IN THE SUPREME COURT FOR THE STATE OF ALASKA

LAW OFFICES OF JAMES B. GOTTSTEIN Appellant, vs. ALASKA DEPARTMENT OF NATURAL RESOURCES, DIVISION OF OIL & GAS Appellee	)	Supreme Court Case No. S-12942

Trial Court Case Nos. 3AN-06-06003CI, & 3AN-06-08094CI

OPPOSITION TO APPELLEE'S MOTION TO DISMISS FOR FAILURE TO APPEAL FROM RULE 511.5(c) DISMISSAL AND BECAUSE APPEAL IS MOOT
and
MOTION FOR STAY OF APPEAL PENDING DETERMINATION OF 3AN-05-09272 CI., AND 3AN-06-08419 CI.

Appellant, the Law Offices of James B. Gottstein, a sole proprietorship, hereby:

(1) Opposes Appellee, the Alaska Department of Natural Resources, Division of Oil and Gas (DNR)'s Motion to Dismiss for Failure to Appeal from Rule 511.5(c) Dismissal and Because Appeal is Moot (Motion to Dismiss); and

(2) Moves to stay this appeal pending completion of the Superior Court appeals in *Allen & Donkel v. DNR*, 3AN-05-09272 CI., and *Allen & Donkel v. DNR*, 3AN-06-08419 CI.

With respect, its Motion to Dismiss, it does not appear DNR is correct in its highly technical argument that I didn't appeal properly and my appeal is now subject to

dismissal. However, if so, I have sought leave to cure the defects by filing a motion to amend the notice of appeal and supplement the points on appeal contemporaneously herewith.

The proceedings in this case are somewhat complex, but the essence of my claim is pretty simple, which is that DNR acted in bad faith under a settlement agreement and I am entitled to a *de novo* trial because (1) it was not proper for DNR to decide itself whether it had acted in bad faith, and (b) DNR can not properly act as the tribunal in deciding its own proprietary interests.

I. .....BACKGROUND

The following is a truncated description of the facts and proceedings regarding Oil & Gas Lease No. ADL 369116, the subject of this appeal. A more complete description is contained in the May 9, 2006, Preliminary Pre-Briefing Motions (Preliminary Motions).[1]

(A) DNR's Bad Faith

During a previous Superior Court appeal proceeding over improper termination of the same oil and gas lease involved in this case, ADL 369116, DNR violated an April 27, 2000 court order prohibiting it from leasing the same property during the pendency of the Superior Court appeal,[2] held a competitive oil and gas lease sale including the property on August 16, 2000, notifying the high bidder, Richard E. Wagner on August 28, 2000 he

[1] Attachment 1, hereto.
[2] April, 27, 2000 Order, Attachment 2 hereto

was the high bidder,[3] and issued a new oil and gas lease, ADL 389508, covering the same property to Wagner on May 1, 2001 (Wagner Lease).[4]

Just a month later, on June 1, 2001, DNR issued a letter revoking the Wagner Lease, reciting that it had been issued in violation of a court order and therefore DNR did not have authority to issue the lease.[5] Wagner filed an administrative appeal on June 29, 2001.[6]

On March 4, 2002, the Superior Court ruled that ADL 369116, the subject of this appeal too, had been improperly terminated and remanded the case back to DNR for proper handling.[7] In late November, 2002, DNR and Messrs. Daniel Donkel, Bolt and Kasper entered into a settlement agreement whereby the lessees had until December 31, 2005 to drill a well.[8]

Contrary to expectations that DNR would process Wagner's administrative appeal in due course, DNR failed to do until after I wrote a letter on behalf of Messrs Donkel, Robert Bolt and George Kasper on June 13, 2004, stating among other things, the following:

> To their dismay, the Lessees have found that the Division failed to move forward to correct its violation of the court order prohibiting it to lease any part of ADL 369116 by issuing a final decision with respect to the Wagner lease, ADL 389508, covering part of ADL 369116. The Lessees regard this as bad faith on the part of the Division and grounds to vitiate the December

[3] August 28, 2000, Notice to High Bidder, Attachment 3, hereto
[4] May 1, 2001, Competitive Oil and Gas Lease, ADL No. 389508, attached as Exhibit U to Preliminary Motions.
[5] Attachment 4, hereto.
[6] Attachment 5, hereto.
[7] *See*, March 4, 2002, Order, attached as Exhibit B to Preliminary Motions.
[8] Attachment 6, hereto.

