Trial Ct
Judge Gleason
2/5/10 cp

FILED
STATE OF ALASKA
2010 FEB -5 PM 2:54
CLERK OF APPELLATE COURTS
BY: _____
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Natural Resources,	)	Supreme Ct. No. S-13730
Petitioner,	)	
v.	)	Trial Court No.
	)	**3AN-06-13751CI**
ExxonMobil Corporation, Operator	)	(Consolidated Appeals)
of the Point Thomson Unit; BP	)	3AN-06-13760CI
Exploration (Alaska) Inc.; Chevron U.S.A.	)	3AN-06-13773CI
Inc; ConocoPhillips Alaska, Inc.,	)	3AN-06-13799CI
	)	3AN-07-04634CI
Respondents.	)	3AN-07-04620CI
	)	3AN-07-04621CI

PETITION FOR REVIEW

The State of Alaska, Department of Natural Resources (DNR), respectfully petitions for review of the superior court decision reversing the DNR Commissioner's decision to terminate the Point Thomson Unit (PTU).[1]

I. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

DNR approved the Point Thomson Unit Agreement (PTUA) in 1977, after the unit operator signed it.[2] The PTU contains one of the largest, untapped, proven reserves of oil and gas in North America, including at least eight trillion cubic feet of gas, and hundreds of millions of barrels of gas liquids and oil.[3] But while the unit has existed for over 30 years, it has never been put into production. The PTUA requires the lessees to

[1] Appendix A is the January 11, 2010 superior court PTU decision and the subject of this petition.

[2] *See* Appendix B, the December 26, 2007 superior court PTU decision at 1 and Appendix G the 1977 PTUA and subsequent amendments at 19.

[3] Appendix C, the May 10, 2006 Alaska Department of Revenue preliminary fiscal interest finding regarding proposed gas line contract at 3 and Appendix D, the April 22, 2008 DNR Commissioner's PTU decision at, 31 n. 142.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

periodically submit to DNR Plans of Development (PODs) that set forth their plans for developing the unit. App. B at 7. Beginning in the early 1980's, DNR worked with the lessees to convince them to put the unit in production. DNR's attempts were unsuccessful. App. D at 12-26.

After years of unsuccessful attempts to effect unit production, and pursuant to DNR's constitutionally based mandate to maximize production and statutory responsibility to administer oil and gas leases in the public interest, Director Mark Myers rejected the lessees' 22nd POD in 2005. App. B at 8. He held the PTU in default, explaining in his decision that the unit was subject to termination if the lessees failed to cure by committing to production. *Id.* A year later, the lessees submitted a modified 22nd POD as a cure for the default. *Id.* at 10. The POD proposed to drill one, conditional, exploratory well or to make a monetary payment in lieu of drilling. *Id.* at 24.

Because the modified POD did not commit to unit production, DNR Commissioner Michael Menge rejected it and terminated the PTU in 2006. *Id.* at 13. The lessees appealed, and in a 2007 decision, Superior Court Judge Sharon Gleason held that DNR had both the discretion to reject the modified POD and the authority to administratively terminate the unit. *Id.* at 20, 32. She found, however, that the agency had not given the lessees adequate notice that failure to submit an acceptable POD could result in unit termination. *Id.* at 42. Accordingly, the court remanded for notice and a hearing on what remedy DNR should impose for the lessees' failure to cure. *Id.*

On remand, DNR Commissioner Tom Irwin did not limit the scope of the hearing to the issue of termination, but invited the lessees to suggest alternatives to the rejected

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

22nd POD. App. A at 8. As a proposed remedy, the lessees submitted a 23rd POD, which offered 10,000 barrels a day of gas liquids production by 2014. *Id.* at 9, App. D at 30. Commissioner Irwin held a week-long hearing for the purpose of taking evidence and testimony from just the lessees. He listened to 30 hours of testimony from 14 lessee witnesses, considered the lessees' 256 exhibits, and the agency record. App. D at 3. He analyzed the lessees' proposed remedy. He acknowledged that the 23rd POD committed to some production, but decided to terminate the unit because the lessees did not offer sufficient assurances that they would proceed to development or expand production after the 23rd POD was complete.[4]

It is the DNR Commissioner's view that termination is in the public interest because the lessees were unlikely to follow through with their proposed 23rd POD. App. D at 58, 63. Commissioner Irwin based his decision on the unit's history, the lessees' unwillingness to submit a POD with benchmarks or enforcement mechanisms to assure action, oil and gas law, and his concerns about the credibility of some of the witnesses. *Id.* at 58-60. The lessees sought reconsideration, and the DNR Commissioner affirmed the unit termination. App. A at 11.

The lessees again appealed to the superior court. In the second appeal, which is the subject of this petition, lessees raised due process issues, arguing, in part, that in the remand proceedings they should have been afforded an adversarial hearing before an independent decision-maker and that DNR's attorneys and staff should not have advised the DNR Commissioner. *Id.* 24 – 25. They also argued that section 21 of the PTUA—a

[4] App. A at 10; App. D at 32 n. 144, 58 - 63.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

provision unrelated to PODs and applicable only in narrow circumstances not present here—overrides DNR's discretion to terminate the unit if the DNR Commissioner determines that unitization is no longer in the public interest. *Id* 15, 21 – 23.

The superior court held that section 21 of the PTUA requires DNR to provide the lessees with *a third* hearing to determine what work might conform with "good and diligent oil and gas engineering and production practices." *Id.* at 23. It also found that DNR violated the lessees' due process rights on remand in two ways: by allowing the attorneys who represented DNR in the first superior court appeal to advise the DNR Commissioner on remand and by allowing a DNR staff person who assisted the agency in the appeal to help the DNR Commissioner with procedural issues on remand. *Id.* at 27-29.

II. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Unitization is authorized only where DNR finds it is necessary and advisable in the public interest. AS 38.05.180(p); 11 AAC 83.303. The DNR Commissioner found that the appropriate remedy for lessees' failure to cure their default was unit termination because continuation of the unit was not in the public interest. However, the superior court reversed the DNR Commissioner's decision to terminate because DNR did not evaluate the lessees' proposed remedy under the "good and diligent oil and gas engineering and production practices" standard of section 21 of the PTUA. Given DNR's constitutionally based, statutory responsibility to manage state lands for the public interest, did the court err in applying the standard of section 21 of the PTUA rather than the "public interest" standard?

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

2. State attorneys and DNR staff participated in the a superior court appeal of the DNR Commissioner's decision and then advised the DNR Commissioner in agency proceedings on remand. Did this violate the due process rights of the lessees involved in the agency proceedings when there has been no evidence of actual bias against the lessees?

