EARTHJUSTICE

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VIA ELECTRONIC MAIL

Kindra Geis
Alaska Department of Natural Resources, Water Resources Section
3700 Airport Way
Fairbanks, Alaska 99709-4699
E: kindra.geis@alaska.gov

Re: Public Notice of Applications for Water Rights - LAS 29168 through LAS 29178 and LAS 31477

Dear Ms. Geis:

The Department of Natural Resources (Department) is soliciting comments on water rights applications LAS 29168 through LAS 29178 and LAS 31477, which are associated with Donlin Gold, LLC's proposed Donlin mine project ("the Donlin project" or "the project"). Earthjustice submits these comments on behalf of its client Orutsararmiut Native Council. First, the Department must not proceed with approving these water rights applications without providing the public the opportunity to review and comment on those applications. Notwithstanding the inadequate information provided, we ask that the Department deny these applications pursuant to Alaska Statute 46.15.080 to 46.15.090 because they are not in the public interest and the existing uses of the waters that would be appropriated by these applications are far more important.

I. Orutsararmiut Native Council and tribal governments throughout the region have a strong interest in maintaining water quantity and fish habitat in the Crooked Creek watershed.

Orutsararmiut Native Council is a federally recognized sovereign tribal government, responsible for the health, safety, and well-being of its citizens, located in the Kuskokwim River watershed. The Donlin Project is located on Crooked Creek, which flows directly into the Kuskokwim River. The ancestors of Orutsararmiut Native Council's citizens historically lived, traveled, fished, and traded along the Kuskokwim River, and its present citizens continue to do so. U.S. Army Corps of Engineers, Donlin Gold Project, Final Environmental Impact Statement at 3.21-5 to 3.21-12 (Apr. 2018) (FEIS). The citizens of Orutsararmiut Native Council and tribal governments throughout the region rely on the Kuskokwim River and surrounding lands of the Yukon-Kuskokwim region for nutritional, economic, social, spiritual, and cultural purposes. *Id.* They value and continue to practice their long traditions of fishing and harvesting from the region's lands and waters. *Id.* Of particular importance are the salmon and rainbow smelt that

return to the Kuskokwim River each year to spawn. The many communities along the Kuskokwim River harvest and use these and other subsistence species in various ways, and their combined harvests total well over a million pounds of edible resources every year. *Id.* at 3.21-19 to 3.21-91.

The water rights applications and the project they support threaten Orutsararmiut Native Council's interests. The Donlin project would be the largest pure gold mine in the world. The project footprint would fill 2,053 acres of wetlands and destroy about 29.7 miles of streams, including salmon habitat. *Id.*, App. M at 14, 21. It would produce billions of tons of waste rock and a two-square mile pit lake that would never meet state water quality standards for arsenic, mercury, selenium, and other metals. *Id.*, Exec. Summary at 9, 12; *id.* at 3.5-98, 3.7-123. As a result, Donlin Gold would be required to operate a water treatment plant for all time after the mine closes. *Id.* at 3.5-98. The project would also require a tailings storage facility with the capacity to store 568 million tons of tailings behind a 471-foot dam that would threaten catastrophic damage to downstream waters should it ever fail. *Id.*, Exec. Summary at 10-11. The project would also require substantial amounts of water for construction and operation activities, as well as dewatering and diversion at various sites in order to create mineable areas. *Id.* at 3.5-1 to 3.5-2. The water rights requested in these applications would provide the right to appropriate water in the Crooked Creek drainage for those activities. *See generally* "Table 1, Revised Water Source and Water Use Locations."

II. The Department should not approve the water rights applications because they would not be in the public interest and they would prevent more beneficial uses.

Alaska Statute 46.15.080(a) requires the Commissioner to determine that "the proposed use of water is beneficial" and "the proposed appropriation is in the public interest." This requirement reflects the Alaska Constitution's command that appropriations are "subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife." Alaska Const., Art. 8, § 13. The public interest determination must take into account, among other things, the effect on fish and game resources, public health, loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation, and harm to other persons resulting from the proposed appropriation. AS 46.15.080(b). Here, each of these factors would be negatively affected by the proposed water rights because the appropriations would allow for destruction of vital salmon habitat, which in turn would harm the public interest and be less beneficial than maintaining the current conditions.