> 31, 2005, deadline for drilling a well. This bad faith has prevented the Lessees from drilling a well because it has cast a cloud on Lessee's title. . . . Thus, any termination should, at a minimum, be extended by the amount of time the Division has failed to issue a decision on the Wagner Lease, ADL 389508.
>
> The problem is real because it is my understanding a company decided against a drilling program in Cook Inlet to include ADL 369116 because of the cloud on title created by the Division. My understanding is that not only was ADL 369116 affected, but that drilling of another lease is not occurring because of the continuing cloud on ADL 369116's title created by the Division.
>
> Therefore, if the Division considers the letter/"decision" a decision on the termination of ADL 369116, in prosecuting their appeal, the Lessees are requesting/demanding they be allowed to conduct discovery regarding the underlying facts with full subpoena power to compel relevant testimony and production of documents, briefing and then a hearing by an impartial decisionmaker who is not employed by the State of Alaska.[9]

Sometime on June 14, 2004 or shortly thereafter a "Bill" at DNR, who might be Bill Van Dyke, who was probably the acting director of the Division of Oil and Gas at that time, hand wrote a note to two other DNR employees, "Carol," who is probably Carol Lee and "Pirtle," presumably Pirtle Bates, asking, "What is the deal with the Wagner Lease?"[10]

DNR, never responded to the demand for discovery contained in my June 13, 2004, letter, [11] but by letter dated August 2, 2004, did say the May, 2004, decision addressed by my June 13, 2004 letter was not a lease termination decision.[12]

[9] Attachment 7, hereto.
[10] Attachment 8, hereto.
[11] Attachment 7, hereto.
[12] Attachment 9, hereto.

Less than two weeks later, by letter dated August 13, 2004, DNR finally decided the administrative appeal against Wagner,[13] which Wagner didn't appeal to the Superior Court, thus finally clearing title to ADL 369116.

(B) Renaissance Resource's Acquisition of Working Interest and Requests for Extension

Under Paragraph 8 of the Settlement Agreement,[14] when Unocal and Forest, the then "working interest owners" in ADL 369116,[15] failed to submit a written commitment to drill a well by October 31, 2003, they assigned all of their interests in ADL 369116, including 100% of the working interest, back to Messrs. Donkel, Bolt and Kasper.[16]

It wasn't until after DNR had cleared the title to ADL 369116 by finally revoking the Wagner lease in late summer 2004, that Messrs. Donkel Bolt and Kasper were in a position to try and get someone else to develop (drill) the lease. This was accomplished , by April 25, 2005, when Renaissance Resources, Alaska, LLC (Renaissance) submitted assignments of various interests in ADL 369116, including 100% of the Working Interest from Messrs Donkel, Bolt and Kasper.[17] In spite of Renaissance's tremendous efforts to put a program together before the December 31, 2005 deadline, it was unable to do so

[13] Attachment 10, hereto.
[14] Attachment 6, hereto, p. 2.
[15] "Working interest owners" means they had the right to drill and develop any oil and gas discovered. Messrs. Donkel, Bolt & Kasper, had what is known as royalty or overriding royalty interests, meaning they were entitled to a share of the revenue should oil and/or gas be discovered and produced on the lease.
[16] Exhibit HH to Preliminary Motions.
[17] Exhibit OO to Preliminary Motions.

and submitted two requests for extension of the lease in order for it be able to pull all the pieces together.[18] These requests, however, were denied.[19]

(C) My Involvement In the Administrative Proceedings

On June 15-17, 2004, as part of my compensation for an engagement in another matter, I received assignments of royalty interests in ADL 369116 totaling 1.5% from Messrs. Donkel, Bolt and Kasper.[20] DNR was notified of my ownership interest in ADL 369116 as early as June 21, 2005, [21] which was reiterated in a letter from me dated June 24, 2005.[22]

On February 22, 2006, DNR issued a Final Order and Decision denying Renaissance's request for lease extension.[23] For various reasons I decided to participate in my own name, so I recorded my assignments on March 2, 2005[24] and by letter dated March 3, 2005, I entered the administrative proceedings on my own behalf by writing a letter to the Commissioner of DNR.[25] Portions of this March 3, 2005 letter state:

> I am participating now on my own behalf as an overriding royalty interest owner. . . .
>
> [T]he bad faith of the Division of Oil and Gas under the settlement agreement has given rise to the right to have the lease extended. . . .

