Appendix
Resume: Patrick H. Martin

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Louisiana State University
Baton Rouge, Louisiana 70803
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email: phmarti@lsu.edu

Education: B. A., Louisiana State University, 1967
M. A., Louisiana State University, 1969
Ph. D., Louisiana State University, 1974
J. D., Duke University Law School, 1974 (with Distinction)

Employment: Campanile Professor of Mineral Law, LSU (At LSU since 1977); Director, Louisiana Mineral Law Institute.

Subjects Taught:

Oil & Gas Law	Contracts
Regulated Industries	Administrative Law
Environmental Law	Civil Procedure
Jurisprudence	

Personal: Age: 63; Married, 7 children

Previous Employment:

Commissioner of Conservation
Louisiana Department of Natural Resources
July 1, 1982 - March 12, 1984
(Appointed by Governor David C. Treen)

Assistant Professor of Law
University of Tulsa College of Law
Tulsa, Oklahoma
1975 - 1977

Attorney
Gulf Oil Corporation
New Orleans, Louisiana
1974 - 75

Activities:

Arbitrations:

a. Member of Prudhoe Bay Unit Operating Agreement Arbitration No. 2, April-October, 1984. Arbitration of gas valuation under operating agreement, Prudhoe Bay Field Alaska.

b. Amoco--Texas Gas Pipeline, fall 1984 (third arbitrator); matter settled prior to hearing.

c. Mesa--Texas Eastern Transmission Company, fall 1985 (third arbitrator); decision rendered February, 1986.

d. Cities Service--Petrofunds/Kelly, September 1986 (sole arbitrator).

e. BTA Producers--Amoco Production Company, September-October, 1987 (sole arbitrator).

f. Banner Petroleum, Ltd.; Kaneb Operating Company, Ltd.; E. Gerald Rolf -- Amoco Production Company, February-March, 1991 (sole arbitrator).

g. Conoco Inc. and Amoco v. Sunterra Gas Gathering Co., (third arbitrator), 1992-93.

h. Selected as arbitrator in a number of other proceedings that resulted in no disposition.

Mediations:

a. State of Louisiana, et al. v. Mid-Louisiana Gas Company, et al. (1994 - co-mediation)

b. Ruth Brown v. Drillers, Inc., et al. (1994).

c. Pardee Exploration Company v. Ashland Exploration, Inc. (Jan. 1997)

Expert witness: Oil Basins Limited v. BHP Billiton Limited et al., Australian arbitration, several statements and testimony April 14-15, 2005, Melbourne Australia, overriding royalty and related topics.

Expert witness: Samedan Oil Corp. v. Kinder Morgan, Inc., Arbitration No. 3, expert report, July 30, 2002; deposition, September 5, 2002 Baton Rouge, Louisiana – gas balancing, joint operating agreements.

Expert witness: Elliott Industries v. Conoco Inc., Amoco Production Company and Amoco Energy Trading Corp., Case No. CIV 00-655-JC-WWD-ACE, U.S.D.C., New Mexico, expert report, June 30, 2002, deposition, Santa Fe, New Mexico, August 14, 2002 - Royalty obligations, overriding royalty.

Expert witness: Parry v. Amoco Production Company, Case No. 94-CV-105, District Court County of La Plata, Colorado, expert report, April 29, 2002; trial testimony, Durango, Colorado, August 28, 2002 – Royalty obligations, overriding royalty.

Expert witness: Texaco Inc. v. Laimelife Associates et al Civil Action No. 94-539, Division "A" (2) U.S.D.C., M.D. La.; deposition January 22, 2002; testimony January 31, 2002 – Royalty obligations, overriding royalty.

Expert witness: Freeport-McMoRan Inc. and FM Properties Operating Co. v. Transcontinental Gas Pipe Line Corporation and Transco Energy Company, et al.; 19th JDC; Case No: 415,589, Docket "C" – Affidavit, August 7, 2001; deposition, August 14, 2001; testimony July 9, 2003 – Excess Royalty issue

Expert witness: Eunice Smith, et al. v. Anadarko Petroleum Corp. et al.; Case No. 00-C2; In the District Court of Grant County, Kansas – Affidavit, July 31, 2001 – Mineral deed, class action.

Expert witness: Samson Resources Company v. Questar Exploration and Production Company, a Texas corporation; Case No. CV-00618-E(E); U.S.D.C., N.D. Ok expert report joint operating agreements, May 10, 2001; deposition, November 28, 2001.

Expert witness: Samedan Oil Corporation vs. SOCO Offshore, Inc., Civil Action No. 98-0001-BH-S U.S.D.C., S.D. Ala., expert report joint operating agreements, deposition March 29, 2001.

Expert witness: Mojave Oil & Gas, L.L.C. v. Sanguine, Ltd., No. CJ-98-4383 (D.Ct. of Tulsa County, Oklahoma); trial testimony re: joint operating agreement, non-consent operations, maintenance of uniform interest, December 5, 2000.

Expert witness: Cause No. 17622; Famcor Oil, Inc. v. Whiting Petroleum Corp., 3TEC Energy Corporation, Tipperary Oil and Gas Corporation, Unit Petroleum Company and Famray Investments, L.L.C.; In the 11th Judicial District Court of Polk County, Texas; submitted affidavit re: Pugh clause of leases, November 17, 2000.

Expert witness: Burlington Resources Oil and Gas Company v. Oklahoma Tax Commission; testimony before administrative law judge, Oklahoma City, September 26, 2000.

Expert witness: R v. John Francis Xavier O'Brien – on behalf of Serious Fraud Office, Scotland Yard; submitted export report on Louisiana oil and gas lease law on October 27, 1999 and Supplemental Report November 3, 1999; testified in London trial via video-link on November 9, 1999.

Expert witness: Online Resources, Inc. et al. v. Stone Energy Corp. - Civil Action No. 99-2006, U. S. District Court, Eastern District Louisiana , expert report submitted September 10, 1999, trial testimony September 29, 1999 re: Preferential right to purchase under operating agreement.

Expert witness: Stanley Energy, Inc. v. Oxy USA Inc. - Civil Action No. 98 CV 051 - J, U. S. District Court, Wyoming, expert report submitted October 15, 1998 re: Preferential right to purchase under operating agreement.

Expert witness: Case No. 11792 involving Myers Langlie-Mattix Unit, New Mexico Energy, Minerals and Natural Resources Department, Oil Conservation Division, two affidavits filed, June 30, 1997 and July 10, 1997 re: unitization.

Expert witness: W. Watson LaForce, et al v. El Paso Natural Gas Co., case No. CV-92-645-1, Eleventh Judicial District, San Juan County, New Mexico expert report re: royalty obligations, February 1997.

Expert witness: Stuart Pike v. Petro Chem Operating Co., Inc., Deposition, Dec. 19, 1996 (by phone) - operating agreements.

Expert witness: Shell-Todd v. Kapuni Gas Contracts Limited and Natural Gas Corporation - Statement of evidence re: gas purchase contracts submitted, May 1996, Aukland New Zealand.

Expert witness: Antelope et al, v. Mobil, Case No. 94-CV-6544 District Court, Denver, Colorado; expert report; deposition, October 31, 1995 - Unit Agreement, Unit Operating Agreement, and royalties.

Expert witness: Arbitration - Wolverine Exploration Company et al. v. Texaco, Inc., deposition May 15, 1995 and testimony June 29, 1995 re: gas purchase contracts.

Expert witness: Energy Development Corporation and HGC, Inc. vs. Louisiana Natural Gas Gathering Company, 129th Judicial District Court of Harris County, Texas. deposition June 23, 1994 re: gas balancing issues.

Expert witness: Moncrief v. Williston Basin Interstate Pipeline Company, D. Wyoming, deposition June 22, 1994 re: gas purchase contract issues; testimony in Federal district court, Cheyenne, Wyoming, January 17, 1996.

Expert witness: CXY Energy, Inc. v. Texas Gas Transmission Corp., Jan. 1995, royalty clause.

Expert witness: Bass Strait Royalty Arbitration (Oil Basins Limited v. The Broken Hill Proprietary Company Limited, BHP Petroleum (North West Shelf) Pty. Ltd., BHP Petroleum (Bass Strait) Pty. Ltd., and Esso Australia Resources Ltd.], several expert statements re: royalty on oil and gas production (1993-94).

Expert witness: Columbia Gas Transmission Company, bankruptcy claims proceeding (for Exxon); expert statement and testimony re: Louisiana law of obligations, gas contracts (1993).

Expert witness: Huffco Petroleum Corporation et al v. Trunkline Gas Company, gas purchase contract dispute; affidavit re: Louisiana law filed. (1992).

Expert witness: Arbitration between Texas Eastern Transmission Corp. and CanadianOxy Offshore Production Co., gas purchase contract dispute (1992).

Expert witness: Sonat Exploration Company v. Chevron U.S.A. Inc., U.S.D.C., W.D. La., Lake Charles Division, No. 90-1960."

Expert witness: Amoco Production Company, et al. vs. Total Minatome Corporation. USDC SD Texas, Houston Div. Civil Action No. H-91-1553.

Expert witness: Martin Exploration Company vs. Amoco Production Company, suit number 18,033; Div. C.; deposition September 4, 1991; testimony October 9, 1991 [conservation practice; oil and gas agreements].

Expert witness: M. J. Brannon, Jr. et al v. BHP Petroleum (Americas) Inc., et al and BHP Petroleum (Americas) Inc., v. El Paso Natural Gas Company, San Juan County, New Mexico, Cause No. CV 88-279; deposition July 30, 1991.

Expert witness: Texas Eastern Transmission Corp. v. Amerada Hess, Marathon, and OKC Limited Partnership, CA No. CV892036 (W.D. La.); deposition September 18, 1990.

Expert testimony on pooling and unitization in Wilhelm v. Texaco, M.D. La. Testimony July 23, 30, 1990; deposition March 1, 1990.

Expert witness: E. Brown v. El Paso Natural Gas Company, USDC DNM Cause No. CIV 89-390 JP. (operating agreements; gas purchase contracts)(two affidavits filed).

Expert witness: PEDCO et al. v. Mobil Exploration & Producing North America (Federal district court and state district court, Tulsa, OK) (pooling and unitization; operating agreements; gas purchase contracts)(two affidavits filed).

Expert witness: Shell Offshore, Inc. v. FMP Operating Co., et al., CIV. A. No. 87-3919, (E.D.La.). Deposition, March 15, 1988. Expert opinion re: OCS agreements.

Expert witness: Louisiana Power & Light v. United Gas Pipe Line Co., CA 84-5156, E.D. La.. Deposition Feb. 18, 1988. Expert report re: gas valuation, south Louisiana.

Expert Witness: Quintana v. LRC Arbitration, Deposition April 7, 1988; testimony in hearing of April 11-14, 1988. (Louisiana oil and gas agreements - gas purchase contract litigation).

Deposition in fall 1982 in lease contract dispute, Pointe Coupee Parish.

Testimony in civil proceeding May 5, 1986 – Federal district court, Lake Charles, Louisiana regarding oil theft claim (fact witness).

Expert witness, Spring 1980 Mulcahey v. Petrofunds, Inc. (USDC S.D. Texas) re: Louisiana law relating to a gas purchase contract dispute. (no deposition, testimony or expert report).

Special Assistant United States Attorney, Middle District, Louisiana, January-August, 1985.

Adjunct Professor of Law, Tulane University School of Law. Fall, 1984: Energy Law.

Editor, Oil & Gas Reporter (since 1980)(Louisiana).

Advisory Board, International Oil and Gas Educational Center, Southwestern Legal Foundation; Treasurer, 1987-1988, Vice-Chairman 1989-95, Chairman 1998-2001.

Chairman, 34th Annual Institute on Oil and Gas Law and Taxation, and co-chairman 32nd and 33rd Annual Institutes, Southwestern Legal Foundation, 1981-83. Planning committee, 1978-87.

Reporter, Committee on Mineral Rights, Louisiana Law Institute.

Subject matter expert, legal - IHRDC oil and gas project for Kazakstan Ministry of Oil and Gas - June 1996.

Co-Reporter, Conservation and Environment, University of Houston Russian Legislation Project, 1991-1992.

Co-Reporter, Special Committee on Department of Environmental Quality Procedures, Louisiana Law Institute, 1991-1992.

Chairman, Marine Resources Committee, Natural Resources Section of the American Bar Association, 1981-83.

Chairman, Institute on Environmental Law and the Petroleum Industry, Southwestern Legal Foundation, Dallas, Texas, October 5-6, 1981.

Trustee, Rocky Mountain Mineral Law Foundation, since 1993.

Editorial Advisor, Public Land and Resources Law Digest (Outer Continental Shelf matters), since 1980.

Editorial Advisor, Public Utilities Law Anthology, 1994-98.

Republican Party, State Central Committee Member, District 62, December 1990 -- 1992.

Commissioner, Amite River Basin Drainage and Water Conservation District (1988-1990).

While Commissioner of Conservation: Governor's delegate to Interstate Oil Compact Commission, to staff advisory committee of the National Governors' Association, and to the Southwest Regional Energy Council; presented testimony before several committees of Congress (Fossil and Synthetic Fuels Committee, April 14, 1983, October 17, 1983 - re: proposed natural gas regulation) and the Federal Energy Regulatory Commission on natural gas and unitization topics (Tight sand formation designation Nov. 12, 1982; Gas purchase practices of pipelines July 11-12, 1983); numerous speeches before public and private groups.

Publications and Speeches or Presentations:

Pooling and Unitization, Matthew Bender, 1989 (updated annually). A revision of a treatise of Raymond Myers, with Professor Bruce Kramer, Texas Tech School of Law.

Williams & Meyers Oil and Gas Law, Matthew Bender - update and revision author, with Professor Bruce Kramer, of this work originally by Howard W. Williams and Charles Meyers. (first update finished in August, 1996).

One Volume edition of *Williams & Meyers Oil and Gas Law* (2004, 2007)(with Kramer).

Manual of Oil and Gas Terms (vol. 8 of *Williams & Meyers Oil and Gas Law*, published separately triennially)

Oil and Gas, Cases and Materials (with Maxwell, and Kramer)(8th ed. 2007), Foundation Press.

Jurisprudence: Text and Readings on the Philosophy of Law (with Christie)(2d Ed.); West Publishing (1995)(3d ed. 2007).

Oil and Gas Law for a New Century: Precedent as Prologue (editor), 1998.

Economic Regulation: Energy, Transportation and Utilities (with Pierce and Allison); Michie/Bobbs-Merrill, 1980.

The Agent, a Biography of William Sterrell, 1561-1631, (in manuscript, with John Finnis)

Shakespeare's Oxford Wedding Plays (with John Finnis) manuscript completed and being revised as of October, 2005.

"Benedicam Dominum: Ben Jonson's Strange 1605 Inscription," *Times Literary Supplement*, 4 November 2005, pp. 12-13.

"Ben Jonson, Thomas Strange and the Gunpowder Plot" (longer version of previous entry, in manuscript, with John Finnis).

"Boulant, the Burgundian Jewels, and the Cobham-Ralegh Treason." (in manuscript, with John Finnis).

"The Secret Sharers: '*Anthony Rivers*' and the Appellant Controversy, 1602" (Forthcoming in *Huntington Library Quarterly*, 2006).

"Shakespeare's Intercession for Love's Martyr," (with Finnis) *Times Literary Supplement*, 18 April 2003, pp. 12-14.

"An Oxford Play Festival in February 1582," (with Finnis) *Notes and Queries* (forthcoming, December 2003).

"*Caesar*, Succession, and the Chastisement of Rulers," (with Finnis) 78 *Notre Dame Law Review* 1045-74 (2003).

"Tyrwhitt of Kettleby, part II: Robert tyrwhitt, a main benefactor of Fr John Gerard SJ, 1600-1605," (with Finnis) *Recusant History* (forthcoming, 2003).

"Tyrwhitt of Kettleby, Part I: Goddard Tyrwhitt, Martyr, 1580" (with Finnis) *Recusant History* 26 (2002) 301 seq.

