Denali Citizens Council
Serving to protect Denali National Park and environs
PO Box 78 Denali Park, Alaska 99755 907-683-3396 www.denalicitizens.org

Thomas E. Irwin, Commissioner
Department of Natural Resources
550 W. 7th Ave., Ste. 1400
Anchorage, Alaska 99501

July 19, 2010

SUBJECT: Healy Gas Only Exploration License, Final Best Interest Finding

Commissioner Irwin;

On behalf of the board of directors and members of the Denali Citizens Council, I am filing a **request for reconsideration** of the decision by the Director of the Division of Oil and Gas that the Healy Gas Exploration License, as currently configured, is in the best interests of the state of Alaska. We, in addition, request an **oral hearing**, to be conducted in Healy, Alaska, to consider concerns detailed in the body of this letter, and to fulfill citizens' desire for due process.

The Denali Citizens Council (DCC) is a locally founded (1974), non-profit, grassroots community education and advocacy organization. Please note that in the letter announcing the Final Finding we were inaccurately referenced as the 'Denali Citizens Commission.' We represent a large number of local citizens in the Denali Borough, some of whom have filed separate comments with you. Some of our non-resident members lived and/or worked in the Denali region in the past. Some individuals have asked that their names be appended as co-supporters of our comments. These names are listed at the end of this document.

Our interest in this issue is based upon our long-term knowledge of the gateway areas of Denali National Park, and our long-term vision for a balanced future for public lands in the Denali Borough. Of the several meetings that DNR attended or attempted to attend in the borough, at least two were sponsored and advertised by DCC. We also sponsored a workshop in the Denali Borough with guests from the Powder River Basin, an area where gas development was ongoing at the time. However, these public events were nearly five years ago. It is accurate to state that this entire public process has become stale.

DCC has never opposed gas development in the Denali Borough. We have argued for stronger citizen protections and mitigations. We have argued for some limitations on the license area. We have not opposed the industry whole cloth. Extracting gas from coal seams or underground reservoirs could provide a cleaner-burning source of energy for power generation and home heating. However, shallow gas development is a relatively young industry whose cumulative impacts are incompletely understood. Impacts from the use of fracturing chemicals, disposal of drilling wastes and disposal of produced water are not fully understood. Conventional gas drilling, also part of this license, has unique impacts that have been inadequately addressed in this Finding. In addition, Usibelli Coal Mine, Inc., though they may hire

consultants, has pledged to be the sole operator on this field. Their expertise in the area of gas exploration and development is as yet untested. We would be much more comfortable if the standards or guidelines for gas development that the state developed for the Mat-Su and promised to include in this finding were stronger. We feel that the state of Alaska has a responsibility to develop a body of regulations governing gas only licensing, rather than simply relying on the dizzying array of future permitting and agency sign offs.

There are four main topic areas that form the basis of our request for reconsideration of this Final Finding. These issues fall under the broad headings of

1. **Due process concerns**
2. **Information gaps or inadequacies (shallow v. deep), TBAP role and state's obligation, Mental Health Trust lands, SRA missing information**
3. **Mitigation inadequacies**
4. **Concerns regarding land use conflicts and sensitive lands**

Under each topic heading, this request will detail our concerns with the Final Finding and then suggest remedies.

1. Issue- Due Process.

DNR has failed to provide due process to citizens of the state of Alaska and in particular local citizens of the Denali Borough, considering the long period of time citizens were required to wait.

Members of DCC have due process protections under both the State and Federal Constitutions. The Due Process Clause of the Alaska Constitution, Article I, Section 7, provides, "No person shall be deprived of life, liberty, or property, without due process of law" and guarantees a right of meaningful access to the courts in civil actions. The U.S. Constitution (Fifth Amendment) has nearly identical language, providing that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The fundamental right to due process applies not only when a property interest is at stake, but also when interests in life and liberty are at stake. DCC members, as citizens of the state, certainly have a general property interest in the **public trust resources** of the state—land, water, wildlife, and fish[1]—but also at stake here are DCC's interests in liberty—the ability to use state lands in the license area for subsistence, hunting, fishing, and recreation. Many of the public lands within the license area are recognized as world class recreation resources. This is particularly true of areas within the Wolf Townships west of Healy. A large number of people have settled in the area with its recreational resources in mind.