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[18] Exhibits VV and XX to Preliminary Motions.
[19] Exhibits WW and YY to Preliminary Motions.
[20] Attachment 11, hereto, pp 20-25.
[21] Attachment 11, hereto, p. 18, n.1 ("In the interest of full disclosure, it should probably be noted that my law office has received assignments of overriding royalty interests as part of my compensation in an engagement in another matter").
[22] Attachment 11, hereto, p 19, n. 2 ("As I mentioned in my June 21st letter, I am a principal in ADL 369116").
[23] Exhibit EE to Preliminary Motions.
[24] Attachment 11, hereto, pp 20-25.
[25] Attachment 11, hereto.

> It is a matter of "Black Letter Law" in Alaska that every contract, which includes settlement agreements, includes the implied requirement of "good faith and fair dealing." Here, it was not until I wrote your predecessor on June 13, 2004, that the Division finally corrected its contempt of court in issuing ADL 398508 in violation of the Superior Court's order prohibiting it from doing so. This had the effect of clouding title to ADL 369116 and preventing the Appellants from receiving the benefit of their bargain in the settlement agreement. . . .
>
> The deadline for appealing your February 22nd Final Order and Decision is coming up and, if necessary, among other things, I intend to file an appeal to the Superior Court of that decision in order to provide a vehicle for the lease extension and to protect my legal rights. . . .
>
> I hereby request the opportunity to conduct discovery with respect to the Division's failure to terminate ADL 398508 in a timely manner and a hearing before an impartial decisionmaker.
>
> I hope we can amicably resolve this matter and avoid this otherwise inevitable litigation.[26]

In spite of this letter and attempts to negotiate, the Commissioner did not reverse his decision rejecting Renaissance's request for a lease extension and issued a final decision terminating ADL 369116 on April 24, 2006.[27]

(D) The Four Superior Court Appeals

There were four appeals filed from the various DNR decisions regarding ADL 369116:

1. *Allen & Donkel v. DNR*, 3AN-05-09272 CI.
2. *Law Offices of James B. Gottstein v. DNR*, 3AN-06-06003CI.
3. *Law Offices of James B. Gottstein v. DNR*, 3AN-06-08094CI.
4. *Allen & Donkel v. DNR*, 3AN-06-08419 CI.

The first one, 3AN-05-09272 CI, was to the decision on the Plan of Development, which Messrs. Allen and Donkel filed to make sure that DNR wasn't going to come back

[26] Attachment 11, hereto, pp 1-2.
[27] Exhibit III to Preliminary Motions.

later and assert they had lost the opportunity to assert DNR's bad faith.[28] The second one, 3AN-06-06003CI, was by me to DNR's decision not to extend the lease to allow the new working interest owner, Renaissance, a chance to put a drilling program together. The third one, 3AN-06-08094CI, also by me, was to the decision terminating the lease. The fourth one, 3AN-06-08419 CI, by Messrs. Allen and Donkel also appealed the termination of the lease.

(E) The Allen/Donkel Brief

On April 3, 2006, Messrs. Allen and Donkel filed their opening brief in the first appeal.[29] The Issues Presented for Review are:

> 1. Whether the Commissioner violated 11 AAC 02.050(a) in denying Appellants' request for a hearing on the dispute concerning ADL 369116?
>
> 2. Whether the Commissioner's refusal to grant Appellants a hearing on the dispute over ADL 369116 violated the requirements of due process set forth in Article 1, §7 of the Alaska Constitution?
>
> 3. Whether the DNR breached the covenant of good faith and fair dealing implicit in ADL 369116 by denying Appellants' request for an extension of the term of ADL 369116?
>
> 4. Whether the DNR breached section 4(d) of ADL 369116 by refusing to extend the terms of the lease?
>
> 5. Whether the DNR was correct in determining that an extension of ADL 369116 was not in the State's best interest?
>
> 6. Whether the DNR violated the terms of the stay in Case No.3 AN-OO-3616 CI ("Donkel et al v. State") by issuing ADL 389508 to Richard Wagner?