"Thomas Thorpe, W. S., and the Catholic Intelligencers", (with Finnis) *English Literary Renaissance* 33 (2003) 1-43.

"The Identity of 'Anthony Rivers'," (with Finnis) *Recusant History* 26 (2002) 39-74.

"The Oil and Gas Lease: Defining the Duration of the Grant" ; "Conservation Regulation" Both of these were presented to the Rocky Mountain Mineral Law Foundation Oil & Gas Law Short Course held in Houston Texas, October 25-29, 2004; again, Boulder Colorado, October 17, 2005.

"Setting the Legal Framework: Enactment of the Outer Continental Shelf Lands Act (OCSLA), Continuing Issues of Federal/State Jurisdiction, and the Role of Interior and Other Agencies," Federal Offshore Oil and Gas Leasing Conference, Rocky Mountain Mineral Law Foundation Houston, Texas, April 9-11, 2003; October 25-29, 2004.

"Natural Law: Voegelin and The End of [Legal] Philosophy." - A paper on "Voegelin's *The Nature of the Law*" presented September 1, 2001 at American Political Science Association annual meeting in San Francisco and published in the *LSU Law Review*, 62 La. L. Rev. 879 (Spring, 2002).

"Relations under a Joint Operating Agreement" Mississippi Oil and Gas Institute Triennial Oil and Gas Law Seminar, Jackson Mississippi April 27, 2001.

"Royalty Issues: Post - Production Costs", American Bar Association Section of Environment, Energy, and Resources, Current Issues in Energy Litigation New Orleans, Louisiana September 20 - 24, 2000

"Crossing State Lines (*or* Both Sides of the Sabine): A Selective Comparison of Louisiana and Texas Oil and Gas Law," Ernest E. Smith Oil, Gas and Mineral Law Institute, The University of Texas School of Law March 31, 2000, Houston, Texas.

"The Implications of the Magnolia Coal Case for Environmental Law," Annual Institute on Environmental Law, Baton Rouge, Louisiana, March 5, 1999.

"Recent Developments in Nonregulatory Oil and Gas Law," Fiftieth Annual Institute on Oil and Gas Law and Taxation, Dallas, Texas, February 18, 1999.

"Multi-State Litigation and Statutory Update," National Association of Division Order Analysts, New Orleans, September 13, 1997.

"The Joint Operating Agreement - An Unsettled Relationship?" Southwestern Legal Foundation, Fiftieth Anniversary Continuing Legal Education Seminar, Dallas Texas, June 18, 1997.

"Pooling under the Pooling Clause of an Oil and Gas Lease," 44th Louisiana Mineral Law Institute, Baton Rouge, Louisiana, March 21, 1997.

"Recent Developments in Nonregulatory Oil and Gas Law," Forty-Eighth Annual Institute on Oil and Gas Law and Taxation, Dallas, Texas, February 13, 1997.

"Gas Balancing and Split Stream Sales under Joint Operating Agreements and Unit Operating Agreements," Rocky Mountain Mineral Law Foundation Special Institute on Onshore Pooling & Unitization, Denver, Colorado January 30, 1997.

"UnBundling the Executive Right *or* Reflections on a Misguided Metaphor," Oil and Gas Symposium, University of New Mexico, Albuquerque, New Mexico, October 30, 1996, published as "Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests," 37 Nat. Res. J. 311 (1997).

"The Courts and the Commissions: Recent Developments in Judicial Review of Oil and Gas Agency Orders," 17th Eastern Mineral Law Foundation Institute, Baltimore, Maryland, April 26, 1996.

"Recent Developments in Nonregulatory Oil and Gas Law," Forty-Sixth Annual Institute on Oil and Gas Law and Taxation, Dallas, Texas, February 23-24, 1995.

"Implied Covenants in Oil and Gas Leases - Past, Present & Future," Symposium on The Future Course of Oil and Gas Jurisprudence, Washburn University School of Law, March 18-19, 1994, Topeka, Kansas; 33 Washburn L.J. 639 (1994).

"Recent Trends in Pooling, Unitization and Conservation Regulation," PLANO'S Fifth Annual Oil and Gas Seminar, Beaver Creek, Colorado, January 20 - January 23, 1994.

"Gas Prorationing - A Review," 40th LSU Mineral Law Institute, Baton Rouge, Louisiana, March 25, 1993.

"Royalty Issues on Lands Owned by State or Local Governments," Rocky Mountain Mineral Law Foundation Special Institute on Oil and Gas Royalties on Non-Federal Lands, Santa Fe, New Mexico, April 19, 1993.

"Louisiana and Texas Oil & Gas Law - An Overview of the Differences," 52 La. L. Rev. 769 (1992)(with J. L. Yeates).

"Gas Prorationing - A Review of the Issues," Mineral Law Section, Louisiana State Bar Association Annual Meeting, Destin, Florida, June 12, 1992.

Louisiana and Texas Oil & Gas Law - A Comparison; PLANO'S Third Annual Oil and Gas Seminar, Breckenridge, Colorado, January 30 - February 2, 1992.

"The Gas Balancing Agreement: What, When, Why and How," 36th Rocky Mountain Mineral Law Institute, Santa Fe, New Mexico, July 19-21, 1990.

"Pooling and Unitization: A Review of Recent Cases on Regulatory Developments," 41st Annual Institute on Oil and Gas Law and Taxation, February 22, 1990, Dallas, Texas.

"Louisiana and Texas Oil & Gas Law: An Overview of the Differences," Advanced Oil & Gas Short Course, University of Houston Law Center, Houston, Texas - January 25-26, 1990, New Orleans, Louisiana - February 1-2, 1990; repeated 1991 and 1992.

"Jurisdiction of Commission and Court: The Public Right/Private Right Distinction in Oklahoma Law," 25 Tulsa L.J. 535 (1990) (with Kramer).

"Federalism and State Regulation of the Production of Natural Gas - The Supreme Court Revisits Preemption," 5 J. Min. L. & Pol. 207 (1990).

"Recent Legal Developments in State Oil and Gas Administrative Hearings," 15th Annual Meeting and Seminar, National Association of Administrative Law Judges, October 12, 1989, New Orleans, Louisiana.

"Federalism and State Regulation of the Production of Natural Gas - The Supreme Court Revisits Preemption," Oil, Gas and Mineral Law Section, Dallas Bar Association, July 27-28, 1989, Dallas, Texas.

"Solving the Natural Gas Problem," presented to the organizational meeting of the Mississippi Independent Producers and Royalty Owners Association, Jackson, Mississippi, August 22, 1989.

"Federalism and State Regulation of the Production of Natural Gas - The Supreme Court Revisits Preemption," Oil and Gas Section, Louisiana State Bar Association, New Orleans, Louisiana May 5, 1989.

"Lease Maintenance in Louisiana: the Effects of Voluntary and Compulsory Pooling," 36th LSU Institute on Mineral Law, March 30-31, 1989.

"Regulation of Gas Production Rates and Imbalances after Transco v. Oil & Gas Board," presented for Hugoton Reservoir Symposium, Wichita Kansas, November 13, 1987. 27 Washburn L. J. 298 (1988).

"State Regulation of Natural Gas Production," presented at Eighth Annual Natural Gas Conference, Executive Enterprises, Washington, D. C. January 25-26, 1988.

"Jurisdiction of State Conservation Agencies," presented at Conference on Natural Gas Issues, Rocky Mountain Mineral Law Foundation, Houston, Texas, April 21-22, 1988.

"Introduction," Public Utilities Law Anthology, Vol. IX, International Library (1987).

"State Regulation of Natural Gas Production After Transco v. Oil & Gas Board," Oil, Gas and Mineral Law Seminar, Alabama Bar Institute for Continuing Legal Education May 8, 1987, Law Center, Tuscaloosa, Alabama.

"State Regulation of Natural Gas Production: Is There Life After Transco?," Thirty-Eighth Annual Institute on Oil and Gas Law Dallas, Texas - February 26, 1987. 38 Inst. on Oil & Gas L. & Tax'n 10-1 (1987).

"The Changing Gas Marketplace: FERC Order No. 436, the Transco Decision and Implications for the Future," for The Practice of Oil and Gas Law in New Mexico: The Old and The New, (New Mexico Bar Association) Albuquerque, New Mexico, May 23, 1986.

"Recent Developments in Nonregulatory Oil and Gas Law," Thirty-Seventh Annual Institute on Oil and Gas Law and Taxation, Dallas, Texas, February 26-28, 1986.

"Private Royalty Owner Issues in Today's Natural Gas Markets: An Overview," American Bar Association Workshop on "Valuing Natural Gas for Royalty Purposes," New Orleans, Louisiana October 29-30, 1985.

"Status of State Jurisdiction and Activities," presented at program on "Natural Gas Certification and Ratemaking under New FERC Rules," Executive Enterprises, Houston, Texas, November 18-19, 1985.

"The Jurisdiction of State Oil and Gas Commissions," Institute on Oil and Gas Conservation Law and Practice, Rocky Mountain Mineral Law Foundation, Santa Fe, New Mexico--September 26-27, 1985.

"The Establishment of Allowables for Production of Gas in Louisiana," presented to "Workshop on Natural Gas Prorationing and Ratable Take," Natural Resources Law Center, University of Colorado, June 26-28, 1985.

Panel member, "Contract Issues in the Changing Energy Industry," Joint Showcase Program Natural Resources Section with the Administrative Law and Public Utility Law Sections, American Bar Association Annual Meeting, Chicago, August 7, 1984.

"Natural Gas Policy Act--Introduction to the Problem Areas," Short Course on Natural Gas Regulation, Southwestern Legal Foundation, October 25-26, 1984, Dallas, Texas.

"Discovery and use of proprietary data," 15 Nat. Resources Law. 799 (1983)(A.B.A. Natural Resources Law Section Task Force Report on Federal Oil and Gas Royalty Matters).

Short Course, Oil and Gas Law and Taxation, Southwestern Legal Foundation, May 1981, May 1982, May 1983, May 1984, May 1985, May 1987, May 1988, June 1989, June 1990 and June 1991 (Four days of lectures on Pooling and Unitization, Conservation Regulation, Windfall Profit Tax, and Natural Gas Policy Act).

"Judicial Review of Agency Action in Pooling and Unitization in Mississippi and Alabama: Observations of a Louisiana Lawyer," Mississippi Oil & Gas Law Seminar, April 22, 1983, Jackson, Mississippi, (published in 28 Landman 43 (July, 1983)).

"The Challenge of Change in Natural Gas Pricing: The Path of Decontrol," 78th Annual Meeting of the Midwest Gas Association, March 7, 1983, Chicago, Illinois.

Editor, 26th and 27th Institutes on Mineral Law (both published 1980).

"Administrative Law and Practice before the Louisiana Office of Conservation," 29th Institute on Mineral Law (published in 30 L.S.U. Min. L. Inst. 461).

"Brambles in the Gas Patch: Problems of Natural Gas Decontrol," 33 Mercer L. Rev. 751 (1982).

"Louisiana Oil & Gas Law," Tulane Law School program on Louisiana Oil and Gas Law and Taxation, New Orleans, Louisiana, May 17-21, 1982.

Workshop on Oil and Gas Conservation Practice, November 29-30, 1979; Seminar by Southwestern Legal Foundation (3 hour talk on Principles of Administrative Law). Updated presentation, same seminar October 13-14, 1980.

Fundamentals of Federal Oil & Gas Regulation, two day short course by Executive Enterprises, Inc., presented with Richard J. Pierce in Houston, Denver, and Los Angeles, August 2-10, 1979; Tulsa, December. 13-14, 1979; New Orleans, January 24-25, 1980; Houston, March 6-7, 1980; New Orleans, May 1-2, 1980; Denver, June 12-13, 1980; Houston, October 23-24, 1980; New Orleans, December 11-12, 1980; Dallas, March 9-10, 1981.

"Implementation of the Natural Gas Policy Act in Louisiana," Seminar by the Institute for Energy Development, Dallas, October 26-27, 1979.

"Oil and Gas: Impacts of Price and Allocation Controls," Special Institute for Natural Resources Law Teachers, Boulder, Colorado, May 28-30, 1981, Rocky Mountain Mineral Law Foundation.

"Implied Covenants in Oil and Gas Leases," Tulane Oil and Gas Policy Symposium, New Orleans, Louisiana December 11, 1981.

"Mineral Law: Leases and Title Problems," Fourth Post Graduate Summer School for Lawyers, LSU Law Center, June 23, 1981.

Short Course on Louisiana Property and Mineral Law, Baton Rouge, December 3-7, 1979; May 5-9, 1980.

"Current Developments in Oil Regulation," Denver Association of Petroleum Landmen, September 24, 1980, Denver, Colorado.

"Principles of Administrative Law (applicable to unemployment compensation case review)," presentation to unemployment compensation referees and Board of Review, Office of Employment Security, Louisiana Department of Labor, September 11, 1980, Many Louisiana.

"The Mineral Leasing Act of 1920: An Overview," Seminar on Federal Lands, Law and Policy Affecting Development of Natural Resources, University of Colorado, July 30, 1980.

"Energy Law: The Uncertain Response to Crisis and Change," Annual Meeting of the American Association of Law Libraries, St. Louis, Missouri, June 23, 1980.

"Cecil D. Andrus v. Shell Oil Company and D. A. Shale, Inc.," case analysis in Preview of United States Supreme Court Cases, Oct. 1979 term No. 31 (April 2, 1980).

"Current Trends in Gas Purchase Contracts," 25th Institute on Mineral Law (printed in 26th Institute on Mineral Law 359).

Faculty Symposium, "Work of the Appellate Courts--1977-1978: Mineral Rights," 39 La. L. Rev. 739 (1979).

Faculty Symposium, "Work of the Appellate Courts--1978-1979: Mineral Rights," 40 La. L. Rev. 588 (1980).

Faculty Symposium, "Work of the Appellate Courts--1979-1980: Mineral Rights," 41 La. L. Rev. 344 (1980).

Faculty Symposium, "Work of the Appellate Courts--1980-1981: Mineral Rights," 42 La. L. Rev. 374 (1982).

Faculty Symposium, "Work of the Appellate Courts--1981-1982: Mineral Rights," 43 La. L. Rev. 523 (1982).

Faculty Symposium, "Work of the Appellate Courts--1982-1983: Mineral Rights," 44 La. L. Rev. 451 (1983).

Faculty Symposium, "Work of the Appellate Courts--1983-1984: Mineral Rights," 45 La. L. Rev. 433 (1984).

Faculty Symposium, "Work of the Appellate Courts--1984-1985: Mineral Rights," 46 La. L. Rev. 569 (1986).

Faculty Symposium, "Work of the Appellate Courts--1985-1986: Mineral Rights," 47 La. L. Rev. 347 (1986).

Faculty Symposium, "Work of the Appellate Courts--1986-1987: Mineral Rights," 48 La. L. Rev. 387 (1987).

Faculty Symposium, "Work of the Appellate Courts--1987-1988: Mineral Rights," 49 La. L. Rev. 433 (1988).

Faculty Symposium, "Work of the Appellate Courts--1988-1989: Mineral Rights," 50 La. L. Rev. 303 (1989).

Faculty Symposium, "Work of the Appellate Courts--1989-1990: Mineral Rights," 51 La. L. Rev. 335 (1990).

Faculty Symposium, "Work of the Appellate Courts--1990-1991: Mineral Rights," 52 La. L. Rev. --- (1991).

Faculty Symposium, "Work of the Appellate Courts--1991-1992: Mineral Rights," 53 La. L. Rev. --- (1992).

"Recent Developments in Mineral Rights," 26th Institute on Mineral Law 208 (1980).

Legal Aspects of Enhanced Oil Recovery for Enhanced Oil Recovery Assessment Project of the Office of Technology Assessment, U. S. Congress (Director of Study). 1977.

"Enhanced Recovery: Institutional and Other Aspects," 24th Institute on Mineral Law (1977) (printed in 26th Institute on Mineral Law 235 (1980)).