Salmon and other anadromous and resident fish "are dependent on a variety of aquatic habitat types and stream conditions" including flow, water quality regimes, the availability and distribution of gravel-sized substrates, and the availability and distribution of rock and vegetative cover. FEIS at 3.13-7 to 3.13-8. Each of the applications at issue here would allow appropriation of water within the Crooked Creek watershed. *See* "20201014 Enclosure (Figure 1-14)." According to the FEIS, the activities authorized by the proposed water rights would substantially alter these necessary conditions within the Crooked Creek watershed.

The FEIS concludes that the Donlin project will involve groundwater dewatering and other processes that reduce the flow of water in Crooked Creek, dewatering salmon spawning redds in low flow conditions: "Overall, impacts of streamflow changes and salmon spawning habitat as described above would involve noticeable changes in the character or quantity of aquatic habitat. The duration of these impacts may be expected to last during and beyond the life of the project." FEIS at 3.13-90. Upwelling and downwelling in Crooked Creek would "reduce intergravel flow and egg survival in the segment of creek adjacent to the mine during operations." *Id.* The FEIS also notes that 65% to 78% of the salmon redds in Crooked Creek between American Creek and Crevice Creek "were located in gravels that would be outside the predicted wetted portions of the stream channel during winter low flow conditions during construction and operations." *Id.* That segment of Crooked Creek is a distance of four miles as the crow flies and much longer taking into account the winding of the creek. *See id.* at 3.13-9, Fig. 3.13-1. This means most of the habitat in this significant segment of stream will be lost.

Importantly, the FEIS makes these conclusions, even considering all the proposed mitigation measures. FEIS at 3.13-159. Thus, it is clear that the effects of dewatering and other stream-altering processes will result in impacts to salmon habitat in Crooked Creek regardless of mitigation, so the Department should not assume the impacts will be any less than stated in the FEIS.

The loss of this habitat due to appropriations for the Donlin project will affect public health and prevent uses of the water that would otherwise be made. As explained above, Orutsararmiut Native Council's citizens and people throughout the region enjoy and rely on the existence and persistence of healthy salmon runs for their subsistence practices. The destruction of significant salmon spawning areas is not in their health, economic, or cultural interests. Orutsararmiut Native Council's citizens will certainly engage in salmon fishing downstream from the affected areas if not precluded or hindered by the proposed appropriations, as they and their ancestors have for millennia. Because salmon are anadromous and rely on spawning habitat upstream from where fishing takes place, the success of such fishing practices relies on the protection of the upstream spawning grounds.

Ensuring Orutsararmiut Native Council's citizens and people throughout the region can rely on healthy salmon runs is the most beneficial use of the water in question here. The Crooked Creek watershed can support productive salmon habitat in perpetuity if left unappropriated for destructive activities such as the Donlin project. The mine's shorter-term benefits do not outweigh the benefits of protecting such habitat. The shorter-term benefits of economic development and jobs are often cited as reasons mining projects are in the public interest, but here, the communities that most stand to benefit from any such economic development overwhelmingly oppose the project and recognize it as a threat. *See* Exs. 1-14. Thus, leaving the waters reserved for the people is the more beneficial use and should not be undermined by granting these water right applications. AS 46.15.090.

For these reasons, the Department must deny the water rights applications because they are not in the public interest and leaving the waters reserved for the people as described in Alaska Statute 46.15.030 would be the most beneficial use. Moreover, the Department should not proceed with approving these applications unless and until it has provided the public with adequate time to review the applications on which the public notice is based.

Sincerely,

Olivia Glasscock
Thomas S. Waldo
EARTHJUSTICE

Attorneys for Orutsararmiut Native Council