses, and historic and cultural resources.[27] DNR clarified: "This statute specifies that the area to be considered is the sale area; areas outside the sale area are not required to be considered and discussed concerning cumulative effects . . .".[28]

DNR noticed interested parties that they had thirty days to submit written comments to the Commissioner; all comments and reconsideration requests were due by November 30, 2009.[29] REDOIL then filed a request for reconsideration of the best interest finding to Tom Irwin, DNR Commissioner ("Commissioner") on November 30, 2009.[30] REDOIL requested DNR to reconsider on the grounds that (1) DNR's phasing approach violated the Alaska Constitution[31]; (2) it failed to adequately analyze the reasonably foreseeable and significant effects of cleaning up spills in the Arctic[32]; (3) greenhouse gas emissions should have been reviewed for the best interest of the state at the lease sale stage[33]; and (4) DNR failed to adequately consider the reasonably foreseeable cumulative effects of oil and gas activity on fish and wildlife habitats[34].

REDOIL's request for reconsideration was denied on December 9, 2009. DNR's denial of reconsideration discussed the issues raised by REDOIL. Among other things and excepting the information not relevant to this appeal, DNR noted it was outside its jurisdiction as a state agency (and beyond the scope of a best interest finding) to determine the constitutionality of the statute allowing for the best interest finding process,

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[27] *Id.* at A-12.
[28] *Id.* at A-12.
[29] See Preliminary Finding, *supra* note 4, at 1-8.
[30] Request for Reconsideration.
[31] *See id.* at 3.
[32] *Id.* at 12.
[33] *Id.* at 13.
[34] *Id.* at 15.

AS 38.05.035(e).[35] DNR also indicated that its findings regarding the reasonably foreseeable cumulative effects of oil and gas lease sales were based on only that information currently available to it, and that current information was considered and discussed in the best interest finding as required by Alaska statute.[36] REDOIL timely appealed the Commissioner's decision to this Court on January 8, 2010.[37]

STANDARD OF REVIEW

This appeal involves constitutional interpretation of a statute, which is a question of law to which an appellate court applies its independent judgment.[38] The court must "adopt the rule of law that is most persuasive in light of precedent, reason and policy."[39] Statutes are "presumed to be constitutional, and the burden of showing that they are unconstitutional is on the party challenging the statute."[40]

ARGUMENTS

The essential, and fairly narrow, question posed by this appeal is whether, as applied to the facts of this case, a 2001 amendment to AS 38.05.035(e) authorizing the director to prepare a single written BIF violates the provisions of Article VIII of the Alaska Constitution. The relevant section states:

> Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them. In approving a contract under this subsection, the director need only prepare a single written finding.[41]

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[35] DNR's Response to Request, at 2.
[36] *See id.* at 3.
[37] AS 38.05.035(*l*) prescribes that an appeal may be taken from a final written finding to the superior court where an eligible party timely requested an administrative appeal or reconsideration of the finding from DNR. REDOIL did request reconsideration within thirty days as required by the statute. *See id.* Under AS 44.62.560(a) and Appellate Rule 601(a), final administrative orders are appealable to the Superior Court.
[38] *McMullen v. Bell*, 128 P.3d 186, 190 (Alaska 2006).
[39] *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).
[40] *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 34 (Alaska 2007).
[41] AS 38.05.035(e).