"Energy and Environment: An Overview," Washburn Midwestern Environmental Law Conference (March 25, 1977) 1 Washburn Midwestern Environmental Law Conference Papers 74 (1977)

Book Review: Baker, Kaming and Morrison, Environmental Impact Statements: A Guide to Preparation and Review in 10 Nat. Res. Lawyer 605 (1977)

"A Modern Look at Implied Covenants to Explore, Develop, and Market under Mineral Leases," 27th Annual Institute on Oil and Gas Law and Taxation 177 (1976).

State of Alaska

Department of Natural Resources
550 W. 7th Avenue, Suite 1400
Anchorage, Alaska 99501

In re Remand Proceedings Pursuant to
December 26, 2007 Order of Superior Court
Regarding Point Thomson Unit Agreement

State of California)
) ss.
County of Los Angeles)

I, Patrick H. Martin, being first duly sworn, affirm that the statements and opinions in the attached Affidavit are true and correct to the best of my knowledge.

Further the Affiant sayeth naught

Patrick H. Martin

Subscribed and sworn to before me on this 12th day of March 2008

Notary Public in and for the State of California

MARGARET RODRIGUEZ-PEREZ
Commission # 1647290
Notary Public - California
Los Angeles County
My Comm. Expires Mar 22, 2010

My Commission Expires: March 22, 2010

PTU REC_30994

Exc. 000967

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

550 W. 7th Avenue, Suite 1400

Anchorage, Alaska 99501

In re Remand Proceedings Pursuant to
December 26, 2007 Order of Superior Court
Regarding Point Thomson Unit Agreement

AFFIDAVIT OF CRAIG HAYMES

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Craig Haymes, being first duly sworn, testifies as follows:

1. My name is Craig Haymes and I am the Production Manager for ExxonMobil's Alaska operations. I provided testimony during the remand hearing held during the week of March 3, 2008. During the hearing, I was asked several questions and, at times, those questions referenced documents that I did not have available to me. I am submitting this affidavit to respond to the questions I was asked during the remand hearing.

I. PRIOR CYCLING PROJECTS.

2. First, I would like to address the questions I was asked about prior cycling projects for Point Thomson and the skepticism expressed about the Owners' level of commitment to those prior cycling projects.

3. The Owners have always been focused on commercializing the resources at Point Thomson. Over the last 30 years, the Owners have spent a considerable amount of time and money pursuing various development options. The technical experts unanimously testified that Point Thomson has significant challenges and risks. Prudent management of the risks is required, and the State historically has recognized Point Thomson's challenges.

4. Plan of Development ("POD") 23 is different from prior PODs because the Owners have committed to produce condensate within the period of POD 23. (PTU Rec_30000-30019 (POD 23) at 30009.) The significance of that commitment is that the Owners have agreed to assume the economic, reservoir, and technological risks in the pursuit of delineating and producing Point Thomson resources. This was not the situation in the past.

A. In The 1980s, The Owners Worked On A Cycling Plan To Produce Condensate, But Concluded The Risk Was Too Great.

5. In PODs 1 through 5, the Owners directed their efforts on drilling wells to learn about the available resources, and to delineate the reservoir. The information obtained during PODs 1 through 5 demonstrated that Point Thomson contains "a

substantial gas reservoir with a thin oil leg." (PTU Rec_011261-68 (POD 6) at 011262.) Based on this early information, the Owners explained to the State that the reservoir would be "commercially developable at such time as transportation facilities for gas production to market are assured" and, in POD 7, proposed "no further drilling activities" on the ground that "wells drilled in advance of commencement of sustained production frequently deteriorate physically to the extent of requiring expensive reworking or even redrilling." (PTU Rec_004278-004280 (POD 7) at 004279-80.)

6. Although the Owners could not commercialize the gas at Point Thomson through a gas pipeline, they were exploring other means of commercializing Point Thomson's resources. In 1985, during POD 7, the Owners reported that "[d]evelopment screening studies have indicated field-wide reserves may be sufficient to support a commercial gas cycling/condensate recovery project which could start up in the early 1990's." (PTU Rec_011223-011226 (December 6, 1985, Annual Progress Report for POD 7) at 011224.)

7. The Owners were eager to commercialize the resources and had therefore "performed numerous engineering design studies as part of a preliminary investigation." (*Id.* at 011225.) To progress this project, the Working Interest Owners ("WIOs") met several times, "and the majority [of WIOs] ha[d] conducted their own preliminary engineering and economics screening studies." (*Id.*) These efforts prove the Owners' commitment to develop and produce the resources at Point Thomson.

8. Notwithstanding the Owners' hope and belief that condensate could be produced, they explained to the State that "further field and laboratory testing and performance modeling [were required] to confirm the technical and economic feasibility of the gas cycling project," and that "much work remain[ed] to define development costs." (*Id.*) The Owners therefore continued to progress the project by identifying the permitting, engineering, and construction that would be required to start up a gas cycling project. (*Id.* at 011226.)

9. After another year of work to progress their plans to commercialize the condensate, the Owners remained convinced that cycling was a feasible option and reported to the State the achievements they had accomplished to progress this project. (PTU Rec_011211-011214 (October 1, 1986, Annual Progress Report for POD 8) at 011212-13.) For example, the Owners had initiated field studies, investigated and "confirmed [the] feasibility of high pressure pipeline and compressor system," retained a permit consultant, and completed "drafts of a planning study update and the engineering overview." (*Id.* at 011213.) Based on the work completed, the project that was contemplated in late 1986 involved 12 producer and 8 injector wells. The Owners hoped to produce 450Mcfd of gas, which the Owners believed would provide approximately 35,000 barrels of condensate per day. The Owners still had cost and technical concerns, but continued to pursue the project in an effort to resolve those concerns.

10. One year later, at the end of 1987, the Owners made a presentation to DNR to discuss its progress and assessment of the cycling project. (PTU Rec_014109-014115

(December 16, 1987 Letter with Enclosure).) The Owners explained that it viewed cycling favorably because it "permits liquid production prior to major gas sales," but that it had not been able to resolve the numerous concerns it had about the cycling project. (*Id.* at 014114.) The Owners explained that the recovery of condensate is "vulnerable to complex geology," meaning that there may be more faulting than what the maps currently showed, "substantial variation in rock properties," and/or "uncertain depositional trends." (*Id.*) The Owners also explained that "continuous injection compression at [the] required pressure [was] currently unproven" and the "dehydration required [was] untested in [the] arctic." (*Id.* at 014115.) Moreover, the "well test data illustrate[d] [a] wide range in condensate yields," and the "development costs [were] estimated to exceed one billion dollars" (in 1987 dollars). (*Id.* at 014114-15.)

11. In 1988, the Owners reported to the State that cycling "is considered to have a high risk and is currently viewed by the majority of owners as uneconomic." (PTU Rec_011529-011534 (POD 8) at 011531.) Based on that conclusion, the Owners re-focused their efforts and proposed, in POD 8, to do work that would help the Owners better understand the Point Thomson reservoir for development as a cycling or gas sales project. (*Id.* at 011532.) The State approved POD 8 for a three-year term. (PTU Rec_011528 (October 5, 1988 Letter).)

B. In The 1990s, The Owners Again Worked On A Cycling Project, But Decided In 2003 That It Was Not Commercially Viable.

12. When the Owners submitted POD 9 on September 25, 1991, they commented that "[m]ajor uncertainties affecting both gas cycling and gas sales development options include reserve assessment, market outlook, investment level, and the availability of a gas transportation system." (PTU Rec_011422-011427 (POD 9) at 011423.) Notwithstanding those issues, they indicated that "[i]f it is reasonably certain that a gas transportation system for Point Thomson gas will never become available or that it will not be available in the foreseeable future, gas cycling could become a viable option once reservoir description and performance projections are thoroughly studied." (*Id.*) The Owners continued to refine their understanding of the reservoir so they could more accurately assess Point Thomson's development potential. (PTU Rec_011386-92 (POD 10) at 011387.)

13. In June 1993, the Owners made an extensive presentation to the DNR at which time they re-affirmed that gas cycling still was not an appropriate development option and that "[g]as sales are currently viewed as the only potentially viable development option." (PTU Rec_014188-014217 (June 23, 1993 Letter with Presentation) at 014215.) During that presentation, the Owners provided the bases for those conclusions. (*See id.*) Consistent with those beliefs, the Owners proposed in POD 11 to continue studying the reservoir to position Point Thomson for a potential gas sales development. (PTU Rec_011738-011743 (POD 11) at 011740.) The DNR approved POD 11. (PTU Rec_000336-000337 (December 17, 1993 Letter) at 000337.)

14. In 1996, when it seemed gas sales were not on the horizon, the Owners re-focused on cycling. During POD 14, the Owners formed a Development Steering Committee ("DSC") to conduct studies of various development options. (PTU Rec_011835-011843 (POD 15) at 011837.) The DSC conducted a Phase I study where they designed the facilities required for various development scenarios, and prepared cost estimates for each. (*Id.*)

15. In October 1997, after cycling had passed Phase I screening, the Owners stated in POD 15 that they would "complete the remaining scoping activities . . . to refine gas cycling" as a development option. (*Id.* at 011840.) The timeline attached to POD 15 showed that the Owners would begin Conceptual Engineering in 2000 if the cycling project remained viable. (*Id.* at 011842.)

16. By July 30, 1999, the cycling project had progressed through Phase II. (PTU Rec_011758-011764 (POD 16) at 011761.) At this point, the project that was contemplated involved:

- 8 producer and 7 injector wells to produce 1 Bcfd of gas. It was hoped that this would result in 50,000-70,000 barrels per day of condensate.
- The producers would be drilled from 2 onshore drill sites, one located in the east of the field and the other located in the west. The injectors would be drilled from one centrally-located onshore drill site.
- Condensate would be separated from the gas for export to the TransAlaska Pipeline Pump Station # 1.

(*Id.*)

17. At that time, the Owners explained that "[o]ne of the major uncertainties affecting the economic outlook of the gas cycling project is the estimate of condensate yield over the life of the project." (*Id.*) The Owners therefore focused their attention on "engineering and geological studies directed at enhancing confidence in the analysis of the Thomson Sand Gas Cycling Project." (PUT Rec_012004-012012 (POD 17) at 012005.) Specifically, they looked at ways to reduce project costs, maximize liquid recovery, and manage project risk and uncertainty. (*Id.* at 012008.) Because the injection pressure would be world class, "a compression study was conducted during POD 16 to identify and assess technical limitations and alternative turbine drivers and compressor configurations." (*Id.*) Other issues were studied, such as the "potential cost reductions and pros/cons of single vs. dual rig programs." (*Id.* at 012009.) In addition, the Owners formed a Project Management Team to "effectively begin the transition from project assessment to project execution." (*Id.* at 012010.)

18. Having made significant progress, the Owners turned next to the task of selecting a development plan and initiating the permitting process. (PTU Rec_011931-011939 (POD 18) at 011932-33.) The Owners "worked with two main contractors to develop conceptual engineering designs," which would "provide the base upon which Preliminary Engineering, to be initiated during POD 18, [would] be built." (*Id.* at 011934.) The Owners identified the need to complete the prestack depth migration ("PSDM") of the 4 merged 3-D seismic surveys, which would then be used to update the geologic model that would be used in selecting final development well locations. (*Id.* at

011937-38.) In response to these efforts, the State said that it was "pleased to see concrete plans put into motion for development of [Point Thomson] reserves." (PTU Rec_000374-375 (September 14, 2001 Letter) at 000374.) So too were the Owners.

19. In August 2002, the Owners reported that significant progress had occurred on the cycling project during the term of POD 18. For example, "[a] group dedicated to permit support [was] put in place" and "an engineering contractor [began] work to support the permitting effort." (PTU Rec_000383-391 (POD 19) at 000387.) FEED was started and "[f]urther field studies not originally envisioned in . . . POD 18 were also performed." (*Id.*) The Owners worked "to expedite the permitting process" to "allow development drilling to begin on schedule, no later than 2006." (*Id.*)

20. The Owners reported that "the POD 18 studies have identified sufficient economic incentive for the major Owners to . . . proceed to the next level of expenditures." (*Id.* at 000389.) Therefore, in POD 19, the Owners proposed several activities, including the ongoing pursuit of permits needed for development and construction, continuation of FEED to "progress the project toward commercial approval," and completion of PSDM interpretation so they could update the geologic model "to improve the ability to evaluate the commercial viability of both gas cycling and ultimate gas sales." Importantly, the Owners set forth plans to "assess the project commercial viability in preparation for the decision to progress the project to the next phase of funding." (*Id.* at 000390.)

21. The State accepted and approved of "ExxonMobil's plan [in POD 19] to continue evaluating the commercial viability of . . . gas cycling," and specifically found that it "protect[ed] the public interest." (PTU Rec_000393-000394 (August 28, 2002 Letter) at 000394.)

22. A month after the State accepted POD 19, ExxonMobil circulated a binder entitled, "Point Thomson Gas Cycling Project Description Revision A," which was a "reference document" describing the "base case project design as currently envisaged" (known as "Rev A"). (*See* Exhibit A (September 23, 2002 Letter) attached hereto.) ExxonMobil also prepared a draft Design Basis Memorandum ("DBM") based on the Project Description Rev A, which was the subject of questions during the March 3 hearing.

23. The DBM was neither prepared for nor provided to DNR, nor was it issued in a final form. It is an internal planning document, created in January 2003, with additional details about the Rev A project description. (PTU Rec_2DNRH000048 (DBM).) It was prepared to further the Owners' goal of implementing the cycling project, and it contained an aggressive schedule based on more than a dozen optimistic assumptions. (*Id.* at § 12.1.)

24. One month later, when ExxonMobil put together and circulated an updated Project Description ("Rev B"), the schedule contained in the draft DBM became obsolete. (*See* Exhibit B (February 18, 2003 Letter) attached hereto.) The Rev B description did not have a date for the start of production, but showed that drilling would not begin until

the winter 2005-2006 season. Drilling would not be completed (assuming permits were obtained to drill year round) until July 2008.

25. In early 2003, ExxonMobil informed the State that it thought this project might not be viable because of cost and reservoir uncertainties. (PTU Rec_016909-016930 (April 8, 2004 Presentation, "Point Thomson Gas Injection Project Overview") at 016918.) Regardless of whether the project was viable, the Owners would not be able to keep the anticipated schedule, which was aggressive and "based on the President's call for federal agencies to accelerate their approval process for important producing properties." (PTU Rec_012179-012180 (April 24, 2003 Letter) at 012179.)

26. In an effort to determine if there was any scenario to progress the cycling project, the Owners undertook additional efforts to reduce costs and enhance recovery. (PTU Rec_009637 (October 10, 2003 Letter); PTU Rec_000419-424 (POD 21) at 000420.) The result of that effort was a project description called Rev B double prime ("Rev B""). (PTU Rec_000419-424 (POD 21) at 000421.) Rev B" made "a number of aggressive and optimistic assumptions to reduce the cost of the project without specifically determining technical viability" or the impact the cost reductions would have on the project's success. (PTU Rec_003319-003346 (April 8, 2005 Letter) at 003322.) Notwithstanding the technology and resource challenges, the Owners concluded that the cost reduction efforts resulting in Rev B" did not yield a commercially viable project. (PTU Rec_000419-424 (POD 21) at 000421.) As a result, and in light of the recent movement toward a gas pipeline, the Owners focused on gas sales. (*Id.* at 000423-424.)

27. During the hearing, I was asked questions that implied the Owners have never been serious about developing the resources at Point Thomson and therefore cannot be trusted to implement the delineation drilling and cycling project contained in POD 23. Those implications cannot be reconciled with the large amounts of time and money, and the substantial efforts made by the WIOs, to identify a cycling project that was commercially viable, particularly during the 1983-1988 and 1998-2003 time periods.

28. During the terms of PODs 18 through 21, the Owners spent more than $67 million and approximately 160 staff years working on the cycling project and other matters related to Point Thomson. It is therefore not unexpected that the Owners would come to the State in POD 23 and, after careful consideration, set forth a cycling project.

