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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,  
  
Appellee.

Case No. \_\_\_\_\_

**APPEAL OF FINAL DECISION ON  
APPEAL NO. 22-015, MLUPNS 22-  
001, OIL SEARCH (ALASKA), LLC,  
KRU ACCESS CORRIDORS  
MISCELLANEOUS LAND USE  
PERMIT APPROVAL, DATED  
DECEMBER 1, 2022**

**STATEMENT OF POINTS ON WHICH APPELLANT  
INTENDS TO RELY ON APPEAL**

Appellant ConocoPhillips Alaska, Inc. ("CPAI"), as operator for and on behalf of the Kuparuk River Unit ("KRU") oil and gas lease lessees (collectively the "KRU

Lessees”),<sup>1</sup> appeals the Department of Natural Resources Commissioner’s Final Decision on Appeal No. 22-015, MLUPNS 22-001, Oil Search (Alaska), LLC, KRU Access Corridors Miscellaneous Land Use Permit Approval, Dated December 1, 2022 (the “Decision”). This Statement of Points on which Appellant Intends to Rely on Appeal is filed pursuant to Appellate Rule 602(c)(1)(A).

The Commissioner erred in affirming the Department of Natural Resources, Division of Oil and Gas’s (“DNR”) decision to issue a miscellaneous land use permit (the “Permit”) granting Oil Search (Alaska), LLC (“OSA”) the right to use 75.5 miles of the KRU road system—a system engineered, constructed, operated, and maintained for decades at the sole expense of the KRU Lessees, who use the roads to operate an active oil and gas producing unit. The annual cost to maintain the KRU roads ranges from \$10-\$20 million; the cost to build comparable roads today would be in excess of \$1 billion. In the 40 years since the KRU roads were first built, the State has never contributed to their ongoing construction, maintenance, repair, operating costs, or taxes.

Far from impeding North Slope development, for years the KRU Lessees have allowed OSA to use the KRU roads for pre-development access to the Pikka Unit. That use has been at no cost to OSA. Going forward, OSA intends to use the KRU roads to construct and operate the Pikka Unit, relying on high-volume, heavy traffic to meet its needs. For fair compensation, the KRU Lessees are willing to grant OSA the requested access. OSA instead petitioned DNR to allow it access for free. Despite OSA’s material change in use, and the associated risks and costs the KRU Lessees are certain to incur, DNR has granted OSA the right to use the KRU roads for years to come—without any compensation to the KRU Lessees or regard for their 40-year investment.

DNR’s exercise of power is as unprecedented as it is improper. Never before has

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<sup>1</sup> Throughout this filing, references to CPAI are intended to include ConocoPhillips Alaska, Inc., as the KRU operator, acting on behalf of itself and the other KRU Lessees, Chevron U.S.A. Inc. and ExxonMobil Alaska Production Inc.

DNR relied on a miscellaneous land use permit to grant a third-party the right to use privately-owned improvements to land. DNR has no authority to abrogate the KRU Lessee's exclusive property rights under the guise of a permit. Neither the leases nor the applicable statutory and regulatory scheme bestow upon DNR the power to exercise dominion over the KRU roads—let alone grant a third party access without consent. If the State views the KRU Lessees' consent as unnecessary, Alaska law prescribes the procedure: the Alaska Department of Transportation may seek to exercise its eminent domain power and pay the KRU Lessees just compensation. But DNR has not been vested with such power—and DNR cannot circumvent the United States and Alaska Constitutions in the purported name of “public interest.”

By this Appeal, the KRU Lessees seek to advance the public's interest in developing the North Slope: for no operator will invest in North Slope infrastructure that is eternally at risk of being used by third parties without compensation or even consent. Because DNR has no authority under contract, statute, or regulation to grant a third party the right to use the KRU roads, the Decision must be reversed and the Permit revoked.

CPAI intends to rely on the followings Points of Error:

1. The Commissioner's Decision is arbitrary and capricious, violates the KRU Lessees' private property, due process, and other rights under the United States and Alaska Constitutions, commits error as a matter of law, and, to the extent the Commissioner has discretion, abuses that discretion.

2. The Commissioner erred as a matter of law in the interpretation and application of the Form No. DL-1 Lease (the “Lease”) and the DMEM-4-83 lease form. The Commissioner's interpretation of the Lease is unreasonable.

3. The Commissioner erred in interpreting and defining state-owned land to include private improvements installed on the land under existing oil and gas leases.

4. The Commissioner erred in concluding that the KRU Lessees do not have an exclusive right in, or ownership of, the improvements installed by the KRU Lessees during the term of Lease.