Article VIII of the Alaska Constitution, regarding natural resources, includes provisions designed to "encourage the settlement of [Alaskan] land and the development of [Alaskan] resources by making them available for maximum use consistent with the public interest."[42] The Constitution grants power to the legislature to provide for the utilization, development and conservation of Alaskan public resources.[43] Article VIII grants the legislature power to provide for leasing and issuance of permits for exploration of public lands, subject to reasonable concurrent uses.[44] In addition, Article VIII provides that no disposal of state lands may be made without public notice and legally prescribed safeguards.[45] AS 38.05.038(e) grants the director of DNR the power to approve contracts for the disposal of public land, and specifies requirements for the disposal process, including the requirement of a written best interest finding.[46]

Conceding that the phasing process itself is constitutionally permitted under Article VIII, Appellant argues that DNR's duty to ensure that leasing of land or uses in such land is in the public's best interest requires that the director make a formal BIF at each phase of the process, unless the scope of the sale is limited to allow a comprehensive evaluation of the cumulative effect of the proposed development. This issue turns on language from the decision of the Alaska Supreme Court in *Kachemak Bay*

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[42] ALASKA CONST., art. VIII, § 1.
[43] *Id.*, § 2.
[44] *Id.*, § 8. Section 8 provides:

> 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. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

Id.
[45] *Id.*, § 10. Section 10 provides: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." *Id.*
[46] AS 38.05.035(e).

Conservation Society v. State, Department of Natural Resources.[47] Finding that the phasing process was a policy choice properly enacted by the legislature, the Court went on to say 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."[48]

The statutory language at issue in this appeal appears to have been enacted in 2001 in response to *Kachemak Bay.*[49] Appellant contends that because the requirement articulated in *Kachemak Bay* springs from the provisions of Article VIII, the statute is unconstitutional. Appellee contends that the *Kachemak Bay* language is dicta based on a misreading of the original statute, and that the 2001 amendment represents a policy decision by the legislature which should not be overturned by the courts.

I. *Appellant's Argument*

Appellant argues that because the obligation defined in *Kachemak Bay* is grounded in a constitutional duty, the statute is unconstitutional. Appellant's first argument is that phasing of the Beaufort Sea areawide BIF process is unconstitutional as applied by DNR. Noting that DNR's overall duty to conduct a best interest finding arises specifically from Article VIII, Appellant appears to argue that the phasing approach permits DNR to limit the scope of the BIF review at the disposal phase only because DNR can perform subsequent site-specific BIFs at post-disposal phases. Appellant cites *Kachemak Bay* as noted above for the proposition that phasing "is prohibited if it can

[47] 6 P.3d 270 (Alaska 2000).
[48] *Id.* at 294 (emphasis omitted).
[49] *See* Ch. 101, § 1(f), SLA 2001.

result in disregard of the cumulative potential impacts of a project."[50] Appellant asserts that in a sale involving an area as large as the one at issue here, limiting the BIF to the disposal phase without further BIFs at subsequent development stages fails to ensure that the public interest is protected. Appellant also asserts—in a footnote—that the statute is unconstitutional on its face in that it fails to meet the spirit and letter of Article VIII.

Appellant's second argument is that DNR should not be permitted to employ a single BIF for a large area when it could hold lease sales for smaller areas that would allow for site-specific BIFs covering all phases of a development project.

Appellant's third argument is that a single BIF at the disposal phase can only discuss the overall effects of development in general terms, and that the agency's reliance on other kinds of review, such as the actions of other government agencies and public review applications, fails to ensure that all aspects of BIF consideration will be otherwise addressed at post-disposal phases.

Appellant notes that the most comprehensive effects analysis occurs at the "plan of operations" stage but also observes that the statute requires only that a plan of operations address direct impacts, not indirect and cumulative impacts, nor is it required to consider information covered in other plans of operation. Appellant also argues that because DNR cannot amend a plan of operations in a manner that deprives a lessee of reasonable use, information gathered subsequent to the initial BIF becomes irrelevant, even if it were to change the initial BIF assessment. Appellant notes that the consistency findings required by the Alaska Coastal Management Plan do not review cumulative effects of a project, and exempts significant activities from review. Appellant also argues

[50] 6 P.3d 270, 277 (citing *Thane Neighborhood Ass'n v. City and Borough of Juneau*, 922 P.2d 901, 906–08 (Alaska 1996)).

that because some post-disposal evaluations are not within State control, DNR abdicates its own responsibility for compliance with its constitutional mandate.

