

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

CONOCOPHILLIPS ALASKA, INC.,

Appellant,

v.

STATE OF ALASKA DEPARTMENT OF
NATURAL RESOURCES, and OIL SEARCH
(ALASKA), LLC,

Appellees.

Case No. 3AN-22-09828 CI

**OIL SEARCH (ALASKA) LLC'S REPLY IN SUPPORT OF DNR'S AND OSA'S
MOTION FOR STAY PENDING APPEAL**

Appellee Oil Search (Alaska), LLC ("OSA") submits this reply in support of the Motion for Stay Pending Appeal ("Motion for Stay") filed by the State of Alaska, Department of Natural Resources ("DNR" or "State") on December 9, 2024 and joined by OSA on December 10, 2024.

The State and OSA seek a stay pending appeal of any order by this Court that vacates the Miscellaneous Land Use Permit issued by DNR on March 29, 2022 ("MLUP"). In its opposition to the Motion for Stay ("Opposition"), ConocoPhillips Alaska, Inc. ("CPAI") does not dispute the legal framework that governs this motion for stay pending appeal, recognizing that a stay is governed by the same test that governs issuance of a preliminary injunction. As the discussion below demonstrates, CPAI's arguments on each element of the legal test for a stay pending appeal are meritless.

I. The Proposed Stay Would Preserve the Status Quo.

The purpose of a stay pending appeal is to preserve the status quo during the appeal. CPAI claims that in this case, the status quo is the time before DNR issued the MLUP to OSA. This contention is plainly incorrect. The MLUP became effective on March 29, 2022.¹ A stay “simply suspend[s] *judicial alteration* of the status quo”² while an appeal is pending. Here, “judicial alteration” of the status quo would be an order from the Superior Court vacating the MLUP. Preservation of the status quo means keeping the MLUP in place while the Supreme Court reviews DNR’s decision to issue the MLUP.

II. Appellees Have Demonstrated Irreparable Harm.

CPAI incorrectly asserts that Appellees’ have not shown irreparable harm because their harms are speculative, self-inflicted, purely economic, and indirect third-party harm. None of these assertions is accurate.

A. Appellees’ Harms are Not Speculative.

CPAI incorrectly asserts that Appellees’ claimed harms are speculative because CPAI might not take action to prevent continued use of the KRU roads during appeal. This logic fails for several reasons. First, CPAI does not deny the events that led to DNR’s

¹ Notably, DNR did not stay the MLUP after CPAI challenged the MLUP. CPAI requested a stay [Exc. 318-21] but the Commissioner denied the stay [R. SOA AR 503]. In its appeal to the Superior Court, CPAI did not challenge the Commissioner’s denial of a stay.

² *Nken v. Holder*, 556 U.S. 418, 429 (2009),

issuance of the MLUP in 2022.³ CPAI made it clear that it was unwilling to allow OSA to continue using the KRU roads under the existing Ad Hoc Agreement,⁴ and stated in writing that in the absence of a new agreement CPAI was prepared to block OSA’s access to the KRU Roads through “practical physical measures and legal remedies.”⁵ Moreover, it is undisputed that CPAI gave notice of breach under the existing Ad Hoc Agreement and can therefore terminate the Ad Hoc Agreement at any time.⁶ And, it is undisputed that OSA and CPAI were unable to agree on terms for continued use going forward—which is the condition for DNR’s issuance of the MLUP under 11 AAC 96.010(a).

Faced with this Motion for Stay, CPAI asserts in various formulations that it will not prevent OSA’s use of the KRU roads during appeal. In CPAI’s brief, these assertions are coupled with the condition that CPAI will not prevent OSA from using the roads, if OSA will simply agree to CPAI’s terms.⁷ As discussed below, a stay pending appeal cannot be conditioned on the moving party’s capitulation to the other party’s terms. Moreover, CPAI’s assurances do not provide any *enforceable* protection for OSA’s continued use of the KRU roads during an appeal. Notably, CPAI has not withdrawn its

³ Affidavit of Peter Laliberte (“Laliberte Aff.”) (Dec. 17, 2025) ¶¶ 5-16.

⁴ Laliberte Affidavit ¶ 7.

⁵ Exc. 279 (“CPAI has practical physical measures and legal remedies to prevent and remedy unauthorized use of KRU Roads, which would be implemented as necessary.”).

⁶ Exc. 74-75.