---

[1] *See* Alaska Const. art. VIII, §§ 3 and 4. In *Owsichek v. State, Guide Licensing and Control Bd.*, the court recognized the importance of the rights afforded to members of the public over public trust land and resources: "[s]ince the right of common use is guaranteed expressly by the constitution [under Article VIII, section 3], it must be viewed as a highly important interest running to each person within the state." 763 P.2d 488, 492, n. 10 (Alaska 1988). The Court explained that the common use clause of the Alaska Constitution "is intended to provide independent protection of the public's access to natural resources," and that "a minimum requirement of this duty is the prohibition against any monopolistic grants or special privileges." *Id.* In addition, although the Court in *Greenpeace, Inc.*, expressly declined to "decide whether Greenpeace had a property interest in the DNR permit dispute," it nevertheless concluded that "[o]nce Greenpeace challenged TWUP A00-10 administratively, it was entitled to due process, i.e., notice and an opportunity to be heard, while the agency resolved the permit dispute, including the stay issue." 96 P.3d at 1056.

a. **Citizens with direct and relevant interests have been omitted from this process.** Although DNR addressed the long time period and the possibility of re-issuing a new preliminary finding with more public comment opportunities, DNR concluded that documented small population numbers for the Denali Borough indicate that not many have been left out. We do not believe this argument is valid. DNR willingly omitted an **unknown number** of both local and state citizens who have acquired an interest in the license area within the last 5 years. For example, DCC has two board members who now reside and/or own property within the license area but did not 5 years ago. The Denali Borough Assembly has members who did not represent the Borough 5 years ago when the Borough had a chance to comment on the Preliminary Finding. These changes are reflective of the general movement of citizens during this lengthy period of time. While there will always be some changes in affected populations during a public process, 5 years is a long time. We believe there are a substantial number of citizens of Alaska and the Denali Borough who have acquired an interest in the license area in the intervening time and have not been given their right to due process.

b. **DNR has not acted in the best interest of Alaskans by failing to exclude certain lands within the license area that have other and very significant values**. **Many people requested reducing the size of the licensing area.** While we are well aware that the state has the right, on all state lands, to offer the subsurface for resource extraction, this does not mean that **all lands** should be available for gas exploration/development activities, especially since gas development carries with it reasonably foreseeable impacts to other significant state values on these lands, particularly recreation/habitat values. Article VIII confers substantive rights to Alaska citizens, including reservation of rights to fish, wildlife, and waters for common use (Article VIII, Section 3) and free access to the navigable or public waters of the State (Article VIII, Section 14). The Alaska Supreme Court observed: "The framers of our state constitution were united in the view that the lands and other natural resources of this abundant state are among the most prized assets. Although favoring productive use of these resources, the framers believed that development should proceed only when it benefitted the people of the state and only in compliance with applicable constitutional and statutory processes."[2] The lands in question include Townships FO12S008W and FO12S009W. In the case of 12S9W, the entire township was classified for Wildlife Habitat/Public Recreation, and a significant portion of non-privately owned lands in 12S8W have been so designated.

c. **DNR appears to have changed "best interests" focus between the Preliminary Finding and the Final Finding, creating a situation in which citizens who felt they were having a "critical" role in this process now feel ignored.** In the Preliminary Finding, DNR stated unequivocally the following, on page 1-11, *"The revenue stream to the state from the proposed exploration license and any downstream production is not expected to significantly impact the overall oil and gas revenue of the state of Alaska. The best interests of local residents is therefore of critical importance to the best interest decision."* This statement provided a ray of hope for our members and other residents that their input into the process would be fully and carefully acknowledged, and even acted upon. However, mitigations and changes we suggested were not widely accepted. We note that of the 17 individual comments recorded in the Final BIF, most suggested a smaller license area, some asked for more residential protections. These requests were mostly brushed off.

---

[2] *Moore v. State,* 553 P.2d 8, 20 (Alaska 1976).

DNR explained that although local interests are critical they "are not overriding or prioritized above all other interests." The FBIF suggested that mitigation measures A(1) a – i addressed many concerns for local citizens. However, noise and residential lot size mitigations within this very set of mitigations were watered down in the FBIF. These changes appear to have been made more with the interests of the developer-operator in mind than those of individual borough citizens.