III. CRITERIA FOR INTERLOCUTORY REVIEW

Under Appellate Rule 402(b), the Court will grant interlocutory review when any one of the following three specified conditions are satisfied: (1) postponement of review will result in injustice because the superior court's due process ruling and interpretation of the PTUA impairs DNR's legal rights and because it will cause unnecessary expense, delay, and hardship; (2) the superior court's decision involves substantial disagreement over important questions of law and immediate review is necessary because a ruling from this Court will advance an important public interest; or (3) the issue presented in this petition might otherwise evade review and a decision from this Court is needed for guidance to the lower court. As explained in more detail below, this petition satisfies all these criteria for immediate review.

IV. REASONS WHY REVIEW SHOULD NOT BE POSTPONED UNTIL APPEAL MAY BE TAKEN FROM FINAL JUDGMENT

A. This Court should not wait for an appeal from final judgment to determine the correct interpretation of the unit agreement.

1. This Court should immediately review the superior court decision because the decision hinders DNR's ability to manage state resources in the public interest, involves important questions of law regarding

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

the meaning and application of section 21, and immediate review will expedite the litigation and prevent further harm to the public interest.[5]

The superior court's interpretation of the PTUA significantly undermines DNR's ability to protect the public interest. DNR has the responsibility to manage the state's oil and gas resources for the public. Alaska's natural resources belong to the state, which controls them as trustee for Alaskans.[6] The Alaska Constitution provides that the state has the policy of encouraging the development of its resources by making them "available for maximum use consistent with the public interest,"[7]and requires the legislature to "provide for the utilization, development, and conservation of all natural resources belonging to the State ... for the maximum benefit of its people."[8] The legislature has delegated primary responsibility for managing Alaska's oil and gas resources to the DNR Commissioner.[9]

Yet the superior court held that while DNR has authority to reject the proposed PODs and to terminate the unit, the lessees' failure to submit an acceptable POD—even

---

[5] *See* Alaska R. App. P. 402(b)(1) and (2).

[6] *Shepherd v. State, Dep't of Fish and Game*, 897 P.2d 33, 41 (Alaska 1995) (citing Alaska Const., Art. VIII, § 2).

[7] Alaska Const., Art. VIII, § 1.

[8] Alaska Const., Art. VIII, § 2.

[9] *See, e.g.,* AS 38.05.020 ("The DNR Commissioner shall supervise the administration of the division of lands.... [and] exercise the powers and do the acts necessary to carry out the provisions of this chapter"); AS 38.05.180 (oil and gas and gas-only leases effectuate interests of Alaskans in the development of the state's oil and gas resources and the DNR Commissioner manages the leasing process); AS 44.37.020 (DNR shall administer oil and gas resources for development); *see also Kachemak Bay Conservation Soc'y v. State,* 6 P.3d 270, 276 (Alaska 2000) ("[T]he legislature delegated to DNR much of its authority to ensure that such leasing of state land or interests in state land is consistent with the public interest."); 11 AAC 83.303(a)(the DNR Commissioner will approve a POD if it is necessary and advisable in the public interest).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

after 30 years without production—was not a material breach of the agreement. App. A at 18. If DNR is unsatisfied with a proposed POD, it cannot place a unit into default, but must provide a hearing under section 21 of the PTUA. *Id.* at 23. This ruling significantly shifts the respective rights and obligations of DNR and the lessees under the applicable statutes and regulations, and the PTUA. Moreover, this ruling also potentially undermines DNR's responsibility to manage other state lands because it may restrict DNR's ability to place units into default.

The superior court misinterpreted the PTUA by requiring a section 21 hearing under the facts of this case. Section 21 does not apply to this case. On its face, it applies when the Director issues an "order of alteration or modification," when "in his discretion" he determines that it would be "in the public interest" to "alter or modify ... the quantity and rate of production" or to alter or modify the rate of prospecting, development, or production "in the interest of attaining ... conservation objectives. . . ." § 21, ¶1, App. A at 2. This authority can be exercised only "after notice ... and opportunity for hearing," and cannot require an increase that would exceed "that required under good and diligent oil and gas engineering and production practices . . . ." § 21, ¶ 2. App. A at 4.

The DNR Commissioner found that section 21 did not apply because there were no ongoing unit operations. App. D at 64. This means it applies only where lessees have made capital investment to effect functioning infrastructure for a prospecting, development or production operation. Its procedural safeguards protect the lessees' investment in this infrastructure when DNR unilaterally orders changes in the rate of

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

prospecting, development, or production. Once a lessee has invested substantial sums in infrastructure based on DNR's approval of a certain rate of prospecting and development, altering the rate is not always a simple matter. Infrastructure is often scaled to certain rates of production, and altering these rates can involve installing new and expensive upgrades. Therefore, providing a hearing before mandating potentially expensive modifications—and limiting the allowable changes to those "required under good and diligent oil and gas engineering and production practices"—strikes the appropriate balance in protecting the interests of the parties.

But section 21 has no relevance to DNR's decision to reject a POD and default a unit, particularly in this case where the lessees had not made a capital investment in a DNR-approved operation and known reserves had not been put into production for 30 years. Further, a section 21 hearing in this case would not address the DNR Commissioner's decision[10] and it would serve only to give the lessees unintended ability to retain the PTU, notwithstanding the public interest, if they can show that the "good and diligent" standard allows them to continue to hold the unit. If DNR is to have the ability to achieve its constitutional and statutory mandates—to advance development of the resource in a manner that protects the public interest—the good and diligent engineering practices standard of section 21 should not be held to supersede the statutory

[10] Application of section 21 makes no sense in this case, where the DNR Commissioner did not reject the 23rd POD because he demanded a higher rate of prospecting, development, or production. To the contrary, the DNR Commissioner found that the 23rd POD was a technically reasonable first step to unit development. App. D at 31. He rejected the POD because he needed, but did not receive, adequate assurances that the lessees would complete the 23rd POD and expand unit production after the POD expired. *Id.* at 58 – 60.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

and regulatory criteria for unitization.

The superior court, nevertheless, construed section 21 to mean that DNR cannot terminate a unit with known reserves that have not been produced for 30 years. DNR instead must show in a section 21 hearing that commercial production is consistent with "good and diligent oil and gas engineering and production practices." This shifts to DNR the burden of proposing an acceptable development path, and it eliminates the DNR Commissioner's ability to determine, as he did in this case, that the plan should not be approved because it was not in the public interest. The lessees can insist that DNR either accept any POD they submit, or subject the agency to a complex, protracted proceeding, and as this case demonstrates, engage in years of appeals and further litigation.

In sum, this petition satisfies Rule 402(b)(1) because DNR's ability to manage the state's resources in the public interest is hindered by the superior court's decision. This petition also satisfies Rule 402(b)(2) because the meaning and application of section 21 of the PTUA are important legal questions on which substantial grounds exist for differences of opinion. The Court should also grant the petition to prevent years of needless litigation. This would materially advance the termination of the case and allow DNR to manage the resource for the maximum benefit of the public, an important interest that otherwise will be compromised indefinitely.