⁷ CPAI Opp’n at 10 (“The harm alleged by Appellees is wholly illusory as it can be avoided altogether if OSA simply enters into a commercial agreement with CPAI.”).

declaration that CPAI is in default of the Ad Hoc Agreement.⁸ And even if CPAI did so, a stay order is the only way to provide the essential certainty that OSA’s use of the KRU roads can continue without interruption pending appeal. Finally, if CPAI is in fact willing to allow OSA to use the KRU roads under the terms of the MLUP or the Ad Hoc Agreement during an appeal, CPAI should have no objection to a stay. The fact that CPAI vehemently opposes a stay strongly indicates that it wants to preserve its option to prevent access during the appeal.

B. Appellees’ Harms are Not Purely Economic.

CPAI next contends that OSA’s harms are not irreparable because they are “purely economic.”⁹ This is incorrect. Appellees’ harms include far more than economic damages: the project delay, lost jobs, inability to comply with environmental compliance and other regulatory obligations, interruptions to required fish and wildlife studies, inability to comply with federal carbon initiative grants and complete carbon studies, violation of contractual terms and lease obligations, inability to perform essential business functions, potential loss of OSA’s leases, reputational harm, and lost benefits to

⁸ In fact, CPAI indicates that OSA’s current use of the KRU Roads is a “continuing trespass” (CPAI Opp’n at 20, n.10), reinforcing its unequivocal confirmation and threats that it can and will terminate the Ad Hoc Road Use Agreement and block OSA’s access to the KRU Roads if OSA refuses to agree to CPAI’s unreasonable commercial terms for a long-term road use agreement.

⁹ CPAI Opp’n at 8, 13.

the State and people of Alaska that will result if a stay is not granted are not purely economic.¹⁰ These non-economic harms, which are detailed in Appellees’ motion and joinder, cannot be “recovered later”¹¹ and fully support a stay.

C. Appellees’ Economic Losses are Irreparable Because they are Not Recoverable.

CPAI also incorrectly argues that economic losses are not irreparable. This is incorrect. As CPAI concedes, economic losses can constitute irreparable harm that supports a stay if the economic losses cannot be recovered later.¹² CPAI has not identified any means for OSA or the State to recover the economic losses that will occur if the MLUP is vacated without a stay pending appeal. CPAI offers no cause of action that either Appellee could bring to recover or receive redress for loss of revenues to OSA and the State, penalties assessed on OSA for failure to comply with the terms of their

¹⁰ Dingeman Aff. ¶¶ 17-30.

¹¹ CPAI Opp’n at 14 (quoting *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015)).

¹² *Id.*; see also *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (“Economic harm is not normally considered irreparable However, such harm is irreparable here because the states will not be able to recovery monetary damages.”); *LSP Transmission Holdings II, LLC v. Huston*, No. 1:24-CV-01722-TWP-MG, 2024 WL 5008048, at *9 (S.D. Ind. Dec. 6, 2024) (“And because LSP cannot recover monetary damages from the IURC Defendants as state officials, the Court is satisfied that LSP will suffer irreparable harm without an injunction.”); *ITServe All., Inc. v. Scalia*, No. 20-14604 (SRC), 2020 WL 7074391, at *9 (D.N.J. Dec. 3, 2020) (“[I]n instances where the injured parties cannot recover monetary damages after the fact, even purely economic harm is considered irreparable.”).

agreements, loss of investment, or loss of federal grant funding that will result if OSA is unable to access its leases using the KRU Roads. Without any mechanism for recovery for these economic or monetary losses, the losses are literally “irreparable” and unquestionably support a stay.

D. Appellees’ Harms are Not Self-Inflicted.

CPAI next contends that Appellees’ harms are not irreparable because they are “self-inflicted injuries” that Appellees can avoid.¹³ Again, this is incorrect.

CPAI contends that OSA knowingly attempted to obtain access to the KRU roads through the MLUP instead of negotiating with CPAI and “has since doubled down by refusing—to this day—to negotiate with CPAI.”¹⁴ According to CPAI, because Appellees’ alleged harm “stems from their own calculated decisions, that harm is self-inflicted and cannot justify a stay.”¹⁵ In essence, CPAI argues that OSA’s harms cannot be irreparable because OSA can avoid the harms by simply agreeing to CPAI’s commercially unreasonable terms. This is not supported by fact or law.

