IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BY DEPUTY CLERK KS

THE ALASKA GASLINE PORT AUTHORITY and JIM WHITAKER, Plaintiffs, v. THE STATE OF ALASKA, Department of Natural Resources, THOMAS IRWIN, Commissioner, Department of Natural Resources, and MARK MYERS, Director, Division of Oil and Gas, Defendants.	CASE NO.: 3AN-05-12486CIV

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs the Alaska Gasline Port Authority (the "Authority") and Jim Whitaker, on his own behalf and on behalf of every citizen-taxpayer in Alaska ("Whitaker"), seek to enjoin Defendants the State, Department of Natural Resources ("DNR" or the "Department"), the Commissioner of DNR, Thomas Irwin (the "Commissioner") and the Director of DNR's Division of Oil and Gas, Mark Myers (the "Director") from approving, extending or acting upon the Point Thomson Unit ("PTU" or the "Unit") 21st or proposed 22nd Plan of Development, the Unit Agreement or any Unit leases. ExxonMobil Corporation ("ExxonMobil"), the Point Thomson ("PT") Unit Operator, and other holders of state leases in the PTU ("Leaseholders"), have concluded that it is uneconomic to develop the PTU gas reserves until there is a committed date for availability or construction of a pipeline to market. ExxonMobil and the other Leaseholders have requested indefinite postponement of any future drilling or production requirements in the PTU. Plaintiffs seek the right to be heard and to participate in the process to determine whether the resources of the State should

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be locked up indefinitely upon the Leaseholders' request, and whether it is constitutionally permissible for DNR to allow ExxonMobil and the other Leaseholders to "mothball" State oil and gas resources in this manner, that is, to delay their development indefinitely.

Accordingly, the Court should enjoin DNR, the Commissioner and the Director from extending, approving or acting upon the Leaseholders' development postponement request, their proposed 22nd Plan of Development or extension of their 21st Plan of Development, and should direct DNR to conduct a public hearing on the issues raised by the Authority, Whitaker, and the public at large.

RELEVANT FACTS

The Authority was formed in 1999 pursuant to AS 29.35.600-29.35.730 by the North Slope Borough, Fairbanks North Star Borough and the City of Valdez. The Authority was formed for the purpose of building or causing to be built a gas line from Alaska's North Slope to tidewater at Valdez, to include a spur line from Glennallen to the Palmer area to provide gas to the South Central gas grid.

Since its formation, the Authority has engaged the services of Bechtel Corporation who provided a Project cost estimate and received a Private Letter Ruling from the IRS declaring that income to the Authority would be tax exempt. In January 2005 the Authority entered into an exclusive purchase agreement for Yukon Pacific Corporation ("YPC"). YPC was started in the early 1980's by former Governors William Egan and Walter Hickel to develop a gas line/LNG Project from the North Slope to tidewater at Valdez. Since its creation, YPC, among other things, obtained 12 senior permits from the Federal and State governments for the gasline Project which include a federal Environmental Impact Statement, Conditional Right of Way Permit, LNG Liquefaction Site Permit and a Federal Export License.

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The Authority is one of three applicants under the Alaska Stranded Gas Development Act, AS 43.82 et seq., and is currently in negotiations with the Governor. In the past year Congress amended the Alaska Natural Gas Pipeline Act of 2004, 15 U.S.C. § 720n, to make the Authority's LNG Project qualify for the $18 billion federal loan guarantee gas line incentive package.

The Authority has received a Memorandum of Understanding ("MOU") from 5 West Coast LNG receiving terminals interested in receiving LNG from Alaska. It has also received an MOU from Totem Ocean Trailer Express for the shipment of LNG from Alaska to the West Coast on Jones Act compliant vessels. Given the current status of the Authority's Project, and by using existing West Coast gas grids, the Authority can market Alaska gas to both the Midwest and West Coast markets in 2011-2012.

The only remaining piece for the Authority's Project is the acquisition of the gas.

The substantial gas reserves in the PTU are not being utilized: the PTU is not presently producing either oil or gas for market. The U.S. Department of Energy estimates that there are eight trillion cubic feet ("TCF") of proven, recoverable natural gas reserves in the Unit. Exhibit 1.