2. This Court should immediately review the superior court's decision to prevent the injustice of an unnecessary hearing that will be protracted, expensive, and extremely complicated, and to prevent injustice to the public for whom development is sought.[11]

[11] *See* Alaska R. App. P. 402(b)(1).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

The hearing that the superior court has ordered on remand will be a complex matter. Litigating how to appropriately develop the PTU resources will be a very expensive and time consuming proceeding that will extend this litigation for years and waste judicial resources. More specifically, the hearing will involve testimony from technical experts representing both DNR and the lessees, including reservoir geologists, petroleum engineers, and drilling technicians. Adding to the complexity is that a vast amount of the testimony, evidence, and data will require confidentiality protection, requiring protective orders, confidential filings, and hearing sessions. Both parties will likely seek extensive discovery, with tens of thousands of documents, numerous depositions, and discovery disputes. Given the significance of the matters at stake, the hearing could take from three to eight weeks, preceded by several years of pretrial activity.

That a section 21 hearing will be enormously complicated, expensive and time-consuming is not only DNR's opinion; it is evidenced by the lessees' own explanation to DNR of what it will entail. After the superior court remanded the case for a hearing on the appropriate remedy for an unacceptable POD, DNR Commissioner Irwin asked the lessees to submit briefs on the question.[12] They requested an adversarial proceeding before an independent decision-maker. App. E at 2. Before prehearing briefs were due, lessees argued that DNR would be required to inform the lessees of the applicable legal standards, acceptable remedies, and the factual basis for the remedies DNR sought. *Id.* at 5. DNR's witnesses would be subject to pre-hearing discovery and cross-examination.

[12] *See* App. A at 8 and Appendix E, a January 18, 2008 Exxon letter to DNR.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Id. at 2, 5. At a minimum, the lessees asserted, the hearing should address a number of complex issues. App. E. They also argued that DNR must accept their proposed 23rd POD unless DNR carried the burden of proof in a section 21 hearing that the lessees were required to do more than the 23rd POD.[13]

In short, undertaking this proceeding will be costly both in the expense of the proceedings and in the cost of further delay to the ultimate development of the PTU – one of the largest undeveloped oil and gas fields in North America. This Court should grant the petition to prevent the injustice that will result if a hearing of this magnitude is ultimately determined to have been unnecessary.

3. This Court should immediately review the superior court decision because it otherwise will evade review.[14]

The superior court holding that DNR must provide a section 21 hearing is likely to be unreviewable by this Court after remand, so immediate review of the proper interpretation of section 21 is advisable under Appellate Rule 402(b)(4). The question of whether the PTUA requires a section 21 hearing under the facts of this case will not be at issue on remand, and DNR will be unable to appeal its own decision in any event.[15]

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

---

[13] Appendix F at 18-19 a February 18, 2008 Exxon PTU brief to DNR.

[14] *See* Alaska R. App. P. 402(b)(4).

[15] While the superior court suggests that it would be willing to conduct the section 21 hearing, App. A at 29, this would be inappropriate both because the criteria for trial de novo are not present in this case, *see S. Anchorage Concerned Coal. v. Anchorage Bd. of Adjustment,* 172 P.3d 774, 778 (Alaska 2007), and because DNR is unwilling to cede its authority to the court.

Therefore, the superior court's decision on section 21's applicability is essentially final as to DNR.[16]

B. The Court should immediately consider whether the superior court's holding that DNR's attorneys and staff violated due process by participating in the remand proceeding.

1. The superior court's holding on due process involves an important question of law on which there is substantial ground for disagreement and immediate review is necessary because it will advance an important public interest.[17]

Immediate review is necessary because the superior court's ruling involves an important question of law, the scope of due process in administrative proceedings, and because there is a substantial ground for difference of opinion regarding the superior court's due process holding.

Relying on *In re Robson*,[18] the superior court held that the lessees' due process rights were violated because, during the remand proceedings, the DNR Commissioner was advised by the same attorneys who had represented the agency in the first superior court appeal. In addition, the court found that DNR violated due process by having DNR employee Nan Thompson assist the DNR Commissioner on procedural issues during the remand proceedings when she had previously appeared as an agency representative at a superior court argument.

---

[16] In some jurisdictions, such orders carry a right of appeal. *See, e.g., Cliff House Nursing Home, Inc. v. Rate Setting Commission*, 390 N.E.2d 723, 724 (Mass. 1979) (holding that the commission had a right to appellate review despite remand because, since it "cannot logically appeal from its own decision on remand," it "may never have another opportunity to obtain judicial review...."); *see also Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, (9th Cir. 2004)(discussing the collateral order doctrine).

[17] *See* Alaska R. App. P. 402(b)(2).

[18] 575 P.2d 771 (Alaska 1978).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

The superior court's decision misapplied *In re Robson*, which is based on the principle that an agency employee may not serve dual roles in a case.[19] In that case, the Court held that due process was violated because the Alaska Bar Association's Executive Director supervised the attorneys who prosecuted the subjects of bar complaints and, therefore, she could not be present to advise the board when it decided whether to impose discipline.[20]

That situation is quite different than this case in which neither the attorneys nor Ms. Thompson served dual roles. Their roles were always to advise and represent the DNR Commissioner. While the attorneys acted as advocates for the DNR Commissioner in the 2007 superior court appeal, they did so in a proceeding in which the superior court, and not the DNR Commissioner, was the decision-maker. On remand to the DNR Commissioner in 2008, they advised the DNR Commissioner on the decision he faced, but they did not serve as advocates in an adversarial proceeding before him.

In short, neither the attorneys nor Ms. Thompson played dual roles in the case. Instead, they simply advised the DNR Commissioner. Such a practice does not violate due process.[21] And, in the absence of dual roles, *actual bias* would be required to support

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

---

[19] *See id.*

[20] *Robson*, 575 P.2d at 774; *see also Amerada Hess v. RCA*, 176 P.3d 667, 677 (Alaska 2008) (discussing the scope of *Robson*).

[21] *See Amerada Hess,* 176 P.3d at 677; *see generally* 1 Charles H. Koch, Jr., *Administrative Law and Practice* § 6.11[1] ("An agency may combine investigative, adversarial and adjudicative functions, as long as no employees serve in dual roles.")

a finding that due process was violated,[22] a finding that the superior court explicitly declined to make in this case. App. A at 28. Thus, this petition presents an important question of law on which there is substantial grounds for disagreement.

Additionally, the superior court's ruling implicates an important public interest because it has created uncertainty around whether state agencies can continue to be advised on remand by staff and attorneys who previously participated in litigation against a party.