Appellant argues finally that the sheer size of the sale at issue here, coupled with the fact that DNR is only required to evaluate known information and is not to speculate about possible future effects, results in a generic BIF that renders meaningless the duties imposed by Article VIII.

II. ***Appellee's Argument***

Appellee argues that while the overall duty imposed on DNR may be constitutional in origin, the legislature has delegated discretion to DNR to effectuate policy through specific procedures. Appellee notes that each time the Supreme Court has considered the procedural requirements, it has deferred to the legislature and the agency. Appellee notes that the Constitution itself contains no requirement that any particular written findings be issued. Appellee rejects Appellant's characterization of the question as one of phased findings, arguing instead that DNR has the discretion to phase a development project and that the statute permits the agency to proceed at the disposal phase with a single written finding, which can be limited to the laws and facts pertinent to the lease sale itself. Appellee argues essentially that the procedure for approving lease sales is a statutory action within the discretion of the legislature and is not itself a constitutional requirement.

Appellee asserts that Appellant is asking the court to read language into the Alaska Constitution that is not there, noting that the court is "not vested with the authority to add missing terms or hypothesize differently worded provisions in order to

reach a particular result."[51] Appellee argues that the intent of the drafters was that the legislature would dictate procedures for managing natural resources, and that courts have never found that the constitution contains language necessitating the BIF requirement. In particular, Appellee argues that the pronouncement of *Kachemak Bay* regarding the requirement of a BIF at every phase was incorrect dicta based on the Court's misreading of the statute; Appellee further argues that even if the language in *Kachemak Bay* was not dicta, the Court was interpreting a statute, not the Constitution. Appellee asserts that through the 2001 amendment the legislature sought to clarify its intentions and to correct any misunderstanding.[52]

Appellee argues that the BIF itself is a creation of statute, and that the very concept of finding that the State's "best interest" be served is not constitutional in origin. Appellee argues that Article VIII only requires a finding that an action be "consistent" with public interest. Appellee notes that there are many situations governed by the general provisions of Article VIII which do not require a written finding of any kind.

Appellee agrees that the legislature has imposed on DNR the duty to "consider and discuss" reasonably foreseeable cumulative, social and economic effects but that again, the duty is statutory and not constitutional. Appellee also contends that the Supreme Court's "hard look" language is not constitutional or statutory but rather springs from a law review article cited in a Supreme Court decision.[53] Appellee also

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[51] *Hickel v. Cowper*, 874 P.2d 922, 927–28 (Alaska 1994).

[52] The statute was amended to note that "[i]n approving a contract under this subsection, the director need only prepare a single written finding." AS 38.05.035(e).

[53] Appellants note the "hard look" language is a common law concept in Alaska, appearing first in *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983), *superseded by statute*. The Court noted that the role of the court in evaluating agency decisions should be to

argues that the ultimate question posed by this appeal is not ripe because the record contains no evidence regarding what discretionary procedures DNR will employ in the future.

Finally, Appellee argues that DNR fulfilled its duty to consider each of the statutorily mandated factors; that it appropriately limited scope of review to known facts; that it considered concurrent uses; and that it gave the required public notice. Appellee argues that the phasing procedures themselves were upheld by the Court in *Kachemak Bay* and that Appellant has failed to meet its burden of showing that the statutory limits on the scope of the BIF violate the Alaska Constitution.

III. *Appellant's Reply*

Appellant replies that the case is ripe for review because DNR has unequivocally stated its intention not to conduct any further BIF inquiries or issue any further BIFs in connection with the development of this area, and thus the BIF in this case is a final agency action subject to judicial review. Appellant notes that court have imposed upon agencies procedural requirements which are not specifically articulated in constitutional provisions. In particular, Appellant asserts that the Supreme Court has imposed on DNR a duty to conduct a "thorough review" of the project and to evaluate potential cumulative, environmental, economic and cultural impacts of a project, and has held that phasing

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> ensure that the agency "has given reasoned discretion to all the material facts and issues." The court exercises this aspect of its supervisory role with particular vigilance if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a '*hard look*' at the salient problems and has not genuinely engaged in reasoned decision making."

