IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CONOCOPHILLIPS ALASKA, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; and OIL SEARCH (ALASKA), LLC,	)	
	)	
Appellees.	)	Case No. 3AN-22-09828 CI

BRIEF OF APPELLEE STATE OF ALASKA

TREG TAYLOR
ATTORNEY GENERAL

/s/Mary Hunter Gramling
Mary Hunter Gramling
Chief Assistant Attorney General
Alaska Bar No. 1011078
State of Alaska, Dept. of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

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Alaska Constitution:

Art. VIII, §1. Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Art. VIII, §2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Art. VIII, §8. Leases. The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

Alaska Statutes:

AS 38.05.180. Oil and gas and gas only leasing. (in part)

(a) The legislature finds that

(1) the people of Alaska have an interest in the development of the state's oil and gas resources to

(A) maximize the economic and physical recovery of the resources;

(B) maximize competition among parties seeking to explore and develop the resources;

(C) maximize use of Alaska's human resources in the development of the resources;

(2) it is in the best interests of the state

(A) to encourage an assessment of its oil and gas resources and to allow the maximum flexibility in the methods of issuing leases to

(i) recognize the many varied geographical regions of the state and the different costs of exploring for oil and gas in these regions;

(ii) minimize the adverse impact of exploration, development, production, and transportation activity; and

(B) to offer acreage for oil and gas leases or for gas only leases, specifically including

(i) state acreage that has been the subject of a best interest finding at annual areawide lease sales; and

(ii) land in areas that, under (d) of this section, may be leased without having been included in the leasing program prepared and submitted under (b) of this section.

Alaska Regulations:
11 AAC 96.010. Uses requiring a permit.

(a) On state land, a permit or other written authorization is required for

(1) an activity involving

(A) the use of explosives and explosive devices, except firearms;

(B) uses that are not listed in 11 AAC 96.020 as generally allowed uses;

(C) the use of hydraulic prospecting or mining equipment methods;

(D) drilling to a depth in excess of 300 feet, including exploratory drilling or stratigraphic test wells on state land not under oil or gas lease;

(E) geophysical exploration for minerals subject to lease or an oil and gas exploration license under AS 38.05.131 - 38.05.181;

(F) a commercial recreation camp or facility, whether occupied or unoccupied, that remains overnight; or

(G) an event or assembly of more than 50 persons; or

(2) repealed 12/7/2002;

(3) an activity on land subject to a mineral or land estate property interest by a person other than the holder of a property interest, or the holder's authorized representative, if the parties cannot agree on what constitutes reasonable concurrent use.

(b) Repealed 12/7/2002.

PARTIES

ConocoPhillips Alaska, Inc. ("CPAI") is the Appellant. The State of Alaska, Department of Natural Resources ("DNR" or "Department") is the Appellee. Oil Search (Alaska), LLC ("OSA") is an intervenor Appellee.

INTRODUCTION

This appeal arises from the inability of private parties to agree on the terms to enter on and access State land—on existing gravel roads within a State-issued oil and gas development unit composed of state oil and gas leases—to allow for the development of the State's oil and gas resources on adjacent leases. The denial of such access implicates the delay of development millions of barrels of oil and billions of dollars of public revenues. To remedy this impasse, DNR issued a permit provided for in regulation to exercise reservations in the leases and unit agreement to allow the limited, subordinate right to cross the state lands at issue without causing interference with the unit activities and development. DNR's decision should be affirmed.

JURISDICTION

This case is an appeal from a final decision of the Commissioner of DNR under AS 44.37.011. This Court has jurisdiction under AS 22.10.020(d).

STATEMENT OF ISSUES

1) *Authority.* The Alaska Constitution and Alaska Land Act require the Department to manage state resources for maximum use and maximum benefit in the public interest. Leases and permits are subject to reasonable concurrent uses. Did the Department act reasonably when it granted under a long-standing regulation a revocable

land use permit to allow one oil and gas lessee access—over state land on gravel roads placed by another oil and gas lessee—to its leases and easements on state land to prevent delay in development when the parties did not agree on reasonable concurrent use?

2) *Takings.* The gravel roads were installed into state land subject to oil and gas leases that are exclusive only as to oil and gas production from that land and the leases require reasonable concurrent uses. The leases and unit agreement include broad reservations of rights to the State as the sovereign landowner. Did the Department err in finding that no taking was established on appeal when the lessee's grant is limited and the permit allows temporary access to state land over gravel roads, prohibits unreasonable interference with the lessee's use of the roads, and requires the permittee to comply with notice requirements, insurance, reimbursement, and indemnification provisions?

STATEMENT OF THE CASE

I. Factual Background.

A. The development of the PKU and OSA's projects.

The Pikka Unit ("PKU") is located in Alaska's central North Slope area near the Colville River delta. [R.000850; R.000023] DNR approved the formation of the PKU in 2015. [R.000869] The PKU covers approximately 63,304 acres and contains oil and gas leases issued by DNR as well as "joint" oil and gas leases issued by DNR and Arctic Slope Regional Corporation. [R.000848] OSA has been the unit operator since 2018. [Exc. 111] Following exploratory drilling on Mitquq and Stirrup, OSA moved forward to develop the PKU including efforts to connect to existing infrastructure necessary for

development. [Exc. 111] OSA suggested that an additional 120,000 barrels of oil per day could flow into the Trans-Alaska Pipeline System ("TAPS") at the project peak. [Exc. 158] In a summary of its 2020 winter season work, OSA reported that it had employed over 1,200 employees and contractors, and constructed 68 miles of ice roads and 11 miles of gravel roads. [Exc. 89] By 2022, the Division had authorized seven easements and a plan of operations to support the development needed for the PKU. [Exc. 111; 137]

B. The development of the Kuparuk River Unit and its leases.

The Kuparuk River Unit ("KRU"), operated by CPAI, is located adjacent and east of the PKU. [R.000023] KRU was approved in 1981, contains 789 wells, and has been expanded many times throughout its lengthy history. [Exc. 158-159] In 2020, KRU was producing an average of 91,400 barrels of oil per day. [Exc. 159]. CPAI and the other KRU Lessees operations are governed by KRU Leases, the KRU Agreement, and various other approvals like Plans of Development. [Exc. 159] The KRU contains a network of gravel roads, including the 'spine road'. [Exc. 159] The KRU Leases are DL-1 Leases and some newer DMEM-4-83 Leases. [Exc. 192-203] The DL-1 Lease includes the following grant and reservation clauses:

> 1. GRANT. For and in consideration of a cash bonus and the first year's rental, the receipt of which is hereby acknowledged, and of the rentals, royalties, covenants, and conditions herein contained on the part of the Lessee to be paid, kept and performed, and subject to the conditions and reservations herein contained, Lessor does hereby grant and lease unto Lessee, exclusively, without warranty, for the sole and only purposes of exploration, development, production, processing, and marketing of oil and gas, and associated substances produced therewith, and installing of pipe lines and structures thereon to find, produce, save, store, treat, process,

transport, take care of and market all such substances, and for drilling water wells and taking under-ground and surface water for use in its operations thereon, and for housing and boarding employees in its operation thereon, the following described tract of land in Alaska:…" [Exc. 192]

29. RESERVATIONS. Lessor reserves the right to dispose of the surface of said land to others subject to this lease, and the right to authorize others by grant, lease, or permit subject to this lease, to enter upon and use said land:
(a) To explore for oil or gas by geological or geophysical means including the drilling of shallow core holes or stratigraphic tests to a depth of not more than 1,000 feet.
(b) To explore for, develop and remove natural resources other than oil, gas, and associated substances on or from said land.
(c) For nonexclusive easements and rights of way for any lawful purpose including shafts and tunnels necessary or appropriate for the working of said land or other lands for natural resources other than oil, gas, or associated substances.
(d) For well sites and well bores of wells drilled from or through said land to explore for or produce oil, gas, and associated substances in and from said lands.
(e) For any other purpose now or hereafter authorized by law and not inconsistent with the rights of Lessee under this lease. [Exc. 194]

II. Procedural Background

A. OSA applies for a land use permit for "nonexclusive access and use" in the KRU.

OSA requested approval from the Division of Oil and Gas ("Division") for a miscellaneous land use permit ("Permit") for "non-exclusive access and use of certain corridors within the boundary of the [KRU]." [Exc. 284] OSA's request cited to DNR regulation 11 AAC 96.010(a)(3) and explained that OSA "is unable to reach an agreement with [CPAI] on what constitutes "reasonable concurrent use" of Access Corridors in within KRU." [Exc. 284] The request included a description of the current agreement between OSA and CPAI in place since 2018, which does not include any fees,

and details regarding the parties' negotiations for future access. [Exc. 284-85] The request quoted from a CPAI letter in a dispute where CPAI indicated that it had "practical physical measures and legal remedies to prevent and remedy unauthorized use of KRU roads" which OSA described as "a threat to prevent future access by OSA." [Exc. 285]

The parties had exchanged draft agreements throughout 2021. [Exc. 285-86] OSA described its proposal as one "to compensate CPAI approximately $60 million" for operating and maintenance and future capital expenses. [Exc. 285] CPAI's proposal was described as "an attempt to extract exorbitant value from OSA, but it also so severely burdens Pikka project economics to favor processing at CPAI facilities" and that one of CPAI's offers could have OSA paying "more than $600 million" and "possibly more than three times that to develop all the leases [OSA] currently operates west and south of KRU." [Exc. 285] OSA explained the necessity of the Permit as "[a]ssured access, consistent with historical precedent over the past forty years by multiple concurrent users, is necessary for OSA as lessee and unit operator and the DNR as lessor and lease administrator to ensure activities can be undertaken as set forth in the lease terms." [Exc. 285-86] The proposed start date for the Permit was April 1, 2022 with a proposed end date of March 31, 2027. [Exc. 289]

The Division provided notice of the Permit request to CPAI, the notice lessee for the KRU, as well as other agencies and government entities including Alaska's Department of Fish and Game, Alaska's Department of Environmental Conservation, the North Slope Borough, the U.S. Army Corps of Engineers, and U.S. Fish and Wildlife.

