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SENT VIA READ RECEIPT EMAIL & CERTIFIED MAIL

Re: Decision on Appeal No. 22-015, Department of Natural Resources, Commissioner's Office—MLUPNS 22-001, Oil Search (Alaska), LLC, KRU Access Corridors Miscellaneous Land Use Permit Approval

I. DECISION SUMMARY

On April 5, 2022, the Department of Natural Resources, Commissioner's Office (DNR) received an appeal submitted by ConocoPhillips Alaska, Inc. (Appellant or CPAI). CPAI requests the Commissioner's review of the Director of the Division of Oil and Gas's (Division) March 29, 2022 decision granting miscellaneous land use permit MLUPNS 22-001 (Decision and/or Permit). The Permit recipient is OilSearch (Alaska), LLC (Applicant or OSA), and the authorization grants OSA the right to year-round use of an access corridor and existing, overlaid gravel roads on the North Slope within the Kuparuk River Unit (KRU), which is operated by CPAI. For the following reasons the appeal is denied, the Decision is affirmed, and the Permit remains in effect.

II. FACTUAL AND PROCEDURAL HISTORY

a. The Pikka Unit

The Pikka Unit (PKU) is located in Alaska's central North Slope area in the vicinity of the Colville River delta.[1] Situated adjacent to the KRU and Colville River Unit, the PKU—with OSA as its operator—covers approximately 63,304 acres of land owned either by the State or jointly by the State and the Arctic Slope Regional Corporation that have been leased for oil and gas exploration and development.[2] In 2014, the Division received an application for the formation of the PKU, which it approved and established in 2015.[3]

The PKU is positioned to benefit from existing infrastructure to its east,[4] including the Kuparuk pipeline, which is a common carrier of crude oil to the Trans Alaska Pipeline System (TAPS), and the existing road networks in the Kuparuk River and Prudhoe Bay Units.[5] For the State and people of Alaska, production from the PKU is a promising development for the North Slope following setbacks to the oil industry due to both the Covid-19 pandemic and extended periods of oil price uncertainty.[6] Recoverable resource estimates for the PKU range between 397 to 768 million barrels, and the Applicant believes the project will employ 2,600 construction-phase and 500 long-term operating jobs within the State.[7] In 2019, OSA suggested that the Pikka project could produce an additional 120,000 barrels of oil per day at its peak into TAPS.[8]

b. The Kuparuk River Unit

Originally formed in 1981, the KRU is located west of the Prudhoe Bay Unit and southwest of the Milne Point Unit on Alaska's central North Slope, and is operated by

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1 DNR, DOG, Approval of the Application to Form the Pikka Unit, Findings and Decision of the Dir. of DOG, at 5 (Jun. 18, 2015).

2 *Id*. at 3.

3 *Id*.; *see also,* Div. of Oil and Gas, Director's Decision, MLUPNS 22-001 (Mar. 29, 2022) (Decision).

4 The presence of existing infrastructure will reduce the amount of greenfield site development necessary to begin immediate production; *see also,* Definition of GREENFIELD SITE, Black's Law Dictionary (11th ed. 2019) (Land that has never been developed).

5 *See,* The Link: The official magazine of the Alaska Support Industry Alliance, "Santos Forges Ahead with Pikka" (Oct. 2022) (available at: http://www.journalgraphicsdigitalpublications.com/epubs/FireWeed/TheLinkFallOct2022/viewer/desktop/) (last accessed Nov. 21, 2022).

6 *Id*.

7 *Id*.

8 Anchorage Daily News, "Oil Search gets federal approval for Nanushuk project" (May 26, 2019) (available at: https://www.adn.com/business-economy/energy/2019/05/26/oil-search-gets-federal-approval-for-nanushuk-project/) (last accessed Nov. 18, 2022).

CPAI.[9] The KRU contains 798 active wells and has been expanded twelve times throughout its history.[10] Producing an average of 91,400 barrels per day in 2020, this development has been tremendously beneficial to the State of Alaska. The KRU maximizes the use of the State's oil resources consistent with the public interest as the Alaska Constitution requires.[11] The KRU promises to be a critical source of North Slope production for years to come.[12]

The Appellant's development and resource extraction within the KRU is governed by Alaska law, the KRU Unit Agreement (UA), and KRU Leases (Leases).[13] The initial Unit Plan of Development (POD) is also incorporated by reference and included within the UA, which discusses the construction of a "spine road" necessary for the construction of drill sites and facilities.[14] The initial POD provided that the spine road would expand over the phases of development and life of the KRU project.[15] It is this "spine road" corridor that is the subject of the current appeal—as discussed below—based on OSA's application to the Division for access and use.

c. OSA application for a permit pursuant to 11 AAC 96

On February 9, 2022, OSA submitted a "Miscellaneous Land Use Permit Application for Access Corridors within Kuparuk River Unit" (Application) to the Division.[16] In its cover letter, OSA requested "non-exclusive access and use of certain corridors within the boundary of the [KRU] leases … because it is unable to reach an agreement with [CPAI] on what constitutes 'reasonable concurrent use' of Access Corridors within KRU."[17] As explained by OSA, despite a temporary agreement with CPAI to use the access corridors within the KRU, efforts to reach a permanent agreement allowing long-term, reasonable concurrent use, and compensation between the two parties have been unsuccessful.[18]

The Division sent the Application out for agency review and offered CPAI an opportunity to provide comments on February 15 and 25, 2022.[19] DNR's Statewide

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9 DNR, DOG, Kuparuk River Unit 2021 POD – Approved, at 1 (Jul. 23, 2021).

10 *Id*.; DNR, DOG, Approval of the Twelfth Expansion of the Kuparuk Participating Area, Findings and Decision of the Director, at 3 (Dec. 7, 2015).

11 Alaska Const., art. VIII, § 1.

12 DNR, DOG, Kuparuk River Unit 2021 POD – Approval, at 2.

13 *See generally*, CPAI Mem. in Supp. of App., at Exs, 2 & 3 (May 18, 2022) (CPAI Memo).

14 *Id*. at Ex. 3, Ex. E (Unit Plan of Development).

15 *Id*.

16 OSA, "Miscellaneous Land Use Permit Application for Access Corridors within KRU" (Feb. 9, 2022) (Application).

17 *Id*., Cover letter at 1.

18 *Id*. at 1-3.

19 *See* DOG email re: Interagency Review: MLUPNS 22-001 OSA KRU Access Corridor (Feb. 15, 2022); DOG letter to CPAI re: OSA Application (Feb. 25, 2022).

Abatement of Impaired Lands section and two sections of the Alaska Department of Environmental Conservation submitted comments.[20] The Division also requested and received additional information from the Applicant related to the types of vehicles intended for use along the Access Corridor.[21] CPAI provided timely comments opposing OSA's Application on March 14, 2022,[22] which led to a series of responses submitted to the Division by both parties.[23]

On March 29, 2022, the Director of the Division approved the Application and issued the Decision and Permit.[24] The Permit provided for "reasonable concurrent uses on state land consistent with previously approved Division authorizations."[25] The Decision and Permit authorized year-round access to OSA for reasonable concurrent use and access to 75.5 miles of existing gravel roads within the KRU—subject to compliance with stipulations including but not limited to provisions regarding indemnification, reserved rights to the State, insurance, and bonding.[26] It also included agency comments and Division responses, comments from CPAI as the operator of the KRU, Division responses to CPAI comments, a map of the Access Corridor, and required a signature by an authorized representative of OSA to acknowledge and assent to its terms.[27]

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[20] *See* SAIL email re: Interagency Review: MLUPNS 22-001 OSA KRU Access Corridor (Feb. 18, 2022); DEC email re: Interagency Review: MLUPNS 22-001 OSA KRU Access Corridor (Feb. 28, 2022); DEC Contaminated Sites Program email re: Interagency Review: MLUPNS 22-001 KRU Access Corridor (Mar. 1, 2022).

[21] OSA MLUP/NS 22-001 OSA Access Corridors within KRU, Supplementary Information (Feb. 22, 2022).

[22] CPAI letter to DOG re: Comments to February 9, 2022 Oil Search (Alaska) LLC Miscellaneous Land Use Application for Use of Kuparuk River Unit ("KRU") Roads (Mar. 14, 2022). CPAI received an extension to submit comments via email from DOG on February 28, 2022.

[23] *See* OSA response to CPAI comments letter to DOG (Mar. 18, 2022); CPAI reply to OSA response letter to DOG (Mar. 23, 2022); OSA reply to CPAI reply letter to DOG (Mar. 25, 2022).

[24] Decision. The eight-page Decision also serves as the Permit.

[25] *Id*. at 1.

[26] *Id*. at 1, App'x A.

[27] *Id*. at App'x A-D. The map included with the Decision and Permit is included as Exhibit 1 of this final administrative order and decision.

d. Appeal of MLUPNS 22-001

CPAI appealed the Decision to the Commissioner on April 5, 2022.[28] The appeal sought an extension of time and permission to submit additional written information,[29] a hearing,[30] and a stay of the Decision.[31] DNR accepted the appeal the same day.[32]

Thereafter, OSA was notified of the appeal and responded to CPAI's procedural requests.[33] On April 8, 2022, DNR provided CPAI with a limited extension to submit additional written materials and OSA with an extension to respond to any additional submission by CPAI; DNR also denied the stay and held the request for a hearing in abeyance.[34] Both CPAI and OSA filed additional pleadings in May and June, 2022.[35] Having received the administrative record and all party submissions, the matter is now ripe for review.