[28] *See*, Attachment 11, hereto, pp 18 & 19.
[29] Brief of Appellants Monte J. Allen and Daniel K. Donkel, filed in 3AN-05-09272 CI., (Allen/Donkel Brief).

7. Whether the DNR breached the covenant of good faith and fair dealing implicit in the 2002 Settlement Agreement in Case No.3 AN-00-3616 CI ("Donkel et al v. State") by failing to adjudicate the Wagner appeal for over two (2) years?

8. Whether the DNR breached the covenant of good faith and fair dealing implicit in the 2002 Settlement Agreement in Case No.3 AN-00-3616 CI ("Donkel et al v. State") by failing to grant Appellants an extension of ADL 369116?

9. Whether the Commissioner's decision approving the 2005 Plan of Development for the North Middle Ground Shoal Unit failed to meet the criteria set forth in 11 AAC 83.303?[30]

(F) The Motions for Trial *De Novo* and Consolidation

On May 9, 2006, I filed various preliminary motions, including one for a trial *de novo* (Motion for Trial *De Novo*).[31]

On June 1, 2006, DNR moved to consolidate all four appeals, among other things, on the basis that they involved common questions of fact and law (Motion to Consolidate).[32] The Motion to Consolidate was granted on June 6, 2006.[33]

The Motion for *De Novo* Trial was denied March 19, 2007.[34]

(G) Further Briefing

On April 18, 2007, I filed a notice that I would "not be filing an opening brief, intending instead, if necessary and determined desirable, when ripe, to file an appeal to the Alaska Supreme Court with respect to the denial of [my] motion for a *de novo* trial."[35]

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[30] Attachment 12, hereto, pp 5-6.
[31] Attachment 1, hereto.
[32] Memorandum in Support of Rule 42 Motion of Appellee Alaska Department of Natural Resources to Consolidate Four Pending Appellate Rule 605a Administrative Appeals from Decision of the DNR Commissioner.
[33] *See*, Exhibit 3 to Motion to Dismiss.
[34] Exhibit 3 to Motion to Dismiss.

On May 7, 2007, Messrs. Allen and Donkel filed a notice that they would rely on their brief in 3AN 05-09272CI for both of their appeals.

On June 6, 2007, DNR filed its Brief, in the consolidated appeals.[36]

On July 18, 2007, Messrs. Allen and Donkel filed their Reply Brief.[37]

(H) DNR's Motion to Dismiss

On June 29, 2007, DNR filed a motion to dismiss my two appeals and the second Allen/Donkel Appeal for failure to prosecute the appeals.[38]

I filed an opposition to the motion to dismiss my two appeals on July 10, 2007, which included the following

> There are a number of issues in the consolidated appeals, but Gottstein focused on just three in his Points on Appeal:
>
> 1. The Decision to terminate Lease ADL 369116 should be reversed and vacated because the Appellee violated its implied covenant of good faith and fair dealing under the settlement agreement in *Donkel et. al., v Alaska Dept. of Natural Resources*, 3AN-00-3616 CV, and
>
> 2. The Decision did not comport with the requirements of due process. . . .
>
> Point Number 1 was briefed by Allen and Donkel in 3AN-05-09272 CI, which since the cases are consolidated, also applies to Gottstein's two appeals on this same issue. That is the whole point of consolidating the appeals and it is therefore simply not true that the appeal has not been prosecuted. [3] . . .
>
> Point Number 2 involved the necessity of the Court conducting *de novo* trial, which was briefed and decided upon motion and no further

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[35] Exhibit 5, p.2 to Motion to Dismiss.
[36] Brief of Appellee in Rule 605(a) Appeal from May 26, 2005 Decision of the Commissioner of the Alaska Department of Natural Resources.
[37] Reply Brief of Appellants Monte J. Allen and Daniel K. Donkel.
[38] Appellate Rule 511.5(C) Motion to Dismiss Appeals from Decisions of the Commissioner of the Alaska Department of Natural Resources for Failure to Prosecute.

briefing is necessary with respect to this issue. Thus, this issue has also been prosecuted.