[R.000033; Exc. 45] CPAI provided the Division with 24 pages of comments and numerous exhibits. [Exc.45-95]

CPAI stated that "[t]his matter is about the commercial terms for [OSA's] use of privately owned roads within the KRU during the development and operation of the PKU project." [Exc. 45] CPAI's comments asserted that the Permit was "unnecessary" and that "DNR does not have authority to take property via eminent domain or inverse condemnation, which it would be doing by requiring the KRU owners to provide third party use of KRU facilities and structures without compensation." [Exc. 45] CPAI's comments disputed OSA descriptions of the negotiations and avowed that "CPAI has proposed terms for long-term KRU road use substantially equivalent to the terms [OSA] impliedly considered reasonable for long-term use of Pikka Project roads." [Exc. 47]

In OSA's rebuttal of CPAI's comments that alleged that the State "has long recognized" KRU roads as "private property," OSA quoted from the 1999 "Charter for Development of the Alaskan North Slope" as reflecting the State's views on facility access which stated in part that the Commissioner "possesses the statutory, regulatory, and contractual authority to require working interest owners to provide access to production and other facilities." [Exc. 306] OSA indicated that OSA had received a "notice of breach" days earlier from CPAI indicating that OSA was "in material breach" and that "CPAI may terminate" the KRU Road Agreement and the KRU Ad Hoc Infrastructure Agreement "at any time." [Exc. 311]

CPAI provided the Division with a 15-page response to OSA letter declaring that "CPAI is not attempting to block the PKU development. Just the opposite: CPAI's goal

is to negotiate in good faith to reach commercial terms that fairly capture the unique nature of OSA's planned use of the KRU roads." [Exc. 96-110] CPAI postulated "if it was lawful, reasonable, and fair for OSA to propose to pay AIDEA at least $1.4 million per mile per year for long-term use of Pikka roads, then it is lawful, reasonable, and fair for CPAI to propose similar terms to OSA for long-term use of KRU roads." [Exc. 97]

B. The Division grants the Permit with conditions and stipulations for reasonable concurrent use in the KRU.

The Division approved OSA's request in the Division's March 29, 2022 Approval ("Approval" or "Division Decision") with attached Appendices including the Permit and stipulations. [Exc. 111-135] The Appendices included comment summaries and Division responses. [Exc. 127-135] The Approval "authorizes OSA access to its easements within the KRU, the PKU (PKU), and other lands to which OSA holds mineral lease interest, subject to the stipulations of the permit." [Exc. 111] This amounted to year-round access to "approximately 75.5 miles of existing gravel roads." [Exc. 111] The Approval declared that "[t]he [P]ermit effectuates reasonable concurrent uses of state land consistent with previously approved Division authorizations. The [P]ermit is consistent with the best interest of the State in development and management of state land." [Exc. 111] The Approval exhorted that "OSA will exercise good faith to reach an outcome for a commercial road use agreement with CPAI as expeditiously as practicable." [Exc. 112]

The Approval referred to DNR's regulations in 11 AAC 96 including 11 AAC 96.010(a)(3) as a source of authority for the Permit. [Exc. 112] The Approval

repeatedly described the revocable nature of the Permit—revocable for cause for violation of a permit stipulation; "at will, if DNR determines that the revocation is in the state's interest"; and once an agreement is reached on concurrent use by its own terms. [Exc. 112; 117] The Approval explained that the Permit activities "are for a discrete and limited duration with limited, temporary impact to the land." [Exc. 112] The Approval stated that the Permit "issued is subject to any stipulations the DNR determines necessary to assure compliance with [11 AAC 96], to minimize conflicts with other uses, to minimize environmental impacts, or otherwise to be of interest to the state." [Exc. 112] The Approval considered the provisions of KRU Leases and the KRU Agreement and determined that the KRU Leases and KRU Agreement "provide for reservations for reasonable concurrent uses consistent with the Alaska Constitution, AS 38.05, and associated regulations." [Exc. 112-113]

The Approval found that 11 AAC 96.010(a)(3) was applicable, specifically finding that CPAI and OSA "have been unable to agree on reasonable concurrent use of state lands." [Exc. 116] The Approval reiterated that, as implied in the regulation, the Division "expects parties to reach agreements amongst themselves for reasonable concurrent use of state lands" and that "[a] commercial road use agreement for concurrent reasonable access is the most efficient means of prevention and avoidance of unreasonable interference and the effectuation of reasonable concurrent uses." [Exc. 116-17] The Approval reasoned that "the use of existing gravel roads is consistent with the best interests of the state for development and management of state lands" and that

"use of existing gravel roads in KRU is necessary to minimize environmental impacts in development of state land." [Exc. 116]

The Approval expressed that OSA as the party seeking reasonable concurrent use "must prevent and avoid unreasonable interference with CPAI's operations" and that the Permit did not grant OSA any preference over CPAI's use of the surface for its oil and gas operations. [Exc. 116-117] The Approval explained that the Permit included "conditions for notification, indemnification [to the State], and additional surety to protect the best interests of the state and avoid unreasonable interference." [Exc. 117] The stipulations required OSA to provide the Division with $100,000 performance guarantee, a surety of $2,000,000 to be replenished if drawn against, and insurance with the State as an additional insured in the amount of at least $1,000,000 per occurrence and $2,000,000 per annual aggregate. [Exc. 116, 123] The stipulations also declared that CPAI's use "shall take priority over" OSA's use and that OSA is to notify CPAI of any damages that OSA "shall be responsible for arranging reimbursement to [CPAI] for costs associated with repairing damages to the Access Corridors caused by users conducting use on behalf of [OSA]." [Exc. 126]

C. The Commissioner's Decision denies CPAI's appeal and affirms the Permit.

CPAI appealed the Approval to the Commissioner with requests for time to submit additional materials, a stay of the Permit, and a hearing. [Exc. 161; R.000415] DNR provided CPAI with additional time, notified OSA of the appeal, denied the request for a stay, and held the request for hearing in abeyance. [Exc. 161; R.000413-14] CPAI and OSA filed additional submissions on the appeal and following those submissions the

Commissioner determined the matter ripe for decision. [Exc. 161] The Commissioner's Decision ("Decision") determined there were no disputed questions of fact and denied the request for a hearing noting that such requests were in the Commissioner's discretion. [Exc. 163] The Decision found that "DNR *has the authority* to issue the Permit in order to manage its surface and subsurface estates; DNR's process for adjudicating the [Permit] *was and is legal, appropriate, and reasonable*; and the issuance of the Permit *is not* a taking of CPAI's rights or property as properly understood." [Exc. 163]; emphasis original. The Decision started its analysis with three important concepts for DNR:

> (1) the Alaska Constitution mandates the development of resources in a manner that promotes maximum use; (2) the Alaska Constitution requires the Legislature to establish a framework for "the utilization, development, and conservation of all natural resources belonging to the State…for the maximum benefit of its people; and (3) the Legislature has explicitly conferred upon DNR and its Commissioner the responsibility to administer and manage state lands-like those at issue here-in a manner consistent with these Constitutional and legislative mandates. [Exc. 163-64][1]

The Decision considered the grant and reservation clauses in the KRU Leases. [Exc. 164-170] The Decision reasoned that CPAI's interpretation of the granting clause as to the term "exclusively" was not reasonable from the plain language and grammatical syntax. [Exc. 167] The Decision also explained that CPAI's interpretation that it has "exclusivity" in control of the surface estate "when improvements are installed by the Lessee" would conflict with the reservations clause in favor of the State. [Exc. 167] As a corollary to the Decision's finding as to the narrowness of the grant

[1] (citing Alaska Const. Art VIII, § 1, § 2; AS 38.05.020; and AS 44.37.020).

clause, the Decision found the reservations clause was broad and the reservations "significant." [Exc. 168] Like the Approval, the Decision also considered the reservations clause in a later lease form applicable to some areas of the KRU and found that lease form "reiterates the State's intent to retain its authority to grant reasonable concurrent use." [Exc. 168] The Decision explained that "[t]he reservations in the Leases are directly derived from, and mandated by, Article VIII of the Constitution in Section 8." [Exc. 169]

The Decision found CPAI's arguments to elevate roads to allow a "special exclusionary level" unpersuasive. [Exc. 171] The Decision rejected as nonbinding and not relevant CPAI's arguments that roads are "facilities" because they were mentioned with "facilities" in other documents or contexts, like a property tax administrative decision. [Exc. 172] In response to CPAI's claims that the roads were under its exclusive control, the Decision explained that "[n]o provision in Alaska statutes, the Leases, or the UA provide the reservations at issue, or the non-exclusive surface rights the Leases provide, are subject to modification or diminishment due to the actions of the Lessee." [Exc. 175]

In its consideration of CPAI's arguments on the authority of the Division to issue the Permit, the Decision expounded on DNR's authority under the Alaska Land Act and its regulations. [Exc. 176] The Decision found that the regulation 11 AAC 96.010 "explicitly contemplates situations exactly matching the facts in this appeal." [Exc. 176] Akin to its analysis on the Lease activities not diminishing the State's reservations, the Decision explained that CPAI by installing roads in the KRU "does not create a zone of

nullification where the State's regulations do not apply to its own lands because of an intervening surface improvement." [Exc. 176] The Decision found the "failure [of the parties] to agree on terms for long-term concurrent use is evident." [Exc. 177] The Decision held that the State "has the power to ensure that private disputes between its lessees over concurrent use on State lands do not threaten the State's ability to maximize resource development on any of its leased lands" and that the Permit was "consistent" with that power. [Exc. 177]

The Decision explained that the Permit followed appropriate processes and that its issuance was not a taking under the U.S. Constitution or the Alaska Constitution. [Exc. 179-190] The Decision reasoned that CPAI "does not have an appropriately cognizable economic interest in interfering with the development of adjacent State lands" and that CPAI failed to meet its burdens for its inverse condemnation claims and failed to show a deprivation of an economic advantage for a taking or compensation. [Exc. 189] CPAI appealed the Decision to this Court.