Due Process – Remedies sought

DCC suggests the following:

1) Conduct an oral hearing in Healy during which any citizen or government body can provide testimony on their concerns regarding license area and mitigations.
2) Consider protecting the public's "best interests" through exclusion of state-identified high value habitat/recreation lands. This is a smaller exclusion than we originally suggested, but eminently defensible. See "Remedies" under "Sensitive Lands" below.

2. Issue – Information missing or inadequate

a. The Final BIF makes few distinctions between shallow and deep gas drilling, when it comes to reasonably foreseeable impacts. The two distinct types of drilling are described but their impacts not teased apart or compared in any way. We note that according to geologic assessments (per Steve Denton at a public meeting in March 2004), drilling that could occur on the west side of the Nenana River would more likely be deep gas drilling. Significantly, the lands west of the Nenana contain the identified high value lands and most residential and municipal lands. Any specific dangers or impacts from deeper gas drilling should be spelled out and have specific mitigations before the license is granted.

b. The Final BIF does not indicate how exploration of coal gasification possibilities on Mental Health Trust Lands within the license area will affect this process. The Mental Health Trust is not, like the AKRR, mentioned as another landowner in the area.

c. Information on how the 2004 *Enforceable Standards for Development Of State Owned Coalbed Methane Resources in the Matanuska-Susitna Borough* were utilized and incorporated into this Final BIF. In early public meetings in the Denali Borough, citizens were told that these guidelines would be incorporated and individualized for the borough. However, we did not expect that standards for subdivisions or noise mitigation to be eliminated or watered down in this BIF.

d. The information on the Tanana Basin Area Plan and its stipulations was insufficient and represented the plan in a biased way.

Information missing or inadequate – Remedies sought

1) Expand information on foreseeable impacts of deep gas drilling, and provide tailored mitigations for this form of drilling.
2) Include Mental Health Trust land ownership information in a re-written BIF.
3) Make a clear reference to how it issues from or compares with the *2004 Enforceable Standards for Development of State Owned CBM Resources in the Matsu Borough* for every mitigation in the FBIF.

4) Include expanded information from the Tanana Basin Area Plan on sensitive lands in the Wolf Townships.

3. Issue – Mitigations. The Best Interest Finding does not appear to recognize or sufficiently respond to key aspects of citizen comment regarding mitigation requirements.

Denali Citizens Council was particularly dismayed that some key mitigation requirements in the Preliminary Best Interest Finding were eliminated in the Final BIF, despite citizen comment asking that they be strengthened. Two examples are described below, and both are notable in that they are requirements stipulated in the 2004 *Enforceable Standards for Development Of State Owned Coalbed Methane Resources in the Matanuska-Susitna Borough*. It is unclear why if the state agreed to these standards in 2004, and citizens of the Denali Borough were supportive of strengthening the requirements for its locality, that they were omitted entirely from the Final BIF. In fact, Mr. Pat Galvin stated openly, during public meetings in 2004, that DNR "would incorporate" the Mat-Su standards, with customization for Healy. We did not think that in some cases "customization" would mean "elimination."

a. Item 8 under 'Facilities and Operations' in the Preliminary BIF included the following stipulation:

Subdivisions: The operator will not construct drill pads or compressor stations in any residential subdivision in which more than half of the land is divided into lots sized at five acres or less, without the consent of all surface property owners within that subdivision.

In our comments, DCC asked for this particular requirement to be strengthened, citing the different landscape and property ownership conditions that would make such an improvement both desirable and practical compared to the situation in the Mat-Su Borough. Rather than respond to our reasoning, the final BIF dismissed the concern without explanation, stating:

The small lot subdivision exclusion has been replaced by a setback requiring that drill pads be sited at least 500 ft and compressor stations at least 1,500 ft from any occupied residential structure, community or institutional building (Mitigation Measure A(1)(b)).

