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

CONOCOPHILLIPS ALASKA, INC., Appellant, v. STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES, and OIL SEARCH (ALASKA), LLC Appellee.	Case No. 3AN-22-09828 CI **CONOCOPHILLIPS ALASKA, INC.'s OPPOSITION TO STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES' MOTION FOR STAY PENDING APPEAL AND OIL SEARCH (ALASKA), LLC'S JOINDER**

Appellant ConocoPhillips Alaska, Inc. ("CPAI") files this opposition to Appellee State of Alaska, Department of Natural Resources' ("DNR") Motion for Stay Pending Appeal and Appellee Oil Search (Alaska), LLC's subsequently filed Joinder in DNR's Motion for Stay Pending Appeal (collectively, the "Motion for Stay").

In seeking to stay this Court's decision to vacate the Permit,[1] DNR and OSA manufacture a parade of horribles found nowhere in the record or reality—arguing that without a stay, the Pikka development will be delayed, DNR's authority to manage state land will be eviscerated, and oil and gas development in the North Slope will be forever stymied. DNR and OSA then plea for this Court to preserve the "status quo," which to them means maintaining (for many more years) OSA's free access to the KRU roads via an invalid miscellaneous land use permit issued by DNR.

DNR's motion to stay is premised on CPAI's *presumed* intent to immediately deny OSA access to the KRU roads, which DNR *presumes* will cause irreparable harm to the State and OSA. But DNR knows its tale of woe to be untrue. First, CPAI has never prevented OSA from accessing the KRU Roads and has no intent of blocking OSA's access now, even after the Permit is vacated. Romberg Affidavit, ¶ 9. Instead, CPAI continues to seek a commercial agreement for OSA's continued use, but OSA's parent company, Santos Limited, refuses to respond to CPAI's offer—which was first made over a year ago and remains open to this day. *Id*., ¶ 15. Indeed, noticeably missing from OSA's moving papers is any mention of CPAI's recent offers. CPAI's latest proposal would provide OSA use of the KRU roads at a cost of approximately **$7 million per year**,[2] which is a fraction of the **$3-$4 million** Santos claims it spends **per day** on the Pikka Unit. Dingeman

[1] Capitalized words have the meaning ascribed in ConocoPhillips Alaska, Inc.'s Opening Brief and Reply Brief in this appeal.

[2] This amount is far different from the $600 million OSA claims in its December 10 filings. OSA Joinder at p. 11; Dingeman Affidavit, ¶ 12. CPAI's proposal is equivalent to less than $20,000 per day, or a fraction of 1% of Santos' daily Pikka project cost.

Affidavit, ¶ 16. To be clear, OSA could avoid any harm to itself or the State simply by negotiating in good faith, as directed by DNR in the Decision. Decision [Exc. 157] at 25-26. The only way OSA will lose access to the KRU roads is if Santos refuses to act in its own (and apparently the State's) economic best interest, all because Santos and DNR would rather represent to this Court that the parties are at a commercial impasse. For this reason alone, a stay should be denied.

Second, at best, Santo's calculated decision to forego a commercial agreement is *solely* within its own discretion and will result *solely* in monetary losses, which does not equate to irreparable harm. Indeed, Alaska courts consistently recognize that where the claimed harm is compensable by money damages, the harm is not irreparable. *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273 n.5 (Alaska 1992); *Williams Alaska Petro., Inc. v. State*, 529 P.3d 1160, 1191 n.101 (Alaska 2023). For this additional reason, a stay should be denied.

Finally, that vacating the Permit immediately will somehow upend the status quo is not credible. In 50 years, DNR has never before issued a miscellaneous land use permit to grant a third party access to private infrastructure. Just the opposite: for decades DNR has treated roads built on state oil and gas leases as private property, and has required third parties to enter private agreements to obtain access—all the while North Slope development has flourished. Simply put, it is DNR, not CPAI, who is trying to upend the status quo.

The Permit should be vacated and DNR and OSA's request for a stay should be denied.