STANDARD OF REVIEW

In an appeal of a decision by an administrative agency this Court may apply the following four standards of review: 1) the "substantial evidence" test for questions of fact; 2) the "reasonable basis" test for questions of law where agency expertise, legal deference, or policy matters are implicated; 3) the highly deferential "reasonable and not arbitrary" test for an agency's interpretation of its own regulations; and 4) the

"substitution of judgment" test for other legal questions.[2] In interpreting questions of law, the Court is to "consider precedent, reason, and policy."[3] On constitutional issues, the Court applies its independent judgment and adopts "a reasonable and practical interpretation in accordance with common sense upon the plain meaning and purpose of the provision and the intent of the framers."[4]

The issues in this case do not present questions of fact. The parties draw different conclusions and inferences from facts or dispute the applicability of various facts. CPAI refers to *McGlinchy v. State, Department of Natural Resources* in support of its statements that constitutional issues are reviewed de novo.[5] [At. Br. 22] *McGlinchy* is a better citation for the proposition that for questions of fact the Court looks for "substantial evidence" and whether it exists but "do[es] not choose between competing inferences."[6] To the extent that the Court considers any issues of fact, the only questions in this administrative appeal as to facts should be whether "substantial evidence" exists to support the Decision.[7]

DNR's "special expertise" in administration of the grant of land use permits and management of oil and gas leases and the State's resources has been recognized by the Court for review on a reasonable basis.[8] DNR's implementation of reasonable concurrent

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2 *State, Dep't of Revenue v. DynCorp*, 14 P.3d 981, 985 (Alaska 2000); *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).
3 *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 370 (Alaska 2001).
4 21 P.3d at 370 (quoting *Cook v. Botelho*, 921 P.2d 1126, 1128 (Alaska 1996)).
5 354 P.3d 1025 (Alaska 2015).
6 *Id.* at 1029.
7 *Murphy v. Fairbanks N. Star Borough*, 494 P.3d 556, 571 (Alaska 2021).
8 *Teck American Inc. v. Valhalla Mining, LLC*, 528 P.3d 30, 35 (Alaska 2023).

use is a critical policy and land management concern and often fact intensive inquiry left to DNR by the legislature through the Alaska Land Act.[9] DNR's issuance of the Permit to effectuate reasonable concurrent use and maximum utilization of the state resources given the dispute between CPAI and OSA is a perfect example of when the reasonable basis review applies to an agency decision.

CPAI cites to *Davis Wright Tremaine LLP v. State, Dep't of Administration* to explain the substitution of judgment standard of review.[10] [At. Br. 22] In *Davis Wright*, the Court considered an administrative appeal following from a procurement process.[11] The Court applied a "reasonable basis" standard to the Department of Law's interpretation of the regulation explaining that "it is well established that an agency's interpretation of its own regulations is reviewed under the reasonable basis standard; this standard 'recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.'"[12] The Court applied its independent judgment to the argument of whether a common law doctrine, as a judicial concept, was applicable to the statutory and regulatory regime.[13] The Court described the Department of Law's interpretation of specific language in the request for proposals as a "question of law involving the Department's expertise and is thus reviewed under the reasonable basis standard."[14]

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9 AS 38.05; *Sullivan v REDOIL*, 311 P.3d 625, 636 (Alaska 2013).
10 324 P.3d 293, 299 (Alaska 2014).
11 *Id.* at 298.
12 *Id*. at 301 (quoting *Rose v. Commercial Fisheries Entry Com'n*, 647 P.2d 154, 161 (Alaska 1982)).
13 *Id.* at 302.
14 *Id.* at 303.

CPAI argues from *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co*. for the proposition that issues of contract interpretation and statutory interpretation are questions of law subject to independent judgment review.[15] [At. Br. 22]

Given the important policy directives in the legislative delegations to DNR for the Alaska Land Act and DNR's expertise, DNR's interpretation in the Decision of the Alaska Land Act and DNR's associated regulations are subject to reasonable basis review. DNR's application of its regulations for issuance of the Permit are matters for review under the "highly deferential" reasonable and not arbitrary standard.

While in some other instances, contractual terms are reviewed under a substitution of judgment standard, the KRU Leases and KRU Agreement terms as interpreted in the Decision are subject to a reasonable basis review. In *State, Department of Natural Resources v. Alaskan Crude Corporation*, a case involving terms of a DNR oil and gas lease, the Court held the reasonable basis standard of review applied in cases where "agency interpretations of specialized contract terms derived from statutes or regulations."[16] The salient provisions in the KRU Leases and KRU Agreement relating to grants, reservations, and reasonable concurrent uses are implementing constitutional and statutory directives that have been legislatively delegated to DNR and implicate important policy and land management at the core of DNR's expertise.[17] Given the terms are derived from or implementing laws administered by DNR, the Decision's consideration of the KRU Leases and KRU Agreement is reviewed under reasonable

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15 746 P.2d 896 (Alaska 1987).
16 441 P.3d 393, 399 (Alaska 2018).
17 Alaska Const. Art. VIII, §§ 1, 2, 8; AS 38.05.020; AS 38.05.180; 11 AAC 96.

basis standard as well. Significantly, as the KRU Leases contain reservations required under law and grant rights to the State's resources, the rule of interpretation that any ambiguities should be "resolved strictly against the grantee and in favor of the government" applies so that "no rights pass by implication."[18] The Court in *City of Kenai v. Cook Inlet Natural Gas Storage, Alaska, LLC* recognized that this rule of interpretation was contrary to the rule for "private deeds reserving mineral rights."[19] Accordingly, CPAI's reliance on cases not involving DNR or from other jurisdictions related to contracts are inapplicable. [At. Br. 22]

CPAI's arguments as to property taxes, the HB 39 budget bill, and eminent domain statutes are considered under a substitution of judgment standard. CPAI's arguments based on the equitable doctrine of "equitable quasi-estoppel" as a legal doctrine are reviewed in the independent judgment of the Court.[20] This argument was not presented to DNR for consideration in the Decision and therefore should not be considered on appeal due to failure to exhaust administrative remedies.[21] Moreover, CPAI's legal analysis of the argument was so cursory that it should be considered

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18 *City of Kenai v. Cook Inlet Natural Gas Storage, Alaska, LLC*, 373 P.3d 473, 480 (Alaska 2016).

19 *Id.*

20 324 P.3d at 302.

21 *City of Valdez v. Regulatory Commission of Alaska*, 548 P.3d 1067, 1082 (Alaska 2024) (explaining that the purpose of the exhaustion of administrative remedies doctrine is for the agency to make a factual record, apply agency expertise, and correct its own errors.).

abandoned.[22] The Court should review in its independent judgment constitutional arguments in this case concerning Alaska Constitution Art. VIII, Art. I, §18 (takings), Art. II, §13 (confinement clause), and U.S. Constitution Amendment V (takings).

ARGUMENT

I. The Decision reasonably upheld the Permit because the parties could not agree on reasonable concurrent use and the Permit was authorized under a long-standing regulation.

The Decision found that the Division had authority to issue the Permit as part of its management of the surface and subsurface estates. [Exc. 163] One of the authorities underlying the Permit is DNR regulation 11 AAC 96.010(a)(3) which provides:

> (a) On state land, a permit or other written authorization is required for
> (3) an activity on land subject to a mineral or land estate property interest by a person other than the holder of a property interest, or the holder's authorized representative, if the parties cannot agree on what constitutes reasonable concurrent use.

The authority listed for DNR's adoption of this regulation include AS 38.05.020, 38.05.035, 38.05.131, 38.05.180, and 38.05.850. The regulation has been in effect since 1970 and remained in similar form to the original. [App.1] Alaska Statute 38.05.020 provides that the Commissioner "may [] establish reasonable procedures and adopt reasonable regulations necessary to carry out" the Alaska Land Act. DNR's authorities

[22] *Jurgens v. City of North Pole*, 153 P.3d 321, 326 (Alaska 2007) ("An issue is considered abandoned in an administrative appeal to the superior court if the appellant inadequately briefs the issue.").

under the Alaska Land Act are broad to provide for management of the State's lands and resources consistent with statutes and the Alaska Constitution.[23]

Following review of the arguments by CPAI and OSA and the Division documents supporting the permit, the Decision found "the failure to agree on the terms for long-term concurrent use is evident" and that the inability to agree on reasonable concurrent use went back to "at least 2018" when the parties entered into an "Ad Hoc Agreement." [Exc. 177]. The Decision explained the importance of the regulation "as a conflict mitigation tool meant to minimize disputes between third parties where there is a need for concurrent use to develop the State's resources." [Exc. 178] Although DNR hopes reasonable concurrent use agreements can be entered into without DNR's involvement, DNR can issue permits and other orders to ensure reasonable concurrent use of State resources to promote the maximum use and benefit of the State's resources.[24] The parties could not and apparently have not agreed on long-term reasonable concurrent use of state lands containing the KRU gravel roads. The Permit appropriately effectuates reasonable concurrent use of state land until then to avoid delays of development.