These reserves are a valuable resource belonging to the State and its citizens. The State, Department of Natural Resources ("DNR" or the "Department") leased the lands in what is now the PTU beginning in 1965. The working interest ownership in the PTU leases, based solely on acreage, since there has been no production of oil or gas in the PTU, is shown on a DNR map as follows:

ExxonMobil	48.22%
BP	28.40%
ChevronTexaco	15.40%
ConocoPhillips	4.06%
Others	3.92%

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ExxonMobil became the Unit Operator when the Unit was formed on March 1, 1977, and continues as the Unit Operator today. Ex. 2.

All Unit leases are beyond their primary term, and are listed by DNR as "expired," except for ADL 389716, which expires on May 31, 2008. Accordingly, the PTU leases remain in effect today solely because they are incorporated into a State oil and gas unit. *See* AS 38.05.180(m); 11 AAC 83.190; Unit Agreement § 18, Ex. 3.

No gas or oil has been produced from the Unit. In fact, neither ExxonMobil nor any of the other Leaseholders has even drilled a well in the Unit since 1999, and only 3 have been drilled since 1983. Moreover, despite several requests by DNR over the years for the Leaseholders to conduct additional drilling in the Unit, ExxonMobil has previously submitted, and continues to submit, annual plans for the Unit that include no drilling, and no development of the Unit's gas or oil resources. ExxonMobil, on behalf of the Leaseholders, recently requested an extension of all obligations to drill in the PTU, for an indefinite time period.

Several Leaseholders drilled wells in the Unit in the 1970s and 1980s. Seven wells were certified as capable of producing in paying quantities. Ex. 4. All seven are currently listed as plugged and abandoned by the Alaska Oil and Gas Conservation Commission (the "Commission" or "AOGCC"). This means that they cannot physically produce any gas or oil. Ex. 5. In fact, all wells that were drilled in the Unit are currently listed as plugged and abandoned, except one, the status of which is "suspended/confidential." Ex. 5.

When the Unit was formed, ExxonMobil agreed to exercise "[r]easonable diligence...in complying with the obligations of the approved plan of development." Unit Agreement § 10, Ex. 3. The Director of the Division of Oil and Gas (the "Director") may only approve a Plan of Development if it meets certain criteria, including that the Plan will "promote conservation of all

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natural resources." "promote the prevention of economic and physical waste," and "provide for the protection of all parties of interest, including the State." 11 AAC 83.303(a); *see* 11 AAC 83.343(b).

Beginning in 1983, ExxonMobil proposed an indefinite suspension of drilling. Ex. 6. ExxonMobil felt that the Leaseholders had accomplished "sufficient drilling...to establish within reason the area and potential commerciality of the field." Ex. 6. ExxonMobil claimed that "[f]urther development prior to commencement of construction of a pipeline to market would constitute economic waste...." Ex. 6. Accordingly, ExxonMobil proposed a five-year Plan of Development with no further drilling. Ex. 6.

In the mid-1990's, the Leaseholders proposed a Plan of Development that included no drilling or development. Ex. 7. The Leaseholders asserted that "all development options are currently uneconomic." Ex. 7. Although the Director ultimately approved the Plan, he expressed concern "about the lack of exploration and development work...." Ex. 8. The Division wanted "a fair and honest attempt to get this acreage explored...." Ex. 8.

In 1998, the Leaseholders submitted another Plan that again contained no drilling. Ex. 9. The Leaseholders claimed, among other things, a "lack of a gas market and transportation system...." Ex. 9. According to the Leaseholders, the "development of the Thomson Sand gas [was] not economically justified at the present time." Ex. 9.

On April 1, 2005, the Authority made a detailed offer to purchase Alaska North Slope gas and transport it to market. Ex. 10. The offer was distributed to ExxonMobil, ConocoPhillips, British Petroleum, ChevronTexaco and others. During the several months that followed, the major producers, including the Leaseholders, declined to sell the Authority North Slope gas, or even to discuss prices or terms. Ex. 11.