5. The Commissioner erred in concluding that the KRU roads are not “structures” under the Lease and misinterpreted, or deemed irrelevant, Paragraphs 36 and 40 of the Lease in reaching that conclusion.

6. The Commissioner erred in concluding that the reference in the Lease’s granting clause to “exclusivity” applies only to the “purpose” of the Lease, not to the KRU Lessees’ interest. This construction is too narrow and ignores basic grammar.

7. The Commissioner erred in concluding the State’s reservation of a right under the Lease to enter upon and use “said land” allows the State to grant third parties the right to use during the Lease term improvements installed on the land by the lessee pursuant to the Lease.

8. The Commissioner erred in concluding that “the State’s reservation of rights in the Leases ... to prevent harm to the public interest” imbued DNR with the authority to grant the Permit allowing OSA to use the KRU roads.

9. The Commissioner erred in concluding that the State’s “reserved interests in underlying lands” allows the State to grant third party use of “unit improvements, infrastructure, or private property” placed on the land.

10. The Commissioner erred in interpreting the purpose of the Lease to preclude the KRU Lessees from charging third parties for use of the KRU roads.

11. The Commissioner erred in interpreting and applying the Alaska Constitution to modify the rights of the parties, or grant the State additional rights not otherwise granted or reserved, under the plain language of the Lease.

12. The Commissioner erred as a matter of law in its interpretation and application of the KRU Unit Agreement and its amendments (collectively “KRU Agreement”). The Commissioner’s interpretation of the KRU Agreement is unreasonable.

13. The Commissioner erred in concluding that the KRU roads are not “other facilities” or “materials” under the KRU Agreement.

14. The Commissioner erred in concluding that the KRU roads are not “personal property” under the KRU Agreement.

15. The Commissioner erred in concluding that the KRU Lessees have a contractual obligation under the KRU Agreement to “minimize surface impacts” of third party development beyond the KRU Leases.

16. The Commissioner erred in deeming irrelevant the parties’ course of conduct in construing the terms of the Lease and the KRU Agreement.

17. The Commissioner erred in affirming the grant of the Permit because DNR is estopped from taking the position that the KRU roads are not owned by the KRU Lessees.

18. The Commissioner erred in failing to conclude that OSA should be estopped from obtaining the Permit. Under the Ad Hoc Agreement between the KRU Lessees and OSA, OSA acknowledged that the KRU roads were owned by the KRU Lessees, and that the KRU Lessees have a right to exclude OSA from use at any time. OSA also has acknowledged that roads are private property that require compensation for use. OSA attempted to sell its 11-mile Pikka Unit road to the Alaska Industrial Development and Export Authority (“AIDEA”) for \$200 million, after which OSA proposed that AIDEA would charge OSA tolls for their use at a minimum \$1.4 million dollars per road-mile per year, the same per-mile annual amount that the KRU Lessees proposed for OSA’s use of the KRU roads. The admission by OSA that such roads are private property compels a finding, if relevant, that the KRU Lessees’ proposed terms are equitable and OSA is responsible for the “impasse” or not negotiating in good faith.

19. The Commissioner erred in concluding that a 2021 Alaska Department of Revenue decision expressly stating that the KRU Lessees own the KRU roads is irrelevant and not binding on DNR.

20. The Commissioner erred in concluding that DNR can, via a miscellaneous land use permit, grant third parties use of private improvements on state land, without any precedent, enabling statute, or statutory or regulatory regime.

21. The Commissioner erred in the interpretation and application of the statutory and regulatory scheme from which DNR purports to draw authority and jurisdiction to

issue the Permit granting OSA use of the KRU roads. The Commissioner's interpretation of this statutory and regulatory scheme is unreasonable.

22. The Commissioner erred in the interpretation and application of 11 AAC 96.010. The Commissioner's interpretation of 11 AAC 96.010 is unreasonable.

23. The Commissioner erred in the interpretation and application of 11 AAC 96.005 – 11 AAC 96.007. The Commissioner's interpretation of 11 AAC 96.005 – 11 AAC 96.007 is unreasonable.

24. The Commissioner erred in the interpretation and application of the Alaska Land Act. The Commissioner's interpretation of the Alaska Land Act is unreasonable.

25. The Commissioner erred in the interpretation and application of AS 38.05.020. The Commissioner's interpretation of AS 38.05.020 is unreasonable.

26. The Commissioner erred in the interpretation and application of AS 38.05.035. The Commissioner's interpretation of AS 38.05.035 is unreasonable.

27. The Commissioner erred in the interpretation and application of AS 38.05.850. The Commissioner's interpretation of AS AS 38.05.850 is unreasonable.