LEGAL STANDARD FOR A STAY PENDING APPEAL

A "stay pending appeal" is an "'extraordinary remedy.'" *United States v. Mitchell*, 971 F.3d 993, 999 (9th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009). "The standard for issuing a stay on appeal is the same three-part test for deciding whether an injunction should issue." *Holmes v. Wolf*, 243 P.3d 584, 591 (Alaska 2010). Under Alaska's balance of hardships test, "relief is warranted only when the following three factors are present: '(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case.'" *Id.* (quoting *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970) and *Messerli v. Dep't of Natural Res., State of Alaska*, 768 P.2d 1112, 1122 (Alaska 1989)).

Critically, "[w]here the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits," a heightened standard beyond merely a substantial question on the merits. *Holmes*, 243 P.3d at 591; *see also State of Alaska, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) ("If … the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a 'clear showing of probable success on the merit.'").

The parties moving for a stay, here DNR and OSA, bear the burden of convincing the Court that each of these elements has been satisfied. *Dunleavy v. Div. of Elections*, No. 3AN-19-10903CI, 2020 Alas. Trial Order LEXIS 59, *1 (Alaska Super. Jan. 29, 2020); *see also United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020) ("party seeking the stay

bears the burden of showing that these factors favor a stay"). That is a weighty burden; "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken*, 556 U.S. at 427 (internal citations omitted). Because DNR and OSA cannot meet this standard, their request for a stay should be denied.

ARGUMENT

DNR and OSA have failed to prove that a stay is warranted, both as a matter of Alaska law and the record facts. DNR's entire premise for a stay—that OSA will lose access to the KRU roads *immediately* upon the Permit being vacated—is belied by the record and CPAI's sworn representations. Even more, neither DNR nor OSA will suffer irreparable harm; a stay will not protect the CPAI's interests; and Appellees cannot establish (and have not even tried) a likelihood of success on the merits. Accordingly, Appellees' Motion for Stay must be denied.

I. Appellees Have Failed To Prove They Will Suffer Irreparable Harm If A Stay Is Not Entered.

To warrant a stay, DNR and OSA first must show that they will suffer irreparable harm—namely, an injury that "'cannot receive reasonable redress in a court of law.'" *State v. Galvin*, 491 P.3d 325, 333 (Alaska 2021) (quoting *Kluti Kaah*, 831 P.2d at 1273). The "'mere possibility'" of an irreparable injury, *Mitchell*, 971 F.3d at 996, or fears about "speculative future harm" are insufficient. *Riley's Am. Heritage Farms v. Elsasser*, No. 23-55516, 2024 U.S. App. LEXIS 9921, *10 (9th Cir. 2024). The "movant must demonstrate that irreparable harm is probable—as opposed to merely possible—if the stay

is not granted; that is, irreparable harm must be 'the more probable or likely outcome.'" *Mitchell*, 971 F.3d at 996. That threshold "'cannot be met where there is no showing of any real or immediate threat'" to the movant. *Riley's*, 2024 U.S. App. LEXIS 9921, at *11 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). "[E]stablishing a threat of irreparable harm in the indefinite future is not enough." *Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 Fed. Appx. 676, 679 (9th Cir. 2011).

Next, where the harm alleged is self-inflicted or could be avoided by the movant, courts conclude that the harm is not irreparable either. *See, e.g.*, *Salt Lake Tribune Publ. Co. LLC v. At&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable[.]"). Likewise, where the claimed harm is compensable by money damages, the harm is not irreparable. *Kluti Kaah*, 831 P.2d at 1273 n.5; *Williams Alaska*, 529 P.3d at 1191 n.101. Finally, there "must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined" by a stay. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018); *Sovereign Iñupiat for a Living Arctic v. BLM*, 2023 U.S. Dist. LEXIS 58502, *16 (D. Alaska Apr. 3, 2023) (same); *AK Indus. Hemp Ass'n v. Alaska Dep't of Nat. Res.*, No. 3:23-cv-00253, 2023 U.S. Dist. LEXIS 200132, *3 (D. Alaska Nov. 7, 2023) (same). In other words, Appellees' unsupported claims about workers losing their jobs is the type of speculative and attenuated harm to third parties that, even if true, does not justify s stay.

DNR and OSA have not and cannot meet these demanding requirements.

a. Appellees' Alleged Harm Is Based on the False Premise that Vacating the Permit Will Result in OSA Losing Access to the KRU Roads.