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In relation to its revised Project, the Port Authority has intensified its correspondence and meetings with ExxonMobil as the PTU Operator. Ex. 12. In a letter dated August 18, 2005, ExxonMobil was asked to present "general terms/price information of a gas sales agreement that your company would find acceptable." Authority team members met with ExxonMobil executives in Houston on August 30, 2005. In a letter on August 31, 2005, ExxonMobil said it needs to pursue "an analysis includ(ing) all aspects of the value chain from the wellhead to the market to assess Project viability." Authority representatives expressed disappointment (in letters dated September 2 and September 12, 2005) that ExxonMobil had not provided information concerning "price and terms by which you would be willing to sell us gas." As of today, the Authority's offer to purchase Point Thomson (and other North Slope) gas is still open, but ExxonMobil has responded only with a description of its "analysis" needs.

The Authority cannot obtain financing to implement its pipeline LNG Project without a committed supply of natural gas. Since the PTU reserves are not being utilized, they represent the best source of gas for the Authority's pipeline startup needs. However, the Leaseholders have declined to sell any North Slope gas to the Authority.

On September 23, 2005, the Authority submitted a First Supplemental Agency Demand requesting a public hearing on the PT Unit to Defendant Myers, Director of DNR Division of Oil and Gas. Ex. 13. No substantive response has been received.

On September 30, 2005, the Authority appealed the Director's constructive denial of its request for public hearing to Defendant Irwin, Commissioner of DNR. Ex. 14. No response has been received.

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ARGUMENT

A. PLAINTIFFS ARE ENTITLED TO A TRO/PRELIMINARY INJUNCTION.

To determine whether a party is entitled to injunctive relief, courts apply a "balance of hardships" approach that focuses on three factors:

1. The harm to the plaintiff;
2. The harm to, or protection of, the defendant; and
3. The strength of plaintiff's case.

North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough, 850 P.2d 636, 639 (Alaska 1993). *See Keystone Services, Inc. v. Alaska Transportation Comm'n*, 568 P.2d 952 (Alaska 1977) and *Alaska Public Utilities Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549 (Alaska 1975). Once plaintiff has met the preliminary threshold of showing irreparable harm, and that defendants will not be harmed by the injunction (or that they can be adequately protected from harm), plaintiff need only raise serious and substantial questions going to the merits of the case. *North Kenai Maintenance Area,* 850 P.2d at 639; *Keystone Services*, 568 P.2d at 954; *A.J. Industries, Inc. v. Alaska Public Service Comm'n*, 470 P.2d 537 (Alaska 1970).

The "serious and substantial question" standard means that the "issues raised cannot be 'frivolous or obviously without merit.'" *North Kenai Maintenance Area,* 850 P.2d at 639, *quoting State v. Kluti Kaah Native Village,* 831 P.2d 1270, 1273 (Alaska 1992). On the other hand, where the preliminary injunction will harm the defendant, and the defendant cannot be adequately protected, "'a showing of probable success on the merits is required before a temporary restraining order or preliminary injunction can be issued.'" *North Kenai Maintenance Area,* 850 P.2d at 639, *quoting State v. United Cook Inlet Drift Ass'n,* 815 P.2d 378, 378-79 (Alaska 1991).

In this case, it is apparent that Plaintiffs will be irreparably harmed if the Defendants continue to extend the PTU agreement and leases, without requiring development, indefinitely, as

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the Leaseholders seek. There is no relief, other than the injunctive relief requested, which can protect Plaintiffs. It is equally apparent that a TRO or injunction will cause no harm to the State or the Division of Oil and Gas.

Accordingly, Plaintiffs need only raise serious and substantial questions going to the merits of the case. In this case, Plaintiffs clearly meet this minimal threshold showing and are thus entitled to a preliminary injunction. In fact, as the following discussion demonstrates, Plaintiffs satisfy even the more stringent standard of a "probable success on the merits." *See A.J. Industries*, 470 P.2d at 540 and *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 nn. 2 and 11 (Alaska 1973).

B. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

Plaintiffs, and every citizen of the State, will be irreparably harmed unless the court issues the requested injunctive relief. No relief, other than a TRO or an injunction, can protect Plaintiffs from harm.

Plaintiff the Authority will be harmed because, without commitments from the Leaseholders to sell the PTU gas, the Authority cannot obtain financing to implement its pipeline-LNG Project. As a result of the Leaseholders' refusal to develop the PTU reserves and/or commit to sell them, the Authority's ability to obtain the necessary gas for startup may be delayed indefinitely. Currently, the Authority is denied the right to participate and to be heard in the DNR process leading to the extension or termination of the PT Unit Agreement, even though this process will likely determine whether the Authority can obtain commitments for gas reserves necessary to qualify for construction financing. The Authority may only appeal a decision, already made, to the Commissioner of DNR.

Plaintiff Whitaker and every other citizen of Alaska will likewise be irreparably harmed. It is the public policy of the State to develop a Project to take Alaska North Slope natural gas to

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market. Further, the Alaska Constitution requires DNR to manage and develop the State's resources for the benefit of its people. *See, e.g.*, Alaska Constitution, art. VIII §§ 1, 2, 8 and 11, discussed below. It is in the interest of every citizen that a natural gas Project be built because such a Project will provide needed revenue for many government programs, both at the State and local levels. It is also in the public's interest because a natural gas Project will create jobs and economic activity. Currently, Whitaker and other citizens are denied the right to participate and to be heard in the DNR process leading to the extension or termination of the PT Unit Agreement, even though this process will affect every citizen of the State.

Further, Defendants' continued extension of the PT Unit Agreement, without benefit to the citizens of Alaska, causes harm to the State and the development of its resources, in which Plaintiffs have an interest. The Defendants continue to extend the PT Unit Agreement and leases without requiring ExxonMobil and the other Leaseholders to develop or produce from the PTU. Accordingly, irreparable harm is certain absent injunctive relief.

C. <u>THERE WILL BE NO HARM TO THE STATE.</u>

Just as clearly, there will be absolutely no harm to the state if injunctive relief is granted. To the contrary, the State has a duty, mandated by the Constitution, to develop its resources and to ensure that it receives value for the use of its land and resources. *See* discussion below. Thus, the State may in fact benefit, rather than suffer harm, from the relief requested by Plaintiffs. Further, the relief that Plaintiffs seek is merely the right to participate in a public hearing before DNR relating to the issues of PTU gas and getting it to market. A public hearing concerning disposition of the PTU will provide useful information from oil and gas related companies, gas distribution companies, major gas-consuming industries, oil and gas scientists, elected officials, and other members of the public.

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Since Plaintiffs will be irreparably harmed, and the State will suffer no harm, Plaintiffs need only raise serious and substantial questions going to the merits. *Keystone Services*, 568 P.2d at 954; *A.P.U.C. v. Greater Anchorage*, 534 P.2d at 554; and *A.J. Industries*, 470 P.2d 537.

D. PLAINTIFFS HAVE RAISED SERIOUS AND SUBSTANTIAL QUESTIONS GOING TO THE MERITS.

There can be no doubt that Plaintiffs have raised serious and substantial, that is, "non-frivolous" questions going to the merits. Indeed, Plaintiffs have satisfied the more stringent standard of probable success on the merits.

1. Plaintiffs Have the Right to Participate and to be Heard in the DNR Proceeding.

In this proceeding, the Authority and Whitaker seek to participate and to be heard in the DNR proceeding, and to compel DNR to conduct a public hearing on this matter of vital importance to the citizens of Alaska and their natural resources, and to include Plaintiffs and other interested members of the public in the hearing.