CPAI’s assertions regarding OSA’s refusal to negotiate are patently false. It is CPAI, not OSA, that refused and continues to refuse to engage in reasonable commercial

¹³ CPAI Opp’n at 8.

¹⁴ CPAI Opp’n at 9.

¹⁵ CPAI Opp’n at 9.

discussions.¹⁶ CPAI walked away from the table mid-2023 prior to sending what it refers to as the “November 2023 offer.” That “offer” was simply a list of bullets with “key terms” that CPAI transmitted after repeated requests by Santos for a response to their last offer.¹⁷ Contrary to CPAI’s contention, OSA transmitted a fully termed agreement in response to that list in August 2024, which CPAI never responded to.¹⁸ The parties finally met in November 2024 and agreed to continue negotiations in early 2025. Instead, CPAI transmitted its “latest offer” to OSA the day before filing its Opposition.¹⁹ CPAI’s attempt to characterize OSA as unwilling to negotiate is simply not accurate.

CPAI’s argument that OSA and the State cannot obtain a stay because the harms claimed by OSA and the State can be avoided if OSA will just agree to CPAI’s demands is also unsupported by law. “Equity does not require a [party] to acquiesce in the violation of [its] rights in order to avoid a claim that the injury is self-inflicted.”²⁰ Further, the legal authority cited for the proposition that OSA’s harms are “self-inflicted” and therefore not

¹⁶ Laliberte Aff. ¶¶ 17-23.

¹⁷ Laliberte Aff. ¶ 18-19.

¹⁸ Laliberte Aff. ¶ 20.

¹⁹ Laliberte Aff. ¶¶ 21-22.

²⁰ *A.W. Chesterton Co. v. Chesterton*, 907 F. Supp. 19, 24 (D. Mass. 1995); *see also Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 679 (7th Cir. 2012) (“In that case, Stuller's choice not to implement the policy, leading to the termination of the franchises, would not be a true choice and could not be fairly categorized as a self-inflicted injury.”); *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1209 (D. Conn. 1992) (“[P]laintiff does not have to acquiesce in a violation of its rights to avoid a claim of self-infliction of injury.”).

irreparable does not support CPAI's arguments.²¹

E. Irreparable Harm to OSA's Workers, Contractors, and the Citizens of Alaska Supports a Stay.

CPAI next contends that harms to the public and workers whose jobs will be lost if OSA loses access to KRU Roads are merely "alleged harm to third parties and the public" that do not justify a stay.²² Again, this is unsupported by law.

The unpublished decisions CPAI cites provide only that harm to third parties cannot *alone* justify a stay without also demonstrating harm to the moving party.²³ As discussed above, Appellees have identified numerous irreparable harms to Appellees that will result if a stay is not granted in addition to the irreparable harm to employees, contractors, and the public. Appellees have not cited irreparable harm to third parties as the sole basis for the stay. Further, the authority cited does not involve the State as the moving party.²⁴ The irreparable harm to the people of Alaska that will result if OSA is

²¹ None of CPAI's case law supports this contention. See CPAI Opp'n at 6. For example, in *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 n.5 (Alaska 1995), the Court explicitly declined to rule on whether irreparable harm had been shown and instead adopted as correct the superior court's finding that the Tribe would suffer irreparable harm for purposes of a stay. Similarly, in *Williams Alaska Petroleum, Inc. v. State*, 529 P.3d 1160, 1191 n.101 (Alaska 2023) the Court was not even discussing a motion for stay; instead, the Court was discussing the standard for injunctive relief ordered under AS 46.03.765. CPAI's other cases for this assertion are similarly unavailing and are neither binding nor persuasive on this Court.

²² CPAI Opp'n at 14.

²³ CPAI Opp'n at 14-15.

²⁴ CPAI Opp'n at 14-15 (citing unpublished decisions that did not involve a state as a

unable to access the KRU Roads is unquestionably a direct harm that may be asserted by the State.²⁵

The legal authority CPAI cites also does not support CPAI’s suggestion that loss of jobs by the moving party’s employees and contractors or loss of revenue to the State’s citizens are “third-party” harms that are irrelevant to a stay determination.²⁶ The harm to OSA’s employees and contractors and the State’s citizens is not indirect third-party harm: it is direct harm to Appellees.²⁷

The irreparable harms detailed in the Motion for Stay and Joinder unquestionably support a stay from this Court.

party).