CPAI argues that the regulation does not apply and that DNR has no authority over state land where there are improvements. [At. Br. 45-57] CPAI does not argue that the regulation itself was promulgated improperly or that it is without authority. Indeed,

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[23] *Caywood v. State, Dep't of Natural Resources*, 288 P.3d 745, 746 (Alaska 2012); AS 44.37.020.

[24] AS 38.05.020; AS 38.05.180; AS 38.05.850.

the regulation enjoys a presumption of validity.[25] CPAI's argument is essentially that DNR was wrong to apply the regulation in this circumstance and that DNR's interpretation of its own regulation is outside of the authorizing statutes for the regulation. As recognized in the Approval and Decision, the facts at issue align with the regulation text in 11 AAC 96.010(a)(3). [Exc. 116;176] OSA applied for the Permit because it sought to access state lands under a mineral lease held by someone else, the KRU Lessees. [Exc. 178] The KRU Lessees' limited surface use of state land through placement of gravel roads on the land are not an explicit or implicit limitation in the regulatory language to deprive it of applicability. OSA sought a permit for a use of state land in a fashion that the state land was already being used. OSA sought to enter state land on a road that others use to enter state land and for purposes and use similar to that already occurring on state land—the essence of concurrent use. The regulation expressly recognizes that permits to effectuate reasonable concurrent uses of state land may be needed if parties cannot agree on terms in the absence of DNR involvement. CPAI's arguments that the regulation refers to "land" and not "improvements" on the land does not deprive the regulation of applicability. [At. Br. 51-55]. Functionally, there is no other way to use the surface of state land with a road than to cross the road. DNR's authority to manage state land and concurrent uses of state land exists regardless of the other uses of the land. Under CPAI's view, the regulation would need to list every potential use of state land and then identify when DNR could or could not manage state lands for

[25] *Kelso v. Rybachek*, 912 P.2d 536, 540 (Alaska 1996).

reasonable concurrent uses in that circumstance. This is neither a required nor a reasonable interpretation of the regulation.

CPAI argues that AS 38.05.035(a)(2) by reference to "improvements" owned by the State means that the legislature "granted no similar power over improvement owned by third-parties." [At. Br. 49] This statute does not deprive DNR of authority to manage reasonable concurrent uses of state land as provided in the regulation and Permit. The KRU gravel roads are a use of state land. The only surface use of state land with a road is to "enter on" the road. DNR's authority to administer concurrent use cannot be rendered a nullity because a single use occurs on state land. The state land remains subject to the limited purposes of the KRU Leases and the State's reservations for reasonable concurrent uses—including DNR's authority to allow entry and crossing of the land without unreasonable interference with the limited purposes of the KRU Leases.

Whether other parties have agreed to commercial road use agreements with CPAI or whether CPAI views its negotiations with OSA as comparable to CPAI's perception of OSA's negotiations with others, are not questions that can constrain DNR's authority or confine the applicability of the regulation. The Division acted reasonably to issue the Permit because CPAI and OSA had not agreed to long-term use and the Permit was a reasonable use of the DNR's authority to manage state lands for maximizing benefits, minimizing impacts, and allowing reasonable concurrent uses.[26] CPAI's arguments as to commercial uses of roads cannot limit DNR's authority or the broad reservations in the KRU Leases. CPAI's assertions that similar permits have not been issued before does not

[26] AS 38.05.020; AS 38.05.035; AS 38.05.180.

support that DNR lacks authority. Likely, the regulation has induced what was expected and encouraged in the Permit here—that parties would agree on reasonable concurrent use without DNR involvement. DNR's lack of knowledge of other agreements or restraint to exercise its full powers to effectuate reasonable concurrent uses in other circumstances does not negate its authority to issue the Permit. [At. Br. 55-57]

Notably, CPAI has not alleged that the Permit is inconsistent with the KRU Lessees' actual development of oil and gas rights under the leases. The Permit does not prevent CPAI from developing oil and gas nor does the Permit grant any right to OSA to develop oil and gas in the KRU. Accordingly, the Permit does not interfere with CPAI's exclusive rights as to oil and gas in the KRU. CPAI argues that the Permit grants OSA "free" use of roads in the KRU "without consent" [At. Br. 10, 50, 64]. Although CPAI is rightfully careful to note that it has not "blocked" OSA from using the KRU roads, CPAI's arguments are premised on its assertion of a right to do just that—to exclude OSA from access to the KRU over roads installed on state land absent a "commercial use arrangement." [At. Br. 71, 17, 10] CPAI's arguments about the validity of the Permit are not that the Permit lacks adequate protections or indemnification provisions.[27] Instead, CPAI's complaint is that the Permit impacts its ability to earn a commercial return that would flow from an ability to exclude another oil and gas lessee from access to state lands over the KRU gravel roads. Basically, CPAI wanted time to exert commercial pressure on OSA for a long-term use agreement for the KRU roads given

[27] If CPAI had such arguments, it has waived them for failure to exhaust administrative remedies before the Commissioner on appeal as to those points and failure to adequately brief them in its opening brief.

the location of the KRU roads, the size of the PKU, and OSA's development deadlines. [At. Br. 10] The KRU Leases and KRU Agreement do not provide CPAI with that right. [Exc. 166]

CPAI incorrectly asserts that the Permit was at "no cost" to OSA. [At. Br. 9]. For the Permit to take effect, OSA had to meet the conditions for indemnification, insurance, security, and arrangements for reimbursements for any damages. [Exc. 119-126] The Permit also requires OSA prevent unreasonable interference with CPAI's activities and give preferential use to CPAI. [Exc. 125] The Permit protections and conditions are costs for OSA.

CPAI's arguments that "no improvement" "would be immune from a third-party's demand for access under [11 AAC 96.010]" is simply not the fact pattern before this Court. The uses of state land at issue in this case are related to entry and use of state land for access and gravel roads. Moreover, the "no improvement" argument is itself absurd because it reads out the requirements that concurrent uses be "reasonable" and not unnecessarily interfere with other uses. CPAI attempts to distract the Court from the only issue here—the use of state land containing a road that is commonly used as a road by others. CPAI's arguments as to other improvements are entirely speculative and contrary to CPAI's own assertion about what this case is really about: "[t]his matter is about the commercial terms for [OSA's] use of privately owned roads within the KRU during the

development and operation of the PKU project." [Exc. 45] DNR reasonably used its authorities to issue the Permit.[28]

II. DNR retained the right to authorize third party access to all of its land in the KRU regardless of any surface uses or improvements.

CPAI concedes that DNR reserved in the KRU Leases the right to grant third parties' access to the lands the State leased to the KRU Lessees [At. Br. 37], but CPAI claims that those rights do not extend to any part of the State's land on which the KRU Lessees have placed improvements, such as gravel for roads. CPAI does not (and cannot), however, point to any language in the KRU Leases that makes such a distinction. There is a simple reason for this—the KRU Leases explicitly provide the opposite. DNR's right to grant third parties' access to the KRU leased land extends to *all* the State's leased land in the KRU.

Paragraph 29 of the KRU Leases reserves for the State broad rights including "the right to authorize others by grant, lease, or permit . . . to enter upon and use *said land*. . . (e) for *any* other purpose now or hereafter authorized by law and not inconsistent with the rights of the Lessee under this lease." [Exc. 194] (emphasis added); *see also* [Exc. 168] In order for DNR's rights to be limited in the way that CPAI claims, the term "said land" would have to be defined as the State land leased by the KRU Leases, except those portions where the KRU Lessees have placed improvements. But that is not how "said land" is defined in the KRU Leases. Paragraph 1 of the KRU Leases defines the term "said land" as the entire tract of land the State leased under the KRU Leases, not a

[28] 11 AAC 96; AS 38.05.020; AS 38.05.035(a); AS 38.05.850.

subset of that land. [Exc. 192] Accordingly, DNR has the right to grant any third party a permit to enter upon and use any land within the tracts leased under the KRU Leases, including those portions of the KRU where there are existing roads.

CPAI never addresses the specific reservation of rights in the leases relied upon in the Decision, Paragraph 29(e). [Exc. 192; 165] Instead, CPAI argues that different reservations, reservations found in Paragraph 29(a)-(c), did not reserve for the State the right to grant the Permit. [At. Br. 35-37] Whatever limit there may be to those reservations, the State's broad reservation in Paragraph 29(e) applies to all of its leased land and retains for the State the right to permit access to any third party for any lawful purpose. CPAI's failure to address Paragraph 29(e), which formed one of the bases for the Decision's affirmation of grant of the Permit, waives any objection to the State's assertion of its rights under that reservation.[29] On that ground alone, CPAI's appeal should be denied.

A. The State's broad reservation of right to all of its land is consistent with the requirements of the Alaska Constitution.