Id. (citing Harold Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (footnotes omitted)).

cannot be allowed if it would result in disregard of those impacts.[54] Appellant also argues that reliance upon plans of operations or other agency reviews do not adequately protect the public interest.

IV. *Post-Argument Briefing*

Following oral argument in this case, the court invited the parties to file supplemental points and authorities on questions that arose during the argument regarding the particular opportunities for public involvement over the course of a state lease of natural resources for exploration and development. Appellant filed numerous citations to regulations for state permitting required for exploration, development and transportation phases of the lease sale project, noting where written findings would be required and where they would not. Appellee filed a supplemental brief along with several hundred pages of representative documents, most of which relate to projects other than the one at issue here. Because the court reaches its decision without specific reliance on the issue of subsequent public involvement, the court declines to supplement the record.

DISCUSSION

The utilization of a phased approach to projects involving the disposal of state lands has been the subject of extensive review by the Supreme Court. Phasing is essentially the division of a particular project into phases which become successively more specific to the particular area to be developed.[55] Initially the Court found that phasing was disfavored, and focused on the duty of the state to assess the cumulative effects of a project. Justice Rabinowitz articulated the general principle that courts have

[54] *See Kachemak Bay Conservation Soc'y v. State, Dep't of Natural Res.*, 6 P.3d 270, 280 (Alaska 2000).
[55] *Id.* at 274 n.1.

disallowed segmentation of a proposed project to assure that the cumulative effects of the project are adequately considered, as allowing consideration of cumulative impacts after a portion of a project is already approved "swings the balance" in favor of project approval even if the project would have been disapproved had all components of the project been considered in the initial permit application.[56]

The Court analyzed the progress of its thinking on the subject in 1996 in *Thane Neighborhood Association v. City and Borough of Juneau*[57] by reference back to three cases, and summarized its conclusions as follows:

> We can draw three general, guiding principles concerning when and in what manner "phasing" or "segmentation" is permissible from *Gorsuch*[58], *Camden Bay II*[59], and *Kuitsarak*[60]. First, unless a specific

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[56] *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1251 (Alaska 1992) (Rabinowitz, J., dissenting) (quoting *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985)).

[57] 922 P.2d 901 (Alaska 1996).

[58] The *Thane* Court explained the reasoning used in the *Gorsuch* decision:

> [W]e held that in granting mining permits, "[Department of Natural Resources (DNR)] may not ignore cumulative effects of mining and related support facilities . . . by permitting facilities separately." We ruled that when DNR reviews a mining permit application, it must "consider the probable cumulative impact of all anticipated activities which will be a part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review." "If DNR determines that the cumulative impact is problematic," we stated, "the problems must be resolved before the initial permit is approved." We explained that "[t]his type of 'concept approval' is necessary to avoid a situation where, because of industry investment and reliance upon a past mining permit approval, DNR might feel compelled to approve a subsequent permit for a related but environmentally unsound facility." We added that "[i]n some cases, this may require concurrent, as opposed to serial, review of separate, related permit applications," while "[i]n other cases, anticipated problems resulting from cumulative impacts may require that approval of an initial permit be conditioned upon satisfactory resolution of the problems anticipated in subsequent permits."

Thane, 922 P.2d at 906 (citations omitted) (quoting *Gorsuch*, 835 P.2d 1239).

[59] The Court then explained the *Camden Bay II* decision:

> We held that DNR was required to identify known or substantially possible hazard areas before approving the lease sale as a whole. We explained that "deferring a careful and detailed look at particularized geophysical hazards to later stages of the development process . . . entails certain practical risks." Such deferral "may tend to mask appreciation of any cumulative environmental threat that would otherwise be apparent if DNR began with a detailed and comprehensive identification of [the] hazards." We again noted that

statute or regulation allows phasing, phasing is disfavored. Where a statute is silent or ambiguous, phasing should generally not be allowed.