²⁵ See, e.g., *State v. Galvin*, 491 P.3d 325, 338-39 (Alaska 2021) (finding the public interest in “a timely, successful election” was not just the Division’s interest as administrator of the process, but was an interest shared by “all citizens of the state.”); see also *Off. of the Lieutenant Governor, Div. of Elections v. Corbisier ex rel. B.L.*, 522 P.3d 174, 180 (Alaska 2022) (“[T]he Division’s interests in an orderly and timely election are legitimate, and it shares them with the general public.”).

²⁶ CPAI also attempts to argue again that loss of employment by employees and contractors is indirect because 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.” CPAI Opp’n at 15. As discussed above, this argument fails. OSA’s unwillingness to capitulate to CPAI’s unreasonable demands cannot be the reason this Court denies a stay.

²⁷ CPAI also incorrectly argues that “unsupported claims about workers losing their jobs” is “speculative and attenuated harm to third parties.” CPAI Opp’n at 6. Loss of jobs on the North Slope if OSA is unable to access its leases is neither speculative nor attenuated: if OSA is unable to access its leases to generate work, the jobs required to perform that work will be terminated.

III. CPAI is Fully Protected.

CPAI also contends that Appellees have not shown that CPAI's rights will be protected,²⁸ but CPAI fails to identify any actual harm it will suffer if a stay is granted. In its Appellee's Brief, OSA emphasized that both the Ad Hoc Agreement and the MLUP contain terms that fully protect CPAI's priority use of the KRU roads, and that CPAI has never claimed that its use of the KRU roads has been impeded or limited in any way. Thus, CPAI is fully protected if the Court issues a stay. In its Opposition, CPAI did not contest these points. The only alleged harm CPAI has been able to muster is "an unconstitutional deprivation of its constitutional and contractual right to exclude."²⁹ But out of the other side of its corporate mouth, CPAI claims that it does not intend to exercise its "right to exclude" during the appeal.³⁰ CPAI cannot have it both ways. If a stay is granted and CPAI maintains its promise to allow OSA access to the KRU Roads, CPAI's "right to exclude" will not be impacted. To the contrary, the stay will provide CPAI with

²⁸ CPAI Opp'n at 16.

²⁹ CPAI Opp'n at 16. CPAI also suggests in a footnote that allowing the MLUP to remain in place through a stay would harm CPAI because "it sets a precedent that DNR may take private infrastructure without consent or compensation" (*Id.* at n.7). A stay does not set precedent, and CPAI's remedy for any alleged taking lies in a separate action against the State for compensation for this impairment. It is also difficult to see what compensation would be due for impairment of the "right to exclude" for the limited duration of a stay pending appeal, especially given CPAI's insistence that it does not intend to prohibit use of the KRU roads during this period.

³⁰ CPAI Opp'n at 16.

additional protections. In any event, under the “balance of hardship” approach, the concrete and irreparable harms identified by OSA and the State are not outweighed by CPAI’s desire to maintain its constitutional principle during an appeal.

IV. Appellees Have Identified Serious and Substantial Questions and Shown Probable Success on the Merits.

CPAI next argues that Appellees failed to identify serious and substantial questions on the merits, and that Appellees were required to make a clear showing of probable success on the merits.³¹ Both arguments fail.

CPAI makes a cursory argument that the State and OSA have not raised serious and substantial questions on the merits. But this standard only requires that the party seeking a stay has raised arguments that are not frivolous.³² CPAI has not argued that the positions taken by OSA and the State are frivolous, and any appeal will unquestionably raise “serious and substantial questions on the merits.”³³

CONCLUSION

For the foregoing reasons and the reasons set forth in the Motion for Stay and

³¹ CPAI Opp’n at 18.

³² See, e.g., *Galvin*, 491 P.3d at 333.

³³ CPAI concludes by making the puzzling argument that the affidavits submitted in support of the Motion for Stay and Joinder constitute an “improper attempt to supplement the merits record for appeal” (CPAI Opp’n at 21), despite the fact that CPAI also submitted an affidavit to support its Opposition. Alaska Appellate Rule 503(b)(2) governing motions explicitly provides for affidavits to be submitted in support of a motion. That is what Appellees did.

Joinder, this Court should grant the Motion for Stay or include in its Final Decision that the decision is stayed pending appeal to prevent irreparable harm to Appellees while an appeal is pending.

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