2. The Court should immediately consider the due process issue because the superior court impaired DNR's legal rights by interfering with the attorney-client relationship of an agency and its attorneys.[23]

The superior court also erred by relying on *In re Robson* to find that in the newly-ordered section 21 hearing, the DNR Commissioner cannot obtain advice from the attorneys who represented the agency in the second appeal, or allow participation of staff who assisted in the appeal. The superior court imposed this rule despite never making a finding of actual bias.

The superior court's due process decision will critically impair DNR's ability to fulfill its responsibilities in this case on remand and, more broadly, it could alter how the agency handles all administrative appeals that are remanded. The court has interfered with the attorney-client relationship between DNR and its lawyers, which will inhibit the DNR Commissioner's right to be assisted by DNR staff and counsel. As indicated in

---

[22] *See Law offices of James B. Gottstein v. State, Dep't of Natural Resources*, ___ P.3d ___, 2010 WL 199910 (Alaska 2010) ("We ... reiterate that agency personnel are presumed to be impartial until a party shows actual bias or prejudgment").

[23] *See* Alaska R. App. P. 402(b)(1) and (2).

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

section IV.A.2, above, the remand hearing will be a long and complex proceeding. Conducting this hearing will require several state attorneys and a number of DNR staff members, and it is self-evident that those best able to assist the agency in this hearing are the very people whose participation the superior court decision prohibits. Unless the Court grants this petition and considers this issue immediately, the superior court decision will result in injustice by impairing DNR's right to receive assistance from the most knowledgeable state attorneys and agency staff.

3. The Court should immediately consider the due process issues because they otherwise will evade review.[24]

For the reasons discussed in section IV.A.3, above, if the Court declines to consider the due process rulings immediately, the issues are likely to evade review altogether.

V. STATEMENT OF RELIEF SOUGHT

This Court should grant review and reverse the superior court's holdings that section 21 of the PTUA requires a hearing when the DNR Commissioner terminates a unit for failure to submit an acceptable POD and that DNR's attorneys and staff cannot participate on remand.

DATED February 5, 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: Joanne M. Grace, Alaska Bar No. 8606035
Richard J. Todd, Alaska Bar No. 8011114
Assistant Attorneys General

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

[24] Alaska R. App. P. 402(b)(4).

CERTIFICATE OF SERVICE

I certify that on this date I caused to be served by first class mail, postage prepaid, a true and correct copy of *Petition for Review* to the following:

Attorney for BP Exploration (Alaska) Inc. Susan Orlansky FELDMAN ORLANSKY & SANDERS 500 L Street, Suite 400 Anchorage, Alaska 99501	Attorney for ExxonMobil Corp. Douglas J. Serdahely PATTON BOGGS LLP 601 West 5th Avenue, Suite 700 Anchorage, Alaska 99501
Attorney for Chevron U.S.A. Inc. Stephen M. Ellis DELANEY WILES, INC. 1007 West 3rd Avenue, Suite 400 Anchorage, Alaska 99501	Joseph Farrell, Managing Counsel CONOCOPHILIPS ALASKA, INC. Legal Department P.O. Box 100360 Anchorage, Alaska 99501
Attorney for ConocoPhillips Alaska, Inc. Spencer C. Sneed DORSEY & WHITNEY, LLP 1031 West 4th Avenue, Suite 600 Anchorage, Alaska 99501	Attorney for State of Alaska Richard Todd Assistant Attorney General 1031 West 4th Avenue, Suite 200 Anchorage, Alaska 99501
Attorney for BP Exploration (Alaska), Inc. George R. Lyle GUESS & RUDD 510 L Street, 7th Floor Anchorage, Alaska 99501	Attorney for BP Exploration (Alaska), Inc. Bradford G. Keithley PERKINS COIE LLP 1029 West 3rd Avenue, Suite 300 Anchorage, Alaska 99501
David B. Ruskin 601 West 5th Avenue, Suite 700 Anchorage, Alaska 99501	Attorney for ExxonMobil William B. Rozell Box 20730 Juneau, Alaska 99802-0720
Judge Sharon Gleason Anchorage Superior Court 825 West 4th Avenue Anchorage, Alaska 99501-2004	

Samantha Christenson

February 5, 2010
Date

FILED
STATE OF ALASKA
APPELLATE COURTS
2010 FEB -5 PM 2:54
BY: [illegible] APPELLATE COURTS
DEPUTY CLERK

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES, Petitioner, v. EXXON MOBIL CORPORATION, OPERATOR OF THE POINT THOMSON UNIT; BP EXPLORATION (ALASKA) INC.; CHEVRON U.S.A. INC.; CONOCOPHILLIPS ALASKA, INC., Respondents.	Supreme Court Case No. S-13730 Trial Court Case No. **3AN-06-13751 CI** (Consolidated) Case No. 3AN-06-13760 CI Case No. 3AN-06-13773 CI Case No. 3AN-06-13799 CI Case No. 3AN-07-04634 CI Case No. 3AN-07-04620 CI Case No. 3AN-07-04621 CI

Circ: SCT
Judge Gleason
3/11/10 cfg

OPPOSITION TO PETITION FOR REVIEW

Respondents oppose DNR's Petition for Review ("Pet."). The central question before the superior court was whether DNR had lawfully terminated the Point Thomson Unit Agreement ("PTUA"). Judge Gleason found DNR's action was unlawful. Her rulings were legally sound, and DNR has established no reason for interlocutory review.

I. Background Facts And Proceedings.

In 1977, DNR found that the PTUA was in the public interest, and formally entered into this contractual agreement with Respondents, who are the Working Interest Owners ("WIOs") of the Point Thomson Unit ("Unit") and primary holders of the unitized leases. [R. 9483][1] Once the PTUA was signed and approved, the language of the agreement governed the parties' rights. The PTUA expressly incorporates by reference statutes and DNR regulations in force as of 1977; later statutes and regulations are incorporated only if "not inconsistent with the terms" of the PTUA. [R. 1430, §1]

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

[1] "R. __" refers to the record filed in superior court. "Tr. __" is the transcript of the prehearing conference conducted by DNR. "1 Ct. Dec. __" refers to Judge

Under the PTUA, the WIOs must periodically submit to DNR a proposed plan of development ("POD") that governs development of the Unit for the time it is in effect. [R. 1437, §5] For almost 30 years, the WIOs submitted a succession of such PODs, which DNR approved. DNR now complains that there was no production from the Unit for 30 years. But that fact arose from the absence of a gas pipeline to the North Slope, the technical difficulties of producing from a high-pressure retrograde condensate reservoir such as exists in the Unit, and the low prices of natural gas, facts that DNR understood and accepted in each POD that DNR approved through 2005. The WIOs had every right to, and did, rely on DNR's approvals of PODs that did not call for imminent production of oil or gas. At all times, DNR had full contractual authority to disapprove a POD or, as discussed below, to demand a higher rate of development under PTUA Section 21. And the absence of production does not mean that there was no ongoing development under the PODs, or that work was not being done to prepare for production. By 2005, the WIOs had invested over $800 million in the Unit.