Second, phasing is prohibited if it can result in disregard of the cumulative potential environmental impacts of a project. The more interlinked the components of a project are and the greater the danger that phasing will lead to insufficient consideration of cumulative impacts, the greater the need to bar phasing.

Third, conditions and stipulations may be used to address unforeseen occurrences or unforeseen situations that may arise during exploration or development, but permit conditions may not serve as a substitute for an initial pre-permitting analysis that can be conducted with reasonably obtainable information.

Thus, phasing through the use of conditions is prohibited where it is feasible to obtain the information necessary to determine whether environmental standards will be satisfied before granting an initial permit, but allowed where it is impractical or impossible to create detailed development plans without conducting additional physical exploration.[61]

In response to the Court's decisions on phasing, in 1994 the legislature amended subsection (e)(1)(C) of AS 38.05.035[62]:

[F]or a specific proposed disposal of available land, resources, or property, or of an interest in them, [DNR] in the written finding, . . . may, if the project for which the proposed disposal is sought is a multiphased development, limit the scope of an administrative review and finding for the proposed disposal to the applicable statutes and regulations, facts, and issues identified in (B)(i)-(iii) of this paragraph that pertain solely to a discrete phase of the project when

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

"the more segmented an assessment of environmental hazards [is], the greater the risk that prior permits will compel DNR to approve later, environmentally unsound permits."

Thane, 922 P.2d at 907 (citations omitted) (quoting *Trustees for Alaska v. State, Dep't of Natural Res. (Camden Bay II)*, 851 P.2d 1340 (Alaska 1993)).

[60] In *Kuitsarak Corp. v. Swope*, 870 P.2d 901 (Alaska 1996), the Court disapproved of DNR's use of conditions to require the development of plans to minimize potential dangers as a substitute for a complete analysis of the potential dangers. *Thane*, 922 P.2d at 908.

[61] *Thane*, 922 P.2d at 908 (citations omitted).

[62] *See* Ch. 38, § 2, SLA 1994.

> (ii) [DNR]'s approval is required before the next phase of the project may proceed; and
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> (iii) [DNR] describes its reasons for a decision to phase and conditions its approval to ensure that any additional uses or activities proposed for that or any later phase of the project will serve the best interests of the state.[63]

In addition, the legislature amended subsection (B) to provide the director of DNR with authority to limit the scope of best interest findings:

> [T]he director, in the written finding, . . . may limit the scope of an administrative review and finding for a proposed disposal to
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> (i) applicable statutes and regulations;
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> (ii) the facts pertaining to the land, resources, or property, or interest in them, that the director finds are material to the determination and that are known to the director or knowledge of which is made available to the director during the administrative review; and
>
> (iii) issues that, based on the statutes and regulations referred to in (i) of this subparagraph, on the facts as described in (ii) of this subparagraph, and on the nature of the uses sought to be authorized, the director finds are material to the determination of whether the proposed disposal will best serve the interests of the state[.][64]

The Court revisited the issue in *Kachemak Bay*, and considered the effects of the 1994 statutory amendments to the principles articulated in *Thane*. Noting that the legislature clearly intended to authorize phasing, the Court observed that *Thane* and its predecessors were not explicitly overruled. The Court concluded that the legislature took action to modify the first and third of these conditions: it enacted amendments favoring

[63] *Kachemak Bay*, 6 P.3d at 276 (citing AS 38.05.035(e)(1)(C) (1994)).
[64] *Kachemak Bay*, 6 P.3d at 276 (citing AS 38.05.035(e)(1)(B) (1994)).

phasing and limited the scope of review to facts known at the time or brought to DNR's attention by others.[65]