Despite the explicit language of the KRU Leases, CPAI argues that its "interpretation" limiting the State's reservation of rights in the KRU Leases to unimproved portions of the KRU "makes sense" and is dictated by "common sense." [At. Br. 37] Common sense supports exactly the opposite conclusion. CPAI's position is that the State reserved an explicit and expansive right to authorize third parties to "enter upon and use" the leased land, but then implicitly consented to limit that right to only

[29] *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015).

where there are no roads. CPAI's "common sense" assertion would mean that an entirely expected activity, construction of roads on the surface of state lands, implicitly converts the land with a road into land that cannot be "enter[ed] upon." This is contrary to the express reservations and the most common method to enter land. The only sensible conclusion is that the State's right to grant access to enter upon and use its leased lands includes the right to grant access to the State's land where the KRU Lessees built roads. And, in accessing that land, a third party can traverse the roads that have been placed on State land by the KRU Lessees.

This conclusion is especially true given that the Alaska Constitution requires the State to make its lands available for "maximum use" and directs the legislature to provide for the utilization and conservation of State lands for the maximum benefit of its citizens.[30] CPAI's proffered reading of the State's reservations effecting this Constitutional directive—that the leases are an implicit, exclusive right to control access to any of areas of the State land on which roads are placed—is plainly inconsistent with maximum use. Requiring third parties to build duplicative roads to enter upon and use the State's leased land is wholly inconsistent with these Constitutional directives and every reasonable conception of orderly utilization and conservation of land management. The Permit facilitates efficient use of the State's land. In keeping with sound land management and the explicit reservations in the leases, the Permit also ensures that the environmental impact of OSA's access and use of State land within the KRU Unit will be far smaller than it would have been had OSA built a duplicate set of roads as CPAI

[30] Alaska Const. Art. VIII, §§ 1, 2; AS 38.05.180(a).

suggested was required absent CPAI's "consent." [At. Br. 49]; *see* [Exc. 169-70] The Permit is consistent with "DNR's mandate to 'minimize the adverse impact of exploration, development, production, and transport activity.[31]'" [Exc. 178]

CPAI's arguments that KLU Lessees "enjoy exclusive ownership and control over the KRU roads" and that the State cannot exercise "dominion" over the roads is without support in the Leases and KRU Agreement terms. [At. Br. 25] The State as the Lessor can "inspect all operations at any time" and "enter on said land to repair damage and prevent waste at Lessee's expense." [Exc. 193]; KRU Agreement, Provision 3.6 ("The State of Alaska retains all rights reserved it to explore, use, dispose of, or otherwise act upon or with respect to the surface and subsurface to the same extent as those rights are reserved in the oil and gas leases. The Working Interest Owners and the Unit Operator will, to the extent possible, minimize and consolidate surface facilities in order to minimize surface impacts.") [Exc. 17] CPAI's arguments to the effect that reasonable concurrent use only allows the State authorize construction of an additional road for OSA to access its leases and easements instead of use of existing roads would be contrary to the State's authorities and duties to prevent waste of State resources recognized in the Leases and KRU Agreement. [Exc. 178]

CPAI's "interpretation" of the KRU Leases is also contrary to the Alaska Constitution's requirement that all State land subject to an oil and gas lease be available for "reasonable concurrent uses."[32] CPAI claims that the KRU Lessees placement of

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31 AS 38.05.180(a)(2)(ii).

32 Alaska Const. Art. VIII, §8.

gravel for roads on the State's leased land entitles CPAI to exclusive use of State land wherever that gravel rests. Under these "Kingdom of Conoco" arguments—where gravel roads impede entry onto state land instead of facilitating it—could CPAI still block perpendicular crossings of the otherwise parallel roads that it posits that OSA could be authorized to unnecessarily build? This interpretation and outcome are an anathema to reasonable concurrent use.

The logical conclusion from CPAI's argument is that it could place bread crumb paths of gravel along the borders of the KRU and exclude entry and access across the entire area, defeating the State's reservations—leaving huge swaths of State land inaccessible *because of gravel*. But this cannot be the case because granting such an exclusive use of State land would be contrary to the requirements of the Alaska Constitution. Instead, as the Constitution requires, the State reserved the right under the KRU Leases, among other things, to grant third parties concurrent use of any and all parts of the leased State lands so long as that access did not unnecessarily or unreasonably interfere with the operations of the KRU Lessees. *See* [Exc. 167-70]

The qualification in Paragraph 29(e) that any concurrent use not unnecessarily or unreasonably interfere with the rights and operations of the KRU Lessees confirms that the KRU Leases authorize access to a Lessee's improvements to State land. [Exc. 194] Otherwise, there would not be a need to insert such a qualification. Access to State land where the KRU Lessees are not present, i.e. where there are no improvements and no activity, would not have any likely prospect of interfering with the rights and operations of the KRU Lessees. The Constitution and lease language focus on protecting lessees

from unreasonable interference precisely because the concurrent uses eligible for the reservation in the KRU Leases may implicate the same land where unit activities occur.

Ultimately, CPAI admits that the State has the right to grant concurrent use of State land to third parties, but claims that that right only extends to unimproved land, i.e. the portions of the state land that the KRU Lessees are not using.[33] This argument is irreconcilable with "concurrent" in "concurrent use." Concurrent use includes use of the same land by more than one party. CPAI's argument that the State only has the right to grant concurrent use permits for land that the KRU Unit Lessees are not using is nonsensical.

B. The Grant clause of the KRU Leases did not confer on the KRU Lessees an exclusive interest in the State's leased land for all purposes.

Even if the State had not reserved the broad rights in Paragraph 29(e), the KRU Lessees would not have had the right to prevent the State from granting the Permit to OSA. The grant in Paragraph 1 provides the KRU Lessees with leases to State lands within the KRU "for the sole and only purposes of exploration, development, production, and processing and marketing of oil, gas, gas and associated substances." [Exc. 192] This is consistent with the title of the KRU Leases—"Competitive Oil and Gas Lease." [Exc. 192] The KRU Leases are not leases of State land for all purposes; they are limited to the use of State lands for the specific purpose of developing the State's oil and gas resources. Thus, CPAI as a KRU Lessee had no grounds under the

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[33] CPAI argues that the differences between the DMEM-4-83 and DL-1 Lease forms are "recognition of the limited reservations in the DL-1 form." [At. Br. 35, n.20] The later DMEM-4-83 forms only modernized and clarified language, not change reservations required. [Exc. 196-203]

KRU Leases to object to the State's grant of the Permit allowing OSA to use the Access Corridors in order to reach the PKU and OSA's easements on state land within the KRU that support the PKU.

CPAI suggests that the presence of the word "exclusively" in the grant clause means that the lease gave the KRU Lessees a general right to exclude any third party from all of the State's lands that they leased. [At. Br. 33] But this argument is based upon an extremely tortured reading of the grant clause in Paragraph 1. [Exc. 192] According to CPAI, the term "exclusively" modifies "tract of land" and gives the KRU Lessees a general exclusionary right over the State's leased land. [At. Br. 33] The "sole and only purposes" language in Paragraph 1, CPAI argues, is merely meant to define what the KRU Lessees can do on the State's land. [At. Br. 33] CPAI's proffered construction of the grant clause is not a reasonable interpretation of the lease contracts. If the term "exclusively" was meant to modify "tract of land," it would have been followed directly by "tract of land." Instead, exclusively is directly followed by the "sole and only purposes" clause. [Exc. 192] The more than 60 words of the "sole and only purposes" clause separate "exclusively" from the term "tract of land." Given the structure of the grant clause, the "sole and only purposes," clause can only be read to modify the term "exclusively" which it directly follows.

The only "exclusive" grant by the State to the KRU Lessees is for oil and gas production of the subsurface, i.e. the State would not grant that right to another Lessee. This construction does not convey any right to exclude as to surface uses. The reservation in Paragraph 29(b) also supports that exclusivity is just to "oil and gas" since

that clause in the reservation paragraph expressly reserves the right to develop and remove natural resources "other than oil, gas, and associated substances". [Exc. 194] The State's construction of the grant clause is consistent with the fact that the State reserved extensive rights under Paragraph 29, including the right to grant third parties access to State lands within the KRU "for any other purpose now or hereafter authorized by law." [Exc. 194]. The retention of such rights is simply inconsistent with any argument that the State intended to confer upon the KRU Lessees unbounded exclusivity rights over its land.

CPAI's interpretation of the grant clause also conflicts with the Alaska Constitution. CPAI argues that the "sole and only purposes" language of the grant clause merely limits the purposes for which the KRU Lessees may use the State's land. CPAI claims that the KRU Leases give the KRU Lessees the broader right to prevent the State from allowing third parties to use State land for other purposes even though the KRU lessees themselves may not use state lands for such other purposes. This argument, however, is not consistent with Alaska Constitution's mandate requiring the maximum use of State lands and leases and permits for concurrent uses.[34]

In contrast, the Decision finds that the State retained the right to allow third parties to use its lands for purposes other than those granted to the KRU Lessees is consistent with the Constitutional mandate to maximize the use of State land. Under normal rules of contract interpretation, where a contract can be interpreted in two ways, one lawful and

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[34] Alaska Const. Art. VIII, §§1, 2, 8, & *see*, 12.

one unlawful, the lawful one controls.[35] Therefore, CPAI's interpretation must be rejected for yet another reason. CPAI never grapples with any of this. Instead, it baldly claims that the Decision interpreting the structure of the grant clause in a grammatically sensible way somehow renders "exclusively" superfluous because "exclusively" and "sole and only" would both "modify (and limit) the purposes of the lease." [At. Br. 33] The Decision's interpretation does no such thing. It reads "exclusively" and "sole and only" together. The "sole and only" clause limits "exclusively" as the structure of the clause suggests.

C. The Permit imposes significant limits and conditions on OSA's use of the access corridors that ensure the KRU Lessees' legitimate expectations under the Leases are satisfied.