It is inappropriate for the Court to dismiss Gottstein's appeals before the Court determines the issue of bad faith based on the current record and the briefing on that issue.

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[3] Gottstein's notice about not filing an additional brief could have been more clear on this point.[39]

On November 26, 2007, the Superior Court granted DNR's motion to dismiss my two appeals, but not Allen/Donkel's second one.[40] This appeal followed.

II. DISCUSSION

(A) Overview

DNR asserts that because I did not file a separate brief in the consolidated appeals duplicating the arguments made by Messrs. Allen and Donkel[41] that meant I did not prosecute my appeal even though I had informed the court I was relying on Messrs. Allen and Donkel's brief.[42] Then DNR argues that because I appealed just the denial of the motion for trial *de novo* and not the dismissal, I ignored court rules.[43] Finally, DNR argues that because I didn't appeal the dismissal, this Court can not order appropriate relief and therefore this appeal is moot.[44] None of these arguments are well-taken and

[39] Exhibit 6 to Motion to Dismiss.
[40] Exhibit 8, to Motion to Dismiss, p.2.
[41] The appeals were consolidated on DNR's motion to, among other things, avoid duplication.
[42] Motion to Dismiss, p. 7.
[43] *Id.*
[44] Motion to Dismiss, p. 8 ("The question of trial *de novo* is moot because Mr. Gottstein would not be entitled to relief even if he proved the Superior Court made a mistake when it denied his motion for trial *de novo*").

from my perspective DNR has made a mess of the four appeals by re-separating them after it had gotten them consolidated.

Fundamentally, it has always seemed to me, as has been repeatedly asserted, by Messrs. Donkel, Bolt and Kasper,[45] and Allen and Donkel,[46] and me,[47] that we have the right to a legitimate factual determination over whether DNR acted in bad faith under the Settlement Agreement. In *Alaska v. Lundgren Pacific Construction Co.,*[48] this Court stated:

> Individuals given the right to decide in their own favor or in favor of the person who employs them cannot be said to be exercising a judicial function at all. . . .
>
> As we stated in *In re Robson*, "(a)n impartial tribunal is basic to a guarantee of due process." 575 P.2d 771, 774 (Alaska 1978) (footnote omitted). We also emphasized that administrative hearings must not only be fairly conducted, but also give the appearance of complete fairness.

In *Fairbanks Municipal Utilities v. Lees,*[49] this Court held:

> In *State v. Lundgren Pacific Construction Co.*, we established guidelines to determine when a superior court should hold a trial *de novo* in an appeal from an administrative agency. We held that if the procedures of the administrative hearing did not afford the contractor due process, the remedy would be a trial *de novo* on appeal.

More recently, in the 2005 case of *Laidlaw Transit v. Anchorage School District*,[50] this Court re-affirmed the principle:

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[45] *See*, Attachment 7, hereto.
[46] *See*, Exhibit QQ to Preliminary Motions.
[47] Attachment 1, hereto.
[48] 603 P.2d 889, 895 (Alaska 1979)
[49] 705 P.3d 457, 460 (Alaska 1985), underlining added, citations omitted.
[50] 118 P.3d 1018, 1025 (Alaska 2005), emphasis added.

> [O]ur case law indicates that when an administrative proceeding fails to conform to the minimum requirements of procedural due process, the superior court may not review the case on the agency record but must instead remand for a new agency hearing or grant a trial *de novo* as needed to cure the procedural defect.