As an initial matter, all of the harm Appellees allege in their thirty pages of collective briefing is premised on the speculative (and demonstrably false) assumption that OSA will be denied access to the KRU Roads immediately upon the Court's vacatur of the Permit. OSA's brief identifies four categories of harm it purportedly will suffer if the Permit is vacated: 1) an inability to develop oil and gas resources; 2) an inability to perform compliance or abandonment obligations; 3) an inability to carry out regulatory obligations; and 4) an inability to carry out obligations associated with carbon initiatives related to federal grants. OSA Joinder at 3-4. OSA expressly acknowledges that each of these categories of harm is dependent on a "loss of access to the KRU Roads while an appeal is pending." *Id.* at 3 (emphasis added). The harm DNR alleges is likewise dependent on OSA being denied access to the KRU Roads, claiming that vacatur of the Permit will cause irreparable harm to: 1) the State's obligations and best interest in timely developing oil and gas resources; 2) public revenues for the State and likely municipalities; 3) socioeconomic interests and other parties. DNR Mot. at pp. 6-7.

The problem with Appellees' fear mongering is that is has no basis in fact. Since the KRU roads were first built in the 1980s, CPAI **has never blocked any oil and gas operator from using the road system**, including OSA. Romberg Affidavit at ¶ 9. Instead, CPAI has allowed OSA to use the KRU roads at no cost for its pre-development access to the Pikka Unit, as has been CPAI's longstanding practice for other operators' pre-development activities. *Id.* Consistent with this practice, CPAI will not seek to "block"

OSA's or any other operator's use of the KRU roads going forward, even after the Permit is vacated. *See* CPAI March 14, 2022 Comments [Exc. 45] at 20; Romberg Affidavit at ¶ 9. Instead, CPAI will seek to reach a commercial agreement for road use, which has been the longstanding practice on the North Slope. Romberg Affidavit, ¶ 15.

Accordingly, there is no record support for Appellees' conjecture that vacating the Permit will result in the "immediate" or "imminent" exclusion of OSA from the KRU roads. *Riley's*, 2024 U.S. App. LEXIS 9921, at *11; *Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 Fed. Appx. at 679. (9th Cir. 2011). Such a presumption is nothing more than rank speculation that is belied by the record. The Motion for Stay fails on this basis alone.

b. Appellees' Alleged Harms Are Purely Economic, Self-Inflicted Injuries that Appellees Can Avoid.

Even if vacating the Permit did result in OSA's loss of access to the KRU roads (which again is unsupported by the record), the alleged harms cannot be "irreparable" because they are purely economic, self-inflicted injuries that Appellees easily could avoid.

i. Appellees' Alleged Harm is Self-Inflicted.

Most obvious, OSA knowingly attempted to obtain access to the KRU roads via a miscellaneous land use permit, a mechanism never before used to grant a third-party the right to use private leasehold improvements. *See* Decision [R. 1057] at 22. To be clear, instead of negotiating with CPAI, OSA made a business decision to forego a commercial agreement in favor of free road use with knowledge of the associated risks. *See, e.g.* Dingeman Affidavit at ¶¶ 11-15. Even OSA admits it was on notice that the Ad Hoc Agreement could be terminated, *id*. at ¶¶ 13, and it certainly knew the Permit could be overturned, long before its decision to pursue Pikka FID and spend $3-$4MM/day on Pikka

development. *Id*. at ¶ 16. Santos has since doubled down on OSA's gamble by refusing—to this day—to negotiate with CPAI, inconceivably choosing instead to risk supposed losses.

DNR likewise made the unprecedented decision to issue the Permit without any authority in contract, statute, or regulation—instead of encouraging the parties to reach a compromise. The State could have exercised lawful eminent domain procedures, if the State concluded OSA's free use of the KRU Road System served the people of Alaska and if CPAI was afforded due process. *See* AS 09.55.240 et seq. Instead of following the proper procedures, DNR sided with OSA and chose to subsidize its development costs to CPAI's detriment.