Permeating CPAI's arguments are two portrayals that are inconsistent with the facts of the Permit: 1) that private property constituting roads has been turned into a "de facto public road" by the Permit and 2) that OSA's use of the roads is without any limitations. [At. Br. 37] As discussed above and in the Decision, the roads are located on State land that is subject to leases with limited grants and broad explicit reservations for the State. [Exc. 166-69] The Permit does not diminish CPAI's rights in any way. OSA's limited temporary use under the Permit is subject to significant limitations and conditions.

CPAI claims that the grant of the OSA Permit "would eviscerate decades of operator expectations and experience and forever chill future development of the North Slope." [At. Br. 39] CPAI does not identify any provision in the KRU Leases or a single

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[35] *Estate of Polushkin ex rel. Polushkin v. Maw*, 170 P.3d 162, 172 (Alaska 2007) (indicating a preference for reasonable interpretations over unreasonable or unlawful ones); *City of Kenai v. Cook Inlet Natural Gas Storage, Alaska, LLC*, 373 P.3d at 480.

piece of evidence in the record supporting the alleged expectation that the KRU Lessees have an unfettered right to prevent third parties from using the KRU roads. Notably, CPAI does not assert that DNR's Permit is unreasonable—nor could it. The Permit is conditioned on, among other things: (1) OSA coordinating its use of the Access Corridors with the KRU Operator consistent with best practice; (2) OSA not interfering with KRU operations; (3) CPAI's use of KRU Access Corridors to conduct unit operations having priority over OSA's access and use of the Access Corridors; and (4) OSA reimbursing the KRU Operator for the repair of any damage it causes to the Access Corridors. These conditions ensure that the KRU Lessees will continue to enjoy the full benefits of the purposes of the KRU Leases: "exploration, development, production, processing and marketing of oil, gas, and associated substances produced therewith. . ." [Exc. 192]

CPAI's claim that the State's action through the Permit to prevent harm to its development interests in the PKU somehow eviscerates the KRU Lessees' legitimate expectations or would chill North Slope development is unsupportable. [At. Br. 39] The record flatly refutes this claim as to CPAI's actions and those of other operators in the North Slope. For example, the 1982 land use permit authorizing construction of the portion of the gravel road towards Oliktok Point included provisions that the permittee was to make "good faith attempts" with any surface lessee and that "the director" could make "specific approval of operations" of a permittee following adequate provision for damages by the permittee. [Exc. 78] This permit for road construction also included a reservation in favor of the State to "grant additional permits and easements for right-of-

way or other uses to third-parties for compatible uses on or adjacent to the lands subject to this permit." [Exc. 79] As this permit was only for road construction, the land was the very land being improved by the road. Similar to the Permit here, the 1982 permit made it clear that the Director could approve operations for concurrent use. [Exc. 78-79] The KRU Lessees built some of the very roads at issue subject to a permit that contained a reservation allowing for reasonable concurrent uses on that land and that gave the director "control and dominion" for approval of operations under the permit.

While DNR has not in this case taken this approach, the KRU Agreement and plan of operations requirements allow the Commissioner to require operating procedures on roads which could include the requirement for third-party access like that in the Permit in order to minimize impacts. Para. 5.2.3, [Exc. 11] These examples refute CPAI's various "course of dealings" arguments, claims that the State cannot exercise "dominion or control" in the KRU, and arguments about the impact of the Permit on development. [At. Br. 6, 23, 25, 44] OSA is moving forward with roads in the PKU subject to reasonable concurrent uses. Finnex acquired Mustang Holding, LLC from AIDEA even though OSA held an overlapping easement as well for reasonable concurrent uses. [App. 2] CPAI itself moved forward with billions of dollars in investment in its Willow Project after this issuance of this Permit.[36] CPAI's message of doomed future investment is nothing more than disappointment that its unapproved, monopolistic, rent-seeking efforts have not been furthered by the Permit. [At. Br. 39]

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[36] *Sovereign Inupiat for a Living Arctic v. BLM*, 2023 WL 8618294 (D.Alaska) (CPAI "will also invest between $1 billion and $1.5 billion in the Willow project in calendar year 2024 alone.").

As even CPAI concedes, the KRU Lessees may only use the State's land for the "exploration, development, production, processing and marketing of oil, gas, and associated substances produced therewith." *See* [At. Br. 33-34]; [Exc. 192] Accordingly, the only legitimate expectations that the KRU Lessees can have under the KRU Leases must relate to exploration, development, production, and sale of oil and gas from its leases. And, the conditions in the Permit preserve those expectations consistent with the requirements of the Alaska Constitution.[37]

On the other hand, the KRU Lessees cannot claim any legitimate expectation to use their limited surface rights in the leases to block development of adjacent State lands. The KRU Leases did not grant the KRU Lessees the right to use the State's land "to exclude third parties from concurrent use of any portion of the surface to obtain preferential commercial terms for, or to control access. . ." [Exc. 166] Instead, Paragraph 29(e) reserves for the State the right to grant third parties access to and use of any and all of the State's leased land "for any other purpose now or hereafter authorized by law" and prevent the KRU Lessees from blocking reasonable concurrent use of State land. [Exc. 192] Put differently, the only reasonable expectation that the KRU Lessees could have regarding third party access to the KRU leased lands is that the State will step in to "ensure that private disputes between its lessees over concurrent use on State lands do

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[37] Alaska Const. Art. VIII, §8 "The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. *Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions*." (emphasis added).

not threaten the ability of the State to maximize resource development on any of its leased lands." [Exc. 177]

D. The KRU Agreement does not designate the KRU Roads as personal property.

CPAI argues that under the language of the KRU Agreement, the KRU roads are the "personal property" of the KRU Lessees and that the State "has no right to interfere with that which is considered 'personal property' under Section 3.7 of the KRU Agreement. [At. Br. 40] Yet, CPAI does not point to any language or provision in the KRU Agreement or the KRU Leases that provide that "personal property" can be used to override any of the State's other, explicit reserved rights under the KRU Leases. Put differently, nothing in the KRU Agreement provides that affixing personal property on the State's land gives the KRU Lessees the power to interfere with the State's right to grant reasonable concurrent use of its land. The KRU Lessees may own such personal property, but their right to use that property on State land is subject to the conditions of the KRU Leases. All that Section 3.7 provides is that the KRU Lessees remain free to remove their personal property from the Leasehold. [Exc. 17] In any event, the KRU roads are not personal property as defined in the KRU Agreement. CPAI admits that roads are not among the types of property specifically identified in Section 3.7 as personal property. It nonetheless contends that roads still fall within the definition of personal property because Section 3.7 includes "other facilities" as personal property. [Exc. 17] This construction, however, conflicts with Sections 1.20 and 14.4 of the KRU Agreement. [Exc. 13, 34]

Section 14.4 specifies what takes place after termination of the KRU Agreement. [Exc. 34] The KRU Lessees have three years after the termination of the KRU Agreement to remove their Unit Equipment unless the period is extended by DNR. [Exc. 34] "All other improvements, such as roads, well pads, water reservoirs, and material sites shall be abandoned and the sites rehabilitated to the satisfaction of the Commissioner unless the Commissioner determines that such improvements do not have to be rehabilitated. . ." [Exc. 34] Section 1.20 of the KRU Agreement defines Unit Equipment to be "all personal property, lease and well equipment, plants and other facilities and equipment used, taken over or otherwise acquired by the Working Interest Owners for use in Unit Operations." [Exc. 13] Given that Section 14.4 requires roads to be treated differently than Unit Equipment, it necessarily follows that roads are not Unit Equipment. And, because Unit Equipment includes both personal property and other facilities, roads are neither personal property nor an "other facility."

Despite the clarity and straightforward nature of Section 14.4, CPAI resorts to a circular argument: "[g]iven the reference to 'other facilities,' it follows that roads are improvements that are both 'Unit Equipment' under Section 1.2 and 'personal property' under Section 3.7." [At. Br. 43-44] The gaping hole in this argument, of course, is that nowhere in the KRU Agreement is "other facility" defined to include roads. To the contrary, Section 14.4 makes it very clear that roads are "other improvements" that are neither Unit Equipment nor personal property.

E. CPAI mischaracterizes the "course of conduct" and the actual "course of conduct" does not support its claims.

CPAI claims that two items support its assertion that "the conduct of the parties establishes the KRU Lessees as the sole owners of the KRU roads." [At. Br. 44-45] CPAI's mischaracterizes both items. First, CPAI asserts that an affidavit of Mr. Schell supports its claim that "[f]or 40 years, DNR has acknowledged the KRU Lessees' exclusive ownership and control over the KRU roads." Mr. Schell's affidavit does not do so. What Mr. Schell testifies to in his affidavit is that "[i]n the 40 years since the road system was built, the State has not used or attempted to use the KRU roads for third-party beneficiary business, dictated or attempted to dictate access to the KRU roads, or contributed to the ongoing maintenance, repair, operating or tax costs of the KRU roads." [Exc. 138] Contrary to CPAI's assertion, Mr. Schell does not testify that the State ever acknowledged the KRU Lessees' exclusive ownership and control over the KRU roads, that this issue was ever discussed with the State, or that there was ever any occasion where the State would have considered whether to grant a third party a Permit to access the KRU roads. As the Decision stated: "[t]hat DNR may not have faced a situation where the public interest in developing the State's natural resources was threatened by the failure of the parties to agree on road access in no way contradicts its power to act in the present circumstances." [Exc. 177]

CPAI also claims that "DNR has expressly determined . . . that a third-party may only use KRU infrastructure, including the KRU roads, through 'agreement' with the KRU Lessees." [At. Br. 25] The referenced Director's decision stated: "[t]he scope of

this Decision is limited to the determination of whether issuing an easement to OSA for the construction and operation of the Road on state land would be a use of the land that will be of greatest economic benefit to the State and the development of its resources." [R.003311] Individual decisions in specific contexts and circumstances as to what is and is not authorized does not bind or waive any authority for the Division to issue subsequent authorizations that implicate different authorities or address different circumstances. The language quoted by CPAI simply does not support CPAI's contention that DNR determined that a third-party may only ever use KRU roads through agreement with the KRU Lessees. DNR simply declined to address that question, one way or the other, and said as much. The decision quoted could reasonably reflect that agreements either already existed at the time of the decision or that DNR anticipated that parties would come to an agreement. [At. Br. 25] A statement in Division decisions that a particular decision "does not authorize use of those other improvements" does not stand for the proposition that DNR requires commercial agreements or lacks any authority as CPAI claims. [At. Br. 25] The statement supports only that the scope of that particular decision did not concern "other improvements." [R.003313] More tellingly, the statement that the Division "does not authorize use" in a decision supports the inverse that the Division may, can, or has in other instances "authorized use" of improvements, but is not for that particular decision. The statement would be an unnecessary addition should DNR's authority be as lacking as CPAI suggests. A lack of certainty as to similar permits supports that DNR does not lightly issue them and that parties are usually able to agree.