This was all presented to Superior Court below.[51] Since then, this Court has issued *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment*,[52] in which this Court said a *de novo* trial is rarely warranted. However, at the same time this Court clearly stated it was not overruling the above line of cases:

> This court has upheld or directed application of de novo review . . . where the agency's procedures are inadequate or do not otherwise afford due process; or where the agency was biased or excluded important evidence in its decision-making process.[53]

(B) Appellant is Entitled to A Legitimate Factual Determination After Appropriate Discovery is Conducted

Unfortunately, we have recently seen in this state the spectacle of elected officials being convicted for accepting bribes to do the bidding of Big Oil. In what is not a credit to the State of Alaska, Federal prosecutors have had to come intervene upon the failure of State of Alaska. For example Ray Metcalfe tried to get the State of Alaska to address a serious bribery allegation against then Alaska Senate President, Ben Stevens:

> [Ray Metcalfe] fought for years to implicate Stevens, filing complaints with Alaska Public Offices Commission and even attempting to get Stevens recalled.
>
> "There were clear bribery laws that were being broken here. I took it to the state troopers, I took it to the district attorney, I took it to David Marquez, who was the attorney general," Metcalfe said. "I took it to APOC I took it

[51] Preliminary Motions, pp 29-32.
[52] 172 P.3d 774, 778 (Alaska 2007).
[53] *Id*.

> to every single agency the state of Alaska has that's responsible for enforcing the law; 100 percent of them, to the man, said no."[54]

With respect to the recall petition, the Attorney General's Office issued an outlandish opinion that the recall petition should be rejected,[55] the Division of Elections complied,[56] and the Superior Court went along.[57]

In light of the literally billions of dollars involved, it would be naïve to fail to recognize that Big Oil has also corrupted DNR's Division of Oil and Gas.[58] Unless *de novo* review is allowed in cases where a legitimate administrative process has not occurred, corruption will continue to go uncovered. The above line of cases make sense; If proper due process procedures have not occurred, there can be no assurance of a legitimate determination to which the parties are entitled. However, the above line of cases must be followed for the process to have integrity.

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[54] *Ben Stevens Implicated in Veco Corruption Probe*, KTUU, accessed at http://www.ktuu.com/Global/story.asp?S=6482583 on February 16, 2008.

[55] September 7, 2005, Memorandum from Assistant Attorney General, Michael Barnhill to Laura A. Glaiser, Director, Division of Elections, Re: Review of Application for Recall of Senator Ben Stevens, accessed on the Internet February 16, 2008, at http://notes4.state.ak.us/pn/pubnotic.nsf/fe6c17f6017539af89256b21007387ed/014fa5fc50b122cd892570810064757b/$FILE/663-06-0036%20Review%20Recall%20of%20Senator%20Ben%20Stevens.pdf.

[56] September 7, Statement Regarding the Application for theRecall of Senator Ben Stevens, by Laura A. Glaiser, Director, Division of Elections, accessed February 16, 2008, at http://www.gov.state.ak.us/ltgov/elections/05bsra/directorstatement.pdf.

[57] *See*, "Judge Sides with Ben Stevens in Recall Ruling," accessed on the Internet February 16, 2008, at http://www.rempelgroup.com/dailybrief/2006/01/05/judge-sides-with-ben-stevens-in-recall-ruling-ktva/.

[58] The current administration of Governor Palin seems to be making a concerted effort to clean things up, but this effort has not percolated down to this matter, nor is it likely it has percolated down to the problem line Division Oil and Gas staff. I am contemplating moving for a settlement conference under Appellate Rule 222 to at least try and get the Commissioner level to look at this matter. I have always felt it should be settled.

Here, there is a serious allegation that DNR deliberately, and in bad faith, delayed finally terminating the Wagner Lease issued in contempt of court. As set forth above, a "Bill," who was probably the acting director of the Division of Oil and Gas, Bill Van Dyke, asked, "What is the deal on the Wagner Lease."[59] I am entitled to find out.

There are also serious allegations of DNR corruption in this case. For example, "Mr. Donkel was told by Carol Lee in a related matter that despite a court ruling against DNR, she and the then-director of the Division would still make the same decision that the court had ruled to be wrong."[60] I also believe Mr. Donkel would testify that someone then on the Division of Oil and Gas staff having said something like, "we only want to do business with the big oil companies; we don't see any reason to allow the smaller companies to operate in Alaska." This, of course, is a violation of state law.

From what I have seen of certain Division of Oil and Gas staff during the relevant time frame, I think these allegations are substantially true.[61] It seems to me I have the right to a legitimate factual determination over these allegations by an impartial tribunal.