In 2005, Director Myers of the Division of Oil and Gas changed course. He disapproved the proposed 22nd POD on the ground that it did not provide for fast enough development. [R. 648] At first, he invoked DNR's powers under Section 21, and called for a hearing that would establish whether the increased rate of prospecting, development, and/or production that DNR desired was consistent with "good and diligent oil and gas engineering and production practices," and with "adequately protecting all parties in interest," as Section 21 requires. [R. 11143][2] Director Myers then *sua sponte* withdrew the notices of the Section 21 hearing. [R. 11169, 11189-90] He stated no reason, and none was apparent except a desire by DNR to avoid the

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

Gleason's decision filed Dec. 26, 2007. "2 Ct. Dec. __" refers to her decision filed Jan. 11, 2010. Copies of both decisions are attached to the Petition.

[2] The complete text of Section 21 is included in the Appendix.

requirements of Section 21. Director Myers' revised decision continued to assert that an increased rate of development and production was required, without providing the WIOs the protections of Section 21. The WIOs appealed to the Commissioner, who affirmed the disapproval of the 22nd POD. He then terminated the PTUA, without having given the WIOs any kind of notice that such action was contemplated. [R. 5670-89]

In the first appeal to the superior court, Judge Gleason held that termination denied the WIOs due process because of DNR's failure to give notice. [1 Ct. Dec. 42] She held that DNR was within its rights in disapproving the proposed 22nd POD, but carefully did not find that DNR's disapproval of the POD amounted to a breach of contract *by the WIOs,* let alone a material breach of contract that could justify termination of the PTUA. Indeed, she expressly *rejected* the idea that DNR's failure to approve the POD was a "default" under applicable regulations. [1 Ct. Dec. 34-35; *see* 2 Ct. Dec. 17-18, 21] She remanded the matter to the Commissioner for the purpose of considering "the appropriate remedy when [DNR] has rejected the proposed [POD]." [1 Ct. Dec. 45] In her remand order, she explicitly instructed the Commissioner to consider the applicability of Section 21.

On remand, the Commissioner refused to hold a Section 21 hearing, based on his conclusion that Section 21 was inapplicable. [R. 31455] DNR also refused to say what rate of development for the Unit it thought appropriate, refused to put on evidence, refused to specify the materials in the record on which it would rely, refused to allow cross-examination of any DNR employees, and allowed members of DNR's litigation team to provide advice to the Commissioner and participate in his deliberations. [R. 30507-22, 30866-69, Tr. 46-55] Faced with the problem of guessing what DNR wanted, the WIOs submitted a new POD 23, proposing the drilling of five wells, construction of a gas processing facility, and production in 2014. [R. 3000-19]

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

Commissioner Irwin found that the POD was a "technically reasonable first step," but rejected it on the ground that the WIOs could not be "trusted" to carry it out, and he once again terminated the PTUA.[3] [R. 31422, 31463-65]

The WIOs appealed again, and the matter again came before Judge Gleason. The multiple issues raised included whether DNR's procedures denied the WIOs due process, whether DNR was required to or did find a material breach or default sufficient to justify termination of the PTUA, whether an opportunity to cure any breach was required, whether the Commissioner committed legal or factual error with respect to POD 23, and whether his other findings were supported by evidence.

Judge Gleason again reversed, on two independent grounds. [2 Ct. Dec. 1, 29] First, she found that participation in the Commissioner's deliberations by those who were part of the legal team in the prior appeal was a plain violation of due process under *In re Robson*, 575 P.2d 771 (Alaska 1978). [*Id.* at 27-28] Second, she found that DNR had failed to apply Section 21 of the PTUA, the specific contractual provision that governs what happens when, as here, DNR seeks to increase the rate of development of the Unit. [*Id.* at 22-23] These rulings were thoughtful and well-reasoned, in accordance with law and longstanding precedent. They do not meet the criteria for interlocutory review under Appellate Rule 402(b) in any way: There is no substantial ground for a difference of opinion about the correctness of Judge Gleason's rulings, interlocutory review is not needed to prevent injustice of any sort, and it is not likely that review now will materially advance the termination of this litigation.

---

[3] A year later, in separate lease proceedings, the Commissioner partially reversed himself. He found that at least the first two wells would be drilled and the gas processing facility would be built, and approved those projects. Conditional Interim Decision, filed Jan. 27, 2009. One well has now been completed, the second is on schedule, and project work is on track for production in 2014. *See* Affidavit of Dale Pittman, filed Dec. 23, 2009.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

II. The Superior Court Correctly Found That DNR's Conduct Of The Remand Hearing Denied Due Process.

DNR asserts that the superior court erred in finding that having litigation counsel advise the decision-maker during the remand hearing denied the WIOs due process because "there has been no evidence of actual bias against the lessees." Pet. 5.[4] In fact Judge Gleason's decision is based solidly on this Court's decision in *Robson*.

In *Robson*, the Disciplinary Board of the Alaska Bar Association recommended a three-year suspension after Robson was convicted of a felony. The Executive Director of the Bar Association, who formally supervised the bar counsel who prosecuted Robson and recommended his suspension, was present during the Board's deliberations. Robson contended that her presence while the Board deliberated violated his due process rights. This Court agreed.

The Court first noted: "The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed." 575 P.2d at 774. But the Court held squarely that an advocate for an agency may not participate in deliberating, nor in rendering decision. As the Court explained:

> When an administrative official has participated in the past in any advocacy capacity against the party in question, fundamental fairness is normally held to require that the former advocate take no part in rendering the decision. The purpose of this due process requirement is to prevent a person with probable partiality from influencing the other decision-makers.[5]

---

[4] The superior court denied discovery into actual bias, since "the existing record is sufficient to proceed to a determination of the merits of the appeal on remand." Order Denying Motion for Partial Trial De Novo at 6. Interlocutory review would accordingly not resolve the due process issue; it would mean at most that the WIOs would be entitled to discovery about whether "actual bias" was present.

[5] 575 P.2d at 774 (citing *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968); *Trans World Airlines v. CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958)).