It is well-settled that "self-inflicted" wounds like these do not "irreparable" harm make. *Salt Lake Tribune*, 320 F.3d at 1106; *see, e.g. Barton v. Dist. of Columbia*, 131 F. Supp. 2d 236, 247 (D.D.C. 2001); *Tulare Lake Canal Co. v. Stratford Pub. Util. Dist*., 92 Cal. App. 5th 380, 416, 309 Cal. Rptr. 3d 493, 520 (2023) (harm from delay in completing pipeline project not irreparable when attributed to the failure to comply with environmental regulatory obligations, "a harm that can be regarded as self-inflicted"); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948.1 (3d ed. 2023) ("a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.").

Because the harm alleged by Appellees stems from their own calculated decisions, that harm is self-inflicted and cannot justify a stay that impairs CPAI's rights. This is especially true here given Appellees' losses, if any, would be the result of their own "failure

to follow the law in the first instance," *Swan View Coal. V. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014), and the purported harm "would merely represent the burdens of complying with the applicable statutes" and constitutional limitations. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *see also Swan View*, 52 F. Supp. 3d at 1161-62 (D. Mont. 2014) (enjoining Forest Service and explaining that its "argument regarding the difficulties and potentially adverse consequences of complying with the law carry little weight" for if "the Forest Service conducted the requisite analysis prior to taking agency action … the agency would not be in its current predicament").

ii. Appellees' Speculative Harm Can Be Avoided Entirely Via Commercial Agreement.

In addition to being self-inflicted, the harm alleged by Appellees is wholly illusory as it can be avoided altogether if OSA simply enters into a commercial agreement with CPAI. "It is well settled that avoidable harm is not irreparable; if a Plaintiff can mitigate the threatened irreparable harm, [it] cannot refuse to do so and yet still claim that [it] would be irreparably injured absent an injunction." *Bellin v. La Pensee Condo. Assoc. Inc.*, 2005 WL 8156021, at *9 (S.D. Fla. Oct. 13, 2005); *see Dish Network L.L.C. v. Cox Media Grp., LLC*, No. 20 C 570, 2020 U.S. Dist. LEXIS 126850, at *21-24 (N.D. Ill. July 20, 2020) ("DISH also ignores that it can avoid a blackout by negotiating with Terrier… . Simply put, DISH is effectively choosing to black out the stations rather than incurring the extra costs that would be required to reach a new agreement."). It also applies where, as here, a government agency claims "administrative burdens" and delay costs that arise from its own conduct. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020).

OSA could ensure access and erase the specter of possible harm (to OSA and the State) by entering into a long-term road use agreement with CPAI. Since this litigation began, CPAI has continued to seek an agreement that would resolve OSA's request to use the KRU roads for heavy construction and operation of the Pikka Unit. Romberg Affidavit, ¶ 15. CPAI originally proposed KRU road use fees that were substantially equivalent to terms OSA previously offered a third party for the sale and leaseback of OSA's own Pikka Unit roads and bridges. *Id.*, ¶ 14. In November 2023, CPAI amended its offer and substantially decreased the fees required for OSA to use the KRU roads, to approximately 70% of the price OSA demanded for use of its own Pikka roads. *Id.*, ¶ 15. As a compromise, CPAI even offered to forego any compensation for OSA's heavy-construction use of the KRU roads from August 2022 (Pikka final investment decision) to January 2024, even though that use has been subject to an invalid Permit. *Id.* Santos never responded. *Id*., ¶ 16.

After the Court stated its intent to rule in CPAI's favor, CPAI indicated it would continue to honor its November 2023 offer, despite the Court's decision, and provided a fully termed agreement for OSA to sign. *Id.* When Santos again did not respond, CPAI transmitted a new proposal on December 12, 2024, covering all of OSA's units on the North Slope, and further decreasing the fees for OSA's use of the KRU roads to approximately 50% of the price set by OSA for use of its own roads. *Id.* Under this proposal, while the yearly fee will vary with the additional capital required to maintain the KRU road system, the average yearly amount (maintenance plus past and ongoing capital) will be **under $7 million per year**. *Id.*, ¶ 17.