III. STATEMENT OF APPLICABLE LAWS

The appeal complies with the statutory and regulatory procedures for administrative review of agency decisions to the Commissioner of DNR.[36]

The Alaska Constitution calls for the maximum use of state resources, for the maximum benefit of its people, recognizing at times this may require concurrent use of resources: "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."[37] The Legislature is required to "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."[38] "Leasing and permits for exploration are subject to reasonable concurrent uses."[39]

The Alaska Legislature requires the Department of Natural Resources and its Commissioner to "administer the state program for the conservation and development of

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28 CPAI Appeal of MLUPNS 22-001 (Apr. 5, 2022) (Appeal).
29 *Id*. at 1-2 (citing 11 AAC 02.070).
30 *Id*. at 2-3 (citing 11 AAC 02.030 and .050).
31 *Id*. at 1-2 (citing 11 AAC 02.030 and .060).
32 DNR acknowledgment letter to CPAI and OSA (Apr. 5, 2022).
33 OSA response to appeal requests (Apr. 7, 2022).
34 DNR procedural letter to CPAI and OSA (Apr. 8, 2022).
35 CPAI supplement to Appeal (May 18, 2022); OSA response to CPAI supplement (Jun. 7, 2022).
36 *See* AS 38.05.020; AS 44.37.011; 11 AAC 02.
37 Alaska Const., art. VIII, § 1.
38 *Id*. at § 2.
39 *Id*. at § 8.

natural resources" … "including petroleum and natural gas..."[40] The Alaska Land Act (Land Act) governs leasing procedures for oil and gas mineral exploration and extraction.[41] A permit may be required for activities on state land subject to mineral or land estate property interests for a person who is not the holder of said property interest. The Department has recognized that permitting may be necessary in the instance parties cannot reach an agreement on what constitutes reasonable concurrent use and the Department's regulations allow it to issue permits in these circumstances to protect the public interest, among other things.[42]

Permits issued under 11 AAC 96 are not disposals of an interest in land, and do not grant a preference right to a lease or other disposal; they are revocable for cause or at will if the Department determines that the revocation is in the state's interest.[43] Miscellaneous land use permits are further subject to any provisions DNR determines necessary "… to assure compliance with [11 AAC 96], to minimize conflicts with other uses, to minimize environmental impacts, or otherwise to be in the interests of the state."[44]

The Alaska Constitution also requires notice of disposals and takings of property: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law."[45] "Private property shall not be taken or damaged for public use without just compensation."[46] "No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."[47] The applicability of these principles in the context of the development activities and non-exclusive rights at issue in this appeal will be analyzed below.

IV. ANALYSIS

As a threshold matter, the Appellant has standing under 11 AAC 02 and meets the interest-injury test applicable to administrative appeals of DNR decisions.[48] Having

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40 AS 38.05.020; AS 44.37.020.

41 AS 38.05.135, AS 38.05.145, 38.05.180. (AS 38.05.131--.134 do not apply because this appeal concerns land north of the Umiat baseline.)

42 11 AAC 96.010(a)(3). Authority for resolving disputes of potential concurrent uses is *inherent* when the Constitution recognizes, and the nature of non-exclusive rights is predicated on, their occurrence.

43 11 AAC 96.040.

44 *Id*. at (b).

45 Alaska Const., art. VIII, § 10.

46 *Id*. at art. I, § 18.

47 *Id*. at art. VIII, § 16.

48 *See PLC, LLC v. State, Dept. of Nat. Resources*, 484 P.3d 572 (Alaska 2021).

reviewed submissions by the Appellant and the Applicant, and the administrative record, CPAI's request for a hearing is denied because there are no disputed questions of fact.[49]

The authorization on appeal is a decision and miscellaneous land use permit issued to OSA. The Division Decision and Permit granted OSA the right to use an access corridor and gravel roads traversing the KRU, which is operated by CPAI.[50] At its very core, the Permit authorizes "access to OSA's easements within the KRU, PKU development projects, and other lands to which OSA holds a mineral interest *until a commercial road use agreement is executed between OSA and CPAI to provide for reasonable concurrent use*."[51] (Emphasis added.) As the operator of the KRU, CPAI takes issue with the Decision in part because the Permit allows for OSA's use of roads on state land that CPAI "designed, constructed, owned, repaired and maintained."[52]

CPAI's points on appeal fall into three general categories: (1) DNR lacked the authority to issue the Permit; (2) DNR failed to follow the necessary adjudication process; and (3) DNR's issuance of the Permit amounted to a taking under both the U.S. and Alaska Constitutions.[53] As explained below, CPAI's arguments are unavailing—DNR *has the authority* to issue the Permit in order to manage its surface and subsurface estates; DNR's process for adjudicating the Application *was and is legal, appropriate, and reasonable*; and issuance of the Permit *is not* a taking of CPAI's rights or property as properly understood. These conclusions are further assessed below.

A. The Unit Agreement, Leases, and applicable legal framework vest DNR with the authority to issue the Permit.

CPAI raises two categories of concerns about DNR's authorities: those found within the terms of the agreements between DNR and CPAI, and those found within DNR's regulatory framework for issuing permits under Alaska law.[54] Before addressing each concern, three general but important and interrelated concepts warrant emphasis: (1) the Alaska Constitution mandates the development of resources in a manner that promotes maximum use;[55] (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;[56] and (3) the Legislature

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49 *See* 11 AAC 02.050. This determination is within the Commissioner's discretion.
50 *See generally*, Decision.
51 *Id.* at 1-2.
52 CPAI Memo, at 1; *see also*, Decision at 5. (CPAI is the successor in interest to Atlantic Richfield Co.)
53 *See generally*, CPAI Memo.
54 *Id*. at 11-23, 25-33.
55 Alaska Const., art. VIII, § 1.
56 *Id*. at § 2.

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.[57] In this context, the specific terms of these agreements demonstrate that CPAI's concerns about DNR's authority are unfounded.

1. *The UA and the Leases reserve the right to the State to authorize surface use, and do not curtail DNR's statutory authorities.*

Oil and gas leases incentivize and promote the development of the State's resources by granting the exclusive right to the leasing party to the State's subsurface oil and gas resources.[58] These exclusive subsurface rights are accompanied by limited, non-exclusive surface rights for the purpose of facilitating development within the leased tract. In furtherance of its management and development obligations, DNR is enabled by the Land Act to enter into contract agreements to form oil and gas units with entities who hold oil and gas leases and who desire to develop them in a coordinated manner.[59] Unit agreements and the underlying lease agreements are binding contracts between the State as lessor, and the unit owner as lessee. They govern requirements, authorizations, rights granted, rights reserved, and expectations between the State as the surface and subsurface landowner, and—in this instance—CPAI as the unit operator and Lessee within the KRU. Neither the parties nor DNR dispute this;[60] however, the rights granted to CPAI, and the rights retained by the State—under the terms of those agreements—*are* contested by the parties. CPAI claims that these grants and reservations do not provide the State authority to issue the Permit to OSA.

CPAI asserts that the terms of the Leases grant Lessees exclusivity and dominion over all improvements on the surface estate, and that the State did not reserve the right to allow reasonable concurrent use of improvements located on the State-owned surface estate within the KRU.[61] It further claims that the UA is consistent with the Unit Leases in establishing that roads are the personal property of the Lessees.[62] Put simply, OSA disagrees with both claims.[63]

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57 *See* AS 38.05.020; AS 44.37.020.
58 *See* AS 38.05.180(a)(2).
59 *See* AS 38.05.020; AS 38.05.135; AS 38.145; AS 38.05.180; *see also*, 11 AAC 82, *et seq.*, 11 AAC 83, *et seq*.
60 CPAI Memo, at 18; OSA Mem. in Supp. of App., at 4 (Jun. 7, 2022) (OSA Memo); *see also,* Decision, at 2-3.
61 CPAI Memo, at 11-16.
62 *Id*. at 18-22.
63 OSA Memo, at 4-10.

a) The Unit Leases do not prevent DNR from granting concurrent use.

CPAI contends that the granting and reservations clauses within the Unit Leases do not provide DNR the authority to issue the Permit.[64] A review of the granting and reservations clauses—in full—within DNR's standard lease form for the majority of the leases composing the KRU, Form No. DL-1, show that CPAI's argument is incorrect.

The excerpted grant clause from Form No. DL-1, provided by CPAI in their appeal, states: "***Lessor does hereby grant and lease unto Lessee, exclusively, without*** warranty for the sole and of oil, gas, and associated substances produced therewith, ***and of installing 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 … ***the following described tract of land***" (emphasis added by the Appellant).[65]

However, there is a material omission in this excerpt. The full "Grant" and "Reservations" sections read as follows:

> 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, gas, and associated substances produced therewith***,** and of installing 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 underground 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[.] (Emphasis added.)
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> …
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> 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* and under such conditions as will prevent unnecessary or unreasonable interference with the rights of Lessee and operations under this lease, to enter upon and use said land:
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> > (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.

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64 CPAI Memo, at 11-17.

65 *Id*. at 11.

> (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 other lands.
> (e) For any other purpose now or hereafter authorized by law and not inconsistent with the rights of Lessee under this lease.[66] (Emphasis added.)

The granting clause provides that the rights granted are for the *sole and only* purposes of exploration, development, production, and processing and marketing of oil, gas, and associated substances. These rights are subject to significant reservations of the State's authority to manage and otherwise dispose of the surface. No purpose exists to exclude third parties from concurrent use of any portion of the surface in order to obtain preferential commercial terms for, or to control access—the sole and only purposes are related to the development of hydrocarbons from a lease. The focused grant does not introduce limitations on the broad authorities for surface management provided to DNR under the Land Act and explicitly retained by the State in its reservation of rights.

i. The granting clause is focused and specific.

The granting clause enunciates those rights that the State, through DNR, as the owner of the surface and subsurface estate, agreed to give to CPAI as Lessee. A plain reading of the full grant shows four specific purposes for which the Lessee may use the State's land. In this instance, reliance on the syntactic grammar canon is helpful.[67] The State granted the Lessee four rights of action: (1) exploration, development, production, processing and marketing of oil, gas, and associated substances, (2) installation of pipe lines and structures to find, produce, save, store, treat, process, transport, take care of and market all such substances, (3) drilling water wells and taking underground and surface water for use, and (4) housing and boarding employees. Furthermore, pursuant to the Lease language, the grant of these rights was exclusive to the Lessee *for the sole and only purpose* of those actions.[68] This interpretation reasonably applies grammar and usage to

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66 *Id*. at Ex. 2.