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

This Court did not question the Bar Association's contention that the Executive Director played no part in the deliberations and decision-making. Due process was violated by the appearance of partiality created by the advocate's mere presence during the deliberative process. In 2008, the Court reaffirmed the *Robson* holding, noting that "all advocates, the prosecution and defense alike, are *per se* excluded from the jury room or its functional equivalent."[6]

Robson thus holds that a *per se* due process violation occurs when an agency improperly combines its advocacy and judicial functions. That was the case here, as the superior court found:

> In this case, it is undisputed that during the remand proceedings before the agency, the Commissioner, acting in an adjudicative role, was advised by the same attorneys who had represented the agency in the first appeal to this Court. Those attorneys are also representing the agency in this second appeal. In addition, the Commissioner appointed Ms. Thompson to serve as the hearing officer at the remand proceedings. She had previously been DNR's representative when the agency was defending its first decision in the 2007 appeal before this Court. [2 Ct. Dec. 25]

DNR says that the *Robson* rule is limited to situations where an individual serves in a dual role. Pet. 13. Nothing in *Robson* supports this limitation, and the language of the case is inconsistent with it.[7] But in any event, it is a more than sufficient answer to DNR that Ms. Thompson, who served as *Hearing Officer* at the remand proceedings, had been DNR's chief representative and advocate during the first appeal to superior court and was the coordinator of DNR's responses to the WIOs.[8] As Hearing Officer,

---

[6] *Amerada Hess Pipeline Corp. v. Regulatory Comm'n of Alaska*, 176 P.3d 667, 677 (Alaska 2008) (*per curiam*).

[7] *See* 575 P.2d at 774 (test is whether an administrative official has acted in an advocacy capacity "*in the past*"; purpose of rule is to prevent a person with probable partiality from influencing the *other* decision-makers).

[8] In late December 2007, only a few weeks before she began acting as Hearing Officer, DNR described Ms. Thompson as DNR's "contact point for litigation" about

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

she presided alone at pretrial conferences, made procedural rulings, and sat with Commissioner Irwin on the bench throughout the remand proceedings. [Tr. 1-59] Even if combining advocacy and judicial functions in a single person were a prerequisite to a *Robson* violation, such a violation unquestionably occurred here.

DNR, moreover, was fully on notice of the *Robson* issues. The WIOs pointed them out before the remand hearing, and asked for the appointment of an independent hearing officer, an adversarial proceeding, and a clear separation of DNR's advocates from its adjudicators. [R. 30508] DNR refused all such requests. [R. 30513-15] The result was an appearance of partiality much stronger than in *Robson*. As the superior court rightly concluded:

> [I]n order to assure both the fact and appearance of impartiality when the Commissioner was exercising his decisional function, DNR's litigation counsel should not have been providing legal guidance to the Commissioner at the remand hearing, nor should DNR's agency representative in the first appeal have served in the position of hearing officer at the remand proceeding. [2 Ct. Dec. 28-29]

III. The Superior Court Correctly Found That DNR Needed To Comply With Section 21 Of The PTUA.

Ever since Statehood, the Legislature has implemented its constitutional mandate to manage natural resources for the benefit of the people[9] by means of the Alaska Lands Act. AS 38.05. That Act defines, and limits, the powers of DNR with respect to unitization. The reason is straightforward. Unitization often occurs before much is known about the hydrocarbons that will be found in a particular field. Unitization allows leases to be "held" beyond their primary term, as often is needed in Alaska where resources in remote locations may take years or decades to develop. If unit agreements could be terminated by DNR "in the public interest" without contractual

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

Point Thomson. *See* Appellants' Supplement to Renewed Motion For Appointment Of An Independent Hearing Officer, filed Jan. 5, 2009, at 3 & Exh. B at 2.

[9] Alaska Const., Art. VIII, Sec. 2.

constraints, or if additional burdens could be imposed on WIOs by DNR without contractual protections, no one could be sure that the huge investments of money needed to explore for and delineate hydrocarbons in Alaska would not in effect be confiscated by the State by the simple device of terminating the unit agreement and re-leasing the acreage. The Legislature has provided for unitization agreements, like the PTUA, precisely to establish the rights of the parties, and protect all sides.[10] The unit agreement itself must be "in the public interest," but public interest considerations are constrained by the contract once DNR approves the unit agreement.

One of the legislative limitations on DNR's authority, contained in former AS 38.05.180(m) when the PTUA was signed in 1977 and still in force as AS 38.05.180(p), allows the Commissioner to modify the rate of prospecting, development or production of a unitized field only "with the consent of the holders of the leases involved," that is, the WIOs. As an exception to this general rule, and to provide a limited way in which the Commissioner could alter the rate of prospecting, development, or production without consent of the WIOs, the Legislature also authorized the Commissioner to include in a unit agreement "a provision vesting [him] with the authority to alter from time to time the rate of prospecting and development and the quantity and rate of production."[11] The obvious intention was that the terms of any such provision to be included in a unit agreement would be negotiated between the Commissioner and the WIOs, and would thereafter govern their relationship. As the superior court found, Section 21 of the PTUA "corresponds to this statutory grant of authority." [1 Ct. Dec. 31 n.9] It gives DNR the power to modify the rate of prospecting and development

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

[10] AS 38.05.180; *Exxon Corp. v. State*, 40 P.3d 786, 788 (Alaska 2001) ("a unit agreement is a contract between the department and the lessees").

[11] Former AS 38.05.180(n) (now AS 38.05.180(q)); former 11 AAC 83.315 was to the same effect.

without lessee consent, but subject to agreed substantive and procedural requirements.[12]

This statutory framework, which has been in place essentially without change for 50 years, is the complete answer to DNR's arguments that complying with Section 21 will somehow undermine or impair DNR's responsibility to manage state lands. Pet. 6-7. Quite the contrary. Section 21 is the agreed embodiment in the PTUA of a longstanding legislative policy that expressly *restricts* DNR's ability to impose unreasonable requirements on WIOs through its power over units. Section 21 is not contrary to legislative policy; it *is* the policy of the Legislature, as the superior court correctly found. [2 Ct. Dec. 22 & n.21] And if Section 21 is *not* applicable, then under former AS 38.05.180(m) and current AS 38.05.180(p) DNR has *no* power to modify the rate of development and production except "with the consent of the holders of the leases."

Judge Gleason carefully analyzed each of DNR's arguments why Section 21 was inapplicable, and found them inconsistent with the plain language of Section 21 and the reasonable expectations of the parties. [2 Ct. Dec. 15-23] As she correctly found, DNR's position throughout these proceedings has been that the rate of production and development at Point Thomson needs to be increased. Section 21 is the provision of the PTUA that deals expressly with how to alter the rates of prospecting, development, and production. It therefore applies here, as Director Myers acknowledged in his initial decision in 2005 when he gave notice and set a hearing under Section 21. [R. 11143] It is not unjust that DNR should be required to comply with a contractual provision to which it agreed expressly, and with specific statutory authority.