Santos is a very large company, and claiming that the reasonable cost of road access is detrimental to it or its multi-billion dollar Pikka project is absurd.[3] According to its most recently filed investor report, Santos' half-year revenues for 2024 were more than $2.7 billion, its half-year profits were more than $650 million, and its free cash flow was more than $1 billion. *See* Santos 2024 Half Year Results.[4] In 2024, Santos reported that it had access to $4.27 billion in liquidity, comprised of $2.215 billion cash on hand and $2.060 billion in undrawn credit facilities, increased its Pikka project budget by $400 million, and projected the Pikka project will have a 20% rate of return. *See* Santos Investor Presentation; Santos Third Quarter Report.[5] It is simply not credible for OSA to contend that having to pay less than $7 million per year to use a $1 billion dollar asset constitutes irreparable harm or threatens to stop its multi-billion dollar, 20% rate of return project. CPAI's proposal is a tiny fraction of that amount, **equivalent to less than $20,000 per day, or less than 1% of Santos' daily Pikka project cost**. Santos surely pays much more than that to use third-party drilling rigs, heavy equipment, and other third-party property required to execute its Pikka project, yet Santos does not contend that paying other third parties threatens to delay the Pikka project.

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[3] Conversely, if Santos was a small, poorly capitalized entity on financially shaky ground, that status wouldn't provide a basis for claiming irreparable harm or failing to engage in commercial negotiations.

[4] Available at https://www.santos.com/wp-content/uploads/2024/08/2024-Half-year-results.pdf.

[5] Available at https://www.santos.com/wp-content/uploads/2024/11/Santos-Investor-Day-2024.pdf and https://www.santos.com/wp-content/uploads/2024/10/2024_Santos-Third-Quarter-Report.pdf.

At any time Santos can accept or counter CPAI's proposal, and the parties' dispute is likely to be resolved. *Id*. at ¶ 16. What is inconceivable is that Santos would jeopardize a $3 billion investment, incur fees and penalties under third party contacts, forego over $50 million in grant money, and lose its existing leases—or cause the State to lose significant revenue, job creation and other economic benefits—(as claimed in OSA's and DNR's moving papers) instead of reaching an agreement with CPAI at an annual cost of less than $7 million per year. Dingeman Affidavit, ¶¶ 7, 26, 28; DNR Motion to Stay, pp. 8-9. If Santos genuinely wanted to reach a long-term road use agreement, Santos can, which would prevent the alleged harm to the State DNR claims in its Motion to Stay. Instead Santos would rather create a mirage for this Court. The harm alleged by Appellees can be avoided by OSA and does not constitute "irreparable harm" to support a stay pending appeal.[6]

iii. Appellees' Purported Harm is Purely Economic and not "Irreparable."

It is equally axiomatic that purely economic harm is not considered an irreparable injury that justifies a stay. *See, e.g.*, *Cook Inlet Fisherman's Fund v. State, Dep''t of Fish & Game*, 357 P.3d 789, 796 (Alaska 2015) (noting Superior Court conclusion that "harm was not irreparable" because it "involved only economic harm'); *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. *2015); hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th

[6] OSA's continued refusal to enter a long-term road use agreement with CPAI also constitutes self-inflicted harm, as described in Section I(b), *supra*.

1180, 1188 (9th Cir. 2022). Economic harm is not "irreparable" because "money lost may be recovered later." *Coeur D'Alene Tribe*, 794 F.3d at 1046.

The reality here is that the harm Appellees allege is monetary. Appellees claim that losing access to the KRU roads will result in development delays that in turn will reduce revenue to OSA and the State. OSA Joinder at 4-5. Appellees' laundry list of other harms is also monetary in nature. *See* Dingeman Affidavit, ¶¶ 27, 28 (claiming irreparable harm because OSA would have to incur fees and penalties under third party contacts and would lose grant money); DNR Motion to Stay, p. 10 (claiming administrative costs to institute condemnation proceedings and vague "additional costs due to uncertainty and inefficiencies of delays" as irreparable harm). Such economic harms are not "irreparable" for purposes of the stay analysis because they are purely economic. For this additional reason, Appellees cannot establish irreparable harm in support of their Motion for Stay.

II. Alleged Harm to Third Parties and The Public Do Not Justify Appellees' Extraordinary Stay Request.

Unable to demonstrate that DNR and OSA themselves would suffer any irreparable injury absent a stay, DNR and OSA attempt to patch the holes in their proof by speculating about harms that third-parties might suffer. Appellees' fall short for at least two reasons.