28. The Commissioner erred in concluding that DNR's general "mandate" "to minimize the adverse impact of exploration, development, production, and transportation activity" under AS 38.05.180(p) imbues DNR with broad authority to issue the Permit granting OSA use of the KRU roads.

29. The Commissioner erred in concluding that the general purpose of 11 AAC 96.005 "to manage uses and activities on state public domain land, including shoreland, tideland, and submerged land, in order to minimize adverse effects on the land and its resources" applies to private improvements on the land (constructed pursuant to existing oil and gas leases) and imbues DNR with broad authority to issue the Permit granting OSA use of the KRU roads.

30. The Commissioner erred in interpreting and expanding DNR's enabling statutes to grant it authority over improvements beyond those "belonging to the State."

31. The Commissioner erred in the interpreting and expanding the Alaska Constitution to grant DNR authority to issue a miscellaneous land use permit to grant OSA use of the KRU roads, when such authority has not been granted by the Legislature through enabling statutes or by applicable regulation.

32. The Commissioner erred in concluding that the “constitutional requirement” of “reasonable concurrent use” of state land imbues DNR with broad authority to issue a miscellaneous land use permit to grant OSA use of the KRU roads.

33. The Commissioner erred in concluding that DNR has jurisdiction or authority to adjudicate whether commercial terms for KRU road use are “equitable,” without any precedent, enabling statute, or statutory or regulatory regime setting forth such authority or any rules or limits on its exercise. Absent any scheme, guidance, or other policy document setting forth any rules or limits on what qualifies as “equitable,” DNR’s exercise of any such authority is inherently arbitrary.

34. The Commissioner erred in asserting that DNR will revoke the permit if “OSA fails to negotiate in good faith to reach a commercial road use agreement” without authority or jurisdiction over private commercial negotiations between the KRU Lessees and OSA. The Commissioner also failed to articulate any criteria for determining what constitutes good faith negotiations by the parties, or whether and how the KRU Lessees may seek to have the Permit revoked due to OSA’s failure to negotiate in good faith, making any such DNR determination necessarily arbitrary.

35. The Commissioner erred in concluding that OSA’s use of the KRU roads to access the Pikka Unit, under the terms of the Permit, constitutes “reasonable concurrent use” of state land.

36. The Commissioner erred in concluding that, for purposes of the public interest and minimizing surface impacts, the only available alternative to DNR granting the Permit to OSA is the development of “a second road network” adjacent to the KRU roads. DNR failed to consider applicable eminent domain law, which requires DNR to request

that the Alaska Department of Transportation condemn the KRU roads to convert them to public use and pay just compensation to the KRU Lessees, via judicial proceedings.

37. The Commissioner erred in deeming irrelevant to the public interest, the negative effect on development of state resources resulting from DNR's allowance of third party use of existing improvements or infrastructure, constructed at the expense of existing lessees, without compensation.

38. The Commissioner erred in concluding that the Permit "preserves the status quo," particularly when DNR admits it is unprecedented to rely on a miscellaneous land use permit to grant a third party access to leasehold improvements.

39. The Commissioner erred in disregarding the many decades and course of conduct between the State and its lessees on the North Slope.

40. The Commissioner erred in concluding that CPAI does not have a private property right in the KRU roads while disregarding that: (1) the KRU Lessees built the KRU roads with gravel purchased from the State at considerable cost; (2) the KRU Lessees pay \$10MM-\$20MM to maintain the KRU roads; (3) building such roads today would cost in excess of \$1 billion; (4) the KRU Lessees pay annual property taxes on KRU property, which includes the KRU roads; (5) the KRU Lessees remain responsible to remediate and potentially remove the KRU roads when the Leases expire; and (6) the State assumes no responsibility for maintenance or liability associated with improvements constructed on state land, meaning the responsibility falls exclusively to the KRU Lessees.

41. The Commissioner erred in disregarding the risks and liabilities imposed on the KRU Lessees resulting from high volume/heavy load third-party traffic across a large, active oil and gas producing unit with associated pipelines. The Permit provides no protection or indemnity to the KRU Lessees for the risks associates with OSA's activities.

42. The Commissioner erred in concluding that the Permit is not a disposal of land of which prior public notice was required under the Public Notice Clause of the Alaska Constitution, article VIII, section 10.



43. The Commissioner erred in concluding that DNR was not required to provide public notice prior to issuing the Permit.

44. The Commissioner erred in concluding that the Permit is not functionally irrevocable.

45. As support for concluding that the Permit is revocable, the Commissioner erred by relying on the premise that the Permit will be revoked automatically as soon as the parties reach a commercial agreement. This premise is illusory and based on a disputed fact, as OSA has no incentive to agree to any commercial terms, given that OSA now has the ability under the Permit to use the KRU roads without providing compensation to the KRU Lessees.

