



VIA EMAIL ONLY
(corri.feige@alaska.gov)

February 6, 2020

Corri Feige, Commissioner
Department of Natural Resources
550 West 7th Avenue, Suite 1400
Anchorage, Alaska 99508

**Re: Request for Reconsideration of the Right-of-Way Lease
for the Donlin Pipeline, ADL 231908**

Dear Commissioner Feige:

Pursuant to 11 AAC 02.020, Cook Inletkeeper (Inletkeeper) submits this letter on behalf of itself, Orutsararmiut Native Council (ONC), the Kasigluk Traditional Council (KTC), the Tununak IRA Council and the Susitna River Coalition (SRC) to request you to reconsider your January 17, 2020, decision to award the Right-of-Way Lease for the Donlin Pipeline to Donlin Gold, LLC.¹ We have previously submitted comments and attended public hearings to share our concerns about this right-of-way lease with the Alaska Department of Natural Resources (DNR),² and are disappointed to see the lease approved without resolving those concerns. We incorporate our previous comments in this request by reference, and ask you to reconsider and withdraw your approval for this application.

I. The requesting parties will be affected by this decision.

Cook Inletkeeper is a 501(c)(3) nonprofit formed in 1995 by concerned Alaskans to protect the Cook Inlet watershed. Inletkeeper has members and supporters who use and rely on land, water, fish and wildlife resources that will be impacted by DNR's proposed decision on ADL 231908 and who will be adversely affected. More specifically, the construction of the proposed pipeline will harm public resources on which Inletkeeper members and supporters rely for recreation, and subsistence and personal use harvest, including but not limited to interests in

¹ Dep't of Nat. Res., Commissioner's Final Decision: Right-of-Way Lease for the Donlin Pipeline ADL 231908 (Jan. 17, 2020) ("Final Decision").

² Letter from Tribes to Comm'rs Feige and Vincent-Lang, Re: Donlin Gold Mine Pipeline (Mar. 22, 2019); Letter from Cook Inletkeeper to Comm'rs Feige and Vincent-Lang, Re: ADL 231908 Donlin Pipeline and Right-of-Way (Mar. 22, 2019).

fishing, hunting, boating, hiking, camping, wildlife photography, fire safety and other pursuits. Additionally, the clearing work and corridor left in place after the pipeline construction phase will fundamentally change the functions, values and uses along the pipeline right-of-way, and also adversely affect the interests of Inletkeeper and its members and supporters.

The Susitna River Coalition (SRC) is a 501(c)(3) nonprofit formed in 2012 to advocate for health and protection of the Susitna River and the Susitna River watershed. SRC has members and supporters who use and rely on land, water, fish and wildlife resources that will be impacted by DNR's proposed decision on ADL 231908, and who will be adversely affected. More specifically, the construction of the proposed pipeline will harm public resources on which Inletkeeper members and supporters rely for recreation, and subsistence and personal use harvest, including but not limited to interests in fishing, hunting, boating, hiking, camping, wildlife photography, fire safety and other pursuits. Additionally, the clearing work and corridor left in place after the pipeline construction phase will fundamentally change the functions, values and uses along the pipeline right-of-way, and also adversely affect the interests of SRC and its members and supporters.

ONC, the Tununak IRA Council and Kasigluk Traditional Council are federally recognized sovereign governments that work to protect the interests of their citizens and are responsible for their health, safety, and well-being. The Tribes have for millennia relied on the lands and waters of the Kuskokwim watershed—their ancestors lived, hunted, traveled, and fished in these areas, and the Tribes' present members continue to do so today. The Tribes' members value these lands and waters for nutritional, social, economic, spiritual, and cultural purposes. Of particular importance are the salmon, which live in these waters and are harvested annually by Tribal members.