The regulations afford a unit operator, such as ExxonMobil, the right to "reasonable notice and [an] opportunity to be heard," before DNR may terminate the unit agreement as a result of an uncured default. *See* 11 AAC 83. 374(c). Indeed, this is the minimum process afforded to a unit operator, and only applies to a unit "in which there is no well capable of producing oil or gas in paying quantities." *Id.* Where the unit contains a well "capable of producing oil or gas in paying quantities," DNR must initiate "judicial proceedings" to terminate the unit agreement. 11 AAC 83.374(d). Clearly, a unit operator's rights are protected, even where the unit operator is in default of its agreement. *See id.*

Another interested party affected by the Department's decision, such as the Authority here, must be afforded the same rights as the unit operator. *See, e.g., White v. State, Dep't of Natural*

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Resources, 984 P.2d 1112 (Alaska 1999). In this instance, the Authority seeks nothing more than a public hearing, in accordance with its rights to participate and to be heard. The Authority believes that such a hearing will be sufficient to expose the Leaseholders' request for an indefinite delay for what it really is—an ill-disguised attempt to mothball, rather than develop, valuable resources belonging to the citizens and the State of Alaska.

In addition, an "eligible person affected by a decision of the [D]epartment" has the right to appeal to or to request reconsideration from the Commissioner of DNR, and to request a hearing on its appeal or request for reconsideration. *See* 11 AAC 02.020 and 02.030. That is precisely what the Authority, an eligible person affected by DNR's decision, did in this instance. Further, where material facts are disputed and need to be resolved, sound legal principles require an agency to exercise its discretion to hold a hearing. *See White*, 984 P.2d at 1126. In this instance, the Authority described numerous factual issues to be considered at the hearing. *See* the Authority's Appeal to Commissioner Irwin, dated September 30, 2005. Ex. 14. These include:

1. Natural gas from the PTU is necessary to make a natural gasline Project from the North Slope possible.
2. PTU proven gas reserves are sufficient to supply a large diameter gas pipeline at startup.
3. The Authority requires an assured supply of natural gas, such as that found in the PTU, to obtain financing for a gasline Project.
4. ExxonMobil and the other Leaseholders have not developed or produced any gas or oil from the PTU, despite having held their leases for 30 years or more.
5. ExxonMobil and the other Leaseholders have proposed postponing all drilling—and hence and development or production—indefinitely in the PTU.
6. ExxonMobil and the other Leaseholders have refused repeated requests from the Authority, and from Yukon Pacific in the 1990s, for terms or prices for the purchase of natural gas.

See id. The Commissioner has denied the Authority its right to a hearing.

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The Authority seeks nothing more than a full, public hearing in accordance with its rights. Because of the importance of the resources involved, and the expected benefit to the State and its citizens, a public hearing is necessary in this instance.

Another provision of the Alaska Constitution also supports the Authority's request for a public hearing. Article VIII, § 10 requires "public notice" prior to "disposals or leases of state lands: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." Alaska Const., art. VIII, § 10. *See also Baxley v. State*, 958 P.2d 422, 432 (Alaska 1998) (legislative enactment modifying oil and gas leases did not violate section because the public had ample opportunity to comment on the proposed lease amendments). Although the State may argue that this provision does not apply here because the PTU leases are not new disposals or leases of state lands, the Leaseholders have held their leases for between 30 and 40 years without developing the resources. Accordingly, any further delay in the development and production of these resources, as requested by the Leaseholders, should be subject to this public notice requirement.

2. The Leaseholders Cannot be Permitted to "Mothball" Alaska's Natural Gas Resources.

The Leaseholders are attempting to mothball valuable gas reserves that belong to the State and its citizens. These resources are now more valuable than ever, as a result of increases in the price of natural gas in the past few years. Clearly, it is in the State's best interest, and the best interest of its citizens, to develop these resources sooner rather than later.

The Leaseholders, however, do not agree. Since they are unwilling to develop the resources for sale to a party which would take them to market, and in fact want to mothball them indefinitely, their interests are directly adverse to those of the State. The Authority seeks a public hearing to

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argue that the Unit Agreement and PTU leases should therefore be terminated, and the leases made available to third parties who are willing to develop the PTU gas reserves in a timely manner.