29. But to answer the questions I received during the hearing about what is different between this cycling project and those previously worked on, the answer is that in prior PODs, the Owners did not commit to production. In POD 23, they do. The significance of that commitment, which is contained within the period of the POD, is that there will be no "off-ramps" even if the Owners later decide the project is not economic, or contains too many risks due to resource or technological uncertainty. The Owners have agreed to assume those risks and are fully committed the complete all of the work contained in POD 23.

II. COMMITMENTS MADE IN PRIOR PLANS OF DEVELOPMENT.

30. During the hearing, I was asked about several documents that were perceived as commitments that the Owners failed to meet. I did not have those

documents available to me at the time, and it is my understanding that those documents were offered to provide a few examples of why the State is concerned the Owners will not fulfill the commitments made in POD 23. I have now gone through those documents and also reviewed each of the PODs. Below I address the documents raised at the hearing, the prior PODs, and respond to the question posed at the hearing, which was:

> Why were the prior statements not a commitment or how were those commitments different from the commitments being made in POD 23?

A. ***The Owners Fulfilled The Commitments Made In POD 1 (1978).***

31. At the hearing, I was asked why the following statement in POD 1 was not a commitment or is different from the commitments made in POD 23:

> If oil is discovered in sufficient quantities to warrant future development, the Prudhoe Bay to Valdez oil pipeline will be the probable marketing outlet from the area.

(March 7, 2008 Tr. at 1028:3-1029:8 (citing PTU Rec_011347).)

32. The above language comes from POD 1, which was sent to DNR on January 12, 1978 with a cover letter. Both the letter and the POD make clear that the commitment in POD 1 was to drill the Point Thomson #2 well and to conduct related activities:

> Exxon Corporation filed an application with the State Division of Conservation for a permit to drill the subject well together with our check in the amount of $100.00 in payment of the required permit fee.
>
> * * *
>
> As stated herein, it is our plan, State approval permitting, to commence location work immediately after completing the No. 2 site [referring to the

> last well drilled] in February 1978 and actual drilling operations are to be commenced after freeze up during November or December and conclude after breakup four to five months later. The rig will be left on location until the following winter.

(*See* PTU Rec_011343.) The reference to producing oil "if . . . discovered" was a statement of intention. Indeed, the Owners made clear that production would only occur if oil was "discovered in *sufficient quantities to warrant future development.*" (*Id.* at 011347 (emphasis added).) The same statement was made in subsequent PODs and continues to be the Owners' position today.

B. The Owners Fulfilled The Commitments Made In PODs 2-7 (1979-1988).

33. In PODs 2 through 4, the Owners committed to drill one exploratory well each winter season. (PTU Rec_011340-011348 (POD 2) at 011340; PTU Rec_011306-011316 (POD 3); PTU Rec_011292-011295 (POD 4) at 011292-93.) Each of those wells was drilled. (PTU Rec_011272-011274 (POD 5) at 011272.)

34. In POD 5, the Owners proposed to drill three wells. (*Id.* at 011272-73.) Each of those wells was drilled. (PTU Rec_011261 (Nov. 16, 1982 Letter).)

35. In POD 6, the Owners proposed to do studies, which would provide a better understanding of the reservoir. (PTU Rec_011261-011268 (POD 6) at 011262-263.) Although the State expressed concern that the "activities proposed for the time period covered by [POD 6] do not significantly contribute to the further delineation and understanding of the reservoir(s) and unit area," it approved the plan. (PTU Rec_011258 (December 10, 1982 Letter).)

36. The Owners conducted those studies and presented the results to the State. (PTU Rec_000296-000298 (October 28, 1983 Letter) at 000296.) Those studies "confirmed [the Owners'] preliminary findings that the Unit area and other adjacent and nearby lands are underlaid by a large gas field with a thin oil leg, commercially developable at such time as transportation facilities for gas production to market are assured." (*Id.*)

37. Because "[s]ufficient drilling ha[d] been accomplished," the Owners proposed to do the following in POD 7:

> (a) continued evaluation and analysis of available well and seismic data to determine the pattern of future drilling and refine existing knowledge of the reservoir and the areal limits of the field; and
>
> (b) continued study of all available alternatives by which gas production from the Unit Area can be transported to market.

(PTU Rec_004278-004280 (POD 7) at 0004279.) The State approved POD 7 for a five-year term and later commented on the accomplishments made during POD 7. (PTU Rec_005244 (November 29, 1983 Letter); PTU Rec_011528 (October 6, 1988 Letter).)

C. *The Owners Fulfilled The Commitments Made In POD 8 (1989-1991).*

38. In 1988, the Owners proposed to the State that they would gather 3-D seismic data and "plan to prepare consensus maps for each of the currently known reservoirs." (PTU Rec_011529-011534 (POD 8) at 011533.) The Owners also referred to the work they would need to do if they decided to drill the Point Thomson Unit #5 well pursuant to the 1984 Unit Expansion Decision. (*Id.*)

39. The Owners completed the 3-D seismic program, but noted that the consensus mapping program "was delayed more than anticipated." (PTU Rec_011422-011428 (POD 9) at 011426.) Notwithstanding the State's comment that "[t]he consensus mapping by the unit owners was not accomplished as proposed during the term of the Eighth Plan," the Owners did not commit to complete the consensus mapping in POD 8. (PTU Rec_011404-011405 (January 3, 1992 Letter) at 011404.) Rather, the Owners stated that they would "plan to prepare consensus maps for each of the currently known reservoirs." (PTU Rec_011529-011534 (POD 8) at 011533.) That process began in July 1991, five months before the term of POD 8 ended. (PTU Rec_011422-011428 (POD 9) at 011424.) The Owners did therefore fulfill the commitments made in POD 8.

D. The Owners Fulfilled The Commitments Made In PODs 9-11 (1992-1996).

40. In POD 9, the Owners requested a four-year term and proposed to "complete the consensus reservoir mapping program by year end 1994." (*Id.* at 011424.) DNR approved POD 9, but only for a one-year term, insisting that the consensus maps could be completed by that time. (PTU Rec_011404-011405 (January 3, 1992 Letter) at 011405.) The Owners were able to complete the consensus mapping program within that time. (PTU Rec_011386-011396 (POD 10) at 011387.)

41. In POD 10, the Owners proposed to undertake a Reservoir Characterization Study, utilizing the work done on the consensus maps. (*Id.*) The Owners believed the Reservoir Characterization Study would be a multi-year effort so they proposed to

simultaneously work toward finding an appropriate development plan for Point Thomson. (*Id.* at 011388-389.) DNR approved POD 10, and the Owners did what they said they would do. (PTU Rec_011385 (November 27, 1992 Letter); PTU Rec_011738-011743 (POD 11) at 011739-40.)

42. In POD 11, the Owners proposed to continue with the work they had started in POD 10, *i.e.*, the Reservoir Characterization Study. (*Id.* at 011738-40.) The State approved POD 11. (PTU Rec_000336-000337 (December 17, 1993 Letter) at 000336.)

43. The commitments made in POD 11 were fulfilled. (PTU Rec_004331-004337 (POD 12) at 004334.) Other activities that occurred during POD 11, even though they were not part of that plan, included the drilling of a well and the completion of another 3-D seismic survey. (*Id.* at 004335.)

44. In POD 12, the Owners proposed to "complete the Reservoir Characterization Study as proposed in the 10th POD" and initiate engineering studies. (*Id.* at 004336.) Instead of approving POD 12, the State and the Owners had numerous discussions about Point Thomson and the appropriate method of development, which led to the State extending the term of POD 11 through the end of January 1996. (PTU Rec_010479 (December 22, 1994 Letter); PTU Rec_011699 (April 20, 1995 Letter); PTU Rec_011693 (August 31, 1995 Letter).) Rather than have the Owners submit a revised POD 12, the State asked the Owners to submit POD 13. (PTU Rec_055263-055268 (POD 13) at 005265.)

E. The Owners Fulfilled The Commitments Made In PODs 13 And 14 (1996-1998).

45. In POD 13, the Owners proposed "to initiate a phased study related to potential development scenarios for [Point Thomson]." (*Id.* at 005266.) The Owners re-affirmed their belief "that all development options are currently uneconomic," but suggested that "development activity at Badami" might create synergistic opportunities for Point Thomson. (*Id.*)

46. The Owners committed to completing Phase I and commencing Phase II by June 1996. (*Id.* at 005267.) In addition, three of the major owners stated their plan to "initiate a farmout effort" for the purpose of having others "commence exploratory drilling within the PTU." (*Id.*)

47. The State approved POD 13 and the Owners fulfilled their commitments although, after conversations with the State, Phase I was expanded to include work originally planned for Phase II. (PTU Rec_014371-014372 (December 28, 1995 Letter) at 014371; PTU Rec_011647-011652 (POD 14) at 011648-650.)

48. In POD 14, the Owners "plan[ned] to complete the remaining activities associated with Phase I" and explained that "Phase II work activities will be commenced only in the event one or more development scenarios screened during Phase I merit additional evaluation." (*Id.* at 011651.) The State approved POD 14, and the Owners accomplished the required tasks. (PTU Rec_011644-011645 (November 29, 1996 Letter); PTU Rec_011634-011638 (POD 15) at 011634-36).)

F. The Owners Fulfilled The Commitments Made In POD 15 (1998-1999).

49. When POD 15 was initially submitted, the State replied that it was incomplete, in large part, because it "concentrates on gas/condensate development from the Thomson Sandstone [sic] Reservoir" without providing adequate details of the development plans, and that it also failed to "include an evaluation of the oil rim component of the Thomson Sandstone [sic] Reservoir." (PTU Rec_000323-000325 (October 8, 2007 Letter) at 000324.) In response, the Owners worked with the State to address these issues. On December 24, 1997, DNR approved a six-month interim plan of development explaining:

> DNR approves an interim plan of development that allows Exxon six months to develop and submit a complete 15th Plan of Development. It is in the state's interest to allow Exxon time to submit the data promised . . . and coordinate with the other working interest owners to develop a plan to delineate all of the reservoirs . . .

(PTU Rec_011640-011608 (December 24, 1997 Letter) at 011605.)

50. On April 17, 1998, the State acknowledged that the Owners were fulfilling their commitments under the interim plan. (*See* PTU Rec_011590-011591 (April 17, 1998 Letter).)

51. On June 19, 1998, the Owners submitted POD 15. (PTU Rec_011825-843 (POD 15).) The State approved POD 15, and the Owners fulfilled the commitments contained in it. (PTU Rec_011758-011764 (POD 16) at 011760-763.) Significant progress had been made toward implementing a cycling project and the Owners

explained that as a result of the Phase II facility screening study, the Owners had formulated a cycling plan.

52. At the hearing, I was asked about the cycling plan and why the following language was not a commitment or is different from the commitments made in POD 23:

> Exxon said they were going to drill eight gas producers from two onshore drill sites to produce 1 billion cubic feet per day of wet gas. One drill site will be located on the east end of the field, with the other on the west side. The location and number of wells and the project offtake rate are subject to optimization. Both higher and lower offtake rates will be considered.
>
> And Exxon went on to say that it was going to compress and reinject lean gas into the Thomson gas cap through seven injection wells, one centrally located onshore.

(March 7, 2008 Tr. at 1030:6-1031:3 (citing PTU Rec_011758-011764 (July 28, 1999 Letter).]

53. The above language comes from POD 16, but it is a summary of what the Owners had accomplished during POD 15. (PTU Rec_011758-011764 (July 28, 1999 Letter enclosing POD 16) at 011761,) It explains that the "Owners completed the Phase II facility screening study," which was focused on "further refining development scenarios. . . . The scenario resulting from this study (which is currently being used by Unit Owners for planning purposes) . . . consists of the following elements:

+ Drill eight gas producers from two onshore drill sites to produce one billion cubic feet per day (GCF/D) of wet gas. . . .
+ Compress and re-inject lean gas into the Thomson gas cap through 7 injection wells . . .

(*Id.*) After providing this summary of the cycling project contemplated, the Owners described the work they committed to accomplishing during POD 16, which included, among other things, "assessment of project commerciality." (*Id.* at 011763-64.)

G. The Owners Fulfilled The Commitments Made In PODs 16-21 (1998-2004).

54. In POD 16, the Owners enumerated eight tasks. (PTU Rec_001453-001461 (POD 17) at 001453-455.) As required, the Owners fulfilled their commitments for each of those tasks. (*Id.* at 001454-458.) This was the beginning of the Owners' renewed look at the cycling project, which was discussed extensively in paragraphs 14 through 26.

55. In POD 17, the Owners enumerated 10 tasks. (*Id.* at 001454-56.) The State approved POD 17 and specifically found that it "protects the public interest." (PTU Rec_001463-001465 (August 17, 2000 Letter) at 001465.) The Owners fulfilled their commitments for each of those tasks. (PTU Rec_011931-939 (POD 18) at 011932-936.)

56. In POD 18, the Owners enumerated 11 tasks. (*Id.* at 011937-939.) Two of those tasks were references to work related to the 2001 Expansion Agreement. (*Id.* at 011937.) The State approved POD 18, specifically finding that it "protects the public interest." (PTU Rec_000374-375 (September 14, 2001 Letter) at 000374.)

57. Notwithstanding the two tasks that were references to work related to the 2001 Expansion Agreement, the Owners fulfilled their commitments for each of the other nine tasks. (PTU Rec_000383-391 (POD 19) at 000384-389.) Work related to the 2001 Expansion Agreement is addressed below. (*See* pp. 25-26 (paragraph I).)

58. In POD 19, the Owners enumerated five tasks. (PTU Rec_000383-000391.) The State approved POD 19 and specifically found that it "protects the public interest." (PTU Rec_000393-94 (August 28, 2002 Letter) at 000394.) The Owners fulfilled their commitments for three of the five tasks. (PTU Rec_004398-004402 (POD 20) at 004398-4401.) The tasks not completed were assessment of the cycling project's commercial viability and completion of the new Unit Operating Agreement so that it could be offered to the smaller interest Owners. (*Id.* at 004401.) On July 2, 2003, in their request for approval of POD 20, the Owners explained why they were not able to comply with the two tasks set out in POD 19. (*Id.*) On July 14, 2003, the State approved POD 20, after acknowledging that the Owners had been unable to determine whether the cycling project was commercially viable and had not executed a final Unit Operating Agreement to present to the smaller interest owners. (PTU Rec_005380-005384 (July 14, 2003 Letter) at 005381-82.)

59. During the term of POD 20, the Owners enumerated five tasks to be accomplished. (PTU Rec_000419-000424 (POD 21) at 000420-422.) Four of those tasks were worked on, but then suspended after the Owners determined the cycling project was not commercially viable. (*Id.* at 000420-422.) During the term of POD 20, the Owners consulted with the State to discuss these issues and made a series of presentations to discuss their commercial viability conclusion. (*Id.* at 000420.) The Owners fulfilled their commitment on the fifth task enumerated in POD 20. (*Id.*)

60. In POD 21, the Owners enumerated several tasks, which made clear that the Owners were shifting their focus to work on preparing for gas sales, but would provide the State with information so the State could independently assess the Owners' conclusion that the cycling project was not commercially viable. (*Id.* at 000423-424.) The State acknowledged the Owners' "plan to focus on potential gas sales opportunities," but concluded that it could only provide a conditional approval because it needed data and information beyond that which the Owners proposed be provided during the term of POD 21. (PTU Rec_012085-089 (September 23, 2004 Letter) at 012085-086; PTU Rec_001943-001944 (June 29, 2005 Letter) at 001943.)

61. During the term of POD 21, the State acknowledged that the Owners had provided a significant amount of data so the State could make its own assessment of the Owners' conclusion that the cycling project was not commercially viable. (PTU Rec_001943-944 (June 29, 2005 Letter) at 001944.) The State, however, continued to add to the list of information it needed, which the Owners tried to accommodate. (*Id.*)

62. On September 30, 2005, the Owners submitted additional data to the State and stated their understanding that this most recent submittal would "complete the requirements for reporting work conducted under POD 21." (PTU Rec_012332 (September 30, 2005 Letter).) That same date, the State issued its decision rejecting POD 22. (PTU Rec_012333-356 (September 30, 2005 Decision).)