The purpose of the pipeline is to fuel the massive proposed Donlin Gold mine near Crooked Creek,³ which threatens substantial impacts to land and water in the region. Not only would the Tribes be affected by the mine, the pipeline's northern terminus would be within the Kuskokwim watershed the Tribes relies on.⁴ It would cross hunting grounds and hundreds of streams where the salmon and other fish live. Construction and operation of pipelines like the one proposed threaten fish, other wildlife, and their habitat from erosion, sedimentation, spills, and disruption.⁵ These impacts threaten the health, safety, and way of life of Tribal members. Therefore, ONC, the Tununak IRA Council, KTC and their members would be directly affected by both the pipeline itself and the project it is being built to support.

II. Basis on which decision is challenged

³ Alaska Dep't of Nat. Res., Donlin Pipeline Right-of-Way Lease, ADL 231908 Commissioner's Analysis and Proposed Decision, at 2 (Jan. 23, 2019) ("Proposed Decision").

⁴ *Id.* at 5.

⁵ *Id.* at Attachment E at 4.

A. The Commissioner cannot reasonably find that the applicant is fit, willing, and able to construct and operate the pipeline in a manner that will be required by the present or future public interest.

Pursuant to Alaska Statute § 38.35.100 the Commissioner has a duty to determine the proposed activity will not interfere with the public interest. To make this determination, the commissioner must determine whether:

the applicant has the technical and financial capability to take action to the extent reasonably practical to: (A) prevent any significant adverse environmental impact, including but not limited to erosion of the surface of the land and damage to fish and wildlife and their habitat; (B) undertake any necessary restoration or revegetation; and (C) protect the interests of individuals living in the general area of the right-of-way who rely on fish, wildlife, and biotic resources of the area for subsistence purposes...⁶

If, and only if, the commissioner makes these determinations favorably to the applicant, *may* the commissioner grant the application.⁷ “Otherwise, the commissioner shall deny the application.”⁸ Accordingly, the Commissioner must deny the application because the record does not provide sufficient information on which the Commissioner could reasonably make a favorable finding under state law.

DNR has not shown how it could possibly determine the applicant has the capacity to “prevent any significant adverse environmental impact...to fish and...their habitat” or “protect the interests of individuals living in the general area who rely on fish...for subsistence purposes.”⁹ The number of streams to be crossed by the pipeline has not been determined, let alone the amount of damage that might be done to those streams during or after the construction phase. In the Consideration of Comments, the Commissioner states that changes to pipeline alignment because of the NEPA process caused changes in the number of stream crossings,¹⁰ but that does not give the public a clear answer about what the actual number of crossings will be or how many crossings will involve fish habitat. If the fish stream list is not complete,¹¹ DNR cannot determine there will not be significant adverse environmental impacts.

Instead of explaining any basis for a finding that fish habitat will be protected, the Commissioner points to yet-to-be-issued Title 16/Fish Habitat permits.¹² It is no excuse that construction is years away or that the permits are not issued: if DNR wants to issue a right of way now, it must have adequate information about the project to fulfill its statutory duties.

⁶ AS § 38.25.100(a)(3).

⁷ AS § 38.35.100(b).

⁸ *Id.*

⁹ AS § 38.25.100(a)(3).

¹⁰ Final Decision at Attachment 1, pg. 21.

¹¹ *Id.* at 26.

¹² *Id.* at 16.

DNR rightly points out that “it is better to issue the permits close to actual construction with a field component to account for unexpected and site-specific issues.”¹³ The same reasoning for issuing Title 16 permits closer in time applies to right-of-ways – i.e., the Commissioner cannot determine whether or not there will be significant adverse environmental impacts to fish and their habitat if it does not yet know what the site-specific issues might be.

Similarly, the Consideration of Comments confirms that DNR has not even determined what the waterbody crossing techniques Donlin will employ for construction or installation of the pipeline.¹⁴ This information will be reviewed piecemeal, it seems,¹⁵ which prevents the agency or the public from understanding what the full impacts of the pipeline will be, and a determination that the applicant is capable of preventing significant adverse environmental impacts without understanding the frequency at which different techniques will be used is not possible. DNR needs this information to make a rationally based determination.