46. The Commissioner erred in granting the Permit, which qualifies as an unconstitutional taking under the U.S. Constitution and the Alaska Constitution.

47. The Commissioner erred in disregarding Alaska eminent domain law. The Alaska Legislature has not vested DNR with the power of eminent domain. If DNR seeks to take the KRU roads, DNR must request that the Alaska Department of Transportation condemn the KRU roads to convert them to public use and pay just compensation to the KRU Lessees, via judicial proceedings.

48. The Commissioner erred in concluding that the Permit does not constitute a taking under the U.S. Constitution.

49. The Commissioner erred in concluding that the Permit does not constitute a taking under the Alaska Constitution.

50. The Commissioner erred in concluding that the Permit does not divest the KRU Lessees of their exclusive right to use their improvements under Alaska Constitution Article VII, Section 16.

51. The Commissioner erred in concluding that granting use of the KRU roads to a third party is not a “deprivation of economic advantages of ownership” under the Alaska Constitution.

52. The Commissioner erred in concluding that only private improvements constructed prior to statehood are protected under Section 16 of Article VIII of the Alaska Constitution.

53. The Commissioner erred in deeming irrelevant that the Permit does not provide the KRU Lessees with any protection from the liabilities that may result from OSA's activities unreasonably interfering with the KRU Lessees' use of the KRU roads.

54. The Commissioner erred by failing to grant an oral hearing on the basis that there are no disputed questions of fact, and then relying on disputed facts to issue the Permit.

55. While the question of whether DNR has the power to issue the Permit is inherently a legal one, the Decision relies on numerous factual findings that are disputed by the KRU Lessees, including, but not limited to:

- (i) The KRU Lessees "ha[ve] not allowed [OSA]to access unit roads for purposes of developing adjacent leaseholds."
- (ii) KRU road use "negotiations broke down in April 2020 when Oil Search (Alaska) ("OSA") informed CPAI it did not intend to rely on or assist in improving existing KRU processing facilities that are operated by CPAI."
- (iii) "To stay on schedule for development of the Pikka Project, and with a breakdown in negotiations with CPAI, OSA applied for the Permit."
- (iv) The KRU Lessees have engaged in "a strategy of delaying exercising this right [to obtain a commercial agreement for use of KRU roads] in favor of extended dispute."
- (v) "CPAI made its own negotiating choices and the economic consequences of those choices must be borne solely by CPAI."
- (vi) The KRU Lessees have sought "to prevent or impede the people of the State of Alaska from realizing the benefits of development on adjacent State lands such as in the PKU."
- (vii) The KRU Lessees sought "to prohibit reasonable concurrent use" of State land.

- (viii) The only available alternative to DNR granting the Permit to OSA is the development of “a second road network” adjacent to the KRU roads.
- (ix) The Permit is “necessary to protect the public interest” and “minimizes surface disturbance.”
- (x) The KRU Lessees sought to “interfere[e] with the development of adjacent State lands.”
- (xi) The KRU Lessees sought “to obtain preferential commercial terms” for KRU road use.
- (xii) The KRU Lessees, not OSA, are at fault for the failure to reach a commercial agreement for KRU road use.
- (xiii) The commercial terms that the KRU Lessees have previously proposed are not “equitable.”
- (xiv) OSA has an incentive to continue to negotiate with the KRU Lessees in good faith or agree to any commercial terms, given that OSA already has the right to use the KRU roads without providing compensation to the KRU Lessees under the Permit.

56. These factual findings are not supported by substantial evidence. Either the evidence is insufficient or there is no evidence at all.

57. The Commissioner erred in relying on these disputed facts in interpreting and applying the Lease, and statutory and regulatory scheme under which DNR purports to have authority to issue the Permit.

58. Given the Decisions relies on numerous disputed facts, the Commissioner erred in refusing the KRU Lessees’ request for a hearing under 11 AAC 02.030(b) and 11 AAC 02.030(a)(13). This error violated the KRU Lessees’ due process rights and precludes effective review.

The KRU Lessees reserve the right to supplement this Statement of Points on which Appellant Intends to Rely on Appeal. A point on appeal stated generally is not intended to be limited to only those related or similar points of appeal stated specifically. Instead, a

point on appeal stated generally is intended to include all points of appeal that could be included within the general statement.

DATED: December 30, 2022

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By   
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I certify that on December 30, 2022, a copy of the foregoing was served by certified mail, return receipt requested on:

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