First, DNR and OSA's focus on third-party harm is misguided as a threshold matter. The applicable stay "standard … requires irreparable harm **to the plaintiffs themselves**" and thus, a court "abuse[s] its discretion in finding a likelihood of irreparable harm" predicated on "the prospect of harm to third parties" alone. *Immigrant Legal Res. Ctr. v. City of McFarland*, 827 Fed. Appx. 749, 751-752 (9th Cir. 2020) (unpublished)

(citing *Nat'l Wildlife*, 886 F.3d at 822) (emphasis added)); *Walsh v. Ahern Rentals, Inc.*, No. 21-16124, 2022 U.S. App. LEXIS 896, *4 n.2 (9th Cir. 2022) (unpublished) ("The irreparable-harm analysis focuses on the moving party, not the nonmoving party or some third party."); *Wooten v. BNSF Ry. Co.*, No. 16-139, 2017 U.S. Dist. LEXIS 40551, *8 (D. Mont. Mar. 16, 2017) (same); *Aesthetic Eye Assocs., P.S. v. Alderwood Surgical Ctr., LLC*, No. 2:22-cv-00773, 2022 U.S. Dist. LEXIS 181618, *19 (W.D. Wash. Oct. 4, 2022) ("Plaintiff has provided no authority supporting the argument that irreparable harm to a third party (as opposed to the movant) can satisfy [the irreparable harm] element"); *Nutrition Distrib., LLC v. Enhanced Athlete, Inc.*, No. 2:17-cv-2069, 2017 U.S. Dist. LEXIS 188380, *4 (E.D. Cal. Nov. 13, 2017) (same).

Second, courts recognize there "must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined" by a stay. *Nat'l Wildlife*, 886 F.3d at 819 (quoting *Perfect 10*, 653 F.3d at 981-82). Here, any causal connection between this Court's decision to vacate the Permit and any supposed impact on third-party workers and contractors is so attenuated and speculative that it lacks credibility. Even more, any causal connection is necessarily broken by an obvious intervening cause—namely, OSA's refusal to enter a commercial agreement that would avoid its self-inflicted injury. *See Colorado v. United States EPA*, 989 F.3d 874, 888 (10th Cir. 2021) (rejecting irreparable harm claim because "'self-inflicted injuries … break the causal chain" and thus, the claimed injury "is not fairly traceable to the … alleged unlawful conduct") *Cal. PUC v. FERC*, 624 Fed. Appx. 603, 604 (9th Cir. 2015) (similar).

Because Appellees have not and cannot satisfy their burden of proving they will endure irreparable harm if the Court does not stay its decision to vacate the Permit, the Stay should be denied and the Permit should be vacated immediately.

III. DNR Has Not Shown CPAI's Rights Will Be Protected If Its Limitless, Unsecured Stay Is Approved.

Turning to the second stay criterion, DNR and OSA fare no better. While DNR and OSA posit that the harm CPAI would suffer from the stay would be "'relatively slight in comparison'" to what they will suffer, they have failed to carry their heavy burden of showing that CPAI will be "adequately protected" if a stay is entered. *Holmes*, 243 P.3d at 591.

Indeed, the injury CPAI has suffered here—an unconstitutional deprivation of its constitutional and contractual right to exclude—is the antithesis of slight and far more significant than the burden DNR and OSA would face (in complying with the law no less). DNR Mot. at 14 (citation omitted); OSA Mot. at 11-12. DNR and OSA offer no explanation for how CPAI's rights would be protected by a blanket, open-ended stay that would run throughout the course of an appeal—which DNR and OSA would have every incentive to delay and prolong. If this Court's anticipated ruling were to be stayed, then the erroneous and unlawful deprivation of CPAI's rights would only persist.[7]

[7] There is also harm to CPAI in allowing the Permit to stand pending appeal given it sets a precedent that DNR may take private infrastructure without consent or compensation, eviscerating decades of operator expectations on the North Slope. This danger is especially high given DNR's stated intention in its request for stay "to consider enforcement actions under leases or other authorizations" if the Court rules against DNR in this case. DNR Mot. at 10. DNR's apparent willingness to circumvent this Court's decision by using