67 Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012). "Words are to be given the meaning that proper grammar and usage would assign them."

68 CPAI Memo, at Ex. 2.

the intent not only of *when* but also precisely *for what purpose* those actions the State granted to the Lessee.

Whatever the cause, CPAI's excerpt of the granting clause omits reference to grammatically and substantively relevant portions of the full grant: "…the sole and *only purposes* of exploration, development, production, processing and marketing" as well as the right to establish housing and boarding employees.[69] (Emphasis added.) CPAI's exclusion of the operative words "only purpose" materially limits the full and proper reading of the granting clause and undercuts CPAI's subsequent interpretations.[70]

CPAI further asserts that the use of the word "exclusively" grants *exclusivity* in control of the surface estate of the land when improvements are installed by the Lessee.[71] This is not a reasonable interpretation of the granting clause's plain text, nor does it align with the clause's grammatical syntax. The term "exclusively" must be read in conjunction with the language that directly follows in the same sentence: "for the sole and only purposes of" the rights of action. When read in that proper context, exclusivity is granted to CPAI for the sole purpose of the rights of action specifically set forth in that sentence. It does not grant exclusivity for the purposes not set forth in the sentence, *i.e.* the right to exclude third parties from a portion of the surface by placing roads in the KRU.

At most, the grant provides CPAI with the right to exclude others from using KRU roads for purposes "of exploration, development, production, processing and marketing of oil, gas, and associated substances produced therewith" *on the leased tracts*. It does not provide any rights to CPAI to exclude third parties from using the KRU roads in conjunction with exploration, development, production, processing, or marketing oil or gas *on lands outside of the leased tract*.

The conclusion that "exclusively" only applies to the four enumerated rights of action is also necessary to prevent conflict with the State's explicit reservation of rights in Clause 29. Under CPAI's proffered interpretation of the grant, the State could not, for example, authorize others to use the KRU roads in conjunction with the extraction of natural resources other than oil and gas. That interpretation would conflict, however, with Clause 29(c), which explicitly reserves for the State the right to grant third parties "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" on the leased tracts.[72] On the other hand, interpreting the term "exclusively" in the granting clause in conjunction with the rest of

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69 *Id*. at 11.
70 *See also*, OSA Memo, at 5-6. OSA also identifies this omission in its pleadings.
71 CPAI Memo, at 12-13.
72 *Id*. at Ex. 2.

the language of the sentence limits the exclusivity to the enumerated rights of action so that it does not encompass rights that the State reserved in Clause 29. CPAI's interpretation of the granting clause is therefore incorrect.

ii. The reservations clause is broad.

CPAI's claims also fail because the State's issuance of the Permit is authorized by the reservations clause, Clause 29.[73] Corollary to the granting clause, the reservations clause in the Form No. DL-1 leases defines those rights that DNR retains within the area of the leased lands. These reservations are significant, and include the "right to authorize others by grant, lease or permit subject to this lease and under such conditions as will prevent unnecessary or unreasonable interference with the rights of the Lessee … to enter upon and use said land … [f]or any other purpose now or hereafter authorized by law and not inconsistent with the rights of Lessee under this lease."[74] These reservations clearly maintain the right to authorize reasonable concurrent use during the pendency of the KRU Leases.

This is evident in the sample Lease Agreement provided by CPAI and in the Decision itself. The Division Decision details additional support for this interpretation of the reservations clause by citing to a second lease form, Form No. DMEM-4-83, that reiterates the State's intent to retain its authority to grant reasonable concurrent use. That form contains the following language:

> 2. RESERVED RIGHTS. (a) The state, for itself and others, reserves all rights not expressly granted to the lessee by this lease. These reserved rights include, but are not limited to:
>
> (1) the right to explore for oil, gas, and associated substances by geological and geophysical means;
> (2) the right to explore for, develop, and remove natural resources other than oil, gas, and associated substances on or from the leased area;
> (3) the right to establish or grant easements and rights-of-way for any lawful purpose, including without limitation for shafts and tunnels necessary or appropriate for the working of the leased area or other lands for natural resources other than oil, gas, and associated substances;
> (4) the right to dispose of land within the leased area for well sites and well bores of wells drilled from or through the leased area to explore for or produce oil, gas, and associated substances in and from lands not within the leased area; and

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73 Decision, at 2.

74 CPAI Memo, at Ex. 2.

> (5) the right otherwise to manage and dispose of the surface of the leased area or interests in that land by grant, lease, permit, or otherwise to third parties.
>
> (b) The rights reserved may be exercised by the state, or by any other person or entity acting under authority of the state, in any manner that does not unreasonably interfere with or endanger the lessee's operations under this lease.[75]

Like Form No. DL-1, this reservations clause expressly reserves to the State the right to manage the surface by grant, lease, *permit*, or otherwise to third parties so long as it does not unreasonably interfere with lessee operations. The Decision properly invokes and interprets these reservations under the authorities that directed the Department to issue the leases themselves: "The [KRU] leases and unit agreement provide for reservation for reasonable concurrent uses consistent with the Alaska Constitution, AS 38.05, and associated regulations."[76] Thus, the State has the explicit right under the Leases to issue the Permit allowing OSA reasonable concurrent use of the KRU roads.

The reservations in the Leases are directly derived from, and mandated by, Article VIII of the Constitution in Section 8. As the Decision notes, reasonable concurrent use must be managed by the State under these reservations.[77] The oft-consulted Alaska Legislative Affairs Agency's Citizen's Guide to the Alaska Constitution further explains: "This section authorizes the legislature [by DNR through delegated authority] to lease the public domain *and issue permits* for mineral exploration on it."[78] (Emphasis added.) The Citizen's Guide also quotes the 1955 Constitutional Drafting Committee commentary: "each lease shall state the particular use or uses to be made of the lands as well as the conditions of the use and the term or tenure of the lease in order to facilitate reasonable concurrent use by others if the occasion arises[,]" but also that "concurrent uses implies that possibilities of conflict in use should be kept to a minimum."[79] Given this direction,

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75 *Id*., at 2-3; *see also*, Standard Form No. DMEM-4-83.

76 Decision, at 2.

77 *Id*. at 2; s*ee also* Alaska Const., art. VIII, § 8. "The legislature may provide for … the issuance of permits for exploration of, any part of the public domain or interests 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."; *see also*, AS 38.05.180(a) (Legislative finding of purpose that development of oil and gas leases should (1) maximize economic and physical recovery of resources, (2) maximize competition among parties seeking to develop resources, and (3) minimize the adverse impact of exploration, development, production, and transportation activities).

78 *See* Harrison, Gordon. "Alaska's Constitution: A Citizen's Guide," Alaska Legislative Affairs Agency, 5th ed., at 136 (Jan. 2021).

79 *Id*.

DNR was required to reserve its rights to allow—through permitting—reasonable concurrent use to third parties; it explicitly did so in the relevant leases.

Read in harmony with the granting clause, it remains clear that DNR had the requisite authority under the terms of the Leases to grant the Permit to OSA. Through the Permit, DNR appropriately performed its mission of maximizing development and competition, while minimizing surface impacts. It would not be reasonable to require or even allow OSA to build an entirely separate road network to develop the PKU. This would expand rather than minimize the surface impacts on the land. CPAI's suggestion that as an alternative OSA could build 75.5 miles of duplicative roads is not consistent with the public interest in minimizing surface impacts and is precisely why the Permit granting reasonable concurrent use is warranted in this case. It is also inconsistent with CPAI's own direct obligation under the UA to minimize surface impacts.[80]

In sum, the State's reservation of rights in the Leases preserved its ability to prevent harm to the public interest. The failure of the parties to reach a commercial road use agreement threatens the timely and efficient development of the PKU, and the prospect of developing a second road network threatens to impact state resources. This is contrary to the interests of the Alaska public to maximize oil production on State lands while minimizing surface impacts. The grant of the Permit protects the public interests in its lands from harm caused by a commercial impasse between State lessees.

Furthermore, the Decision unequivocally notes that the desired outcome would be a commercial road use agreement between OSA and CPAI and eventual revocation of the Permit.[81] Both parties have represented that they are negotiating in good faith and are endeavoring to conclude such an agreement. DNR hopes that their efforts will result in an agreement, but in the meantime, DNR has granted the Permit as is its right under the Leases to protect the public interest, just as the framers of the Alaska Constitution contemplated and expected.

Taken together, these provisions show an unbroken chain of authority for concurrent use —and permitting to allow concurrent use in areas of disagreement or dispute—from the Constitution to the broad provisions in the Land Act under which the Leases were issued and the unit was formed, to the terms and reservations of the Leases themselves, to the regulatory provisions related to authorizing the permit.

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80 CPAI Memo, at Ex. 3, Section 3.6.

81 Decision, at 1, 7.

iii. Roads are not defined in a way that creates an exclusionary right not otherwise provided.

CPAI makes several claims that various portions of the Leases or other approvals identify or infer that roads are "structures", "facilities", "Unit Equipment", or are otherwise defined in a way that elevates them to a special exclusionary level, either within the granting clause of the Leases or implicitly beyond its reservations. Read together, these arguments are unavailing.

For example, CPAI argues that the drilling operations clause in the Leases (Clause 40) supports its position.[82] It claims that Clause 40 defines roads as structures. It then asserts that under the Lease grant, it has exclusive control over any structures necessary for its drilling operations.[83] As discussed above, the Lease grant must be read with, and certainly does not override, the State's Lease reservations to grant third parties reasonable concurrent use of the KRU roads. Leaving that point aside, CPAI's interpretation of the Lease terms is not supported by the language itself, as Clause 40 does not define any terms and cannot reasonably be used to define any terms. Nonetheless, CPAI claims that because the word "road" is included in a list that also contains "and/or other necessary structures," a road must be a structure, and then must be understood to be part of the original grant. But that interpretation is not plausible.