The Leaseholders' request for continued postponement of developing the PTU resources violates several provisions of the Alaska Constitution, notably Article VIII, §§ 1 and 2. Section 1 provides: "It is the policy of the State to encourage...the development of its resources by making them available for maximum use consistent with the public interest." Alaska Const., art. VIII, § 1. Section 2 provides: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State...for the maximum benefit of its people." *Id.*, art. VIII, § 2. The request for indefinite postponement of all drilling—and hence any development or production—plainly violates the intent of these provisions, which is to utilize the State's resources, such as the PTU gas reserves, for the maximum benefit of its citizens.

3. DNR's Constitutional Duty to Promote Development of Alaska's Natural Resources Requires it to Terminate the PTU Leases.

DNR has a constitutional duty to the State and its citizens to ensure that the PTU gas reserves are developed in a timely manner, and not mothballed as the Leaseholders seek to do. *See* Alaska Const., art VIII, §§ 8 and 11. *See Baxley v. State*, 958 P.2d 422, 432-33 (Alaska 1998). These provisions provide for the leasing of State lands, and require forfeiture in "the event of breach of conditions." *Id.*, art. VIII, § 8. Furthermore, continuation of lease rights depend upon the performance of annual labor, or the payment of rents or royalties, or upon other requests as may be prescribed by law." *Id.*, art. VIII, § 11.

Here, the State has leased the lands to the Leaseholders, but the Leaseholders refuse to develop the resources or even to negotiate for the sale of the resources to other parties, such as the Authority. To the contrary, as noted above, the Leaseholders seek to mothball the reserves, which, while it may be in their interests, is not in the best interest of the State or its citizens.

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DNR has the constitutional duty to require the Leaseholders to adhere to the terms of the Unit Agreement and leases, and to develop the resources in a timely manner. Since the Leaseholders refuse to comply with the Agreement and their leases, and seek to mothball the PTU gas reserves indefinitely, they are in breach of the Agreement and their leases. The leases and the Unit should therefore be terminated, and the Authority here seeks the opportunity to be heard on this issue.

4. The Public Trust Doctrine Requires DNR to Terminate the PTU Leases or to Require the Leaseholders to Market the Gas Reserves.

DNR's failure to require the Leaseholders to comply with the terms of the Unit Agreement and their leases also constitutes a violation of the public trust doctrine. The public trust doctrine provides that the State holds its mineral resources (and other natural resources) in trust for public use, "and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary." *McDowell v. State*, 785 P.2d 1, 16 n.9 (Alaska 1989). Under the doctrine, where a trustee has discretion, courts "will only review the trustee's acts for abuse of discretion." *Baxley*, 958 P.2d at 434.

In addition, the Director may only approve a Plan of Development if it meets certain criteria, including that the Plan will "promote conservation of all natural resources," "promote the prevention of economic and physical waste," and "provide for the protection of all parties of interest, including the State." 11 AAC 83.303(a); *see* 11 AAC 83.343(b). A Plan that indefinitely postpones all development and production clearly does not satisfy these regulatory requirements.

In this instance, Plaintiff believes DNR has abused its discretion by failing to terminate the Unit Agreement and leases in the face of clear evidence that the Leaseholders have breached the terms of, and their obligations under, these documents. In fact, the abuse of discretion is evident because the Leaseholders' mothballing tactics are clearly adverse to the best interests of the State

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and its citizens, and again Plaintiff seeks a public hearing at the administrative level on these allegations.

CONCLUSION

Plainly, Plaintiffs have raised serious and substantial, non-frivolous issues going to the merits. In fact, Plaintiffs have even met the higher threshold of probable success on the merits. Accordingly, the Court should enjoin the Department, the Commissioner and the Director from taking any action to extend the 21st PTU Plan of Development, to approve a 22nd Plan of Development, or to extend the PT Unit Agreement or leases, and should direct DNR to conduct a public hearing on the issues raised by Plaintiffs.

DATED this ___ day of October 2005.

WALKER & LEVESQUE, LLC
Attorneys for Plaintiffs Alaska Gasline Port Authority and Jim Whitaker

By: _____
William M. Walker
Alaska Bar No. 8310155

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2005, I caused a true and correct copy of the foregoing to be served upon the following:

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Thomas Irwin, Commissioner
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Nancy R. Gordon, Chief
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