63. In its 22-page decision rejecting POD 22, the State does not contend that the Owners failed to fulfill the commitments made in POD 21. (*See* PTU Rec_000627-000650 (October 27, 2005 Amended Decision).)

64. As explained above, the Owners fulfilled their commitments in prior PODs. Likewise, the commitments made in POD 23 to drill 5 wells and produce condensate by 2014 will also be fulfilled.

H. The Expansion Leases Are Distinguishable From The PODs Because The Owners Had The Option Not To Drill Wells.

65. At the hearing, I was asked why the following language, contained in a letter from Exxon to the State, was not a commitment or is different from the commitments made in POD 23:

> To reiterate, Exxon, as Point Thomson Unit Operator, is making preparations to be in a position to commence a well in the 1985-1986 winter drilling season. The purpose of this well would be to confirm resources sufficient to prove commerciality of the reservoir. Additional delineation wells may be required. . . . As discussed with you, current plans call for establishment of a participating area and start-up of production for a gas-cycling condensate recovery development as early as [1992].

(March 7, 2008 Tr. at 1029:13-23 (citing (PTU Rec_010023-010024).)

66. The above language comes from a letter, not a POD or even a letter referring to a POD. The letter refers to the 1984 Unit Expansion Decision. (PTU Rec_010023.) It explains that Exxon is preparing to drill the well, but must "meet with the other working interest owners" to obtain their approval. (PTU Rec_010024.) After

meeting with the other lease owners, the decision was made not to drill the well. However, the affected lease owners fulfilled their obligation under the 1984 Unit Expansion Decision. That Decision states that the lease owners can either drill a well or the expansion leases will contract out of the Unit:

> The lessees . . . agree that if such a well is not commenced prior to February 1, 1990, all leases not containing a well . . . will be contracted out of the Point Thomson Unit Area effective as of February 1, 1990.

(PTU Rec_010033-53 (1984 Expansion Agreement) at 010040.)

67. At the hearing, I was also asked about the following statements, which pertain to the 2001 Expansion Agreement:

> [The Owners plan to] [l]ocate the most advantageous location for the work commitment Area A delineation well, develop the drilling plan and cost estimates, and file drilling permits by the third quarter of 2002.
>
> [The Owners plan to] contract for a drill rig for a WCAA well by June 15th, 2002. Drill the well through the Thomson sand interval during the 2002 to 2003 winter season.
>
> [The Owners plan] to prepare a drilling permit application and seek expedited approvals.

(March 7, 2008 Tr. at 1031:8-1032:19 (citing PTU Rec_000365-000372 (June 22, 2001 Letter).)

68. The 2001 Expansion Agreement provided that "[t]he Working Interest Owners must complete drilling . . . a new well or deepening the Red Dog #1 Well." (PTU Rec_000365-000372 (June 22, 2001 Letter).) However, the Working Interest Owners had the option not to drill. If they chose that option, then the Agreement

provided that "the acreage automatically contracts out of the PTU . . . and the Working Interest Owners will pay the State of Alaska [$940,000] to compensate for the unrealized bonus payments during the period that the acreage was withheld from leasing (Drilling Extension Charge)." (*Id.*)

69. On August 5, 2002, the Owners confirmed that they chose instead "to pay the Drilling Extension Charge of $940,000 to the State of Alaska, and relinquish the western Red Dog Leases as prescribed in the Unit Expansion Approval." (PTU Rec_000383-000391 (POD 19) at 000385.) This decision was communicated to DNR nearly a year before the due date of June 15, 2003. (PTU Rec_000377-000378 (January 21, 2003 Letter) at 000377.) The Owners fulfilled their commitment, as acknowledge by the State. (PTU Rec_005380-005384 (July 14, 2003 Letter) at 005380.)

70. POD 23 is different from the Expansion Agreements because there are no off-ramps. If the Owners do not comply with the terms contained in the POD, then under 11 AAC 83.374, they will be in default of the Unit Agreement. The term of POD 23 is longer than most PODs, but it was specifically designed that way so the Owners could commit to production.

III. COMMITMENT TO PARTICIPATE IN OPEN SEASON.

71. During the hearing, I was asked what was meant by "terms and conditions" in the February 19, 2008 letter to Commissioner Irwin, which stated that "ExxonMobil, as an individual owner, will fully participate in and make commitments for Point Thomson gas in an open season for a gas pipeline (producer owned, third-party owned or

some other combination) in that pipeline's open season on terms and conditions no less favorable to ExxonMobil than those upon which other shipping commitments are made."

72. By "terms and conditions," ExxonMobil is referring to both transportation and fiscal terms, specifically, the terms and conditions offered by the transporter to any other prospective firm shipper in its tariff for shipping rates and other service, as well as the fiscal terms offered by the State of Alaska to any other ANS producer. The "no less favorable" provision would only apply to the extent that the transporter or the State offers different terms and conditions to different shippers and ANS producers, respectively. In that event, ExxonMobil would confirm that it has received terms and conditions that are at least as favorable as those offered to other prospective firm shippers or ANS producers, as the case may be.

73. ExxonMobil's goal is to commercialize its share of Alaska North Slope gas in a manner that maximizes value to the State and to our shareholders, and we have continually pursued ways to do so. As evidence of this ongoing commitment, ExxonMobil recently announced an agreement to commercialize a portion of its Prudhoe Bay gas through a sale to Fairbanks Natural Gas. ExxonMobil's commitment to commercialize Point Thomson gas is no different. We will continue working to find a suitable market for North Slope gas, including participating in any pipeline open season that meets this objective.

IV. TERMINATION IS NOT IN THE PUBLIC'S INTEREST.

A. ExxonMobil Is More Than Qualified To Implement POD 23.

74. During the hearing, I was asked about ExxonMobil's experience as an operator in Alaska. At the time, I stated that ExxonMobil has only been an operator at Point Thomson. That testimony was not complete.

75. ExxonMobil discovered Granite Point Field in Cook Inlet in 1965, installed the Granite Point Platform in 1966, and was operator of the field until 1978.

76. ExxonMobil also was the operator at Duck Island from 1978 through 1984. During that time, ExxonMobil drilled the Duck Island Unit 1, 2, and 3 wells.

77. Last, ExxonMobil was the operator at Thetis Island until 1995.

78. During the hearing, Mr. Boyd testified that the Thetis Island Unit was terminated because it "stopped working." I won't speculate on what Mr. Boyd meant by "stopped working," but would like to provide some background to explain that it would not be appropriate to believe the circumstances at Thetis Island are a reflection of ExxonMobil's commitment to POD 23. What occurred with the Thetis Island Unit is analogous to the 1984 and 2001 Unit Expansions, which contained well obligations and also provided that the Owners could choose not to drill.

79. In 1993, the State approved a five-year Plan of Exploration for Thetis Island. (RECLT7_013702-711 (February 12, 1993 Letter) at 013711.) That Plan required the drilling of three exploration wells or the unit would "automatically terminate." (RECLT7_013693-694 (May 1, 1995 Letter) at 013693.) ExxonMobil drilled the first well in 1993. After drilling the first exploratory well, Exxon decided -- as was its right pursuant

to the Plan of Exploration -- that it would allow the Unit to terminate rather than drill a second well. Accordingly, the Thetis Island Unit was automatically terminated pursuant to the Unit Agreement. (*Id.*)

80. As I have testified -- and as the letter from the President of ExxonMobil Production Company, Morris E. Foster (attached hereto as Exhibit C) shows -- ExxonMobil is committed to POD 23. There are no off-ramps. In contrast to prior PODs, ExxonMobil and the other Owners have agreed to assume the economic, reservoir, and technological risks associated with the in POD 23.

81. Moreover, each of the major owners has testified that they believe ExxonMobil is well qualified to implement POD 23 notwithstanding the numerous questions posed on that topic and on the topic of what circumstances must exist before those Owners would vote to remove ExxonMobil as operator.

82. The witnesses that testified during the March 3 hearing made clear that they do not believe that ExxonMobil has breached, much less "materially breached," the Operating Agreement, which addresses the basis for removal of the Unit Operator. There is no reason to believe that ExxonMobil will do so in the future.

B. New Owners Generally Would Not Be Entitled To The Technical And Seismic Data Owned By The Current Owners.

83. During the hearing, I was also asked about restrictions on the use of data shared between the Owners. Although the data between the Owners have been shared, it is governed by confidentiality or other provisions restricting use. This means that if the Unit is terminated, the current owners would generally not be able to share data with future owners.

84. Data, analysis, interpretations and work product for the Point Thomson Unit are subject to a number of distinct agreements and obligations. I am familiar with and can testify about the following agreements, which pertain to Point Thomson seismic and other technical data:

(a) The Point Thomson Unit Operating Agreement;

(b) March 17, 1988 Point Thomson Unit Common Database Agreement;

(c) August 1, 1988 Point Thomson Unit ExxonMobil, Phillips, and Chevron Confidential Well Data Trade Agreement;

(d) August 10, 1988 Point Thomson Unit Group Seismic Survey Agreement;

(e) July 1, 1998 Non-Exclusive Use Agreement West Island Corridor, Flaxman Lagoon and 1997 Flaxman OBC 3-D Seismic Surveys;

(f) April 15, 1999 Non-Exclusive Use Agreement West Island Corridor, Flaxman Lagoon, Yukon Gold, Mammoth and 1997 Flaxman OBC 3-D Seismic Surveys, Sourdough #2 and #3 Well Data, 1998 PTAC Drilling Study, 1998 PTAC Co-Development Study, and 1998 PTAC Environmental Studies; and

(g) February 1, 2001 Challenge Island 3-D Seismic Survey and Red Dog Well Data License Agreement.

85. The agreements identified in Paragraph 84(a)-(c) relate to technical data (including well data) and analysis. These agreements contain confidentiality provisions under which the signatories to the agreement covenant to keep the information confidential and to not share it with any third party absent the consent of the affected parties. Limited basic well data is kept confidential under the Point Thomson Unit Operating Agreement (the "Operating Agreement") for 5 years, but that time limitation is superseded by provisions in other agreements requiring confidentiality for certain Point Thomson wells.

86. ExxonMobil's analysis and interpretations of data are considered Technical Information under the Operating Agreement. The Operating Agreement provides that such Technical Information cannot be disclosed to others or used except in connection with operations under the Operating Agreement.

87. The Point Thomson Unit Group Seismic Survey Agreement (identified in Paragraph 84(d)) relates to seismic data and requires each of the signatories to maintain the confidentiality of the data and information obtained pursuant to the Agreement.

88. The agreements identified in Paragraph 84(e)-(g) relate to seismic data. The agreement identified in Paragraph 84(f) also includes other types of data. These agreements contain confidentiality provisions in which the party receiving information under the agreement covenants to keep the information confidential and to not share it with any third party absent the consent of the party providing the information under the agreement.

V. CONCLUSION.

89. Throughout the hearing, ExxonMobil has attempted to address concerns identified by the Commissioner and Hearing Officer, and to convey the basis for our belief that POD 23 sets out the right course for Point Thomson and is the proper remedy in this matter. I wish to reiterate what I said during the hearing: To the extent that the Commissioner or Hearing Officer has any remaining questions or continuing concerns of any kind, we remain willing to discuss such matters at any time.

FURTHER THIS AFFIANT SAYETH NAUGHT.

CRAIG HAYMES

SUBSCRIBED AND SWORN TO before me this 14th day of March 2008.

Notary Public in and for Alaska

My Commission Expires: 8/7/11

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ExxonMobil Corporation, Operator of the Point Thomson Unit; BP Exploration (Alaska) Inc.; Chevron U.S.A. Inc; ConocoPhillips Alaska, Inc.,	)	**Case No.: 3AN-06-13751 CI** (Consolidated Appeals)
Appellants,	)	Case No. 3AN-06-13760 CI
	)	Case No. 3AN-06-13773 CI
	)	Case No. 3AN-06-13799 CI
vs.	)	Case No. 3AN-07-04634 CI
	)	Case No. 3AN-07-04620 CI
State of Alaska, Department of Natural Resources,	)	Case No. 3AN-07-04621 CI
	)	Case No. 3AN-08-09369 CI
Appellee.	)	

APPEAL FROM APRIL 22 AND JUNE 10, 2008 DECISIONS OF THE COMMISSIONER OF THE ALASKA DEPARTMENT OF NATURAL RESOURCES TERMINATING THE POINT THOMSON OIL AND GAS UNIT

OPPOSITION TO MOTION FOR TRIAL DE NOVO

I. INTRODUCTION

Appellants ask for a partial trial *de novo*, seeking leave to take discovery from DNR. Appellants attempt to justify their request by alleging that the remand hearing before Commissioner Irwin did not comport with due process. Appellants' entire motion is based on a flawed premise – that because DNR is a party to the PTUA, the remand hearing was (or should have been) an adversarial proceeding between Appellants and a division of DNR. Appellants' arguments ignore: (1) DNR's applicable procedural regulations; (2) that the legislature explicitly gave DNR the power and

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flexibility to issue administrative decisions regarding State oil and gas leases; and (3) Alaska Supreme Court decisions rejecting the pecuniary interest argument Appellants make here and upholding DNR's administrative process. In short, DNR conducted its remand proceedings on remedy consistent with its applicable procedural regulations and Appellants' motion fails to establish any due process violations or that additional procedural steps were necessary.

Appellants nonetheless claim that they are entitled to a partial trial *de novo* in the form of taking expansive discovery from DNR in order for Appellants to learn whether: (1) DNR violated their due process rights; (2) DNR's remand decisions relied on documents outside the record; and (3) the extent of DNR's alleged pecuniary interests and due process violations. Appellants have it backwards. In order to justify this requested relief, Appellants must first establish the predicate of a due process violation, extra-record evidence, or bias. As discussed below, Appellants have failed to demonstrate that DNR's remand proceedings violated due process, that DNR relied on extra-record evidence, or that DNR was impermissibly "biased" due to its pecuniary interests in the PTUA. Appellants cannot simply come to court, make unsupported allegations, and then receive a trial *de novo* where they are permitted expansive discovery into an agency's files. Such a process is flatly contrary to Alaska administrative law, and it would cause significant delay in the resolution of the appeal.

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Even examined in isolation, Appellants' discovery requests have no merit and should not be permitted. Specifically, Appellants seek discovery on: (1) a study by PetroTel addressing Point Thomson reservoirs related to DNR's efforts regarding the gas line and the Alaska Gasline Inducement Act; (2) DNR Commissioner Irwin's discussions with staff and legal advisors; and (3) DNR's pecuniary interest as a party to the PTUA.

Regarding the PetroTel study, Appellants' only proffered justification for this discovery is that the report relates to Point Thomson reservoirs. Commissioner Irwin specifically informed Appellants that the PetroTel study was for the purpose of addressing issues related to the gas line and that he did not consider it in connection with the PTU decisions. Appellants have offered no proof to the contrary and thus have not overcome the general rule that agency decisions are presumed to be based on the designated record. It would be contrary to both Alaska administrative law and public policy if those challenging an agency decision could upend the administrative process and embark on expansive discovery simply by identifying a document that is arguably related to an agency decision but is not in the record.

Appellants likewise offer no legitimate justification to probe into Commissioner Irwin's communications with his staff and legal advisors. Putting aside that these communications are protected by the deliberative process and attorney-client privilege protections, Appellants have not shown that the existence of such communications

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constituted any sort of due process or other legal violation. Indeed, in generating a decision exclusively or heavily based on DNR expertise and formulation of DNR policy, it is necessary and appropriate for the Commissioner to have access to DNR staff. Appellants rest their argument on the notion that such communications were *ex parte* communications. But the remand proceedings were an agency hearing before the Commissioner – *not an adversary proceeding*. Accordingly, there can be no "ex parte" communications.