Furthermore, the Commissioner cannot make determinations about the impacts if it has not undertaken review of the activities associated with this pipeline. The duty in Alaska Statute 38.35.100(a) includes “other acts proposed” beyond transportation of products through a pipeline. DNR must have adequate information and make a determination of favorability about these other acts—such as airstrips, materials sites, and access roads—to issue the right-of-way lease. The Consideration of Comments does not indicate that DNR knows where many of these facilities will be sited, or what their impacts may be.¹⁶ It is unclear what “major permits” DNR is referring to in its Consideration of Comments.¹⁷ Donlin has been given a substantial number of state and federal authorizations, and assertions that the project is too “preliminary” to fully analyze impacts and activities preclude any meaningful review.

Additionally, the decision fails to identify and secure the financial resources needed by the applicant to successfully implement decommissioning, removal and remediation (DR&R) for the pipeline and associated facilities, contrary to the Alaska Constitution and state law and rules.

Lastly, despite DNR’s assertions to the contrary, it clearly has a legal duty to consider the *future* impacts to the public interest.¹⁸ The *future* impacts of a right-of-way the agency is authorizing necessarily influence the future public interest as required by the statute.¹⁹

In sum, DNR’s lack of baseline environmental information, failure to obtain more specific plans from Donlin, failure to identify and secure DR&R costs, and the narrowing of the scope of consideration prevent the Commissioner from making a justifiable determination that complies with the Right-of-Way Leasing Act and to fulfill DNR’s overarching statutory obligation to

¹³ *Id.*

¹⁴ *Id.* at 15.

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 24.

¹⁹ AS 38.35.010(a).

“ensure the careful protection of [Alaska’s] incomparable natural environment” when authorizing rights-of-way.²⁰

B. The decision does not uphold the duty to protect the public trust resources.

The Commissioner’s decision states that it upholds the duty to protect public trust resources under Alaska Constitution Article VIII, but for many of the same reasons discussed above, this decision does not support a finding the agency is doing so in approving this application. The Commissioner must ensure resources are made available consistent with the public interest and maximum benefit of the people of Alaska.²¹

In order to ensure this duty is fulfilled, DNR must look beyond the direct impacts of the right-of-way alone and must consider its full impact on the public interest, including direct, indirect, cumulative and synergistic impacts. The pipeline is proposed as part of a massive gold mine with substantial environmental impacts, including habitat loss and degradation, water and air quality impacts, and risk of tailings dam failure, to name a few. If the benefits of the entire Donlin project can be used to bolster DNR’s analysis of the public interest,²² the detriments of the entire project should also be used in its analysis to ensure the agency is truly acting consistent with the public interest.

III. Conclusion and Remedy Requested

For the reasons stated above and in our previous communications with DNR, the undersigned entities request that the Commissioner reconsider her decision to approve the Right-of-Way Lease for the Donlin Pipeline. We ask that DNR withdraw this approval and not issue a decision on the application until further information about stream impacts is gathered and Title XIV permits are issued with the appropriate analysis, meaningful analysis of associated acts is undertaken, and the Commissioner can support a finding that the public interest will not be harmed.

Any communication about this request may be sent to me acting on behalf of Inletkeeper and the other signers to this request for reconsideration at:

Cook Inletkeeper
3734 Ben Walters Lane
Homer, AK 99603
cell: 907.299.3277
fax: 907.235.4069
bob@inletkeeper.org

²⁰ *Id.*

²¹ Alaska Const. art. VIII § 1, 2.

²² Final Decision, Attachment 1 at 18.

The fee required by 11 AAC 05.160 is available immediately by contacting me at 907.299.3277 to pay the fee through credit card, wire transfer or other mutually agreeable method.

Thank you and please let me know if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bob Shavelson". The signature is fluid and cursive, with the first name "Bob" being more prominent than the last name "Shavelson".

Bob Shavelson
Cook Inletkeeper

On behalf of:

Orutsararmiut Native Council (ONC)
P.O. Box 927
117 Alex Hately Dr
Bethel, Alaska 99559

Susitna River Coalition (SRC)
PO BOX 320
Talkeetna, AK 99676

Kasigluk Traditional Council
Box 19
Kasigluk, AK 99609

Tununak IRA Council
29 Main St
Tununak, AK 99681