Given the Constitutional, statutory, and lease language, the Court need not even consider CPAI's "course of dealing arguments." Notably, CPAI's "course of dealings" indicates that it acknowledged and was fully aware that it had nonexclusive use to the surface and that DNR requires lessees to comply with reasonable concurrent use conditions of its leases and use of the surface estate. CPAI notes that it currently allows other companies, OSA, and local residents to use the roads without compensation. CPAI asserts that OSA by applying for the Permit is in breach of the Ad Hoc agreement. [At. Br. 12]. CPAI cannot claim that the use under the Permit is without authority by DNR and unprecedented while at the same time argue that OSA breached a term of the Ad Hoc Agreement by applying for the Permit. CPAI's breach argument hinges on the premise it was aware and acknowledged that DNR could grant use otherwise the provision would be unnecessary.[38]

III. CPAI's arguments from HB 39, an easement, property taxes, and estoppel are inapplicable to the Decision and cannot overcome the DNR's authorization of the reasonable concurrent use in the Permit.

A. HB 39 is inapplicable to the Decision.

CPAI's brief was overlength due to red herrings; chief among them, its post-decisional arguments regarding HB 39. HB 39, as an appropriation bill, cannot make substantive law changes. The "confinement clause" of Alaska's Constitution requires

[38] This provision of the Ad Hoc agreement could be interpreted to mean that the parties agree that the agreement itself does not create an adverse prescription to CPAI's interest. This interpretation precludes any claim of breach due to application for the Permit. Neither interpretation has any impact on DNR's authorities or the KRU Lease language. It does cast doubt on CPAI's claims of bad faith and the consistency of its own arguments.

bills for appropriations only contain—be confined—to appropriations.[39] The purpose of the clause is to "prevent[] the legislature from enacting substantive policy outside the public eye."[40] Yet, this is exactly the purpose that CPAI wildly extrapolates into this case with its arguments from HB 39. Ignoring the confinement clause, CPAI infers that the few sentences of HB 39 describing a calculation related to an AIDEA appropriation has, in some form or another: modified statute and regulation, reinterpreted longstanding oil and gas leases, walked back agency action, removed Constitutional requirements for concurrent use, and set natural resource development policy for the State. None of these can flow from a few sentences of text of a single-year appropriations bill.

CPAI's arguments as to HB 39 cannot form the basis for any estoppel or other legal support to reverse the Decision or invalidate the Permit. [At. Br. 26] The Decision predates the enactment of HB 39 so HB 39 could not be the basis for estoppel since it was enacted long after the Decision. Any variant of estoppel requires previous statements or actions.[41] HB 39 and the legislative materials relied on by CPAI contain no statements from DNR, only presentations from AIDEA. The emails between staff at AIDEA and former DNR Commissioner Feige predate the legislation, are largely authored by staff at AIDEA, and generally convey nothing more than requests for information on development and financing progress and AIDEA's restatements of arguments for an appeal over an easement. [Exc. 144]

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39 Alaska Const. Art II, §13.

40 21 P.3d. at 377.

41 *Cooper Leasing, LLC v. Woronzof Condo. Ass'n*, 548 P.3d 636, 650 (Alaska 2024).

CPAI's arguments as to the Governor's involvement in HB 39 are too general to be an acknowledgment of anything regarding DNR's authorities, let alone some sort of implicit repeal or disapproval of the authority underpinning the Permit as CPAI suggests. [At. Br. 26] The Governor's budget bill as introduced did not include the language found in the final version of the budget that CPAI relies. The bill as introduced included the "up to $17,907,000" as the amount "declared available" by the AIDEA board of directors for the appropriation from various AIDEA funds into the state general fund.[42] AIDEA over the years has varied the amount of its "dividend" to the general fund and the remaining money remains in various AIDEA related funds. [At. Ex. A at 21] The final version of HB 39 just appropriated a smaller dividend amount than the bill as originally introduced. It was not a "purchase" of anything by AIDEA or the State and the bill did not and could not purport to grant or change any authorities. The language relied by CPAI cannot have the import that CPAI ascribes to it. The language is descriptive, unenforceable, and vague "intention" language sometimes found in budget bills that just attempts to explain the intent behind a dividend number. The language does not even describe the intent of the legislature on how to spend the dividend as would be more common, but instead declares a vague explanation behind the amount; pure policy. The entire section could have been struck from the bill and the appropriation amount not changed.[43]

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42 https://www.akleg.gov/PDF/33/Bills/HB0039A.PDF

43 21 P.3d at 383 ("because we think it preferable to choose the reading that avoids unconstitutionality, we conclude this language is descriptive and non-binding.).

The Governor in consideration of a budget bill passed by the legislature cannot add language, increase appropriations, or rewrite provisions.[44] The amount in the budget bill as introduced was based on AIDEA's board recommendations and the Governor later in the process lacks authority to increase the amount of the dividend so nothing of legal significance can be gleaned here.[45] The legislative committee testimony relied on by CPAI contains few statements that even mention roads. Regardless of the legislative discussion on appropriations, nothing in the Alaska Statutes, applicable regulations, KRU Leases, and Alaska Constitutional provisions at issue in this appeal have been changed or could be changed by HB 39.

B. A State Assessment Review Board ("SARB) Decision is inapplicable to DNR's authorities for reasonable concurrent use and the grant of the Permit.

CPAI's arguments based on property tax are without merit. [At. Br. 23] First, CPAI's argument rests on the flawed premise that fee simple ownership with a right to exclude is a requirement for the property tax. The property tax requires returns to be filed by "every person having ownership or control of an interest in property taxable under this chapter. . ."[46] CPAI as the operator has "ownership or control of interest in property taxable" under AS 43.56 in the KRU. Full fee simple ownership with a

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44 *Id.* at 372 ("Alaska constitutional convention delegates intended to "create a strong executive branch with a strong control on the purse strings' of the state. But this control gives the governor no appropriation power.")(internal quotations omitted).

45 *Id.* at 371.

46 AS 43.56.070.

complete right to exclude is not required for taxing jurisdiction to lie.[47] In short, the nature of CPAI's interest in the KRU roads for the purposes of property taxation is immaterial to this case and cannot be any adverse "admittance" over DNR's authority to issue the Permit. Second, DNR's requirements for reasonable concurrent uses of state land and management of the use of state land of maximum benefit are independent of the Department of Revenue's administration of tax. The use of the word "owns" in a decision for a property tax appeal as a method of denoting the taxable nature of the property and requirement of taxpayers to file returns on the property is not applicable or binding on DNR's jurisdiction to issue the permit. [Exc. 39] The roads were mentioned in an illustrative list of production property, not as part of any particular findings about the status of the roads as "facilities." [Exc. 39] Nothing about a SARB Decision can bind or preclude any interpretation by DNR. [At. Br. 23]

C. Quasi-estoppel is inapplicable and preempted.

CPAI suggests based on *Estate of Lampert Through Thurston v. Estate of Lampert*, and *Jamison v. Consol. Utils*., that "quasi-estoppel" precludes the Permit.[48] [At. Br. 24] The cases are easily distinguishable from this one as neither of those cases involved State agencies with vastly different roles. CPAI's interest in KRU roads stem from the KRU Leases with DNR as the Lessor and agency statutorily delegated to administer state lands. DNR and the Department of Revenue are not the same parties for

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47 Alaska Const. Art. IX, §5; see, *Fairbanks N. Star Borough Assessor's Office v. Golden Heart Utilities, Inc.*, 13 P.3d 263, 272 (Alaska 2000) (allowing for the taxation of a possessory interest in a non-exclusive lease).

48 896 P.2d 214 (Alaska 1995); 576 P.2d 97 (Alaska 1978).

any estoppel argument and therefore there can be no inconsistent position from the "same party" to form a basis for equitable quasi-estoppel.