Finally, Appellants fail to justify their request to probe into DNR's pecuniary interest in the PTUA and underlying leases. As an initial matter, the fact that DNR is a party to the PTUA or that DNR is responsible for administering state land are not issues justifying discovery. Moreover, Appellants cannot argue that they need discovery about the "extent" of this pecuniary interest in order to establish a bias argument. The Alaska courts have repeatedly rejected the argument that agencies cannot adjudicate disputes where the agency also holds a pecuniary interest. Thus, the alleged "extent" of DNR's pecuniary interest in the PTUA and underlying leases is insufficient, by itself, to establish a bias or due process argument, and is likewise insufficient to overcome the presumption that public officers and agencies are presumed to carry out their duties in good faith. Put another way, because Appellants' "bias" argument rests solely on the fact that DNR has a pecuniary interest in this dispute, Appellants have not established a "bias" claim justifying any discovery.

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Appellants' motion is essentially a glorified discovery request likely aimed at delaying this appeal. To the extent Appellants wish to challenge DNR's unit termination decisions on due process grounds, the place to make that challenge is in the actual appeal – not in a side motion asking for discovery. Not only have Appellants failed to make the necessary showing to justify receiving *any* form of trial *de novo*, Appellants have failed to demonstrate that their requested discovery is relevant, appropriate, or necessary to the due process arguments they wish to raise in this appeal. This Court should therefore deny Appellants' discovery requests.

II. FACTS AND PROCEDURAL HISTORY

The Rule 600 appeals in this consolidated proceeding arise from DNR decisions regarding the Point Thomson oil and gas unit on the North Slope (PTU). The factual predicate for all DNR PTU decisions was the unit and lease history and the voluminous materials submitted to DNR by Appellants.

On October 27, 2005, the DNR Director of Oil and Gas rejected the 22nd POD and placed the PTU into default.[1] The factual basis of this decision was Appellants' failure to: (1) develop the unit over its approximate 30 year history despite the existence of known large reserves of hydrocarbons; (2) fully explore and delineate the unit; and (3) commit to putting the unit into production or to perform adequate unit exploration

[1] R. 627-50.

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and delineation.[2] The 22nd POD proposed no drilling or development, and it did not commit to unit production or exploration.[3] Rather it simply called for more "studies."[4] DNR gave Appellants a year to cure the default.[5] The Director's decision stated the unit was subject to termination if the default were not cured.[6]

But instead of proposing to cure the deficiencies by submitting a POD that committed to development and production, Appellants submitted thousands of pages of documents and briefing to Commissioner Menge in the fall of 2006.[7] Appellants contended that they were under no obligation to develop the unit, and that DNR was obliged to accept the modified 22nd POD offered on appeal which was very similar to the 22nd POD that the Director had rejected in October of 2005.[8]

On November 27, 2006, Commissioner Menge issued a decision affirming the Director's decision and terminating the unit.[9] In reaching this decision he adopted the Director's decision, considered the history of the unit, and Appellants' failure to develop the unit and put it into production.[10] He also considered Appellants' continuing

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[2] R. 633-48.
[3] Id.
[4] R. 633-35.
[5] R. 652, 2012.
[6] R. 649.
[7] R. 1-9298.
[8] R. 702-8.
[9] R. 5670-89.
[10] R. 5671, 5682, 5686.

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refusal to commit to unit development or production.[11] Appellants asked Commissioner Rutherford to reconsider Commissioner Menge's decision submitting several thousand more pages of documents to DNR.[12] In December of 2006, she affirmed Commissioner Menge's decision stating two grounds for termination: (1) Appellants' failure to meet their obligation to develop the unit; (2) Appellants' failure to submit a POD that made an acceptable commitment to develop and produce the unit.[13]

Appellants appealed to the superior court in the instant proceeding. DNR certified a record consisting of the materials it relied on in reaching the decisions including all DNR PTU unit files, all DNR PTU lease files, and all materials Appellants submitted to Commissioner Menge and Commissioner Rutherford.[14] In addition, Appellants supplemented the record with additional documents in the spring of 2007.[15]

On December 26, 2007 this Court issued its decision upholding DNR's rejection of the 22nd POD, affirming that DNR had the authority to administratively terminate the PTU, but reversing the unit termination, finding that Appellants had received inadequate notice that DNR was considering unit termination as a remedy and remanded the proceeding to DNR to hold a hearing on remedy.

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[11] R. 5678, 5682-3.

[12] R. 5726-42, 5797-809, 5819-9259.

[13] R. 9290.

[14] R. 1-27953.

[15] R. 27954-28575.

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Pursuant to this Court's remand order, Commissioner Irwin notified Appellants that DNR would hold a hearing to provide them with opportunity to be heard on the appropriate remedy for their breach and specifically informed them that DNR was considering the remedy of unit termination.[16] Commissioner Irwin also requested briefing on whether the remedy of unit termination was appropriate, and if not, "what remedy would be an appropriate response to the Appellants' failure to submit an acceptable POD."[17] During a prehearing conference, DNR presented a list of topics it wanted Appellants to cover at the hearing and/or in their briefing.[18]

Prior to the hearing, Commissioner Irwin further described the scope and issues for the remand proceedings in response to inquiries from Appellants. For example, in response to a letter from Appellants, Commissioner Irwin re-iterated the scope of the hearing and added that he wanted Appellants to address "why it is in the public interest for DNR to accept the remedy you propose."[19] Likewise, in a third letter, Commissioner Irwin informed Appellants that at the hearing they will "have the opportunity to address whether unit termination is an appropriate remedy and to present alternative remedies . . . . In making your presentations, you should explain why you believe your proposals are consistent with the applicable statutes, regulations and

[16] R. 30505.

[17] R. 30505.

[18] Tr. 68.

[19] R. 30514.

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agreements and are reasonable in light of the history of this unit."[20] Further, in response to a question from Appellants regarding the record, Commissioner Irwin explained that he would consider the pre-existing appeal record and any evidence they submitted on remand.[21]

At the week-long hearing, Appellants put on witnesses and filed briefs and numerous other documents.[22] As a proposed remedy, Appellants submitted a 23rd POD that proposed production from one well of 10,000 barrels a day of liquid hydrocarbons suspended in gas in the Thomson reservoir.[23] The 23rd POD also suggested potential additional production depending on what was found during the initial development phase.[24] The Appellants made no firm commitment to develop the hundreds of millions of barrels of oil in the PTU Brookian reservoirs,[25] or to drill in undelineated areas of the unit.[26]

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[20] R. 30521.

[21] R. 30513-15, 30521-22.

[22] R. 30505 – 31494.

[23] R. 30594-30613.

[24] Appellants did not contest at the remand hearing that the thirteen "expansion leases" had contracted from the unit. *See* Tr. of Remand Hearing, Volume II at 181 (March 3, 2008). Further, this Court's December 26, 2007 Order found that "all of the Appellants' claims concerning the Expansion Agreement are hereby dismissed as they have been expressly abandoned by all Appellants." Decision at 44.

[25] R. 324, 629.

[26] R. 30595, 30598-604, 31433.

After considering the Appellants' presentation, Commissioner Irwin rejected their proposed remedy and concluded that the public interest required unit termination. The rationale for that decision is set out in Commissioner Irwin's detailed written decisions of April 22 and July 10, 2008.[27] Like Commissioner Menge's initial unit termination decision and Commissioner Rutherford's decision affirming the Menge's decision, the factual predicate for Commissioner Irwin's decisions was the unit history of non-development and the materials submitted by Appellants[28] – all of which are part of the existing administrative record on appeal.

DNR certified additional documents from the remand proceeding to be included in the record on appeal in this proceeding in 18 volumes, including all Appellants' remand filings, all hearing transcripts, and all communications between DNR and Appellants.[29] The record DNR submitted to this Court constitutes the materials the DNR Commissioner considered in reaching his remand decision.

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[27] R. 31389-31467, 31561-31586.

[28] R. 31431-4.

[29] *See* August 14, 2008 First Amendment Notice of Additional Documents to be Included in the Record on Appeal.

III. ARGUMENT

A. Appropriate Legal Standards.

1. Law Applicable to Court Review of DNR Administrative Decisions.

DNR is the entity responsible for the administration of state lands including state oil and gas leases.[30] By statute,[31] regulation[32] and court decision,[33] persons challenging DNR administrative action must follow the appeal procedure provided for by DNR regulation, and the DNR Commissioner is vested with authority to issue the final agency decision.[34]

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[30] AS 38.05.020, AS 38.05.180; *State Dept. of Natural Resources v. Arctic Slope Regional Corp.*, 834 P.2d 134, 143 (Alaska 1991) (DNR is responsible "for implementing the constitutional mandate that the legislature 'provide for the utilization, development, and conservation of all natural resources belonging to the State ... for the maximum benefit of its people.'").

[31] AS 44.37.011.

[32] 11 AAC 02.010 through 11 AAC 02.900.

[33] *White v. State, DNR II*, 14 P.3d 956, 960 (Alaska 2000) (DNR regulations require oil and gas lessees to pursue all grievances through administrative remedies with the commissioner issuing the final administrative decision); *Danco Exploration, Inc. v. State, Dept. of Natural Resources*, 924 P.2d 432, 434 (Alaska 1996) (challenges to DNR leasing decisions must be by appeal to the commissioner followed by appeal to the superior court).

[34] The current applicable DNR procedural regulations are set forth at 11 AAC 02.010 *et seq.* The regulations, while enacted after the PTUA was executed, are consistent with the PTUA and thus were applicable to the remand hearings. *See Exxon Corp. v. State, DNR*, 40 P.3d 786 (Alaska 2001). Further, the regulations in place at the time the PTUA was enacted provided for similar procedures, most importantly, by also providing that DNR would hold administrative proceedings on state oil and gas leases and unit agreements, and notably not requiring any adversary proceeding or the

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DNR regulations allow an appellant to request special procedures and provide that the Commissioner may hold a hearing if disputed facts are presented for determination.[35] But in every case the regulations require that an appellant brief the grounds for that appeal to the Commissioner.[36] There is no requirement in the regulations, statute or decisions, that the DNR Commissioner base his or her decision on an adversarial proceeding between his or her subordinates and the appellants. Nor is there any requirement that DNR must appoint an independent hearing officer in order to issue a final agency decision.

Thus, the typical DNR administrative appeal process begins with a written statement of the appeal submitted to the Commissioner. The Commissioner then issues the final agency decision, and the appellant may appeal to superior court pursuant to Appellate Rule 602. This procedure has repeatedly upheld by the Alaska Supreme Court, notwithstanding the fact that DNR is party to the oil and gas leases it administers.[37] The typical court review of a DNR Commissioner's decision is to review

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appointment of an independent hearing officer. *See* 11 AAC 88.100 - .185; *see also* DNR's Supplemental Briefing under this Court's November 21, 2007 Order.

[35] 11 AAC 02.030(a)(13).

[36] 11 AAC 02.030(a)(8) and (13)

[37] *See, e.g., White v. State DNR II*, 14 P.3d at 960 ("we have recognized the authority of administrative agencies to consider breach of contract claims in which the agencies were parties."); *see also University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 128-129 (Alaska 1975) (rejecting any distinction between an agency's "proprietary" and "governmental" activities in suits involving the state or its agencies). *Cf. ConocoPhillips v. State Dep't of Natural Resources*, 109 P.3d 914

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the decision and record submitted by the agency as provided for under the Appellate Rules.[38] Appellants request for partial trial *de novo* is a request to depart from this standard administrative appeal process.

2. Law Applicable to Requests for Trial *De Novo*.

The superior court has discretion under Appellate Rule 609(b) to grant trial *de novo* in an appeal from administrative agency either in whole or in part. Trial *de novo* on appeal, however, is "rarely warranted" in Alaska.[39] *De novo* proceedings have been approved only in limited circumstances:

> (1) when certain issues are not within the expertise of an administrative body;
> (2) when the record is inadequate;
> (3) when the procedures of the administrative body are inadequate, for instance when they do not provide due process;
> (4) when the administrative agency was biased; or
> (5) when the administrative agency excluded important evidence.[40]

(Alaska 2005) (DNR permitted to adjudicate royalty dispute); *State Dept. of Natural Resources v. Arctic Slope Regional Corp.*, 834 P.2d 134, 143 (Alaska 1991) ("the line the companies draw between "regulatory" and "proprietary" functions more clear in theory than in practice.").

[38] *See Olson v. State, DNR*, 799 P.2d 289, 294-95 (Alaska 1990). *Accord SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses its action was based.").

[39] South Anchorage Concerned Coalition v. Municipality of Anchorage Board of Adjustment, 172 P.3d 774, 778 (Alaska 2007); see also Kott v. City of Fairbanks, 661 P.2d 177, 180 n. 1 (Alaska 1983) (noting trial de novo is not "common procedure.").

[40] *South Anchorage Concerned*, 172 P.3d at 778; *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 270 (Alaska 2004); *State v. Lundgren Pacific Constr. Co.*, 603 P.2d 889, 896 and n. 18 (Alaska 1979).

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Finally, "[i]f the process provided by agency regulations conforms to due process, but the agency has not adhered to the required process in a particular case, the remedy is not a trial de novo but a remand to the agency."[41]

Here, Appellants seek a partial trial *de novo* in the form of taking discovery from DNR, arguing that trial *de novo* is justified because: (1) the remand proceedings did not comport with due process; (2) DNR's termination decisions allegedly relied on materials outside the administrative records; and (3) DNR was allegedly "biased" because of its pecuniary interest in the PTUA. As discussed below, none of these arguments have merit and trial *de novo* is unjustified in this appeal.

3. Law Applicable to Alleged Due Process Violations.

Due process requires notice and an opportunity to be heard, but whether due process has been satisfied must be determined on a case-by-case basis.[42]

B. DNR's Remand Proceedings Comported with Due Process.

Appellants claim that the remand hearing violated due process because: (1) they were entitled to an adversary proceeding with an independent hearing officer; (2) they

[41] Alaska Public Interest Research Group v. State, 167 P.3d 27, 46 (2007).

[42] *See, e.g., State, Dep't of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1063 (Alaska 2004) ("due process does not have a precise definition, nor can it be reduced to a mathematical formula"); *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192-93 (Alaska 1980) ("The crux of due process is opportunity to be heard and the right to adequately represent one's interests. Adequate notice is the common vehicle by which these rights are guaranteed. Where notice is inadequate the opportunity to be heard can still be preserved and protected if a contestant actually appears and presents his claim.").

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were not provided proper notice of the applicable procedures and issues to be considered on remand; (3) Commissioner Irwin had alleged *ex parte* contact with Appellants' litigation adversaries; (4) Commissioner Irwin allegedly relied on materials outside the administrative record; and (5) DNR has a pecuniary interest in the PTU. None of these arguments have merit and they do not justify the expansive discovery into DNR files Appellants seek here. As discussed below, Appellants have not demonstrated that DNR should have departed from its standard administrative process and appoint an independent hearing officer, and Appellants received the notice required by due process.[43] DNR will address Appellants' other due process arguments in the context of their specific discovery requests.[44]

1. Appellants were not entitled to an adversary proceeding or an independent hearing officer.

Appellants' arguments regarding an adversarial proceeding and an independent hearing officer are premised on their argument that DNR cannot fairly adjudicate state oil and gas leases where DNR is party to the leases and unit agreements.[45] Appellants ignore extensive Alaska authority that grants DNR this power. The legislature has

[43] As noted above, to the extent that these arguments have any merit, the appropriate remedy is a remand, not a trial de novo. *Alaska Public Interest Research Group*, 167 P.3d at 46.

[44] Appellants also argue that DNR violated their due process rights by not adjudicating the issue of whether Appellants materially breached the PTUA and by not holding a hearing pursuant to Section 21 of the PTUA. *See* Mot. at 5, 8-9. These arguments are not due process arguments but rather arguments on the merits which (presumably) will be addressed in the parties' main briefing.

[45] *See* Mot. at 3, 10, 19-20.

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invested DNR with the authority to manage the State's oil and gas leasing program in the public interest,[46] granted DNR the power to issue its own procedural regulations,[47] and chosen not to subject DNR proceedings to the requirements of the Administrative Procedure Act.[48]

Most importantly, the Alaska Supreme Court has repeatedly affirmed DNR's appeal procedures,[49] and concluded that state agencies may combine investigatory, and adjudicatory functions.[50] Indeed, the Court has specifically noted that, despite being a

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[46] *See* AS 38.05.020, 38.05.180, AS 44.37.020(a); *see also Kachemak Bay Conservation Soc'y v. State, DNR*, 6 P.3d 270, 276 (Alaska 2000) ("the 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.").