However, the second *Thane* condition, requiring consideration of cumulative potential environmental impacts of a project, "appears to have survived and, indeed, to have been reaffirmed by the 1994 amendment."[66]

> In *Thane,* we held that "phasing is prohibited if it can result in disregard of the cumulative potential environmental impacts of a project." The "Legislative Findings" section of the 1994 amendment provides that "consideration of a disposal as a phase of a development project is not intended to artificially divide or segment a proposed development project to avoid thorough review of the project or to avoid consideration of potential future environmental, sociological, or economic effects." Further, subsection (g)(1)(B)(vi), which was substantively unaffected by the 1994 amendment, provides that "when the director prepares a written finding ... for an oil and gas lease ... the director shall consider and discuss ... the reasonably foreseeable cumulative effects of oil and gas exploration, development, production, and transportation on the sale area."[67]

Thus the Court's continuing analysis remained grounded in the original principle that the phasing is permissible only if it takes into consideration the cumulative effects of the project, demonstrating that the essence of the Court's concern is that deferring key decisions through phasing may mask cumulative effects. The Legislative Findings explicitly refer to "disposal as a phase of a development project" and the Court's reasoning demonstrates its assumption that each phase is to be treated as a distinct disposal of an interest in state lands.[68]

The ultimate conclusion that DNR is still required to make phased findings leads from the *Kachemak Bay* Court's invocation of Article VIII and its consistent adherence to

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[65] *Kachemak Bay*, 6 P.3d at 278–79.
[66] *Id.* at 278.
[67] *Id.* (citations omitted).
[68] *Id.*

the principle that DNR always must consider cumulative effects. Referring to the particular BIF in question, the Court held that DNR had to meet not only the statutory test for phasing as required by AS 38.05.035(e)(1)(C), but also had to meet the overarching test of

> . . . whether DNR, by phasing its review, would "avoid thorough review of the project or . . . avoid consideration of potential future environmental, sociological, or economic effects" or, as we stated in *Thane,* whether phasing would "result in disregard of the cumulative potential environmental impacts of a project."[69]

Finally, the Court concluded with the critical observation that

> the legislature's policy choice does not, by any means, relieve DNR of its duty to take a continuing "hard look" at future development on the lease sale lands. To the contrary, 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.[70]

This language distinguishes between the phasing procedure, which the Court describes as a policy choice, and what the Court characterizes as DNR's "obligation" to scrutinize each phase for the best interest of the public. This distinction suggests that while phasing may be a function of legislative policy, the duty to scrutinize each phase, which itself arises from the duty to consider cumulative effects, springs from a higher principle which supersedes agency policy. Implicit in its finding that phasing is constitutional is the Court's confidence that the statutory duty to issue findings at each phase insured that DNR would fulfill its constitutional duties.

In *Kachemak Bay* the Court described the nature and constitutional foundation for DNR's obligation:

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[69] *Id.* at 280.
[70] *Id.* at 294.

> DNR's obligation to consider the "best interests of the state" and to issue written findings when it proposes to alienate state land or an interest in state land can be traced to the Alaska Constitution. Article VIII, Section 1 proclaims that "[i]t is the policy of the State to encourage the . . . development of its resources by making them available for maximum use consistent with the public interest." Section 2 further provides that "[t]he 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." Finally, Section 8 endows the Legislature with the power to "provide for the leasing of, and the issuance of permits for the exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses."
>
> In Title 38, Chapter 5 of the Alaska Statutes, the legislature delegated to DNR much of its authority to ensure that such leasing of state land or interests in land is consistent with the public interest. Alaska Statute 38.05.035(e) provides, in part: "Upon a written finding that the interests of the state will be best served, [DNR] may . . . approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them."[71]

While the conclusion that written findings are required is clearly grounded in the language of the statute, the continuing nature of DNR's duty to scrutinize is not.