I also think I have the right to conduct appropriate discovery. In *Dougan v. Aurora Electric*, 50 P.3d 789, 796 (Alaska 2002), this Court held parties to an administrative proceeding have the right to conduct discovery:

> We have held that a fair and meaningful hearing, as required by due process, does require that the parties be given adequate access to information requested in discovery.

[59] Attachment 8, hereto.
[60] Exhibit AA, n. 3, to Preliminary Motions.
[61] It is also my observation that at least certain then Division of Oil & Gas staff were particularly prejudiced against Mr. Donkel.

In *Dougan*, this Court held that where the agency failed to rule on discovery requests, a remand was necessary.

Here, in my March 3, 2006 letter to DNR, after raising DNR's bad faith, it states, "I hereby request the opportunity to conduct discovery with respect to the Division's failure to terminate [the Wagner Lease] in a timely manner."[62]

To summarize, I am entitled to a legitimate factual determination by an impartial tribunal after being allowed discovery as to the circumstances surrounding DNR's failure to timely terminate the Wagner Lease. It is basic due process.

(C) Is An Appeal of the Dismissal Necessary?

In its Motion to Dismiss, DNR asserts that my appeal of the denial of my motion for a trial *de novo* is defective because I didn't also appeal the court's order dismissing my appeals and that makes the motion for trial *de novo* moot because this Court is powerless to grant relief:

> The question of trial *de novo* is moot because Mr. Gottstein would not be entitled to relief even if he proved the Superior Court made a mistake when it denied his motion for trial *de novo*.[63]

No authority is offered for the proposition this Court can not grant relief if I prove the Superior Court erred in denying the motion for trial *de novo*. Appellate Rule 520(a)&(c) provide:

> (a) In any matter lawfully brought before it for review, the supreme court, upon motion and notice of a party or upon its own motion, may at any time modify or vacate any order made by a trial court or the court of appeals in relation to the prosecution of an appeal or a petition for review. . . .

[62] Attachment 11, hereto, p.2.
[63] Motion to Dismiss, pp. 8.

> (c) The appellate court may affirm, modify, vacate, set aside or reverse any judgment, decree, decision or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order; or require such further proceedings to be had as may be just under the circumstances.

Since DNR's mootness argument arises out of its unsupported and apparently erroneous assertion that this Court is powerless to grant relief even if I prove I am entitled to a trial *de novo*, the entire basis for its Motion to Dismiss disappears.

DNR is putting dubious form over substance. While it is unfathomable to me why the Superior Court allowed Messrs. Allen and Donkel to rely on their briefs in one of their two appeals to apply to their other appeal, but did not allow me to do the same thing,[64] from my perspective, it had no practical effect because if Allen/Donkel win their appeals, I receive the benefit.

If I did appeal the dismissal and won, what would that mean? As mentioned above, if Messrs. Allen and Donkel win their appeal, I am the beneficiary, but what if they lose and I have appealed the dismissal and win, as I think I should? Do I get another bite at the apple on what they litigated or am I bound by what the Superior Court decided because of *collateral estoppel*?[65] It seems to me I would be subject to *collateral*

[64] *See*, Exhibit 8, p.2 of Motion to Dismiss. In other words, DNR is insisting I was required to file a duplicative brief.
[65] *See*, *McDonald v. Trihub*, 173 P.3d 416, 421 (Alaska 2007) (collateral estoppel bars relitigation by a party or one in privity with a party of all issues of facts or law that were actually litigated and necessarily decided in a prior proceeding).

estoppel,[66] which means that DNR is insisting I should have engaged in a meaningless formality by including it in my Notice of Appeal and Points on Appeal.

Nevertheless, it seems prudent to move to amend my Notice of Appeal and supplement my Points on Appeal to guard against dismissal that would prevent me from pursuing my right to a trial *de novo*. I am therefore filing a motion for leave to do so contemporaneously herewith.

III. MOTION TO STAY APPEAL PENDING DETERMINATION OF 3AN-05-09272 CI., AND 3AN-06-08419 CI.

While, as demonstrated, I believe there are compelling reasons to grant a trial *de novo*, I recognize this Court prefers to have agencies properly handle administrative matters in compliance with due process requirements so that administrative appeals can be decided on the record.[67] Thus, it has seemed to me that a remand to DNR for proper handling, if possible, which is sought in the Allen/Donkel Brief,[68] is one of two ways to correct the due process violations that occurred here. The other, of course, is the trial *de novo*.