[47] *See, e.g., Chevron U.S.A. Inc. v. LeResche*, 663 P.2d 923, 928 (Alaska 1983) (holding that the Alaska Land Act provides DNR with authority to establish reasonable procedures and regulations to carry out DNR's responsibility under the Alaska Land Act to maximize the state's return from state owned oil and gas resources).

[48] AS 44.62.330(a)-(b). *Cf. KILA, Inc. v. State, DOA*, 876 P.2d 1102, 1106 (Alaska 1994) (agencies not listed in AS 44.62.330 are not covered by the AAPA).

[49] *See, e.g., White v. State, DNR II*, 14 P.3d 956, 960 (Alaska 2000) ("The department's regulations require oil and gas lessees to pursue all grievances through administrative remedies, making no exception for contract claims. The commissioner is the final administrative adjudicator of such grievances."); *White v. State, DNR, I*, 984 P.2d 1122, 1126-27 (Alaska 1999) (noting that DNR has the authority to adjudicate whether oil and gas lease terminated under habendum clause and directing DNR to hold hearing on issue); *see also ConocoPhillips Alaska v. State, DNR*, 109 P.3d 914, 923-24 (Alaska 2005) (affirming DNR's right to adjudicate royalty dispute); *Exxon Corp. v. State, DNR*, 40 P.3d 786, 794-96, 798-99 (Alaska 2001) (observing that DNR can adjudicate dispute over interpretation of unit agreement's criteria for permitting unit expansion despite royalty implications).

[50] *See Alyeska Pipeline Serv. Co. v. State, DEC*, 145 P.3d 561, 572 (Alaska 2006) (rejecting argument that regulations establishing procedure for reviewing disputes are constitutionally flawed because agency investigates and adjudicates, thereby creating an

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contracting party, DNR: (1) is the final adjudicator of oil and gas contract disputes; (2) is not a party to the administrative proceeding; and (3) can administratively terminate oil and gas leases.[51] Thus, DNR's role as a party to a contract and adjudicator, even when it is terminating a lease, does not, by itself, violate due process.

Appellants also argue that even if DNR could adjudicate this dispute, they "were entitled to a full-scale administrative adjudication," and that "cancellation of the PTUA is clearly a drastic remedy, requiring that most, if not all of the procedural safeguards of an additional trial be provided."[52] Appellants are mistaken. There is no requirement under Alaska law that DNR hold an adversarial proceeding at the administrative level prior to terminating leases or unit agreements.[53] To the contrary, as discussed above, Alaska case law is clear that DNR has the authority to administratively terminate leases and unit agreements and simply needs to hold an administrative hearing consistent with

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impermissible conflicts of interest); *see also University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 128-129 (Alaska 1975) (rejecting any distinction between an agency's "proprietary" and "governmental" activities in suits involving the state and state agencies).

[51] *See White II*, 14 P.3d at 960; *White I*, 984 P.2d at 1126-27. *Accord* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev., 1267, 1279-1295 (1975) (Judge Friendly lists eleven elements of a fair administrative hearing; DNR's remand proceeding complied with every element).

[52] Mot. at 10.

[53] Current regulations provide for judicial proceedings under certain circumstances. *See* 11 AAC 83.374; 11 AAC 82.120(b). These regulations, however, do not require an adversary proceeding at the *administrative* level. And this Court has previously concluded that 11 AAC 83.374 does not apply to this dispute. *See* December 26, 2007 Order at 30-31.

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applicable regulations before doing so.[54] The U.S. Supreme Court has likewise rejected due process challenges to an agency's refusal to hold a "full scale" adversarial proceeding before a wholly neutral tribunal prior to the termination of property rights.[55]

Finally, it is important to note that DNR's ability to administer State oil and gas leases was not a mystery to Appellants when they entered into the PTUA with the State.[56] Appellants knew they were entering into a contract with a state agency and likewise were aware of the agency's applicable regulations, which at the time, as they do today, provided that DNR would adjudicate disputes regarding state oil and gas leases and unit agreements.[57]

2. Appellants received proper notice of the applicable procedures and the issues and evidence to be addressed at the remand hearing.

Appellants claim that they received insufficient notice of the issues and evidence DNR would consider on remand. This claim is contrary to the record. As discussed in

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[54] *See supra* n. 49.

[55] *See Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass.*, 426 U.S. 482 (1976) (affirming school board's rejection of plaintiffs' request for an independent tribunal and decision to hold a non-adversarial proceeding that prohibited plaintiffs from cross-examining board members prior to its decision to terminate teachers' property interests).

[56] In other words, DNR's procedural regulations were part of the "bargain" of entering into the PTUA. *Accord Batagiannas v. West Lafayette Community School Corp*, 454 F.3d 738, 742 (7th Cir. 2006) (holding that plaintiff teacher waived any due process right to a termination hearing before "wholly neutral decision-maker" by agreeing in her contract to a hearing before school board.).

[57] *See supra* p. 11 and n. 34. Likewise, when the majority of the PTU leases were signed, DNR's procedural regulations provided that DNR will adjudicate termination decisions in a non-adversarial proceeding. *See* 11 AAC 516.31-.52 (1964).

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more detail above, prior to the hearing DNR and Appellants engaged in lengthy correspondence where DNR informed Appellants that: (1) the remand procedures would be conducted pursuant to DNR's administrative appeal regulations 11 AAC 02.010 *et seq*;[58] (2) the purpose of the remand proceedings was to determine the appropriate remedy for Appellants' failure to submit an acceptable POD and that DNR would be considering unit termination as a possible remedy; and (3) Commissioner Irwin would consider the pre-existing appeal record and any testimonial and documentary evidence Appellants submitted on remand in making his decision.[59] Thus, DNR provided Appellants with "sufficient notice and information to understand the nature of the proceedings."[60]

C. Appellants' Requests for Additional "Augmentation of the Existing Appellate Record," *i.e.*, Discovery, Are Unjustified.

Appellants spend much of their motion arguing that their due process rights were

[58] Appellants argued to Commissioner Irwin that these regulations did not apply to the remand proceedings because the proceedings were not an "appeal." R. 30869. Appellants miss, however, that the remand to Commissioner Irwin was essentially a continuation of the administrative appeal process that began when Appellants first appealed Director Myers's default decisions to then Commissioner Menge. Moreover, Commissioner Irwin's reference to these procedural regulations satisfied any requirement that DNR provide notice to Appellants of what procedures it intended to apply on remand.

[59] *See supra* pp. 8-9.

[60] *Groom v. State, DOT*, 169 P.3d 626, 635 (Alaska 2007) ("The question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings."). To the extent Appellants argue there was a lack of notice regarding what Commissioner Irwin relied on in his termination decision, this was cured by Appellants' opportunity to file briefs and evidence in support of its reconsideration petition objecting to the remand decision. *See Greenpeace*, 96 P.3d at 1068-69.

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violated on remand, only to argue that additional discovery is necessary before Appellants can truly ascertain whether their due process rights were violated. Appellants argue that this Court cannot evaluate Appellants' due process claims without "a complete record reflecting all of the relevant facts and circumstances surrounding the conduct of the remand proceedings."[61] But as discussed above, this Court already has the entire remand record before it, and typically, Alaska courts review agency decisions solely on the administrative record, including reviewing for due process violations.[62] Appellants cannot justify their requests for discovery on the basis that this additional material "might" provide relevant information relevant to their due process claims.

Likewise, federal law has made clear that because judicial review of agency action is generally limited to the administrative record, discovery is typically not permitted.[63] Appellants seeking discovery must overcome the "presumption of regularity" – the presumption that public officers have properly discharged their official

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[61] Mot. at 12.

[62] *See Olson v. State, DNR*, 799 P.2d 289, 294-95 (Alaska 1990); *Kott v. City of Fairbanks*, 661 P.2d 177, 180 n. 1 (Alaska 1983); *Accord Tafas v. Dudas*, 530 F.Supp.2d 786, 796, 802-03 (E.D.Va. 2008) (rejecting appellants attempt to get discovery because appellant failed to show on the basis of the decision that the agency relied on documents not contained in the record).

[63] *See, e.g., NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3rd Cir.2006) ("There is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process.").

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duties.[64] Courts must apply this presumption absent clear evidence that those duties were improperly discharged.[65] Applying this concept to judicial review of agency action, there is a presumption that the agency properly designated the administrative record, and plaintiffs must show clear evidence to the contrary to obtain discovery.[66] Clear evidence may be demonstrated by a "strong," "substantial," or "prima facie" showing that the record is incomplete.[67] As shown below, Appellants' requests for discovery to augment the record are unjustified and would not aid this Court in reviewing DNR's administrative termination decision.

1. Appellants are not entitled to discovery regarding the PetroTel Study – It was not part of the Administrative Record and Commissioner Irwin's Remand Decisions Did Not Rely on it.

Appellants argue that after the remand hearing concluded, they learned for the first time that DNR had commissioned a study from PetroTel, Inc. to evaluate the Point Thomson reservoir. Appellants essentially claim that because the PetroTel study related to Point Thomson, Commissioner Irwin must have somehow relied on it in reaching his termination decision.[68] The PetroTel study is a red herring. Commissioner Irwin did not consider it during the remand hearing, it is not part of the PTU file, and it is

[64] *Tafas*, 530 F.Supp.2d at 795 (citing authorities).

[65] Id.

[66] Id.

[67] Id.; see also Amfac Resorts, LLC v. U.S. Dep't of the Interior, 143 F.Supp.2d 7, 11 (D. D.C. 2001).

[68] *See* Mot. at 13-17.

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irrelevant to the animating rational for his decision.[69] Appellants acknowledge that DNR already informed them that the report played no part in Commissioner Irwin's remand decisions (the PetroTel study relates to a separate matter – DNR's efforts related to the gas line and the Alaska Gasline Inducement Act).[70] Nonetheless, Appellants refuse to accept that Commissioner Irwin did not consider the PetroTel study on remand and apparently find its contents too tantalizing to resist demanding that this Court order DNR to produce the study and communications related to the study. Appellants fail to justify this discovery.

First, as discussed above, there is a presumption that an agency properly designated the administrative record.[71] "Courts must apply this presumption absent clear evidence that those duties were improperly discharged."[72] Here, Commissioner Irwin informed Appellants that the PetroTel study was not included in the appeal record because he did not rely on the study during the remand.[73] There is no reason to believe that he was lying.[74]

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[69] See Exhibit H to Motion.

[70] Mot. at 14.

[71] *See, e.g., Bar MK Ranches v. Yuetter,* 994 F.2d 735, 739-40 (10th Cir. 1993) *see also Blue Ocean Inst. v. Gutierrez,* 503 F.Supp.2d 366, 369 (D. D.C.2007) ("[T]he agency enjoys a presumption that it properly designated the administrative record.").

[72] *Tafas*, 530 F.Supp.2d at 795.

[73] *See* Appellants' Exhibit H.

[74] *Cf. AT&T Alascom v. Orchitt,* 161 P.3d 1232, 1246 (Alaska 2007) ("Administrative agency personnel are presumed to be honest"); *Earth Res. Co. of Alaska*, 665 P.2d at 962 n. 1 (providing that "agency personnel and procedures are

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Second, the United States Supreme Court established long ago the principle that judges review administrative action on the basis of the agency's *stated* rationale and findings, and instructed courts to have a correlative reluctance to supplement the record.[75] Courts are not, in other words, to look for hidden agendas if the agency's decision speaks for itself.[76]

Thus, to get discovery or supplementation of the record, Appellants must show, *on the basis of the written decision*, that Commissioner Irwin relied on materials not contained in the record.[77] Otherwise, every time an appellant accused an agency of relying on documents not contained in the appeal record, a court would have to permit

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presumed to be honest and impartial until the petitioner makes a showing of actual bias or prejudgment.").

[75] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("Since the decision of the Commission was *explicitly* based upon the applicability of [certain principles] ... its validity must likewise be judged *on that basis.*") (emphasis added); *see also Amfac Resorts LLC*, 143 F.Supp.2d at 11 ("Under longstanding precedent . . . judicial review is ordinarily confined to the administrative record."); *Cf. Exxon Corp. v. DEC*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) ("Matters not considered by the agency, however, are outside the record evaluated for substantial evidence, are legally irrelevant, and therefore are not discoverable").

[76] *Deukmejian v. NRC*, 751 F.2d 1287, 1324-27 (D.C.Cir.1984) *aff'd* 789 F.2d 26 (D.C. Cir. 1986) (en banc) ("[J]udges are not historians charged with isolating the 'true' basis for an agency's decision when its ostensible justification proves unconvincing. We review administrative action for compliance with applicable law, nothing more.").

[77] *See Olson v. State, DNR*, 799 P.2d 289, 294-95 (1990) (concluding that DNR did not rely on evidence outside the record after reviewing the agency's decision).

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discovery. This is not how the administrative appeal process is supposed to work.[78] In short, under Alaska law, and the federal cases cited by Appellants, to supplement the record with the PetroTel study and communications related to the study, or to get discovery regarding these documents, Appellants must show that the remand decisions and/or the designated record indicate that the agency relied on withheld information.[79]

A review of the remand decisions, however, demonstrates that Commissioner Irwin did not rely on the PetroTel study, or communications related to the study, because the decisions' factual assertions and legal conclusions are supported by the existing appeal record. Appellants nonetheless claim that the following issues in Commissioner Irwin's decisions could only be explained by the PetroTel study: (1) reference to the "Oil Rim"; and (2) criticism of the limited scope of Appellants' proposed production. Appellants misread the record.

Commissioner Irwin's decisions never stated, as Appellants insinuate, that an acceptable development plan must produce from the "Oil Rim."[80] To the extent that

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[78] *See, e.g., Harvard Pilgrim Health Care of New England v. Thompson*, 318 F.Supp.2d 1, 8-9 (D.R.I. 2004) ("[B]road-ranging discovery aimed at matters not included in the administrative record is inappropriate.").

[79] *See Olson*, 799 P.2d at 294-95 (concluding that DNR did not rely on evidence outside the record after reviewing the agency's decision); *KILA , Inc. v. State, DOA*, 876 P.2d 1102, 1105 (Alaska 1994) (reviewing agency decision and record to determine if a due process violation occurred); *Accord Tafas v. Dudas*, 530 F.Supp.2d 786, 796, 802-03 (E.D.Va. 2008) (rejecting appellants' attempt to procure discovery because appellants failed to show on the basis of the decision that the agency relied on documents not contained in the record).

[80] Mot. 15-16.

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Commissioner Irwin discussed the Oil Rim, he referenced Appellants' statements that there was currently too much uncertainty regarding the resource to require production – although he noted that the alleged uncertainty directly resulted from ExxonMobil's failure to drill any wells over the past 25 years.[81]

Commissioner Irwin's decision was critical of what he viewed as Appellants' decision to continue to warehouse significant state resources. But these criticisms of Appellants past and current production plans were all supported by citations to the existing record. Indeed, Commissioner Irwin did not need the PetroTel study to criticize Appellants' warehousing of resources because the decision merely amplifies a position DNR has repeatedly articulated since 1983.[82]

In short, the remand decisions speak for themselves and they must be judged on that basis alone. The decisions show that the 23rd POD was rejected, and the PTU terminated, not because, as Appellants appear to allege, that the PetroTel study suggested the unit should be developed differently, but rather because Commissioner

[81] R. 31403 n. 51, 31433, 31535 n. 42.

[82] *See* Remand Decision at R.31404-05, 11258, 11242, 10022, 11555. *See generally Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 280-81 (1934) (rejecting lessee's proposal to retain acreage with "no present intention of drilling at any time in the near or remote future. This attitude does not comport with the obligation to prosecute development with due regard to the interests of the lessor. The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor not only of the expected royalty from production, but of the privilege of making some other arrangement for availing himself of the mineral content of the land.").