First of all, the cited setback requirement was also in the preliminary BIF – there was no "replacement" of the small lot subdivision exclusion with a setback requirement, just an elimination of the subdivision exclusion. Secondly, DO&G provided no rationale for ignoring DCC's reasoned argument for a strengthened subdivision exclusion (please see our original comments). Thirdly, the setback requirement is much less protective of surface property interests than the subdivision requirement, and there is no evidence that DO&G contemplated the difference when making its decision. For example, the setback requirement does not account for vacant small parcels on which owners intend to build homes, but may have their options severely restricted by gas development; one of our board members has exactly this problem.

b. The Preliminary BIF included specific noise standards to be achieved during gas development operations. While the standards were woefully inadequate to protect a rural quality of life, at least they were something. DCC and others urged DO&G to strengthen

those standards, only to have them removed from the finding altogether. DO&G then offered up the remaining noise mitigation requirements (monitoring plan, suggested measures, requirement to "minimize" without specification) as if they responded to DCC's concerns.

In fact, according to this BIF as long as DO&G and Usibelli agree that they have monitored, minimized, and mitigated it doesn't matter how loud the noise is in someone's backyard. In the absence of standards, we have little confidence that the BIF will protect surface property owners. DO&G has not responded to our concerns.

c. In many instances, the Final BIF justified its limited mitigation requirements with this statement (see, for example, pages A-1, A-18, A-22, A-35, A-37, A-38):

ADNR has researched and visited coalbed methane development sites in Colorado and Wyoming and finds that the development and leasing statutes are significantly different. Alaska's are more protective of environmental and surface owner interests.

While we would be comforted if this assertion were true, and that Alaskans would be protected from some of the gas-development horror stories that have occurred in the lower 48, ***we are unable to find information*** that explains the differences in regulation from the states identified. An inquiry to DO&G staff to articulate the statutory and regulatory differences was met with an explanation that most of the staff who participated in that investigation are no longer with DO&G, and with a helpful reference to 11 lengthy-looking documents that are related to the topic but not a specific articulation of the differences. These documents could only be reviewed at the DNR office or photocopied and delivered at an expense to the requester (please see attached note from Bruce Buzby). Since the time for requesting reconsideration is so short, it is not possible for us or other citizens to review those documents. We find it a little surprising that DO&G leans so heavily on a comparison that cannot be readily articulated to the public.

d. Disposal of waste water – Mitigation A (5) (d) states, "Wherever practicable, the preferred method for disposal of muds and cuttings is by underground injection….On-pad temporary cuttings storage will be allowed." Will the public be noticed if a variance from underground injection is requested? Will water-well testing in areas where re-injection is practiced be mandated and paid for? What guarantee is there that on-pad cuttings storage will be safe?

Mitigations - Remedies sought:

DCC requests the following remedies to these issues.

1) A revised Final BIF that restores and strengthens the small-lot subdivision exclusion from the Preliminary BIF. We stand by our recommendation that the BIF raise the threshold from 5-acre to 10-acre lots to be consistent with the particular landscape and property ownership conditions in the license area.
2) A revised Final BIF that restores and strengthens the noise standards from the Preliminary BIF to protect a key feature of surface property values for many local residents.

3) A Final BIF that at least retains 2004 *Enforceable Standards for Development Of State Owned Coalbed Methane Resources in the Matanuska-Susitna Borough,* as part of the document, and ideally strengthens them.
4) Before finalizing a revised BIF, we would like to see a clear articulation of the differences between Alaska and Colorado/Wyoming statutory and regulatory regimes that result in better protection for Alaska residents and the opportunity to review those claims.
5) BIF should indicate more specifically how re-injection and/or disposal of produced water will be noticed and regulated and how DNR will establish controls to protect private wells in the vicinity of drilling sites.

4. Issue: Sensitive lands. In its decision not to protect sensitive lands west of Healy, DO&G seems to apply a different standard than the "best interest" of the citizens of the state. In addition, its rationale seems to be purely arbitrary and the broadness of its application precludes the opportunity to remove particularly sensitive lands from the license area. Simply because DNR does not feel it can exclude all lands west of the Nenana River from the license does not mean that it cannot exclude particular lands with compelling other values.