The complete language at issue is: "construction of a road *or* derrick *and/or* other necessary structure for the drilling of an oil and gas well …" Notably, "road," "derrick," and "other necessary structure" are not put together in a single unitary list, *i.e.* "road, derrick, or other necessary structure." Instead, "road" is separated from "derrick" and "other necessary structure" by an "or" and then "derrick" and "other necessary structure" are *connected* by an "and/or." The use of an "and/or" between derrick and/or other necessary structures connects those two terms together. The use of "and/or" *at most* means that a derrick is a necessary structure. "Road," however, is not included within the set of "necessary structures" because it is separated from "derrick and/or other necessary structure" by an "or." Thus, even if one were to accept CPAI's arguments that Clause 40 can be used as a tool to interpret whether a road is a structure, the specific insertion of an "or" instead of merely using a comma after "road" undercuts CPAI's argument. Instead, it supports the conclusion that a "road" is distinguished from and thus not a structure.

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[82] CPAI Memo, at Ex. 2. "[Clause] 40. DRILLING OPERATIONS. As used in this lease "drilling operations" mean any work or actual operations undertaken or commenced in good faith for the purpose of carrying out any of the rights, privileges or duties of Lessee under this lease, followed diligently and in due course by the construction of a road or derrick and/or other necessary structures for the drilling of an oil or gas well, and by the actual operation of drilling in the ground. Any such work or operations preliminary to drilling in the ground may be undertaken either on said land or in the vicinity of said land in any order Lessee shall see fit."

[83] *Id*. at 13-14.

CPAI argues that roads are also facilities and are thus its personal property to which it has exclusive control. This claim is inconsistent with the use of the term "facilities" in the POD. At the onset of KRU development, the initial POD outlines the need to construct or improve upon "facilities" such as "production facilities and development drilling[,]" an operations complex, and a "Central Production Facility ("CPF-1") in the short-term, which would be followed thereafter by expansion and construction of "additional production facilities."[84] This development plan additionally identifies that construction of these facilities will inherently require a spine road, which would eventually be extended upon future expansion of operations.[85] This is noteworthy because the spine road is routinely referenced as necessary to support the advancement of the actual facilities that are required for development and extraction within the KRU. Again, CPAI's attempt to cobble together support for its position by pointing to isolated snippets of agreements divorced from context is unconvincing. In context, the language that CPAI relies upon provides no support for its position.

Finally, CPAI relies on DNR's North Slope Areawide 2018 Mitigation Measures' definition of "facilities," and a 2021 Alaska Department of Revenue Decision to support its claim that improvements are property.[86] These are not relevant. As to the Mitigation Measures, the use of the term in that document is not binding and is outside of the scope of the contractual intent specific to the UA and Leases.[87] CPAI's argument that roads are included as facilities under property tax statutes is even farther afield and off the mark. As OSA points out, the Revenue Decision is neither precedential nor binding upon DNR's legal authority to issue permits authorizing reasonable concurrent use on State-owned lands.[88]

b) The UA does not curtail DNR's authority to grant concurrent use of the land and improvements upon it.

To harmonize its claim that the KRU Leases do not vest DNR with the authority to grant third-party reasonable concurrent use, CPAI asserts that gravel roads are personal property as defined by the UA and thus their use is contractually excluded from the concurrent use reservations in the Leases.[89] Clause 3.6 of the UA provides that the State

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84 *Id*. at Ex. 2, Ex. E. Including additional Central Production Facilities and facilities at Oliktok Point.

85 *Id*.

86 *Id*. at 6, 20, 24.

87 *Id*. at 20; *see, e.g., Graham v. Municipality of Anchorage*, 446 P.3d.349, 352 (Alaska 2019) (contract interpretation requires giving effect to reasonable expectations, the language of the contract provisions, relevant extrinsic evidence, and case law); *Estate of Plushkin v. Maw*, 170 P.3d 162, 167 (Alaska 2007) (the Court determines intent of a contract through review of party intent, provisions of the contract, relevant extrinsic evidence, and case law).

88 OSA Memo, at 9.

89 CPAI Memo, at 18-23.

retains "all rights reserved to 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."[90] This provision alone further supports the fact that DNR has appropriately reserved the right to permit reasonable concurrent use within the KRU. The UA did not introduce or form new limitations on the State's authorities with regard to its surface lands.

Both parties rely heavily on Clauses 3.6, 3.7, and 14.4. Those clauses state:

> 3.6 Surface and Subsurface Operating Rights. Except to the extent modified in this Agreement, Working Interest Owners, and Unit Operator in their behalf, shall have the same rights to the use of the surface and subsurface, and use of water, and any other rights as are granted in the leases. Except to the extent expanded by this Agreement, or to the extent that such rights are common to the affected leases, the rights granted by a lease may be exercised only on the land covered by that lease. 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.
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> 3.7 Personal Property Excepted. All lease and well equipment, materials, and other facilities placed by any of the Working Interest Owners in the Unit Area shall be deemed to be and shall remain personal property belonging to and may be removed by the Working Interest Owners. The rights and interests in that property as among Working Interest Owners are set out in the Unit Operating Agreement.

…

> 14.4 Salvaging Equipment and Rehabilitation Upon Termination. The Unit Operator and the Working Interest Owners shall have the right for a period of three years after the date of termination of this Agreement in which to salvage and remove Unit Equipment. Unit Operator shall rehabilitate the Unit Area to the satisfaction of the Commissioner within a reasonable time (not less than three years) after the date of removal of Unit Equipment. The Commissioner may extend the period for salvage and removal of Unit Equipment and rehabilitation of the Unit Area. Upon the expiration of this period, and at the option of the Commissioner, any Unit Equipment not removed from the Unit Area becomes the property of the State or may be

90 *Id*. at Ex. 3.

> removed by the State at the Working Interest Owners' expense. 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, in which event those improvements shall be left intact and the Unit Operator and the Working Interest Owners absolved of all further responsibility as to their maintenance, repair, and eventual abandonment and rehabilitation.[91]

CPAI claims that the KRU roads are its personal property and therefore it has the absolute right to exclude any third party from using those roads. Whether the roads are CPAI's personal property or not is irrelevant because they are placed on leased State lands and are subject to the terms of the Leases, including their reservations. The State still has the right under the Leases to grant the Permit. No provision of the UA overrides the lease reservations vis-à-vis improvements to State land.

In any event, CPAI's claim that the KRU roads are its personal property is not supported by the UA. CPAI argues that the KRU roads are "other facilities" and therefore are personal property under Clause 3.7.[92] CPAI's interpretation cannot be correct because that interpretation of "other facilities" directly conflicts with Clause 14.4.

CPAI attempts to reconcile its interpretation of the term "other facilities" in Clause 3.7 with the way that term is used in Clause 14.4. CPAI claims that roads are Unit Equipment for the purposes of Clause 14.4 because Clause 1.2 of the UA "defines Unit Equipment to be 'personal property, lease and well equipment, plants and *other facilities* and equipment used taken over or acquired' by the KRU Lessees for use in operations."[93] It asserts that "given 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 …"[94] But interpreting Clause 14.4 in this manner directly conflicts with how the clause operates.

Under Clause 14.4, after the termination of the UA, the Working Interest Owners (1) have three years to salvage and remove Unit Equipment and (2) within a reasonable time *after the date of the removal of the Unit Equipment* must rehabilitate the Unit Area. Importantly, Clause 14.4 specifically provides that all other improvements, including roads, are to be remediated *after the date of the removal of the Unit Equipment*. If the roads were Unit Equipment, under CPAI's interpretation, the roads would have to be removed before any rehabilitation of the Unit Area commenced, but Clause 14.4 provides

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91 *Id.* at 8, 25.
92 *Id*. at 14-15, 18-21.
93 *Id*. at 22. (Emphasis added in original.)
94 *Id*. at 22-23.

for the opposite. Clause 14.4 explicitly refers to roads as "other improvements" and places their ultimate disposition under the discretion of the Commissioner of DNR. Consequently, roads cannot be "other facilities" for the purpose of Clause 14.4. Since conflicting interpretations of the same term in an agreement should be avoided where possible, as CPAI concedes,[95] roads are not "other facilities" for the purpose of either Clauses 3.7 or 14.4. Therefore, CPAI's claim that roads are its personal property is not sustainable.

c) The State's reservations are not diminished or overcome by improvements under the terms of either the unit leases or the UA.

CPAI's argument turns on the assertion that the roads themselves are its inviolate personal property and thus transit across them is under its exclusive control, regardless of the State's reserved interests in underlying lands. CPAI acknowledges that the State's broad reservations allow it to authorize other crossings of the state lands within the Unit boundaries, and even to authorize the construction and use of roads by third parties within the Unit boundaries – so long as they do not transit the roads at issue.[96] Implicit in this position is a claim that unit improvements, infrastructure, or private property, however termed, are superior to and displace the State's ownership interests and ultimate control over the surface estate. No 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. CPAI has no right or option to perfect a durable ownership interest in the surface of the land under the lease, no matter what development or improvement activities it may undertake on that land. Activities do not convert State land into private property. It follows that CPAI does not gain a right to exclude by utilizing the surface itself.

Consistent with the Leases' grant, the Permit maintains CPAI's right to use the surface of the leased land – without unreasonable interference – for the sole and only purpose to develop the subsurface oil and gas resources on the leased land. CPAI thus has the right to exclude third parties from using the surface of the leased land for development of subsurface oil and gas resources *on that same land*. But the Lease grant does not confer an exclusive easement upon CPAI for any the road corridors. CPAI was granted the right to build the KRU roads subject to the State's right, among other things, to grant third parties concurrent use of any and all of the leased lands. Consistent with that reservation of rights, the Permit granted OSA a reasonable and limited right to concurrent use of the KRU road corridors.