As numerous courts have recognized, the resulting injury to CPAI's constitutional rights is irreparable—and cannot be adequately safeguarded or remedied. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury."); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *United States v. Alaska*, 608 F. Supp. 3d 802, 809 n.38 (D. Alaska 2022) ("'Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm in the context of preliminary injunction.'") (citation omitted).[8]

Ironically, rather than a stay being in the public's interest, as DNR suggests, "[g]enerally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Indeed, "it is 'always in the public interest to prevent the violation of a party's constitutional rights.'" *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (quoting *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731

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unrelated powers to indirectly compel CPAI to cede its private property to DNR threatens to irreparably harm CPAI and the State.

[8]Contrary to DNR's misguided suggestion, CPAI's fundamental constitutional and legal rights do not carry any less weight simply because CPAI has elected not to exclude others from using its property interests. *See* DNR Mot. at 13. To the contrary, the federal and state constitutions protect CPAI's right to do with its property as it pleases—including permitting OSA's use via agreement—and neither constitution guarantees more limited privileges to property owners who choose not to exclude others. OSA is equally wrong to suggest that "CPAI's 'harm' from a stay is, at most, its inability to generate revenue from OSA's use of the KRU Roads while the appeal is pending." OSA Mot. at 14. That summary refrain misses the point. It entirely fails to account for the irreparable, unguardable infringement on CPAI's constitutional rights and constitutionally protected property interests.

(9th Cir. 2022)). Additionally, immediately vacating the Permit, which was improperly granted without authority, is in the public interest because the public interest favors the correct application of the law. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[I]t is obvious that compliance with the law is in the public interest.") (citation omitted).

IV. DNR Has Not Pointed To Any Serious And Substantial Questions On The Merits, Let Alone Made A Clear Showing Of Probable Success On The Merits.

As for the final stay criterion, Appellees must make a "clear showing of probable success [on the merits]"—the heightened standard that applies when ***either*** "the party asking for relief does not stand to suffer irreparable harm, ***or*** where the party against whom the [stay] is sought will suffer injury if the [stay] is issued[.]" *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1249 (Alaska 1995) (quoting *A.J. Indus.*, 470 P.2d at 540). Because Appellees have not shown their own irreparable harm nor that CPAI will be adequately protected by a stay, the heighted standard of a clear showing of probable success applies.

DNR and OSA claim they do "not believe that this standard is applicable given the balance of harms," and that their burden is merely to show "serious and substantial questions" on the merits. DNR Mot. at 14; *see* OSA Mot. at 2 ("adopting DNR's analysis of the serious and substantial questions"). But other than their own wishful thinking, they offer no argument or authority that would lessen their burden.

In any event, whether the probable-success-on-the-merits standard or serious-and-substantial-questions standard applies, DNR and OSA have met neither. Tellingly, they

make no attempt to meaningfully explain how they could satisfy these standards, with DNR offering only two short paragraphs and OSA only one. *See* DNR Mot. at 14-15; OSA Mot. at 15. That is not enough to meet their burden. *See, e.g.*, *Breedlove v. Hartford Life & Accident Ins. Co.*, No. 6:11-cv-991, 2013 U.S. Dist. LEXIS 12468, *4 (M.D. Fla. Jan. 30, 2013) (holding movants "have not met her burden of proving either a probable likelihood of success or that they have a substantial case on the merits" by "summarily argu[ing] that the Court erred in its analysis, but offer[ing] no evidence or case law to support their argument."); *LLC SPC Stileks v. Republic of Mold.*, 985 F.3d 871, 880-881 (D.C. Cir. 2021) (rejecting argument that stay should be lifted based on rote "prognostications" of a "'high probability'" of success on the merits, because such "*ipse dixit* is insufficient").