---

[12] In 1985, after the first series of discovery wells was completed, DNR and the WIOs agreed to a notable tightening of the procedural requirements of Section 21. The amendments no doubt reflected both the discovery and a recognition by both sides that, given the absence of a gas pipeline, it would be years before development would be practical. *See* 1 Ct. Dec. 4.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

DNR argues that Section 21 cannot apply in a situation where "there are no ongoing operations, and thus no existing functioning infrastructure (such as active wells, production facilities, and pipelines)." Pet. 7-8. The superior court properly recognized that this argument is inconsistent with the common-sense proposition that a "rate" of production can be zero. [2 Ct. Dec. 18-20] It is also inconsistent with the text of Section 21 itself, which clearly distinguishes among rates of "prospecting," "development," and "production." Prospecting involves no infrastructure of any sort and yet Section 21 on its face applies to changing the rate of prospecting. It follows that Section 21 cannot logically be limited to situations where infrastructure is present.[13]

DNR next argues that Section 21 is inconsistent with DNR's powers to reject a POD. Pet. 7. This argument too is without merit. In trying to establish that Section 21 is inconsistent with other parts of the PTUA, DNR does not explain what purpose Section 21 has. Judge Gleason did not require that DNR hold a Section 21 hearing before it may reject a proposed POD. To the contrary, Judge Gleason's first decision gave DNR broad discretion to reject PODs under PTUA Section 10, essentially treating DNR's power to reject a POD as analogous to the privilege an owner has to reject an architect's plans in a contract that provides that plans must be to the owner's "satisfaction." [1 Ct. Dec. 22-23; 2 Ct. Dec. 17, 21] But as the superior court also found, "when Section 10 is interpreted in that manner," then rejection of a POD cannot be a material breach of contract *by the WIOS,* and a Section 21 hearing is the natural

[13] DNR's arguments about "infrastructure," moreover, are for all practical purposes moot. There is now indisputably a great quantity of "infrastructure" on site -- an enormous drilling rig, a gravel pad to support the rig, a completed well and one being drilled, storage tanks, a warehouse, living quarters for the crews, etc., so by DNR's own logic Section 21 will be applicable to any future hearing. *See* Pittman Affidavit, n.3 *supra*. Moreover, if Section 21 is applicable, as DNR says, when "lessees have made capital investments to effect functioning infrastructure for a prospecting, development, or production operation," Pet. 7, it is evident that they have done so here.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

next step if, following the rejection of one proposed POD, DNR and the WIOs cannot agree on an alternative plan and DNR seeks to impose a rate of prospecting, development, or production that is higher than what the WIOs agree to accept. [2 Ct. Dec. 17-18] Section 21 is consistent with DNR's power to reject a POD. It simply provides that when DNR *has rejected* a proposed POD on the ground that it does not increase the rate of prospecting, development, or production to a level satisfactory to DNR, DNR may not move toward termination of the PTUA without providing a properly noticed Section 21 hearing. [2 Ct. Dec. 21]

Finally, DNR argues that it would be unfair to shift to DNR "the burden of proposing an acceptable development path." Pet. 9. There are two major flaws in this argument. First, nothing in Judge Gleason's decision requires DNR to provide a "development path," as distinct from explaining the rate of development or production that it believes the WIOs should meet and then being prepared to demonstrate that this rate does not exceed what is required by good and diligent oil and gas engineering and production practices. Second, whatever burden is placed on DNR in a Section 21 hearing is not unfair: It is the burden DNR agreed to assume when it approved the PTUA in 1977 and the amendments it negotiated with the WIOs in 1985. [*See* 2 Ct. Dec. 23] Throughout this litigation, DNR has claimed its decisions deserve deference because of its agency expertise. The litigation exists because DNR contends that development of the Unit was not proceeding fast enough, and that DNR's judgment on what is "fast enough" is better than that of the WIOs. There is nothing unfair about requiring DNR to demonstrate its expertise and to prove that the rate of development it desires is consistent with good and diligent oil and gas engineering and production practice, and that it will protect the interest of "all parties." That is all compliance with Section 21 requires.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

IV. The Prospect Of A Section 21 Hearing Is No Reason For Interlocutory Review.

The Section 21 hearing is now substantially all that remains to be done in this litigation before a final judgment can be entered and an ordinary appeal taken, if there is need for one. DNR's arguments for interlocutory review therefore must needs rest heavily on claims about how time-consuming and expensive a Section 21 hearing would be.

The truth is that no one knows what a Section 21 hearing will be like. Judge Gleason asked for briefing on that topic, including the question of whether it should take place in superior court, before DNR, or before the Office of Administrative Hearings. [2 Ct. Dec. 29] The parties submitted their briefs, but at DNR's request Judge Gleason stayed further proceedings pending this Court's disposition of DNR's Petition. Accordingly, there has been no ruling of any kind as to how the Section 21 hearing will be conducted. Everything that DNR says about what will happen in a Section 21 hearing is thus mere speculation, and it cannot provide any basis for asking this Court to depart from the ordinary course of appellate procedure. In the highly unlikely event that Judge Gleason imposes some unreasonable or burdensome procedure, DNR can petition for review of that order at that time.

There are, however, two relevant comparisons that show how exaggerated are DNR's claims. The first is the hearing conducted on remand in March 2008. That hearing involved 14 witnesses in precisely the technical fields identified by DNR -- reservoir geology, reservoir engineering, facilities design and construction, petroleum engineering, drilling. It involved many protective orders and much testimony under seal, something DNR says will make any Section 21 hearing especially complex. Pet. 10. Yet the hearing took less than a week. It is true that all the witnesses were put on by the WIOs, since DNR refused to put on evidence. But even assuming that DNR would take as long to put on its case as it took the WIOs to put on theirs in March 2008, the hearing would last two weeks. That is hardly an unreasonable burden for an administrative agency seeking to deprive the WIOs of an extremely valuable resource.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

The second point of comparison is what DNR itself, in its most recent brief filed with Judge Gleason, says should happen now. It proposes a remand to Commissioner Irwin, after which DNR once again will not offer evidence or state a position. Instead, DNR proposes to hear only such testimony as the WIOs care to offer. DNR does not contemplate any discovery, and certainly no adversarial hearing before the Commissioner. And DNR says it can avoid any future *Robson* problem merely by walling off three lawyers.[14] In other words, DNR does not contemplate the parade of horribles that it tells this Court are inevitable, Pet. 10-11, 14-15, but a repeat of the hearing in March 2008. That could not impose an unreasonable burden on DNR.[15]

V. Interlocutory Review Will Result In Piecemeal Appeals And Waste of Judicial Resources.

Interlocutory review is disfavored because it produces piecemeal appeals and makes unnecessary work for appellate courts, since issues presented on interlocutory review are often mooted out by further proceedings in the case. Those considerations are present here, and they counsel strongly against interlocutory review.