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95 *Id*. at 21-22.

96 *Id.* at 17.

2. The Alaska Land Act and its regulations allow DNR to issue the miscellaneous land use permit.

The Land Act grants DNR authority to issue authorizations—such as permits, easements, and rights-of-way—to accomplish its mandate to administer and manage the development of the State's natural resources.[97] CPAI alleges that DNR lacks the authority under AS 38.05.850 and its associated regulations—including 11 AAC 96.010—to issue the Permit granting OSA's use of roads within the KRU access corridor.[98] Analysis bears out the persistence, and in fact specific contemplation, of this authority under the statutes and regulations invoked by the Division in its decision.

Specifically, CPAI asserts that the legislature never gave DNR the authority to grant access to "leasehold improvements;" that the plain language of 11 AAC 96.010 limits permit authority to use of "state land" (*i.e.* not to improvements thereon); and that DNR admits it has never used this permitting process to grant access to "privately" owned improvements.[99] To the contrary, not only did the legislature entrust land administration and management authority to DNR,[100] the regulation in question explicitly contemplates situations exactly matching the facts in this appeal.[101] As described above, the placement of roads within the KRU subject to the non-exclusive surface use rights of CPAI did not override or displace the reservations in the Leases to authorize concurrent use in those areas. Similarly, it 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.

As recently as 2012, the Alaska Supreme Court recognized DNR's "broad authority to manage public lands."[102] Under the Land Act, DNR "may issue permits, rights-of-way, or easements on state land … and other similar uses or improvements, or revocable, nonexclusive permits for [] personal or commercial use…"[103] The regulations issued pursuant to the Land Act authorize DNR to issue permits for "an activity on land subject to a mineral or land estate interest by a person other than the holder of the property interest … if the parties cannot agree on what constitutes reasonable concurrent use."[104]

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97 AS 38.05.850; 11 AAC 96.010.

98 CPAI Memo, at 25.

99 *Id*. at 26-31.

100 AS 38.05.020; AS 38.05.035.

101 *See* 11 AAC 96.010(a)(3). "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."

102 *Caywood v. State, Dep't of Natural Resources*, 288 P.3d 745, 746 (Alaska 2012).

103 AS 38.05.850.

104 11 AAC 96.010(a)(3).

This scenario could not be more appropriate to justify DNR's authority under the statutory and regulatory framework to issue the Permit.

DNR has administered thousands of leases, easements, and permits under its general Land Act authorities. Whether DNR has ever utilized its authority to issue a miscellaneous land use permit in the specific instance where two oil and gas unit operators cannot agree on commercial terms to use a road network is irrelevant. Notably, CPAI has not identified any other circumstance in which a unit operator has not allowed a third party to access unit roads for purposes of developing adjacent leaseholds.

That DNR may not have faced a situation where the public interest in developing the State's natural resources was threatened by the failure of parties to agree on road access in no way contradicts its power to act in the present circumstances. The fact that the long-standing regulation exists indicates that concerns of this nature were anticipated. The Permit (1) preserves the status quo, (2) protects the public interest in development of natural resources on State lands, while minimizing surface disturbance, and (3) ensures that the public interest in natural resource development on leased State lands cannot be threatened by disagreements between its lessees.

In short, 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. While the State's preference is for its lessees to reach concurrent use agreements on their own in a timely manner, where the public interest is threatened, DNR has the power to act to remove that threat. The issuance of the Permit is consistent with that power.

The failure to agree on the terms for long-term concurrent use is evident. CPAI and OSA's inability to agree on reasonable concurrent use dates to at least 2018.[105] At that time, they entered into the Ad Hoc Agreement, which allowed OSA to travel through the KRU Access Corridor on gravel roads maintained by CPAI.[106] Since entering the Ad Hoc Agreement, OSA has been able to use KRU roads while the parties have attempted to negotiate a permanent road use agreement. By OSA's account, those negotiations broke down in April 2020 when OSA informed CPAI it did not intend to rely on or assist in improving existing KRU processing facilities that are operated by CPAI.[107] By the end of 2021, CPAI and OSA had yet to enter into a permanent concurrent use agreement and it

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105 OSA Ltr. to DNR, at 1 (Jun. 7, 2022); OSA Memo, at 2.

106 OSA Memo, at 1; *see also*, CPAI Memo, at Ex. 11 (Confidential KRU Ad Hoc Road Access and Use Agreement). Appellant submitted this document with a request for confidentiality under AS 38.05.035(a)(8). It is accepted as part of the administrative record and will be held as confidential for the purpose of review by the Commissioner.

107 OSA Memo, at 1.

appeared that negotiations had all but ceased. To stay on schedule for development of the Pikka Project, and with a breakdown in negotiations with CPAI, OSA applied for the Permit.[108] Consequently, this instance highlights the importance of 11 AAC 96.010(a)(3) and the purpose for its promulgation: as a conflict mitigation tool meant to minimize disputes between third parties when there is a need for concurrent use to develop the State's resources. Just like the Ad Hoc Agreement, the Permit is intended to bridge the period prior to conclusion of a commercial agreement. The fact that it prevents exclusion in the interim is not a violation of CPAI's rights but a vindication of the State's – that non-exclusive surface rights with significant reservations from State-issued leases cannot impede the broader development of the State's resources.

CPAI asserts that DNR's permitting authority is limited to use and activity on state public domain land.[109] While each of the regulations CPAI cites to reference uses and activities on *state land*, Appellant overlooks that the purpose of the chapter includes DNR's authority to issue permits "…in order to minimize adverse effects on the land and its resources." Upon more thorough examination of these regulations, it is clear they conform with DNR's mandate to "minimize the adverse impact of exploration, development, production, and transportation activity."[110] As OSA notes, "CPAI's suggestion that 11 AAC 96.010(a)(3) authorizes DNR to issue a permit for activity on state land but not on gravel roads traversing that land would render the authority provided by regulation meaningless."

This analysis is repeatable on a smaller scale. For example, an individual who obtains the proper non-exclusive permits and clears a right-of-way or section line easement on state land would not be allowed to then gate the easement and demand payment from third parties to travel across the cleared state land. This is because the right-of-way or section line easement is state land subject to reasonable concurrent use, and the state is required to maintain access to the surface to allow use on nearby state land by others; the need for reasonable concurrent use prevails even if an individual developed or made improvements to the state land. As noted above, the right to reasonable concurrent use is constitutionally required, and this conclusion is consistent across a spectrum of DNR's resource development and management authorities.[111]

Simply because a qualified person with a non-exclusive interest in the state-owned surface estate inputs time, money, and resources into developing the relevant portion of

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108 Application cover letter, at 3-4.

109 CPAI Memo, at 29 (citing 11 AAC 96.005, .007, & .010).

110 AS 38.05.180(p).

111 *See e.g.*, AS 38.05.255(a). "Surface uses of land or water included within a mining property by the owners, lessees, or operators shall be limited to those necessary for the prospecting for, extraction of, or basic processing of minerals and *shall be subject to reasonable concurrent uses*." (Emphasis added.)

state-owned land, it does not bestow the right to prohibit reasonable concurrent use. Nor would it prevent the State, through DNR, from exercising its authority to permit third party access when it is in the public interest to do so. Moreover, and as previously mentioned, the terms of the KRU Leases include reserved rights such as the ability to authorize reasonable concurrent use, which is consistent across the terms of the KRU Unit Agreement and the regulatory framework. This confirms that DNR has the appropriate authority to adjudicate and issue the Permit to OSA.

DNR's authority to issue the Permit is one of the tools it has to protect the public interest. CPAI and OSA have not been able to reach a commercial agreement for over four years. Issuance of the Permit preserves the status quo (continued development of the PKU) and is necessary to protect the public interest until CPAI and OSA are able to reach a commercial agreement.

B. DNR appropriately and reasonably followed procedures required for the issuance of the Permit.

CPAI also claims that DNR failed to follow the required process for adjudicating the Application prior to issuance.[112] CPAI argues that the Permit constitutes a disposal of land or is functionally irrevocable and thus required public notice. Again, CPAI's argument lacks merit.

Alaska's Constitution and the Land Act require public notice prior to an agency's final decision when adjudicating applications for certain authorizations.[113] Most relevant here, public notice is required when the authorization will result in a disposal of an interest in state land or when a permit is determined to be functionally irrevocable.[114] As noted previously, CPAI argues that the Permit is both a disposal and is functionally irrevocable. OSA disagrees.[115] CPAI's claim is not correct – the Permit does not result in a disposal and it is not functionally irrevocable.

The Division relied on 11 AAC 96.010(a)(3) and its associated statute—AS 38.05.850—when adjudicating OSA's Application.[116] As set forth in the Decision:

> Issuance of a permit under 11 AAC 96 is not a disposal of an interest in land and does not grant a preference right to a lease or other disposal. The permit is revocable for cause for violation of any permit stipulation of this chapter, or at will, if the DNR determines that revocation is in the state's interest…

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112 CPAI Memo, at 35-37.
113 Alaska Const., art. VIII, § 10; AS 38.05.035.
114 *Id*.
115 OSA Memo, at 12-15.
116 Decision, at 2.

> The proposed activities are for a discrete and limited duration with limited, temporary impact to the land. Therefore, the permit is both legally and functionally revocable.[117]

The Decision's language is an affirmation of the statutory and regulatory conditions the Division met when it authorized the Permit; moreover, the Decision goes on to clarify the Permit's inherent revocability: "…this permit shall be unnecessary and revoked once an agreement is reached."[118] It was unreasonable, then, for CPAI to conclude that the Permit is functionally irrevocable when both the Decision, the applicable statute and regulation, and the nature of the Permit itself show the opposite. Since it remains clear that the Permit is a fully revocable authorization, the adjudication process therefore did not require public notice.[119]

1. The Permit does not constitute a disposal of an interest in state land.

CPAI briefly—and without substantive explanation—equates the Permit to a disposal of an interest in state land.[120] However, the state land subject to, and the activities supported by, the Permit have already gone through a disposal process upon the establishment of the leases comprising the KRU and PKU.[121] Additionally, the public is well aware that there is an existing road network in KRU, that these roads are regularly used in support of oil and gas operations by CPAI and other entities, and that this use is expected to continue. CPAI's extended participation in the administrative process, both for the permit and a variety of other OSA authorizations, bar it from claiming any lack of notice or prejudice to its position.