As an equitable and common law principle, quasi-estoppel is highly dependent on facts of the case.[49] CPAI's claims here are not akin to the aged heir on a fixed income in *Lampert* seeking to remain in a home.[50] The other authority relied on by CPAI, *Jamison,* concerned a dispute between a union employee and a utility company over allegations of past due wages in a union agreement.[51] As for allegations about DNR in other decisions or from emails not even directed at CPAI, no reading of those documents could support a factual finding by this Court that DNR's grant of the Permit here is "so inconsistent" to be "unconscionable" that "to prevent injustice" equity requires revocation of the Permit so that CPAI can exert upmost commercial pressure over other oil and gas lessees.[52] [At. Br. 24, 26, 45] CPAI cannot meet the elements required for "equitable quasi-estoppel." Finally, quasi-estoppel is a common law doctrine that cannot apply against DNR due preemption stemming from AS 38.95.010, prohibiting prescription against an interest of the state to land, and the reservations clause in the KRU Leases implementing the Alaska Constitution.[53]

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49 576 P.2d at 102.

50 896 P.2d 214. *Lampert* was applying Hawaii case law, not Alaska case law.

51 576 P.2d at 104.

52 548 P.3d at 650-52.

53 *Donnybrook Bldg. Supply Co., Inc. v. Alaska Nat. Bank of North*, 736 P.2d 1147, 1149 (Alaska 1987)(mechanics' lien law preempting common law and equitable remedies.); *City of Kenai*, 373 P.3d at 480.

IV. The Permit is not a taking under Alaska law.

There would be no purpose behind the language in the Alaska Constitution Art VIII, §8 requiring "[l]eases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use" if permits could only be granted on land where there are no roads or improvements that could be damaged by concurrent use. Similarly, as the Alaska Constitution itself anticipates that permits will be issued with conditions governing reasonable concurrent use and that those permits provide for payment for damages then those permits cannot constitute a "taking" in violation of the Alaska Constitution as CPAI alleges. [At. Br. 63] The KRU Leases and KRU Agreement contain limited grants by the State with express reservations in favor of the State to allow for required reasonable concurrent uses. CPAI's arguments from Art. VIII, §16 of the Alaska Constitution for its claims to just compensation are inapplicable. [At. Br. 63] The KRU Leases and KRU Unit Agreement grant is limited and reservations broad such that no "involuntarily divest[ment]" of any rights can be found, the KRU Leases require allowance for reasonable concurrent uses like those authorized in the Permit. Moreover, as the Decision explained, the KRU roads are not "improvements" for the purposes of Art. VIII, §16 because the roads did not exist at the time of statehood.[54] [Exc. 190]

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[54] *State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1213-14 (Alaska 2010) (explaining that tidelands that were unimproved at the time of statehood would be state property that could be disposed of only in accordance with the other provisions of article VIII.").

CPAI disputes the Decision's characterization of the Permit as a temporary limitation. [At. Br. 64] The Permit is revocable for violations of conditions. [Exc. 141] Contrary to CPAI's assertions, those conditions are not without cost to OSA. The Permit also expires after five years and is revoked when the parties reach a long-term agreement. [Exc 111] CPAI argues that the Permit means that OSA "has no incentive to negotiate at all." [At. Br. 65] Given the necessity of access and the revocable nature of the Permit, its expiration date, and the increased scrutiny by DNR as part of the conditions for the Permit, CPAI's assumptions about OSA's incentives for negotiations are not reasonable ones. CPAI critiques that the Permit does did not articulate criteria for monitoring the conditions, but the Permit conditions require reporting to DNR. [Exc. 123-124] Again, CPAI did not challenge or appeal any of the actual Permit conditions.

A. Reasonable concurrent uses under the Permit are not inverse condemnation.

In *Parker v. Alaska Power Authority*, Mr. Parker held a mining claim on land owned by the State and the Alaska Power Authority had built two power line towers under a right-of-way permit issued by the State over the same land.[55] The Court in *Parker* considered the common law pertaining to mineral owner's rights to surface estate noting that the mineral interest could use the surface estate as "reasonably necessary to obtain access to the minerals" and the reasonableness of the conduct could depend on consistency "with the practices of the extraction industry.[56]" The Court in *Parker* found this common law "not applicable to lands owned by or devolving from the State of

[55] 913 P.2d 1089, 1089 (Alaska 1996).
[56] *Id.* at 1090.

Alaska."[57] The Court in *Parker* expressly declared the limited right to surface for Mr. Parker as that "necessary for his mining activities, but his surface uses are subject to reasonable concurrent uses."[58] In short, the use of the surface by mineral interest holders on State land is even more limited than the "reasonableness" at common law as it subject to reasonable concurrent uses.

The Court in *Parker* held that "[t]he State, as the owner of the surface estate, is permitted to convey all or part of its interest to other parties and it has done so in this case through the right-of-way grant to [the Alaska Power Authority]."[59] The grant by the State of the right-of-way to the Alaska Power Authority was not an acquisition of title to Mr. Parker's limited interest in the surface estate. Similarly, the State's issuance of the Permit to OSA carries even less weight than the right-of-way in *Parker*. The Court opined in dictum that if Mr. Parker could "demonstrate that the APA towers substantially interfere with his mining activity" that Mr. Parker could initiate an inverse condemnation action, but the Court refrained from expressing views as to how that such a case could be resolved, implying that maybe there was no legal basis.[60]

Significantly, even a liberal reading of this dictum suggests that the Court would require at a minimum showing of "substantial interference" with actual mineral activity. The issuance of the Permit cannot satisfy such a showing and even if an inverse condemnation action could be sustained in the future it would be limited to the activity

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57 *Id.*
58 *Id.* at 1091.
59 *Id.*
60 *Id*.

actually substantially interfering with oil and development under the KRU Leases. This is simply not the case before this Court. The Permit itself effects no interference any inverse condemnation action. Moreover, the Permit requires OSA to take action to prevent unreasonable interference and is revocable by the DNR for violation of its terms. From a factual standpoint, an inverse condemnations action could not be made against the State and the insurance and indemnification provision are designed to address any harms without the need for such an action even if one could be sustained. CPAI's bridge-troll-blustering in this case to extract commercial rents from another oil and gas lessee is not a reasonable surface use for an oil and gas lessee that is being "interfered" with by the Permit.

B. The Permit was not an exercise of the power of eminent domain.

ConocoPhillips asserts, without citation or without consideration of the breadth of Alaska law, that DNR has not been delegated eminent domain authority. [At. Br. 2]. This is incorrect and inapplicable to the Permit at issue in this case.[61] Alaska Statute 09.55.240(d) is also contrary to CPAI's arguments. [At. Br. 58] This statute provides that the prohibition of use of the power of eminent domain to "acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes" does not apply if "the transferred property

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[61] See, *Arco Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64 (Alaska 1975) (Alaska legislature delegating in AS 38.35.130 DNR with authority to delegate eminent domain powers for construction of the Trans-Alaska Pipeline); *Williams v. City of Valdez*, 603 P.2d 483, 491 n.23 (Alaska 1979) (noting legislation in 1971 that added to statute DNR's authority to determine the necessity of a fee simple taking for "its state purposes".).

is used for a private way of necessity to permit essential access for extraction or use of natural resources."[62] The Permit did not "transfer title" to "private property" within the meaning of this statute.[63] Alaska Statute 09.55.390 provides that for the acquisition of easements for the "transmission and distribution of . . . gas" that the court may grant the plaintiff seeking the easement possession "[i]f the court finds that urgent public necessity requires." Neither the declaration of taking process nor condemnation proceedings contemplated in AS 09.55 are applicable here however because CPAI does not have the character of total fee title to the "road" contemplated in those statutes. Importantly, the Permit does not grant OSA any such title either. On gravel roads, CPAI owned the gravel when it acquired the gravel, a commodity. However, CPAI's "dominion" over gravel materially changed when the gravel became part of a road on state land built under a limited grant and reservations. CPAI was authorized to place the gravel for its construction of the road and subsequent use of the road was entirely based on authorizations from the State.

C. The Decision did not err in finding that CPAI had not shown that the Permit was a taking under the U.S. Constitution.

CPAI argues that the Permit is a *per se* taking of CPAI's "right to exclude" OSA from the KRU roads "by virtue of [CPAI's] exclusive interest in the project subject to the Leases." [At. Br. 61-62] CPAI relies on *Cedar Point Nursery v. Hassid* for this

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62 AS 09.55.240(d).

63 The classifications of land subject to be taken are all real property interests in the form of fee simple estates, easements, and rights of entry to take from the land (dirt, gravel, stones, trees, and timber). AS 09.55.250. The right of entry upon an occupation of land is also a classification of estates and land subject to be taken and the statute contemplates that DNR could make that taking. AS 09.55.250(3).

argument.[64] The U.S. Supreme Court in *Cedar Point Nursery* considered a state regulation that granted labor organizations a right to access agricultural employer's property for union activity.[65] In *Cedar Point Nursery*, the Court reiterated that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[66] The Court held that the regulation constituted a *per se* physical taking.[67] The Decision affirming the Permit did not take this essential property stick of the "right to exclude" because CPAI never had it. [Exc. 184] *Cedar Point* was premised on the employers having a full bundle of rights which is not present for the KRU Lessees. The KRU Leases and KRU Agreement provide limited grants of surface use and contain broad reservations allowing for concurrent use of state land like that authorized in the Permit. While KRU Lessees may have the right to exclude some person, due to safety concerns for example, any right to exclude against the State, an order of the State, or in this case a Permit for reasonable concurrent use was not conveyed in the lease grants.

CONCLUSION

The Decision reasonably affirmed the grant of the Permit that effectuates reasonable concurrent use of state land. CPAI's arguments are contrary to the limited grant and broad reservations required in state oil and gas leases. The Decision should be affirmed and the appeal denied.

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64 594 U.S. 139, 143 (2021).
65 *Id.* at 143.
66 *Id.* at 150.
67 *Id.*