In considering the project at issue in the present appeal, DNR construed the statute to require a written BIF only at the lease sale phase of the project in question. The Commissioner interpreted this to mean that only a single finding is required regardless of the number of phases. To the extent that this conclusion means that DNR would be relieved of its duty to consider best interests at every phase of the project, this interpretation plainly conflicts with DNR's ongoing constitutional obligations. Because the court concludes that each phase of a project is a distinct disposal of an interest in state land, the application of the statute can only be reconciled with DNR's constitutional duties by requiring a written BIF at each phase of a project.

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[71] *Id.* at 276 (citations omitted).

In the case now before the court, DNR proposes to issue a single, generalized BIF for a vast area of land, acknowledging that the cumulative effects of the development are unknown. Although the courts have concluded, based upon statutory language, that DNR can proceed at any given phase based only upon the information actually known at the time[72], implicit in that conclusion is a finding that the cumulative effects determination upon which an ultimate best interest conclusion must be grounded will itself be assessed as new information is acquired at each stage. While DNR contends that the best interest evaluations will be satisfied at each phase by compliance with other regulatory requirements, it apparently contends that the specific considerations of the BIF need not and will not be reassessed, and asserts that it will not make further findings. Appellee argues that the best interests of the state are protected by opportunities for public input at later phases of the project. But the absence of ongoing BIF requirements calls into question the meaningfulness of any such participation. Without the requirement of written findings DNR is excused from making a record that demonstrates proper consideration of public input, that enables the public to understand the basis for DNR's decision, and that permits appropriate judicial review.

As applied to this case, DNR is asserting that its overall obligation to make a best interest determination is satisfied by making the assessment only in the first phase of development, which is to say, only at the first disposal of an interest in state land. DNR does not concede that its best interest evaluation is a continuing duty. The Alaska Constitution and the Supreme Court's decisions reflect a strong policy of protecting the

[72] AS 38.05.035(e)(1)(B)(ii) (the director may limit the scope of review to facts "that the director finds are material to the determination and that are known to the director or knowledge of which is made available to the director during the administrative review"); *see also Kachemak Bay*, 6 P.3d at 278.

public interest where public land grants are concerned.[73] The statute requires a written BIF.[74] The courts infer from Article VIII a duty of continuing evaluation.[75] The conclusion of *Kachemak Bay* that BIFs are required at every phase is grounded in the constitutional principle of that continuing duty.[76] As such, application of statutory permission to issue only a single BIF at 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 of the Alaska Constitution.

In this case DNR concluded that a "best interest process for post-lease phases is not required by statute," relying on commentary to the statute that states that "no other best interest finding is required after the disposal phase."[78] The court concludes 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. As such, the court cannot approve DNR's application of this interpretation.

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[73] *Messerli v. State, Dep't of Natural Res.*, 768 P.2d 1112, 1119 (Alaska 1989), *abrogated by Olson v. State, Dep't of Natural Res.*, 799 P.2d 289 (Alaska 1990) (citing specifically to the statutory requirement in AS 38.05.035 of a best interest finding as an example of implementation of this strong constitutional policy, and noting Article VIII § 10 requires public notice before disposal).

[74] AS 38.05.035(e) ("upon a *written finding* . . . the director may . . .dispos[e] of available land, resources, property or interests in them.") (emphasis added).

[75] *Kachemak Bay*, 6 P.3d at 294.

[76] *Id.* at 276 ("DNR's obligation to consider the 'best interests of the state' and to issue written findings when it proposes to alienate state land or an interest in state land can be traced to the Alaska Constitution.").

[78] Final BIF, *supra* note 2, at A-3.

CONCLUSION

For the foregoing reasons this Court reverses the final decision of the Commissioner denying reconsideration. The decision in this case is remanded to the Commissioner, who is directed 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.

DATED in Kenai, Alaska, this 22nd day of February, 2011.

PETER ASHMAN
Superior Court Judge *pro tem*

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L. Chirp 2-23-11
Judicial Assistant Date