Permits under 11 AAC 96.010(a)(3) exercise the State's rights and reservations under existing disposals and are not inherently a new disposal of their own. As recognized in *Sullivan v. REDOIL*, disposals of specific tracts of state land in the oil and gas context occur at the leasing phase—not the permitting phase.[122] For the KRU, the issuance of the leases, formation of the unit, and subsequent development and unit management have all followed statutory process for informing the public of the use and development of state land. The disposal that resulted in the right to place the roads on state land has occurred. Similarly, the PKU and its associated disposals have gone through a series of public

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117 *Id*.
118 *Id*. at 7.
119 AS 38.05.035(e).
120 CPAI Memo, at 35.
121 *See Sullivan v. Resisting Env't Destruction on Indigenous Lands (REDOIL)*, 311 P.3d 625, 633 (Alaska 2013). "For an oil and gas development project, the lease is the *only* conveyance of property rights that DNR approves… There are no additional property rights to be conveyed at the later phases." (Emphasis added.)
122 311 P.3d 625, 633-34 (Alaska 2013).

processes consistent with the Alaska Constitution and the Land Act. The permit thus does not create, segment off, or dispose of a new right to use state lands, but instead administers the existing rights of the State.

OSA sought access and use of portions of state-owned surface lands that have already been disposed of within the KRU for use in developing the PKU; OSA would not be a recipient of a disposal of a new interest in state land, but instead a recipient of a permit authorizing access to lands already long used for such access. As OSA points out, the disposal consideration does not depend on who is requesting the permit, rather it focuses on where or what state lands are being disposed.[123]

As the Decision states, the Permit is revocable for cause or at will, and the activities authorized are both discrete and limited in duration and with limited impact to the land.[124] DNR recognizes CPAI's assertion that the Alaska Supreme Court has, in the past, held that miscellaneous land use permits may be considered a disposal in some instances.[125] However, as is thoroughly explained below, the Permit is not functionally irrevocable and therefore not a disposal. Because the Permit is not a disposal, CPAI's assertion that the Alaska Constitution requires public notice prior to issuance lacks merit.

2. The Permit is not functionally irrevocable.

The Land Act requires public notice if DNR determines that an application for a permit is functionally irrevocable.[126] The Permit is revocable for cause or at will, and is designed to be revoked upon satisfaction of requirements of the parties or certain other circumstances.[127] Regardless of DNR's determination that a permit is or is not functionally revocable, the Alaska Supreme Court holds that functional revocability "should be assessed under a hybrid approach which analyzes both (1) the likelihood of revocation and (2) the long-term and harmful character of the environmental impact."[128] Known as the *Wilderness Society* test,[129] CPAI's argument in relation to the Permit's revocability focuses only on the first prong of this test: the likelihood of revocation.[130] According to CPAI, the Permit fails the first prong of the *Wilderness Society* test because of OSA's representations that the Permit is necessary for the development of the Pikka

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123 OSA Memo, at 12.

124 Decision, at 2.

125 CPAI Memo, at 36-37 (citing *Nunamta Aulukestai v. Dept. of Nat. Resources*, 351 P.3d 1041 (Alaska 2015); *N. State Envtl. Ctr. V. Dept. of Nat. Resources*, 2 P.3d 629 (Alaska 2000)).

126 AS 38.05.850(c).

127 Decision, at 2.

128 *N. State Envtl. Ctr.*, 2 P.3d at 638; *see also, Nunamta*, 351 P.3d at 1057-58.

129 *Nunamta*, 351 P.3d at 1063.

130 CPAI Memo, at 37. As CPAI focuses solely on the first prong of the *Wilderness Society* test, it has waived the right to consider the second prong and this decision will focus solely on CPAI's arguments related to the first prong.

Project and it has incurred a substantial investment to complete the project's first phase of operations.[131] Nonetheless, for the following reasons, the Permit is still revocable.

First, the Decision expressly states that the Permit has a limited term – it is intended to provide OSA access to its interests "*until* a commercial road use agreement is executed between OSA and CPAI to provide for reasonable use. OSA will exercise good faith to reach an outcome for a commercial road use agreement with CPAI as expeditiously as practicable."[132] (Emphasis added.) This language in the Decision raises two important points: (1) the Permit is intended to be temporary in duration and limited in activity, and (2) the Permit *will expire* (or be revoked) upon the execution of a commercial use agreement between OSA and CPAI. It is important to the concept of revocability that the Decision unequivocally states that DNR *shall* revoke the Permit once the parties reach a commercial use agreement.[133]

Second, the Permit contains a clear statement of purpose: to allow for third party access *until* the parties reach a commercial agreement. DNR has elucidated the responsibilities of both OSA as the permittee, and CPAI as the KRU Lessee; the parties, by eventually reaching a mutually acceptable concurrent use agreement, are in partial control of when the Permit *will* be revoked. Appropriately, the Decision stated "[a] commercial road use agreement for concurrent reasonable access therefore is the most efficient means of prevention and avoidance of unreasonable interference and the effectuation of reasonable concurrent use."[134] Furthermore, and as noted above, "the permit is revocable for cause … or at will" at DNR's discretion. Taken together, these assertions within the Decision make it clear that not only does DNR maintain discretion to revoke the Permit, it *will* revoke the Permit upon an agreement between CPAI and OSA. Moreover, if OSA fails to negotiate in good faith to reach a commercial road use agreement, or conducts activities contrary to the terms and stipulations of the permit, DNR maintains the authority to revoke the Permit.

While they have not yet concluded a commercial road use agreement, which CPAI and OSA both concede has been historically standard practice on the North Slope, nothing in the administrative record or the parties' briefings suggests that the Permit will be necessary once the parties reach an agreement. In fact, both parties have expressed a continued desire to reach a commercial road use agreement throughout the course of the Application process and this appeal.[135] Presuming both parties act on this desire in good faith, their actions will precipitate revocation and resolution of the Permit.

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131 *Id*.
132 Decision, at 1-2.
133 *Id*. at 7.
134 *Id*.
135 *See, e.g.*, Appeal at 2; OSA response to appeal requests, at 2.

To recapitulate, issuance of this Permit does not constitute a disposal of an interest in land. This is so because a disposal has already occurred for the land identified in the Permit, and the Permit is not functionally irrevocable. The PKU, KRU, KRU roads, and OSA easements have already been subject to public process that anticipated the incidental activities authorized under the Permit (use and transit of an existing road network), as described above.[136] Therefore, the Division violated no process with respect to the Land Act's or the State's constitutional requirement of public notice.

Although there was no *per se* public notice—as none was required—DNR did actively and discretionarily engage with CPAI and OSA during adjudication of the Application. In fact, the Division solicited, received, and reviewed numerous submissions from both parties while reviewing the Application, as did DNR during the appeal review process.[137]

DNR is responsible for operating within the appropriate statutory, regulatory, and constitutional boundaries when employing its land management tools. In this specific instance, both the Decision and the administrative record provide an abundance of evidence that supports the Division's careful consideration and implementation of its designated authorities to issue the Permit. This leaves only CPAI's claim that issuance of the Permit constituted a taking.

C. Issuance of the Permit is not a taking under the U.S. or Alaska Constitutions.

Casting a broad net, CPAI claims that issuance of the Permit is a taking of its property by DNR under the U.S. and Alaska Constitutions. As a remedy it requests just compensation and revocation of the Permit.[138] CPAI alleges that "[a]bsent the Permit, KRU Lessees have an exclusive right to control use of the KRU roads, including the right to exclude access by third parties."[139] CPAI's federal taking claim suggests that DNR engaged in a *per se* taking;[140] while under state law it claims an even lower bar to demonstrate a taking.[141] Under either framework, CPAI's arguments lack merit.

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136 Decision, at 3.

137 *See* Decision; OSA response to CPAI comments letter to DOG (Mar. 18, 2022); CPAI reply to OSA response letter to DOG (Mar. 23, 2022); OSA reply to CPAI reply letter to DOG (Mar. 25, 2022) OSA response to appeal requests (Apr. 7, 2022); DNR procedural letter to CPAI and OSA (Apr. 8, 2022); CPAI supplement to Appeal (May 18, 2022); OSA response to CPAI supplement (Jun. 7, 2022).

138 CPAI Memo, at 38-40.

139 *Id.* at 38.

140 *Id.* at 39.

141 *Id.* at 40.

1. CPAI's interests are non-exclusive.

CPAI has not been denied the commercial use or benefit of its rights, interests, or property. It has exercised the exclusive development rights for oil and gas under the Leases and UA, including its non-exclusive surface access rights and rights to develop necessary roads. It has produced over two billion barrels of oil to date, with production to potentially continue for decades to come.[142] These rights are not diminished by the Permit, as CPAI still enjoys, and OSA's permit is subject to, the primary rights of CPAI to non-exclusively access the surface, and to utilize the roads, to continue this development unimpeded. The Permit includes a number of stipulations that reinforce CPAI's rights. OSA must also indemnify the State, confirming OSA is solely liable for any interference its actions under the Permit may cause.

CPAI also still enjoys the commercial benefit of control over the surface road improvements *consistent with the nature of its interest in the surface*. The fact that this value is not coextensive with the value of a private, non-exclusive surface easement or full fee ownership of the surface is not a taking or overreach by the State. This reflects the inherent fact that CPAI has always enjoyed only a non-exclusive right to access and place surface road improvements in furtherance its exclusive right to develop subsurface hydrocarbons. However, the State always retained the right to access and permit others to access—subject to conditions and stipulations—the surface for a host of reasons.