Nor do DNR and OSA meet their burden by blanketly "referenc[ing]" prior filings and the record in general[9] without providing this Court with specific citations and explanations to demonstrate how any particular issues in this voluminous record satisfies the stay criterion. DNR Mot. at 15. Again, it was DNR and OSA's burden to make the requisite showing through reasoned argument and citation to the record and legal authorities. Instead, DNR and OSA ask this Court to take their word for it that the Court's ruling must be wrong—despite knowing the Court reached its decision only after considering the parties' 200+ pages of briefing. *See United States v. CNA Fin. Corp.*, 168

[9] DNR Mot. at 15; *see also* OSA Mot. at 2 n.3 (declaring generally that DNR and OSA's "probable success on the merits is demonstrated by the record"—apparently in its entirety—and "the appellate briefs filed by the State and OSA" without citation to anything specific whatsoever).

F. Supp. 2d 1125, 1127 (D. Alaska 2001) ("The court has no obligation to scour the record to find support for a party's arguments.").

DNR attempts to justify its shallow response by noting that this Court's ultimate decision "has yet to be issued and therefore the Court's precise rationale [is] unknown[.]" DNR Mot. at 15. But that is only a problem of DNR and OSA's own making. Stating the obvious, no one forced DNR to file, and OSA to subsequently join, a stay request before any final decision has been issued.

V. Vacating the Permit Would Restore the Status Quo.

Finally, with no stay criterion supporting their extraordinary request, DNR and OSA fall back on empty platitudes that issuing a stay would preserve the status quo. *See* DNR Mot. at 2-3; OSA Joinder at 4. That too gets them nowhere. For one, rote invocations of an interest in preserving the status quo cannot justify the extraordinary relief of a stay if DNR and OSA have not met the necessary criteria. *See, e.g.*, *Dicken v. Shaw*, 841 P.2d 1126, 1130 (Mont. 1984) ("A court should act to preserve the status quo only after the applicant has made a showing that he or she will be irreparably injured if an injunction is not granted while the matter is being litigated."). For another, DNR and OSA have got it backwards. As even DNR admits, never before has DNR issued a miscellaneous land use permit to grant a third party access to private infrastructure. By vacating the Permit, the Court will rightly return the parties to the status quo that has existed for 50 years.[10]

[10] A trial court does not abuse its discretion by enjoining a continuing trespass, which OSA's use of the roads would constitute, even if the injunction disturbs, rather than preserves, the status quo. *See Annex Indus. Park, LLC v. Corner Land., LLC*, 206 So. 3d

VI. Appellees' Improper Attempt To Supplement The Merits Record For Appeal Should Be Rejected.

In covert fashion, DNR and OSA couple their extraordinary request for a stay with an equally extraordinary effort to remake the record for an anticipated appeal. Despite admittedly conducting no factfinding before issuing the Permit, Appellees have collectively filed five affidavits with numerous facts that go to the underlying merits of this appeal.

As a matter of well-settled appellate review principles and fundamental fairness, DNR and OSA should not be allowed to take another bite of the proverbial apple to remake the factual record. Indeed, had they moved to stay this Court's final decision after it was issued, DNR and OSA's record supplementation gambit would have been a dead letter. A "fundamental aspect of our normal appellate review process" is to "review a trial court's ruling based on the record as it existed at the time the court made its ruling." *Moore v. State*, 298 P.3d 209, 218 (Alaska App. 2013). Thus, "[p]apers submitted to the … court *after* the ruling that is challenged on appeal should be stricken from the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (collecting cases). Accordingly, DNR and OSA's late-stage affidavits should not be considered in any merits determination in this case, either now or on appeal (or the merits criterion for a stay). Striking this late-stage "additional evidence" is warranted. *Id.*

739 (Fla. 3d DCA 2016) (temporary injunction may be entered to protect a party's private property rights when the temporary injunction prevents an alleged ongoing trespass).

VII. CONCLUSION

In sum, DNR and OSA have "not shown irreparable harm, and further have not raised serious and substantial questions going to the merits of the issue, much less probable success on the merits of the case." *Holmes*, 243 P.3d at 591. Nor have they made any showing that CPAI's rights would be protected if their stay request were granted, because they cannot be. There is no basis for this extraordinary request and attempt to silence this Court's ruling simply because DNR and OSA disagree with it. The Motion to Stay Pending Appeal, and OSA's Joinder in it, should be denied.

DATED: December 13, 2024.

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I certify that on December 13, 2024, a copy of the foregoing was served by email on:

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