The Denali Citizens Council and many others suggested that some portion of lands west of the Nenana River should be removed from the license area because of their importance for other interests and values. DO&G responded that "Removing the area west of the Nenana River from the license area may make the project economically unfeasible." We have several complaints about this response.

a. This rationale applies a different standard than the "best interest" of the state to this finding. How does economic feasibility for a particular corporation equate to the state's best interest, considering all its citizens?

b. Even if the state could demonstrate a reason to equate the two standards, the conclusion that a sizeable exclusion would make the project infeasible is **entirely arbitrary**. There may well be enough gas in areas east of the river to meet Usibelli Coal Mine's minimum stated objective of supplying its own facilities with power. We note that ADNR approved a similar gas exploration proposal in the Holitna Basin which is only 26,791 acres in size, an order of magnitude smaller than the 200,000+ acres in the proposed Healy Basin license area. Obviously DO&G is capable of approving much smaller potentially feasible projects. In addition, Usibelli applied, under the old shallow gas program for eight areas, six of which were east of the Nenana River. In personal communications with DCC, Steve Denton of Usibelli has indicated that shallow gas finds are more likely, from a geologic standpoint, east of the Nenana. A substantial overlay of Nenana Gravel on lands west of the River will make shallow gas more problematic there.

c. Individuals and organizations who commented on the Preliminary BIF identified a variety of values and interests that potentially outweigh the gas development interests. Some of those apply to the entire region west of the Nenana River, others only to sub-areas. By broadly dismissing the feedback, DO&G overlooked opportunities to identify the most sensitive areas and exclude those from the license area. We are particularly concerned about the wildlife and recreational values which are extremely high in Fairbanks Meridian township T12S9W and the state lands in T12S8W. In our comments and others on the Preliminary

BIF the public provided ample reasons why these lands are demonstrably unique and why gas development is incompatible with their protection for these other values.

Even if just these lands were excluded from the license area Usibelli Coal Mine would still have an area vastly larger than Holitna to explore. From information presented by Usibelli, gas deposits likely get deeper the farther west from the river exploration moves. Thus, these areas are likely to have the deepest and least economic gas deposits in any case.

Sensitive lands - Remedy sought:

While DCC still believes that excluding areas west of the Nenana River is sensible, we are particularly passionate that the environmentally sensitive lands identified above – T12S9W and state lands in T12S8W – be protected from gas development activities.

1) We request that the Commissioner review the material presented in the BIF and by various commenters regarding the long-recognized importance of these lands and give serious consideration to excluding just this acreage from the license area based on potentially lower economic value and higher wildlife, recreational, and tourism values. Such an action could also help clarify the mixed standards and arbitrary conclusions drawn in the Final BIF.

2) One clearly mapped and already laid out method for identifying these lands would be to use the Tanana Basin Area Plan, which identified the management intent for the Stampede Lands, located largely within the Townships identified above. We would suggest that lands designated as 4(E)1 be excluded from the license area (see map attached).

Conclusion

We understand that the Department of Natural Resources takes its mandate to develop Alaska's resources consistent with the public interest very seriously. However, in the Final Finding for Healy Basin Gas Exploration, DNR has assumed that gas development can and should occur concurrently with other uses on the identified state lands in the license area. We have a broad objection to that assumption. Instead, our arguments reflect our belief that, in a young community, situated next to a National Park, whose economy depends largely on outdoor recreation and rural community lifestyles, gas development and its attendant, highly foreseeable consequences, can damage sensitive lands, intimidate private property owners, and interfere with the orderly evolution of the community. In our comments we have argued that development mainly east of the Nenana River, similarly to what Usibelli originally requested in 2003, would still be a feasible prospect, but would retain the balance that has previously existed between resource extraction activities at the Coal Mine and the growth of a world class national park gateway community near Healy.

We hope that you will revise the Final BIF to respond to these concerns. Many of these issues arise from the core of DCC's mission and the concerns of our members, and we intend to pursue all avenues open to us to protect sensitive resource areas, recreational opportunities, and the rural quality of life of local residents. We invite you to reconsider the extent of the license area as we have suggested in this letter and to provide additional information resources, enhanced mitigations, and public participation opportunities to ensure that this Finding is truly in the best interests of all Alaskans.

Sincerely,

/s/

Nancy Bale,
President, Denali Citizens Council
PO Box 78
Denali Park, Alaska 99755
nancy@denalicitizens.org
907-277-3825

A few individuals (all either land owners or residents of the Denali Borough) have specifically requested that their names be appended as co-requesters on these comments. Their contact information is available upon request.
Jan St. Peters
Stewart Cubley
Ken Karle
Gloria Oswald
Grady Wilson
Chuck and Mona Bale