This commercial benefit is not insignificant. However, CPAI's commercial benefit does not include the ability 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. CPAI could not, and never would be able to, realize the value of an exclusive surface right, because it has never held such an interest in the State's lands. It does not have a private, exclusive surface easement, nor has it acquired the State's surface lands. It has always had a non-exclusive surface use right. The State retained the right to protect the public interest and has done so through the Permit. But again, the State has done so only due to the impasse between the parties. The State expects, based on the statements of the parties, efforts to realize a commercial agreement will continue in good faith.

As with all commercial considerations, the value of CPAI's right may have changed throughout the development of the Pikka project. If a strategy of delaying exercising this right in favor of extended dispute has resulted or ultimately results in devaluing this right, it does not support arguments that it was a plenary or exclusive right all along that was subject to a taking. CPAI made its own negotiating choices and the economic consequences of those choices must be borne solely by CPAI.

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[142] ConocoPhillips Alaska website, Alaska Operations, Kuparuk (available at https://alaska.conocophillips.com/who-we-are/alaska-operations/kuparuk/) (last accessed11/30/2022).

2. The Permit is not a takings under the U.S. Constitution

The Fifth Amendment of the U.S. Constitution prohibits the taking of private property for public use without just compensation.[143] There are two types of taking without just compensation under federal law: *per se* and regulatory.[144] CPAI asserts issuance of the Permit is a *per se* taking because it has "a right to exclude third parties from using their private property—the KRU roads."[145] The Appellant continues, "[i]f not [a taking], OSA would not be arguing that an MLUP is needed to gain access."[146] This argument misconstrues the meaning of a *per se* taking.

CPAI relies heavily on *Cedar Point Nursery v. Hassid* in support of its proposition that it has the right to exclude third parties from use of the KRU roads.[147] In *Cedar Point*, the Supreme Court held that a state regulation granting union organizers access to a privately owned strawberry farm constitutes a *per se* physical taking.[148] The Appellant argues that the imposition of a regulation—or issuance of the Permit in this instance—restricts the ability to use its property through physical appropriation resulting in the loss of the right to exclude.[149] While the majority in *Cedar Point* found the California regulation constituted a *per se* taking, the significant factual differences with the Permit under appeal make this case inapposite, as summarized below. Additionally, other Supreme Court precedent sheds light on the distinction between temporary limitations on property rights and permanent physical occupations rising to a *per se* taking that are relevant to the instant matter.[150] Taken together, these cases demonstrate that temporary limits on an owner's right to exclude others from property do not always amount to a *per se* taking.

Cedar Point and another Supreme Court case, *Kaiser Aetna v. United States*, that CPAI relies upon are distinguishable.[151] First, both cases involve a regulation allowing a third party to access to privately owned real property. In the present matter under appeal, the real property at issue is *owned and managed* by the State – and CPAI only holds a leased

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143 U.S. Const. amend. V.

144 *See e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071; *Penn Central Transportation Co. v. New York City* 438 U.S. 104, 124.

145 CPAI Memo, at 39.

146 *Id*.

147 *Id*. at 39; 141 S. Ct. 2063 (2021).

148 *Cedar Point*, 141 S. Ct. at 2080.

149 CPA Memo, at 38-9 (citing *Cedar Point*, 141 S. Ct. at 2071-72).

150 *See Cedar Point*, 141 S. Ct. at 2083-85 (Breyer, J., dissenting) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 418, 435-41 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78, 83-84 (1980); *Arkansas Game and Fish Comm'n*, 568 U.S. 23, 36-39 (2020)).

151 CPAI Memo, at 39 (citing *Cedar Point*, 141 S. Ct. at 141; *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979)).

interest, with a specific grant and relevant reservations by the State. Second, neither case relied upon by CPAI involved land owned by a sovereign—state or federal—that has been leased under specific statutory terms to a party for development purposes in the interests of the sovereign. Third, neither case involved contracts between the aggrieved "property" owner and its lessor that contained an express reservation permitting access by third parties for concurrent use. Fourth, neither case incorporated a constitutional and statutory mandate by the real property owner to manage natural resources subject to reasonable concurrent use. In short, neither case involved a situation where the government reserved rights to protect the public interest and grant access to the leased property to third parties. CPAI's reliance on *Cedar Point* and *Kaiser Aetna* is misguided, and its argument that a *per se* taking occurred does not have merit.

As explained above, the KRU roads are not CPAI's personal property and they are not facilities, structures, or Unit Equipment as defined in the UA or Leases. They are therefore not private property subject to CPAI's right to exclude or control. Moreover, the State granted CPAI the leases subject to the State's right, among other things, to grant third party concurrent use. CPAI's construction and use of roads is subject to the State's reservations and therefore CPAI's arguments regarding exclusivity are misplaced even if the roads were considered to be CPAI's private property in other contexts. CPAI could only place the roads in the KRU under the terms of the Leases. Therefore, they are subject to all of the conditions of the Leases. The State's exercise of a right retained under the Leases—a portion of the consideration under the lease contract—cannot be a taking under those circumstances.

Even assuming, *arguendo*, that the roads are CPAI's private property, the Permit and its authorizing regulation amount to a temporary limitation—not a permanent physical appropriation—and thus do not amount to a taking.

First, the Permit is limited to five years, which implies lack of permanency.[152] Second, by regulation and its express terms, the Permit *is* revocable—meaning there is no loss of the right to exclude in perpetuity.[153] Third, the Permit terms explicitly state it *shall* be revoked when the parties enter into a commercial use agreement—enunciating what CPAI can pursue on its own volition to extinguish the temporary limitation.[154] Fourth, the Permit recognizes a use that already exists through a temporary agreement between the parties and therefore does not permanently appropriate any property right to which CPAI has already provided use.[155] Fifth, the Permit contains provisions providing CPAI with

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152 Decision, at 1.

153 *Id.* at 2.

154 *Id.* at 1-2, 7; *see also,* 11 AAC 96.040 (permits authorized under this chapter are revocable at will).

155 *Supra,* fn. 106.

the priority use and a requirement upon OSA not to interfere with CPAI operations—undercutting the claim to a loss of any absolute right.[156] All these elements support the conclusion that the Permit and its authorizing regulation are but a temporary limitation on the "property" and not a *per se* taking.

3. The Permit is not a taking under the Alaska Constitution

CPAI devotes three paragraphs out of its 43-page appeal brief to its claim that the Permit was in violation of Alaska's Constitution and amounts to an inverse condemnation.[157] In summary, CPAI argues that issuance of the Permit is a *per se* taking under Articles I and VIII because the KRU roads are private property. This argument is also without merit.

a) Article I, Section 18. Eminent Domain

Article I, Section 18 of Alaska's Constitution states "[p]rivate property shall not be taken or damaged for public use without just compensation."[158] CPAI correctly asserts that Alaska's Takings Clause provides broader protection compared to the U.S. Constitution and is "interpreted liberally in favor of the property owner."[159] These broader protections include just compensation for personal and real property, as well as for temporary and permanent takings.[160] Beyond identifying these two distinctions, CPAI asserts that its argument advanced under its claim of a federal violation also shows that the Permit is a *per se* taking under Alaska law.[161] Further, it asserts this position is supported by the State Courts' deference to federal law when deciding taking claims.[162] Under either framing, the argument remains unconvincing.

As OSA points out in its brief, claims of inverse condemnation in Alaska require a party to establish "(1) a taking or damaging of private property (2) proximately caused by a government entity (3) exercising power in the public interest without formal condemnation proceedings."[163] Upon meeting these elements, the property owner "must show that the government's activities deprived him of some 'economic advantages of ownership'" to recover damages.[164] Applied here, CPAI has not met the first element; CPAI also fails to show a deprivation of economic advantage of ownership as a result.

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156 Decision, Appx. A, at 7.
157 CPAI Memo, at 39-40.
158 Alaska Const., art. I § 18.
159 CPAI Memo, at 40.
160 *Brewer v. State*, 341 P.3d 1107, 1111 (Alaska 2014).
161 CPAI Memo, at 40.
162 *Id*.
163 OSA Memo, at 16; *Beeson v. City of Palmer*, 370 P.3d 1084, 1088 (Alaska 2016).
164 *Besson*, 370 P.3d at 1088.

Even considering the broader protections of property under the Alaska Constitution, DNR's issuance of the Permit to OSA does not constitute either a taking or damaging of private property. The roads are not CPAI's private property under any of the Unit or Lease terms.[165] In addition, the State retained under the leases, among other things, the right to grant concurrent use to third parties. Therefore, no private property was taken or damaged. In addition, even assuming that the roads are the property of CPAI, and the State did not reserve any rights under the lease, the Permit does not limit CPAI's use of the road to any extent that constitutes a taking of or damaging property. Rather, the Permit provides two rights to OSA: (1) use of an access corridor that contains existing roads in a manner that does not unreasonably interfere with CPAI's superior right of use; and (2) the continued use that exists under the Ad Hoc Agreement with CPAI. Thus, even if the roads are assumed to be CPAI's private property—which they are not—the Permit does not take or damage CPAI's property rights in any manner that is inconsistent with preexisting agreements between CPAI vis-à-vis the State, or vis-à-vis OSA.

Moreover, even assuming CPAI met the elements required to prove inverse condemnation, it still fails to show a deprivation of economic advantages of ownership; CPAI therefore cannot recover damages. Under the Permit, OSA cannot interfere with CPAI's superior right of use. In addition, OSA must reimburse CPAI for any damage to the KRU roads caused by its use of those roads.[166] Importantly, CPAI does not claim that the UA or Unit Leases grant CPAI the right to an economic advantage in the construction or maintenance of the spine roads within the KRU for direct transportation services, nor to use the roads as a profit-making enterprise unrelated to its development of the subsurface oil and gas resources on the leased tracts. The parties agree that some form of economic gain is *possible* in circumstances where private parties agree to a commercial use agreement for the use of roads between and within units, but that circumstance is hypothetical and not the issue presently.