When the four appeals were consolidated, as they were at DNR's request, this matter was in a procedural posture to be handled efficiently. In that posture, if the Superior Court ended up remanding the issue back to the agency to correct the due process violations by DNR, or ruled in Messrs., Allen and Donkel's favor on one or more of their other points, it would have mooted my motion for a trial *de novo*. In addition,

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[66] Of course the trial *de novo* claim is not subject to *collateral estoppel* because I am the only one litigating it.
[67] *South Anchorage Concerned Coalition*, *supra*.
[68] Attachment 12, hereto, p.17 (p. 13 in the Brief's numbering).

there would not have been any final judgment to appeal.[69] However, by winning its motion to dismiss my appeals from the consolidated appeals, there is a final judgment as to me on the trial *de novo* issue and I was forced to appeal to protect my rights even though the issue might have otherwise disappeared.

In this regard, the following analysis from *Bradley v. Bradley*, 32 P.3d 372 (Alaska 2001), citing to *Johnson v. State*, 577 P.2d 706, 709 (Alaska 1978), seems completely applicable:

> [The] rule [prohibiting appeals until all substantive issues are resolved] has at least two purposes. First, it is a rule of judicial economy. Issues which seem important at intermediate stages in litigation may become insignificant or moot when the final judgment is entered. Also, interlocutory review often causes delay and needless expense. Second, the rule is designed to ensure that the questions presented on appeal have a full factual and legal setting in which the practical effect of the parties' contentions may be weighed

It seems to me that staying this appeal pending final determination of the two Allen/Donkel appeals serves most of these goals of the final judgment rule and proceeding with this appeal during the pendency of the Allen/Donkel appeals results in many of the problems of piecemeal appeals.

It is suggested here, the issue of trial *de novo* should only be taken up by this Court if the Superior Court does not remand the case for a legitimate factual determination, or Messrs. Allen and Donkel do not otherwise prevail. It is respectfully suggested, as I argued below, the trial *de novo* issue should never have been severed from the consolidated appeal in the first place.

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[69] *Copeland v. Commercial Fisheries Entry Com'n*, 167 P.3d 682, 686 (Alaska 2007); *Stalnaker v. Williams*, 960 P.3d 590, n3 (Alaska 1998).

While not a perfect solution, this is why I am also herein moving for a stay of this appeal pending determination of the two Allen/Donkel appeals. If, as I think it should, the Superior Court remands the case back to DNR, or if Messrs. Allen and Donkel prevail on one or more of their other appeal points,[70] my motion for trial de novo becomes moot provided I am allowed to participate in the remanded proceedings. If they do not prevail then as this Court has said "the questions presented on appeal [will] have a full factual and legal setting in which the practical effect of the parties' contentions may be weighed."[71] With respect to the trial *de novo*, it will be presented in the context of the Superior having failed to remand the case to DNR for proper handling.

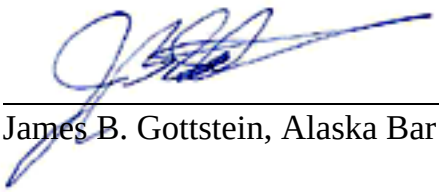
Therefore, I am herein requesting this Court stay this appeal pending the completion of the Superior Court appeals in Allen & Donkel v. DNR, 3AN-05-09272 CI., and Allen & Donkel v. DNR, 3AN-06-08419 CI.

IV. CONCLUSION

For the foregoing reasons, I urge the Court to:

1. **Deny** Appellee's Motion To Dismiss For Failure To Appeal From Rule 511.5(C) Dismissal And Because Appeal Is Moot, and
2. **Grant** Appellant's Motion To Stay Appeal Pending Determination of 3AN-05-09272 CI., and 3AN-06-08419 CI.

DATED February 18, 2008.



James B. Gottstein, Alaska Bar No. 7811100

[70] Attachment 12.
[71] *Bradley*, *supra*.