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Irwin found that unitization was no longer in the public interest.[83] Specifically, Commissioner Irwin referenced both: (1) the historic lack of production and exploration that has resulted in the State being deprived of the bargain it struck when it first issued the leases to ExxonMobil in 1965 and formed the PTU in 1977;[84] and (2) the history of broken promises, combined with the lack of *any* assurances of performance in the 23rd POD, which convinced him that ExxonMobil would not carry out its alleged "commitments" in good faith.[85] All of these findings are supported by a host of reasons discussed at length in the decisions, which in turn are supported by record citations.

The fact that Appellants have identified a document outside the record that they contend is relevant to Commissioner Irwin's decision is insufficient to justify discovery related to the document and does not support an inference that Commissioner Irwin *must* have relied on the document in issuing his decision. Put simply, "[s]ince the decision of the Commission was explicitly based upon the applicability of [certain principles] . . . its validity must likewise be judged *on that basis.*"[86] Here, the remand decisions speak for themselves.[87]

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[83] *See* Reconsideration Decision at 31525-27.

[84] *See* Remand Decision at R. 31421-22, 31425-26, 31433-34, 31458-59, 31463-64; Reconsideration Decision at 31521-22, 31525-30, 31540.

[85] Remand Decision at R. 31401, 31422 31447-54, 31465; Reconsideration Decision at 315222, 31525-26.

[86] *Chenery Corp.*, 318 U.S. at 87 (emphasis added); *see also Tafas*, 530 F.Supp.2d at 802-03 (rejecting appellants attempt to get discovery because appellant

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2. Appellants are not entitled to discovery regarding internal DNR staff communication.

Appellants next urge they are entitled to probe essentially all communication between Commissioner Irwin and internal DNR staff, attorneys, and advisers. Appellants engage in a slight of hand and refer to these communications as "*ex parte* communications" in order to justify their discovery demands.[88] But this argument is based on the same flawed premise that the remand proceedings before DNR were (or should have been) an adversarial proceeding. Where there is no adversarial proceeding, by definition, there can be no *ex parte* communications.[89]

Moreover, there is no prohibition in Alaska law on Commissioner Irwin consulting with his advisors who know a considerable amount about a complicated

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failed to show on the basis of the decision that the agency relied on documents not contained in the record).

[87] As another example of how Appellants misstate the administrative process, they argue that Commissioner Irwin's criticisms of Appellants' proposed remedy created the appearance that they were based on the PetroTel Report, and Appellants never had the opportunity to rebut the PetroTel report. *See* Mot. at 16. But Commissioner Irwin's criticisms were based on the existing administrative record and his decisions contained extensive record citations. Appellants have the opportunity though this administrative appeal to challenge Commissioner Irwin's conclusions based on the existing record. Appellants do not need to review the PetroTel study to challenge Commissioner Irwin's conclusions in his decisions.

[88] *See* Mot. at 17-20.

[89] *See Cook v. State* 36 P.3d 710, 727 and n.29 (Alaska 2001) ("The term " *ex parte*" refers to a proceeding in which a judge hears from only one litigant or one allied group of litigants, while other litigants with adverse interests are not allowed to participate.") (citing *Black's Law Dictionary* (6th ed.1990), p. 576).

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matter.[90] Similarly, there is no requirement that an agency's appeal record must contain such communications.[91] In fact, relevant principles of federal law provide that an agency can omit such documents because: (1) judicial review of agency action "should be based on an agency's stated justification, not the pre-decisional process that led up to the final, articulated decision"; and (2) excluding privileged materials "prevents injury to the quality of agency decisions by encouraging uninhibited and frank discussion of legal and policy matters."[92] As the D.C. Circuit held, a commissioner "may utilize services of subordinates to sift and analyze evidence received by trial examiner" and "subsequent use by the agency of a written resume of that sifting and analyzing is a part of agency's internal decisional process *which may not be probed on appeal.*"[93] Indeed,

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[90] *See, e.g., Amerada Hess v. RCA*, 176 P.3d 667, 674-76 (Alaska 2008) (upholding Regulatory Commission of Alaska's use of an economist to manage voluminous technical testimony and finding no due process violation occurred because there was no evidence that the Commission prejudged any aspect of the case).

[91] *Accord Deukmejian v. NRC*, 789 F.2d 26, 45 (D.C. Cir. 1986) (en banc) ("As the Supreme Court has stated, "there must be a strong showing of bad faith or improper behavior before [inquiry into the mental processes of the administrative decisionmaker] may be made.".) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971)).

[92] *Tafas v. Dudas*, 530 F.Supp.2d 786, 793-94 (E.D.Va. 2008) (collecting cases). *See also Grant v. Shalala*, 989 F.2d 1332, 1344 (3rd Cir. 1993) ("It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper.").

[93] *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C.Cir.1947) (emphasis added).

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the various state and federal cases Appellants cite actually support DNR's argument – they expressly state that the record should *not* contain privileged documents.[94]

Other cases cited by Appellants to support their argument are distinguishable because they involved the administrative procedure act (APA) or adversarial proceedings.[95] The Alaska APA does not apply to DNR's adjudication of oil and gas disputes,[96] and DNR's regulations do not provide for adversarial proceedings.[97] And *Thompson v. United States* provides little help for Appellants because the court there found that the record was incomplete because the agency record excluded evidence *submitted by the appellant* to the administrative decision-maker.[98] Thus, the cases cited

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[94] *See, e.g.*, Mot. at 11-12 citing *Tafas*, 530 F.Supp.2d at 793-94 ("Any evidence of the [agency's] 'internal struggle' or its deliberative 'spade work' is irrelevant as it is the stated reasons for the Final Rules that the Court must consider when conducting arbitrary and capricious review."); *Amfac Resorts, L.L.C. v. U.S. Dept. of the Interior*, 143 F.Supp.2d 7, 13 (D.D.C. 2001) ("[D]eliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record.").

[95] *See e.g., Matter of Robson*, 575 P.2d 771 (Alaska 1978) (addressing alleged due process violation in the context of an adversarial administrative proceeding).

[96] AS 44.62.330(a) & (b). *Cf. KILA , Inc. v. State, DOA*, 876 P.2d 1102, 1106 (Alaska 1994) (agencies not listed in AS 44.62.330 are not covered by the AAPA).

[97] *See White v. State, DNR II*, 14 P.3d 956, 960 (Alaska 2000).

[98] 885 F.2d 551, 555 (9th Cir. 1989). The remaining cases cited by Appellants are also distinguishable because they involve a specific finding that an appellant made the necessary preliminary showing that the agency record was incomplete, or an agency's essentially conceding that it filed an incomplete record. *See Exxon Corp*, 91 F.R.D. at 33 ("Exxon has made a strong showing that the Administrative Record certified to this Court is incomplete. Incompleteness is evident from the record's face."); *Natural Res. Def. Council, Inc. v. Dept. of Energy.*, 519 F.2d 287, 291-92 (D.C. Cir. 1975) (holding that the agency failed to file the entire administrative record because the agency conceded that it filed an incomplete record).

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by Appellants do not support the proposition that they are entitled to discover communications between Commissioner Irwin and his staff and do not provide that the appeal record must by supplemented with these communications.

Likewise, Appellants' contention that Commissioner Irwin could not be advised by "advocates" is mistaken.[99] There is no constitutional prohibition on agency staff litigating against a party and then participating in subsequent administrative proceedings involving the same or similar matters. Indeed, the Alaska Supreme Court, consistent with federal precedent, recently held that officials employed by administrative agencies may decide administrative appeals and then direct the agency's defenses in subsequent proceedings without violating due process "so long as adequate procedural safeguards

[99] The distinction Appellants offer here, that it is somehow different for Commissioner Irwin to be advised by DNR's lawyers on remand than it is for him to be advised by other DNR personnel with specific expertise, does not withstand scrutiny. The DNR Commissioner was advised by staff and legal personnel in making the initial termination decision,, was likewise advised by the same staff and legal personnel while the decision was on appeal (including of course, the lawyers who defended the appeal) and the Commissioner was likewise advised his staff and legal advisors on remand. In this way, the distinction between legal "advocates" and other DNR staff is illusory. They are all personnel the DNR Commissioner consults with in making, and defending, agency decisions. And it is worth noting, the Commissioner is the final decision-maker, not any staff or legal advisor. By way of analogy, other administrative agencies in Alaska are routinely advised by the same legal personnel in making agency decisions and on appeal when those decisions are challenged. The Regulatory Commission of Alaska (RCA) is one example. Now the RCA, of course, is an agency specifically charged to hold adversarial proceedings and act as a neutral regulator. DNR, on the other hand, as discussed above, is charged with making agency decisions to manage the State's oils and gas leasing and is not required to hold adversary proceedings. The point is that as long as an agency is acting within its regulations, there is no *per se* prohibition on the agency relying on the same legal advisors when making its decision as it does when that decision is on appeal (or when there is a remand).

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exist [e.g., a written decision and right to judicial review] to protect the rights of the appellant."[100] Finally, contrary to Appellants' contention, the requirement that an advocate cannot advise a decision-maker has only been applied by the Alaska courts to adversarial adjudications.[101]

In sum, a process that allows an attorney to represent the commissioner on appeal, and continue to represent him when a case is remanded, does not violate a party's constitutional rights because: (1) DNR's procedures do not require an adversarial proceeding; (2) Commissioner Irwin is entitled to seek advice from his advisors; (3) DNR has issued a decision appealable to court; and (4) no evidence has

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[100] *Alyeska Pipeline Serv. Co.*, 145 P.3d at 571-72. *Cf. Porter County v. NRC*, 606 F.2d 1363, 1371-73 (D.C. Cir. 1979) (rejecting objection to Director of Nuclear Reactor Regulation deciding request for revocation or rector permit requests because NRC staff had previously advocated granting permit concluding); *Accord Blinder, Robinson, & Co. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir.1988) (Petitioners argued that the Commission's role as their adversary in litigation prevented it from being an impartial administrative adjudicator in a subsequent administrative action convened by the Commission against petitioners. The court rejected the argument that the Commission violated due process by "engage[ing] in active litigation with the party whom it is judging.").

[101] *See, e.g., In re Robson*, 575 P.2d 771 (Alaska 1978). This conclusion is consistent with federal law which provides that an agency can combine investigatory and adjudicatory functions without violating due process. *See Pathak v. Dept. of Veteran Affairs*, 274 F.3d 28, 33 (1st Cir. 2001) ("The Supreme Court has never held a system of combined functions to be a violation of due process, and it has upheld several such systems.") (quoting 2 K.C. Davis & R.J. Pierce, Jr., *Administrative Law Treatise* § 9.9, at 101 (3d ed. 1994)). Indeed, if an agency can combine these functions, it makes no sense to isolate an agency decision-maker in a non-adversarial proceeding from agency personnel who perform these functions.

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been introduced to overcome the presumption that Commissioner Irwin honestly certified the record he relied upon in reaching his remand decisions.[102]

3. Appellants are not entitled to discovery regarding DNR's alleged financial incentives.

Appellants argue that they are entitled to discover facts regarding DNR's alleged financial incentive to cancel the PTUA because this discovery will allegedly help demonstrate that DNR's pecuniary interest caused it to act with bias.[103]

As an initial matter, Alaska case law suggests that a party cannot supplement the record in the context of a trial *de novo* request based on bias.[104] Appellants' request also ignores the provisions of Alaska law discussed above which permit DNR to adjudicate oil and gas leases where DNR is also a party.[105] Moreover, the fact that DNR has an interest in state oil and gas leases is hardly a hidden fact that requires discovery. Putting these issues aside, Appellants have failed to make a showing of agency bias that would justify this discovery.

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[102] *Amerada Hess*, 176 P.3d at 677.

[103] *See* Mot. at 21-22.

[104] Southwest Marine, Inc. v. State, Dept. of Transp. and Public Fac., 941 P.2d 166, 179-180 (Alaska 1997).

[105] *See supra* p. 12 and n. 37; *see also White v. State DNR II*, 14 P.3d at 960 ("we have recognized the authority of administrative agencies to consider breach of contract claims in which the agencies were parties.").

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Appellants attempt to show "bad faith" and bias by pointing to DNR's pecuniary interest in the leases and PTUA.[106] But the Alaska Supreme Court has previously considered the proprietary interest argument as it relates to DNR oil and gas decisions and has rejected it.[107] The fact that DNR is a royalty owner, issues oil and gas leases, or approves and administers the unit agreement did not preclude it from administratively adjudicating the question of remedy on remand.[108]

Likewise, the Alaska Supreme Court in *Amerada Hess Pipeline Corp.* v. *Alaska Public Utilities Comm'n*,[109] concluded that an alleged pecuniary interest on the part of an adjudicating agency, by itself, is insufficient to establish a due process claim. There, the Trans-Alaska Pipeline owners claimed the state's pecuniary interest in pipeline costs made the Regulatory Commission of Alaska which was adjudicating the matter inherently biased. The Court rejected this argument, holding:

> [t]he dual role of the APUC as both administrator of its own budget and adjudicator of costs does not violate state due process if sufficient

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[106] Notably, Appellants do not argue that Commissioner Irwin *himself* was inherently biased. Rather, they rely on a "structural bias" type argument. *See, e.g., Porter County v. NRC*, 606 F.2d 1363, 1371-73 (D.C. Cir. 1979) ("there is a distinction between claims of "structural" bias, against which there is a strong presumption, and individual bias.").

[107] See State Dept. of Natural Resources v. Arctic Slope Regional Corp., 834 P.2d 134, 143 (Alaska 1991); see also University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121, 128-129 (Alaska 1975) (rejecting any distinction between an agency's "proprietary" and "governmental" activities).

[108] *See supra* p. 12 and n. 37; *Cf. ConocoPhillips v. State Dep't of Natural Resources*, 109 P.3d 914 (Alaska 2005) (DNR permitted to adjudicate royalty dispute).

[109] 711 P.2d 1170, 1180 (Alaska 1986).

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> safeguards exist against APUC's discretion. In this case, the APUC's issuance of a reasoned decision explaining its cost allocation was a sufficient safeguard against the APUC's abuse of discretion.[110]

Here, sufficient safeguards are in place against any abuse of discretion because DNR's written decisions are being reviewed by this Court.

Alaska law is thus clear that simply alleging a pecuniary interest on behalf of an adjudicating agency, by itself, is insufficient to state a due process violation.[111] Indeed, public agencies in Alaska are presumed to act in good faith.[112] A claimant must show actual prejudice or prejudgment to over come the presumption.[113] Appellants have not

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[110] *Id. Accord Tafas*, 530 F.Supp.2d at 797 ("To obtain discovery beyond the administrative record on the basis of bad faith there must be a 'strong preliminary showing' of impropriety. . . . Courts have imposed a high standard on plaintiffs seeking to demonstrate bad faith.").

[111] These principles of Alaska law comport with federal Law. The United States Congress and the U.S. Supreme Court have rejected the contention the federal government's pecuniary interest in oil and gas leases precludes federal agencies from adjudicating oil and gas lease and unit disputes. *See* 30 U.S.C. § 226(i); 30 U.S.C. § 188(b); *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963) (noting DOI's broad powers to administer public lands under Mineral Leasing Act encompasses the power to administratively terminate based on pre-lease factors); *Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980) ("The Secretary has broad authority to cancel oil and gas leases for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued."); *Burton/Hawkes, Inc. v. United States*, 553 F.Supp. 86 (D.Utah 1982) (affirming administration termination of lease).

[112] *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) ("Administrative agency personnel are presumed to be honest"); *Earth Resources Co. v. State, DOR*, 665 P.2d 960, 962 n.1 (Alaska 1983) ("agency personnel and procedure are presumed to be honest and impartial").

[113] *See, id.; Cf. Amerada Hess*, 176 P.3d at 674-75.

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shown either one to justify discovery into DNR's interests as the administrator of the state's hydrocarbons.

IV. CONCLUSION

Appellants' motion for partial trial *de novo* in the form of discovery requests must be denied. Appellants have failed to establish any of the narrow exceptions permitting a trial *de novo* and further, have failed to show that their requested discovery is appropriate or justified. Appellants' motion should therefore be denied and Appellants should simply raise their due process arguments where they belong, in the context of the briefing of this administrative appeal.

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