The permit does not interfere with CPAI's ability to renew negotiations and realize value from its non-exclusive rights. To the contrary, the Permit language expressly states it will be revoked upon the parties' negotiation of a mutually acceptable commercial agreement. Additionally, the record reflects the Division's numerous recommendations that the parties, particularly OSA, negotiate and enter into to an equitable commercial use agreement.[167] When taken in conjunction with CPAI and OSA's existing Ad Hoc Agreement, any assertion by CPAI that they are being deprived of an economic advantage is unfounded.

In other words, DNR's activities here do not deprive CPAI of rights or property interests so much as they provide a blueprint for how it can realize an economic gain through

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165 *Supra* Section IV.A.1.iii.

166 Decision, at App'x A.

167 *See, e.g.*, Decision, at 2 & App'x C.

private party agreements. The Permit prevents the parties from damaging the public interest through sitting at a commercial impasse that interferes with the development of the State's natural resources. CPAI, however, does not have an appropriately cognizable economic interest in interfering with the development of adjacent State lands. Between CPAI's failure to meet the elements of inverse condemnation and its failure to show a deprivation of an economic advantage, there is either no taking under Article I of Alaska's Constitution or no damages that would warrant compensation.

b) Article VII, Section 16. Protection of Rights

CPAI also relies on Article VIII, Section 16, which provides that "[n]o person shall be involuntarily divested of his right to use of … his interests in land, *or improvements affecting* [the interests in land], except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."[168] This argument fails too; the Permit neither involuntary divests CPAI of its right to an interest in land, nor do KRU roads constitute improvements within the meaning of the term in Section 16.

CPAI argues that the Permit results in an involuntary divestment of an interest in land or improvements affecting the land.[169] However, CPAI fails to explain how the Permit resulted in an involuntary divestment, as it still has full use of the roads and continues to hold its interests in them subject to the UA and Leases. The Permit expressly preserves CPAI's superior right to make use of the roads. To divest is to take something away,[170] and the permit has not removed any right from CPAI aside from foreclosing a claimed right to exclude that it, in fact, does not possess. Clearly, the Permit cannot result in removing an interest in the subject land—the KRU—because the interest in land is limited to an exclusive lease of the subsurface estate solely for the purpose of developing and extracting oil and gas reserves coupled with non-exclusive surface use that is subject to concurrent use.

CPAI's argument also fails because the KRU roads are not improvements protected by Article VIII, Section 16. The Alaska Supreme Court has detailed the scope of this section in *State, Dep't of Nat. Res. v. Alaska Riverways, Inc*.[171]

In *Alaska Riverways* the respondent purchased riparian land and built floating docks to support its paddleboat business, only to be told later by DNR that it had to obtain a lease from DNR for use of the property.[172] Relying on Article VIII, Section 16, the respondent claimed that it possessed a protected property right because the docks were improvements

168 Alaska Const., art. VIII, § 16.
169 CPAI Memo, at 40.
170 DIVEST, Black's Law Dictionary (11th ed. 2019).
171 232 P.3d 1203, 1213 (Alaska 2010).
172 *Id*. at 1206-07.

that could not require the company to acquire a lease from DNR.[173] In rejecting the respondent's claim, the Alaska Supreme Court explained:

> A proper understanding of section 16 and the committee commentary requires that it be viewed in historical context. At the time of the constitutional convention much of the infrastructure of the territory was built over tidelands owned by the United States. This included docks, warehouses, streets, hotels, stores, schools, private residences, and much of the commercial sections of Juneau, Ketchikan, Cordova, and Valdez. The United States took the position that most of these facilities were trespasses, though it had no desire to abate them. The reference to "improvements" in section 16 as explained in the commentary was intended to address this problem by recognizing that where "substantial improvements *have been made*" on tidelands as of the time of statehood, a protected property right would arise. Yet as to unimproved tidelands, the delegates were advised that the state legislature would have "full power insofar as the disposition of surface rights for the building of ... docks [and] wharves ... is concerned; the legislature may sell the lands in these cases, should it desire to do so." Properly understood, section 16 establishes that substantial improvements on tidelands that existed at the time of statehood would give rise to protected property rights while 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.[174] (Internal citations omitted.)

The Court explicitly held that "[h]aving built its wharf well after statehood, Alaska Riverways therefore cannot claim that it acquired any property interest protected by section 16."[175] Applying that holding to the KRU roads, it is clear that they are also not protected by section 16 because they were also built well after statehood. It plainly follows that the KRU roads are not improvements for the purposes of asserting an inverse condemnation claim against DNR. Accordingly, DNR was not required to provide just compensation or a formal condemnation hearing prior to its decision to issue the Permit providing third-party access to the road corridors under Section 16.

V. FINDINGS AND CONCLUSIONS

Having concluded that CPAI's points on appeal fail to identify how or why the Division or DNR lacked the authority to issue the Permit, erred in its adjudication process, or undertook a Constitutional taking, the Appeal is denied; the Decision is affirmed, and the associated Permit remains effective. The parties are encouraged to meet, confer, and

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173 *Id*. at 1217.
174 *Id*. at 1213-14 (emphasis added in original).
175 Id. at 1217-18.

reach an equitable road use agreement to effectuate revocation of this reasonable, legal, and revocable permit. In the interim, the Permit ensures that the public interest is protected, and development of the State's natural resources is not impeded.

VI. APPEAL RIGHTS

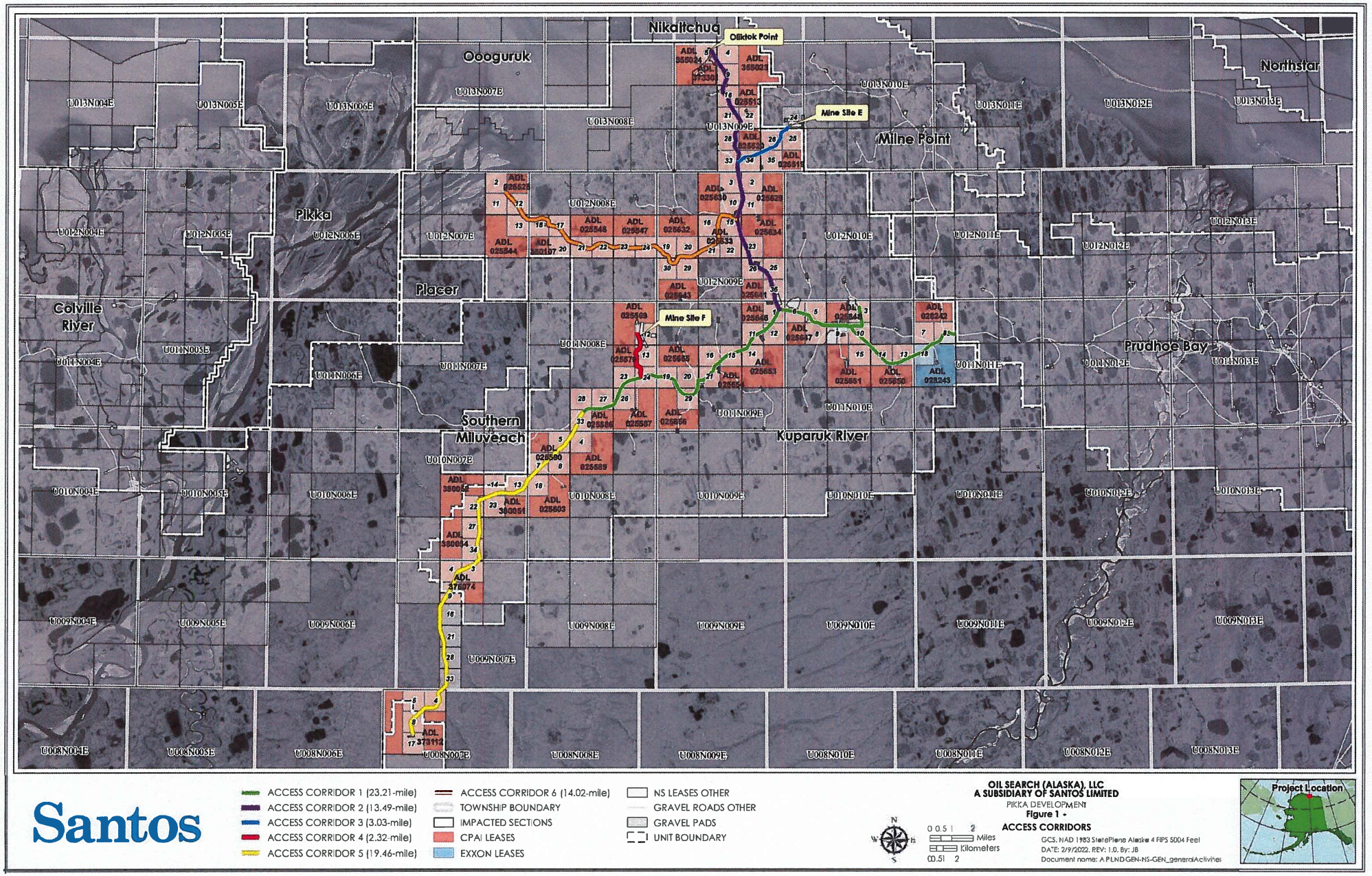
This serves as the final administrative order and decision of the Department of Natural Resources for purposes of appeal to the superior court.[176]

Vasilios Gialopsos, Acting Commissioner, DNR

cc: John Crowther, Deputy Commissioner, DNR
Erik A. Fossum, Director of Appeals & Policy Implementation, DNR
Hannah Pothast, Appeals Officer, DNR
Derek Nottingham, Director, DOG

176 11 AAC 02.020.

APPENDIX D: MAP



Appeal no. 22-015 - EXHIBIT 1