Judge Gleason decided only two of the multitude of issues that were presented to her. Because under her decision there must be a new hearing, most of the other issues presented (about the conduct of the prior hearing, the evidence presented, the Commissioner's findings, and much else) are now effectively moot, and will never need to be decided. On the other hand, if there is interlocutory review now, and if DNR should prevail, Judge Gleason will need to address at least some of the remaining issues. If DNR should lose on those issues, it likely would then face the prospect of a new hearing, on grounds independent of those DNR now asks this Court to review. If the

[14] Appellee's Briefing Regarding Remand Proceedings, filed Feb. 10, 2010, at 9-12 (Superior Court Case No. 3AN-06-13751).

[15] The WIOs disagree that such a hearing would be adequate to remedy the wrongs Judge Gleason identified -- but the nature of the hearing to be conducted is not before this Court. The WIOs have proposed that Judge Gleason conduct the Section 21 hearing as a de novo trial under Appellate Rule 609(b). The mere possibility of a trial in superior court cannot be grounds for interlocutory review.

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

risk of a new hearing justifies an interlocutory appeal now, as DNR argues, it will be grounds for another interlocutory petition then. To grant interlocutory review now will only begin a process of piecemeal appellate review.

The WIOs believe that a new hearing is almost inevitable, regardless of how this Court might resolve the issues presented in DNR's petition. Judge Gleason rejected the Commissioner's view that DNR's refusal to approve the 22nd POD amounted to a material (or total) breach of contract by the WIOs or a "default" that justified termination. [2 Ct. Dec. 16-17, 21; *see* R. 31458] DNR does not seek review of this ruling. Pet. 4-5. Since a material breach or default is a prerequisite to one contracting party's power to put an end to a contract,[16] Judge Gleason's rejection of DNR's view that its disapproval of the proposed 22nd POD was itself a default or material breach by the WIOs means that there must be a new finding of a material breach in order for there to be a new termination. That will require a new hearing.

In short, contrary to DNR's claims, DNR's request for interlocutory review, even if successful, may well achieve no saving of time, because the hearing that DNR hopes to avoid will be necessary on alternative grounds. On the other hand, granting interlocutory review will derail and delay the prospects for a relatively prompt resolution of this entire controversy. The underlying dispute, after all, is not about termination. It is about the proper rate of development and production of the Point Thomson field. A Section 21 hearing, conducted consistent with due process and proper procedure, can resolve that question fairly and consistent with the facts. And once the appropriate rates of development and production are determined, the WIOs can

PATTON BOGGS LLP
Law Offices
601 West Fifth Avenue
Suite 700
Anchorage, AK 99501
Phone: (907) 263-6300
Fax: (907) 263-6345

16 *Conam Alaska v. Bell Lavalin, Inc.*, 842 P.2d 148, 158 (Alaska 1992) (termination justified "only in the event of a total breach"); *Cent. Alaska Broad., Inc. v. Bracale*, 637 P.2d 711, 713 (Alaska 1981) ("well established" that "only a material breach of contract justifies termination"); RESTATEMENT (SECOND) OF CONTRACTS §237.

21. RATE OF PROSPECTING, DEVELOPMENT AND PRODUCTION. The Director is hereby vested with authority to alter or modify from time to time in his discretion the quantity and rate of production under this agreement when such quantity and rate is not fixed pursuant to state law or does not conform to any statewide voluntary conservation or allocation program which is established, recognized and generally adhered to by the majority of operators in such state, such authority being hereby limited to alternation or modification in the public interest, the purpose thereof and the public interest to be served thereby to be stated in the order of alteration or modification. Without regard to the foregoing, the Director is also hereby vested with authority to alter or modify from time to time at his discretion the rate of prospecting and development and the quantity and rate of production under this agreement when such alteration or modification is in the interest of attaining the conservation objectives stated in this agreement and is not in violation under any applicable state law.

Powers in this section vested in the Director shall only be exercised after notice to Unit Operator and opportunity for hearing to be held not less than thirty (30) days from notice, and shall not be exercised in a manner that would (i) require any increase in the rate of prospecting, development or production in excess of that required under good and diligent oil and gas engineering and production practices; or (ii) alter or modify the rates of production from the rates provided in the approved plan of development and operations then in effect or, in any case, curtail rates of production to an unreasonable extent, considering unit productive capacity, transportation facilities available, and conservation objectives; or (iii) prevent this agreement from serving its purpose of adequately protecting all parties in interest hereunder, subject to applicable conservation laws and regulations.

In the Supreme Court of the State of Alaska

State of Alaska, Department of Natural Resources,	
Petitioner,	Supreme Court No. **S-13730**
v.	**Order**
	Petition for Review
ExxonMobil Corporation, Operator of the Point Thompson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A. Inc.; ConocoPhillips Alaska, Inc.,	
Respondents.	Date of Order: **5/28/2010**

Trial Court Case # **3AN-06-13751CI**

Before: Fabe, Winfree, and Stowers, Justices
[Carpeneti, Chief Justice, and Christen, Justice, not participating]

On consideration of the Petition for Review filed on **2/5/2010**, and the Response filed on **3/1/2010**,

IT IS ORDERED:

1. The Petition for Review is **GRANTED.**

2. The Notice of Completion of Preparation of File is due from the trial court clerk on or before **7/7/2010**.

3. Following the certification of the record, the petitioner's brief notice will issue. Formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 shall be filed. Briefing and excerpting shall proceed on the schedule prescribed in Appellate Rule 212(a)(1).

4. Either party may request oral argument within the time allowed by Appellate Rule 505.

Entered by direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Supreme Court Justices
Judge Gleason
Regional Appeals Clerk/Anchorage
Trial Court Clerk/Anchorage

Distribution: (fax and mail)

Mark E Ashburn
Dani Crosby
Ashburn & Mason
1227 W 9th Ave Ste 200
Anchorage AK 99501

Richard J Todd
Asst Attorney General
1031 W 4th Ave Ste 200
Anchorage AK 99501

William B Rozell
Attorney At Law
PO Box 20730
Juneau AK 998020730

Douglas J Serdahely
Patton Boggs LLP
601 W 5th Ave Ste 700
Anchorage AK 99501

Bradford Keithley
Perkins Coie LLP
1029 W 3rd Ave Ste 300
Anchorage AK 99501

Susan Orlansky
Feldman Orlansky & Sanders
500 L St Ste 400
Anchorage AK 99501

George R Lyle
Guess & Rudd
510 L St Ste 700
Anchorage AK 99501

Stephen M Ellis
Delaney Wiles Hayes Gerety Ellis & Young Inc
1007 W 3rd Ave Ste 400
Anchorage AK 99501

Spencer C Sneed
Dorsey & Whitney LLP
1031 W 4th Ave Ste 600
Anchorage AK 99501

David B Ruskin
David B. Ruskin, PC
601 W 5th Ave Ste 700
Anchorage AK 99501